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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 Kitasoo 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

HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF CANADA,
MINISTER OF THE ENVIRONMENT, NORTHERN GATEWAY PIPELINES
INC., NORTHERN GATEWAY PIPELINES LIMITED PARTNERSHIP
and NATIONAL ENERGY BOARD

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 applicant
FEDERATION OF BRITISH COLUMBIA NATURALISTS
carrying on business as **BC NATURE**

Counsel for the Applicant BC Nature
Chris Tollefson
Environmental Law Centre
University of Victoria, Faculty of Law
Murray and Anne Fraser Building, Rm 102
McGill Road at Ring Road
Victoria, British Columbia V8P 5C2
T: (250) 888-6074
F: (250) 472-4528
E: ctollef@uvic.ca

TO: **Federal Court of Appeal**
ATTN: Judicial Administrator
Vancouver Local Office
Pacific Centre
P.O. Box 10065
701 West Georgia Street
Vancouver, British Columbia V7Y 1B6

AND TO: **Counsel for the Applicant/Appellant Gitxaala Nation**
Robert Janes and Erin Sigurdson
Janes Freedman Kyle Law Corporation
340 – 1122 Mainland Street
Vancouver, British Columbia V6B 5L1
T: (604) 687-0549 ext. 101
F: (604) 687-2696
E: rjanes@jfklaw.ca; esigurdson@jfklaw.ca

AND TO: **Counsel for the Applicant Gitga'at Frist Nation**
Michael Lee Ross and Grace Jackson
1500 – 885 West Georgia Street
Vancouver, British Columbia V6C 3E8
T: (604) 601 2083
F: (604) 683-8125
E: ross@michaelleeross.com; gjacksonlaw@shaw.ca

AND TO: **Counsel for the Applicant/Appellant Haisla Nation**
Allan Donovan, Jennifer Griffith, and Amy Jo Scherman
Donovan & Company
6th Floor, 73 Water Street
Vancouver, British Columbia V6B 1A1
T: (604) 688-4272
F: (604) 688-4282
E: Allan_Donovan@aboriginal-law.com;
Jennifer_griffith@aboriginal-law.com; AmyJo_Scherman@aboriginal-law.com

AND TO: **Counsel for the Applicants The Council of the Haida Nation and Peter Lantin**
Terri-Lynn William-Davison
White Raven Law Corporation
16541 Upper Beach Road
Surrey, British Columbia V3Z 9R6
T: (604) 536-5541
F: (604) 536-5542
E: tlwd@whiteravenlaw.ca; sredmond@whiteravenlaw.ca; ebulbrook@whiteravenlaw.ca; justice@mjacksonlaw.ca; david.paterson@patersonlaw.ca

AND TO: **Counsel for the Applicants Kitasoo Xai'Xais Band Council and Heiltsuk Tribal Council**
Lisa Fong
Ng Ariss Fong, Lawyers
210 – 900 Howe Street, Box 160
Vancouver, British Columbia V6Z 2M4
T: (604) 331-1155
F: (604) 677-5410
E: lisa@ngariss.com; lisa@ngariss.org; julia@ngariss.com; julia@ngariss.org

AND TO: **Counsel for the Applicants Martin Louie, Fred Sam, Nak'azdli and Nadleh Whut'en First Nations**
Chery Sharvit, Gavin Smith, and Jessica Clogg
Mandell Pinder
Reception Suite 300
Vancouver, British Columbia V6B 2T4
T: (604) 681-4146
F: (604) 681-0959
E: cheryl@mandellpinder.com; gavin_smith @wcel.org; jessica_clogg@wcel.org

AND TO: **Counsel for the Applicant/Appellant Unifor**
Steven Shrybman and Ben Piper
Sack Goldblattt Mitchell LLP
500 – 30 Rue Metcalfe Street
Ottawa, Ontario K1P 5L4
T: (613) 482-2456
F: (613) 235-3041
E: sshrybman@sgmlaw.com; bpiper@sgmlaw.com; klord@sgmlaw.com

AND TO: **Counsel for the Applicants/Appellants ForestEthics Advocacy Association, Living Oceans Society, and Raincoast Conservation Foundation**
Barry Robinson and Karen Campbell
Ecojustice
1000 – 5th Avenue SW, Suite 900
Calgary, Alberta T2P 4V1
T: (403) 705-0202
F: (403) 264-8399
E: brobinson@ecojustice.ca; kcampbell@ecojustice.ca

AND TO: **Counsel for the Respondents Her Majesty the Queen, Attorney General of Canada, and Minister of the Environment**
Jan Brongers, Dayna Anderson, Ken Manning, and Catherine Douglas
Department of Justice Canada, BC Regional Office
900 – 840 Howe Street
Vancouver, British Columbia V6Z 2S9
T: (604) 666-0110
F: (604) 666-1585
E: jan.brongers@justice.gc.ca; dayna.anderson@justice.gc.ca; ken.manning@justice.gc.ca; catherine.douglas@justice.gc.ca

AND TO: **Counsel for the Respondents Northern Gateway Pipelines Inc. and Northern Gateway Pipelines Limited Partnership**
Richard A. Neufeld, Q.C., Laura Estep and Bernard Roth
Dentons Canada LLP
15th Floor, Bankers Court
850 – 2nd Street SW
Calgary, Alberta T2P 0R8
T: (403) 268-7023
F: (403) 268-3100
E: Richard.neufeld@dentons.com; laura.estep@dentons.com; bernard.roth@dentons.com

AND TO: **Counsel for the Respondent National Energy Board**
Andrew Hudson and Isabelle Cadotte
National Energy Board
510 – 10th Avenue SW
Calgary, Alberta T3R 0A8
T: (403) 292-6540
F: (403) 292-5503
E: Andrew.hudson@neb-one.gc.ca; isabelle.cadotte@neb-one.ca

AND TO: **Counsel for the Intervener Attorney General of British Columbia**
Angela Cousins
Ministry of Justice
3rd Floor, 1405 Douglas Street
PO Box 9270, Stn Prov Govt
Victoria, British Columbia V8W 9J5
T: (250) 387-2890
F: (250) 387-0343
E: angela.cousins@gov.bc.ca

AND TO: **Counsel for the Intervener Amnesty International**
Justin Safayeni and Naomi Greckol-Herlich
Stockwoods LLP Barristers
TD North Tower
77 King Street West
Suite 4130, P. O. Box 140
Toronto-Dominion Centre
Toronto, Ontario M5K 1H1
T: (416) 966-0404
F: (416) 966-2999
E: justins@stockwoods.ca

Colleen Bauman
Sack Goldblatt Mitchell LLP
500 – 30 rue Metcalfe St.
Ottawa, Ontario K1P 5L5
T: (613) 482-2463
F: (613) 235-3041
E: cbauman@sgmlaw.com

AND TO: **Counsel for the Intervener The Canadian Association of Petroleum Producers**
Keith Bergner, Lewis Manning, and Toby Kruger
Lawson Lundell LLP
1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia V6C 3L2
T: (604) 685-3456
F: (604) 669-1620
E: kbergner@lawsonlundell.com; lmanning@lawsonlundell.com; tkruger@lawsonlundell.com

INDEX

PART I: FACTS	1
PART II: POINTS IN ISSUE	3
PART III: SUBMISSIONS	3
A: Standing	3
B: Standard of Review	4
C: Did the JRP unreasonably err in failing to discharge its obligations under the *CEAA, 2012* to assess “the environmental effects of malfunctions or accidents that may occur in connection with the designated project”?	5
1) Overview	5
2) The JRP’s reasons, conclusions and recommendations on “malfunctions or accidents”	9
3) The JRP unreasonably erred by conflating its duty to consider “malfunctions or accidents that may occur” under s. 19 of the *CEAA, 2012* with the question of whether the project is “likely to cause significant adverse environmental effects”	11
4) The JRP unreasonably erred by failing to conduct a legally adequate assessment of the effects of a large marine oil spill on the environment, including whether such effects would be adverse and significant	16
5) The JRP unreasonably erred by improperly concluding that the significant adverse effects of a large oil spill could be mitigated below the “significance” threshold in the absence of evidence capable of supporting this conclusion	19
6) The JRP unreasonably erred by improperly considering and rendering conclusions as to whether the risk associated with a large oil spill was “manageable” or “acceptable” as part of its “malfunctions or accidents” inquiry	22
7) The JRP unreasonably erred by failing to provide adequate reasons for its conclusions in relation to malfunctions and accidents	24
D: Did the JRP unreasonably err in recommending that the significant adverse environmental effects the Project will likely cause to certain populations of woodland caribou and grizzly bear were “justified in the circumstances”?	28
1) The JRP unreasonably erred by conflating its respective duties and roles under the *CEAA, 2012* and the *NEB Act*	29
2) The JRP unreasonably erred by offering a recommendation that was inconsistent with the purposes and structure of the *CEAA, 2012*	30
3) The JRP unreasonably erred in failing to provide adequate reasons for its recommendation in relation to “justified in the circumstances” under the *CEAA, 2012*	32

E. Did the Governor in Council unreasonably err in concluding that the significant adverse environmental effects the Project will likely cause to certain populations of woodland caribou and grizzly bear were “justified in the circumstances”?	34
1) The statutory process followed under the *CEAA, 2012* prior to the GiC Order being made was flawed	36
2) The Governor in Council unreasonably erred in failing to provide any or adequate reasons for its decision	38
PART IV: ORDER REQUESTED	40
PART V: LIST OF AUTHORITIES	40

PART I: FACTS

1. The applicant Federation of British Columbia Naturalists ("BC Nature" or "Applicant") seeks judicial review of the following:

   a. the *Report of the Joint Review Panel for the Enbridge Northern Gateway Project* ("Report") that the Enbridge Northern Gateway Project Joint Review Panel ("JRP") issued on December 19, 2013 with respect to the Enbridge Northern Gateway Project ("Project"); and

   b. Order in Council P.C. 2014-809 (the "GiC Order") that the Governor in Council ("GiC") issued on or about June 17, 2014, which directs the National Energy Board ("NEB") to issue certificates of public necessity and convenience ("CPNC") to Northern Gateway Pipelines Inc., on behalf of the respondent Northern Gateway Pipelines Limited Partnership ("Northern Gateway") for the Project.

2. BC Nature adopts the Statement of Agreed Facts filed in this matter subject to the additional submissions below.

3. This JRP was established under an agreement between the NEB and the Minister of the Environment pursuant to the *National Energy Board Act* [1] ("*NEB Act*") and the *Canadian Environmental Assessment Act* [2] ("former *CEAA*").[3]

4. Section 126 of the *Canadian Environmental Assessment Act, 2012*[4] ("*CEAA, 2012*") continued the JRP as if the environmental assessment had been referred by the Minister of the Environment to a review panel under s. 38 of that Act.

5. Under the *NEB Act*, the JRP's Report must set out its recommendation as to whether or not the CPCN should be issued and all the terms and conditions that

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[1] *National Energy Board Act*, RSC 1985, c N-7 ("*NEB Act*").

[2] *Canadian Environmental Assessment Act*, SC 1992, c 37, as repealed by *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19, s 66 ("*Jobs Act*").

[3] See Statement of Agreed Facts at para. 24 **[Book of Major Documents ["MB"], Vol 1, Tab 1, pages 6-7]**.

[4] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 ("*CEAA, 2012*").

it considers necessary or desirable in the public interest.[5] The Report must also set out the JRP's environmental assessment prepared under the *CEAA, 2012*.[6]

6. Section 43 of the *CEAA, 2012* provides that, *inter alia*, a review panel must, in accordance with its terms of reference: 1) conduct an environmental assessment of the Project; and 2) prepare a report with respect to the environmental assessment that sets out the review panel's rationale, conclusions and recommendations.[7] Section 19 lists the factors that the JRP must consider as part of its environmental assessment.

7. This JRP is also governed by an amended agreement between the NEB and the Minister of the Environment dated August 3, 2012 ("Amended JRP Agreement").[8] The Amended JRP Agreement provides that the Report will, *inter alia*, identify "those conclusions that relate to the environmental effects to be taken into account under section 5 of the [*CEAA, 2012*]" and recommend mitigation measures.[9] Under this provision, the JRP is required to offer conclusions as to whether the designated project "is likely to cause significant adverse environmental effects" referred to in ss. 5(1) or (2) of the *CEAA, 2012*.[10]

8. Once the JRP has submitted the Report, the GiC must, taking into account the Report, decide whether the Project is likely to cause significant adverse

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[5] *NEB Act*, s 52(1).
[6] *Ibid.*, s 52(3), as amended by the *Jobs Act*, s 104(3).
[7] *CEAA, 2012*, s 43(1)(a) & (d)(i).
[8] See Statement of Agreed Facts at para. 46 **[MB, Vol 1, Tab 1, pages 11-12]**.
[9] Amended Agreement Between the National Energy Board and The Minister of Environment Concerning the Joint Review of The Northern Gateway Project ("Amended JRP Agreement"), Exhibit B174-4, s. 9.1 **[MB, Vol 1, Tab 10, pages 222-223]**.
[10] It is notable that, as discussed below, this JRP was under no statutory or other duty to offer a conclusion or recommendation on the question of whether the Project is likely to cause any significant adverse environmental effects that are "justified in the circumstances": see para. 7 and footnote 9, *supra*.

environmental effects and, if so, whether such effects are "justified in the circumstances".[11]

PART II: POINTS IN ISSUE

9. The points in issue in this application are:

   a. Does the Applicant have standing?

   b. What is the appropriate standard of review?

   c. Did the JRP err in failing to discharge its obligations under the *CEAA, 2012* to assess "the environmental effects of malfunctions or accidents that may occur in connection with the designated project"?

   d. Did the JRP err in recommending in its Report that the Project will likely cause significant adverse environmental effects for certain populations of woodland caribou and grizzly bear that are justified in the circumstances?

   e. Did the GiC err in concluding that the Project will likely cause significant adverse environmental effects for certain populations of woodland caribou and grizzly bear that are justified in the circumstances?

PART III: SUBMISSIONS

A. Standing

10. In relation to the judicial review applications A-59-14 and A-443-14, the Applicant is both "directly affected" and has public interest standing. The Applicant relies on the reply submissions on standing that it filed in connection with its application for leave for judicial review of the GiC Order.[12] The

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[11] *CEAA, 2012*, ss 47 & 52, as amended by the *Jobs Act*, s 104(4)(a); The *CEAA, 2012* does not impose a duty upon review panels to offer a recommendation on either 1) whether the Project is likely to cause significant adverse environmental effects, or 2) whether such effects are "justified on the circumstances".

[12] BC Nature's final reply for leave to apply for judicial review of the GiC Order (filed in lead docket 14-A-48) **[BC Nature's Compendium of References ["BCNCR"], Tab A, pages 0001-0024]**.

Applicant also adopts *mutatis mutandis* the submissions of the Coalition on public interest standing.[13]

11. The points in issue identified in subparagraphs 9(c)-(e), *supra*, and supporting arguments are serious, justiciable, and can be distinguished from those raised by other applicants. Many of the issues the Applicant addresses herein, moreover, were ones that the Applicant brought forward during the pre-hearing and hearing process before the JRP.[14]

B. Standard of Review

12. The appropriate standard of review for the errors alleged here is reasonableness. In applying this standard, a reviewing court "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process."[15] This Court must also consider whether the impugned errors of the JRP and the GiC fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[16]

13. When applying the reasonableness standard in a particular factual and legal context, a reviewing court must pay special attention to the identity of the decision-maker and the nature of the decision under review.[17]

14. The Federal Court has recently considered how the reasonableness standard should be applied to review panels constituted under the former *CEAA*. In *Greenpeace*, the Court states that, "because the [former *CEAA*] sets out specific duties and responsibilities for a review panel, a reviewing court must go beyond

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[13] Memorandum of Fact and Law filed in this matter by ForestEthics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation, at paras. 10-19.
[14] For references to BC Nature's involvement in various aspects of the JRP hearings, see paras. 17, 42, 74, 86, *infra* and the citations therein.
[15] *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at para 47 [*Dunsmuir*].
[16] *Ibid*.
[17] *Globalive Wireless Management Corp v Public Mobile Inc*, [2011] 3 FCR 344, 2011 FCA 194.

assessing whether a panel came to a reasonable conclusion" and consider whether the panel has interpreted and carried out its statutory duties "*reasonably* in the circumstances".[18]

15. In a judicial review of a GiC decision under s. 37 of the former *CEAA* (now s. 52 of the *CEAA, 2012*), this Court has also confirmed that GiC decisions are reviewable on a reasonableness standard *inter alia* to "ensure that the exercise of power delegated by Parliament remains within the bounds established by the statutory scheme".[19]

C. Did the JRP unreasonably err in failing to discharge its obligations under the *CEAA, 2012* to assess "the environmental effects of malfunctions or accidents that may occur in connection with the designated project"?

1) Overview

16. This application presents for judicial interpretation the requirement under the *CEAA, 2012* that a responsible authority consider the "environmental effects of malfunctions or accidents that *may* occur in connection with the designated project".[20] While this language came into force in 1995 under the former *CEAA*, this is the first time a court has been called upon to grapple squarely with the substance and meaning of this specific provision. For reasons set out in Section D below, the interpretation and application of this provision by the JRP is unreasonable.

17. The meaning and implications of "malfunctions or accidents" under s. 19(1)(a) of the *CEAA, 2012* was an issue that emerged early in the hearing, and remained a source of contention throughout. Ultimately, the JRP adopted the restrictive approach to this statutory provision urged upon it by Northern

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[18] *Greenpeace Canada v Canada (Attorney General)*, 2014 FC 463 at para 30 (emphasis in original) [*Greenpeace*].
[19] *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189 at para 44.
[20] *CEAA, 2012*, s 19(1)(a) (emphasis added).

Gateway,[21] an approach that was in direct conflict with the one advocated for by Environment Canada,[22] BC Nature,[23] and other parties.[24] A key feature of this disagreement turned on the implications of a finding that the "malfunctions or accidents" being assessed under s. 19(1)(a) are not *likely* to occur.

18. The relevant portions of the *CEAA, 2012* are set out below. The term "malfunctions or accidents" is not defined in the statute, though it appears in s. 19, which sets out the mandatory factors that an environmental assessment must include:

> 19. (1) The environmental assessment of a designated project must take into account the following factors:
>
> (a) the environmental effects of the designated project, <u>including the environmental effects of malfunctions or accidents that may occur in connection with the designated project</u> and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;
>
> (b) the significance of the effects referred to in paragraph (a);…

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[21] See Exhibit B46-2 (Northern Gateway), page 190 ("Northern Gateway believes that the outcome of any assessment of the environmental effects of a major spill … would arrive at a similar conclusion of multiple adverse and significant effects to the marine biophysical environment and human use. What is important in assessing these adverse and significant effects, is the likelihood or statistical probability that a spill will occur during the life of the Northern Gateway Project.") **[BCNCR, Tab E, page 0057]**.

[22] See Exhibit E9-6-32 (Environment Canada), paras. 13-14 ("… As acknowledged by the Proponent in its Project Application, a spill in the marine environment could be severe for marine birds under certain conditions and at certain times of year. Environment Canada encourages the Proponent to strengthen its research and analysis of the potential consequences of spills on marine birds. Environment Canada suggests that the Proponent continue to build on risk assessment studies completed to date in order to better characterize these potential consequences.") **[BCNCR, Tab Q, page 0163]**.

[23] See Exhibit D12-31-2 (BC Nature), paras. 118-182 **[BCNCR, Tab J, pages 0087-0105]**; Transcript Vol. 133, paras. 388-389 **[BCNCR, Tab T, page 0191]**; see also footnote 64, *infra*.

[24] See e.g., Exhibit D170-2-14 (Raincoast), para. 39 ("What's crucially absent in Volume 8C [of Northern Gateway's application] is an actual assessment of risk, by which we mean a quantitative assessment not only of the probability of an oil spill, but also a quantitative assessment of consequences of a spill.") **[BCNCR, Tab M, page 0118]**.

> (d) mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;…[25]

19. The definition of "environmental effects" is set out in ss. 5(1) and (2). For present purposes the definition can be understood as embracing changes to various designated "components of the environment".[26] The term "environment" is defined in s. 2.

20. Based upon the environmental assessment report of a review panel, the statutory decision-maker under s. 52 (the "s. 52 decision-maker") must decide, taking into account mitigation measures it considers appropriate, if the designated project "is likely to cause significant adverse environmental effects" that are referred to in ss. 5(1) or (2).[27] If the s. 52 decision-maker decides that the designated project is likely to cause such effects, it "must refer to the Governor in Council the matter of whether those effects are justified in the circumstances".[28]

21. Review panels have discretion to decide what project-related activities require assessment as "malfunctions or accidents". This discretion must be exercised mindful of the distinction between "malfunctions or accidents" and "routine operations". Malfunctions or accidents are considered to be low probability, "hypothetical"[29] events that, accordingly, do not occur in the course of routine operations.[30] The Applicant does not challenge the JRP's decision to identify

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[25] *CEAA, 2012*, s 19(1) (emphasis added).
[26] *Ibid.*, s 5(1)(a).
[27] *Ibid.*, s 52(1).
[28] *Ibid.*, s 52(2).
[29] *Greenpeace*, *supra* note 18 at para 320.
[30] The probability of a malfunction or accident occurring also depends on the timeframe within which it is calculated. In this case, the probability of a spill happening is greater if calculated over the life of the Project than if it is calculated annually: See Exhibit D12-31-2 (BC Nature), paras. 232-235 **[BCNCR, Tab J, page 0106]**. The *CEAA, 2012* is silent as to the period over which a malfunctions and accidents analysis should be undertaken.

small and large oil and condensate spills as being the assessable "malfunctions or accidents that may occur in connection with the designated project".[31]

22. A key purpose of the *CEAA, 2012* is to ensure that decision-makers have the benefit of an environmental assessment that provides them with an evidentiary basis to decide whether the routine operations of the designated project are "likely to cause significant adverse environmental effects". However, another important function of the *CEAA, 2012* is to provide decision-makers with an assessment of risks and environmental effects associated with low probability yet potentially catastrophic events. These events may include large marine oil spills, dam breaches, or nuclear meltdowns.[32] These and other "worst case" scenarios, which by definition are "unlikely" but yet "may occur", are typically assessed as "malfunctions or accidents" under s. 19(1)(a) of the *CEAA, 2012*.

23. The JRP committed five errors in the course of its inquiry into "malfunctions or accidents" under the *CEAA, 2012* which, both individually and collectively, are reversible on a reasonableness review:

    a. conflating its duty to consider "malfunctions or accidents that may occur" under s. 19(1) of the *CEAA, 2012* with the question of whether the project is "likely to cause significant adverse environmental effects";

    b. failing to conduct a legally adequate assessment of the effects of a large marine oil spill on the environment, including whether such effects would be adverse and significant;

    c. improperly concluding that the significant adverse effects of a large oil spill could be mitigated below the "significance" threshold in the absence of evidence capable of supporting this conclusion;

    d. improperly considering and concluding that the risk associated with a large spill was "manageable" and "acceptable" as part of its assessment of malfunctions or accidents; and

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[31] *CEAA, 2012*, s 19(1)(a).

[32] For a discussion of the need to analyze worse-case scenarios, see Zellmer, Sandra; Mintz, Joel A.; and Glicksman, Robert "Throwing Precaution to the Wind: NEPA and the Deepwater Horizon Blowout" (2011) *Journal of Energy & Environmental Law* 62 **[BCNCR, Tab X, pages 0231-0240]**.

e. failing to provide adequate reasons for its conclusions in relation to malfunctions or accidents.

2) The JRP's reasons, conclusions and recommendations on "malfunctions or accidents"

24. The JRP's assessment of the environmental effects of oil and condensate spills from pipeline facilities, terminal, or tankers is contained within Chapter 7 of the Report. The spatial scope of the JRP's assessment is the pipeline, the Kitimat terminal, and the marine shipping component of the Project out to Canada's territorial sea boundary.[33]

25. The JRP describes its approach to assessing the environmental effects of malfunctions or accidents as follows:

> The Panel focused on malfunctions and accidents that cause oil or condensate spills, and considered both the likelihood of a spill event happening, and the consequences of the spill if it happened. The Panel then considered whether any adverse consequences were likely to be significant. The Panel distinguished between small spills and large spills.[34]

26. According to the JRP, "a large spill would involve a volume of oil that spreads beyond the immediate spill area" and response measures "may not be able to be effectively cleaned up," in which case, "natural recovery would be the predominant means by which the environment is restored".[35]

27. Chapter 7 of the Report is divided into five parts. The JRP begins in Section 7.1 with a discussion of the regulatory framework for safety and environmental protection. In Section 7.2, the JRP assesses the consequence of oil and condensate spills. Sections 7.3 and 7.4 contain discussions of Northern Gateway's spill prevention and mitigation strategy and its emergency

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[33] JRP Report Volume 2: Considerations, p. 103 (column 1) **[Basic Common Book ["CB"], Vol 2, Tab 21, page 542]**.
[34] *Ibid.*, under the heading "Views of the Panel" ("VoP"), p. 146 (columns 1-2) **[CB, Vol 2, Tab 21, page 585]**.
[35] *Ibid.*, VoP, p. 146 (column 2) **[CB, Vol 2, Tab 21, page 585]**.

preparedness and response planning. Finally, the JRP summarizes its findings and offers its conclusions in Section 7.5.

28. The JRP finds in Section 7.2 that, if a large oil spill were to take place, there would be significant adverse environmental effects.[36] Yet in Section 7.2.5, the JRP concludes that the adverse effects of such a spill "would not be permanent and widespread".[37] The JRP bases this latter conclusion on its finding that, despite the significant adverse environmental effects that would occur immediately following a large spill, ecosystems will recover over time.[38]

29. The JRP then turns to the issue of mitigation. Rather than analyzing whether and how mitigation measures may reduce the significance of the anticipated adverse environmental effects, most of Section 7.3 is devoted to a discussion of the ways in which the likelihood of a spill itself can be reduced. It concludes this section by finding that "malfunctions or accidents leading to large spills from the pipeline facilities, terminal, or tankers are not likely and may not occur during the life of the project".[39] Further, it concludes that "in the unlikely event of a large oil spill, there would be significant adverse environmental effects, and that functioning ecosystems would recover through mitigation and natural processes."[40]

30. In Section 7.3.3 ("Views of the Panel", under the heading "Malfunctions and Accidents"), the JRP uses the term "likely" or "unlikely" to discuss the probability of an oil spill on three separate occasions.[41] It reiterates its finding that a large spill is "unlikely" under the heading "Risk and Consequences".[42]

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[36] *Ibid.*, VoP, p. 129 (column 1) **[CB, Vol 2, Tab 21, page 568]**.
[37] *Ibid.*, VoP, p. 129 (column 1) **[CB, Vol 2, Tab 21, page 568]**.
[38] *Ibid.*, VoP, pp. 129 (columns 2-3)-130 (columns 1-3) **[CB, Vol 2, Tab 21, pages 568-569]**.
[39] *Ibid.*, VoP, p. 146 (column 3) **[CB, Vol 2, Tab 21, page 585]**.
[40] *Ibid*.
[41] *Ibid.*, VoP, p. 146 (columns 1 & 3) **[CB, Vol 2, Tab 21, page 585]**.
[42] *Ibid.*, VoP, p. 147 (column 1) **[CB, Vol 2, Tab 21, page 586]**.

31. In addition, the JRP makes the following findings in Section 7.3.3 of its Report that:

a. the "true effects of a large oil spill are unknowable other than to conclude that they would be significant and adverse to people and the environment";[43]

b. the risk associated with the project was "manageable" in the circumstances;[44] and

c. it has "sufficient information" regarding the potential occurrence of a low probability, high consequence event and notes that it "accepts" that there is a low probability of a large spill occurring, but that it "does not accept that a large spill is inevitable or *likely* given the available safety technology, management systems and the regulatory regime".[45]

32. Finally, the JRP summarizes its findings and recommendations in Section 7.5:

> The Panel finds that a large spill, due to a malfunction or accident, from the pipeline facilities, terminal, or tankers, is not *likely*. The Panel finds that Northern Gateway has taken steps to minimize the likelihood of a large spill through its precautionary design approach and its commitments to use innovative and redundant safety systems…
>
> The Panel finds that, in the *unlikely* event of a large oil spill, there would be significant adverse environmental effects, and that functioning ecosystems would recover through mitigation and natural processes. The Panel finds that a large oil spill would not cause permanent, widespread damage to the environment…
>
> It is the Panel's view that, after mitigation, the likelihood of significant adverse environmental effects resulting from project malfunctions or accidents is very low.[46]

3) The JRP unreasonably erred by conflating its duty to consider "malfunctions or accidents that may occur" under s. 19 of the *CEAA, 2012* with the question of whether the project is "likely to cause significant adverse environmental effects"

33. Twice in its conclusions on malfunctions and accidents reprised in the preceding paragraph, the JRP makes the foundational finding that a large oil

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[43] *Ibid.*, VoP, p. 147 (column 3), citing with apparent approval views expressed by Northern Gateway **[CB, Vol 2, Tab 21, page 586]**.
[44] *Ibid.*, VoP, p. 147 (column 3)-148 (column 1) **[CB, Vol 2, Tab 21, pages 586-587]**.
[45] *Ibid.*, VoP, p. 148 (column 1) (emphasis added) **[CB, Vol 2, Tab 21, page 587]**.
[46] *Ibid.*, under the heading "Summary of the Panel's Views" ("SoPV"), p. 168 (columns 1-2) (emphasis added) **[CB, Vol 2, Tab 21, page 607]**.

spill is not likely (or is unlikely).[47] These conclusions are, in turn, informed by earlier findings set out under the heading "Malfunctions and Accidents" where the JRP uses this same terminology on several occasions.[48]

34. Review panels have a duty to consider the "environmental effects of malfunctions or accidents that *may occur* in connection with the designated project".[49] The JRP's preoccupation with whether or not such a spill is *likely to occur* strongly suggests that it misunderstood the nature of its legal duty to conduct an assessment of malfunctions or accidents under s. 19.

35. Whether or not a large spill is *likely* is not part of the inquiry that a panel is obliged to undertake in an assessment of malfunctions or accidents under s. 19 of the *CEAA, 2012*. Rather, review panels are required to consider the "environmental effects" of a specified malfunction or accident that *may* occur in connection with the project and the *significance* of those effects.[50]

36. In importing into its assessment of the environmental effects of malfunctions or accidents under s. 19(1)(a) the consideration of whether a large spill is likely, the JRP conflated two distinct tasks:

    a. its obligation to render a legally adequate assessment of the factors identified in s. 19, including the environmental effects of malfunctions or accidents that *may occur* in connection with the Project; and

    b. its separate obligation, under the Amended JRP Agreement, to provide the s. 52 decision-maker with an opinion on *whether the project is likely to cause* any significant adverse environmental effects referred to in ss. 5(1) or (2).[51]

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[47] *Ibid*.
[48] See text accompanying footnote 39, *supra* and citation therein.
[49] *CEAA, 2012*, s 19(1)(a) (emphasis added).
[50] *CEAA, 2012*, ss 19(1)(a) & (b).
[51] See para. 7, *supra* (In the absence of this obligation, there is no statutory duty on a review panel to offer an opinion on whether a designated project will likely cause significant adverse environmental effects.).

37. This conflation is significant both in the context of the current case, and for the future administration of the *CEAA, 2012*. If review panels are allowed to weigh as a key consideration under s. 19 that a malfunction or accident is *not likely* to occur, this would entitle them to abridge their assessment of the environmental effects of such a malfunction or accident. Such an interpretation would seriously undermine the efficacy of the malfunctions or accident inquiry required by s. 19.

38. As Environment Canada emphasized in critiquing Northern Gateway's approach to malfunctions or accidents, "risk is not only probability, but should also include consideration of the severity of consequence: risk = probability x consequence".[52] To assess the risk associated with a low probability, "worst-case" scenario outcome, it is essential to consider *both* the probability of an event *and* its potential consequences. For a review panel to abridge or abandon this latter inquiry on the footing that the relevant malfunction or accident is not *likely* to occur deprives the public and decision-makers of critical information that the *CEAA, 2012* process was designed to generate and make public.[53]

39. Moreover, the notion that a malfunction or accident is less deserving of attention or assessment because it is *not likely* is not only corrosive of but also inconsistent with the *CEAA, 2012*. Virtually all malfunctions and accidents are by definition low (usually very low) probability events.[54] Events that occur on a more regular basis in connection with "routine operations", which indeed may be "likely" to occur, are separately assessed under the *CEAA, 2012*.[55]

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[52] Exhibit E9-4-1 (Government of Canada), pages 74-75 **[BCNCR, Tab P, pages 0153-0154]**; See also, Transcript Vol. 133, paras. 388-389 **[BCNCR, Tab T, page 0191]**.
[53] *Greenpeace*, *supra* note 18.
[54] See footnote 30, *supra*.
[55] The JRP reviewed environmental effects associated with routine project operations in Chapter 8 while considering "malfunctions or accidents" in Chapter 7.

40. If, *arguendo*, the JRP is correct that, in a malfunction or accident analysis under s. 19, legal significance attaches to a finding that the malfunction or accident is "not likely", this would have implications for the application of s. 19(1)(a) in every future environmental assessment. This is because virtually no malfunction or accident is ever "likely" even when assessed over the life of a project. Common sense and fidelity to the purposes and structure of the *CEAA, 2012*, including its commitment to the precautionary principle,[56] require this Court to reject the JRP's approach to this issue.

41. The JRP's approach in its Report to malfunctions and accidents aligns closely with the approach urged upon it during the hearing process by Northern Gateway. Both in the information request ("IR") process and during the cross-examination phase of the hearing, Northern Gateway repeatedly asserted that when assessing the adverse and significant effects associated with a large spill, "what is important in assessing these adverse and significant effects [of a large oil spill] is the likelihood or statistical probability that a spill will occur during the life of the Northern Gateway project".[57]

42. Relying on this argument, Northern Gateway resisted repeated requests by Environment Canada and others to undertake a more robust assessment of the environmental effects of a large spill.[58] According to Northern Gateway, further investigation into the consequences of a large oil spill would not alter the conclusion that the effects of such an oil spill would be significant and

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[56] For a recent treatment and application of the precautionary principle, see *Morton v Canada (Fisheries and Oceans)*, 2015 FC 575 at para 96-99.

[57] Exhibit B46-2 (Northern Gateway), p. 190 **[BCNCR, Tab E, page 0057]**; For others examples in the IR process, see Exhibit B39-3 (Northern Gateway), pp. 50-51 ("While there is potential for spills to result in significant adverse consequences on the biophysical environment, the probability of large spills is considered to be low and therefore any significant adverse effects is unlikely.") and p. 207 ("While these adverse environmental effects could be significant…, the likelihood that they will occur is directly linked to whether a pipeline break will occur.") **[BCNCR, Tab C, pages 0028-0029 & 0035]**; for an example of testimony during cross-examination, see Transcript Vol. 133, paras. 493-500 **[BCNCR, Tab T, pages 0192-0193]**.

[58] See footnotes 23 & 24, *supra* & 67, *infra*.

adverse.[59] Despite this, because a large oil spill was not likely to occur in the life of the Project, Northern Gateway's position was that the potential of such a spill could never justify a conclusion that the Project would "likely cause significant adverse environmental effects" (under s. 52(1) of *CEAA, 2012*). Accordingly, in its view, further investigation and assessment of the consequences of a large spill were unnecessary.[60]

43. This JRP proceeded as if its only task under the *CEAA, 2012* was to inquire into and offer the s. 52 decision-maker advice on whether the project was likely to cause significant adverse environmental effects.[61] If the statutory duties of a review panel under *CEAA, 2012* were that restricted, then Northern Gateway's reluctance to provide more data on the consequences of oil spills might be justified, as would this JRP's repeated invocations that such a spill was "not likely".

44. Clearly, however, the role that the *CEAA, 2012* assigns to review panels is more robust and proactive, as are its legislative purposes. In addition to providing s. 52 decision-makers with evidence upon which to conclude whether a project will likely cause significant adverse environmental effects, environmental assessments conducted by review panels support a range of broader purposes. These include providing *CEAA, 2012* decision-makers (those with authority

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[59] Exhibit B46-2 (Northern Gateway), p. 190 ("Northern Gateway believes that the outcome of any assessment of the environmental effects of a major spill in the CCAA and OWA would arrive at a similar conclusion of multiple adverse and significant effects to the marine biophysical environment and human use. What is important in assessing these adverse and significant effects, is the likelihood or statistical probability that a spill will occur during the life of the Northern Gateway Project.") **[BCNCR, Tab E, page 0057]**.

[60] See Exhibit B226-2 (Northern Gateway), paras. 850-852 **[BCNCR, Tab F, pages 0060-0061]**.

[61] Professor Doelle states that, with regards to the former *CEAA*, "the process is about more than a consideration of biophysical environment, what is expected is that the EA process will result in integrated decision-making, considering environmental, social and economic consequences of projects": Doelle, Meinhard, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham, Ontario: LexisNexis, 2008), p. 137-138 **[BCNCR, Tab V, pages 0201-0202]**.

under s. 52 of the *CEAA, 2012* and those with other permitting powers) with information and analysis that allows them to take actions that advance sustainable development, and consider projects in a precautionary manner that ensures that projects do not cause significant adverse environmental effects.[62]

45. Properly understood, review panel reports thus serve two distinct functions for *CEAA, 2012* decision-makers:

> One is to help with the determination of whether the project is likely to cause significant adverse environmental effects. The other is to more generally help federal decision-makers decide whether to exercise their discretion to make a decision that allows the project to proceed… taking account of the full range of environmental, social and economic factors.[63]

46. This JRP focussed its attention exclusively on this first determination: whether the Project is likely to cause significant adverse environmental effects. It folded directly into this analysis its conclusion that a malfunction or accident (in the form of a large oil spill) is unlikely to occur. In approaching its duty to consider "malfunctions or accidents" in this manner, it committed an error reversible on a reasonableness standard.

4) The JRP unreasonably erred by failing to conduct a legally adequate assessment of the effects of a large marine oil spill on the environment, including whether such effects would be adverse and significant

47. The JRP's erroneous approach to malfunctions and accidents under the *CEAA, 2012* had a direct and significant impact on the hearing process and the evidentiary record. During the hearing process several parties, including Environment Canada (which brought special expertise with respect to spills modeling and assessment to the hearing), repeatedly voiced concerns about the adequacy of the evidence tendered by Northern Gateway in relation to the consequences of a large marine spill.[64]

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[62] See *CEAA, 2012*, s 4.
[63] Doelle, *supra* note 61, p. 140 **[BCNCR, Tab V, page 0203]**.
[64] See Exhibit E9-6-32 (Environment Canada), paras. 14, 81, 89-97 & 211-220 **[BCNCR, Tab Q, pages 0163, 0165-0172]**; see also Exhibit D170-2-14 (Raincoast),

48. Environment Canada summarized its concerns about the inadequacy of Northern Gateway's spills consequence evidence as follows: Northern Gateway had adopted a "probability-based" approach to analyzing malfunctions or accidents that failed to "provide spill trajectory and consequence data in an integrated fashion" and failed to ensure that "ecological consequences [were] part of the overall risk assessment".[65]

49. Environment Canada and other intervenors offered various reasons why the JRP should require Northern Gateway to undertake, prior to Project approval and certification, additional and more sophisticated trajectory modeling that was more carefully calibrated to areas of high ecological values and could account for variability (stochasticity) within the modeling.[66] Without this data, these intervenors argued, Northern Gateway had failed to give appropriate consideration to the consequence side of risk in the selection of spill scenarios. More importantly, by failing to provide this data, Northern Gateway deprived the JRP of the ability to make a determination as to the *degree* of the various potential effects associated with a large oil spill, which is a prerequisite to making a determination about the *significance* of those effects under the *CEAA, 2012*.[67]

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paras. 39-43 **[BCNCR, Tab M, pages 0118-0119]** & Exhibit D12-8-2 (BC Nature), paras. 85-88 **[BCNCR, Tab G, pages 0064-0065]**.

[65] Exhibit E9-4-1 (Government of Canada), p. 77 **[BCNCR, Tab P, page 0156]**.

[66] See Exhibit E9-6-32 (Environment Canada), para. 93 **[BCNCR, Tab Q, page 0168]**; Exhibit D72-92-2 (Gitxaala), paras. 207-210 **[BCNCR, Tab K, pages 0110-0111]**; Exhibit D80-104-2 (Haida), paras. 1246-1248 **[BCNCR, Tab L, pages 0114-0115]**.

[67] The federal government in IR#1.116 criticized the adequacy of Northern Gateway's selection of spill scenarios and requested Northern Gateway to do additional modelling, including spills trajectory assessments (Exhibit B41-4, pp. 236-238 **[BCNCR, Tab D, pages 0039-0041]**). In response, Northern Gateway stated that while "some practitioners use trajectory models to predict longer term movement of a spill or stochastic models to predict probability of spill contact, and then assess the environmental consequences of the spill or stochastic simulation, Northern Gateway does not support this approach" (*Ibid*., p. 239, emphasis added, **[BCNCR, Tab D, page 0042]**). In IR#2.76, Environment Canada continued to express its criticism of Northern Gateway's spill scenarios and reiterated its request for "spill

50. In its discussion of "malfunctions and accidents", the JRP says nothing about the *degree* of significance of the adverse environmental effects associated with a large spill.[68] The JRP appears to justify this omission on the basis of a proposition it attributes to Northern Gateway:

> Northern Gateway said that the true effects of a large oil spill are unknowable other than to conclude they would be significant and adverse to people and the environment.[69]

51. While this may have been the position of Northern Gateway during the earlier stages of the hearing, and in particular during the first round of IRs,[70] it appears that later Northern Gateway's position changed. By the end of the hearing, Northern Gateway was arguing that the effects of a large oil spill could be studied and quantified, but that the cost and time of doing so would not alter the conclusion that the effects of a large oil spill would be significant and adverse and that, therefore, such efforts were unnecessary and ill advised.[71]

52. Regardless, in the end, the JRP unreasonably erred by failing to take further steps to ensure that it possessed adequate data with respect to the *degree* of the

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trajectory and consequence data in an integrated fashion, with ecological consequences as part of the overall risk assessment (as opposed to the spill probability-based method)" (Exhibit B46-2, pp. 178-182 **[BCNCR, Tab E, pages 0045-0049]**). Northern Gateway again refused the request (*Ibid*., p. 182 **[BCNCR, Tab E, page 0049]**). Environment Canada underscored its continuing concerns in its written evidence filed after the IR process: "Despite the Proponent's acknowledgement of the potentially severe consequences of a spill, Environment Canada advises that it remains important that the Application adequately convey the <u>degree</u> of potential significance of a spill to marine birds; this includes understanding the potential effects from the perspective of severity, geographic extent, duration, reversibility and the ecological context" (Exhibit E9-6-32, para. 218, emphasis in original **[BCNCR, Tab Q, page 0171]**).

[68] JRP Report Volume 2: Considerations, pp. 146 (columns 1-3)-147 (column 1) **[CB, Vol 2, Tab 21, page 585]**.

[69] *Ibid*., VoP, p. 147 (column 3) **[CB, Vol 2, Tab 21, page 586]**.

[70] Exhibit B41-4 (Northern Gateway), p. 238 ("In the event that an incident occurs, and the less likely case where a spill resulted, it is impossible to predict where oil would end up and the associated consequences.") **[BCNCR, Tab D, page 0041]**.

[71] See Exhibit B226-2 (Northern Gateway), paras. 850-852 **[BCNCR, Tab F, pages 0060-0061]**.

adverse environmental effects resulting from a large oil spill. Before the JRP could make a significance determination in relation to a large spill, indeed before it could assess whether natural processes or mitigation could reduce the adverse environmental effects *below* the level of significance, the JRP was under a duty to undertake a robust effects assessment. It failed to do so.

53. The JRP's failure to conduct such an assessment is strikingly similar to the failure of the review panel in *Greenpeace*.[72] There, Russell J. held that the review panel took "a short-cut by skipping over the assessment of effects, and proceeding directly to consider mitigation, which relate to their significance or their likelihood".[73] He then opined:

> …it is in my view not possible to know that the potential effects in questions "*can and will* be mitigated" to below the level of significance … without having some sense of what level of effect would be significant, which is a decision for the s. 37 [now s. 52] decision-maker. Where there is no available standard or set of standards that can serve as a proxy for significance…, those decision-makers must be provided with actual expected effects and the degree to which they will be mitigated…. In any case, where an effect is potentially significant, simply saying that an unknown level of effect will be mitigated to another unknown level is not sufficient to permit the s. 37 decision-makers to discharge their responsibilities.[74]

5) The JRP unreasonably erred by improperly concluding that the significant adverse effects of a large oil spill could be mitigated below the "significance" threshold in the absence of evidence capable of supporting this conclusion

54. In relation to "malfunctions or accidents", the *CEAA, 2012* contemplates under s. 19(1) that a review panel shall consider *inter alia*:

  a. the environmental effects of malfunctions or accidents that may occur in connection with the project;

  b. the significance of the above effects; and

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[72] *Greenpeace*, *supra* note 18.
[73] *Ibid*. at para 276. Justice Russell also says in the same paragraph that "such a short cut might be permissible where there is a clear standard or threshold that can serve as a proxy for actual effects." Of course, no such standard or threshold exists applies here.
[74] *Ibid.* at para 355 (emphasis in original).

c. mitigation measures that are technically and economically feasible and that would *mitigate* any significant adverse environmental effects of the project.

55. The term "mitigation measures" is defined in the *CEAA, 2012* as:

> …measures for the elimination, reduction or control of the adverse environmental effects of a designated project, and includes restitution for any damage to the environment caused by those effects through replacement, restoration, compensation or other means.[75]

56. The relevant *CEAA, 2012* provisions confirm that the JRP must identify and determine the technical and economic feasibility of any mitigation measures upon which it relies in its analysis. Moreover, it is clear that mitigation measures are distinct from the amelioration of adverse environmental effects that may occur through natural recovery.

57. The conclusions offered by the JRP appear to show that, in making its recommendation in relation to the risk posed by a large oil spill, it relied on "mitigation measures" to bring the adverse environmental effects below the "significance" threshold. It frames its *CEAA, 2012* recommendation as follows:

> The Panel finds that, in the unlikely event of a large oil spill, there would be significant adverse environmental effects, and that functioning ecosystems would recover through *mitigation* and natural processes…. It is the Panel's view that, after mitigation, the likelihood of significant adverse environmental effects resulting from project malfunctions or accidents is very low.[76]

58. To the extent that the JRP has relied on mitigation (and natural processes) to bring the environmental effects below the "significance" threshold, it has unreasonably erred in at least three respects.[77]

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[75] *CEAA, 2012*, s 2(1).

[76] JRP Report Volume 2: Considerations, SoPV, p. 168 (column 3), emphasis added **[CB, Vol 2, Tab 21, page 607]**.

[77] It is possible to interpret the JRP's reasons as not relying on mitigation to reduce environmental effects below the significance thresholds, as its reasons are equivocal and unclear on this point. If it did not rely on mitigation to reduce adverse environmental effects below the significance threshold, this means that its

59. First, as noted earlier, prior to making a finding that mitigation measures will reduce adverse environmental effects associated with the project *below* the "significance" threshold, the JRP was required to conduct a legally adequate analysis of the nature and degree of the environmental effects in question.[78] To paraphrase Russell J. in *Greenpeace*, a review panel cannot simply assert "that an unknown level of effect will be mitigated to another unknown level."[79] Such reasoning does not "permit the s. 37 [now s. 52] decision-makers to discharge their responsibilities."[80] In short, the JRP here took an impermissible short-cut by abandoning its statutory duty to identify and assess the environmental effects of a large oil spill and instead leapfrogging to a mitigation analysis.[81]

60. A second reversible error arises from the JRP's conclusion that *unidentified* mitigation measures will reduce the significant and adverse environmental effects associated with the Project below a "significance" threshold.[82] It is unreasonable for the JRP to opine, without analysis or rationale, that unidentified mitigation measures will reduce the significant and adverse effects associated with a large oil spill (conceded by Northern Gateway) below the "significance" threshold.

61. The third reversible error committed by the JRP arises from its failure to identify and distinguish between "mitigation measures" and what it terms "natural processes." In its "malfunctions or accidents" analysis, the JRP makes no attempt to distinguish between these two concepts. Yet, the JRP appears to

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recommendation that a large spill is not significant rests entirely on a conclusion that such a spill is not likely.

[78] See text accompanying footnote 74, *supra*.

[79] *Greenpeace*, *supra* note 18 at para 355.

[80] *Ibid*.

[81] *Ibid*. at para 274.

[82] The JRP in Section 7.5 of its Report merely states that "after mitigation, the likelihood of significant adverse environmental effects resulting from project malfunctions or accidents is very low" (JRP Report Volume 2: Considerations, SoPV, p. 168 (column 3), emphasis added **[CB, Vol 2, Tab 21, page 607]**). The JRP does not indicate what mitigation measures it relied upon to make that determination.

rely on both mitigation and natural processes to conclude that, in the long-term, the adverse environmental effects associated with a large oil spill will not exceed the *CEAA, 2012*'s "significance" threshold.

62. While *CEAA, 2012* allows a review panel to rely on mitigation measures as part of its significance analysis, it is silent with respect to whether and, if so, to what extent a review panel may rely on or take into account natural processes. The JRP offers no explanation based on the evidence as to why it concluded it was appropriate to rely on natural processes in its mitigation assessment; nor as to the nature and functioning of these natural processes; nor as to the predicted ameliorative effect of these processes relation to mitigation measures. These failures were unreasonable and reversible. [83]

6) The JRP unreasonably erred by improperly considering and rendering conclusions as to whether the risk associated with a large oil spill was "manageable" or "acceptable" as part of its "malfunctions or accidents" inquiry

63. The reasons of the JRP reveal that in discharging its responsibility to inquire into "malfunctions or accidents" it went beyond its technical and scientific mandate of assessing environmental effects, and traversed squarely into a domain reserved for s. 52 decision-makers by offering analysis and conclusions on the question of whether the risk associated with a large oil spill was "manageable" and "acceptable".[84]

64. The JRP states in Section 7.3.3 that, "[i]n looking at all aspects of this Project, as proposed, the Panel is of the view that the spill risk posed by this project is

[83] If a review panel relies on the concept of "natural recovery," it must clearly distinguish between these natural effects and those attributable to human-led mitigation measures. Natural recovery would not diminish the magnitude of the initial effect, only the duration. Therefore, at the very least, the JRP must identify the duration of the adverse environmental effect before natural processes begin the ecosystem recovery process, and how these natural processes affect the its finding of significance.

[84] JRP Report Volume 2: Considerations, VoP, pp. 147 (columns 2-3)-148 (column 1) **[CB, Vol 2, Tab 21, page 586]**.

manageable."[85] Then, after a brief discussion of Northern Gateway's marine shipping quantitative risk analysis, the JRP describes its methodology for assessing the "acceptable level of risk," and then proceeds to apply this methodology to justify its earlier stated conclusion that the spill risk posed by this project is *manageable* – treating "manageability" and "acceptability" as synonyms.[86]

65. The manageability or acceptability of risk are not terms that appear anywhere in the *CEAA, 2012*. Nor do they form part of the legal mandate of this JRP under the *CEAA, 2012* or the Amended JRP Agreement.

66. It is well established that the role of a review panel "is to provide an evidentiary basis for decisions that must be taken by Cabinet and responsible authorities".[87] The *CEAA, 2012* thus reflects a clear division of labour between those charged with undertaking a technical and scientific assessment of potential environmental effects, and those charged with making broader political or policy determinations relating to the project under review. In the words of Russell J.: "Parliament has designed a decision-making process under the [former *CEAA*] that is, when it functions properly, both evidence-based and democratically accountable".[88]

67. A critical feature of maintaining this division of labour is ensuring respect for the role of s. 52 decision-makers: namely Cabinet, Ministers, and Responsible Authorities. A key function of these decision-makers, which distinguishes their role from that of expert tribunals, is their authority to make decisions in light of "society's chosen level of protection against risk."[89] This is particularly so

[85] *Ibid.*, VoP, p. 147 (column 2) (emphasis added) **[CB, Vol 2, Tab 21, page 586]**.
[86] *Ibid.*, VoP, p. 147 (column 3) (emphasis added) **[CB, Vol 2, Tab 21, page 586]**.
[87] *Greenpeace*, *supra* note 18 at para 235.
[88] *Ibid*. at para 237.
[89] *Ibid*. at para 238.

where the issues at stake require reference "not simply to scientific evidence, but to societal values and associated public policy choices".[90]

68. In assessing "malfunctions or accidents", the JRP impermissibly and inexplicably undertook an analysis of, and rendered conclusions with respect to, the manageability and acceptability of the risk associated with a large oil spill. In so doing, it exceeded its jurisdiction under the *CEAA, 2012* and intruded on the statutory mandate of the Governor in Council. This was an unreasonable and reversible error.

7) The JRP unreasonably erred by failing to provide adequate reasons for its conclusions in relation to malfunctions and accidents

69. It is settled law that the adequacy of reasons is not "a stand-alone ground for quashing a decision… the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes".[91] On such a review, an impugned decision should be upheld under the reasonableness standard if the tribunal's reasoning satisfies the test of "justification, transparency and intelligibility" and the result falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[92]

70. On an adequacy of reasons review conducted under the reasonableness standard, a court should neither insist on perfection nor require the tribunal to respond to all of the evidence or arguments put before it.[93] Nonetheless, this Court has

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[90] *Ibid.*; See also, *ibid*. at para 242 ("The key substantive point with respect to the decision-making structure of the [former] *CEAA* is, in my view, that it is the role of s. 37 [now s. 52] decision-makers to decide what is an acceptable level of environmental impact or risk").
[91] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 at para 14 [*Newfoundland Nurses*].
[92] *Dunsmuir*, *supra* note 15 at para 47.
[93] *Newfoundland Nurses*, *supra* note 91 at para 16.

recently cautioned that an adequacy review should not be regarded as an invitation to remedy reasons that contain or reveal serious legal defects.[94]

71. In reaching this conclusion, in *Lemus* this Court distinguished the Supreme Court of Canada's decisions in *Newfoundland Nurses* and *Alberta Teachers*,[95] and determined that the "controlling authority" was *Alberta Teachers*.[96] According to *Lemus*, it is important to distinguish between instances where the reasons are deficient by virtue of being ill-founded as opposed to being too sparse. In the former instance, a reviewing court should be reluctant to intervene to cure the deficiency and thus be prepared to find that the reasons supplied are deficient under the reasonableness standard.[97]

72. An inquiry into the adequacy of reasons must be mindful of the purposes behind requiring reasons in the first place. The foundational authority on this point is the decision of this Court in *YVR*.[98] This Court in *YVR* laid down four fundamental purposes behind requiring reasons for administrative decisions:

   a. *Substantive purpose*: the substance of the decision and why the decision-maker ruled in the way it did must be understood;

   b. *Procedural purpose*: parties must be able to decide whether to invoke their right of judicial review;

   c. *Accountability purpose*: there must be enough information for a reviewing court to assess the decision's validity, including, where the

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[94] *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 [*Lemus*].
[95] *Alberta (Information and Privacy Commissioner) v Alberta Teachers Association*, [2011] 3 SCR 654, 2011 SCC 61 [*Alberta Teachers*].
[96] *Lemus*, *supra* note 94 at para 37.
[97] *Alberta Teachers*, *supra* note 95 at para 54, cited in *Lemus*, *supra* note 94 at para 30.
[98] *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158 [*YVR*]. While *YVR* was rendered prior to some important Supreme Court of Canada cases dealing with the adequacy of reasons including *Newfoundland Nurses*, *supra* note 91, and *Alberta Teachers Association*, *supra* note 95, it remains a strong authority for the principles that must inform an adequacy of reasons review on a reasonableness standard: see *Allen v Canada (Attorney General)*, 2015 FC 213 at paras 18-19; *Sidhu v Canada (Citizenship and Immigration)*, 2014 FC 176 at para 26; *Tursunbayev v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 5 at para 35; *Fook Cheung v Canada (Citizenship and Immigration)*, 2012 FC 348 at para 14.

standard is reasonableness, whether the decision falls within the range of acceptable outcomes; and

d. *"Justification, transparency and intelligibility" purpose*: justification and intelligibility relate to whether the basis provided for a decision is understandable and has some discernable rationality and logic. Transparency relates to whether others can scrutinize and understand what the decision-maker has decided and why.[99]

73. When assessed against the fundamental purposes for reasons set out in *YVR*, the reasons offered by the JRP in relation to malfunctions and accidents are troublingly thin and tenuous. Even in terms of the basic *substantive* and *procedural* purposes described in *YVR*, the Report falls short. At the core of the JRP's analysis of malfunctions and accidents is the conclusion that a large oil spill is not likely.[100] The JRP erred in attaching legal significance to this finding. Whether such a spill was likely was not a question it was asked, nor should it have allowed the answer to this question to influence its malfunctions and accidents analysis. The Report likewise conveys an optimism about the salutary effects of "mitigation measures" and "natural processes", yet the JRP never identifies which mitigation measures and natural processes it relies upon to determine that the Project is unlikely to cause significant adverse environmental effects.[101]

74. Moreover, the JRP's report is devoid of any citations that identify the evidence upon which the JRP is relying as the evidentiary basis for its findings and conclusions.[102] The absence of citations in the Report deprives a reviewing

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[99] *YVR*, *supra* note 98 at para 16.
[100] See para. 32, *supra*.
[101] JRP Report Volume 2: Considerations, SoPV, p. 168 (columns 1-3) **[CB, Vol 2, Tab 21, page 607]**.
[102] On some occasions, the JRP Report mentions documents tendered by Northern Gateway by name: for example, the Marine Shipping Quantitative Risk Analysis (see JRP Report Volume 2: Considerations, p. 142 (column 1) **[CB, Vol 2, Tab 21, page 581]**). The Report also refers to some reports in a more oblique manner: for example "two reports on the susceptibility of marine birds to oil and the acute and chronic effects of the Exxon Valdez oil spill on marine birds" (*ibid.*, p. 126 (column 1)) **[CB,**

court of the ability to determine what evidence the JRP relied on, what weight it ascribed to that evidence, and ultimately how it came to its conclusions and recommendations. While the JRP was not required to discuss every piece of relevant evidence, on at least one occasion the JRP completely fails to acknowledge that evidence tendered by Northern Gateway, upon which the JRP seemingly relied, was seriously undermined in cross-examination.[103]

75. The Report also falls far short of satisfying the *accountability* purpose. The deficiencies set out above resulted in a failure by the JRP to provide enough information in the Report for a reviewing court to assess the Report's validity, including whether its conclusions fall within the range of acceptable outcomes.

76. Finally, again for the same reasons as set out above, the JRP fails to satisfy the *justification, transparency and intelligibility* purpose set out in *YVR*. Moreover, the JRP's approach raises serious concerns in terms of transparency. Given the profile of this public hearing process and the importance of the Report in informing both government decision-makers and the public, the JRP's decision not to include citations in its Report, nor identify particular witnesses or studies by name, is troubling.

Vol 2, Tab 21, pages 565]. However, in no instances does the JRP provide citations to the documentary evidence to which it is referring.

[103] An example arose in relation to a report Northern Gateway commissioned on "natural processes" and "natural recovery" that was adduced in evidence and apparently relied on by the JRP: see JRP Report Volume 2: Considerations, VoP, pp. 129 (column 2)-130 (columns 1-3) **[CB, Vol 2, Tab 21, pages 568-569]**. Under cross-examination, the lead author of the report (Dr. Walter Pearson), conceded that it was "problematic" for the report not to include any studies involving marine mammals or marine reptiles, particularly since these species have the longest life spans and take the longest time to recover: Transcript Vol. 133, paras. 1290-1292 & 1485-1492 **[BCNCR, Tab T, pages 0194-0195]**.

D. Did the JRP unreasonably err in recommending that the significant adverse environmental effects the Project will likely cause to certain populations of woodland caribou and grizzly bear were "justified in the circumstances"?

77. In Chapter 8 of the Report, the JRP provides its assessment of the environmental effects of the Project on terrestrial wildlife. The JRP recommends that for woodland caribou and grizzly bear, "project effects, in combination with effects of past, present, and reasonably foreseeable projects, activities, or actions, are likely to be significant".[104]

78. In offering the conclusion that the project is likely to cause significant adverse environmental effects to certain populations of caribou and grizzly bear, the JRP was discharging its duties under the Amended JRP Agreement.[105] Yet, the JRP decided to go further, volunteering an opinion on a question it was never asked: namely, whether these significant adverse environmental effects are "justified in the circumstances".[106] According to the JRP, the answer to this question is found in Chapter 2 of its Report:

> In Chapter 2, the Panel considers the overall benefits and burdens of the project, and recommends that significant effects in these two cases be found to be justified in the circumstances.[107]

79. At seven pages, Chapter 2 is the briefest of the eleven chapters contained in the Report. The ostensible purpose of Chapter 2 is to satisfy the JRP's duty under s. 52 of the *NEB Act* to make a recommendation by applying what is commonly referred to as the "public convenience and necessity test". This test, in turn, involves what amounts to an environmental, social, and economic cost-benefit analysis of the Project. The overarching question posed and answered by the

[104] JRP Report Volume 2: Considerations, SoPV, p. 262 (column 2) **[CB, Vol 2, Tab 21, page 701]**.
[105] See para. 7, *supra*.
[106] See footnote 11, *supra*.
[107] JRP Report Volume 2: Considerations, SoPV, p. 262 (column 3) **[CB, Vol 2, Tab 21, page 701]**.

JRP in its *NEB Act* analysis is whether "Canadians would be better off with this Project than without it".[108]

1) The JRP unreasonably erred by conflating its respective duties and roles under the *CEAA, 2012* and the *NEB Act*

80. The JRP was under a legal obligation to render a recommendation as to whether this project was in the public interest under s. 52 of the *NEB Act*. However, it was under no duty, statutory or otherwise, to offer a recommendation under the *CEAA, 2012* as to whether the Project is likely to cause significant adverse environmental effects for certain populations of caribou and grizzly that are "justified in the circumstances".[109]

81. When a tribunal is discharging responsibilities under more than one statute simultaneously, it must be mindful what "hat" it is wearing for any given task. The *CEAA, 2012* and the *NEB Act* have very distinct purposes.[110] In these circumstances, the JRP should have ensured that it kept its duties under these two different statutes separate and distinct.

82. Instead, this JRP proceeded on the basis that the test to determine whether significant adverse environmental effects are "justified in the circumstances" under the *CEAA, 2012* is the same test that determines whether a project is in the "public interest" under the *NEB Act*.[111] This was an unreasonable legal error on any standard.

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[108] *Ibid.*, pp. 1 (column 2) & 13 (column 3) **[CB, Vol 2, Tab 21, pages 440 & 452]**.
[109] See footnote 11, *supra*.
[110] The purposes of the *CEAA, 2012*, as set out in s. 4, affirm the importance of concepts such as environmental protection, the precautionary principle, and sustainable development. On the other hand, while the *NEB Act* does not have a purpose section, it is primarily focused on the regulation and promotion of the development of energy projects.
[111] *Emera Brunswick Pipeline Company Ltd.* (31 May 2007), NEB Decision GH-1-2006 at 93-94.

2) The JRP unreasonably erred by offering a recommendation that was inconsistent with the purposes and structure of the *CEAA, 2012*

83. The *CEAA* process has always involved two distinct and sequential stages: the environmental assessment stage and the decision stage.[112] For environmental assessments conducted by review panels, this distinction is even starker. In this context, there is a division of labour between the expert body responsible for collecting and analyzing the relevant information, and the democratically accountable s. 52 decision-maker (in this instance, the GiC). This division of labour helps to ensure that the *CEAA, 2012* process is both "evidence-based and democratically accountable".[113]

84. It follows, then, that review panels under the *CEAA, 2012* should be cautious about entering the domain of social values and associated public policy choices by offering conclusions or recommendations on whether significant adverse environmental effects "are justified in the circumstances". They should be especially cautious about entering this domain uninvited.[114]

85. In volunteering a recommendation as to whether the significant adverse environmental effects in this case are "justified in the circumstances", the JRP was required to answer the question in a manner that was consistent with the purposes, principles, and values embodied in the *CEAA, 2012*. These include a commitment to sustainable development, to the precautionary principle,[115] and to give special consideration for species at risk (of which the woodland caribou is an iconic example) protected under the *Species at Risk Act*.[116]

86. During the hearing process, BC Nature (along with its joint-intervenor Nature Canada) was active in both providing evidence surrounding environmental effects on woodland caribou and challenging Northern Gateway's evidence

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[112] *Greenpeace*, *supra* note 18 at paras 234-238.
[113] *Ibid*. at paras 236-237.
[114] See para. 78, *supra*.
[115] See footnote 56, *supra*.
[116] See *CEAA, 2012*, ss 4 & 5.

regarding such effects. BC Nature played a key role in ensuring that the *Recovery Strategy for Woodland Caribou (Boreal population*) published in October 2012 (after the deadline for submitting evidence to the JRP had passed) was admitted into the hearing record as late evidence.[117] Moreover, during the cross-examination phase of the public hearing, BC Nature successfully undermined the linear feature density threshold relied on by Northern Gateway in its application as the metric to measure the Project's contribution to cumulative impacts on caribou habitat.[118] Ultimately, the JRP did not rely on linear feature density threshold as a metric in the Report,[119] and found that "there would likely be significant cumulative adverse environmental effects on caribou".[120]

87. Chapter 2 of the Report barely mentions caribou, grizzly or, for that matter, the *CEAA, 2012*. There is no discussion in Chapter 2 of the nexus between the harm that these species will suffer and the broader public interest, nor does the JRP grapple with or analyze the available and relevant evidence on this issue. Nowhere in its justification analysis does the JRP attempt to analyze or quantify the significant adverse environmental effects on these species in economic, social, cultural, or environmental terms, nor does the JRP weigh these effects against competing considerations contemplated under the *CEAA, 2012*. Moreover, Chapter 2 contains no references to alternatives or potential conditions that will prevent irreversible harm from occurring for these populations of woodland caribou and grizzly bear.

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[117] Once the recovery strategy was published, BC Nature moved to have the document entered into evidence: Exhibit D12-20-2 **[BCNCR, Tab H, pages 0067-0072]**. The JRP in its Ruling No. 119 allowed Environment Canada to file the document: Exhibit A284-1 **[BCNCR, Tab B, pages 0025-0026]**. Environment Canada subsequently did so: Exhibits E6-2-1 & E6-2-2 **[BCNCR, Tabs N & O, pages 0121-0149]**.

[118] Transcript Vol. 101, paras. 26168-26256, especially paras. 26225-26226 **[BCNCR, Tab S, pages 0180-0187]** & Exhibit D12-31-2 (BC Nature), paras. 56-67 **[BCNCR, Tab J, pages 0083-0086]**.

[119] JRP Report Volume 2: Considerations, VoP, pp. 210 (columns 2-3)-212 (columns 1-2) **[CB, Vol 2, Tab 21, pages 649-650]**.

[120] *Ibid.*, VoP, p. 212 (column 2) **[CB, Vol 2, Tab 21, page 651]**.

88. There is no caselaw that establishes a legal test for assessing the validity of a justification recommendation made by a review panel under the *CEAA, 2012* or its predecessor Act. That said, at a minimum, in volunteering a recommendation on "justified in the circumstances" under the *CEAA, 2012*, this JRP ought to have offered a rationale that grapples with the nexus between its "justification" recommendation and its conclusion that caribou and grizzly populations are likely to suffer significant adverse environmental effects. By simply referring the reader to its analysis in Chapter 2 of whether the Project is in the public interest under the *NEB Act*, the JRP fails even this modest test.

3) The JRP unreasonably erred in failing to provide adequate reasons for its recommendation in relation to "justified in the circumstances" under the *CEAA, 2012*

89. As discussed above, adequacy of reasons now forms part of a broader reasonableness analysis: see paras. 69-72, *supra*. In the current case, the JRP's reasons with regard to "justified in the circumstances" are unreasonable when measured against all four of the purposes identified in *YVR*.

90. It is relevant to an assessment under the *YVR* test that the JRP volunteered a recommendation on "justified in the circumstances" under the *CEAA, 2012*. Given the polycentric and value-laden nature of this judgment, it is difficult to perceive how such a recommendation aligns with the expertise that the JRP brought to this process. Yet, without acknowledging any of the foregoing, the JRP proceeded to offer a recommendation nonetheless—a recommendation that was entirely based on its assessment, under the *NEB Act* rather than the *CEAA, 2012*, as to whether the Project was in the public interest.

91. In light of the foregoing, the "reasons" offered by the JRP are inconsistent with both the *substantive* and *procedural* purposes in *YVR*. As in *Lemus*, this is an instance in which the reasons at issue (i.e. Chapter 2) are ill-founded rather than sparse. Admittedly, the reasons offered respond to a question under the *NEB Act* in respect of which the Panel possesses expertise. But, these reasons are

entirely unresponsive to the question under the *CEAA, 2012* regarding justification of significant adverse environmental effects. Among other things, Chapter 2 completely fails to address the question of why the significant adverse environmental effects that will likely come to these populations of caribou and grizzly are "justified in the circumstances." Rather, the reasons indicate that the Project is "justified" because it will make Canadians better off, which is the answer to a different question.

92. The JRP's failure to articulate or engage with the applicable "justification" test under the *CEAA, 2012* means that its reasons fail the *accountability* purpose. This is because the JRP has deprived a reviewing court of the ability to determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[121] The *accountability* purpose should also be assessed in relation to the important function played by the JRP's reasons in informing the public on an issue of broad concern.[122]

93. The JRP's reasons also fail all three branches of the last purpose described in *YVR*: *justification, transparency and intelligibility*. Because of the JRP's failure to offer an intelligible, *CEAA*-based justification for its conclusion that the significant adverse environmental effects on caribou and grizzly are justified, one cannot reasonably conclude that the JRP's decision has a "discernable rationality and logic".[123] Moreover, given the importance of the Project and the unaccustomed role in which the JRP has cast itself by volunteering to offer this "justification" recommendation, its reasons should be

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[121] *Dunsmuir*, *supra* note 15 at para 47.
[122] See Olszynski, Marin Z. P. "Environmental Assessment as Planning and Disclosure Tool: *Greenpeace Canada v Canada (Attorney General)* 2014 FC 463" (2015) Dal L J *forthcoming*, p. 13 ("The most significant, if also long overdue, development coming out of *Greenpeace* is Justice Russell's recognition that environmental assessment is an information-gathering tool not just for governments but also – and just as importantly – for the public.") **[BCNCR, Tab W, page 0217]**.
[123] *YVR*, *supra* note 98 at para 16.

held to a high standard of transparency. In light of the foregoing, and because of the way the JRP framed its recommendation (essentially in the form of a marginal note referring the reader from Chapter 8 to Chapter 2), it cannot reasonably be said that its reasons achieve even a minimal level of transparency.

E. Did the Governor in Council unreasonably err in concluding that the significant adverse environmental effects the Project will likely cause to certain populations of woodland caribou and grizzly bear were "justified in the circumstances"?

94. In the GiC Order, the GiC concludes that:

    a. taking into account mitigation, the Project is not likely to cause significant adverse environmental effects except for certain populations of woodland caribou and grizzly bear; and

    b. the significant adverse environmental effects to woodland caribou and grizzly bear are justified in the circumstances.[124]

95. A determination by the GiC under the *CEAA, 2012* that these likely significant adverse environmental effects are "justified in the circumstances" is reviewable on a reasonableness standard.[125] It follows that an element of this reasonableness review may involve an assessment of the adequacy or existence of reasons offered to support the GiC decision.

96. The nature of a reasonableness review with respect to GiC decisions in the *CEAA* context was recently addressed by the Federal Court of Appeal. In *Council of the Innu,* this Court offered several examples of circumstances in which a GiC determination may be reversed on a reasonableness review. These circumstances included where 1) the "CEAA statutory process was not properly followed" prior to the decision; 2) where the GiC decision was "taken without

[124] Order in Council PC 2014-809, (2014) C Gaz I, 1645, p. 1646 **[CB, Vol 3, Tab 22, page 867]**.

[125] See *Canadian National Railway Co v Canada (Attorney General)*, [2014] 2 SCR 135, 2014 SCC 40.

regard for the purpose of the CEAA"; or 3) where the GiC decision had no reasonable basis in fact.[126]

97. In *Council of the Innu*, this Court upheld a Federal Court decision arising from a challenge to a GiC decision concluding that significant adverse environmental effects were "justified in the circumstances" under the former *CEAA*. It appears that the appellant argued that the GiC decision was "taken without regard for the purpose of the CEAA,"[127] and that it lacked "a reasonable basis in fact".[128]

98. The appellant in *Council of the Innu* did not seek to challenge the adequacy of the reasons offered for the GiC decision. In that proceeding, the federal government filed a detailed "Response" that accompanied the GiC's order that was the subject of the judicial review application. According to Scott J., the Response described federal involvement in the project, the EA process and the basis for the Federal Government's conclusion that the significant adverse environmental effects of the project were "justified in the circumstances".[129] Ultimately, Scott J. concluded, having reviewed the Response and the GIC decision, "that both are carefully considered decisions that balance competing objectives".[130]

99. In the case at bar, the GiC Order must be set aside for two reasons: 1) on the basis of the first arm of the test approved in *Counsel of the Innu* (that the

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[126] *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189 at para 40 [*Council of the Innu*], aff'g *Conseil des innus de Ekuanitshit c Canada (Procureur général)*, 2013 FC 418 [*Conseil des innus*].
[127] *Conseil des innus*, *supra* note 126 at para 2 (The applicant argued that "despite the requirements of paragraph 4(1)(a) of the *CEAA* [the purpose section], the Governor in Council and RAs did not possess sufficient information to assess the potential negative impact that the Project is liable to have on the current use of the land and resources for traditional purposes by the Ekuanitshit").
[128] *Ibid.* at para 78 (The applicant argued that the "Governor in Council and Responsible Ministers could not reasonably conclude that the negative environmental effects of the Project were justifiable in the circumstances without a complete and thorough understanding of the severity of those environmental effects").
[129] *Ibid*. at para 37.
[130] *Ibid*. at para 95.

process under the *CEAA, 2012* was not properly followed prior to the GiC Order being made); and 2) on the basis that the GiC has failed to provide any or adequate reasons for its decision.

1) The statutory process followed under the *CEAA, 2012* prior to the GiC Order being made was flawed

100. As argued above, there must be a recognition and respect for the division of labour embodied in the *CEAA, 2012*, which distinguishes between the task of assessing and weighing the scientific and technical evidence on the one hand, and the task of making judgments that involve "societal values and associated public policy choices" on the other.[131]

101. This division of labour has legal significance. If the review panel fails in its task of creating an evidentiary record that can be relied on by the GiC and other political decision-makers, this casts serious doubt on the legal validity of subsequent decisions. In the words of Russell J.:

> The most important role for a review panel is to provide an evidentiary basis for decisions that must be taken by Cabinet and responsible authorities. The jurisprudence establishes that gathering, disclosing, and holding hearings to assemble and assess this evidentiary foundation is an independent duty of a review panel, and failure to discharge it undermines the ability of the Cabinet and responsible authorities to discharge their own duties under the Act.[132]

102. The record below reveals some very significant flaws in the *CEAA, 2012* statutory process prior to the GiC Order.[133] These flaws indicate that the JRP misapprehended its role under the *CEAA, 2012*. These misapprehensions affected both the scope and nature of the environmental assessment, and the

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[131] *Greenpeace*, *supra* note 18 at para 238.
[132] *Ibid*. at para 235.
[133] These flaws are set out in the previously in this memorandum, including but not limited to: 1) the JRP's conflation of its duty to assess malfunctions and accidents and to assess whether the Project will likely cause significant adverse environmental effects (see paras 33-46, *supra*); and 2) the JRP's determination that the Project will likely cause significant adverse environmental effects for certain populations of caribou and grizzly that are justified in the circumstances (see paras 77-79, *supra*).

conclusions and recommendations that the JRP reached on the basis of that assessment.

103. As submitted above, these flaws in the Report and in the manner in which the JRP conducted its environmental assessment render the Report and the environmental assessment invalid and unreasonable. Without a valid Report and a valid environmental assessment, the GiC lacks jurisdiction to issue the GiC Order because the existence of a valid Report and environmental assessment is a pre-requisite to the GiC having the power to issue the GiC Order. As this Court states in *Alberta Wilderness*:

> The requirements of CEAA are legislated directions that are explicit in mandating the necessity of an environmental assessment as a pre-requisite to Ministerial action. It is clear that the Minister has no jurisdiction to issue authorizations in the absence of an environmental assessment.[134]

104. Likewise, in *MiningWatch*, the Supreme Court of Canada states that the former *CEAA* "is a detailed set of procedures that federal authorities *must* follow before projects that may adversely affect the environment are permitted to proceed".[135] This applies equally to the current *CEAA, 2012*.[136]

105. This is not a case where it can plausibly be argued that the flaws are of a minor technical or procedural nature. On the contrary, the errors committed here by

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[134] *Alberta Wilderness Assn v Canada (Minister of Fisheries & Oceans)*, [1999] 1 FC 483, [1998] FCJ No 1746 (FC) at para 18 [*Alberta Wilderness*].

[135] *MiningWatch Canada v Canada*, [2010] 1 SCR 6, 2010 SCC 2 at para 1 (emphasis added) [*MiningWatch*].

[136] In fact, the trial judge in *MiningWatch* ordered the parties to "substantially redo" the environmental assessment because he found that the responsible authorities there failed to perform their statutory duties under the former *CEAA* (*MiningWatch*, *supra* note 135 at paras 9-10 & 45). The Supreme Court of Canada agreed that the responsible authorities failed to perform their duties under the Act, but denied quashing the decision to approve the project. Declaratory relief was granted instead, partly on the basis that the appellant MiningWatch did not participate in the environment assessment and brought the judicial review "as a test case of the federal government's obligations under s. 21 [of the former *CEAA*]" (*ibid*., para 50). In the case at bar, BC Nature did participate actively in the hearings before the JRP: see paras. 17, 42, 74, and 86, *supra*, and citations therein.

the JRP had the effect of depriving the GiC of the evidentiary record necessary for it to lawfully carry out its legal function under s. 52 of the *CEAA, 2012*.

2) The Governor in Council unreasonably erred in failing to provide any or adequate reasons for its decision

106. In the case at bar, the GiC failed to provide any or adequate reasons in support of the GiC Order (including its determination that significant adverse environmental effects on caribou and grizzly bear are justified in the circumstances), contrary to s. 54(2) of the *NEB Act*.

107. When the GiC makes an order under s. 54(1) of the *NEB Act*, it "must set out the reasons for the order".[137] Despite a clear statutory duty to provide reasons for the order, the GiC fails to do so. After setting out briefly the factual background to the GiC Order, the GiC simply states that it accepts the Panel's findings and recommendations, or the GiC simply reiterates the findings made by the JRP. It does not set out within the GiC Order any reasons for accepting the JRP's findings nor for any of its own conclusions.

108. In the alternative, the GiC failed to provide adequate reasons for the GiC Order contrary to s. 54(2) of the *NEB Act*. To assess the adequacy of the GiC's reasons for the GiC Order, this Court must apply its decision in *YVR* to determine whether the reasons underlying the GiC Order satisfy the four purposes for requiring reasons: see para. 72, *supra*.

109. The GiC's reasons for the GiC Order are unreasonable when measured against all four of these purposes. Its "reasons" simply reprise some basic background facts, and then sequentially set out the various orders made. Thus, it cannot be said that either the *substantive* or *procedural* purposes in *YVR* are satisfied. Moreover, in terms of the *accountability* purpose, the GiC Order likewise completely fails to provide any reasons that would 1) allow a reviewing court to understand why the GiC decided the way that it did, or 2) lend assistance to a

[137] *NEB Act*, s 54(2).

reviewing court in its assessment of the GiC Order's validity, including a determination of whether the GiC Order falls within the range of acceptable outcomes. Finally, the GiC Order fails the "*justification, transparency and intelligibility*" purpose because it provides no "discernable rationality and logic" for its conclusions. In particular, the GiC Order provides no discernable rationality and logic between its conclusion that there will likely be significant adverse environmental effects for certain populations of woodland caribou and grizzly bear and its conclusion that these effects are justified in the circumstances.

110. A further consideration relevant to whether the "*justification, transparency and intelligibility*" arm in *YVR* is satisfied flows from the literal meaning of the word "justified". The *Oxford Canadian Dictionary* defines "justify" as follows:

> **1.** *Show* the justice or rightness of (a person, act, etc.) **2.** *Demonstrate* the correctness of (an assertion etc.) **3.** *Provide adequate grounds for* (conduct, a claim, etc) **4.** (esp. in passive) (of circumstances) be *a good reason or excuse* for …[138]

111. When the GiC is called upon to make a "justified in the circumstances" determination, the GiC should be required to provide reasons that are consistent with the principles in both *Dunsmuir* and *YVR*. In making the order at issue in this case, the GiC is exercising a power that may well determine the fate of species whose populations are already in serious peril.[139] Unless the GiC provides reasons that are transparent and intelligible for highly consequential decisions such as this, whether it has exercised its discretion in the public interest and in accordance with the rule of law will remain unknown.

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[138] *The Oxford Canadian Dictionary*, 2d ed, *sub verbo* "justify" (emphasis added) **[BCNCR, Tab U, page 0198]**.

[139] See Transcript Vol. 100, paras. 24952-24963 **[BCNCR, Tab R, pages 0175-0176]** & Vol. 101, paras. 25149-25152 **[BCNCR, Tab S, page 0179]**; and see late evidence tendered by BC Nature: Exhibits D12-23-3 **[BCNCR, Tab I, pages 0073-0080]**; see also the *Recovery Strategy for the Woodland Caribou (Rangifer tarandus caribou), Boreal population*, which indicates that 95% of the critical habitat of the Little Smoky range is already disturbed by human causes: Exhibit E6-2-2, p. 98 **[BCNCR, Tab O, page 0149]**.

PART IV: ORDER REQUESTED

112. BC Nature seeks an order or orders:

a. Declaring that the environmental assessment conducted by the JRP failed to comply with the *CEAA, 2012* and with the Amended JRP Agreement and is therefore invalid and unlawful in whole or in part;

b. Declaring that the Report failed to comply with the *NEB Act*, the *CEAA, 2012*, and the Amended JRP Agreement, and is therefore invalid and unlawful in whole or in part;

c. Directing that the environmental assessment and the Report be referred back to the JRP for further consideration and determination in accordance with such directions as the Court considers appropriate to ensure compliance with the legal requirements set out in the *NEB Act*, the *CEAA, 2012*, and the Amended JRP Agreement;

d. Setting aside any orders, including the GiC Order, made by the Governor in Council that reference or rely on the impugned environmental assessment or Report;

e. Confirming that the Parties herein will have liberty to make written submissions on costs in this matter in any event in the cause pursuant to Rule 400 of the *Federal Courts Rules*; and

f. Such further and other relief as this Honourable Court may deem just.

PART V: LIST OF AUTHORITIES

113. BC Nature relies on the following authorities:

a. Sections 52, 83, and 104 of the *Jobs Act*;

b. Sections 2, 4, 19, 43, 47, and 52 of the *CEAA, 2012*;

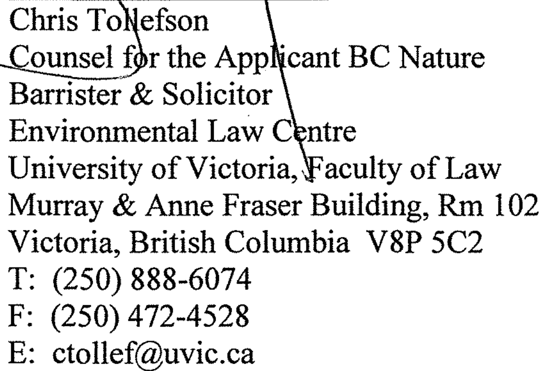
c. Sections 52, 54, and 55 of the *NEB Act*;

d. Sections 18, 18.1, 28(1)(g), and 28(2) of the *Federal Courts Act*;

e. Part V generally, Rules 70 and 400 of the *Federal Courts Rules*, as varied by the Orders of Stratas J.A. dated December 17, 2014, February 12, 2015, and April 20, 2015;

f. Any such further authorities as counsel may advise.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON MAY 22, 2015



Chris Tollefson
Counsel for the Applicant BC Nature
Barrister & Solicitor
Environmental Law Centre
University of Victoria, Faculty of Law
Murray & Anne Fraser Building, Rm 102
Victoria, British Columbia V8P 5C2
T: (250) 888-6074
F: (250) 472-4528
E: ctollef@uvic.ca