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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

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Respondents

and

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

Interveners

MEMORANDUM OF FACT AND LAW
(KITASOO XAI'XAIS AND HEILTSUK)

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1.0 PART 1 - FACTS

1.1. The Applicants

1.1.1. Kitasoo Xai'Xais First Nation

1. Kitasoo Xai'Xais is a sovereign nation. Kitasoo Xai'Xais asserts aboriginal rights, including title, to their land and waters, including the right to steward marine and land resources. Kitasoo Xai'Xais has never surrendered these rights, its territories or jurisdiction to the Crown through conquest, treaty or other means.[1]

2. Kitasoo Xai'Xais have lived in and stewarded their traditional territory since time immemorial.[2] Kitasoo Xai'Xais traditional territory consists of land and marine areas totaling more than 3,900 square kilometers. The territory spans Price Island, Higgins Passage, Aristazabal Island, Laredo Inlet, Laredo Channel, East Princess Royal Island, and Canoona River, to Kynoch Inlet, Moss Passage, Mussel Inelt, and north to Klekane and Altanhash Inlet.[3]

3. Kitasoo Xai'Xais have an integral relationship with the sea and terrestrial wildlife in its territory. The wildlife form part of Kitasoo Xai'Xais' culture, and are represented in Kitasoo Xai'Xais' crests, stories, artwork, and songs.[4] Like their ancestors, Kitasoo Xai'Xais members continue to respect, sustainably manage, and use the marine resources throughout their entire territory for food, social and ceremonial purposes.[5]

4. Kitasoo Xai'Xais make intensive use of their entire territory, and from these locations, gather traditional foods, including salmon, halibut, herring and herring roe, eulachon and others. The extraction of these resources is governed by Kitasoo Xai'Xais' hereditary system of ownership, the

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[1] Exhibit D111-2-01, at page 24; **[Applicants' Compendium of References ["ACR"], Vol. II, Tab 35, ACR page 939]**
[2] *Ibid.*
[3] Transcript Vol. 40, ¶29509 **[ACR, Vol .II, Tab 13, pages 854-855]**; Transcript Vol. 41, ¶¶29703-29705 ; 30453-30454 **[ACR, Vol. II, Tab 14, ACR pages 857-858; 863]**; Exhibit D111-2-01 at Adobe page 12 **[ACR, Vol. II, Tab 35, ACR page 935]**; and Exhibit D111-4-1, Kitasoo Xai'Xais Submissions to the JRP, at page 2 **[ACR, Vol. II, Tab 9, ACR page 834].**
[4] Transcript Vol. 41, paras. 30412 – 30413 **[ACR, Vol. II, Tab 14, ACR pages 861-862]**.
[5] Exhibit D111-2-01, at Adobe pages 13, 24 **[ACR, Vol. II, Tab 35, ACR pages 936, 939]**.

preservation cycle, and the need for use in potlatch ceremonies, ensuring the sustainable use of resources for thousands of years.[6]

5. The hereditary chiefs are the rightful owners of the rights to hunt, fish, pick berries, or gather raw materials from their geographically defined area. Access to resources in a certain hereditary chief's territory only be achieved on obtaining permission from the owner of that place.[7]

6. Kitasoo Xai'Xais has 15 reserves, including Klemtu on Swindle Island.[8] Tankers travelling through the Project's proposed Southern Approach will cross Kitasoo Xai'Xais' asserted traditional territory in the Open Water Area ("OWA"), and will also transit through Kitasoo Xai'Xais asserted traditional territory in the Confined Channel Assessment Area ("CCAA"), in Caamaño Sound.[9]

7. Kitasoo Xai'Xais' two largest reserves are approximately 50 kilometres and 65 kilometres from the proposed shipping route.[10]

1.1.2. Heiltsuk First Nation

8. Heiltsuk Nation is a sovereign nation. Heiltsuk asserts Aboriginal rights and title to their lands and waters, including the right to steward marine and land resources. Heiltsuk have never surrendered or ceded these rights to the Crown or otherwise.[11]

9. Heiltsuk have lived in their traditional territory since time immemorial. Their traditional territory encompasses 16, 658 square kilometres of land, as well as extensive nearshore and offshore waters in an area now known as the Central Coast of British Columbia.[12] It extends from the southern tip of Calvert Island north to Klekane Inlet across from Butedale, inland from the head of

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[6] Affidavit #1 of Douglas Neasloss, affirmed January 25, 2015 ("Neasloss Affidavit #1"), Exhibit "E" at page 52 [**ACR, Vol. I, Tab 2, ACR page 412**]; Exhibit D111-2-01 at page 16 [**ACR, Vol. II, Tab 35, ACR page 937**].

[7] Affidavit #1 of Douglas Neasloss, affirmed January 25, 2015 ("Neasloss Affidavit #1"), Exhibit "E" at page 52 [**ACR, Vol. I, Tab 2, ACR page 412**]; Exhibit D111-2-01 at page 16 [**ACR, Vol. II, Tab 35, ACR page 937**]

[8] Exhibit D111-2-14 [**ACR, Vol. II, Tab 36, ACR page 940**]

[9] Neasloss Affidavit #1, Exhibit "E", at pages 53 – 54 [**ACR, Vol. I, Tab 2, ACR pages 413-414**]

[10] Affidavit of Jim Clarke, affirmed February 4, 2015 ("Clarke Affidavit"), Exhibit "A" at page 72 [**ACR, Vol. II, Tab 40, ACR page 976**]

[11] Exhibit D85-3-02, at Adobe page 3 [**ACR, Vol. II, Tab 31, ACR page 925**]

[12] Exhibit D85-3-14, at Adobe page 14 [**ACR, Vol. II, Tab 32, ACR page 928**]

Dean Channel and Inlet to the offshore area west of Goose Island, Aristazabal Island, and Calvert Island, and the intervening inlets, channels, islands and waterways.[13]

10. Heiltsuk are ocean people. They depend on a wide range of marine resources, and their relationship with the environment, including the marine resources, forms an integral part of the Nation's cultural, social, economic, spiritual, and physical well-being.[14]

11. Heiltsuk make use of their entire traditional territory in an intensive way. Altogether, they use nearly 180 locations or areas as sources of food, including approximately 140 from within Heiltsuk territory and 40 from outside. From these locations, the Heiltsuk obtain the majority of their traditional foods, including salmon, seaweed, herring and herring roe, among others. It is these highly nutritious traditional food sources which compose the majority of the Heiltsuk diet. [15]

12. The hunting, harvesting and sharing of these traditional foods is an integral component of Heiltsuk culture. In addition to being crucial to the physical health of the Heiltsuk, the hunting and gathering of these traditional foods serves as an important tool for the transmission of knowledge between the Elders and young people. The hunting and harvesting of traditional foods also serves to affirm the connection of the Heiltsuk to the sea, and the strong communal ties that are present in Heiltsuk society.[16]

13. Heiltsuk Hemas are the hereditary chiefs who govern by *Gvi'ilas,* which are the traditional laws. *Gvi'ilas* include laws on the stewardship of Heiltsuk territory and their resources. For example, *Gvi'ilas* requires that when marine harvesting, Heiltsuk take what they need, and release the rest, so as to continue to sustain resources.[17]

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[13] Exhibit D85-3-16 **[ACR, Vol. II, Tab 33, ACR page 930]**; Transcript Vol. 39 at ¶29012 **[ACR, Vol. II, Tab 12, ACR pages 847-848]**.
[14] Exhibit D85-3-02, Adobe page 7 **[ACR, Vol. II, Tab 31, ACR page 926]**.
[15] Exhibit D85-5-09, at pages 3-4 **[ACR, Vol. II, Tab 34, ACR pages 932-934]**
[16] Transcript Vol. 38 at ¶¶28261 - 28265 **[ACR, Vol. II, Tab 11, ACR page 844]**
[17] Transcript Vol. 37 at ¶27106 **[ACR, Vol. II, Tab 10, ACR pages 840-841]**

14. Heiltsuk's stewardship of its marine resources is inextricably tied to the Heiltsuk community's wellbeing. An important part of recent Heiltsuk history is the seminal case, *R v. Gladstone*[18] [*Gladstone*], which was ultimately heard before the Supreme Court of Canada (the "SCC") after years of litigation aimed at protecting Heiltsuk's right to harvest and sell herring spawn.[19] The SCC recognized Heiltsuk's right to a commercial herring-spawn-on-kelp fishery.

15. The closest Heiltsuk reserve to the proposed shipping route is approximately 88.4 kilometres from the proposed shipping route.[20] The proposed southern approach for the Project Shipping route squarely intersects with Heiltsuk Traditional Marine Territory.[21]

1.2. The Project's significance: adverse effects on the Applicants' Aboriginal rights

16. The Applicant's marine areas will be subject to oil tanker travel. The Project proposes 190 to 250 tankers per year travelling through waters that include the Applicants' marine areas within the OWA.[22]

17. The Applicants' Aboriginal rights face potential adverse effects from accidental spills. Spills may have profound effects on marine resources and their habitats, which will affect Aboriginal rights and interests including harvesting and sustenance rights, and social and cultural rights.[23]

18. The probability of a spill affecting the Applicants remains open to dispute. The JRP Report noted the probability of a spill, based on a return period of 250 years, meant a spill probability of 18.2 per cent during the approximate

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[18] *R v. Gladstone,* [1996] 2 SCR 723, [1996] SCJ No 79
[19] Transcript Vol. 39 at para 29031 **[ACR, Vol. II, Tab 12, ACR page 848]**
[20] Exhibit B24-2, at Adobe page 381 **[ACR, Vol. II, Tab 27, p 905]**
[21] Exhibit D85-3-16 **[ACR, Vol. II, Tab 33, ACR page 930];** Affidavit #1 of Marilyn Slett, affirmed January 21, 2015 (Slett Affidavit #1), Exhibit "G" at page 170 **[ACR, Vol. I, Tab 1, ACR page 175]**
[22] The OWA includes the Northern Approach and the Southern Approaches to and from the Kitimat Terminal and encompasses Hecate Strait, Dixon Entrance, Browning Entrance, Otter Passage, Queen Charlotte Sound and other coastal waters around Haida Gwaii to the 12 nautical mile limit on the western side of these islands, Exhibit B3-35, at Adobe pages 1-2 **[ACR, Vol. II, Tab 23, ACR pages 885-886]**
[23] Exhibit B3-39 at Adobe pages 5, 9-11, 18-21 **[ACR, Vol. II, Tab 24, ACR pages 888-895];** Heiltsuk Tribal Council Submissions to the JRP, Exhibit D85-27-4, at paras. 84-114 **[ACR, Vol. II, Tab 6, ACR pages 779-786]**

project life of 50 years, but the JRP Report did not find that spill probabilities relating to the Applicants' territorial marine areas were different or lower.[24] The Proponent's calculations of spill odds were also subject to significant flaws.[25]

1.3. The Crown's consultation duty and the promise of deep consultation

19. The Applicants assert a right to deep consultation on potential impacts on their Aboriginal rights, given their longstanding occupation of their lands and waters and the potential severity of spill effects.

20. A Crown witness testified that First Nations that might be impacted by the Project were considered to be at the high end of the consultation spectrum; that the JRP Process would provide a deep level of responsive and meaningful consultation; and that the JRP Process was consistent with the Aboriginal Consultation and Accommodation Guidelines.[26]

21. The Crown stated in its Aboriginal Consultation Framework that the JRP Process would play a key role in the federal government's consultation with Aboriginal groups. The JRP would "consider potential adverse impacts that the Project may have on potential and established Aboriginal rights." The Framework represented that the JRP Process would be the primary mechanism for Aboriginal groups to *learn* about the Project, and to present their views about, *inter alia*, "the impacts the Crown conduct in respect of the project may have on those rights".[27] The Crown represented that the JRP Process would be an effective and reasonable means of ensuring that Aboriginal Groups have access to the JRP and can bring to the JRP's attention the best available information with respect to the Project and its

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[24] Joint Review Panel ("JRP") Report, Vol II, at page 142, column III, **[Common Book of Documents ["CB"], Vol. 2, Tab 21, CB page 581]**

[25] The Applicants adopt the submissions of Coastal First Nations to the JRP respecting the Proponent's calculation of spill odds, Exhibit D35-51-2, at ¶¶207-252 **[ACR, Vol. II, Tab 29, ACR pages 911 - 921]**

[26] Transcript Vol. 173 ¶¶26564 – 26565 **[ACR, Vol. II, Tab 19, ACR page 874]**; Transcript Vol. 174, ¶¶26851, 26859 **[ACR, Vol. II, Tab 20, ACR pages 876-877; 878]**; Exhibit E9-6-07, at pages 1-16 **[ACR, Vol. II, Tab 37, ACR pages 945-960]**

[27] Aboriginal Consultation Framework at page 1 **[Book of Major Documents "MB", Vol I, Tab 3, page 85]**

impacts;[28] and represented that after the issuance of the JRP Report, the Crown would, in Phase IV, consult with Aboriginal groups on "the report and its recommendations" *and* "whether there remain any outstanding issues."[29]

1.4. The Crown's failure to adequately consult

1.4.1. The Missing Information on impacts to the Applicants' Aboriginal rights

22. The Proponent did not provide, the JRP and the Governor in Council ("GiC") did not require that the Proponent provide, and the Crown did not otherwise provide certain foundational information that the Applicants needed to fully understand the nature and severity of potential spill effects on their Aboriginal rights.[30] The missing information included the following elements:

    a. *Oil spill modeling for spills in the OWA*: This was necessary so that the Applicants could understand how oil spills might travel to their harvesting and marine resource habitat areas.[31] The Proponent presented only six spill scenario sites in its Environmental Impact Statement, focused on the CCAA. The Applicants' territories are located in the OWA (Kitasoo Xai'Xais' northern-most territory extends into the CCAA, but the most significant portion of its active harvesting areas are in the OWA.) The Proponent's spill-modelling

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[28] *Ibid,* at page 2 **[MB, Vol I, Tab 3, page 82]**

[29] *Ibid,* at page 8 **[MB, Vol I, Tab 3, page 88]**

[30] The Applicants addressed the information that the Proponent provided, and its inadequacy for consultation purposes, in submissions made to the JRP and to the Crown during Phase IV, which the Applicants adopt: Exhibit D111-4-1, Kitasoo Xai'Xais Submissions to the JRP **[ACR, Vol. II, Tab 9]**; Exhibit D85-27-2, Heiltsuk Hemas Submissions to the JRP **[ACR, Vol. II, Tab 5]**; Exhibit D85-27-4 Heiltsuk Tribal Council Submissions to the JRP **[ACR, Vol. II, Tab 6]**; Exhibit D85-27-6, Heiltsuk Economic Development Corporation Submissions to the JRP **[ACR, Vol. II, Tab 7]**; Exhibit D85-27-8, Heiltsuk Youth Submissions to the JRP **[ACR, Vol. II, Tab 8]**; Neasloss Affidavit #1, at Exhibit "D", pages 31 – 48 **[ACR, Vol. I, Tab 2, ACR pages 391-408]**; Slett Affidavit #1, at Exhibit "F", pages 55 – 81 **[ACR, Vol. I, Tab 1, ACR pages 60-86]**

[31] Representatives for Environment Canada confirmed that spill modelling near the Scott Islands in the OWA may be useful, Transcript Vol. 168, ¶¶18279 – 18287 **[ACR, Vol . II, Tab 18, ACR pages 871-872]**; Exhibit D85-27-4, Heiltsuk Tribal Council Submissions to the JRP, at ¶¶44-53 **[ACR, Vol II, Tab 6, ACR pages 763-766]**; Slett Affidavit #1, at Exhibit "F" at ¶¶51-52 **[ACR, Vol. I, Tab 1, ACR page 76]**; Neasloss Affidavit #1, at Exhibits "E" and "F", esp. at pages 71-74, 96, 100, 114-121 **[ACR, Vol. I, Tab 2, ACR pages 431-434, 456, 460, 474-481]**; Affidavit #2 of Douglas Neasloss, affirmed January 25, 2015 (" Neasloss Affidavit #2") at ¶14 **[ACR, Vol. I, Tab 4, ACR page 717]**; Affidavit #2 of Marilyn Slett, affirmed February 5, 2015 ("Slett Affidavit #2") at ¶20 **[ACR, Vol. I, Tab 3, ACR pages 680-681]**.

was limited in its testing regime. The Science Branch of Fisheries and Oceans Canada requested a more comprehensive assessment of the spread of oil and condensate through Canadian waters from marine accidents along all of the shipping routes.[32] Environment Canada requested further spill scenarios for areas along transport routes that had relatively higher ecological values, and identified the need for stochastic approaches.[33] DFO acknowledged spill-modelling as relevant to potential damage to marine biological resources, and sought consideration of whether a spill could reach, *inter alia*, the west coast of Vancouver Island.[34]

b. *The fate of spilled diluted bitumen in the marine environment*: This was necessary so that the Applicants could understand whether and how much spilled bitumen would float, submerge or sink when spilled in the marine environment, and understand mitigation, including the likelihood of recovery, in their harvesting and marine resource habitat areas.[35] The evidence before the JRP indicated scientific uncertainty which necessitated additional research about the behaviour, fate and effects of spilled dilbit, and disclosed issues concerning the quality of test results before the JRP, which testing failed to consider various interactions involving environmental conditions and other factors.[36] The JRP was not able to address feasible mitigation measures, and determined that research on behaviour and clean-up of heavy oil would be required to inform spill response.[37]

c. *Environmental baselines for the Applicants' marine resources in the OWA, including their traditional marine areas*: This was necessary so

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[32] Exhibit B46-2, at page 174 **[ACR, Vol. II, Tab 28, ACR page 906]**
[33] Exhibit B46-2, at pages 178 – 180 **[ACR, Vol. II, Tab 28, ACR pages 907-909]**
[34] Exhibit E9-21-09, Federal Government Participants' Response to Information Request No. 1.8.5.2 from Gitxaala Nation at pages 64-65 **[ACR, Vol. II, Tab 39, ACR pages 964-965]**
[35] Heiltsuk Tribal Council Submissions to the JRP, Exhibit D85-27-4, at paras. 59-69 **[ACR, Vol. II, Tab 6, pp 767-774]**; Neasloss Affidavit #1, at Exhibits "E" and "F", esp. at pages 72-73, 99-100, 105, 122-123 **[ACR, Vol. I, Tab 2, ACR pages 432-433, 459-460, 465, 482-483]**; Neasloss Affidavit #2 at ¶14 **[ACR, Vol. I, Tab 4, ACR page 717]**; Slett Affidavit #2 at ¶20**[ACR, Vol. I, Tab 3, ACR pages 680-681]**.
[36] In addition to adopting their previous submissions on these issues, the Applicants adopt the submissions of Forest Ethics ("Issue 3" Section B re: diluted bitumen).
[37] JRP Report, Vol. II, at page 101 **[CB, Vol. II, Tab 21, CB page 540]**

that the Applicants could understand, from a scientific perspective, the presence and health of marine resources and habitats in their traditional marine areas, including the state of stressed resources like herring,[38] and also understand what mitigation measures would be required for the particular resource.[39] The Proponent conducted no field surveys south of Fisheries Management Area 6,[40] and only described current baseline characteristics of marine fisheries in the CCAA and in the project effects assessment area.[41] There were no current baseline characteristics of the biophysical elements of the Applicants' harvest areas. The literature reviewed concerning marine resources in the OWA did not address the Applicants' areas, did not provide any species inventories or baselines for the Applicants' areas, and were significantly outdated. The Proponent's TDR reported that Central Coast herring stocks are "currently considered to be at healthy levels" based on a report from 2001.[42] The outdated nature of this information is illustrated by testimony of Larry Greba, Director of Kitasoo Fisheries Development Corporation, that as a result of overfishing through the 1990s and early 2000s, the commercial herring fishery on the central coast had been closed for the last five years (2007-2012).[43]

d. *Spill impacts on the Applicants' marine resources in the OWA, including herring and SOK*: This was necessary so that the Applicants

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[38] Transcript Vol. 41 at ¶¶ 30243 – 30245 **[ACR, Vol. II, Tab 14, ACR pages 859-860]**; Transcript Vol. 37 at para 27386 **[ACR, Vol. II, Tab 10, ACR page 842]**; and Transcript Vol. 64, at ¶¶11775 – 11776 **[ACR, Vol. II, Tab 15, ACR page 865]**.

[39] Transcript Vol. 112 at ¶¶ 10452-10455 **[ACR, Vol. II, Tab 16, ACR page 867]**; Transcript Vol. 175 at ¶¶ 28648 – 28655 **[ACR, Vol. II, Tab 21, ACR pages 880-881]**; Exhibit D85-27-4, Heiltsuk Tribal Council Submissions to the JRP, at paras. 38-43 **[ACR, Vol. II, Tab 6, ACR pages 760-762]** Exhibit D85-27-2, Heiltsuk Hemas Submissions to the JRP at ¶¶9-11 **[ACR, Vol. II, Tab 5, ACR page 724]**; Slett Affidavit #1, Exhibit "F" at page 71, ¶50 **[ACR, Vol. I, Tab 1, ACR page 76]**; Neasloss Affidavit #1 Exhibit "E" esp. at pages 74-77, Exhibit "F" at 124-137 **[ACR, Vol. I, Tab 2, pp 434-437. 484-497]**; Neasloss Affidavit #2 at ¶ 14 **[ACR, Vol. I, Tab 4, ACR page 717]**; Slett Affidavit #2 at ¶20**[ACR, Vol. I, Tab 3, ACR pages 680-681]**.

[40] The Proponent did not analyze marine fish and fish habitat in the OWA: Exhibit B9-25 – Marine Fish and Fish Habitat TDR (Part 1 of 15) at Adobe page 17 **[ACR, Vol. II, Tab 25, ACR page 898]**.

[41] Exhibit B9-40, Marine Fisheries TDR (Part 1 of 2) at Adobe page 21 **[ACR, Vol. II, Tab 36, ACR page 901]**.

[42] Exhibit B9-25, at Adobe page 48 **[ACR, Vol. II, Tab 25, ACR page 899]**

[43] Transcript Vol. 41, ¶¶ 30243-30245 **[ACR, Vol. II, Tab 14, ACR pages 859-860]**

could understand specific impacts relating to instant toxic contamination, accumulated toxic contamination, mortality, injury, potential for recovery, contamination of food sources, and destruction of, or damage to, habitat.[44] For example, the Proponent's evidence disclosed that the Exxon Valdez Oil Spill (EVOS) in 1989 resulted in large effects on all life stages of Pacific herring, with a large percentage of eggs in 1989 being affected by oil at toxic levels, and a debate about possible links to the collapse of the herring population in 1993.[45] However, the JRP Process provided no further information on the potential severity and lasting nature of spill effects on the Applicants' herring, or their other marine resources.

(Collectively the "Missing Information").

23. The JRP did not require that the Proponent provide the Missing Information. Instead the JRP recommended: **(a)** some conditions for studies to occur *post-certificate*, e.g., concerning the behaviour of heavy oil spills (condition 169) and concerning further spill-trajectory studies but without any additional study sites in the OWA (condition 167); **(b)** survey baseline studies to be done in the CCAA and its approach, but not in the Applicants' marine areas in the OWA (conditions 36-38);[46] and **(c)** oil spill effects monitoring to be potentially done on unspecified marine species.[47]

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[44] Exhibit D85-27-4, Heiltsuk Tribal Council Submissions to the JRP, at paras 84-132 [**ACR, Vol. II, Tab 6, ACR page 779-790**]; Heiltsuk Hemas Submissions to the JRP, Exhibit D85-27-2, at ¶¶12-14 [**ACR, Vol. II, Tab 5, ACR pages 724-725**]; Neasloss Affidavit #1 Exhibit "E" esp. at pp. 74-77, Exhibit "F" at 124-137 [**ACR, Vol. I, Tab 2, pp 434-437. 484-497**]; Neasloss Affidavit #2 at ¶ 14 [**ACR, Vol. I, Tab 4, ACR page 717**]; Slett Affidavit #2 at ¶20[**ACR, Vol. I, Tab 3, ACR pages 680-681**]

[45] Exhibit B3-39, page 33 [**ACR, Vol. II, Tab 24, ACR page 896**]

[46] For example, in its letter of July 14, 2014, Canada relied on the following conditions as mitigating impacts to Heiltsuk's fish and fish habitat [**MB, Vol 2, Tab 36, at p 439**], when in fact, the conditions do not extend to Heiltsuk: Conditions 27-29 (Pipeline Environmental Effects Monitoring Program) applies to the pipeline route [**CB, Vol. 2, Tab 21, CB page 810**], not the Applicants' marine areas; Condition 36 (Marine Environmental Effects Monitoring Program) does not extend into the OWA [**CB, Vol. 2, Tab 21, CB page 810**]; Conditions 53-56 (TLU investigation plan for detailed routing and final design) does not apply to the Applicants' marine areas[**CB, Vol. 2, Tab 21, CB page 813**]; Conditions 63-66 (Construction Environmental Protection and Management Plan) do not cover the Applicants' marine areas[**CB, Vol. 2, Tab 21, CB page 815**]; conditions 120-121 (Freshwater Fish and Fish Habitat Compensation Plan) do not apply to marine environments [**CB, Vol. 2, Tab 21, CB page 822**]; condition 122 (Marine Habitat Compensation Plan) only applies to the Kitimat Terminal [**CB, Vol. 2, Tab 21, CB page 822**]; and conditions 127-128 (Provisional Least Risk Periods) only

24. Both Applicants lacked the personnel and scientific expertise to conduct, and lacked the financial capacity to retain others to conduct, spill modelling, bitumen impact studies on marine resources, or baseline marine resource studies.[48]

1.4.2. The inaccessible consultation process

1.4.2.1. No consultation about the consultation process

25. The Crown did not consult with the Applicants about its five-phase review process, about the impact of the Crown using a hearing process to consult, about the timing or scope of the "consultation" the Crown would undertake in Phase IV, or about the Crown's Aboriginal Consultation Framework.[49]

26. The Crown also did not provide Heiltsuk with an opportunity to make submissions on the JRP Agreement and Terms of Reference, or the Scope of Factors for the Environmental Assessment.[50]

27. Neither Kitasoo nor Heiltsuk engage in consultation matters through Coastal First Nations ("CFN").[51] The mandate of CFN does not include consultation in relation to individual member First Nations' Aboriginal rights and title.[52]

1.4.2.2. Limited access to consultation

28. The Crown tied consultation to a review process for which the Proponent filed a Project Application which, including technical reports, totaled over

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apply to the pipeline and do not appear to require baseline information **[CB, Vol. 2, Tab 21, CB page 823]**

[47] Exhibit B46-38, Northern Gateway, Attachment 1 Federal Government IR 2.66 ("Oil Spill Effects Monitoring") **[ACR, Vol. II, Tab 43, ACR pages 1029-1030]**

[48] Neasloss Affidavit #2, at paras. 5-6 **[ACR, Vol I, Tab 4, pp 714-715]**; Slett Affidavit #2 at para. 12 **[ACR, Vol I, Tab 3, p 676]**

[49] Slett Affidavit #2 at ¶¶4-5 **[ACR, Vol I, Tab 3, ACR pages 673]**

[50] *Ibid,* at paras. 5-7 **[ACR, Vol I, Tab 3, ACR pages 673-674]**

[51] Neasloss Affidavit #2 at ¶13 **[ACR, Vol I, Tab 4, ACR pages 716-717]**; Slett Affidavit #2 at para. 3 **[ACR, Vol I, Tab 3, ACR page 673]**

[52] Clarke Affidavit, Exhibit "A" at page 29, s. 3.1 **[ACR, Vol. II, Tab 40, ACR page 975]**

30,000 pages.[53] Phases II and III of the JRP hearing process included community hearings, as well as cross-examination hearings which spanned 96 hearing days over 9 months. The JRP cross-examination hearing process was a lengthy, adversarial process involving evidential rules, a need for First Nations to apply to cross-examine the government, and access to information which required that participants cross-examine panels of 15-30 experts.[54] The JRP hearing process further included participants providing written closing submissions and oral response submissions. The process effectively required significant legal assistance[55] and significant travel expenses, given the hearings were held in Prince Rupert and Terrace, BC. Even though approximately 35 Aboriginal communities registered as intervenors, only 12 First Nations cross-examined witness panels,[56] and only 2 First Nations substantially participated in the cross-examination hearings.

29. Funding to participate in the JRP hearing process was an issue for First Nations generally,[57] and the Applicants in particular.[58] Kitasoo Xai'Xais received no funding before Phase IV, and did not participate in the JRP hearing except by holding a community hearing at its own expense, providing some documentary evidence, and providing brief written closing submissions.[59] In Phase IV, Kitasoo Xai'Xais sought funding of $110,410, but received $14,000.[60] For all phases, Heiltsuk sought funding of $421,877, but received only $82,000,[61] with a substantial portion being spent on 3½ days of community hearings in Bella Bella and Denny Island.[62]

30. The formal nature of the process resulted in the Applicants and other First Nations facing restrictions as to what information they could provide, when

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[53] Slett Affidavit #2 at ¶11 **[ACR, Vol I, Tab 3, ACR pages 676]**
[54] Exhibit D85-27-4, Heiltsuk Tribal Council Submissions to the JRP, at para. 20 **[ACR, Vol. II, Tab 6, ACR pages 754-755]**
[55] *Ibid.*
[56] Exhibit D85-27-2, Heiltsuk Hemas Submissions to the JRP, at ¶72 **[ACR, Vol. II, Tab 5, ACR page 737]**; JRP Report Vol II, at pages 411-412 **[CB Vol 2, Tab 21, CB pages 850-851]**
[57] Exhibit D85-27-2, Heiltsuk Hemas Submissions to the JRP, at ¶¶62-77 **[ACR, Vol. II, Tab 5, ACR pages 734-738]**
[58] Neasloss Affidavit #2 at ¶¶7-12 **[ACR, Vol I, Tab 4, ACR pages 715-716]**; Slett Affidavit #2 at para. 9 **[ACR, Vol I, Tab 3, ACR page 675]**
[59] Neasloss Affidavit #2 at ¶¶ 9-12 **[ACR, Vol I, Tab 4, ACR page 716]**
[60] Agreed Facts ¶127 **[MB, Vol 1, Tab 1, MB page 28]**
[61] Agreed Facts, ¶¶132-133 **[MB, Vol 1, Tab 1, MB page 29]**
[62] Affidavit #2 of Slett, at ¶9 **[ACR, Vol I, Tab 3, ACR page 675]**

they could provide it, and the required format, as well as restrictions on who, how long and on what topics they could ask questions.[63] Whatever the JRP hearing was, it was not a dialogue. However, the extent to which the JRP hearing was to "assist" in the Crown fulfilling its duty to consult was ambiguous, given the Crown's intention expressed in the Aboriginal Consultation Framework to rely on the process "to the extent possible," but to later consult on "whether there remain any outstanding issues."[64]

31. Prior to Phase IV, the Crown declined to meet with the Applicants to consult, citing the JRP Process as the reason for the Crown not meeting directly with Aboriginal groups.[65]

1.5. Phase IV did not achieve consultation

1.5.1. The Crown's "three questions"

32. Following the JRP Report the Applicants had significant unanswered questions about potential adverse effects on their Aboriginal rights which they expected the Crown to address during Phase IV. As noted in the JRP Report, "[t]he Government of Canada said that, if project-related issues that required Crown consultation could not be addressed through the Panel's process, it would consult directly with the potentially affected Aboriginal groups on these issues."[66]

33. The Crown confirmed to the Applicants that it wished to meaningfully discuss "any remaining concerns or potential approaches to addressing any concern," and that "where there are concerns that Aboriginal groups feel have

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[63] Exhibit D85-27-2, Heiltsuk Hemas Submissions to the JRP, at ¶¶78-88 **[ACR, Vol. II, Tab 5, ACR pages 738-741]**; Affidavit #2 of Slett, at ¶¶13-19 **[ACR, Vol I, Tab 3, ACR pages 676-679]**; Transcript Vol. 39, at ¶¶28979 – 28980, 29101 – 29113, 29130 – 29139 **[ACR, Vol. II, Tab 12, ACR pages 846, ACR pages 849-850; 851-852]**; Transcript Vol. 179, at ¶¶3738 – 3753 **[ACR, Vol. II, Tab 22, ACR pages 883-884]**; Members of Kitasoo Xai'Xais felt "gagged" during the JRP process, Affidavit #1 of Neasloss, Exhibit "E" at page 108 **[ACR, Vol. 1, Tab 2, ACR page 468]**

[64] Aboriginal Consultation Framework at pages 1-2, and 8 **[MB, Vol I, Tab 3, MB pages 81-82, 88]**

[65] Exhibit E9-6-08 **[ACR, Vol x, Tab x, pp XX- XX]**; Affidavit #2 of Slett, at ¶¶4, 10 **[ACR, Vol I, Tab 3, ACR pages 673, 675-676]** Affidavit of Clarence Innis, sworn February 2, 2015, Exhibit 19 **[ACR, Vol. II, Tab 42, ACR pages 1018-1020]** Clarke Affidavit, Exhibit A, Crown Consultation Report, page 29 **[ACR, Vol. II, Tab 40, ACR page 975]**.

[66] JRP Report, Vol II, at page 36 **[CB Vol 2, Tab 21, p 475]**; Exhibit E9-6-08, at page 1 **[ACR, Vol. II, Tab 38, ACR page 961]**

not been addressed by the Panel, the federal government is open to hearing their views in Phase IV...."[67]

34. The Crown asked the Applicants to answer three questions within 45 days of the JRP Report, with the answers to be provided by the Crown Consultation Coordinator to responsible Ministers and to the GiC (the "Crown Consultation Report").[68]

35. In response, the Applicants told the Crown that the JRP had failed to provide the Missing Information, that the JRP failed to consider impacts on their Aboriginal rights, and that consultation had not occurred.[69]

1.5.2. The Phase IV meetings

36. During meetings with the Applicants, Canada's representatives said the "environmental assessment" record was already closed and would not be re-opened in Phase IV. Phase IV was to double-check to see if any issues were not addressed by the JRP in the JRP Report. Any issues not addressed by the JRP could be addressed in six key ways, which included a reconsideration of the conditions, adding a condition, placing a regulatory process to ensure the condition is met, resolving the issue with the Proponent, a department initiative, or Cabinet deciding to do something else. The federal representatives were working on the assumption that the GiC would make a decision by June 17, so that they advised there was a "fine" deadline to have input from communities. Canada's representatives advised that they had no power to make consultation commitments; that they were there to delivery certain information from their ministries; that they were there to receive information but had no authority to do more; that their recommendations to their ministers was privileged; that the recommendations from the ministers

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[67] Clarke Affidavit, Exhibit "F", at Adobe pages 220-222 **[ACR, Vol. II, Tab 40, ACR pages 978-980]**; Clarke Affidavit, Exhibit "G", at Adobe pages 607-609 **[ACR, Vol. II, Tab 40, ACR pages 986-988]**

[68] Clarke Affidavit, Exhibit "F", at Adobe pages 221-222 **[ACR, Vol. II, Tab 40, ACR pages 979-980]**; Clarke Affidavit, Exhibit "G", at Adobe pages 608-609 **[ACR, Vol. II, Tab 40, ACR pages 987-988]**

[69] Neasloss Affidavit #1, Exhibit "D", esp. at ¶¶33- 45(d), 55-57, 59, and 6 (8.1) **[ACR Vol I, Tab 2, pp 399 – 403, 405 – 407]**; Slett Affidavit #1, Exhibit "F", esp. at ¶¶20, 30, 43-50, and 57-60 **[ACR Vol I, Tab 1, pp 69, 72, 74 – 76, 78]**

to the Cabinet would be privileged; and that information before the GiC would be privileged.[70]

1.5.2.1. Kitasoo Xai'Xais Phase IV meeting

37. Kitasoo Xai'Xais representatives met with Canada's representatives on April 22, 2014 for about six hours.

38. Kitasoo Xai'Xais advised the Crown about their traditional territory; their governance and cultural rights, including title; their seasonally-harvested resources, including herring eggs, halibut, seaweed, salmon, sea cucumber, clams and cockles; their exercise of Aboriginal rights throughout their territories, including around Aristazabal Island, Caamaño Sound, Moore Islands, Princess Royal Island, Surf Inlet, and Kitasu Bay; and their resource sustainability practices; historical mismanagement of sea resources by Canada.[71]

39. Kitasoo Xai'Xais raised their concerns about what they needed to assess impacts to their Aboriginal rights given the JRP Process did not produce the Missing Information.[72]

40. **Spill-modelling:** Consequently they presented consultation plans and budgets for discussion and planning, concerning *spill-modelling* in specified marine areas on a seasonal basis, and in high risk areas in the event of a spill (including Caamaño Sound, southern Hecate Strait, and the shoal areas of Harvey and Moore Islands), to ascertain potential spill impacts on key harvesting locations and species of critical importance. They explained their need for current data, over all seasons, and their need to be involved in developing a robust model for spill-modelling and assessment, including one

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[70] Neasloss Affidavit #1, Exhibit "E", at pages 71-72, 79, 81, 82, 84-86, 88, 93 **[ACR Vol I, Tab 2, ACR pages 431-432, 439, 441-442 444-446, 448, 453];** Slett Affidavit #1, Exhibit "G", at pages 132-133, 165, 167-168 **[ACR Vol I, Tab 1, pp 137-138, 160, 167-168]**

[71] Affidavit #1 of Neasloss, Exhibit "E", at pages 54-56, 58, 62- 63, 65 **[ACR Vol. I, Tab 1, ACR pages 414-416, 418, 422-423, 425]**

[72] Affidavit #1 of Neasloss, Exhibit "E", at pages 71 – 78, 95-97, 101 **[ACR Vol. I, Tab 1, ACR pages 455-456, 431 – 438, 461];** Exhibit "J", at pages 301 – 309 **[ACR Vol I, Tab 1, ACR pages 661 – 669]**; Exhibit "K", at pages 310-311.

that would account for climate change and surface and sub-surface monitoring.[73] Canada's representatives did not disagree with the need.

41. **Bitumen fate study:** Kitasoo Xai'Xais presented on the need for additional work to assess the fate of diluted bitumen in their marine areas, to adequately assess how the product will move, how persistent it will be, and the opportunities for recovery.[74] Canada's representatives did not disagree.

42. **Baseline and marine impact study:** Kitasoo Xai'Xais presented a preliminary work plan and costs for baseline inventory studies on specific named species, in multiple sites and in varied seasons, to assess the impact of oil on each species at all life stages, including bioaccumulation impacts, to understand the potential impact of oil on marine species and those who rely on them.[75] Canada's representatives did not disagree.

43. Kitasoo Xai'Xais advised that since they lacked sufficient information of impacts to make decisions, their discussing mitigation was premature, and that the Crown should assess impacts and be prepared to discuss accommodation prior to the GiC's decision. Kitasoo Xai'Xais asked for an agreement to proceed with consultation, but the personnel attending did not have authority to make decisions, and advised that the Crown would provide an answer by letter, and provide "what we can, when we can".[76] However, Kitasoo Xai'Xais did not receive a response to its request for consultation.[77]

44. On June 10, 2014, the Crown provided a consultation record which was incomplete and inaccurate, to which Kitasoo Xai'Xais provided a letter in response concerning inaccuracies dated June 17, 2014. However, the Minister

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[73] Neasloss Affidavit #1, Exhibit "E", pages 72 – 73**[ACR Vol I, Tab 1, ACR pages 432 – 433]**, Exhibit "F", at pages 114 - 121 **[ACR Vol I, Tab 1, ACR pages 475-481]**

[74] Neasloss Affidavit #1, Exhibit "E", pages 73-74 **[ACR Vol I, Tab 1, ACR pages 433 – 434]**, Exhibit "F", at pages 122-123 **[ACR Vol I, Tab 1, ACR pages 482-483]**

[75] Neasloss Affidavit #1, Exhibit "E", pages 73- 77 **[ACR Vol. I, Tab 2, ACR pages 434 – 437]**; Exhibit "F", pages 124 – 137 **[ACR Vol I, Tab 2, ACR pages 484 – 497]**

[76] Neasloss Affidavit #1, Exhibit "E", pages 84-85, 87-88, 108 **[ACR, Vol. I, Tab 2, ACR pages 444- 445, 447-448, 468],**

[77] Neasloss Affidavit #1 at ¶9 **[ACR, Vol I, Tab 2, ACR pages 358-359]**

received the Crown Consultation Report in "early June," and clearly would not have seen Kitasoo Xai'Xais' response letter of June 17.[78]

1.5.2.2. Heiltsuk Phase IV meeting

45. Heiltsuk representatives met with Canada's representatives on April 24, 2014 for about five hours, and on April 25, 2014 for about three hours.

46. Heiltsuk advised the Crown about: their Aboriginal territories, governance and cultural rights; their seasonally-harvested marine resources, including herring, salmon, and seaweed; their harvesting and resource sustainability practices; and their established Aboriginal right to a harvest and trade in herring spawn-on-kelp commercially.[79]

47. Heiltsuk advised that they were not consulted about the JRP Process as forming part of consultation; that the JRP Process was not consultation as it was not a dialogue; and of apprehended bias on the part of the JRP, as a result of which the JRP record did not reflect all the information Heiltsuk wished to provide. [80]

48. Heiltsuk raised the need for consultation so that Heiltsuk could assess impacts to their Aboriginal rights. Heiltsuk also raised issues relating to the inadequacy of compensation for social, cultural, spiritual and other non-economic losses, and the need for a complete compensation plan. Heiltsuk sought a meeting with Crown decision-makers as soon as July, to discuss how to consult on the Project, and asserted that the Crown did not have the information necessary for a decision to be made by the GiC, and that consultation was necessary to obtain that information so that it would be

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[78] Cross-examination of Jim Clarke (Canada) by Haisla Nation, page 6 line 23 to page 7 line 24 **[ACR, Vol. II, Tab 44, ACR pages 1034-1035]**

[79] Slett Affidavit #1, Exhibit "G", at pages 87 – 102, 104-117 **[ACR, Vol. I, Tab 1, ACR pages 92 – 108, 109 -122]**

[80] Slett Affidavit #1, Exhibit "G", at pages 107, 117 -131 **[ACR, Vol. I, Tab 1, ACR pages 112, 122 – 136]**

available to both the Crown and Heiltsuk.[81] Heiltsuk did not, however, receive a response to its request and invitation.[82]

49. **Bitumen fate study:** Heiltsuk raised the need for the Crown to complete research on the behaviour and fate of diluted bitumen in the marine environment (Canada's representatives did not disagree) before deciding to proceed with the Project.[83]

50. **Baselines and impact studies:** Heiltsuk raised the absence of any baseline inventories of species in Heiltsuk territory that might be impacted, and the absence of any information about spill impacts in Heiltsuk territory (Canada's representatives did not disagree about the absence).[84]

51. On June 10, 2014, the Crown provided a consultation record which was incomplete and inaccurate, to which Heiltsuk provided a response dated June 17, 2014.[85] However, as with Kitasoo Xai'Xais' response, the Minister would not have seen Heiltsuk's response.

1.5.2.3. Phase IV follow-up letters

52. On June 17, 2014, the GiC made its decision (the "Decision").[86] On July 14, 2014, each of the Applicants received a letter from the Crown Consultation Coordinator and the Major Projects Management Office advising that the JRP conditions on which the GiC had issued a certificate to proceed would address their concerns as the Project proceeded.[87]

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[81] Slett Affidavit #1, Exhibit "G" at pages 114, 137 -138, 156-159, 169 **[ACR, Vol. I, Tab 1, ACR pages 119, 142 – 143, 161-164, 174]**; Exhibit "K", at pages 334 – 336 **[ACR, Vol. I, Tab 1, ACR pages 339 – 341]**

[82] Slett Affidavit #1, at ¶10 **[ACR, Vol. I, Tab 1, ACR pages 4]**

[83] Slett Affidavit #1, at Exhibit "G", page 160 **[ACR, Vol I, Tab 1, ACR page 165]**; Exhibit "K", at page 336 **[ACR, Vol I, Tab 1, ACR page 341]**

[84] Slett Affidavit #1, Exhibit "K", at page 336 **[ACR, Vol I, Tab 1, ACR page 341]**

[85] Slett Affidavit #1, Exhibit "L", at pages 337 – 346 **[ACR, Vol I, Tab 1, ACR pages 342- 351]**; Exhibit "M", at pages 347 – 348 **[ACR, Vol. I, Tab 1, ACR pages 352 – 353]**

[86] Governor in Council Order P.C. 2014-809 (Certified Copy) **[CB, Vol. 3, Tab 22, CB page 858-863]**

[87] Jim Clarke and Brett Maracle letter to Kitasoo Xai'Xais, July 7, 2014 **[MB, Vol. II, Tab 35, MB pages 415-428]**; Jim Clarke and Brett Maracle letter to Heiltsuk, July 7, 2014 **[MB, Vol. II, Tab 35, MB page 429-445]**

1.5.2.4. Crown table of Applicant concerns

53. For each of the Applicants, Canada created a table listing Aboriginal concerns. The Missing Information issues raised by the Applicants were listed in this table, but their resolution by Canada or the JRP were geographically inapplicable to the Applicants.[88]

2.0 PART 2 – POINTS IN ISSUE

54. The Applicants address the following issues: **(a)** did the Crown fail to fulfil its duty to consult the Applicants (i) due to the Crown failing to inform itself of the nature and severity of potential adverse spill impacts on the Applicants' Aboriginal rights, and/or (ii) due to the Crown relying on a process which limited access to consultation, and which ultimately did not provide consultation in substance? **(b)** Are the Project's risks of significant adverse spill effects to Heiltsuk's established and constitutionally-protected Aboriginal rights justifiable? **(c)** Did the Crown fail to fulfil its duty to consult the Applicants due to the GiC failing to provide written reasons on how Aboriginal concerns impacted decision-making? Alternatively, did the GiC fail to provide reasons required by s. 54(2) of the NEB Act[89]? **(d)** Are the Proponent's affidavits, or parts of them, inadmissible?

3.0 PART 3 – SUBMISSIONS

3.1. Constitutional and statutory duties are distinct

55. The process by which the GiC decided to direct that the NEB issue a certificate raises two distinct duties: the duties of Canada to give effect to Aboriginal rights by consulting, accommodating, and making only decisions that justifiably infringe Aboriginal rights; and the distinct duties of the JRP and the GiC to carry out their statutory duties under the NEB Act and CEAA.[90] The attempt at meeting these duties in a single process does not conflate these distinct duties, which have different content and different purposes.

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[88] Clarke Affidavit, Exhibit "F", Adobe pages 497-500 **[ACR, Vol. II, Tab 40, ACR pages 981-984]**, Exhibit "G", Adobe pages 941-943 **[ACR, Vol. II, Tab 40, ACR pages 989-1001]**,
[89] *National Energy Board Act,* R.S.C. 1985, c. N-7 (the "NEB Act")
[90] *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 19 ("CEAA")

56. This Court recognized in *Ekuanitshit*[91] that a forum created for another purpose *may* satisfy a duty to consult, but only if it provides an appropriate level of consultation in substance.[92] This means an appropriate level of consultation does not presumptively arise out of any process, either generally *or respecting any particular First Nation.* The adequacy of a process as a method of consultation requires that the Court assess the level of consultation it provides, including any *procedural impediments*. This Court has recognized the importance of process by recognizing that the Crown may need to consult about the process it selects for a regulatory review.[93]

57. Thus, while *Ekuanitshit* illustrates a five-phase process fulfilling the Crown's duty to consult *in that case* – where project impacts "would not be significant"[94] and the seriousness of adverse impacts "remain limited"[95] – the case does not decide if the statute-based review process here, including Phase IV meetings, satisfied the Crown's concurrent duty to consult about the Project's adverse effects on the Applicants' rights. The GiC's Decision in the present case about, *inter alia,* terms and conditions served dual purposes: fulfilling statutory objects, but also addressing and accommodating Aboriginal rights pursuant to the Crown's constitutional duties.

3.2. A duty of the Crown to engage in "deep" consultation

58. The Applicants assert a right to deep consultation by the Crown. The Crown has effectively conceded this right for purposes of this consultation, having stated that First Nations that might be impacted would be considered at the high end of the consultation spectrum.

59. The Applicants adopt the submissions of Nadleh and Nak'azdli on the law of consultation and accommodation, and the standard of review,[96] and the submissions of Haisla on the meaning of "deep" consultation.[97]

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[91] *Council of the Innu of Ekuanitshit v. Canada (Attorney-General)*, 2014 FCA 189 ("Ekuanitshit")
[92] *Ekuanitshit* at ¶99
[93] *Dene Tha' First Nation* v. *Canada (Minister of Environment)*, 2006 FC 1354, appeal dismissed 2008 FCA 20 ("Dene Tha'") at ¶¶114-115
[94] *Ekuanitshit* at ¶101
[95] *Ekuanitshit* at ¶106
[96] Memorandum of Nadleh and Nak'azdli, Part III.A "The law of consultation and accommodation"
[97] Memorandum of Haisla, Part D.2 at ¶78

3.3. The Crown's failure to meaningfully consult

3.3.1. The Crown's failure to inform itself on adverse impacts

60. **The Crown's duty to inform itself:** The Crown's duties, when engaging in high and deep consultation, must at least encompass the duties it owes when claims to Aboriginal rights are weak, or impacts are minor. As noted in *Haida*,[98] such "minimum" duties include duties to "give notice, disclose information, and discuss any issues raised in response to the notice".[99] The duty to disclose information is not, however, isolated to the information a Proponent may provide. Rather, the honour of the Crown requires that *the Crown inform itself of the nature and severity of the impacts a project may have on Aboriginal rights, and to communicate those findings.*

61. The Crown's duty to inform itself (e.g., by requiring that a proponent provide information necessary to the Crown and affected First Nations understanding adverse effects on their Aboriginal rights) has been affirmed by the SCC in both *Mikisew Cree*[100] and *Little Salmon*[101]. Although Aboriginal rights were codified in treaties in those cases, the SCC made clear in *Little Salmon* that a duty to consult, including a duty of the Crown to inform itself and convey that information, arose in relation to adverse effects not as a matter of treaty, but as a matter of law.[102]

62. *Mikisew:* As the SCC noted in *Mikisew*, the Crown had in that case, despite a treaty right to "take up" surrendered lands for transportation purposes (and where the Court recognized a duty to consult "at the lower end of the spectrum"), "an obligation to inform itself *of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew.*" (emphasis added) On that basis, i.e., the Crown and the Mikisew being equally and fully informed – the

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[98] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.) ("Haida")
[99] Haida at ¶43
[100] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.) ("Mikisew") at ¶55
[101] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 (S.C.C.) ("Little Salmon") at ¶73
[102] Little Salmon at ¶¶61 and 66

Crown then had to "attempt to deal with the Mikisew 'in good faith, and with the intention of substantially addressing' Mikisew concerns".[103]

63. *Little Salmon:* Similarly, the SCC noted in *Little Salmon*, where a grant of surrendered land for agricultural use might affect treaty right access for hunting and fishing for subsistence (and where the Court recognized a duty to consult on the "lower end of the spectrum"), a Director of the Yukon government was "required, as a matter of both compliance with the legal duty to consult based on the honour of the Crown and procedural fairness *to be informed about the nature and severity of such impacts* before he made a decision to determine (amongst other things) whether accommodation was necessary or appropriate".[104]

64. *Jack* and *Halfway:* The duty of the Crown to inform itself, and convey that information, has been consistently recognized by lower courts, as in *R. v. Jack*[105] and in *Halfway River*.[106]

65. The Crown's duty to inform itself and convey information becomes of particular importance where a proponent's application or disclosure, may suggest significant adverse effects, but the particulars of those effects may only be revealed by further scientific study, for example due to the complexities of an ecosystem. First Nations – especially where they lack the financial or technical means to obtain information about the nature and severity of adverse effects on their rights for themselves – are entitled to not merely all information a proponent may initially provide, but all information reasonably necessary for the Crown, and in turn the First Nation, to

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[103] Mikisew at ¶55

[104] Little Salmon at ¶73

[105] *R. v. Jack* (1995), 16 B.C.L.R. (3d) 201 (C.A.) ("Jack") at ¶77: ""We consider *that there was a duty on the DFO to ensure that the Indian Band was provided with full information on the conservation measures and their effect* on the Indians and other user groups. The DFO had *a duty to fully inform itself of the fishing practices of the aboriginal group* and their views of the conservation measures."

[106] *Halfway River First Nation v. British Columbia* (Ministry of Forests) (1997), 39 B.C.L.R. (3d) 227 (S.C.) ("Halfway") at ¶¶130 and 133, affirmed 1999 BCCA 470: ""In the present case, this translates into *a duty on the MOF to inform itself of Halfway's traditional uses of the Tusdzuh area*, without imposing a requirement that there be agreement between Halfway and the Crown on all actions to be taken by the Crown. [...] In order for the Crown to consult reasonably, *it must fully inform itself* of the practices and of the views of the Nation affected. In so doing, *it must ensure that the group affected is provided with full information with respect to* the proposed legislation or decision and its *potential impact* on Aboriginal rights."

understand, with some reasonable level of certainty, the scope and severity of a project's potential adverse impacts on their Aboriginal rights.

66. The proper scope of the Crown's consultation-related duty to inform itself must arise from the essential purpose of such a duty. Generally speaking, such a duty ensures that the Crown and First Nations are fully informed about the scope and severity of possible impacts on Aboriginal rights. Thus, where a First Nation may object or consent to an infringement, the Crown's duty to inform itself and advise the First Nation operates to ensure that such an objection or consent is an *informed* response. The honour of the Crown requires that it act prudently to acquire such information, and convey it to First Nations. The Crown acting to such a standard is a necessary prerequisite to a "meaningful process of consultation" aimed at "substantially addressing" Aboriginal concerns.[107]

67. Obtaining and conveying full information to the First Nation is the foundation on which the Crown is able to carry out its other obligations that make up "deep" consultation, i.e., the duty to provide to First Nations "the opportunity to make submissions or a response," to provide "formal participation in the decision-making process," or to provide "written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision".[108] Without the Crown meeting its duty to inform itself and convey information about the scope and severity of possible impacts on Aboriginal rights, the First Nation's opportunity to make submissions, or formulate "Aboriginal concerns" with specificity, is curtailed. Similarly, a First Nation's ability to formally participate in a hearing process, such as by asking questions or making submissions about impacts on its rights, is curtailed by an absence of foundational information.

68. **The Missing Information:** Despite risks of spill impacts to the Applicants,[109] the Proponent did not provide, and neither the JRP nor the GiC

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[107] Haida at ¶42

[108] Haida at ¶44

[109] While the Proponent asserted at the JRP hearing that the Project was not likely to affect Heiltsuk's herring resources, the lack of the Missing Information fundamentally impairs any assessment of the risks of OWA spills to the Applicants. Further, evidence supported some spill risks, e.g., Steven Groves, DFO Section Head, Salmon and Hearing, and PICFI North Coast Area Coordinator, agreed a

required, the Missing Information. At the time the GiC decided on the certificate and on conditions, the Applicants still did not know when spills in the OWA might spread to their traditional marine areas; or know how diluted bitumen might behave under various conditions within those areas or affect mitigation; or receive baseline data about marine resources and habitats in those areas that could be affected by a spill; or receive any analysis about the scope and severity of potential spill effects.

69. The promises of the Aboriginal Consultation Framework were not borne out by the JRP Process. The JRP hearing was not one where the Applicants could obtain the Missing Information and "learn" about the Project's impacts on their rights. As a result the Applicants could not provide the "best available information" about the Project's impacts to the JRP. The JRP did not and could not have "assessed the Project's impacts on the Applicants' marine resources, or on their Aboriginal rights".

70. As a matter of consultation, the Crown breached its foundational duty to inform itself of adverse effects, and convey that information, by failing to provide the Missing Information to the Applicants, or put them in a position to obtain that information. The Crown's duty to inform itself was crucial for this Project, as the Applicants lacked the technical and financial resources to obtain for themselves the highly technical and detailed information they would need to assess adverse spill effects on their many marine resources. The Crown knew that without the Missing Information, the Applicants could not provide informed responses about impacts to their Aboriginal rights; indeed, the Applicants advised the JRP and the Crown they needed the Missing Information during both the JRP hearing and Phase IV.

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spill could have a detrimental effect on herring, even where shipping routes do not overlap with fishing locations: Transcript Vol. 168 at ¶¶18409-18410. **[Electronic Record ["ER"], Tab 36, Schedule "D", Volume 168]**

71. During Phase IV, the Applicants invited the Crown to consult with them about obtaining the Missing Information, so that the Applicants could conduct an assessment of the Project's impacts on their Aboriginal rights. Kitasoo Xai'Xais went so far as to have a technical team at the meeting to present preliminary plans on obtaining the Missing Information, with the support and funding that would be needed. Heiltsuk specified that they would be available in July for the Crown (meaning persons with authority to consult) to return to Bella Bella to start discussions on a consultation plan, which would focus on obtaining the Missing Information, so that Heiltsuk could assess impacts on their Aboriginal rights. The Applicants met with Canada's representatives in good faith, believing that consultation would take place, but were met with the barrier that Canada's representatives had no power to consult, and therefore could not address "any outstanding issues", such as developing a consultation plan to obtain the Missing Information. They were there to deliver set *pro forma* messages from their ministries, largely on how the Applicants concerns could be met through the conditions, and could do no more than convey information from the Applicants back to their ministries. They told the Applicants that recommendations they would provide to their ministries would be privileged. They told the applicants that recommendations their ministries would provide to the Cabinet would be privileged. They told the applicants that the information the Cabinet and the GiC would have access to would be privileged. They could not advise if the Crown would respond to the Applicants' requests for consultation. Ultimately, the Crown provided no response to the Applicants' requests for consultation, or their proposed consultation plans, and claimed Cabinet privilege over ministry recommendations to the GiC.

72. The Crown not only ignored the Applicants' requests for consultation to obtain the Missing Information, but provided its consultation record on what turned out to be only days before the GiC made the Decision, without providing any real opportunity for the Applicants to correct the consultation record. The Applicants did provide a response to the consultation record dated June 17, 2014, advising of some of the errors about information conveyed in the meetings, but clearly a response had not been contemplated

by the Crown, as the consultation record had already been delivered to the Cabinet and the GiC made the Decision on June 17, 2014.

73. On July 14, 2014, after the Decision, the Crown provided additional letters advising the Applicants as to how their concerns would be addressed through the JRP conditions. The letters did not address the Applicants' specific concerns, but were *pro forma* statements about how the conditions would address the concerns of Aboriginal groups. For example, the Crown suggested that Heiltsuk's concern regarding the Missing Information about its marine baseline could be satisfied by conditions (27-29) that required a marine survey to be collected in the CCAA. (Heiltsuk is located in the OWA.) The letters did not provide reasons for why procurement of the Missing Information and consultation would not be conducted prior to the GiC making the Decision.

3.3.2. The Crown's failed consultation process

74. The JRP Process as it unfolded did not support a concurrent consultation process. The focus on the statutory process created an inaccessible hearing process, which is inconsistent with the Crown's obligation to consult. That focus also led to confusion between statutory and constitutional duties, where the statutory process was uncritically accepted as satisfying the Crown's consultation obligations. One glaring example of this confusion is the marginalization of the Missing Information necessary to the Applicants assessing potential impacts on their Aboriginal rights. Another glaring example is the unfolding of Phase IV, which lost its ability to address consultation obligations left unsatisfied by the JRP hearing process.

3.3.2.1. A failure to consult on the design of the JRP Process

75. The Crown did not consult with the Applicants about the design of the JRP Process. Had this occurred, the Applicants would have had opportunity to address impediments to consultation by the use of the JRP Process, including their lack of financial and expert capacity, as well as their view that a hearing process could not substitute for a dialogue between Heiltsuk and the Crown. Instead, the Applicants were left with no option but to participate in the established JRP Process to the extent that they could, or not be heard at all.

3.3.2.2. The inaccessibility of Phases II and III (the JRP hearing)

76. Meaningful consultation presupposes accessible consultation. While a process with process *may* satisfy a duty to consult, it may also fail to provide consultation in substance by being substantially inaccessible to First Nations. The Crown, knowing of the enormity and complexity of the review process for this Project, and the extensive amount of technical and legal information, nonetheless tied consultation to the statutory review process.

77. Due to procedural impediments arising from the scope and quasi-judicial nature of the JRP Process, the Applicants could only very selectively participate in the JRP Process, and had to forego participating in large parts of the JRP hearing.[110] Neither Heiltsuk nor Kitasoo Xai'Xais could afford to provide expert reports, or retain experts to review the Proponent's extensive scientific data. While Heiltsuk received some funding for Phases II and III, the funding was only a fraction of what it would reasonably need to fully participation in a process of that scale.

78. The formalities of the quasi-judicial tribunal process versus a dialogue-oriented consultation process led to friction between Heiltsuk and the panel, and restrictions on Heiltsuk's ability to provide all of the information they wished to provide for consultation purposes.[111]

3.3.2.3. The ineffectiveness of Phase IV

79. Phase IV, as it in fact unfolded, precluded any consultation or accommodation because in substance it was a vehicle for Canada's representatives to provide set, *pro forma* statements about how the conditions would, after certification, eventually satisfy all of the Applicants' concerns. Putting aside whether post-certificate conditions can constitute accommodation in this

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[110] Kitasoo Xai'Xais could not participate in the cross-examination hearing, could not submit closing submissions with legal or expert analysis, or present oral argument. They were only able to submit limited written evidence and hold a community hearing. Heiltsuk had to selectively participate, given that it did not have the funding capacity for obtaining expert reports.

[111] Affidavit of Jessie Housty, affirmed January 24, 2015, at ¶2 **[ACR Vol. II, Tab 41, ACR page 1003]**; Slett Affidavit #2, at ¶¶14-19, Exhibit "C" at page 40**[ACR, Vol. I, Tab 3, ACR pages 676-680, 771]**; Transcript Vol. 39, at ¶¶28979 – 28980, 29101 – 29113, 29130 – 29139 **[ACR, Vol. II, Tab 12, ACR pages 846, ACR pages 849-850; 851-852]**; Transcript Vol. 179, at ¶¶3738 – 3753 **[ACR, Vol. II, Tab 22, ACR pages 883-884]**; Slett Affidavit #1, Exhibit "G" at pages 117-131 **[ACR Vol. I, Tab 1, ACR pages 122-136]**

case, not one of the conditions recommended by the JRP before Phase IV changed as a result of Phase IV "consultations". The promise that Phase IV would address "any outstanding issues" was hollow.

80. The failure of the JRP Process to incorporate consultation is further borne out by the Crown's table listing the Applicants' concerns. The responses set out by the Crown about the Missing Information were wholly inapplicable to the Applicants, demonstrating their ambivalence to addressing the Applicants' concerns.

3.3.3. No meaningful consultation

81. As a result of both the Crown's failure to inform itself, and the nature of the JRP Process, including the Phase IV process, the Applicants were deprived of *meaningful* consultation about potential impacts on their Aboriginal rights.

82. At the core of the duty to consult is a duty of the Crown to engage in a dialogue – dialogue that occurs where the participants are fully-informed, and in cases where "deep" consultation is required, a dialogue that leads to a *demonstrably* serious consideration of accommodation (as manifest by the Crown's consultation-related duty to provide written reasons, addressed below).

83. Consultation is "not just a process of exchanging information".[112] A "meaningful process of consultation"[113] means the Crown must be open to acting to resolve Aboriginal concerns. Thus consultation may begin, but not end, with discussion. The SCC has expressed (in the context of Aboriginal title, but in relation to the Crown knowing of the potential existence of any Aboriginal right or title) a range of consultation duties – from a minimum duty to "discuss" an important decision where adverse effects are minor, to a mid-level duty "significantly deeper than mere consultation" in "most cases," to "full consent" on various serious issues (in cases of established rights).[114]

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[112] Haida at ¶46
[113] Haida at ¶42
[114] Haida at ¶¶24, 35, 40 and 48; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.) ("Delgamuukw") at ¶168

84. The higher the Crown's consultation duty, the higher its duty to look for solutions *for acting upon*, so that concerns are "wherever possible, demonstrably integrated into the proposed plan of action".[115] Thus conduct presenting significant effects on strong Aboriginal rights may raise a "duty to accommodate," to "avoid irreparable harm or to minimize the effects of infringement".[116] A duty to seek accommodation is a prelude to the Crown's duty, in relation to established Aboriginal rights, to *justify* any infringement by showing *inter alia* the Crown has accommodated to the point that impacts go no further than necessary to achieve a valid goal.[117]

85. Thus consultation may fail on various grounds. For example, the Crown may demonstrate that despite ostensible consultation, it did not look for solutions. Thus the Crown does not properly consult if a decision has already been made.[118] Consultation which excludes any accommodation from the outset is "meaningless".[119] A process is not consultation if it merely gives a First Nation "an opportunity to blow off steam before the [Crown] proceeds to do what she intended to do all along".[120]

86. The Crown may also "sabotage" a consultation process through procedural impediments, or by failing to inform itself and convey project's impacts, so that parties cannot engage in meaningful discussions, as affected Aboriginal groups lack impact details, and cannot make fully-informed submissions.

87. A lack of meaningful consultation, due to a failure of the Crown to inform itself of adverse project effects on Aboriginal rights, is illustrated by a proponent of a copper mine failing to provide, and the Crown failed to ensure, wildlife data sufficient for a First Nation to assess project impacts on wildlife in *Cheslatta*.[121] The Court found that "...the Executive Director before recommending the issuance of a project certificate and the Ministers before issuing same *must have sufficient information about the impact of the*

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[115] Mikisew at ¶64
[116] Haida at ¶47
[117] *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44 ("Tsilhqot'in") at ¶87
[118] Mikisew at ¶67
[119] Mikisew at ¶54
[120] Mikisew at ¶54
[121] *Cheslatta Carrier Nation v. British Columbia (Environmental Assessment Act, Project Assessment Director)* (1998), 53 B.C.L.R. (3d) 1 (S.C.) ("Cheslatta")

project upon the Petitioners *and that the Petitioners also have sufficient information* to advise the Executive Director as to the impact on their lives and their land".[122] The First Nation repeatedly raised the issue of adequacy of wildlife data for considering effects on traditional practices.[123] The Project Committee directed the proponent to produce the necessary mapping, but the proponent did not.[124] The committee concluded "some adverse impacts" on some species, but deferred further wildlife considerations to after issuance of the project certificate.[125] Despite an argument that information had been adequate for consultation, the Court concluded that meaningful consultation on the wildlife issue had not taken place.[126]

3.3.4. The inadequacy of consultation or assessment after the key decision

3.3.4.1. The duty to consult when the key decision is at hand

88. The Crown had a duty to consult before the GiC's Decision. The GiC could not make the Decision without knowing how it would impact the Appellants' Aboriginal rights, which required the Missing Information. It could not cure the failure to procure the Missing Information by setting conditions to ostensibly obtain such information that could no longer inform a decision already made. The strategic decision of the GiC to permit the Project, and to establish conditions, is a high-level Crown decision that sets into motion risks to the Applicants' Aboriginal rights.[127] As the SCC decided in *Haida*, consultation will only be meaningful if consultation takes place at the stage of the grant of right to proceed, rather than during later operational decisions.[128] A potential for adverse impact suffices.[129] The duty to consult, which began when the Crown was *designing* the regulatory and

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[122] Cheslatta at ¶53
[123] Cheslatta at ¶54
[124] Cheslatta ¶¶55-56
[125] Cheslatta at ¶56
[126] Cheslatta at ¶59
[127] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 ("Rio Tinto") at ¶47
[128] Haida at ¶¶76-77
[129] Rio Tinto at ¶44

environmental review process for the Project,[130] had to be fulfilled *before the strategic decision-making*.

89. The Crown's duty to consult is a duty to "reasonably ensure that Aboriginal people are provided with all necessary information *in a timely way* so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action".[131] For consultation to be meaningful, it cannot be "postponed until the last and final point in a series of decisions. Once important preliminary decisions have been made there may well be 'a clear momentum' to move forward with a particular course of action...."[132]

90. Thus the reasoning of the BCSC in *Klahoose*[133] is instructive, where the Crown refused to provide requested information on the basis the licensee was not required to provide it, and could be addressed in the context of operational decisions: "[129] ... *Where the duty to consult is deep, it is not an answer to say that there will be further opportunities for consultation* when the process that may lead to harm is further advanced, or that the information sought, while important, is not part of the process at this stage. ... [131] ... ...the constitutional duty to consult and accommodate is "upstream" of the statutes... so that the district manager is not able to follow a statute, regulation or policy in such a way as to offend the Constitution...."[134]

3.3.4.2. A parallel duty of the GiC to assess under the CEAA without deferral

91. The Crown's duty to consult *so that* the GiC can make a strategic and high-level decision about approving the Project, subject to conditions, is supported by a parallel statutory duty of the JRP, under CEAA, to assess environmental effects of accidents and their significance (e.g., to the Applicants) and to report such effects *so that* they may be assessed by democratically-elected

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[130] Dene Tha' at ¶¶107-110
[131] Halfway at ¶160
[132] *Sambaa K'e Dene Band v Duncan*, 2012 FC 204 ("Sambaa") at ¶165
[133] *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, [2009] 1 C.N.L.R. 110 (B.C.S.C.) ("Klahoose")
[134] Klahoose at ¶¶129 and 131

and accountable decision-makers (meaning the GiC as advised by cabinet), instead of being deferred for later assessment by regulatory decision-makers.

92. The Missing Information was necessary not only for consultation purposes, but also for statutory purposes. The JRP had a duty under CEAA s. 19(1) to assess the effects of accidents; a duty under CEAA s. 42(2) and its terms of reference to assess areas that could be affected by an accident; and a duty to report to a political decision-maker, the GiC as advised by the Queen's Privy Council, meaning the Cabinet. By not obtaining the Missing Information to assess OWA impacts, the JRP kept the GiC from making a fully-informed decision.

93. The Federal Court reached a similar conclusion in *Greenpeace*,[135] under the old CEAA,[136] where a panel assessed a nuclear power plant project (the "Darlington Project") and recommended GiC approval. In reviewing how the panel dealt with uncertainties, the Court reasoned that decision-making allocated to the GiC meant elected officials accountable to the electorate. The assessment was the only occasion "when democratically elected and accountable federal decision-makers" would decide on the Project proceeding.[137] The democratic legitimacy of the Cabinet was "particularly relevant... where issues require reference not simply to scientific evidence, but to societal values and associated public policy choices".[138] Accordingly, panel choices that could "diminish the Cabinet's ability to consider and decide such matters, deferring them instead for consideration at a future date by an expert body," might depart from Parliament's intent.[139]

94. The Court found three panel failures. First, absent a choice about reactor technology, the proponent had not assessed the effects of liquid effluent and

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[135] *Greenpeace Canada v. Canada (Attorney General)*, 2014 FC 463 ("Greenpeace")
[136] Although *Greenpeace* involved a former version of CEAA, the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (the "Old CEAA"), the decision relies on language that remains in CEAA.
[137] Greenpeace at ¶¶232-233
[138] Greenpeace at ¶¶237-238
[139] Greenpeace at ¶239. Accordingly, the court found that "in order to comply with its obligations under ss. 16 and 34 of the CEAA [now ss. 19 and 43 of CEAA], the Panel's assessment should provide an analysis of the actual expected effects of the Project...", and found that "it was incumbent on the Panel to... explain why significant departures from it (that is, gaps in information about the bounding scenario) did not make the assessment non-compliant with the CEAA" (*Greenpeace* at ¶¶244 and 247).

stormwater runoff.[140] The JRP concluded no significant adverse environmental effects, based on proponent commitments, mitigation options and regulatory controls.[141] But while the panel reached which might be a reasonable conclusion, it failed to provide "sufficient analysis and justification" to allow the GiC to do the same, based on a broader range of considerations.[142] The Panel took a "short-cut by *skipping over the assessment of effects*, and proceeding directly to consider mitigation, which relates to their significance or likelihood",[143] thus preventing political decision-makers from evaluating "whether that level of impact is acceptable in light of policy considerations, including 'society's chosen level of protection against risk.'"[144]

95. Second, the proponent failed to provide any "extended treatment" of the issue of long-term nuclear spent fuel management and disposal. An industry-funded body, the NWMO, was to develop an approach.[145] But the issue of long-term management of spent fuel should have been put before the GiC, with a proper record on long-term management, including what is known and not known.[146] Without information on the suitability of existing management plans, the political decision-makers "cannot realistically assess whether the risks and impacts are in line with 'society's chosen level of protection against risk.'"[147]

96. Third, after the Fukushima Daiichi nuclear disaster, the prospect arose of a severe "common cause" accident (e.g., earthquakes) affecting multiple reactors. The proponent had not analyzed such scenarios based on their low probability.[148] The panel recommended a later assessment of the effects of a severe accident. But the Court decided that, in this realm of "highly improbable, but possibility [sic – possibly] catastrophic, events," such

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[140] *Greenpeace* at ¶250
[141] *Greenpeace* at ¶¶263 and 271
[142] Greenpeace at ¶272
[143] Greenpeace at ¶275
[144] Greenpeace at ¶281. The panel's failure to assess the *effects* of hazardous substance releases, to instead assess mitigation measures for managing effects did not meet CEAA requirements: Greenpeace at ¶282.
[145] Greenpeace at ¶293. "NWMO" refers to the Nuclear Waste Management Organization.
[146] Greenpeace at ¶297
[147] Greenpeace at ¶310; also see ¶312.
[148] Greenpeace at ¶320

scenarios should, on policy grounds, be considered by political decision-makers.[149]

97. As in *Greenpeace*, the JRP skipped over the effects of "improbable" spills and instead looked only at mitigation, which it left to future development. This impaired the ability of the only democratically-elected decision-maker to assess the risks and impacts of a possibly catastrophic event on the Applicants. The statutory requirement that the GiC be enabled to assess even improbable impacts parallels the Crown's consultation duty to inform itself of potential impacts on Aboriginal rights, also to inform the GiC's Decision.

3.4. The Crown's need to justify risks to established constitutional rights

98. Section 35(1) of the *Constitution Act*, 1982 operates to "import some restraint" on federal power" by demanding *justification* of any government action that infringes upon or denies Aboriginal rights.[150]

99. As Aboriginal title is a kind of Aboriginal right,[151] cases on infringements of Aboriginal title[152] also speak to infringements on Aboriginal rights. If the Crown has discharged its duty to consult, which is part of justification,[153] and assuming infringing action involves a compelling and substantial objective, the Crown must justify infringing action by showing it is consistent with "the fiduciary duty owed by the Crown to the Aboriginal group"[154] that infuses an obligation of "proportionality".[155] The Crown must show the action is rationally connected to the objective; impairs the right in question as little as possible; and has infringing effects proportionate to the objective.[156]

100. *The burden lies on the Crown* to justify infringements of Heiltsuk's established Aboriginal rights, e.g., by showing that current Project conditions minimize impairment, despite the following circumstances. First, if the Court

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[149] Greenpeace at ¶331
[150] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 ("Sparrow") at ¶62
[151] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 ("Van der Peet") at ¶74
[152] e.g., Tsilhqot'in
[153] Tsilhqot'in at ¶¶77 and 78
[154] Tsilhqot'in at ¶80
[155] Tsilhqot'in at ¶87
[156] Tsilhqot'in at ¶87

concludes the Crown did not consult with Heiltsuk, the infringement is not justifiable.

101. Second, current conditions fail to minimize risks to Heiltsuk's SOK rights, as they do not require one or more of the following measures which would further prevent adverse effects: **(a)** further spill modelling in the OWA to clarify spill risks to herring; **(b)** assessments of reduced shipping or altered shipping routes during herring spawning season; **(c)** a minimum level of spill response capacity in the OWA to address herring habitats; or **(d)** mandatory membership and decision-making participation by Heiltsuk in committees or technical groups, including the Fisheries Liaison Committee, which will address matters which impact Heiltsuk's SOK rights.

102. Third, fair compensation may form an element of justification.[157] In the context of spill risks, access to compensation may translate into conditions ensuring that Heiltsuk are indemnified for all adverse spill effects on their SOK rights, not only in terms of indemnities covering both monetary and non-monetary losses, but also in terms of ensuring adequate baselines and assessments necessary for Heiltsuk to quantify losses attributable to spills. Current JRP conditions fail to minimize risks to Heiltsuk's SOK rights, as they do not require one or more of the following measures which would restore Heiltsuk to a pre-spill condition: **(a)** requiring baseline assessments in the OWA relating to Heiltsuk's SOK rights;[158] and **(b)** requiring programs or other grants of rights that will ensure Heiltsuk (and any First Nations that may establish Aboriginal rights during the operational life of the Project) are made whole with respect to monetary and non-monetary losses relating to

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[157] Sparrow at ¶82

[158] Baseline studies are essential to assessing the after-effects of a spill: Exhibit D85-27-4, Heiltsuk Tribal Council Submissions to the JRP, at ¶¶42-43 **[ACR, Vol. II, Tab 6, ACR page 761].** A causal chain is difficult or practically impossible to establish in the wake of accidents in poorly characterized ecosystems: *Ibid.* at para. 94 **[ACR, Vol. II, Tab 6, ACR page 781];** Exhibit D72-32-08, Gitxaala Nation – Report on Expert Opinion on Effects from Petroleum Spills for Gitxaala, Adobe page 17 **[ACR, Vol. II, Tab 30, ACR page 923]**. Baselines addressing the current viability and status of a population are a vital component of formulating appropriate mitigation measures: Transcript Vol. 163, at ¶9225 **[ACR, Vol. II, Tab 17, ACR page 869]**.

spill effects on established rights, e.g., interference with Heiltsuk's harvesting of herring SOK for food, social, ceremonial, and commercial purposes.[159]

3.5. The Crown's failure to provide reasons

3.5.1. Consultation: the duty to provide written reasons relating to Aboriginal concerns

103. The Crown failed to provide the written reasons to which the Applicants were entitled as part of the Crown's duty to engage in deep consultation *with them.*

104. In a non-consultation context, a tribunal may owe a duty to give reasons where a statute expressly imposes a duty, where such a duty is implied (e.g., as a result of a statutory right of appeal), or to ensure procedural fairness so that a person will, for example, know why an important decision was made. While procedural fairness does not require reasons of any particular *quality*,[160] a tribunal's reasoning process may still be "inadequately revealed",[161] reasons must serve their function, including permitting a reviewing Court to understand why a decision-maker made a decision, and decide if its conclusion falls is within a range of acceptable outcomes.[162] Reasons are only adequate if they permit meaningful appellate review.[163] Reasons must, if required, demonstrate in the context of the record and submissions of the parties that a decision-maker was seized the substance of the critical issues.[164]

105. In a consultation-context, a duty to provide written reasons engages these same considerations, as illustrated in *Brokenhead* (where this Court applied *R.E.M.* to find reasons relating to consultation inadequate, due to a first appellate court failing to grapple with difficult legal issues.[165] But a Crown

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[159] The Project's conditions do not require insurance or other coverage that will adequately address non-economic losses, including cultural impacts, that would flow from significant spill effects on Heiltsuk's established Aboriginal right to harvest herring SOK: Exhibit D85-27-6, Heiltsuk Economic Development Corporation Submissions to the JRP, at ¶¶44-59 **[ACR, Vol. II, Tab 7, ACR pages 814-818]**

[160] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.) ("Nfld. Nurses") at ¶20

[161] Nfld. Nurses at ¶22

[162] Nfld. Nurses at ¶16

[163] *R. v. R.E.M.*, 2008 SCC 51 ("R.E.M.") at ¶¶11 and 15

[164] R.E.M. at ¶¶43 and 55

[165] *Brokenhead First Nation v. Canada (AG)*, 2011 FCA 148 ("Brokenhead") at ¶¶33 and 50

duty to provide reasons as part of consultation requires reasons *that engage issues specific to Aboriginal rights*. Where a Crown decision may result in significant adverse effects on strong (or established) Aboriginal rights, the honour of the Crown requires that reasons demonstrate "that Aboriginal concerns were considered," and "*reveal the impact they had on the decision*".[166] A demand for such specific content provides transparency of decision-making *specifically in relation to Aboriginal rights*. Transparency is a guiding principle under the Crown's own consultation guidelines.[167] Such mandatory transparency safeguards Aboriginal rights by ensuring that the Crown considers the fruits of its consultation activities, and how it should accommodate Aboriginal rights: "the task of articulating the reasons directs the judge's attention to the salient issues and *lessens the possibility of overlooking or under-emphasizing important points* of fact or law".[168]

106. Where the Crown must balance multiple interests, a safeguard requiring that the Crown set out the impacts of Aboriginal concerns on decision-making becomes *more* important, not less; in the absence of such a safeguard other "public" issues may overshadow or entirely displace the issue of impacts on Aboriginal rights. Accordingly, the fact of reasons addressing a multitude of other factors does not satisfy the need for the reasons to specifically address Aboriginal rights. The adequacy of reasons in terms of Aboriginal rights must be determined not by "the amount of ink spilled on the page,"[169] but whether they satisfy their fundamental purposes.

107. The value of a procedural safeguard requiring that a Crown decision-maker provide reasons to explain *how* he considered Aboriginal rights is magnified when decision-making occurs at the cabinet-level, such that all evidence of reasoning may fall within cabinet privilege and other privileges, except for whatever information forms a part of the government's reasons. In this case, privilege has been claimed over federal staff's recommendations to their

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[166] Haida at ¶44
[167] Aboriginal Consultation and Accommodation Guidelines (March 2011), Guiding Principle No. 4 at p.14.
[168] R.E.M. at ¶12
[169] *Vancouver Int'l Airport Authority*, 2010 FCA 158 at ¶17(b)

ministers, ministerial recommendations to the GiC, and information before the GiC when he made the Decision.

108. The GiC and the Cabinet had to account for not only factors addressed by the JRP, but also Aboriginal concerns expressed by First Nations during Phase IV, when deciding whether to exercise powers under the NEB Act, including the power to refer the JRP's recommendation back for reconsideration (s. 53(1)); to refer any term or condition back for reconsideration (s. 53(1)); to specify factors the JRP must take into account on a reconsideration (s. 53(2)); and to allow or dismiss an application for a certificate (s. 54(1)). The GiC had to consider the suitability of terms or conditions, singly and collectively, in light of Aboriginal concerns expressed during Phase IV by all First Nations, including those specifically expressed by the Applicants. Canada's representatives told the Applicants at the Phase IV meetings that their information would be conveyed for decision-making in relation to these options open to the GiC.

109. The GiC Order refers to "a process of consultation and accommodation" (Order at 1645)), but does not show how concerns expressed by the Applicants during Phase IV, or any First Nation during Phase IV, impacted its decision-making in relation to conditions.

110. The Crown published an "Explanatory Note" along with the Order, but the note is expressly labelled as not forming a part of the Order, and in any event, does not address how the Applicants' concerns about their inability to assess spill-impacts on their Aboriginal rights impacted the GiC's decision-making.

111. The GiC does not adopt the JRP Report as part of its own reasons, but even if it did, the JRP Report cannot reflect the GiC's reasons respecting the concerns the Applicants expressed during Phase IV, or why the GiC decided that these concerns were not a basis for its exercising its various powers under the NEB Act to satisfy consultation duties, as distinct from statutory duties.

112. The July 14 letters do not save the Crown from the absence of GiC reasons. They are not the recommendations to the GiC on which he made its decision, which are privileged. They do not address why the GiC made the Decision

prior the Applicants being able to obtain the Missing Information, assess impacts on their Aboriginal rights and address any applicable accommodation or justification.

3.5.2. Statute: the duty for reasons under the NEB Act

113. The GiC had an express statutory duty, when making an order for a certificate, to set out in the order "the reasons for making the order" (NEB Act s. 54(1) and (2)). The Applicants adopt and rely on the submissions of Forest Ethics as they relate to the GiC's duty to provide reasons under s. 54 of the NEB Act.

3.6. Admissibility of Northern Gateway's Affidavits

114. The Proponent's affidavits of Carruthers (Mar. 4, 2015)[170], Green (Mar. 5, 2015)[171] and McHugh (Mar. 4, 2015)[172] are substantially submissions in affidavit form, and the whole of each (collectively the "Offending Affidavits"), or alternatively the offending parts of each, should be struck out.

115. An affidavit should not confuse the purpose of an affidavit with submissions.[173] As the purpose of an affidavit is to "adduce facts relevant to the dispute without gloss or explanation",[174] the Court may strike out affidavits, or portions of them, where they contain "opinion, argument or legal conclusions".[175] Where strike-outs leave an affidavit in "tatters" then the Court may strike out the remaining affidavit in its entirety.[176]

116. While affidavits in judicial reviews may adduce evidence relating to procedural defects which cannot be found in the record, or highlight the absence of evidence relating to a particular finding, and may for those

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[170] Affidavit of John Carruthers, sworn March 4, 2015 **[Electronic Record ["ER"], Tab 87]**
[171] Affidavit of Jeffrey Emil Green, sworn March 5, 2015 **[ER, Tab 85]**
[172] Affidavit of Owen McHugh, affirmed March 4, 2015 **[ER, Tab 88]**
[173] *Van Duyvenbode v. Canada (Attorney General)*, 2009 FCA 120 ("Van Duyvenbode") at ¶3
[174] Van Duyvenbode at ¶2
[175] *Canada (Attorney General) v. Quadrini*, 2010 FCA 47 ("Quadrini") at ¶18
[176] *Bell Canada v. Canada (Human Rights Commission)*, [1991] 1 F.C. 356 (F.C.T.D.) ("Bell Canada") at ¶16

reasons supplement the evidential record before a decision-maker,[177] an affidavit cannot provide submissions; submissions are the province of memoranda of fact and law.

117. Accordingly, while an affidavit in a judicial review may prove facts *additional* to the record, its content will be improper submissions, or otherwise inadmissible, on one or more of the following grounds: (#1) it asserts facts, or collections of facts, based on documents in the JRP or Crown consultation records, or are attached to other affidavits; (#2) it asserts facts from the JRP Report; (#3) it asserts an inference of fact; (#4) it asserts a conclusion of law, or mixed fact and law; or (#5) the evidence is inadmissible (e.g., it is opinion evidence, hearsay, or irrelevant). For example, all paragraphs in the Offending Affidavits which set out facts based on documents already in the record, or based on statements in the JRP Report – as clearly evidenced by footnote references to JRP Exhibits or the JRP Report – amount to *submissions* that belong in the Proponent's memorandum of fact and law, rather than in an affidavit that is, by the presence of such submissions, circumventing any page-limits that the Court may order respecting the Proponent's memoranda of fact and law.

118. Given the extensive, improper submissions woven through the Offending Affidavits, the Applicants submit that each of the Offending Affidavits should be struck in its entirety, as being a submission in substance.

119. Alternatively, excepting Exhibits not already contained in a record, the following paragraphs of the Offending Affidavits warrant judicial scrutiny for being, in whole or in part, *submissions of fact or law* based on evidence already in the record or from other affidavits (and as such these submissions belong in the Proponent's memorandum of fact and law), or for raising new but "glossed" facts intertwined with argument, as distinct from providing unadorned fact (Grounds #1, #2, #3 or #4). On a non-exhaustive basis, paragraphs may instead or also be inadmissible on other grounds (Ground #5) as parties may elaborate: (a) **Carruthers:** 4-5; 6 (#5: irrelevant); 10-15; 18-

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[177] *Assn of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency,* 2012 FCA 22 ("Universities") at ¶20

27; 29; 32-33; 35-36; 38; 40-43; 45-130; 132-134; 137-143; 157-167; 168-174 (factual submissions to the JRP on the record); 175-195; 206-231 (re: Gitxaala) and 232 (#5: irrelevant); 233-251 (re: Gitga'at) and 252 (#5: irrelevant); 253-263 (re: Haida) and 264 (#5: irrelevant); 265-291 (re: Haisla) and 292-295 (#5: irrelevant); 296-303 (re: Heiltsuk) and 303 (#5: irrelevant); 304-306; 308-308-311 (re: Kitasoo) and 312 (#5: irrelevant); 313-316, 320-329, 331, 333-336, 340-342 (re: Nadleh and Nak'azdli); 343-484; (b) **Green:** 4-6; 7 (#5: irrelevant); 11-16; 19-410; and **McHugh**: 407; 8 (#5: irrelevant); 12-16; 18-254.

120. The Offending Affidavits are essentially submissions – submissions consisting of 435 pages of affidavit body – which belong in the Proponent's memoranda of fact and law. The Proponent is free to argue whatever it wishes, but not under the guise of affidavit evidence.

4.0 PART 4 – ORDER SOUGHT

121. As set out in the Applicants' Application. In brief, the Applicants seek, *inter alia*, (1) declarations relating to (a) the Crown's failure to consult; (b) the GiC improperly delegating and deferring assessment of environmental effects under CEAA; (c) the Decision unjustifiably infringing Heiltsuk's established constitutional rights; and (d) the GiC failing to provide reasons under s. 54(2) of the NEB Act; and (2) an order quashing the Decision (and the JRP Report as appropriate), and referring the matter back to the GiC (or the JRP as appropriate) with directions the Court considers appropriate.

5.0 PART 5 – AUTHORITIES

CASES

STATUTES

Dated: May 22, 2015

Counsel for the Applicants
Per: Lisa C. Fong