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A-517-14, A-520-14, A-522-14

FEDERAL COURT OF APPEAL

BETWEEN:

GITXAALA NATION, GITGA'AT FIRST NATION, HAISLA NATION,
THE COUNCIL OF THE HAIDA NATION and PETER LANTIN suing on his own
behalf and on behalf of all citizens of the Haida Nation,
KITASOO XAI'XAIS BAND COUNCIL on behalf of all members of the Kitsoo
Xai'Xais Nation and HEILTSUK TRIBAL COUNCIL on behalf of all
members of the Heiltsuk Nation, MARTIN LOUIE, on his own behalf, and on behalf
of Nadleh Whut'en and on behalf of the Nadleh Whut'en Band, FRED SAM, on his
own behalf, on behalf of all Nak'azdli Whut'en, and on behalf of the Nak'azdli Band,
UNIFOR, FORESTETHICS ADVOCACY ASSOCIATION, LIVING OCEANS
SOCIETY, RAINCOAST CONSERVATION FOUNDATION, FEDERATION OF
BRITISH COLUMBIA NATURALISTS carrying on business as BC NATURE

Applicants and Appellants

and

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Respondents

and

THE ATTORNEY GENERAL OF BRITISH COLUMBIA,
AMNESTY INTERNATIONAL and
THE CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS

Interveners

**MEMORANDUM OF FACT AND LAW OF THE APPLICANTS,
THE COUNCIL OF THE HAIDA NATION and PETER LANTIN suing on his
own behalf and on behalf of all citizens of the Haida Nation**

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OVERVIEW

The Haida Nation is the rightful heir to Haida Gwaii. Our culture is born of respect; and intimacy with the land and sea and the air around us. Like the forests, the roots of our people are intertwined such that the greatest troubles cannot overcome us. We owe our existence to Haida Gwaii. The living generation accepts the responsibility to insure *[sic]* that our heritage is passed on to following generations.¹

1. On June 28, 2014, the Governor in Council (“**GIC**”) published its decision under the *National Energy Board Act* (“**NEB Act**”) and the *Canadian Environmental Assessment Act, 2012* (“**CEAA, 2012**”) (the “**Order**”) to order the issuance of the Certificates to permit the construction and operation of the Enbridge Northern Gateway Pipelines Project (the “**Project**”).²
2. In making the Order, Canada failed to meet its constitutional obligations to the Haida Nation. The activities undertaken by Canada in respect of the Project and the environmental assessment process for the Project were not legally sufficient to meet the Crown’s obligations to consult and accommodate the Haida Nation. Crown Consultation has not been proportionate to the strength of the Haida Nation’s case of Aboriginal Title and Rights and the seriousness of the potential adverse impacts of the Project; nor have they been responsive to the identified concerns of the Haida Nation regarding the Project.
3. To the extent that Canada relies upon the Joint Review Panel (the “**JRP**”) to fulfill its consultation obligations, the generic non-Haida specific nature of the JRP’s environmental assessment process represents a fatal flaw. The Haida do not seek judicial review of the JRP process in these proceedings, however, the JRP’s failure to assess the environmental impact and risks of the Project in the specific context of the Haida Nation and Haida Gwaii, result in the

¹ Peter Lantin Affidavit #1, affirmed July 10, 2014 [“**Lantin #1 Affidavit**”] [Council of the Haida Nation Compendium of References (“**CHNCR**”), Vol III, Tab 2, p 1109].

² Statement of Agreed Facts (“**Agreed Facts**”), [Book of Major Documents “**MB**”, Vol 1, Tab 1, p 14].

Report being an insufficient foundation for the Crown's obligations to consult and accommodate the Haida Nation to assure the protection of Haida Aboriginal Title and Rights.

4. To the extent that Canada relies upon its own consultation framework, it failed to respect the terms, spirit, and intent of the existing agreements and protocols that the Haida Nation, the Federal Government and the British Columbia government have developed collaboratively. These collaborative arrangements give institutional expression and context to the distinctive Haida perspective on Haida Title and Rights and their reconciliation with asserted crown sovereignty, which are essential elements of the law of consultation.

PART I: STATEMENT OF FACTS

5. The Applicants, The Council of the Haida Nation and Peter Lantin, suing on his own behalf and on behalf of all citizens of the Haida Nation, (the "CHN"), rely on the Agreed Statement of Facts and on the facts listed below.

I. BACKGROUND

A. The Haida Nation

"...we came out of the ocean ... many spots all over Haida Gwaii that we can point to and say this is where our ancestors came out of the ocean."³

6. The Haida Nation is the Indigenous Peoples of Haida Gwaii, which has been their homeland since time immemorial.⁴ Haida oral traditions tell of their origin from the oceans surrounding Haida Gwaii.⁵
7. From these origins, the Haida people dispersed throughout Haida Gwaii and Alaska. Haida oral traditions tell of the time when there were no trees, the witnessing of the arrival of trees 12,500 years ago, and two great floods. There were, prior to the arrival of Europeans, over one hundred village sites.

³ [CHNCR, Vol VII, Tab 15, p 2269].

⁴ *Council of the Haida Nation et al v Canada (Fisheries and Oceans)*, 2015 FC 290 at para 3. ["*Haida Nation v Canada*"]. Lantin Affidavit #1 [CHNCR, Vol III, Tab 2, p 1095 at para 7].

⁵ [CHNCR, Vol VII, Tab 24].

Haida culture is intimately connected with the land and waters of Haida Gwaii, and the ready availability of material resources enabled a complex and diverse society.⁶

8. The Haida language is a linguistic isolate, beginning its independent and isolated development over 10,000 years ago, about the time that the last glaciation ended. The physical and spiritual connection with Haida Gwaii is evident in place names, songs, the Haida language⁷ and oral histories.⁸
9. The Applicant, the Council of the Haida Nation, is the governing authority of the Haida Nation, an aboriginal people within the meaning of s. 35 of the *Constitution Act, 1982* and *CEAA 2012, s. 5*.⁹ The Applicant Peter Lantin is President of the Haida Nation.¹⁰

B. Haida Gwaii

*To our children and descendants, we know that this is your world too. You have the right to enjoy the islands and the earth as we have. Good earth, which has given us life and from which we receive every fibre and cell of our being; and to these islands, from whom we are born, that give us our culture, that continue to provide for us, we will not abandon you.*¹¹

10. Haida Gwaii, meaning the “islands of the people”,¹² is an archipelago of more than 150 islands, extending roughly 250 km from its southern tip to the northernmost point and containing about 4,700 km of shoreline. “More than 25 per cent of the archipelago’s ‘interior’ is within 1 kilometre of salt water, and no place is further [*sic*] than 20 kilometres from the sea.”¹³

⁶ [CHNCR, Vol VII, Tab 21, p 2474-2479] and [CHNCR, Vol VII, Tab 22, p 2483-2484].

⁷ [CHNCR, Vol VII, Tab 22, p 2482] and [CHNCR, Vol VII, Tab 23, p 2488].

⁸ [CHNCR, Vol VII, Tab 24].

⁹ Lantin #1 Affidavit [CHNCR, Vol III, Tab 2, p 1094 at para 3].

¹⁰ Lantin #1 Affidavit [CHNCR, Vol III, Tab 2, p 1094 at para 1].

¹¹ [CHNCR, Vol VII, Tab 15, p 2267].

¹² Formerly known as the “Queen Charlotte Islands”.

¹³ [CHNCR, Vol VIII, Tab 27, p 2678] and Lantin #1 Affidavit [CHNCR, Vol III, Tab 2, p 1095 at para 6].

11. The influence of the ocean on the land base of Haida Gwaii is pervasive in Haida life, culture and history. Haida Gwaii has over 4,000 km of inlet and island shorelines.¹⁴ Every village is carefully selected based on the abundance of seafood and its marine geography – well protected harbours are selected for year-round or winter sites, and more exposed locations for seasonal summer camps.¹⁵ There are 14 kinds of fish in Haida Gwaii's streams and lakes including all 7 species of Pacific salmon.¹⁶ Anadromous salmon are a key source of nutrients transferred from marine food webs to the forest on the land, and a major factor in the high productivity of forest ecosystems.¹⁷ Sea creatures, from the most common to the supernatural, figure prominently in Haida art, design, and family crests. The sea is also central to Haida oral history, and its bounty is the basis of many Haida foods and medicines.¹⁸
12. Haida Gwaii is home to some of the richest marine environments on the planet. Perched on the continental shelf at the most westerly edge of North America, the archipelago is where Alaskan and Japanese Currents mix in Haida Eddies. Haida Gwaii and its surrounding waters sustain diverse marine habitats, from kelp forests and eelgrass meadows to sand flats, weathered rocky shores and the abyssal ocean depths.
13. The Haida Nation's territory, relative to the Crown's interests, includes the entire lands of Haida Gwaii, the surrounding waters, sub-surface area and air space. The surrounding waters include the entire Dixon Entrance, half of Hecate Strait (North and South), Queen Charlotte Sound halfway to Vancouver Island, and westward into the ocean depths, including, relative to Canada's interests, the 200 nautical mile limit of the Exclusive Economic

¹⁴[CHNCR, Vol. VIII, Tab 26, p 2636].

¹⁵[CHNCR, Vol VII, Tab 15, p 2269].

¹⁶[CHNCR, Vol VIII, Tab 26, p 2636].

¹⁷[CHNCR, Vol VIII, Tab 26, p 2636].

¹⁸[CHNCR, Vol VII, Tab 24] and [CHNCR, Vol VII, Tab 15, p 2269].

Zone (“**Haida Territory**”).¹⁹ It is entirely contained within the Open Water Area (the “**OWA**”) of the Project.²⁰

14. Haida Gwaii is surrounded by seven of the nine ecosections and eight of the twelve “Oceanographic Areas of Significance” in the OWA identified by Northern Gateway Pipeline (“**NGP**”) in its Project application to the JRP (“**Application**”).²¹
15. All tanker routes proposed for the Project go through and are immediately adjacent to, the marine portion of the Haida Territory.²²

C. Haida Agreements

16. For more than a century, the Haida have engaged in political action, negotiations and legal actions to protect their lands, waters and resources.²³ The Haida Nation filed statements accepted for negotiation under Canada’s Comprehensive Land Claims Process (in 1980²⁴ and 2009) and in the British Columbia Treaty Process.
17. The Haida Nation have since negotiated and concluded with Canada and BC a history of agreements creating collaborative management of the entire terrestrial, and portions of the marine, areas in Haida Gwaii. As referenced in the recent judgment of Manson J. in *Haida Nation v. Canada*, these agreements explicitly recognize dual assertions of sovereignty, title and ownership of both land and waters in Haida Gwaii by the Crown and the Haida Nation.²⁵ These agreements include the following:
 - a) The 1993 Gwaii Haanas Agreement, providing for collaborative management with Canada of the Haida Heritage Site and National

¹⁹[CHNCR, Vol III, Tab 2, p 1095 at para 5].

²⁰Lantin #1 Affidavit [CHNCR, Vol III, Tab 2, p 1123]; [CHNCR, Vol VIII, Tab 31, p 2732].

²¹ [CHNCR, Vol VIII, Tab 31, p 2731].

²² [CHNCR, Vol VIII, Tab 31, p 2733].

²³ *Haida Nation v Canada* at para 7.

²⁴ Lantin #1 Affidavit [CHNCR, Vol III, Tab 2, p 1096 at para 13], *Haida Nation v Canada*, at para 9.

²⁵ *Haida Nation v Canada* at para 10.

Park Reserve covering a quarter of the land area of Haida Gwaii, including the whole of the southern area of the archipelago.²⁶

- b) The 2010 Gwaii Haanas Marine Agreement, that builds on the success of the Gwaii Haanas Agreement, and expands the responsibilities of the Archipelago Management Board (“AMB”), to include the cooperative planning, operation, management and use of the marine portion of Gwaii Haanas, designated both as a Haida Heritage Site and later as Canada’s first National Marine Conservation Area Reserve (the “**Gwaii Haanas Marine Area**”) (the “**Gwaii Haanas Marine Agreement**”).²⁷
- c) The 2007 Strategic Land Use Plan Agreement and the 2009 *Kunst’aa Guu-Kunst’aayah* Reconciliation Protocol with the Province of British Columbia, for shared and joint management of lands and resources of a quarter of the land area in the northern part of Haida Gwaii, including 74% of the coastline and some marine areas.²⁸ Schedule B of the *Kunst’aa Guu-Kunst’aayah* Reconciliation Protocol sets out the framework for shared decision-making between the Parties for land and natural resource management on Haida Gwaii, including joint decision making. The Haida Nation and the Province of British Columbia jointly manage more than half of the land base of Haida Gwaii, including nearshore and foreshore areas.
- d) Memorandum of Understanding with Canada for the cooperative management and planning of the *sGaan Kinghlas* (Bowie Seamount)

²⁶ *Haida Nation v Canada* at para 10(a). [CHNCR, Vol III, Tab 2, p 1099 at para 24], and Jason Alsop Affidavit, affirmed November 7, 2014 [“**Alsop Affidavit**”] [CHNCR, Vol VI, Tab 7, p 1868 at para 9].

²⁷ Lantin #1 Affidavit [CHNCR, Vol III, Tab 2, p 1102-1103, paras 39-41], and Alsop Affidavit [CHNCR, Vol VI, Tab 7, p 1869 at paras 12-14].

²⁸ *Haida Nation v Canada*, at para 10(c); See also Lantin Affidavit #1 [CHNCR Vol III, Tab 26, p 1100-1101 at paras 29-34].

area, Canada through the *Oceans Act*.²⁹ This area, off the west coast of Haida Gwaii, was earlier designated as a Haida Protected Area, with the Haida name “supernatural being looking outwards”. It is an offshore range of three undersea mountains, located about 180 km west of Haida Gwaii, and which rises to within 25 m of the water surface. Canada has described this area as an “oceanic oasis in the deep sea, a rare and ecologically rich marine area”. Both the Haida Nation and Canada view this area as an important fish and marine habitat, containing endangered marine species, unique features and an area with high biological productivity or biodiversity. The Haida and Canada are developing a co-operative management plan to define acceptable and unacceptable uses within the boundary, including requirements for research, monitoring and enforcement.³⁰

(collectively, referred to as the “**Haida Agreements**”)

18. In addition, the Haida Nation has entered into Protocol Agreements with all of the local communities of Haida Gwaii.³¹
19. The Haida Agreements provide for formal protection and collaborative management of a total of 52% of the land base of Haida Gwaii [about 500,000 hectares], and 3,464 square km of marine spaces.³²
20. The Haida recognize that “linking land and sea planning is undeniably critical for an archipelago such as Haida Gwaii”³³ and the importance of the oceans to the well-being of Haida culture and all communities in Haida Gwaii,³⁴ and have also made significant progress with marine use planning and community

²⁹ *Haida Nation v Canada*, at para 10(c); See also Lantin #1 Affidavit [CHNCR Vol III, Tab 2, p 1103 at paras 42-44], and Alsop Affidavit [CHNCR, Vol VI, Tab 7, p 1873-1874 at paras 31-37].

³⁰ [CHNCR Vol VII, Tab 15, p 2279].

³¹ Lantin #1 Affidavit [CHNCR, Vol III, Tab 2, p 1097-1098 at paras 17-18].

³² *Haida Nation v Canada*, at para 10(d); See also Lantin #1 Affidavit [CHNCR Vol III, Tab 2, p 1123 and 1160].

³³ [CHNCR Vol VII, Tab 15, p 2278].

³⁴ [CHNCR Vol VII, Tab 17, p 2329].

engagement to create a foundation for better knowledge of the marine ecosystems and better management.

D. Gwaii Haanas Area

21. In the 1980s, the Haida Nation brought international attention to logging of the southern Moresby Island area and the designation and management of the Haida Heritage Site called “Islands of Beauty”, or Gwaii Haanas.³⁵ Canada and the Haida Nation have since developed a collaborative relationship for dealing with matters having an impact on Haida lands, waters and resources – a practice which has become tantamount to a convention of proper conduct between the parties exemplified by the Haida Agreements and acknowledged by the Federal Court.
22. The marine and terrestrial areas of Gwaii Haanas were first designated by the Haida Nation as a Haida Heritage Site in 1985, and later by Canada as a National Park Reserve in 1988 and a National Marine Conservation Area Reserve (“**NMCAR**”) in 2010.³⁶ Gwaii Haanas also contains a UNESCO World Heritage Site called *sGan gwaay* or *nansdins* (Ninstints).³⁷
23. The Gwaii Haanas Marine Area is known as “one of the world’s ecological and cultural treasures”, containing nearly 3,500 marine species. Gwaii Haanas is the first area in the world formally managed from the mountain top to sea floor (nearly 5,000 square km), and is recognized as a rare and significant achievement nationally and globally.³⁸
24. The Gwaii Haanas Marine Agreement provides that the AMB is responsible for “developing recommendations to the Council of the Haida Nation and the Government of Canada regarding any other matter pertaining to the planning,

³⁵ Lantin #1 Affidavit [CHNCR Vol III, Tab 2, p 1098 at para 23].

³⁶ *Haida Nation v Canada* at para 13 and 51; Alsop Affidavit [CHNCR Vol VI, Tab 7, p 1873 at paras 29 and 30].

³⁷ Alsop Affidavit [CHNCR, Vol VI, Tab 7, p 1919].

³⁸ *Haida Nation v Canada* at para 12; Alsop Affidavit [CHNCR, Vol VI, Tab 7, p 1869 at para 15].

operation, management or use of the Gwaii Haanas Marine Area.”[*emphasis added*]³⁹

25. Under the Gwaii Haanas Marine Agreement, Canada and the Haida Nation have agreed that the Gwaii Haanas Marine Area “shall be regarded with the highest degree of respect and will be managed in an ecologically sustainable manner that meets the needs of present and future generations, without compromising the structure and function of the ecosystem.”⁴⁰
26. One of the responsibilities of the AMB is “developing ecosystem objectives for the management of activities, including fisheries, as selected by the AMB”. The AMB is also responsible for development of a Gwaii Haanas Marine Area Management Plan, due to be completed in December 2015, and a Gwaii Haanas Marine Area Strategy.⁴¹
27. In May 2010, Canada and the Haida Nation completed the Gwaii Haanas NMCAR and Haida Heritage Site Interim Management Plan and Zoning Plan (“**Interim Plan**”) which identifies management priorities, principles and objectives.⁴² The Interim Plan was signed on behalf of DFO by the Minister of Fisheries and Oceans Canada and provides that an initial focus of the AMB will be the development of “a full suite of ecosystem objectives.”⁴³

E. Reconciliation

28. In addition to the Haida Agreements, the Haida Nation has been actively pursuing the reconciliation of their Aboriginal Title and Rights in respect of the marine areas of Haida Gwaii through the negotiation of a Reconciliation

³⁹ Peter Lantin Affidavit #2, affirmed July 10, 2014 [“**Lantin #2 Affidavit**”] [CHNCR Vol IV, Tab 3, p 1208 at Section 4.1(k)].

⁴⁰ *Haida Nation v Canada* at para 15; Also Affidavit [CHNCR, Vol VI, Tab 7, p 1870 and 1871 at para 21].

⁴¹ *Haida Nation v Canada* at para 16; Also Affidavit [CHNCR, Vol VI, Tab 7, p 1871 and 1872 at para 24].

⁴² Also Affidavit [CHNCR, Vol VI, Tab 7, p 1872 at para 25].

⁴³ Also Affidavit [CHNCR, Vol VI, Tab 7, p 2120].

Agreement with Canada and British Columbia.⁴⁴ This includes a Reconciliation Protocol, or a framework for shared and joint decision-making in oceans and fisheries management, that highlights both conservation and access to commercial fisheries in the Haida Gwaii area. (“**Federal Reconciliation Protocol**”).⁴⁵

29. Canada’s Special Federal Representative on West Coast Energy Infrastructure, Douglas Eyford, recommended in his November 2013 Report to the Prime Minister that Canada enter into negotiations to advance reconciliation measures in response to proposals from the Haida Nation to establish “shared decision-making frameworks in federal areas of jurisdiction over fisheries and marine management”. The Project was one of the projects considered in the Report of the Special Federal Representative on West Coast Energy Infrastructure (the “**Eyford Report**”).⁴⁶

F. Haida Aboriginal Title and Rights

30. Haida Gwaii is not subject to a treaty and the Haida Nation has not ceded or surrendered their Aboriginal Title and Rights.⁴⁷
31. As part of the Haida Nation’s efforts to protect their lands, water and resources, the Haida Nation filed an Aboriginal Title case over the land and marine areas of Haida Territory (the “**Haida Title Case**”)⁴⁸ in 2002. Canada’s courts have recognized that the Haida Nation has a strong *prima facie* case to Aboriginal Title and Rights in Haida Gwaii.⁴⁹ The Haida Title Case is active

⁴⁴ *Haida Nation v Canada*, at para 11; Lantin #1 Affidavit [CHNCR, Vol III, Tab 2, p 1104 at para 50].

⁴⁵ *Haida Nation v Canada*, at para 11; Lantin #2 Affidavit [CHNCR, Vol IV, Tab 3, p 1223-1247].

⁴⁶ Lantin #1 Affidavit [CHNCR, Vol III, Tab 2, p 1104 at para 51].

⁴⁷ Lantin #1 Affidavit [CHNCR, Vol III, Tab 2, p 1096 at para 10].

⁴⁸ *Haida Nation v British Columbia and Canada*, SCBC Action No. L020662, Vancouver Registry, filed 6 March, 2002, (“**Haida Nation v BC and Canada**”), see also *Haida Nation v Canada* at para 7.

⁴⁹ *Haida Nation v BC (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 (“**Haida Nation v BC**”) at para 71, see also *Haida Nation v Canada*, at para 8.

and pending.⁵⁰ The federal Crown is a party to the Haida Title Case and has notice and knowledge of both the Haida Nation's Title and the experience and successes associated with implementing the reconciliation of Haida and Crown Title throughout Haida Territory.⁵¹

II. THE PROJECT, THE JRP PROCESS AND HAIDA PARTICIPATION

32. The Project proposes that tankers travel through Haida Territory for both the Southern and Northern Approaches in the **OWA**.⁵²
33. The Haida Nation participated in all phases of the JRP process. From the outset, the Haida Nation maintained that the nature of the JRP process and its limited terms of reference could not substitute for a legally sufficient Haida specific Crown consultation process. However, a complete and comprehensive environmental assessment would provide a necessary foundation for a Haida focussed Crown consultation and accommodation.
34. To this end the Haida Nation's participation included making information requests, submitting written technical and aboriginal evidence, providing oral aboriginal evidence, attending hearings in Edmonton and Prince Rupert to question NGP witnesses, submitting a final written argument with comments on proposed conditions, and making oral reply argument.⁵³ Neither NGP nor Canada questioned Haida Nation witnesses.

A. Haida Nation Written Evidence

35. The Haida Nation filed voluminous evidence with the JRP, including the Haida Marine Traditional Knowledge Study (the "**HMTK Study**") (2011), the Living Marine Legacy Reports ("**LML Reports**") (1999-2006), and many hours of oral testimony (see the next section) by Haida elders, Hereditary Chiefs and traditional knowledge holders.

⁵⁰ *Haida Nation v Canada* at para 8.

⁵¹ Lantin #1 Affidavit [CHNCR, Vol III, Tab 2, p 1096 to 1105 at paras 12-53 and p 1107-1108 at paras 63-65].

⁵² [CHNCR, Vol VIII, Tab 31, p 2732 and 2733]; [CHNCR, Vol VIII, Tab 32, p 2735]; [CHNCR, Vol VIII, Tab 30, p 2726-2729].

⁵³ Lantin #1 Affidavit [CHNCR, Vol III, Tab 2, p 1105 at paras 54 and 55].

36. The Haida Nation's written (6,621 pages) and oral testimony provided evidence about the nature, extent and strength of Haida Aboriginal Title and Rights in Haida Gwaii, including the surrounding marine environment, and the exercise of Haida Title and Rights through both the Haida Agreements with Canada and British Columbia and through the laws, customs, traditions and internal governance processes of the Haida Nation.
37. The HMTK Study includes 336 pages of information regarding historic and contemporary traditional harvesting activities of Haida peoples, for various species throughout Haida Gwaii.⁵⁴ It identified areas, species, specific sites, systems, and practices that were not captured in NGP's assessment of potential impacts and provided the basis for the "Ocean Way of Life" map,⁵⁵ which demonstrates the vast body of marine knowledge and use and the integral place that the ocean has for the Haida Nation.
38. The HMTK study filed with the JRP is an important and vital part of any assessment of Project effects, as it provides extensive information about Haida marine use and associated cultural use and values and leads to a more holistic understanding of the Haida Gwaii ecosystem.
39. The LML Reports were prepared by Parks Canada through a joint initiative of the Government of Canada and the Haida Nation and over a period of seven years (1999-2006). This five volume series provides long-term baseline inventories of marine plants, invertebrates, birds and mammals along the entire coast of Haida Gwaii and is not restricted to the Gwaii Haanas area.⁵⁶ The LML Reports provide baseline data that could have informed an environmental assessment of Haida Gwaii and the OWA.

⁵⁴ The marine species that are documented in the HMTK Study as occurring, being harvested or having cultural significance throughout Haida Gwaii include 133 species. [CHNCR, Vol VII, Tab 19, p 2420 at para 61].

⁵⁵[CHNCR, Vol VII, Tab 12].

⁵⁶[CHNCR, Vol VII, Tab 8 and 9].

40. NGP did not incorporate the information contained in the LML Reports⁵⁷ or the HMTK Study into their Application or Application Updates (other than to acknowledge their existence in a table).⁵⁸ The baseline data that the Haida Nation filed with the JRP contained actual data that could have informed baseline assessments and field studies that would have been part of an environmental assessment of the potential impacts of the project on Haida Gwaii.
41. Instead NGP included “broad and regional” information. NGP witnesses indicated that any specific information provided in the JRP process would be incorporated, post-Project approval, into NGP’s marine environmental effects monitoring program.⁵⁹
42. The environmental assessment that was utilized by NGP and accepted by the JRP was limited to a Key Indicator species (“**KIs**”) for the Confined Channel Assessment Area (“**CCAA**”)⁶⁰ which was complemented by a review of baseline information for the CCAA including field studies. The assessment of the OWA was cursory and limited mainly to general descriptions of the OWA and potential impacts of the project including oil spills on species in the OWA. No field studies were conducted in Haida Gwaii or the OWA as in the CCAA. NGP decided early in the process to limit the Environmental Assessment to the CCAA and the JRP accepted their decision without adequate consideration of the consequences of that approach to assessing project effects in the OWA and on the Haida Nation.
43. The Haida Nation also filed with the JRP the “Riparian Fish Forest on Haida Gwaii Report” and map, both of which were produced to assist with joint land use planning with the Government of BC by showing the distribution of fish and the spatial pattern of forests that sustain salmon. Estuaries are a critical

⁵⁷ [CHNCR, Vol VIII, Tab 29, p 2710, line 22562].

⁵⁸ [CHNCR, Vol VIII, Tab 29, p 2710, line 22569, p 2711 line 22572].

⁵⁹ [CHNCR, Vol VIII, Tab 29, p 2718, lines 22638-22639].

⁶⁰ This includes Kitimat Arm and Douglas Channel, Wright Sound, Lewis Passage and portions of Squally Sound, and out through Caamaño Sound (Southern Approach) and Principe Channel (Northern Approach).

portion of marine habitat that could be affected by the project including oil spills. Salmon is a cultural-keystone species in Haida culture, and marine habitat occurs throughout Haida Gwaii including the portions of Haida Territory, bordering Dixon Entrance and the proposed northern tanker route and Hecate Strait and the proposed southern route.⁶¹

44. The Haida Nation also filed written evidence showing the socio-economic data of six marine sectors relevant to the Haida Nation,⁶² and the historic trade in marine resources.⁶³ Sablefish, halibut, crab, razor clams, herring spawn-on-kelp are all important cultural species which contribute significantly to the BC economy.

B. Haida Oral Testimony

45. The Haida Nation provided oral testimony, at the JRP hearings held in Massett and Skidegate, Haida Gwaii, with oral history and oral statements provided by 33 community members including Hereditary Chiefs. The Haida Nation's oral history evidence provided references to areas, activities, species, specific sites, systems, practices and rights that were not captured in NGP's assessment of the Project's potential impacts. In particular, this evidence highlighted the Haida Nation's history, laws, governance, traditional knowledge, and practices concerning the harvesting, preservation and enhancement of resources.
46. The Haida witnesses also gave evidence concerning the impacts on resources resulting from an oil spill or the dumping of ballast water and the risks posed by the introduction of aquatic invasive species and spoke to navigation hazards for both the northern and southern tanker routes proposed by NGP for the Project, potential places of refuge for the Project, and most significantly,

⁶¹ [CHNCR, Vol. VIII, Tab 26] and [CHNCR, Vol. VIII, Tab 27].

⁶² [CHNCR, Vol. VII, Tab 18] and [CHNCR, Vol. VIII, Tab 25].

⁶³ [CHNCR, Vol. VIII, Tab 28].

potential cumulative cultural effects, and socio-economic impacts of the Project on the Haida Nation.⁶⁴

47. The Haida witnesses in their evidence before the JRP addressed their deep connection with their ancestral lands and marine areas and how the Project would seriously jeopardize their relationship with the land and marine areas of Haida Gwaii, and their ability to fulfill their stewardship responsibilities under Haida law. None of this evidence was incorporated into NGP's Application, or their response to the JRP requesting traditional knowledge information.⁶⁵ Rather, they admitted that any general information that the Haida Nation provided that was consistent with the general or broad information they had for the Project, would be considered post-Project approval in mitigation measures.⁶⁶
48. NGP also did not assess any impacts of the Project upon the Haida Territory and Haida culture expressed in the evidence of the Haida witnesses, including the relationship between the Haida, the natural world and the spiritual world.⁶⁷ Rather NGP indicated that its Application only considered "current use of land" and "waters for the purpose of resource harvesting" and considered this impact by selecting KIs and Valued Ecosystem Components ("VECs") that they "know or think are important to Aboriginal communities" and from there "try to examine the potential impacts on land uses, whether they be traditional, recreational, social or spiritual".⁶⁸

⁶⁴ NGP did not receive and incorporate in its application any input regarding local conditions from Haida mariners and fishers and their concerns about emergency response. Haida witnesses testified about the hazards of navigation along the two proposed tanker routes arising from the unpredictable weather, extreme weather conditions, and factors contributing to extreme weather. [CHNCR, Vol VII, Tab 19, p 2429 at paras 104-112 and 118-123]. The Russian-flagged cargo vessel *Simushir* lost power due to a mechanical failure on early Friday morning on October 17, 2014 and began drifting in heavy seas. See Dunderdale Affidavit, affirmed November 8, 2014 [CHNCR, Vol. VI, Tab 6, p. 1803-1804, paras 25-31].

⁶⁵ [CHNCR, Vol VIII, Tab 29, p 2712, line 22589].

⁶⁶ [CHNCR, Vol VIII, Tab 29, p 2715-2716, lines 22607-22620].

⁶⁷ [CHNCR, Vol VIII, Tab 29, p 2713, line 22592].

⁶⁸ [CHNCR, Vol VIII, Tab 29, p 2713, lines 22593-223595].

49. NGP's Application omitted from its map of Aboriginal groups in the vicinity of the marine transportation quarters,⁶⁹ many historic and traditional village locations throughout Haida Gwaii including the Gwaii Haanas National Park Reserve and Gwaii Haanas NMCAR.
50. NGP was aware of the joint (Haida-Canada) management of the Gwaii Haanas area,⁷⁰ the Gwaii Haanas Marine Area,⁷¹ *sGaan Kinghlas* (Bowie Seamount),⁷² and the Haida-BC joint management of the rest of the land base including near and foreshore areas but yet they failed to integrate the Haida Agreements into their application updates and the JRP failed to reflect them in its report.⁷³

C. Haida Interests and Concerns

51. The evidence provided by the Haida Nation emphasized and illustrated the importance of the marine environment and ecosystems to the Haida Nation.⁷⁴ The marine environment and ecosystems are the foundation of the culture and economy of the Haida Nation, and the Project has a high potential for long-lasting and potentially permanent adverse impacts on Haida Gwaii and the Haida Nation's Aboriginal Title and Rights.⁷⁵
52. The Haida Nation raised concerns about the potential adverse impacts arising from a major oil spill, accidents and malfunctions,⁷⁶ the effectiveness of

⁶⁹ [CHNCR, Vol VIII, Tab 29, p 2720, line 22652].

⁷⁰ [CHNCR, Vol VIII, Tab 29, p 2720, line 22652].

⁷¹ [CHNCR, Vol VIII, Tab 29, p 2722, line 22682].

⁷² [CHNCR, Vol VIII, Tab 29, p 2723, lines 22754 and 22756].

⁷³ [CHNCR, Vol VIII, Tab 29, p 2724, line 22771].

⁷⁴ [CHNCR, Vol VII, Tab 19, p 2418, at paras 53-55, p 2420-2422 at paras 61-63]; [CHNCR, Vol VII, Tab 20, p 2468-2469, at lines 1548-1554].

⁷⁵ [CHNCR, Vol VII, Tab 19, p 2422-2429, at paras 65-99, 113-6]; [CHNCR, Vol VII, Tab 20, p 2464-2467, at lines 1522-1543, p 2469-2472].

⁷⁶ [CHNCR Vol VII, Tab 19, p 2422-2429, at paras 65-99, p 2429-2433, at paras 104-116, p 2434-2438 at paras 118-125]; [CHNCR Vol VII, Tab 20, p 2459-2461, at lines 1486-1501, p 2461 at line 1508].

recovery efforts in the event of an oil spill,⁷⁷ the introduction of aquatic invasive species through the dumping of ballast waters and ship hull fouling,⁷⁸ and the adverse impacts of the Project on species at risk⁷⁹. The JRP Report was largely unresponsive to these concerns, and some of them, as discussed below, were not addressed in the Report at all.

53. Throughout the JRP process the Haida Nation's participation focused on the potential impacts of an oil spill in the waters and ecosystems in the OWA, and specifically Haida Gwaii, as a result of the Project. To address these potential impacts, the Haida Nation argued that a focused and thorough environmental assessment of the potential impacts of the Project on Haida Aboriginal Title and Rights in Haida Territory should be conducted.⁸⁰ That argument was never addressed by the JRP.
54. While NGP completed an environmental assessment for the CCAA, this did not include an environmental assessment of the OWA or Haida Gwaii including *SGaan Kinghlas*. In the absence of such an assessment, NGP failed, indeed was unable, to assess the adverse impacts resulting from an oil spill in the waters surrounding Haida Gwaii and the adverse impacts of such on the Haida Nation's Aboriginal Title and Rights. At a minimum there is potential for significant effects that have not been adequately assessed.
55. NGP's assessment of the OWA was limited to a literature review and description of key environmental values and the mapping of coastal habitats to inform oil spill response and mitigation. The VEC and KIs that NGP selected were selected for the CCAA, which has differing ecosystem characteristics from Haida Gwaii.

⁷⁷ [CHNCR Vol VII, Tab 20, p 2461, at lines 1505-1506, p 2464-2465, lines 1524-1530].

⁷⁸ [CHNCR Vol VII, Tab 19, p 2439-2443, at paras 133-150]; [CHNCR Vol VII, Tab 20, p 2463, at lines 1518-1519].

⁷⁹ [CHNCR Vol VII, Tab 19, p 2424, at paras 81-84, p 2425-2427 at paras 87-92].

⁸⁰ [CHNCR Vol VII, Tab 19, p 2413-2414, at paras 22-26]; [CHNCR, Vol VII, Tab 20, p 2462-2463, at lines 1510-1517].

56. The Haida Nation identified a significant number of concerns to the JRP specifically related to the potential impacts of the Project on Haida Gwaii. None of these matters and concerns raised by the Haida Nation as they applied to Haida Gwaii were addressed. The potential threat to the Aboriginal Title and Rights of the Haida Nation included:

- a) Threats to the viability of maintaining traditional foods at abundance levels sufficient to sustain food harvesting critical to Haida culture.⁸¹
- b) Threats to specific species. These include the Ancient Murrelet, a species at risk, and Northern Abalone,⁸² which is listed as a species of importance for Dixon Entrance and as an endangered species under the *Species at Risk Act* and other potentially impacted marine species documented in the HMTK Study, which are harvested by or have cultural significance to the Haida Nation. NGP did not factor in the negative cumulative impacts these species.
- c) Specific concerns about genetically distinct Pacific Herring populations in Skidegate Inlet and Louscoone Inlet, a cultural-keystone species in Haida culture.⁸³ Herring are particularly susceptible to oil spills and the chronic effects of the oily discharge arising from tanker traffic. Haida Gwaii supports one of the five major stocks of herring in the area from Louscoone Inlet to Cumshewa Inlet. These herring are genetically distinct from other herring populations in British Columbia. Chronically low or small populations of herring, such as those found in Haida Gwaii, are vulnerable to events such as major oil spills or chronic exposure to oil. A loss of this stock or genetically distinct populations would have a devastating impact on the Haida Nation.

⁸¹ [CHNCR Vol VII, Tab 19, p 2420-2427, at paras 60-93].

⁸² [CHNCR Vol VII, Tab 19, p 2425-2427, at paras 87-93].

⁸³ [CHNCR Vol VII, Tab 19, p 2424 at paras 77-80]; [CHNCR Vol VII, Tab 20, p 2463, at line 1517].

57. Oil spills are the most obvious potential threat to these valuable species and the ecosystems which supports them, particularly where the properties and behavior of dilbit, in the event of a spill, are uncertain.⁸⁴ A further problem, not addressed in the JRP Report, concerns timely protection efforts to limit damage or recovery efforts in the event of an oil spill near Haida Gwaii, given the evidence in relation to the weather and rough seas in the OWA surrounding Haida Gwaii.⁸⁵
58. The threats to these and other species comes not only from oil spills, but as well from the introduction of invasive species through the release of ballast water and ship hull fouling. International shipping is the largest vector for the introduction of aquatic invasive species and is a major cause of animal extinctions and reductions in biodiversity.
59. Finally, the Haida Nation's significant concerns about damage to the important, but fragile ecosystems of *sGa*an *King*hlas (Bowie Seamount) were not considered by the NGP nor the JRP as they were beyond the scope of the Project.⁸⁶ Marine transportation from oil spills or introduction of invasive species was identified as a major risk for this protected area.⁸⁷

III. Phase IV Consultation and Haida Nation Participation

60. The Haida Nation participated in the Phase IV consultation process established by the federal government, and led by the Canadian Environmental Assessment Agency ("CEAA").⁸⁸
61. The purpose of this phase was limited to the following:

⁸⁴ The Haida Nation adopts the submissions of Forest Ethics that the Panel unlawfully failed to consider the environmental effects and feasible mitigation in the event of a dilbit spill. [Forest Ethics MFL, p 27-31, at paras 93-108].

⁸⁵ [CHNCR Vol VII, Tab 19, p 2430-2432, at paras 105-112, p 2434-2438 at paras 118-123].

⁸⁶ [CHNCR Vol VIII, Tab 29, p 2723, at line 22756].

⁸⁷ [CHNCR Vol III, p 838].

⁸⁸ Lantin #1 Affidavit [CHNCR, Vol III, Tab 2, p 1106 to 1107 at paras 58-62].

- a) Whether concerns about potential project impacts on potential or established Aboriginal and Treaty rights have been accurately characterized by the JRP;
 - b) Whether concerns have been addressed by NGP in the JRP's Environmental Assessment Report and recommendations;
 - c) Whether there remain any outstanding concerns; and
 - d) The manner and extent to which any recommended mitigation measures might serve to accommodate these concerns.⁸⁹
62. While the JRP had no mandate to make an assessment of the strength of the Haida Aboriginal Title case, or to make an assessment of the adequacy of the Crown's consultation and accommodation efforts, under the Amended Agreement between the NEB and the Minister of the Environment, the JRP was required to reference the "information provided by the Aboriginal groups' strength of claim respecting Aboriginal Rights."⁹⁰ The JRP Report did not include that information for consideration by the federal Crown.
63. The Haida Nation reviewed the JRP Report and provided written submissions to CEAA in mid-March 2014, outlining in detail its concerns respecting the conclusions and recommendations made by the JRP in the report.
64. On March 20, 2014, the Haida Nation met with representatives from CEAA and various other federal agencies.⁹¹ During this three hour meeting, the Haida Nation elaborated on the concerns and issues identified in their Submissions, and the potential effects of the Project on the Haida Nation's Aboriginal Title and Rights.⁹²
65. The Haida Nation learned, and confirmed in writing that Canada:

⁸⁹ [MB, Vol 1, Tab 3, p 88-89].

⁹⁰ [MB, Vol 1, Tab 10, p 222].

⁹¹ [MB, Vol 1, Tab 1, p 13-14 at para 58].

⁹² Lantin Affidavit #1[CHNCR, Vol III, Tab 2, p 1106 at para 58].

- a) had conducted a strength-of-claim analysis in respect of the Haida Nation's Aboriginal Title and Rights, but that Canada refused to provide that analysis to the Haida; and
 - b) was of the view that the JRP process, including a three-hour meeting and Stage IV would constitute the entire consultation and accommodation of the Haida Nation's interests.⁹³
66. At the March 20, 2014 meeting, CEAA committed to responding to the Submissions and the concerns raised by the Haida Nation at the meeting by May 2014.⁹⁴
67. On April 16, 2014, the Haida Nation provided CEAA with a three page summary (a limit unilaterally set by the Agency) of its principal concerns in respect of the Project and its potential effects on the Haida Nation's Aboriginal Title and Rights, the specific wording of which was to have been included in the Crown Consultation Report to be provided to Cabinet as background for the Decision.⁹⁵
68. The Haida Nation did not receive a response from CEAA until it received a copy of the content of the Crown Consultation Report relevant to the Haida dated June 9, 2014 ("**CEAA Response**").⁹⁶ The letter from CEAA and Natural Resources Canada enclosing the CEAA Response was a version of a form letter provided to all other First Nations, promoting Canada's approach to consultation, pipeline safety systems, tanker safety systems, engagement measures, and the *Species at Risk Act*.
69. The CEAA response failed to address the overriding concern raised by the Haida throughout the JRP and Crown consultation process - that there was legally insufficient consultation and accommodation of Haida Aboriginal Title and Rights.

⁹³ Lantin Affidavit #1 [CHNCR, Vol III, Tab 2, p 1107 at para 59b].

⁹⁴ Lantin Affidavit #1 [CHNCR, Vol III, Tab 2, p 1107 at para 60].

⁹⁵ Lantin Affidavit #2 [CHNCR, Vol IV, Tab 3, p 1306-1308].

⁹⁶ Lantin Affidavit #2 [CHNCR, Vol IV, Tab 3, p 1309-1312].

70. Canada's own evidence in these proceedings demonstrates its limited and generic approach to consultation. Canada's tracking table for consultation issues proposed a boilerplate response to all Aboriginal title claims saying that the government "acknowledged" the issue but that claims of title and self-government were to be addressed in the context of treaty negotiations.⁹⁷
71. The JRP process allowed for the possibility for other processes to address outstanding Haida concerns through the Haida Agreements,⁹⁸ but Canada elected to not pursue this avenue.

PART II: POINTS IN ISSUE

72. Did the Crown breach its constitutional duty to the Haida Nation prior to making the Order by:
- a) Failing to consult and accommodate the Haida Nation proportionate to the strength of the Haida Aboriginal Title and Rights case and the seriousness of the adverse impacts of the Project;
 - b) Failing to consult and accommodate the Haida Nation by not being responsive to the identified concerns of the Haida regarding the Project;
 - c) Failing to engage in deep consultation and accommodation with the Haida Nation utilizing the existing mechanisms and protocols for reconciliation of Haida and Crown title that the Haida Nation, the federal government and the British Columbia government have developed collaboratively; and
 - d) Failing to consider the impact of breaching the Haida Agreements with the Haida Nation in concluding that the Project was in the public interest when it made its public interest assessment.

⁹⁷Jim Clarke Affidavit, sworn February 4, 2015 [**"Clarke Affidavit"**] [ER Tab 89, Ex B].

⁹⁸CEAA's December 2013 letter at para 7e provided that "Other Government Programs or Initiatives", such as "treaty negotiations through the British Columbia Treaty Commission or self-government negotiations" might be used as opposed to regulatory decision making.

PART III: SUBMISSIONS

A. Canada Failed to Consult and Accommodate

73. The Haida Nation adopts the submissions of Nadleh and Nak'azdli Whut'en on the relevant law of consultation and accommodation, including the existence and scope of the duty to consult and the associated standard of review.⁹⁹
74. A purposive analysis of Crown consultation and accommodation requires that it be tailored to the specific strength and nature of the Haida Nation's Title, Rights and interests and the seriousness of the adverse impact of the contemplated governmental action. This cannot be discharged by a generic "one size/template fits all" approach to environmental assessment and consultation.
75. To the extent that Canada relies upon the JRP process to fulfill its consultation obligations, the generic non-Haida specific nature of the environmental assessment process represents a fatal flaw.
76. To the extent that Canada relies upon its own generic consultation framework, it failed to respect the Haida Agreements which give institutional expression and context to the distinctive Haida perspective on Haida Title and Rights and their reconciliation with asserted crown sovereignty which are essential elements of the law of consultation and accommodation.
77. The necessity for an individualized and not global framework in the determination of issues involving Aboriginal Title, Rights and consultation has deep roots in the Supreme Court's Aboriginal law jurisprudence. In 1978, Dickson J in *Kruger v The Queen* stated:

If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered

⁹⁹ [Nadleh and Nak'azdli Whut'en MFL, p 16-21 at paras 54-69].

*on the facts pertinent to that Band [First Nation] and to that land, and not on any global basis.*¹⁰⁰

78. This individualized approach has been hardwired into the Constitution through the articulation and elaboration of the section 35 justification framework. In *Haida Nation*, in the specific context of consultation the Court established that the scope of the duty to consult and accommodate is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.¹⁰¹ This principle was most recently affirmed by the Supreme Court of Canada in *Tsilhqot'in*.¹⁰²
79. From both *Haida Nation* and *Tsilhqot'in* cases flow the principle that a strength of case analysis is required when the Crown contemplates decisions which could impact Aboriginal Title and Rights. The strength of case defines the scope of the duty to consult. This is such an important element for the fulfillment of Crown obligations that the Courts have concluded that the standard of review of the assessment of the scope of the duty is correctness.¹⁰³

B. The Strength of the Haida Claim

80. In *Haida Nation* the Supreme Court, in assessing the strength of Haida Title and Rights, stated they were “supported by a good *prima facie* case”.¹⁰⁴
81. In 2004, the Supreme Court of Canada in confirming the strength of Haida Aboriginal Title and Rights directed that the federal and provincial governments were obligated under law to consult and accommodate Haida interests prior to an ultimate determination of Haida Aboriginal Title and Rights.

¹⁰⁰ *Kruger and al v The Queen*, [1978] 1 SCR 104 at para 110.

¹⁰¹ *Haida Nation v BC* at para 39.

¹⁰² *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 [“*Tsilhqot'in*”].

¹⁰³ See *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189, at para 82, 376 DLR (4th) 348 [“*Innu of Ekuanitshit*”].

¹⁰⁴ *Haida Nation v BC* at para 71, see also *Haida Nation v Canada* at para 8.

82. Since the *Haida Nation* case was decided in 2004, the Crown's knowledge of the strength of the Haida Title case has deepened considerably as a result of the following factors:
- a) the Crown's participation as a defendant in the Haida Title case in which the Crown has had access to an exhaustive document collection and has done an extensive series of cross-examined depositions within the Haida title case from elders and other witnesses demonstrating the historical and continuing harvesting and stewardship of land and marine based resources that have sustained the Haida Nation, and the important social, cultural and economic benefits of these resources for present and future generations of Haida;
 - b) ongoing negotiations and reaching of agreements with the Haida towards the establishment of reconciliation and cooperation in the management of the lands and waters of Haida Gwaii; and
 - c) the decision of the Supreme Court in *Tsilhqot'in*, which reaffirmed the test for Aboriginal Title not theretofore accepted by Canada, but which rests at the heart of Haida Title.
83. For these reasons, the Crown's duty of consultation and accommodation resides at the higher end of the spectrum as articulated by *Tsilhqot'in*. In that case, the Supreme Court ruled "Where a claim is particularly strong... appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim."¹⁰⁵
84. The Haida Nation is in the unique position of not only having a Supreme Court affirmation of their strong *prima facie* Title and Rights but also are parties to the Haida Agreements, with both federal and provincial crowns that recognize concurrent jurisdictions and the exercise of those jurisdictions in pursuit of reconciliation through collaborative decision-making.

¹⁰⁵ *Tsilhqot'in* at para 91.

C. Potential Adverse Impact of the Project on Haida Title and Rights

85. As set out above (para 54), many species of significance to the Haida Nation are at risk, some to the extent of possible extinction, by the Project. The Haida have an inherent duty to protect the land and sea within the Haida Territory, including its extensive coastline which constitutes the largest and most significant parts of the ancestral territory of the Haida Nation, from the risk of being fouled and damaged. The impact of this, from both a Haida and Canadian perspective, would be devastating.
86. The adverse impacts of the Project on the Haida Nation's exercise of Haida Title and Rights are serious. They will undermine the Haida Nation's right to the economic social and cultural benefits of the land and waters of Haida Gwaii and to proactively use and manage the Haida Territory. They constitute a threat to the ability of the Haida Nation to maintain their distinctive and integral relationship to the lands, marine waterways and resources of Haida Gwaii which have both sustained past generations of Haida and which constitute in the words of the Supreme Court of Canada in *Tsilhqot'in* "... it is collective title not only for the present generation but for all succeeding generations."¹⁰⁶

D. The Haida Agreements

87. The Crown obligations to engage in a deep level of consultation and accommodation with the Haida Nation in respect of the Project are both reinforced and individualized by the existence of the collaborative management agreements between the Haida Nation and Canada and BC in respect of Haida Gwaii. The framework for making strategic and operational decisions relating to Haida Gwaii terrestrial and marine resources is contained in the Haida Agreements. It is these arrangements and their animating commitment to joint decision-making that should have played an integral part in, and informed, any environmental assessment of the Project and any Crown consultation and accommodation.

¹⁰⁶ *Tsilhqot'in* at para 74.

88. As a result of these negotiations, both the Haida Nation and the Federal Government have invested substantially in governance structures to support collaborative decision-making under these agreements. Many of the agreements, particularly those entered into between the Haida Nation and Canada, are in relation to marine spaces and species which, as outlined above, are at risk of being adversely affected by the Project.
89. These agreements, and the co-management activities authorized therein, are an exercise of the Haida Nation's Title and Rights, including the right to manage the lands and resources of Haida Gwaii. They give institutional expression to the Haida perspective on Haida Title and Rights, and most importantly for the purposes of this judicial review, the expectation that from both the Haida and Canada that the Gwaii Haanas Marine Area be managed to a higher standard with a lower threshold of risk.
90. The model of collaborative management over Haida Gwaii, reflected in the Haida Agreements, was endorsed by the Federal Court in *Moresby Explorers Ltd. v. Canada (Attorney General)*, as providing "a structure for consultation with the Haida Nation which has the happy effect of blending competing jurisdiction claims...".¹⁰⁷
91. The Haida Nation signed the Gwaii Haanas Marine Agreement to work cooperatively with the Government of Canada through consensus-based decision-making, to effect change in fisheries management.
92. The *Canada National Marine Conservation Areas Act*¹⁰⁸ was predicated on the need to establish sufficient and representative areas to maintain healthy marine ecosystems, recognize that the marine environment is fundamental to the social, cultural and economic well-being of coastal communities, and

¹⁰⁷ *Moresby Explorers Ltd. v. Canada (Attorney General)*, [2001] 4 FC 591 at para 74.

¹⁰⁸ *Canada National Marine Conservation Areas Act*, SC 2002, c 18, ("*NMCA Act*") Preamble.

provide opportunities through zoning for ecologically sustainable use for the benefit of coastal communities.¹⁰⁹

93. While NMCAs are intended to be “in perpetuity”, by definition, NMCA Reserves (“*NMCARs*”) are subject to Aboriginal Rights, and are established where “an area or portion of an area proposed for marine conservation area is subject to a claim in respect of aboriginal rights that has been accepted for negotiation by the Government of Canada”. The management of NMCAs (and NMCARs) should consider traditional ecological knowledge in marine planning and management.¹¹⁰
94. The *NMCA Act* provides that “the primary considerations in the development and modification of management plans and interim management plans shall be principles of ecosystem management and the precautionary principle”. The commitment to the precautionary principle in the *NMCA Act* means “that, where there are threats of environmental damage, lack of scientific certainty is not used as a reason for postponing preventive measures”. Management and use of a NMCA (and NMCAR) shall be “in a sustainable manner that meets the needs of present and future generations without compromising the structure and function of the ecosystems, including the submerged lands and water column, with which they are associated”.¹¹¹
95. Under the Gwaii Haanas Agreement, the Government of Canada and the Haida Nation agreed that “The parties intend to act in accordance with the Gwaii Haanas Marine Area Interim and subsequent Management Plans,...”. Canada’s approval of the Project contradicts this commitment and is not consistent with the direction outlined in the Interim Plan.¹¹²
96. In March, 2015 the Federal Court again referenced the Haida Agreements, in supporting an injunction based upon the failure of DFO to consult and accommodate the Haida Nation with respect to the roe herring fishery in

¹⁰⁹ *NMCA Act*, Preamble.

¹¹⁰ *NMCA Act*, s. 4(2).

¹¹¹ *NMCA Act*, ss. 4(3), Preamble and 9(3).

¹¹² [CHNCR, Vol IV, Tab 3, p 1208, para 5.3].

Haida Gwaii. After setting out the historical progression of the agreements and the duty to foster reconciliation, Manson J. drew from them a “heightened duty to accommodate the Haida Nation” with “a lower tolerance of risk” in respect to the areas subject to joint management.

The 1993 Gwaii Haanas Agreement specifically recognizes the dual assertions of sovereignty, title and ownership of both land and waters in Haida Gwaii by Canada and the Haida Nation.

In my opinion, there is a heightened duty for DFO and the Minister to accommodate the Haida Nation ... given the existing Gwaii Haanas Agreement, the unique Haida Gwaii marine conservation area, the ecological concerns, and the duty to foster reconciliation with and protection of the constitutional rights of the Haida Nation.¹¹³

97. Manson J. specifically cited from the Interim Plan, issued by the AMB, set up under the Gwaii Haanas Agreement, and the positions taken by Parks Canada regarding the impact unilateral decisions will have upon the Haida-Crown relationship, as seen in the excerpts below:

Parks Canada considers the Haida Nation to be a full partner in the management of Gwaii Haanas. ... The relationship will fail and the intent of the GHA (1993 Gwaii Haanas Agreement) will be undermined if one party exercises their authority unilaterally.

Gwaii Haanas is a protected area established by the Parliament of Canada and the Haida Nation. Guidance from the NMCA indicates that NMCA’s such as Gwaii Haanas will be managed differently than other areas of the coast to ensure that ecosystem structure and function is maintained and principles of ecosystem management are followed.

There is an expectation from Canada and the Haida Nation that Gwaii

¹¹³ *Haida Nation v. Canada* at paras 51-53.

Haanas will be managed to a higher standard, with a lower tolerance of risk. [emphasis added]¹¹⁴

98. The courts have clarified that reconciliation is not some far-off distant goal, but rather is an on-going process that characterizes the relationship between Aboriginal peoples and the Crown. In considering the Project and making the Order, the Crown has a duty to ensure that Aboriginal interests are protected. The Haida Agreements serve as a means of enabling the Crown to uphold the honour of the Crown by preventing the unilateral exploitation of resources. These agreements also help to facilitate consultation and accommodation. By jointly seeking to balance competing interests, these agreements help to foster the trust needed for a new relationship between the Crown and the Haida Nation, and lead to long-lasting reconciliation.
99. The negotiation of the Haida Agreements has advanced in large measure due to the exercise by the Haida Nation of their Aboriginal Title throughout Haida Territory and the prior-to-proof recognition of their strong *prima facie* case for Aboriginal Title and Rights over the whole territory of Haida Gwaii. In the context of deep consultation and accommodation the agreements provide the collaborative protocols that Canada was required to engage in before making the Order.
100. The consultation activities undertaken by Canada in respect of the Project and the environmental assessment process for the Project were not legally sufficient to meet the Crown's obligations to the Haida Nation. They have not built upon the mutually recognized framework for collaborative decision making and reconciliation and fail to respect the terms, spirit, and intent of the Haida Agreements which the Parties have successfully operated under for more than 20 years. Nor have they been responsive to the identified concerns of the Haida. Rather, the Federal Government's consultation process has proceeded on the assumption that the Project will proceed, with a clear focus

¹¹⁴ *Haida Nation v. Canada* at paras 55 and 56.

on Project conditions and mitigation measures, rather than an assessment of impacts on Haida Title and Rights.

101. The individualized Haida-specific consultation and accommodation that would have fulfilled Canada's constitutional obligations is reflected in an important contribution to the scholarship by former Chief Justice Finch.¹¹⁵ Building upon the jurisprudence of the Supreme Court of Canada which has acknowledged the pre-existence of Aboriginal societies and Aboriginal legal traditions and the necessity of taking into account the Aboriginal perspective of the rights at stake, Chief Justice Finch articulated "the duty to learn" as a necessary conceptual element of the duty to consult:

We speak often in the field of Aboriginal law of the honour of the Crown, which mandates, among other requirements ... the duty to consult and the duty to accommodate. Now, I suggest, a more widely applicable concept of honour imposes on all members of the legal profession the duty to learn ...

A powerful analogy may be drawn from the notion of title, or, expressed more broadly, from the relationship of an organized society to its traditional territory. Present Canadian society must find a way to exist together with a pre-existing cultural landscape. Similarly, in the purely legal context, we must find ways to achieve reconciliation by finding space for the Canadian legal order within the pre-existing legal landscape.

In other words, the task for which we are attempting to equip ourselves ... is a matter of attempting, in good faith, and as respectfully as possible, to enter new landscapes: legal, ethical, and cultural. [emphasis added]¹¹⁶

¹¹⁵ Finch L. "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" [**Finch**] CLEBC Indigenous Legal Orders and the Common Law, November 15, 2012.

¹¹⁶ Finch at paras 15, 38 and 39.

102. Far from engaging in an assessment and consultation and accommodation framework that entered into the Haida legal, ethical and cultural landscape, NGP, the JRP, and ultimately and most significantly the Crown, came to the Haida with their environmental and risk assessment and consultation tools pre-configured. The resulting process and decision do not demonstrate recognition nor respect for the Haida landscape, one framed by the Haida Agreements which give institutionalized expression to not only the Haida but also the Crown perspectives on reconciliation.

E. Environmental Assessment and Consultation by Proxy

103. The Haida Nation participated in the JRP process with the anticipation that a proper and competent environmental assessment would be undertaken which would be of assistance in advancing the required Crown consultation and accommodation.
104. The legal adequacy of the assessments relied upon in the JRP process is the subject of other parties' arguments in these proceedings. The Haida Nation adopts the arguments of BC Nature on the five errors committed by the JRP in the course of its required inquiry into "malfunctions or accidents" that are reversible on reasonableness review. While the Haida Nation in its application does not challenge the JRP report the significance of these errors is that, to the extent the Canada relies upon the JRP report to address and provide remedial responses to these issues, an essential part of the Crown's duty to the Haida Nation to consult and accommodate regarding its concerns of the risk and consequences of malfunctions or accidents affecting the waters and shorelines of Haida Gwaii was not discharged.¹¹⁷
105. Independently of those arguments, the gravamen of the Haida case is that it is a legitimate and legally founded expectation that Crown consultation with the Haida regarding the Project must be Haida specific, with reference to Haida Title, Rights and interests.

¹¹⁷ [BC Nature MFL, p 5-9 at paras 16-23].

106. In significant areas the JRP process, which underpinned the Crown consultation process, failed to give adequate and individualized consideration to the Haida Title, Rights and interests. As earlier described a major concern of the Haida throughout the JRP and Crown consultation process and in this judicial review was the failure of the JRP to undertake a comprehensive and cumulative environmental assessment of the OWA – particularly the marine areas of Haida Territory –and the failure to assess impacts upon certain species of importance to the Haida.
107. Canada, was aware of the limitations of the NGP Application and the JRP Report, as referenced by the Haida Nation, and failed to follow through on their own independent Haida specific consultation obligations.
108. One example of the failure of the JRP process and the Crown consultation process to enter the Haida landscape is the treatment of the *SGaan Kinghlas* Bowie Seamount. As referenced in para 16(d), the Bowie Seamount is an iconic part of the OWA, an important fishery habitat, and the subject of a Canada-Haida agreement resulting in Canada designating the Haida Protected Area as a protected area under the *Oceans Act*. NGPs affiant, Jeffery Green, justifies its exclusion from a NGP marine assessment or review by the JRP in this way:
- Given the Haida's involvement in the management planning process for the SGaan Kinghlas Bowie Seamount Marine Protected Area, it is understandable that they would have concerns for any industry or activity, including vessel transits, in the vicinity of the Bowie Seamount. However, the reason that the Bowie Seamount was not included in the Northern Gateway environmental assessment or the review by the JRP was that the area is well beyond the geographic scope of the assessment as described in the JRP Agreement, being the 12 nautical mile limit of the Territorial Sea of Canada.*¹¹⁸

¹¹⁸ [ER Tab 85 para 45].

109. Haida concerns are simultaneously seen as “understandable” but not to be considered because of a decision to exclude it from the geographical scoping of the assessment. *SGaan Kinghlas* is within Haida Territory, within the exclusive economic zone claimed by Canada and within the scope of Project impacts. Furthermore, in a risk assessment filed by the Haida before the JRP, marine transportation was identified as one of the major ecological risks for *SGaan Kinghlas*.¹¹⁹ For the Haida, based on oral traditions, economic and cultural significance, this underwater volcano is within the boundaries of the Haida legal, ethical and cultural landscape. Its *de facto* invisibility to the NGP and JRP assessment process does not annul its *de jure* significance for Crown consultation.
110. Where a matter required for Crown consultation falls, expressly or by implication, beyond the mandate of the JRP, that matter must be the subject of direct consultation outside the JRP process and such consultation must be taken into account by the decision-maker. That did not occur in regard to the impact of the Project on *SGaan Kinghlas* and its co-management regime.
111. A second example of the way in which Haida specific concerns regarding the distinctive Haida landscape are finessed is concealed within the technical language of environmental assessment and the concepts of scoping , VECs and KIs:

*Criticisms by groups such as the Haida that certain effects on certain species or resources were ignored by Northern Gateway or the JRP reflect a disagreement with this scoping stage of the assessment. Their specific concern may not have been addressed because it is not considered to be a key issue and/or environmental effects on the specific species or resource are adequately addressed by a similar species or representative. [emphasis added]*¹²⁰

¹¹⁹ [CHNCR, Vol III, p 838].

¹²⁰ Jeffrey Emil Green Affidavit #1, Sworn March 5, 2015 [“Green Affidavit”] [ER Tab 85 at para 43].

... Project effects and cumulative effects on species not selected as KI species can be inferred from the assessment of Project effects on KI species selected representative of those species by similar habitat or biophysical requirements, or by being likely to respond similarly - or to a lesser degree - to certain effects. [emphasis added]¹²¹

112. Translated into the language of consultation and accommodation this means that both environmental and risk assessments to the resources and habitats of Haida Gwaii and impacts on Haida Title, Rights and interests can be achieved by proxy. Any concerns of the Haida can be addressed by identifying a proxy species or habitat. Under this scenario there is no need, scientifically or legally, for entering into the Haida landscape, let alone doing it with eyes and ears wide open. This cannot be the basis for legally sufficient consultation.
113. VECs are but one step in an approach to assess environmental impacts. They have limited use for assessing social, economic or cultural impacts, and are based on a simplified model of the ecosystem. A legally sufficient basis for deep consultation requires individualizing the model to the Haida Gwaii biophysical and cultural ecosystems.
114. The dissonance and distance between the non-Haida specific nature of the environmental and risk assessments that were put before the JRP and upon which the Crown relies, and the legitimate expectations of the Haida for a consultation process that was Haida- and Haida Gwaii-specific, are highlighted by NGPs approach to addressing the critical issues of the risk assessments of a major oil spill and recovery of ecosystems and species. As expressed by NGP's affiant Jeffery Green:

It is understandable that these groups might like to have a specific spill scenario that addresses a site-specific concern of their Aboriginal group or that the assessment include an assessment of effects of a spill specific to species or resource of interest to them. For example the Haida had concerns about site-specific effects on Pacific herring,

¹²¹ Green Affidavit [ER Tab 85 at para 48].

*abalone, Dungeness crab and black sea weed. While the assessment by Northern Gateway and the JRP did not meet the expectations of certain groups, this is not grounds for dismissing the assessments undertaken by Northern Gateway or the JRP or claiming that it is inadequate. The assessments completed by Northern Gateway were thorough and credible.*¹²²

115. The Haida Nation adopts the argument of the Haisla Nation on the legally flawed nature of the JRP's approach to oil spill assessment and recovery.¹²³ The JRP's conclusion that the effects of a large spill would not be widespread does not address the significance of effects of an accident or malfunction in Haida Territory, on Haida use, or on Haida culture. The JRP relies on a definition of recovery that contemplates a return to a functioning ecosystem, rather than a return to an ecosystem that supports species relied on by the Haida.¹²⁴ The necessary recovery assessment needed to discharge the Crown's obligation of consultation and accommodation, which the JRP did not consider, was recovery to a state that supports functioning ecosystems similar to those existing before a spill for the purpose of the land, waters and resources relied on by the Haida.¹²⁵

F. Haida Nation's Adoption of Other Parties' Submissions on Crown Consultation

116. The Crown's consultation with the Haida was not adequate, in substance, to address Haida concerns. The Haida Nation adopts the following arguments of the Haisla Nation on the legally significant shortcomings of the consultation process: (a) it was unilaterally developed and imposed; (b) it was not followed in good faith; (c) it was founded in a misplaced reliance on the JRP process; (d) it was artificially limited and constrained; (e) it relies on promises of

¹²² Green Affidavit [ER Tab 85 at para 96].

¹²³ [Haisla MFL, pp 16 to 18 at paras 38-47].

¹²⁴ [Haisla MFL p 17 at para 45].

¹²⁵ [Haisla MFL p 18 at para 47].

future consultation that are hollow; and (f) it did not address or demonstrably integrate the Haida Nation's concerns into the Decision.¹²⁶

117. As the Haisla Nation argues, "Governments will only be allowed to rely on regulatory processes to meet consultation obligations where 'in substance an appropriate level of consultation is provided' during that process."¹²⁷ The process that occurred pursuant to Canada's Consultation Framework has not addressed the concerns of the Haida Nation.
118. As with the case of Haisla Nation and other Aboriginal parties, all the JRP did with Haida's extensive submissions and evidence in relation to these various matters was to cross-reference their location in an Appendix to the JRP Report.¹²⁸
119. The Haida Nation adopts the arguments of the Haisla Nation distinguishing *Council of Innus of Ekuanitshit*¹²⁹ and make the further argument that there was nothing before the Court similar to the Haida Agreements to provide a distinctive process and foundation for Crown consultation.
120. Canada's Phase IV consultation process purported to address any Project-related issues that were outside of the JRP's mandate. However, as described above the consultation process undertaken by the Federal Government was not responsive to the concerns identified by the Haida Nation in respect of the Project. The consultation process was hollow and designed to create the appearance of consultation when, in fact, all the process did was allow the Haida Nation "to blow off steam".¹³⁰ The Haida Nation agrees with the Haisla Nation that "The conduct of the Crown must be viewed as a whole to answer

¹²⁶ [Haisla MFL p 25 at para 81].

¹²⁷ [Haisla MFL p 25 at para 83, citing *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 39, [2010] 3 SCR 103].

¹²⁸ [Haisla MFL p 28 at para 94]. Ross Affidavit, paras 74-75 [HCR, Vol 1, Tab 3, p 143]; JRP Report Vol 2, hardcopy p 45 and Appendix 8, hardcopy p 415 [CB, Vol 2, Tab 21, CB p 484 and 854].

¹²⁹ *Innu of Ekuanitshit* at paras 101, 102 and 112. Haisla MFL at paras 96-98.

¹³⁰ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 at para 54.

the simple question: did the Crown act with diligence to pursue the fulfilment of its obligations? Just as an Aboriginal group must not be left with ‘an empty shell’ of a treaty promise, an Aboriginal group must not be left with an empty shell of a consultation promise.”¹³¹

121. The Haida Nation’s concerns must be accommodated early, at the broader stage of nation-to-nation negotiations and during marine use strategy planning. Accommodation post-Order is too late to satisfy the Crown’s constitutional obligations. The Haida Nation adopts the arguments of Haisla Nation on this issue. If consultation “is to be meaningful, [it] cannot be postponed to the last and final point in a series of decisions”, since “[o]nce important preliminary decisions have been made and relied upon by the proponent and others, there is clear momentum to allow a project”.¹³²
122. The Haida Nation further adopts the arguments of Gitxaala Nation that the Crown improperly sub-delegated and deferred core aspects of its environmental assessment and consultation duties to future decision-makers and post-approval processes. The Crown has no authority to defer consultation. Canada must fulfill the duty to consult before it makes a decision that may adversely affect established or asserted aboriginal rights.¹³³
123. The Haida Nation were entitled to receive a sufficient level of responsiveness to their concerns about the Project, including a willingness to alter or reject the Project, in order to accommodate their concerns and any potential adverse impacts on the Haida Nation’s Aboriginal Title and Rights. None of the engagement activities undertaken by NGP, the JRP or the Crown involved this level of responsiveness. As a result, the Crown’s duty to consult and accommodate the Haida Nation has not been met.
124. It is also of significance that the Federal Government adopted amendments to the *National Energy Board Act* and the *Canadian Environmental Assessment*

¹³¹ [Haisla MFL p 25 at para 82].

¹³² [Haisla MFL p 21 at para 62].

¹³³ [Gitxaala MFL p 36 at paras 102-103].

Act, 2012 while the environmental review process for the Project was already well underway, coupled with statements by ministers of the Crown that indicated that the decision to approve the project had been predetermined and that the Crown's consultation process would make no difference to the ultimate decision. The Haida Nation adopts the arguments of the Gitxaala Nation that the JRP and the Crown's consultation process was overshadowed and tainted by the strong sense that Canada had pre-determined the outcome and was not interested in engaging in deep consultation on matters that might frustrate that outcome.¹³⁴

G. The Crown did not consider the Haida Agreements in its public interest assessment

125. The Haida Nation adopts the arguments of the Gitxaala and Haisla Nations that the Crown failed to consider impacts to aboriginal rights in its public interest assessment.¹³⁵ As the Supreme Court has made clear “[t]he constitutional dimension of the duty to consult gives rise to a special public interest...”¹³⁶
126. The Haida Nation raises the further argument that the Order and the process followed by Canada leading to the Order undermines and threatens the objectives and commitments contained in the Haida Agreements made between the Haida Nation and the federal and provincial governments, and also undermines and frustrates the reconciliation process.. Reconciliation of the assertion of Crown sovereignty with Haida Title and Rights is in the public interest as expressed by Manson J., “The Honour of the Crown in dealing appropriately with consultation and reconciliation with the Haida Nation is also very much in the public interest, given the special conservation

¹³⁴ [Gitxaala MFL p 27 at para 71].

¹³⁵ [Gitxaala MFL p 36-38 at paras 104 to 111; Haisla MFL p 44 to 45 at paras 163-167].

¹³⁶ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650, at para 70 and para 42.

and ecological agreements governing the Haida Gwaii area”.¹³⁷ By undermining these reconciliation efforts and agreements, the Federal Government has also acted contrary to the public interest of all Canadians.

H. Conclusion

127. Given all of the foregoing, the GIC acted unlawfully in making the Order, including the Decision Statement. As such, the Order should be quashed.

PART IV: ORDER SOUGHT

128. The Applicants seek an order or orders:

- a) Declaring that Canada failed to meet its constitutional duty to consult with and accommodate Haida Nation’s Aboriginal Title and Rights prior to making the Order;
- b) Quashing the Order, including the Decision Statement;
- c) For costs of and incidental to this application;
- d) That the applicant shall not be required to pay costs to the respondents of this application, pursuant to Rule 400 of the *Federal Courts Rules*, in the event that this application is dismissed; and
- e) Such further and other relief as this Honourable Court may deem appropriate and just.

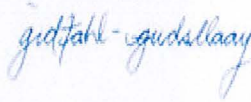
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of May, 2015.



MICHAEL JACKSON, Q.C.



DAVID PATERSON



gid7ahl-gudsllaay, TERRI-LYNN
WILLIAMS-DAVIDSON

¹³⁷ *Haida Nation v. Canada*, at para 61. In the specific context of the issues in that case Manson J. found that “unilaterally imposing a highly questionable opening of the roe herring fishery in Haida Gwaii for 2015 also constitutes irreparable harm. Canada’s unilateral implementation of the roe herring fishery in Haida Gwaii for 2015 compromises, rather than encourages, the mandated reconciliation process” (at para 54).

PART V: TABLE OF AUTHORITIES

Authorities	Cited in Memorandum at paragraph
<i>Canada National Marine Conservation Areas Act</i> , SC 2002, c 18.	92, 93, 94
CJ Lance Finch, “The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice” (2012) CLEBC Indigenous Legal Orders and the Common Law paper presented November 15, 2012.	101
<i>Council of the Haida Nation et al v Canada (Fisheries and Oceans)</i> , 2015 FC 290	6, 16, 17, 29
<i>Council of the Innu of Ekuanitshit v Canada (Attorney General)</i> , 2014 FCA 189	79, 119
<i>Haida Nation v BC (Minister of Forests)</i> , 2004 SCC 73	78,80
<i>Kruger and al v The Queen</i> , [1978] 1 SCR 104	77
<i>Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)</i> , 2005 SCC 69	120
<i>Moresby Explorers Ltd. v. Canada (Attorney General)</i> , [2001] 4 FC 591	90
<i>Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council</i> , 2010 SCC 43	125
<i>Tsilhqot’in Nation v. British Columbia</i> , 2014 SCC 44	78, 83, 86