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A-447-14, A-448-14, A-514-14, A-517-14,
A-520-14, A-522-14

FEDERAL COURT OF APPEAL

BETWEEN:

GITXAAŁA 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, and 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:

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

RESPONDENTS

AND

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

INTERVENERS

MEMORANDUM OF FACT AND LAW OF THE APPLICANTS, 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, and on behalf of all NAK'AZDLI WHUT'EN, and on behalf of the NAK'AZDLI BAND

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PART I – STATEMENT OF FACTS

A. Overview

1. Nadleh and Nak'azdli submit that the Crown owes them a deep duty to consult and accommodate regarding the Project, including with respect to their *prima facie* governance rights. The Crown incorrectly determined that it had no duty to consult in relation to impacts on governance rights, and accordingly failed to meet its duty. Nadleh and Nak'azdli submit that the Order must be set aside and consultation ordered with regard to their *prima facie* governance rights.

2. Nadleh and Nak'azdli rely on the Statement of Agreed Facts (the "Agreed Facts")[1] and the facts set out below. Defined terms in the Agreed Facts are used herein with the same meaning.

B. The Applicants' responsibilities under their governance system

3. Nadleh and Nak'azdli have been self-governing for thousands of years.[2] Key elements of their governance system and legal order are the affiliation of Nadleh and Nak'azdli people with clans that include hereditary leaders, the existence of land and resource management territories known as *keyah* (Nadleh) or *keyoh* (Nak'azdli) associated with extended family units, and the use of a system of governance known as *bahlats* (sometimes called "potlatches") as an institution to govern the *keyah*/*keyoh* and clans.[3] Prior to contact with Europeans, this interconnected system determined legal obligations and authority for stewardship of and access to lands, waters and natural resources to ensure that they benefit present and future generations.[4]

4. After contact, Nadleh and Nak'azdli legal orders persisted and evolved, responding to developments such as the imposition of Indian reserves and bands, a provincial trapline registration system that did not necessarily correspond to

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[1] Statement of Agreed Facts, Book of Major Documents **["MB"]**, Vol 1, Tab 1 **["AF"]**.
[2] Affidavit #1 of Martin Louie, 10 July 2014 **["Louie Affidavit #1"]**, Ex HH, Nadleh and Nak'azdli's Compendium of References **["NNCR"]**, Vol 2, Tab 17: Appendix **["App"]** 1, page 228; App 9, page 416.
[3] AF, page 30 at para 139; Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, page 230 at para 92; App 4, page 315.
[4] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, pages 228-232; App 4, pages 286, 308-318, 346-348; App 6, pages 386-387; App 7, pages 390-391; App 9, pages 416-417. Hereditary leaders are referred to as uzah'neh (Louie Affidavit #1, NNCR, Vol 1, Tab 1, pages 1-2, 13), duneza and tsekeza (Louie Affidavit #1, Ex HH, NNCR Vol 2, Tab 17, App 4, page 286).

keyoh/*keyah*, and Canada's former ban on conducting *bahlats*.[5] Nadleh and Nak'azdli continue to apply their laws, including through the *bahlats*, and continue to recognize hereditary leadership, *keyoh/keyah*, and clan membership in a manner that integrates elected band councils.[6]

5. The relationship between Nadleh and Nak'azdli's culture and governance and the waters and fish in their territories is inextricable, functioning like a two-way street. Harvesting fish is a key cultural and economic practice that supports the clans, *bahlats*, *keyoh/keyah* and hereditary leaders. At the same time, the system of clans, *bahlats*, *keyoh/keyah* and hereditary leaders form the framework for regulation of use of waters and fish for the benefit of present and future generations, including responsibilities to make decisions regarding protection and stewardship. Nadleh and Nak'azdli continue to undertake monitoring, regulation and enforcement activities in keeping with these obligations.[7]

C. The Applicants' Aboriginal rights and the Project

6. Nadleh and Nak'azdli informed the Crown of their *prima facie* Aboriginal rights and title, including their governance rights and obligations, which stand to be impacted by the Project and the Crown's conduct in relation to same.[8] This included information showing:

    a. the operation of Nadleh and Nak'azdli's systems of governance, as summarized above, including procedural and substantive principles of Yinka Dene law that informed the application of governance rights to the Project;[9]

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[5] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, page 232; App 9, pages 416, 420; Affidavit of Jim Clarke, 9 April 2015, in response to written cross-examination **["Clarke Examination Response"]**, Ex A, NNCR, Vol 4, Tab 70, page 1152; *Indian Act*, RSC 1886, c 43, s 114.

[6] AF, page 30 at para 139; Louie Affidavit #1, NNCR, Vol 1, Tab 1, page 2 at para 9; Affidavit of Fred Sam, 11 July 2014 **["Sam Affidavit"]**, NNCR, Vol 3, Tab 26, pages 573-574 at para 12; Clarke Examination Response, Ex A, NNCR, Vol 4, Tab 70, pages 1150-1151; Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, pages 232-233; App 4, pages 314-315, 336, 347-350; App 6, pages 385-387; App 7, pages 389-391.

[7] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, pages 225, 227-235, 241-243; App 4, pages 286, 308-318, 337-338, 340, 346-351; App 6, pages 384-387; App 7, pages 389-391; App 9, pages 410, 416-418, 420, 426-427; Clarke Affidavit, Ex I, NNCR, Vol 4, Tab 73, page 1211; Clarke Examination Response, Ex A, NNCR, Vol 4, Tab 70, pages 1150-1154.

[8] See e.g. Affidavit of Jim Clarke, 4 February 2015 **["Clarke Affidavit"]**, Ex J, NNCR, Vol 3, Tab 45; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 46.

[9] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, pages 228-232; App 4, pages 286, 308-318, 346-348; App 6, pages 386-387; App 7, pages 390-391; App 9, pages 416-418,

b. regular and exclusive use of land by Nadleh and Nak'azdli in their traditional territories, including by controlling use and access through the *keyoh*/*keyah* and clan system, requiring permission for access and resource use outside of one's own *keyoh*/*keyah*, ejecting trespassers[10] or prohibiting their return, construction of dwellings, and regular use of definite tracts of land for hunting, fishing and other harvesting, cultural and spiritual uses;[11]

c. the crucial importance of fish and fishing not only for sustenance and trade but as a defining feature of Nadleh and Nak'azdli as peoples, as a foundation for maintaining culture, community identity and trade networks, and for use to sustain their governance through the *bahlats*, all of which are closely linked to obligations to protect and manage waters and ensure the health and sustainability of fish populations;[12]

d. extensive fishing activities in waters that would be traversed or potentially affected by the Project, including those described in paragraph 7 below;[13] and

e. other harvesting activities and land use values in the vicinity of the Project such as hunting, trapping, gathering of plants and berries and archaeologically important areas such as trails.[14]

7. Nadleh and Nak'azdli made submissions to the Crown that the Project presents the potential for serious adverse impacts to their *prima facie* rights and title as a result of spills, including submissions that:

a. there are risks of diluted bitumen and condensate spills from the Project;[15]

426-427; Clarke Examination Response, Ex A, NNCR, Vol 4, Tab 70, pages 1150-1154; Clarke Affidavit, Ex I, NNCR, Vol 4, Tab 73, page 1211.

[10] For example, when James Douglas directed Hudson's Bay fishers to fish in Stuart River without Dakelh permission, the HBC fishers were ejected: Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17, App 6, page 387 at para 27.

[11] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, pages 228-233; App 4, pages 311, 316; App 6, pages 386-387; App 7, pages 389-391; App 9, pages 410, 413-418, 420, 426-427, 430-431, 436-440.

[12] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, pages 237-243; App 4, pages 285, 315, 318, 330, 337-338, 340, 348, 350-351; App 6, pages 385-386, App 7, page 390; App 8, page 395; App 9, pages 407, 461, 503.

[13] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, pages 221, 238-240; App 4, pages 300, 325, 329-330, 337, 344-345; App 6, pages 385-386 at paras 18-22; App 7, pages 389-390, 392-393; App 8, pages 394-396; App 9, pages 407, 436-440, 462-463; App 10, pages 516-533.

[14] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17, App 9, pages 417-418, 431-440, 444-449, 501.

[15] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, pages 213-216; App 9, pages

b. spills from the Project could cover extensive stretches of key waters in Nadleh and Nak'azdli territories in which their people fish, including Stuart River, Stuart Lake (including the shores of Nak'azdli's main community and reserve), Salmon River, Muskeg River, Sutherland River, Shovel Creek, Necoslie River, Marie Lake, Pitka Creek and Pitka Lake, among others;[16]

c. potentially affected fish species of importance to Nadleh and Nak'azdli in such waters include steelhead trout, dolly varden trout, rainbow trout, chinook salmon, coho salmon, sockeye salmon, sturgeon, kokanee, burbot, suckers, char and whitefish;[17]

d. spills from the Project into water could cause both acute and chronic negative effects to fish that could reduce their populations and damage their health over a period of years to decades, depending on the circumstances;[18] and

e. significant harm to, or loss of, fish populations in their territories would be devastating to their people and culture and could not be compensated.[19]

8. Nadleh and Nak'azdli also indicated to the Crown that the Project posed the risk of other serious potential impacts on their *prima facie* rights and title such as:

a. the right-of-way for the Project opening up access for sports hunters, fishermen and other recreational users, thereby increasing pressure on resources relied upon by Nadleh and Nak'azdli and making their people feel less safe when using the territories for harvesting or ceremonial purposes;[20]

b. the introduction or spreading of invasive species, competing with native species of importance to the Applicants;[21]

c. disturbance of important cultural and archaeological areas such as the large number of trails that intersect with the corridor of the Project;[22]

470-474.

[16] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, pages 216-221, 237-240, 243-245; App 2, pages 264-265; App 6, pages 385-386; App 7, pages 390, 392-393; App 8, pages 394-396; App 9, pages 407, 436-440, 462-463; App 10, pages 516-533.

[17] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, pages 221-222, 237-240; App 4, pages 325, 329-330, 337, 344-345, 350; App 6, page 386; App 7, page 390; App 8, page 394; App 9, pages 436-439, 461-463.

[18] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, pages 221-225; App 2, pages 255, 258, 260, 266-268; App 9, pages 471, 474-476.

[19] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 6, page 385; App 7, page 390; App 8, page 395; App 9, pages 502-503.

[20] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17, App 9, pages 453, 468.

[21] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17, App 9, pages 452, 457, 497.

[22] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17, App 9, pages 444-449.

d. disruptions to wildlife through fragmentation and damage to habitat, disruption and contamination of food webs and degradation of water supplies, thereby impacting Nadleh and Nak'azdli's wildlife harvesting practices;[23]

e. negative impacts on fish from Project construction due to sedimentation, turbidity and temperature increases in fish habitat, particularly in watercourses identified by Northern Gateway ("NGP") as high sensitivity such as Stuart River, Salmon River, Endako River and Sutherland River;[24] and

f. fragmentation of Nadleh and Nak'azdli's territories and diminished value and accessibility of Aboriginal title lands.[25]

9. NGP disputes certain aspects of Nadleh and Nak'azdli's submissions to the Crown regarding spill risks and effects, and asserts that it has sought to address some of the those concerns through mitigation measures.[26] While Nadleh and Nak'azdli disagree with NGP's assertions, other Applicants in these consolidated proceedings raise grounds for review that directly engage issues such as assessment of spill risks and effects.[27] For the purpose of this Application, the potential for adverse effects and their seriousness are relevant only to an assessment of the duty to consult, addressed below in Part III, Submissions.

D. The Applicants' exercise of their responsibility to review the Project and engagement with the Crown

10. When NGP submitted its Preliminary Information Package in 2005, Nadleh and Nak'azdli worked with the Carrier Sekani Tribal Council ("CSTC") to conduct extensive review, community engagement and research, which led to the *Carrier Sekani Tribal Council Aboriginal Interest and Use Study on the Enbridge Gateway Pipeline* ("AIUS"). The work informing the AIUS included:

a. The establishment of community coordinators in each CSTC First Nation;

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[23] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17, App 9, pages 452, 458-460, 467-468, 500-501.
[24] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, page 213 at para 11; App 9, pages 459-461, 464, 469-470, 498-500.
[25] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17, App 9, page 502.
[26] Affidavit of John Carruthers, 4 March 2015 (excerpts) **["Carruthers Affidavit"]**, NNCR, Vol 4, Tab 65, pages 940, 945 at paras 316, 342; Affidavit of Owen McHugh, 5 March 2015 (excerpts), NNCR, Vol 4, Tab 66, pages 947-952.
[27] BC Nature Notice of Application, Basic Common Book **["CB"]**, Vol 1, Tab 1, pages 11-13; Forestethics et al Notice of Application, CB, Vol 1, Tab 2, page 19; Gitxaala Nation Notice of Application, CB, Vol 1, Tab 3, pages 55-56, 58-59; Haisla Nation Notice of Application, CB, Vol 1, Tab 5, page 75.

b. Interviews with elders and *keyoh*/*keyah* holders;

c. Engagement of consultants, academic scholars, CSTC staff and community members to conduct research; and

d. Multiple community meetings in the CSTC nations at different stages to distribute information, obtain input on directions for research, present an overview of potential impacts, gain input on Aboriginal interests, and review the draft AIUS and propose modifications where necessary.[28]

11. The AIUS was provided to the Crown and NGP in 2006.[29] It concluded, *inter alia*, that the impacts of the Project on CSTC communities were potentially numerous and serious. The AIUS recommended, *inter alia*, that Chiefs work with their communities to determine whether to refuse approval of the Project, and that a First Nations-led review process should be carried out.[30]

12. In January 2006, CSTC advised the Crown that due to the unceded rights and title of CSTC members along a substantial portion of the Project route, the Project would either require their consent or significant consultation and accommodation. CSTC stated that establishing a JRP was a major step that should not be undertaken without fully consulting CSTC.[31] In February 2006 CSTC indicated that it sought a significant role in designing the review process for the Project.[32]

13. Consistent with the AIUS, CSTC developed a proposal for a First Nations review process for the Project. The proposal, intended to act as a foundation for further discussions and development,[33] included a steering committee with representatives from First Nations along the proposed pipeline and tanker routes.

14. The proposal proposed a First Nations Review Panel to make non-binding recommendations to First Nations decision makers regarding the risks and benefits of the Project in light of their Aboriginal interests, and address potential Project conditions.[34] The document further proposed government-to-government

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[28] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17, App 9, pages 399-400, 403; Sam Affidavit, NNCR, Vol 3, Tab 26, pages 582-583 at paras 48-49; Louie Affidavit #1, NNCR, Vol 1, Tab 1, page 4 at paras 17-18.
[29] AF, page 33 at para 150(a); Sam Affidavit, NNCR, Vol 3, Tab 26, pages 577-578 at paras 27, 29.
[30] Louie Affidavit #1, NNCR, Vol 2, Tab 17, App 9, page 508.
[31] Sam Affidavit, Ex C, NNCR, Vol 3, Tab 27, pages 590-591.
[32] Clarke Affidavit, Ex I, NNCR, Vol 3, Tab 35, pages 632-633.
[33] Fred Sam cross-examination transcript, 1 April 2015 **["Sam Transcript"]**, NNCR, Vol 4, Tab 69, pages 1142-1143.
[34] Clarke Affidavit, Ex I, NNCR, Vol 3, Tab 40, pages 648-649.

negotiations between the Crown and the steering committee as well as other interested First Nations in order to harmonize the parallel review processes.

15. CSTC provided the Crown with the proposal and sought consultation with a view to reconciling the review processes prior to a decision being made regarding review of the Project by a review panel.[35] At meetings with NEB officials in June 2006,[36] and with Natural Resources Canada officials in July 2006,[37] CSTC emphasized the proposal for a First Nations review process and requested that this be recommended as part of the Crown's approach to reviewing the Project. CSTC also requested meetings with the Minister of Environment and the Minister of Natural Resources on the issue, which were declined.[38]

16. The Crown's decision in September 2006 to refer the Project to a JRP was the subject of a judicial review application by CSTC on the basis of a breach of the duty to consult, which was withdrawn approximately one year later, following suspension of the regulatory review process at NGP's request. In June 2008, NGP requested that the Crown's regulatory review be resumed, and the Crown subsequently reinitiated a comment period on the 2006 draft JRP agreement.[39]

17. In July 2008, CSTC First Nations, including Nadleh and Nak'azdli, advised that CSTC was no longer authorized to represent them regarding the Project.[40]

18. In December 2008, Nadleh provided NGP with a proposal for a First Nations review process as a basis for a memorandum of understanding for direct engagement with NGP. NGP responded that issues regarding review processes should be addressed with the Crown.[41] NGP had responded in similar fashion to CSTC's proposals to NGP as early as 2002 for a First Nations Review Process.[42]

19. Nadleh held community meetings in 2008 to discuss the Project.[43] Nak'azdli held

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[35] Sam Affidavit, Ex H, NNCR, Vol 3, Tab 28; Sam Affidavit, Ex J, NNCR, Vol 3, Tab 29; Clarke Affidavit, Ex I, NNCR, Vol 3, Tab 38; Clarke Affidavit, Ex I, NNCR, Vol 3, Tab 40.
[36] Clarke Affidavit, Ex I, NNCR, Vol 3, Tab 36.
[37] Clarke Affidavit, Ex I, NNCR, Vol 3, Tab 37.
[38] Clarke Affidavit, Ex I, NNCR, Vol 3, Tabs 39-43.
[39] AF, pages 3-4 at paras 9-15.
[40] Carruthers Affidavit, NNCR, Vol 4, Tab 65, page 940 at para 318; Louie Affidavit #1, Ex B, NNCR, Vol 1, Tab 2, page 23; Louie Affidavit #1, Ex N, NNCR, Vol 2, Tab 9, page 175.
[41] Affidavit #2 of Martin Louie, 10 July 2014 **["Louie Affidavit #2"]**, NNCR, Vol 3, Tab 21, page 544; Louie Affidavit #2, Ex A, NNCR, Vol 3, Tab 22, pages 548-562; Louie Affidavit #2, Ex C, NNCR, Vol 3, Tab 23, page 564; Louie Affidavit #2, Ex D, NNCR, Vol 3, Tab 24, page 568; Louie Affidavit #2, Ex E, NNCR, Vol 3, Tab 25, pages 570-571.
[42] Carruthers Affidavit, NNCR, Vol 4, Tab 65, page 938 at para 314.
[43] Louie Affidavit #1, NNCR, Vol 1, Tab 1, page 13 at para 45.

community meetings in early 2009, at which NGP was present.[44] Nadleh and Nak'azdli continued to express support for a First Nations review process.[45]

20. The Approach to Crown Consultation for the Project, issued by the Crown in February 2009 and described at para 17 of the Agreed Facts, was developed without the involvement of Nadleh and Nak'azdli.[46] The Crown stated in the Approach to Crown Consultation, and in subsequent correspondence with Nadleh, that it did not support a First Nations review process for the Project.[47]

21. Nadleh and Nak'azdli communicated to the Crown their views on the significant problems with the Approach to Crown Consultation, including that the Crown developed it unilaterally and that it failed to give any regard to asserted Aboriginal rights of governance, management and decision-making.[48]

22. The Crown responded by reiterating that it did not support a separate or parallel First Nations' review of the Project, stating that the Crown was prepared to discuss how consultation could be carried out "within the framework provided".[49]

23. In April 2009, Nadleh hosted a gathering attended by hereditary and elected leaders, youth and community members of Nadleh, Nak'azdli and other Yinka Dene nations. Attendees reviewed the AIUS and other sources of information on the Project, discussed the Project and sought the advice of hereditary leaders and others. The unanimous sentiment from participants at this gathering was that the risks of the Project to their rights, resources and people were too great to support the Project. Nadleh and Nak'azdli received direction that it was vital to ensure that the health of their lands and waters are not put at risk by the Project, and that they should collaborate with other First Nations in that regard.[50]

24. Flowing from this process, Nadleh and Nak'azdli determined, pursuant to their responsibilities under their laws, to refuse permission for the Project to cross their

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[44] Carruthers Affidavit, NNCR, Vol 4, Tab 65, page 941 at para 323.
[45] Carruthers Affidavit, NNCR, Vol 4, Tab 65, page 941 at para 323; Louie Affidavit #2, Ex A, NNCR, Vol 3, Tab 22, page 548.
[46] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 45, page 711; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 46, page 715.
[47] Louie Affidavit #1, Ex E, NNCR, Vol 1, Tab 3, page 29; Louie Affidavit #1, Ex F NNCR, Vol 1, Tab 4, page 33.
[48] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 45, page 712; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 46, page 716; Louie Affidavit #1, Ex I, NNCR, Vol 1, Tab 6, pages 122-125, 144-147.
[49] Louie Affidavit #1, Ex F, NNCR, Vol 1, Tab 4, pages 32-33; Louie Affidavit #1, Ex I NNCR, Vol 1, Tab 6, pages 122-125, 144-147.
[50] Sam Affidavit, NNCR, Vol 3, Tab 26, page 583 at para 52; Louie Affidavit #1, NNCR, Vol 1, Tab 1, page 13 at paras 45-46.

territories.[51] This was expressed in writing in the Save the Fraser Declaration (the "Declaration"), an instrument through which signatory First Nations declared that, pursuant to their laws, they have determined that the Project is not permitted to cross their ancestral lands and waters. Nadleh and Nak'azdli signed the Declaration in November 2010, along with other First Nations. In December 2010, YDA delivered a copy of the Declaration to NGP.[52]

25. Both before and after signing the Declaration, Nadleh and Nak'azdli emphasized the crucial role of their governance rights in meetings with NGP. Nak'azdli attended an Enbridge investors briefing in April 2009, the Enbridge annual general meeting in May 2009, and an NGP business summit in March 2010. Representatives travelled to Enbridge's annual general meeting in Calgary in May 2011 and met with Enbridge's President and CEO and Board of Directors, and again travelled to Enbridge's annual general meeting in Toronto in May 2012.[53]

26. Nadleh and Nak'azdli also continued to engage with the Crown regarding the Project to propose approaches through which the exercise of, and impacts upon, their governance rights could be meaningfully considered.

27. In December 2009, Nadleh and Nak'azdli, together with Takla Lake First Nation in a coalition that grew in 2010 and became known as YDA, developed a consultation proposal and related Phase II-III funding application, as identified in the Agreed Facts at paragraph 147. The proposal relied upon the Aboriginal Consultation Framework, which added some details to the Approach to Crown Consultation and stated that Aboriginal groups could apply to the Agency for funding for Phase II and III consultation on "matters outside the JRP mandate."[54] The proposed activities for "matters outside the JRP mandate" focused on:

    a. the application of YDA's Indigenous legal traditions and knowledge to the evidence regarding the Project;

    b. preparation of a First Nations Assessment Report detailing the outcomes of the determinations referred to in (a), to be submitted to the Crown in order to inform government-to-government discussions during Phases IV and V; and

    c. discussions with the Crown and YDA to design the details of Phase IV and V

[51] Sam Affidavit, NNCR, Vol 3, Tab 26, page 583 at para 53; Louie Affidavit #1, NNCR, Vol 1, Tab 1, page 13 at para 47.
[52] Louie Affidavit #1, NNCR, Vol 1, Tab 1, page 13 at paras 47-48; Sam Affidavit, NNCR, Vol 3, Tab 26, page 584 at paras 53-54; Louie Affidavit #1, Ex Z, NNCR, Vol 2, Tab 13.
[53] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 47; Carruthers Affidavit, NNCR, Vol 4, Tab 65, pages 942-943 at paras 327, 332-333; Louie Affidavit #1, Ex AA, NNCR, Vol 2, Tab 14.
[54] Louie Affidavit #1, Ex I, NNCR, Vol 1, Tab 6, page 53.

consultation, including discussion regarding potential shared decision-making and dispute resolution mechanisms.[55]

28. The Crown declined YDA's funding application and the proposed consultation did not occur.[56]

29. In January 2010, YDA wrote a letter to the Crown which, *inter alia*:

    a. stated YDA's view that consultation and accommodation regarding governance rights was outside the mandate of the JRP and asked whether the Crown was prepared to commit to consultation on governance rights;

    b. asked whether, as an alternative to a harmonized First Nations review process, the Crown was willing to consider the establishment of a First Nations council or similar body to review the evidence provided through the JRP process and provide its perspective to the JRP and/or the Cabinet; and

    c. asked whether the Crown was prepared to promptly negotiate the details of Phase IV of its Aboriginal Consultation Framework.[57]

30. In response to the January 2010 letter, the Crown stated, *inter alia*, the following:

    a. regarding YDA's requests for consultation in relation to their asserted governance rights, "The Panel and associated consultation process for this Project is not intended to provide the means to recognize or prove potential rights, rather, the British Columbia Treaty Commission Process is the mechanism through which this important work is undertaken";

    b. regarding YDA's alternative proposal for a First Nations body to provide its perspective on the evidence before the JRP, "It is our view that the approach to consultation described in the [Aboriginal Consultation] Framework provides a meaningful process for consultation… the federal government does not support a review process outside of the joint review panel process"; and

    c. in response to YDA's request to negotiate the details regarding Phase IV consultations, "The federal government is convinced that the consultation process that has been put in place will, in fact, allow for adequate consultation" and the Crown would be prepared to discuss "the process for consultation on the [JRP] report" before its release.[58]

31. In response, YDA repeatedly emphasized that in the context of the Project it was

[55] Louie Affidavit #1, Ex K, NNCR, Vol 1, Tab 7, pages 148, 151.
[56] AF, page 32 at para 148; Louie Affidavit #1, Ex M, NNCR, Vol 2, Tab 8.
[57] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 48, page 722.
[58] Louie Affidavit #1, Ex N, NNCR, Vol 2, Tab 9, pages 165-167.

not seeking a process for determination or proof of governance rights, but rather interim consultation and accommodation regarding impacts on its member nations' *prima facie* governance rights prior to formal rights recognition.[59]

32. The Crown continued to respond to YDA's requests for interim consultation on governance rights by repeating the Crown's position that: "the review panel process is not intended nor is it equipped to deal with a broad determination of the governance, decision making, management and economic aspects of asserted Aboriginal and treaty rights. The British Columbia Treaty Commission is the forum through which these broad asserted rights and title issues are considered."[60]

33. The Crown's position that asserted governance rights would not be addressed in relation to the Project, but rather were issues for treaty negotiation, indicated in YDA's view that it would not be possible to ensure that its member nations' Aboriginal rights, title and interests were appropriately addressed through the JRP, and this informed YDA's decision not to apply to intervene in that process. As noted in the Agreed Facts, Daiya-Mattess Keyoh of Nak'azdli did intervene.[61]

34. During Phase III, Nadleh and Nak'azdli commissioned reports on issues related to governance, fisheries and the impact of potential oil spills, conducted community meetings and interviews regarding fisheries use and potential impacts, and reviewed evidence filed before the JRP. Much of this work was compiled in the written submissions described in the Agreed Facts.[62]

35. The Crown offered to meet to discuss how consultation would be carried out within the Aboriginal Consultation Framework.[63] YDA sent the Agency President (copying Brett Maracle) two letters in December 2011 and March 2012, requesting a meeting to discuss the nature of Phase IV and opportunities to design Phase IV so as to be able to address governance rights. Mr. Maracle did not respond to the letters and the President advised YDA to contact Mr. Maracle.[64]

36. In June 2012, YDA wrote Mr. Maracle to, *inter alia*, request a meeting to discuss

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[59] Louie Affidavit #1, Ex P, NNCR, Vol 2, Tab 10, pages 185-187; Louie Affidavit #1, Ex R, NNCR, Vol 2, Tab 12, pages 197-198.
[60] Louie Affidavit #1, Ex Q, NNCR, Vol 2, Tab 11, page 192.
[61] Louie Affidavit #1, NNCR, Vol 1, Tab 1, page 14 at para 52; AF, page 32 at para 149.
[62] Louie Affidavit #1, NNCR, Vol 1, Tab 1, page 15 at para 53; AF, pages 32-33 at para 150.
[63] AF, page 6 at para 23; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 49, page 724; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 50, page 735.
[64] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 51; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 52; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 53; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 54, page 740.

the design of Phase IV consultation, proposing meeting dates for July and August.[65] In August 2012, Mr. Maracle emailed YDA stating, *inter alia*, that the Agency was working on a response to YDA's letter and would respond "as soon as possible, however, it may take some time before the response is finalized."[66]

37. Not having received a response, in December 2012, YDA again wrote Mr. Maracle to, *inter alia*, request a meeting to discuss Phase IV consultation, proposing dates for mid to late February 2013.[67] Again, no response was received.

38. In March 2013, YDA wrote to the Honourable Bernard Valcourt, Minister of Aboriginal Affairs and Northern Development, requesting a meeting in Ottawa to discuss the laws and governance of its member nations in the context of the Project. Minister Valcourt responded with regrets that he was unable to meet.[68]

39. On October 4, 2013, Nadleh and Nak'azdli received template letters from Mr. Maracle advising of the availability of funding for Phase IV consultations, with applications due by November 8, 2013.[69]

40. On November 8, 2013, YDA wrote to the Agency expressing frustration that the Crown had not responded to its multiple requests to meet to discuss the design of Phase IV consultation.[70] YDA put forward a proposal for Phase IV with the following key elements:

    a. preliminary meetings between YDA and the Crown to design a government-to-government consultation process that would address governance rights;

    b. funding to produce a report, based in the laws of YDA nations and drawing on all the available evidence, to explain the nature and exercise of the governance rights and legal order of YDA nations in relation to the Project;

    c. an opportunity for the Crown to consider the report produced by YDA; and

    d. government-to-government meetings between YDA and the Crown to negotiate and attempt to reconcile the perspectives reflected in YDA's report

[65] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 55.
[66] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 56.
[67] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 57.
[68] Louie Affidavit #1, Ex AA, NNCR, Vol 2, Tab 14; Louie Affidavit #1, Ex BB, NNCR, Vol 2, Tab 15.
[69] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 58; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 59; Clarke Affidavit, Ex B, NNCR, Vol 3, Tab 33.
[70] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 60, pages 775-776.

and the report of the JRP, respectively.[71]

41. Mr. Maracle responded by letter dated December 6, 2013, apologizing for not replying to YDA earlier, and stating that, "As we are now in Phase IV … we are not prepared to revisit the entire consultation process…"[72]

42. In January 2014, the Applicants responded to the JRP report and provided the Crown with further submissions set out at paragraph 150 of the Agreed Facts.[73]

43. The federal Ministers did not accept YDA's invitation to attend the 2014 All Clans Gathering described in paragraph 154 of the Agreed Facts. Mr. Maracle and a panel of federal delegates did attend the All Clans Gathering, which took place over the course of a full day with attendance from approximately 200 hereditary and elected leaders, *keyoh*/*keyah* holders, elders, youth and other clan members.[74]

44. All Clans Gatherings are part of Nadleh and Nak'azdli's governance model. They involve not just one nation, but clan members from multiple Yinka Dene nations convening to deal with a matter of broad importance. Each clan brings their traditional leaders and knowledge keepers, and the people are seated by clan.[75]

45. Speakers at the All Clans Gathering emphasized that the Crown's conduct in relation to the Project stood to impact their governance rights, and that the Crown needs to "work to understand our laws" on a government-to-government basis in order to "make room" for both Canadian and Yinka Dene laws and governance.[76]

46. Speakers noted that, pursuant to their laws and on direction from their people, YDA nations and their communities reviewed and discussed at length the information regarding the Project, including the evidence before the JRP, and considered the reality of serious oil spills such as Enbridge's 2010 pipeline spill into the Kalamazoo River, and the Exxon Valdez and BP Gulf of Mexico spills. Speakers noted NGP could not ensure a spill would not occur in their territories, and the impacts of a serious spill would be devastating and unacceptable.[77]

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[71] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 60, page 776; AF, pages 33-34 at paras 151-153.
[72] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 62, page 830.
[73] Louie Affidavit #1, Ex GG, NNCR, Vol 2, Tab 16; Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17; AF, pages 32-33 at para 150.
[74] Louie Affidavit #1, NNCR, Vol 1, Tab 1, pages 18-19 at paras 64-66; Clarke Examination Response, Ex A, NNCR, Vol 4, Tab 70, pages 1150-1154.
[75] Sam Affidavit, NNCR, Vol 3, Tab 26, page 586 at para 61; Louie Affidavit #1, NNCR, Vol 1, Tab 1, page 19 at para 67; Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17, App 9, page 418.
[76] Clarke Examination Response, Ex A, NNCR, Vol 4, Tab 70, pages 1150-1151.
[77] Clarke Examination Response, Ex A, NNCR, Vol 4, Tab 70, pages 1150-1154.

47. Those who attended the All Clans Gathering made contributions, pursuant to their laws, that were gathered as a payment to "hire" the federal delegates to carry their message back to Cabinet.[78] The Crown's notes on the matter read as follows:

> During the session, a hereditary chief called for a traditional balhat to occur, with 50% of the proceeds to go to Prime Minster Harper to hear the message of no, and 50% to go [to] the federal consultation team to be hired as witnesses or messengers to bring the message of no pipeline to the Prime Minister. Community members came up one by one, and the chief called out the amount they provided, their name and their Nation. The totally [sic] amount collected by the balhat was $914.20 and a hand carved and painted paddled [sic]. This was divided into two envelopes, the one for the Prime Minster with $500 as he has a "big name" and one for the messengers with $414.20. We asked that the money stay in the hall and be given to someone in need in the community and we were told this was against traditional protocol. The money had to leave the community, but could be given to someone else in need.[79]

48. In cross-examination of Chief Fred Sam, NGP suggested that Nak'azdli opposition to NGP was less than unanimous, pointing to the intervention of the Daiya-Mattess Keyoh in the JRP process.[80] This is incorrect. In submissions to the JRP, the Daiya-Mattess Keyoh stated: "We're here to tell the National Energy Board that we're totally rejecting this proposed pipeline going through our territory."[81] Nak'azdli *keyohs*, including Daiya-Mattess, were fully involved in deliberations regarding the Project, including the April 2014 All Clans Gathering, and unanimously refused consent for the Project.[82]

49. The Agency invited YDA to prepare a summary, limited to two to three pages, of outstanding issues for the Crown Consultation Report.[83] YDA submitted that its members had responsibilities pursuant to their own laws regarding the Project, and that "the direction from our people was that allowing the Pipeline to cross our territories would not be consistent with our lawful responsibilities to steward our lands and waters for this and future generations." YDA identified as the key outstanding issue that consultation on the Project had no mechanism for the Crown to appreciate the governance system and laws of YDA nations, and that

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[78] Louie Affidavit #1, NNCR, Vol 1, Tab 1, page 19 at para 67; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 63, page 837.
[79] Clarke Examination Response, Ex A, NNCR, Vol 4, Tab 70, page 1154.
[80] Sam Transcript, NNCR, Vol 4, Tab 69, page 1136.
[81] JRP Transcript, Vol 19, NNCR, Vol 4, Tab 72, page 1189 at line 10565.
[82] Sam Transcript, NNCR, Vol 4, Tab 69, page 1142; Louie Affidavit #1, Ex JJ, NNCR, Vol 3, Tab 19, page 540; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 47.
[83] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 61, page 818.

meaningful consultation on such issues did not occur despite multiple proposals. YDA submitted that, even at such a late stage, the Crown could still show regard for the *prima facie* governance rights of YDA nations by declining approval.[84]

50. In June 2014, the Crown sent a letter to YDA enclosing segments of the Crown Consultation Report that pertain to YDA nations. The letter also purported to describe issues and concerns discussed at the All Clans Gathering and discuss measures that in the Crown's view contributed to mitigating those concerns.[85]

51. In response, YDA noted that the Crown inaccurately referenced discussions at the All Clans Gathering that did not occur, such errors seeming to arise from the nature of the letter as a template, and emphasized that the measures discussed in the letter were not responsive to the issues raised by YDA. YDA further expressed concern that the excerpts from the Crown Consultation Report greatly simplified their evidence and submissions, which could not be effectively condensed into a few pages, and did not provide a sufficient basis for Cabinet to meaningfully consider or address the issues raised by YDA.[86]

52. In July 2014, the Crown wrote to YDA confirming that it had inaccurately portrayed certain discussions at the All Clans Gathering.[87] The letter purported to set out how the issues raised by YDA had been considered. The letter identified the issue of governance rights, but did not indicate that impacts on those rights were considered in making the Order, or show what, if any, effect they had on the Order. Rather the letter reiterated the Crown's general position that:

> Resource development approval processes, including the review of projects under the CEAA 2012 and the *National Energy Board Act*, are not the venue for determining Aboriginal rights and title claims, or for recognizing or negotiating asserted Aboriginal rights and title.[88]

PART II – POINTS IN ISSUE

53. The issues to be determined in this Application are:

    a. Did the Crown, prior to making the Order, have a duty to consult and, where indicated, accommodate the Applicants in relation to their *prima facie* governance rights?

    b. Did the Crown fail to meet its duty to consult and accommodate?

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[84] Louie Affidavit #1, Ex JJ, NNCR, Vol 3, Tab 19.
[85] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 63, pages 832-834.
[86] Louie Affidavit #1, Ex LL, NNCR, Vol 3, Tab 20.
[87] Letter to YDA from Canada, MB, Vol 2, Tab 38, page 469.
[88] Letter to YDA from Canada, MB, Vol 2, Tab 38, page 467.

PART III – SUBMISSIONS

A. The law of consultation and accommodation

Legal framework for the duty to consult and accommodate

54. Flowing from the recognition that "Canada's Aboriginal peoples were here when Europeans came, and were never conquered,"[89] the Crown's assertion of sovereignty over lands that were in the control of Aboriginal peoples imposes upon it an obligation of acting honourably towards Aboriginal peoples in "a process of fair dealing and reconciliation."[90]

55. Grounded in the honour of the Crown and the protection provided for Aboriginal rights in section 35(1) of the *Constitution Act, 1982*, the Crown has a constitutional duty to consult with and, where appropriate, accommodate an Aboriginal group before taking any action that may adversely affect its rights.[91]

56. In particular, a duty to consult and accommodate arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[92]

57. The underlying purpose of the duty is to protect Aboriginal rights while furthering the goal of reconciliation between Aboriginal peoples and the Crown. Consultation must be conducted "with a view to reconciliation."[93]

58. The scope of the Crown's duty varies with the circumstances and is proportionate to "the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[94]

59. In this regard courts have described the duty to consult and accommodate as existing on a spectrum, with a low end entailing less onerous disclosure and discussion obligations, and a high end requiring deep consultation and

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[89] *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 **["*Haida*"]** at para 25.
[90] *Haida* at para 32.
[91] *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, [2010] 2 SCR 650, 2010 SCC 43 **["*Rio Tinto*"]** at paras 32, 34; *Haida* at paras 20, 25, 32; *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 35(1).
[92] *Haida* at para 35.
[93] *Rio Tinto* at paras 32 and 34.
[94] *Haida* at para 39; *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 256, 2014 SCC 44 **["*Tsilhqot'in*"]** at para 17.

accommodation "aimed at finding a satisfactory interim solution."[95] Where a claim is particularly strong, "appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim."[96] In all cases, "the governing ethos is not one of competing interests but of reconciliation."[97]

60. While the duty to consult does not equate to a "duty to agree," the Court in *Tsilhqot'in* encouraged the Crown to seek and obtain the consent of Aboriginal groups as an approach to satisfying its duty to consult.[98] In the case of established rights, an Aboriginal group's consent may be required.[99]

61. The courts have established the following principles that apply to the duty:

    a. Consultation must be meaningful, and not just an opportunity for an Aboriginal group to "blow off steam."[100]

    b. Meaningful exchange of information is required. However, the duty is not fulfilled simply by providing a process for exchanging and discussing information. Rather, there is a "substantive dimension" to the duty.[101]

    c. The Crown must demonstrate good faith efforts to understand and substantially address the Aboriginal group's concerns.[102]

    d. Consultation that excludes accommodation from the outset is not meaningful.[103]

    e. At all stages, good faith on both sides is required.[104]

    f. The Crown must consider and address process-related concerns of Aboriginal groups, as well as substantive issues.[105]

    g. Courts have imposed a duty to consult about the design of review processes

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[95] *Haida* at paras 37, 44.
[96] *Tsilhqot'in* at para 91.
[97] *Tsilhqot'in* at para 17.
[98] *Tsilhqot'in* at para 97; *Haida* at para 49.
[99] *Tsilhqot'in* at paras 76, 90-91; *Haida* at para 48; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 66 BCLR (3d) 285 **["*Delgamuukw*"]** at para 168.
[100] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, 2005 SCC 69 **["*Mikisew*"]** at para 54.
[101] *Sambaa K'e Dene First Nation v Duncan*, 2012 FC 204, [2012] FCJ No 216 **["*Sambaa K'e*"]** at para 89; *Wii'litswx v British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 CNLR 315 **["*Wii'litswx*"]** at para 178; *Da'naxda'xw/Awaetlala First Nation v British Columbia (Environment)*, 2011 BCSC 620, [2011] 3 CNLR 188 at paras 182, 197.
[102] *Haida* at paras 42, 49; *Delgamuukw* at para 168.
[103] *Mikisew* at para 54
[104] *Haida* at para 42; *Mikisew* at para 65.
[105] *Mikisew* at paras 57, 59.

for significant projects.[106]

h. The honour of the Crown cannot be delegated to third parties. Thus, while some procedural elements of the duty to consult can be delegated, the ultimate responsibility for consultation and accommodation cannot.[107]

i. Consultation must take place early, before important decisions are made that may create momentum to move forward with a particular course of action.[108]

j. Strategic, higher level decisions that have the potential to impact Aboriginal rights give rise to a duty to consult and accommodate. Meaningful consultation and accommodation related to such strategic, higher-level decisions is important in pursuing the goal of reconciliation, and may not be supplanted by deferral to the level of operational decisions, where consultation may be of little effect.[109] In order to be meaningful, consultation cannot be postponed to the last stage of decision-making.[110]

k. The nature of consultation required may change as new information comes to light.[111]

l. The Crown must approach consultation with an open mind and be prepared to alter decisions depending on the input received – "[r]esponsiveness is a key requirement of both consultation and accommodation."[112]

Standard of review for the duty to consult and accommodate

62. In *Haida*, the Supreme Court of Canada (the "SCC") held as follows:

> On questions of law, a decision-maker must generally be correct... On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will

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[106] *Canada (Environment) v Imperial Oil Resources Ventures Ltd.*, 2008 FCA 20, 35 CELR (3d) 1 **["*Imperial Oil*"]** at paras 1, 9.
[107] *Haida* at para 53.
[108] *Sambaa K'e* at paras 164-166; *Squamish Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 34 BCLR (4th) 280, 2004 BCSC 1320 **["*Squamish (2004)*"]** at paras 74, 83, 92.
[109] *Haida* at para 76; *Rio Tinto* at para 44; *Wii'litswx* at para 186.
[110] *Sambaa K'e* at para 165.
[111] *Haida* at paras 45-46.
[112] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550, 2004 SCC 74 **["*Taku River*"]** at para 25; *Haida* at paras 26- 27, 45-46.

> depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal… Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness.[113]

63. In *Ahousaht*, this Honourable Court applied *Haida* to hold that the existence and extent of the duty to consult and accommodate is a question of law reviewable on a standard of correctness. This Court further held that, where the Crown correctly determines the nature of its duty, the Crown's decision will be upheld if the actions the Crown undertakes to meet its duty are reasonable.[114]

64. The *Haida* approach to the standard of review was reaffirmed in *Rio Tinto*.[115] Shortly afterward, the SCC held as follows in *Beckman*:

> In exercising his discretion… the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. In other words, if there was adequate consultation, did the Director's decision… having regard to all the relevant considerations, fall within the range of reasonable outcomes?[116]

65. Applying *Beckman*, this Honourable Court in *Council of the Innu* recently affirmed that "issues relating to the existence and content of the duty to consult attract a standard of correctness," and further held that the adequacy of the Crown's efforts to meet its duty to consult is evaluated on a correctness standard which must nonetheless be assessed with regard to the facts.[117]

66. Some judicial analysis has been devoted to approaching the standard of review in a manner that integrates the reasons in *Haida* and *Beckman*.[118] The Applicants

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[113] *Haida* at para 61.
[114] *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2008 FCA 212, [2008] FCJ No 946 **["*Ahousaht*"]** at paras 33-34.
[115] *Rio Tinto* at paras 63-65, 78.
[116] *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103, 2010 SCC 53 **["*Beckman*"]** at para 48.
[117] *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189, [2015] 1 CNLR 51 **["*Council of the Innu*"]** at paras 82-83; *Beckman* at paras 48 and 72.
[118] See for example *Squamish Nation v British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991, [2014] 4 CNLR 416 at paras 155-167.

submit that the common thread running through the judgments of the SCC and this Honourable Court is that no deference is to be shown by the Court on questions of law, whereas a degree of deference may be appropriate on primarily factual questions, particularly where the facts are within the expertise of the decision maker.[119] Thus the overriding consideration for the standard of review is whether a question is primarily one of "pure law" or rather is primarily a factual determination which may be "inextricably entwined" with the legal issues.[120]

67. This Honourable Court's finding that the existence, content and extent of the duty to consult are reviewable on a standard of correctness is consistent with the legal character of these determinations.[121] Questions about: (i) whether the Crown owes a duty to consult and accommodate, (ii) the *prima facie* rights and issues with regard to which the duty is owed, and (iii) the level of required consultation on those issues along the *Haida* spectrum, are primarily questions of law that lend themselves towards one particular conclusion. No deference is owed on such legal questions because they set the constitutional limits within which the Crown must operate and thus a correctness standard "promotes just decisions and avoids inconsistent and unauthorized application of law."[122]

68. Where the Crown's approach to consultation and accommodation relies on incorrect determinations of this nature, the results will be unreasonable because, as noted by the SCC in *Rio Tinto*: "any conclusion resting on incorrect legal principles of law would not be reasonable."[123]

69. Where the Crown has correctly determined the existence, content and extent of its duty, and "acts on the appropriate standard"[124] reflecting those conclusions, then within these constitutional limits there may be, in the words of the SCC in *Dunsmuir*, a "range of acceptable and rational solutions" for the Crown to employ in meeting its duty to consult.[125] In such circumstances, choices about particular forms of consultation and accommodation that fall within constitutional limits may entail primarily factual determinations for which deference may be

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[119] *Haida* at para 61; *Ahousaht* at para 33; *Rio Tinto* at paras 64-65, 78; *Beckman* at para 48; *Council of the Innu* at para 82.
[120] *Haida* at para 61; *Rio Tinto* at para 64.
[121] *Ahousaht* at para 34; *Council of the Innu* at para 82; *Haida* at para 63.
[122] *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 **["*Dunsmuir*"]** at para 50; *Beckman* at para 48.
[123] *Rio Tinto* at para 78.
[124] *Haida* at para 63.
[125] *Dunsmuir* at para 47; *Beckman* at para 48.

appropriate, invoking a reasonableness standard of review.[126]

B. Canada erred in determining that the content of its duty to consult and accommodate the Applicants did not include governance rights

70. Both NGP and the Crown have acknowledged that the Project has "engaged the Crown's duty of deep consultation with Gitxaala and with the other First Nations whose interests stand to be similarly affected."[127] While Nadleh and Nak'azdli's *prima facie* rights stand to be impacted by the proposed pipelines, as opposed to the proposed tankers carrying the same products, Nadleh and Nak'azdli submit there should be little dispute that there is sufficient potential for serious adverse impacts from the Project so as to engage the Crown's deep duty to consult them.

71. The issue is the content of the duty. The Crown's position that its review and decision-making related to the Project is not a forum for consultation on matters of Indigenous governance, and that those issues are to be left to the treaty process, is an incorrect interpretation of the Crown's duty to consult and accommodate.

72. Aboriginal governance is cognizable as a right in Canadian law, whether as an aspect of Aboriginal title or as a right to regulate with regard to particular matters. Thus, contemplated Crown conduct with the potential to impact a governance right triggers a duty to consult and accommodate, including in the interim period prior to claims resolution. There is no legal authority to support the notion that a governance right is somehow exempt from the established constitutional principles concerning the duty to consult and accommodate.

<u>Governance rights are cognizable at law</u>

73. The SCC has recognized that, long before Europeans arrived in Canada, Aboriginal peoples occupied the land in "organized, distinctive societies with their own social and political structures."[128] In the words of United States Chief Justice Marshall, cited by Justice Hall of the SCC in *Calder*:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, *having institutions of their own, and governing themselves by their own laws* [Justice Hall's emphasis].[129]

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[126] *Haida* at paras 61-63; *Beckman* at para 48.
[127] *Gitxaala Nation v Canada (Transport, Infrastructure and Communities)*, 2012 FC 1336, [2012] FCJ No 1446 **["*Gitxaala*"]** at para 35.
[128] *Mitchell v Minister of National Revenue*, [2001] 1 SCR 911, 2001 SCC 33 **["*Mitchell*"]** at para 9.
[129] Hall J. in *Calder v British Columbia (Attorney General)*, [1973] SCR 313 at page 383, para 125, 34 DLR (3d) 145, on behalf of three dissenting Justices, quoting Marshall C.J. in

74. English law "accepted that the aboriginal peoples possessed pre-existing laws and interests," which were presumed to continue after the Crown's assertion of sovereignty and were incorporated into the common law as rights.[130] Rights arising under Aboriginal peoples' laws "are no less enforceable than rights arising under English law."[131]

75. The British Columbia Supreme Court has held that the division of powers between the federal and provincial governments in the *Constitution Act, 1867*, is not exhaustive, and that aboriginal rights "akin to a legislative power to make laws, survived as one of the unwritten "underlying values" of the Constitution outside of the powers distributed to Parliament and the legislatures 1867."[132]

76. In *R. v. Van der Peet*, Justice McLachlin (as she then was) described the recognition of Aboriginal laws and customs as the "golden thread" running through the history of the common law.[133]

77. Governance may be linked with Aboriginal title which, as affirmed in *Tsilhqot'in*, includes "the right to pro-actively use and manage the land."[134] Governance may also be recognized as a right to regulate with regard to a particular issue, where pre-contact regulation by Indigenous peoples is an integral and defining feature of the culture.[135] An Aboriginal right to governance should be "looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right."[136]

78. Aboriginal rights do not depend on a court declaration or Crown recognition for their legal existence, rather: "All that a court declaration or Crown acceptance does is to identify the exact nature and extent of the title or other rights."[137]

79. In *R. v. Marshall*, the SCC quoted with approval the following statement of legal scholar John Borrows:

Worcester v State of Georgia (1832), 31 US (6 Pet) 515, 8 L ed 483.
[130] *Mitchell* at paras 9-10.
[131] *In Re Southern Rhodesia*, [1919] AC 211 at page 234, [1918] UKPC 78.
[132] *Campbell v British Columbia (Attorney General)*, 79 BCLR (3d) 122, 2000 BCSC 1123 **[*"Campbell"*]** at para 81.
[133] McLachlin J. (as she then was) in *R. v Van der Peet*, [1996] 2 SCR 507, 23 BCLR (3d) 1 **[*"Van der Peet"*]** at para 263 (in dissent on another point).
[134] *Tsilhqot'in* at para 73.
[135] *R. v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204 **[*"Pamajewon"*]** at para 24.
[136] *Pamajewon* at para 27.
[137] *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc.*, 2015 BCCA 154, 2015 CarswellBC 925 at para 61.

> Aboriginal law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of land. It is more than evidence: it is actually law. And so, there should be some way to bring to the decision-making process those laws that arise from the standards of the indigenous people before the court.[138]

The Crown owes a deep duty to consult that includes governance rights

80. The Crown had real or constructive knowledge of a strong *prima facie* claim of Nadleh and Nak'azdli Aboriginal rights and title, including governance rights, and that the Crown's conduct regarding the Project, and the Order in particular, had the potential to seriously and adversely affect those rights. Thus the Crown owed a deep duty to consult and accommodate Nadleh and Nak'azdli in relation to their governance rights.

81. The SCC has noted that the claims of CSTC First Nations, which include Nadleh and Nak'azdli, are "well-known to the Crown."[139]

82. CSTC First Nations filed a Comprehensive Land Claim with the Crown, which Canada accepted for negotiation in 1982.[140] The Crown's acceptance of CSTC's 1982 claim was based in part on an analysis and verification of the systems of governance of CSTC First Nations.[141] The SCC observed that such claims "underwent an extensive validation process in order to be accepted into the federal land claims policy" and held that acceptance of a claim for negotiation "establishes a *prima facie* case in support of its Aboriginal rights and title."[142]

83. CSTC First Nations entered the British Columbia Treaty Commission ("BCTC") negotiations process in 1994. The CSTC and the Crown completed stage three of the six-stage process in 1997 with the signing of a Framework Agreement setting out the basic principles for the conduct of future negotiations. The Framework Agreement included governance as a substantive issue to be addressed in treaty negotiations, along with issues such as environmental management, protection and impact assessment.[143]

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[138] *R. v Marshall; R. v Bernard*, [2005] 2 SCR 220, 2005 SCC 43 at para 130, quoting John Borrows, "Creating an Indigenous Legal Community" (2005) 50:1 McGill LJ 153.
[139] *Rio Tinto* at para 80.
[140] AF, page 31 at para 144.
[141] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17, App 9, pages 426-427.
[142] *Taku River* at paras 26, 30; Douglas R. Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights* (April 2015), online: Aboriginal Affairs and Northern Development Canada: <http://www.aadnc-aandc.gc.ca/eng/1426169199009/1426169236218> at page 17.
[143] AF, page 31 at para 145; Affidavit of Edward John, 17 November 2014 **["John**

84. CSTC and the Crown did not complete stage four of the negotiation process. In 2007, during a two-day All Clans Gathering of CSTC First Nations attended by elected and hereditary leaders, elders and hundreds of clan members, the CSTC received direction to discontinue treaty negotiations until Canada reformed its comprehensive land claim policies and self-government policies to allow for equitable treaties. The CSTC informed the Prime Minister and the Minister of Aboriginal Affairs and Northern Development of this decision in writing.[144]

85. The shortcomings of the BCTC process, communicated to federal officials at the 2007 All Clans Gathering and in writing to the Prime Minister and Minister of Aboriginal Affairs, included concerns that the Crown had taken firm positions on fundamental issues, such as governance and management of lands, leaving Crown representatives no mandate to meaningfully negotiate on those issues. As a result, for a decade the parties had been unable to approach agreement on issues of key importance to CSTC First Nations such as regimes for territorial co-management and shared governance that would account for their ancestral and modern governance systems. CSTC also indicated concern that the Crown continued to make decisions alienating or affecting their territories in a manner inconsistent with commitments to enter into interim arrangements addressing issues such as joint governance processes, protocols for consent and consultation, and restrictions on the alienation of lands and resources.[145]

86. In the context of the Project, Nadleh and Nak'azdli provided the Crown with further information and submissions regarding their title and governance rights as set out in paragraph 150 of the Agreed Facts, as well as through oral statements of elected and hereditary leaders, *keyoh/keyah*, elders and clan members at the 2014 All Clans Gathering.[146]

87. Thus the Crown had knowledge of a strong *prima facie* case that, since prior to contact, Nak'azdli and Nadleh have managed the use of the lands, waters and resources within their territories in order to ensure that the benefits they provide

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Affidavit"], NNCR, Vol 3, Tab 30, page 601 at paras 10-11; John Affidavit, Ex B, NNCR, Vol 3, Tab 31, pages 609-610.

[144] AF, page 31 at para 145; John Affidavit, NNCR, Vol 3, Tab 30, pages 601-604 at paras 11, 13-14, 17-19; John Affidavit, Ex C, NNCR, Vol 3, Tab 32.

[145] John Affidavit, NNCR, Vol 3, Tab 30, pages 602-604 at paras 14-19; John Affidavit, Ex C, NNCR, Vol 3, Tab 32.

[146] AF, pages 32-34 at paras 150, 154; Clarke Examination Response, Ex A, NNCR, Vol 4, Tab 70, pages 1150-1154; Louie Affidavit #1, NNCR, Vol 1, Tab 1, pages 18-19 at paras 64-68; Louie Affidavit #1, Ex II, NNCR, Vol 3, Tab 18; Sam Affidavit, NNCR, Vol 3, Tab 26, page 586 at paras 61-64.

are available to present and future generations, and that such management and use is and has always been integral to their distinctive societies and cultures. Particularly detailed submissions were made with regard to the established rules and responsibilities for protection and stewardship of waters and fish.[147]

88. In the context of established Aboriginal title, or an established governance right, overriding the rights holders' wishes is an infringement that must be justified.[148] The Applicants submit that in the pre-proof stage, such conduct adversely impacts *prima facie* rights and triggers a duty to consult in relation to those rights.

89. Section C of Part I above sets out the potential for serious adverse impacts on the Applicants' rights and title resulting from the Project and, consequently, the Order. Further, in their written submissions to the Crown regarding the Project, Nadleh and Nak'azdli indicated that the Crown's conduct and the Order stood to seriously and directly impact their *prima facie* governance rights. Adverse impacts "extend to any effect that may prejudice a pending Aboriginal claim or right," including effects that are not physical in nature.[149]

90. As set out above, the Crown had before it evidence and information regarding Nadleh and Nak'azdli's governance systems, and of the integrality of the management and use of waters and fish to Nadleh and Nak'azdli society and culture since prior to contact, as well as the inextricable relationship between these. The Crown also had before it evidence and information indicating the continued importance of these systems and activities today, and that Nadleh and Nak'azdli were acting according to their own laws and management obligations in determining not to permit the Project to cross their lands and waters.

91. Nadleh and Nak'azdli informed the Crown that their stewardship obligations did not permit opening the territory to the risk of harm that could not be fully restored,[150] and how an oil spill would impact not just the biophysical environment but the very core of their identity by undermining their system of governance. As Elders of the Beaver Clan stated with respect to the traditional stewards of the land in Yinka Dene law: "Should a disaster occur, their reputation

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[147] *Van der Peet* at para 46; Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, pages 228-232; App 4, pages 286, 308-318, 346-348; App 6, pages 386-387; App 7, pages 390-391; App 9, pages 416-417; Clarke Examination Response, Ex A, NNCR, Vol 4, Tab 70, pages 1150-1154; Clarke Affidavit, Ex I, NNCR, Vol 4, Tab 73, page 1211.
[148] *Tsilhqot'in* at para 77.
[149] *Rio Tinto* at para 47; Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17, App 1, page 234 at para 117-120.
[150] Clarke Examination Response, Ex A, NNCR, Vol 4, Tab 70, page 1151.

and identity as good stewards of the land would be diminished."[151] In giving no consideration to Nadleh and Nak'azdli's exercise of these stewardship governance obligations in relation to the Project, the Crown compromised both the object and purpose of their *prima facie* governance rights.

92. Moreover, the Project is a long-term commitment of lands and waterways; once built, it cannot be easily undone. Governance rights in relation to the Project, including to decide whether a risk of an oil spill is acceptable with respect to the particular watercourses at issue, will have been completely denied if there is no consultation on governance rights, and the existence of the Project will continue to compromise Nadleh and Nak'azdli's ability to exercise their governance rights in relation to the lands and waters for the long term. The Order thus had the potential to seriously impact the governance rights.

The Crown erroneously refused to consult regarding governance rights

93. Courts have clearly indicated that both the existence *and content* of the Crown's duty to consult must be correctly determined.[152] Acknowledgement by the Crown that a deep duty to consult exists is hollow where the Crown maintains that the content of that duty excludes consultation or accommodation on important *prima facie* rights of Nadleh and Nak'azdli related to governance.

94. Section D of Part I above demonstrates that, in response to the Applicants' requests for consultation and accommodation regarding their governance rights, the Crown maintained that the JRP and consultation regarding the Project would not address these aspects of Aboriginal rights and title, asserting instead that the BCTC process is the only forum through which it would consider such issues.

95. The Crown applied its legal determination that it had no duty to consult and accommodate regarding governance rights irrespective of the factual context. For example, in the Crown document entitled "Enbridge Northern Gateway Project: Yinka Dene Alliance Substantive Issue Tracking Summary – June 12, 2014," in response to governance concerns identified by YDA, the column of the tracking table entitled "Crown's Response" is a template that reads as follows:

> If a First Nation has asserted governance rights, in the context of title or otherwise: Canada acknowledges that the [First Nation or Aboriginal group] has raised concerns that the proposed project will impact your assertions of [governance] or [Aboriginal title and

[151] Clarke Affidavit, Ex I, NNCR, Vol 4, Tab 73, page 1211.
[152] *Haida* at para 61; *Ahousaht* at paras 33-34; *Rio Tinto* at paras 63-65, 78; *Beckman* at paras 48 and 72; *Council of the Innu* at paras 82-83.

> governance]. Canada generally recognizes the Inherent Right to Self Government based upon the view that Aboriginal peoples of Canada have a right to govern themselves in relation to matters that are internal to their communities, integral to their distinct Aboriginal cultures, and essential to their operation as a government or institution.
>
> This review of projects under the Canadian Environmental Assessment Act 2012 and the National Energy Board Act is not a rights determination process. Nor is it a process to recognize or negotiate asserted Aboriginal rights and title, including self-government. The negotiation of section 35 rights is undertaken through the comprehensive claims and the self-government negotiation processes. [and for those First Nations in British Columbia, under the British Columbia treaty process].[153]

96. The document entitled "Whole of Government – Issues Tracking," which was described by the Crown as "… a tool to use, if necessary, as required, during the Phase IV consultations" with all Aboriginal groups, addressing the Crown's key messages,[154] contains a template response for the assertion of governance rights, in the context of title or otherwise, that is almost identical to the version above.[155] The Crown's response to governance issues raised by other Aboriginal Applicants in these consolidated proceedings mirrors the form of this template.[156]

97. The Crown's boilerplate reply that its decision-making and consultation for the Project could not "recognize" or "determine" governance rights did not respond to the Applicants' repeated indication they were seeking interim consultation and accommodation regarding their *prima facie* governance rights in the context of the Project, not proposing that such rights be determined.[157]

98. Deferral of consultation about governance rights to treaty cannot amount to fulfillment of the duty to consult in the interim. If the Crown's approach is allowed to stand, then Nadleh and Nak'azdli's *prima facie* governance rights would not be given consideration by the Crown until agreed upon through a treaty. Yet the Crown was aware that treaty negotiations with the Applicants had ceased in 2007 due, in part, to fundamental disagreements between the parties

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[153] Clarke Affidavit, Ex J, NNCR, Vol 4, Tab 64, pages 881-882, 884, 918-919, 932.
[154] Jim Clarke cross-examination transcript, 31 March 2015, NNCR, Vol 4, Tab 67, pages 1044-1045.
[155] Jim Clarke cross-examination transcript, 1 April 2015, Ex 1, NNCR, Vol 4, Tab 68, pages 1094-1095.
[156] For example, the Crown's response to the Gitxaala Nation's concerns regarding its governance rights and Aboriginal title was virtually identical to the template response above. Clarke Affidavit, Ex B, NNCR, Vol 3, Tab 34, pages 629-630.
[157] Louie Affidavit #1, Ex P, NNCR, Vol 2, Tab 10, page 185.

with regard to governance issues.[158] The Crown's circular approach would thus result in consideration of Nadleh and Nak'azdli's *prima facie* governance rights being indefinitely postponed and ignored by the Crown. Such an approach is fundamentally inconsistent with the honour of the Crown and its constitutional obligation to consult and accommodate regarding *prima facie* rights when they stand to be adversely impacted by the Crown's conduct.

99. Moreover, the governance rights of Nadleh and Nak'azdli stand to be seriously eroded if the Order were allowed to stand in the context of:

    a. the imposition by the Crown of a consultation and decision-making process for the Project that did not account for or meaningfully consider Nadleh and Nak'azdli's governance rights, indeed that included explicit indication from the Crown that such governance rights were not to be considered; and

    b. the imposition of the Order authorizing the Project to proceed contrary to the determination of Nadleh and Nak'azdli pursuant to their governance systems, without consultation about their *prima facie* governance rights and with no explanation or rationale for why the exercise of those rights was disregarded.

100. Put another way, by giving Nadleh and Nak'azdli's systems of governance and laws no consideration or effect in the consultation process or the Order, the Crown damages those systems and may undermine their perceived legitimacy or applicability. Legal scholars Jutta Brunnée and Stephen J. Toope observe that failure to enforce or apply systems of governance and law engenders disrespect for those same systems, consequently eroding their authority.[159]

101. The Crown's refusal to consult about governance rights in the context of the Project was based on an error of law going to the content of its duty and as such the Crown is not owed deference by this Honourable Court.[160]

102. The Crown's incorrectly narrow determination of the content of its duty caused it to act without proper regard for legal and constitutional limits on its

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[158] AF, page 31 at para 145; John Affidavit, NNCR, Vol 3, Tab 30, pages 602-604 at paras 13-19; John Affidavit, Ex C, NNCR, Vol 3, Tab 32.

[159] Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge, UK: Cambridge University Press, 2011) at page 355. This is consistent with the recent finding of the Federal Court in *Haida Nation v Canada (Fisheries and Oceans)*, 2015 FC 290, 250 ACWS (3d) 361 at para 54 that the Crown's unilateral imposition of a decision itself constitutes harm and "compromises, rather than encourages, the mandated reconciliation process."

[160] *Haida* at para 61; *Ahousaht* at paras 33-34; *Rio Tinto* at paras 63-65, 78; *Beckman* at paras 48 and 72; *Council of the Innu* at paras 82-83.

discretion, thus the Crown's consultation regarding the Project was inadequate and the Order, resting upon those errors, was unreasonable and should not be permitted to stand.[161]

C. Canada's reliance on its incorrect determination that there is no duty to consult or accommodate regarding the Applicants' governance rights resulted in an inadequate and unreasonable approach to consultation

103. The Crown's incorrect exclusion of the Applicants' *prima facie* governance rights from consultation resulted in a failure to fulfill the duty in three overarching ways: (1) from the outset Canada foreclosed any accommodation of the *prima facie* governance rights, maintaining a closed mind to potential accommodation of them even when faced with new proposals and information; (2) the Crown did not meaningfully consider impacts on these *prima facie* rights in consultation regarding the Project or in making the Order; and (3) the Crown failed to give reasons showing that the *prima facie* governance rights were considered and to demonstrate what, if any, impact they had on the Order.

The Crown foreclosed any accommodation of the Applicants' *prima facie* governance rights in consultation, review and decision-making for the Project

104. By virtue of the Crown's position that the Applicants' *prima facie* governance rights were not a proper subject of consultation with regard to the Project, the Crown excluded accommodation of such rights from the outset. [162] The Crown unilaterally set the terms for how it would engage at an early stage and then on an ongoing basis unreasonably refused or failed to modify how it engaged with Nadleh and Nak'azdli, including when presented with detailed consultation proposals and new information about their *prima facie* governance rights.

105. The following summary indicates the extent to which Nadleh and Nak'azdli's proposals for consultation and accommodation regarding their *prima facie* governance rights in relation to the Project were met with outright rejection:

a. CSTC proposed that it have a role in selecting members of the JRP.[163] This did not occur.

b. CSTC, and Nadleh and Nak'azdli individually (as well as other First Nations), proposed a First Nations review panel composed of members selected by First Nations that stood to be impacted by the Project, which would provide non-

[161] *Rio Tinto* at para 78; *Beckman* at para 48.
[162] *Mikisew* at para 54.
[163] Clarke Affidavit, Ex I, NNCR, Vol 3, Tab 35, pages 632-633.

binding recommendations to those Nations in a parallel process that could be harmonized with the federal review.[164] The Crown rejected this proposal.[165]

c. Nadleh proposed a First Nations review process to NGP as a basis for a memorandum of understanding for direct engagement with NGP. NGP declined the proposal and referred Nadleh back to the Crown.[166]

d. As an alternative to a First Nations review process, YDA proposed a First Nations council to review the evidence provided through the JRP process and provide its perspective to the JRP and/or the Cabinet. The Crown declined.[167]

e. YDA nations submitted a proposal and funding application for Phases II-III to create a report applying their legal traditions and knowledge to the evidence, to be submitted to the Crown in order to inform government-to-government discussions.[168] The Crown declined the funding application and proposal.[169]

f. Over a period of two years, YDA made numerous requests to meet with the Crown to discuss designing Phase IV consultations in a manner that would allow for consultation on governance rights. The Crown either answered the meeting requests evasively or failed to respond at all, and a meeting to discuss the design of Phase IV never took place.[170]

g. YDA prepared a Phase IV consultation proposal and funding application that proposed producing a report explaining the nature and exercise of Dakelh governance rights and legal order in relation to the Project, followed by government-to-government meetings to attempt to reconcile the perspectives

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[164] Clarke Affidavit, Ex I, NNCR, Vol 3, Tab 40, pages 645, 649, 652.
[165] Louie Affidavit #1, Ex E, NNCR, Vol 1, Tab 3, page 29; Louie Affidavit #1, Ex F, NNCR, Vol 1, Tab 4, page 33. NGP has incorrectly suggested that the JRP process was similar to the proposed First Nations review process because, *inter alia*, it "had First Nations membership on the Panel": see Carruthers Affidavit, NNCR, Vol 4, Tab 65, page 939. One of the three JRP members was an Aboriginal man from Ontario, appointed with no involvement from Nadleh and Nak'azdli. This does not in any way make the JRP process similar to the First Nations review process proposed by Nadleh and Nak'azdli. See: JRP Ex B-22-5, NNCR, Vol 4, Tab 71, pages 1168-1169; JRP Report, Vol 1, CB, Vol 1, Tab 20, page 364.
[166] Louie Affidavit #2, NNCR, Vol 3, Tab 21, pages 544-545; Louie Affidavit #2, Ex A, NNCR, Vol 3, Tab 22; Louie Affidavit #2, Ex C, NNCR, Vol 3, Tab 23, page 564; Louie Affidavit #2, Ex E, NNCR, Vol 3, Tab 25, pages 570-571.
[167] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 48, page 722; Louie Affidavit #1, Ex N, NNCR, Vol 2, Tab 9, pages 165-167.
[168] Louie Affidavit #1, Ex K, NNCR, Vol 1, Tab 7, pages 148, 151.
[169] AF, page 32 at para 148; Louie Affidavit #1, Ex M, NNCR, Vol 2, Tab 8.
[170] Clarke Affidavit, Ex J, NNCR, Vol 3, Tabs 51-57; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 60, pages 775-776.

reflected in YDA's report and the JRP report.[171] The Crown rejected the consultation proposal and approved funding that could be spent only on providing comments to the Agency on the JRP report and related activities.[172]

106. In addition to the various proposals put forward by the Applicants, YDA sought to meet directly with Cabinet decision-makers to discuss its member nations' governance rights in the context of the Project, both through a meeting request to Minister Valcourt in 2013 and by inviting three federal Ministers to the April 2014 All Clans Gathering. Minister Valcourt did not accept YDA's meeting request and none of the Ministers attended the All Clans Gathering.[173]

107. The above proposals represent good faith attempts by the Applicants to ensure that their *prima facie* governance rights were meaningfully considered during consultations and in the Order. Contrary to the Crown's position, the proposals put forward by Nadleh and Nak'azdli demonstrate that accommodation of their *prima facie* governance rights does not require "determining" the rights.

108. Nor would accommodation grant a veto to Nadleh and Nak'azdli, or impose upon the Crown a duty to agree – it is not possible to speculate whether agreement could have been reached because there was no opportunity to meaningfully consult on governance issues.[174] Consultation on these rights "never got off the ground."[175] There are numerous examples in other contexts of approaches to consultation and accommodation on governance that do not include veto powers or require final determination of Aboriginal rights and title.

109. In *Wii'litswx*, for example, the BC Supreme Court describes at length interim initiatives that include, *inter alia*: joint land use planning between the Gitanyow and British Columbia, which includes as planning sub-units the Wilp territories under Gitanyow's governance system;[176] a Gitanyow Joint Resources Council which informs Crown administrative decisions;[177] an agreement for forest management which recognizes that Gitanyow's stewardship obligations are

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[171] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 60, page 776; AF, pages 33-34 at paras 151-153.
[172] The Applicants declined funding on those conditions: AF, page 34 at paras 152-153.
[173] Louie Affidavit #1, Exs AA-BB, NNCR, Vol 2, Tabs 14-15; Louie Affidavit #1, NNCR, Vol 1, Tab 1, page 18 at paras 64-65; Louie Affidavit #1, Ex II, NNCR, Vol 3, Tab 18; Clarke Examination Response, NNCR, Vol 4, Tab 70, page 1150.
[174] *Haida* at paras 42, 48.
[175] *Mikisew* at para 65.
[176] *Wii'litswx* at paras 49-55.
[177] *Wii'litswx* at para 61, 73-75, 82

integral to its society and governance;[178] and dispute resolution mechanisms.[179]

110. An example of interim accommodation of governance in the federal context is the Archipelago Management Board described in *Moresby Explorers*, whereby Canada and Haida Nation representatives sit on a joint board which examines all undertakings related to planning, operation and management of the area in question, including addressing federal permitting decisions. While the federal decision-maker's authority is not fettered or limited, he or she must seek to obtain consensus among members of the board before making a decision.[180]

111. The Crown has also sought to employ mechanisms to accommodate Aboriginal decision-making in assessing large-scale industrial projects such as the Mackenzie Valley natural gas pipeline proposal (the "MVP"). Like the Project, the MVP proposed "an enormous and complex industrial undertaking"[181] affecting the territories of many Aboriginal groups, whose relationships with the Crown were in different stages. As the Federal Court describes in *Dene Tha'*, the Inuvialuit, Gwich'in, and Sahtu had entered into modern land claims agreements, following the recommendation of the Berger commission that natural gas development not occur until the conclusion of such agreements. The Deh Cho First Nation had not concluded a land claims agreement, but had entered into interim measures agreements with the Crown.[182]

112. Two co-management boards, established as a result of the land claims agreements, played a shared role with the Crown in establishing a joint review panel for the MVP, including by selecting the members of the panel. Although Deh Cho did not have a land claims agreement, it had an interim agreement with the Crown giving it a seat on one of the co-management boards.[183]

113. Dene Tha' was granted intervener status, but no representation in the design or conduct of the review process.[184] The Crown sought to justify exclusion of Dene Tha' on the basis that "no jurisdiction was provided by Treaty 8, by

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[178] *Wii'litswx* at paras 67-68.
[179] *Wii'litswx* at para 83.
[180] *Moresby Explorers Ltd. v Canada (Attorney General)*, [2001] 4 FCR 591, 2001 FCT 780 at paras 11-15, 67-68.
[181] *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354, [2006] FCJ No 1677 **[*"Dene Tha'"*]** at para 15; ruling upheld in *Imperial Oil*.
[182] *Dene Tha'* at para 64-72.
[183] *Dene Tha'* at paras 27-29, 65-68.
[184] *Dene Tha'* at para 72.

legislation, or by a Comprehensive Land Claim agreement."[185] The Court rejected the Crown's argument, holding that the lack of a settled land claim agreement was legally irrelevant and "is not sufficient to exclude the duty to consult."[186]

114. *Dene Tha'* demonstrate that: (i) in other contexts the Crown has adopted review and decision-making processes for major projects that seek to accommodate the jurisdictional aspects of the rights and title of multiple Aboriginal groups; and (ii) the Crown has employed such approaches both for Aboriginal groups that have settled land claims agreements and through interim agreements for those which do not.

115. Yet, by virtue of the Crown's erroneous conclusion that it had no duty to consult regarding governance rights, the Crown foreclosed from the outset and on a continuing basis any accommodation of Nadleh and Nak'azdli's *prima facie* governance rights in either the design or the implementation of the process for consultation and decision-making regarding the Project. In doing so, the Crown failed to undertake adequate or reasonable consultation.

<u>The Crown did not meaningfully consider impacts on the Applicants' governance rights in consultations or in making the Order</u>

116. Stemming from the Crown's incorrect determination that the content of its duty did not include governance rights, consultation did not allow for the Crown decision-makers to appreciate the nature and exercise of Nadleh and Nak'azdli's governance, nor to consider the impacts of the Order thereupon. The Crown did not consider the strength of claim of the governance rights, or the nature and degree of their potential infringement. The BC Supreme Court has held that: "To fail to consider at all the strength of claim or degree of infringement represents a complete failure of consultation based on the criteria that are constitutionally required for meaningful consultation."[187]

117. The Crown relied upon the JRP "to the extent possible" to fulfill its duty and repeatedly referred the Applicants to the JRP to address the issues they raised. Yet the Crown also stated that the JRP could not address governance issues.[188]

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[185] *Dene Tha'* at para 42.
[186] *Dene Tha'* at paras 72-74.
[187] *Huu-Ay-Aht First Nation v British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 CNLR 74 at para 126.
[188] AF, page 18 at para 80; Louie Affidavit #1, Ex N, NNCR, Vol 2, Tab 9, pages 161, 165-167; Louie Affidavit #1, Ex Q, NNCR, Vol 2, Tab 11, pages 192-193; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 52.

118. Nadleh and Nak'azdli repeatedly expressed concern that the JRP process did not offer an opportunity for substantive, back-and-forth engagement with the Crown, and in particular that it could not provide a forum for government-to-government discussions concerning their *prima facie* governance rights and how to reconcile such rights with the discharge of the Crown's responsibilities.[189] This is consistent with the description of the NEB process in the affidavit of Crown representative Lesley Matthews in the 2006 CSTC judicial review: "The NEB functions as an independent, quasi-judicial tribunal, which means it operates at arm's length from the federal government and conducts itself like a court."[190] The JRP was thus not able to consult regarding *prima facie* governance rights.

119. The Applicants emphasized during Phase IV that the JRP report notes Aboriginal groups asserted governance rights, yet the JRP made no findings or recommendations regarding impacts on those rights, and the conditions for approval do not address Aboriginal governance or legal orders.[191] Thus the Crown's position that the JRP could not address governance issues was borne out.

120. Consequently, the first point in the Aboriginal Consultation Framework during which substantive consultation on *prima facie* governance rights could have occurred was Phase IV. This in itself is inconsistent with the Crown's obligation of timely consultation, before momentum builds in favour of a particular course of action; by the time Phase IV was underway the JRP's positive recommendation had created significant momentum for approval, prejudicing meaningful consultation on the Applicants' *prima facie* governance rights.[192]

121. Furthermore, the Crown misconstrued its duty as relating to consultation on the JRP report rather than impacts on Nadleh and Nak'azdli's rights and title, asserting: "the focus of our discussions and your written responses needs to be on concerns with how the Panel addressed your concerns through the terms and conditions outlined in the report."[193] Given Crown acknowledgement that the JRP process would not address governance rights, and the fact that the JRP report in

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[189] Louie Affidavit #1, Ex JJ, NNCR, Vol 3, Tab 19, page 539; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 60, pages 774-775; Louie Affidavit #1, Ex P, NNCR, Vol 2, Tab 10, page 186; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 45, pages 711-712; Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 46, pages 715-716; Clarke Affidavit, Ex I, NNCR, Vol 3, Tab 37.
[190] Clarke Affidavit, Ex I, NNCR, Vol 3, Tab 44, page 660 at para 6.
[191] Louie Affidavit #1, Ex GG, NNCR, Vol 2, Tab 16, page 207; Louie Affidavit #1, Ex JJ, NNCR, Vol 3, Tab 19, page 539; JRP Report, Vol 2, CB, Vol 2, Tab 21, pages 476, 484-485.
[192] *Sambaa K'e* at paras 164-166; *Squamish* (2004) at paras 74, 83, 92.
[193] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 61, page 822.

fact did not address governance issues, consultation on the JRP report could not offer a meaningful opportunity for consultation on Nadleh and Nak'azdli's *prima facie* governance rights. The Crown's narrow focus on the JRP report was also inconsistent with the Crown's Aboriginal Consultation Framework, which states that Phase IV would provide an opportunity to address "outstanding issues."[194]

122. The federal delegates that attended the 2014 All Clans Gathering did not engage in discussions, rather they observed and offered brief remarks.[195] The Applicants' attempts to meet with Crown decision-makers directly by inviting Cabinet Ministers to the Gathering were not accepted.[196] In the absence of the opportunity for Nadleh and Nak'azdli to consult directly with the Crown decision-makers, at a minimum the Crown delegates were obliged to meaningfully communicate to Crown decision-makers, in an in-depth fashion, the strength of claim to governance rights, potential impacts to such rights, and the issues raised by Nadleh and Nak'azdli so as to meaningfully inform the Order. Indeed this was the purpose of "hiring" the federal delegates at the All Clans Gathering, according to traditional protocol, to convey the message of YDA nations to Cabinet and particularly the Prime Minister.[197]

123. The day-long All Clans Gathering was a major undertaking involving hundreds of Yinka Dene elected and hereditary leaders, elders, *keyoh*/*keyah* holders, and clan members explaining their governance, discussing Project impacts and outlining the need for respectful approaches to decision-making that have regard for Yinka Dene and Crown law.[198] Similarly, the Applicants' written submissions involved hundreds of pages of evidence and explanation of their governance and stewardship obligations in the context of the Project.[199]

124. As the Crown has asserted privilege over the materials considered by Cabinet in making the Order, it is not possible to determine if impacts on Nadleh and Nak'azdli's *prima facie* governance rights were considered at all in making the Order. A Crown Consultation Report on the Project was provided to the Minister

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[194] Aboriginal Consultation Framework, MB, Vol 1, Tab 3, page 88.
[195] Louie Affidavit #1, NNCR, Vol 1, Tab 1, page 19 at para 68.
[196] Louie Affidavit #1, NNCR, Vol 1, Tab 1, page 18 at paras 64-65; Louie Affidavit #1, Ex II, NNCR, Vol 3, Tab 18; NNCR, Vol 4, Clarke Examination Response, Tab 70, page 1150.
[197] Louie Affidavit #1, NNCR, Vol 1, Tab 1, page 19 at para 67; Clarke Examination Response, NNCR, Vol 4, Tab 70, page 1154.
[198] Clarke Examination Response, NNCR, Vol 4, Tab 70, pages 1150-1154; Louie Affidavit #1, NNCR, Vol 1, Tab 1, pages 18-19 at paras 64-68; Sam Affidavit, NNCR, Vol 3, Tab 26, page 586 at paras 61-64.
[199] Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17.

of Natural Resources, although it is not apparent whether Cabinet considered the report in making its decision. [200]

125. In any event, the Crown Consultation Report is a high-level summary that does not provide a basis for meaningful, in-depth consideration of Nadleh and Nak'azdli's *prima facie* governance rights and potential impacts thereon. The relevant portions of the report consist of two pages regarding YDA and three pages regarding Nadleh and Nak'azdli, as well as the permitted three-page summary from YDA.[201] The Report briefly summarizes that the Applicants assert governance rights and are concerned with impacts on those rights arising from the Crown's conduct regarding the Project. The Report also notes that Nadleh and Nak'azdli sought respect from the Crown for their "laws and traditions" related to use of their territories, and "asked federal officials to take this message back to the Prime Minister."[202] The report does not assess the nature or strength of Nadleh and Nak'azdli's claims to governance rights, nor the impacts to those rights.

126. As Nadleh and Nak'azdli noted in their submissions to the Crown, their systems of governance are complex and multi-faceted, and require work to understand and appreciate.[203] Likewise, the impacts of the Project and the Order on their *prima facie* governance rights require careful and diligent consideration. Nadleh and Nak'azdli thus went to great lengths to set out their governance system and the impacts thereupon at the All Clans Gathering and in extensive written submissions. As indicated to the Crown, it is not possible for these issues to be meaningfully addressed and considered by the decision maker when condensed into a summary of a few pages.[204]

127. The Order approved the Project applying only the conditions set out in the JRP report, making no changes as a result of Phase IV consultations. The Crown's approach to Phase IV simply offered Nadleh and Nak'azdli an opportunity to "blow off steam," with no attempts by the Crown to substantively

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[200] Certificate of Cabinet Confidence, MB, Vol 2, Tab 39; Clarke Examination Response, NNCR, Vol 4, Tab 70, page 1148; AF, page 14 at para 59.
[201] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 63, pages 836-840; Louie Affidavit #1, Ex JJ, NNCR, Vol 3, Tab 19.
[202] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 63, page 837.
[203] Clarke Examination Response, NNCR, Vol 4, Tab 70, pages 1150-1151; Louie Affidavit #1, Ex HH, NNCR, Vol 2, Tab 17: App 1, pages 227-228; App 6, pages 386-387.
[204] Louie Affidavit #1, Ex LL, NNCR, Vol 3, Tab 20, page 542.

engage with the issues they raised.[205]

128. Phase IV consultations did not result in meaningful consideration by the Crown of potential impacts on the Applicants' *prima facie* governance rights as a result of the Order. This is further evident from the Crown's lack of response or reasons relating to Nadleh and Nak'azdli's *prima facie* governance rights.

The Crown failed to give reasons showing that the Applicants' governance rights were considered and to reveal what impact they had on the Order

129. The Crown's deep duty to consult ought to have entailed written reasons to show that Nadleh and Nak'azdli's concerns were considered and to reveal what, if any, impact they had on the Order.[206] This is particularly important given that it is not possible to know what materials the Cabinet, as Crown decision-maker, considered in making the Order.

130. The only response Nadleh and Nak'azdli received to their Phase IV written submissions and the All Clans Gathering were two template letters in June and July 2014, with certain modifications made to apply to YDA. These letters did not indicate that impacts on Nadleh and Nak'azdli's *prima facie* governance rights were considered, nor reveal the impact they had on the Order.

131. The June 2014 letter makes brief reference to governance issues without responding to them, then erroneously describes and responds to discussions at the All Clans Gathering that did not occur.[207]

132. The July 2014 letter acknowledges the assertion of governance rights and title and then repeats the Crown's position that resource development approval processes are not a forum for "determining," "recognizing" or "negotiating" Aboriginal rights and title.[208] The Crown's response regarding governance is virtually identical among all Aboriginal Applicants in these proceedings.[209] This

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[205] *Mikisew* at para 54; *Sambaa K'e* at para 89; *Wii'litswx* at para 178; *Haida* at paras 42, 49; *Delgamuukw* at para 168.
[206] *Haida* at para 44.
[207] Clarke Affidavit, Ex J, NNCR, Vol 3, Tab 63, pages 832-833; Louie Affidavit #1, Ex LL, NNCR, Vol 3, Tab 20, page 541; Letter to YDA from Canada, MB, Vol 2, Tab 38, page 469.
[208] Letter to YDA from Canada, MB, Vol 2, Tab 38, pages 466-467.
[209] Letter to Gitxaala from Canada, MB, Vol 2, Tab 31, pages 353-354; Letter to Gitga'at from Canada, MB, Vol 2, Tab 32, pages 374-375; Letter to Haisla from Canada, MB, Vol 2, Tab 33, pages 393-395; Letter to Haida from Canada, MB, Vol 2, Tab 34, pages 409-410; Letter to Kitasoo from Canada, MB, Vol 2, Tab 35, page 424; Letter to Heiltsuk from Canada, MB, Vol 2, Tab 36, pages 441-442; Letter to Coastal First Nations from Canada, MB, Vol 2, Tab 37, page 458; Letter to YDA from Canada, MB, Vol 2, Tab 38, pages 466-

is not responsive to the issues the Applicants raised regarding interim consultation on their *prima facie* governance rights, nor reflective of meaningful consideration of the impacts on such rights. In this regard the Crown's letter indicates that Nadleh and Nak'azdli's *prima facie* governance rights *were not* considered and *did not* have an impact on the Order. This is not adequate to fulfil the Crown's duty to consult, nor is it in keeping with the honour of the Crown.

The Crown failed to meet its duty

133. In summary, the Crown incorrectly determined that the content of its duty to consult regarding the Project did not include the Applicants' *prima facie* governance rights. Resulting from this error, the Crown did not adequately consult and accommodate Nadleh and Nak'azdli.

134. The Crown did not meaningfully consult Nadleh and Nak'azdli regarding the design and implementation of the consultation, review and decision-making process for the Project, and from the outset the Crown foreclosed accommodation of Nadleh and Nak'azdli's *prima facie* governance rights in that process.[210]

135. The Crown's mind was closed and it was not responsive to the issues of governance raised by Nadleh and Nak'azdli.[211]

136. The Crown postponed direct consultation until after substantial momentum had built in favour of approval of the Project by virtue of the JRP report.[212] Furthermore, the Crown's approach to consultation offered only an opportunity to exchange and discuss information, with no corresponding substantive dimension in which the Crown sought to understand and substantially address the issues Nadleh and Nak'azdli raised regarding their *prima facie* governance rights.[213]

137. There is no indication that the *prima facie* governance rights were considered in, or had any impact on, the Order.[214] Rather, the purported reasons for the Order indicate that these *prima facie* rights were not considered because of the Crown's incorrect determination that its duty to consult did not include such issues.

138. By refusing at every turn to include Nadleh and Nak'azdli's *prima facie* governance rights in the content of consultation and accommodation regarding the

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[210] *Mikisew* at paras 54, 57; *Imperial Oil* at paras 1, 9; *Dene Tha'* at paras 2, 100, 106-110.
[211] *Taku River* at para 25; *Haida* at paras 26-27, 45-46.
[212] *Sambaa K'e* at paras 164-166; *Squamish* (2004) at paras 74, 83, 92.
[213] *Sambaa K'e* para 89; *Wii'litswx* at para 178; *Haida* paras 42, 49; *Delgamuukw* para 168.
[214] *Haida* at para 44.

Project, the Crown does serious damage to the goal of reconciliation and protection of Aboriginal rights that underlies the duty to consult and accommodate.[215] Nadleh and Nak'azdli submit that the Crown's approach in this regard must not be allowed to stand and, consequently, the Order should be set aside and consultation ordered with regard to their *prima facie* governance rights.

D. Ensuring adequate consultation and accommodation requires quashing the Order and ordering consultation on prima facie governance rights

139. It is not possible for meaningful consultation and accommodation to occur if the Order is allowed to stand because the exercise of, and impacts upon, Nadleh and Nak'azdli's *prima facie* governance rights in this case go to the very question of whether the risks from the Project should be permitted in their territories. Phase V consultation is not a consideration of this question.

140. The Federal Court has noted that the statutory framework establishes the Order as the ultimate Crown decision authorizing the Project to proceed.[216] This is consistent with the wording of Certificates OC-060 and OC-061, which state that they authorize construction and operation of the Project.[217]

141. The Federal Court has stated as follows in relation to other pipeline projects: "where a duty to consult arises in connection with projects such as these it must be fulfilled at some point before the GIC has given its final approval for the issuance of a Certificate of Public Convenience and Necessity by the NEB."[218]

142. Nadleh and Nak'azdli respectfully submit that the Order must be set aside in order to allow an opportunity for the Crown to fulfil its duty to consult and accommodate in relation to their *prima facie* governance rights.

143. Nadleh and Nak'azdli adopt the submissions of Unifor that, if the Order is quashed or declared a nullity, Certificates OC-060 and OC-061 are a nullity. While Unifor makes these submissions with regard to failure to fulfill necessary statutory preconditions, the conclusion applies *a fortiori* in the context of failure to satisfy constitutional requirements as in Nadleh and Nak'azdli's case.

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[215] *Rio Tinto* at paras 32 and 34; The Honourable Lance Finch, *The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice* (Vancouver: Continuing Legal Education Society of British Columbia, 2012) at paras 5, 38, 43-44.
[216] *Gitxaala* at paras 16, 26.
[217] Certificate OC-060, CB, Vol 3, Tab 24, page 971; Certificate OC-061, CB, Vol 3, Tab 25, page 1092.
[218] *Brokenhead Ojibway First Nation v Canada (Attorney General)*, 2009 FC 484, [2009] FCJ No 608 at para 21.

PART IV – ORDER SOUGHT

144. The Applicants seek an order or orders:

a. Quashing the Order;

b. Declaring that Certificates of Public Convenience and Necessity OC-060 and OC-061 issued as a result of the Order are null and void;

c. Declaring that the Crown failed to fulfil its duty to consult and accommodate each of the Applicants Nadleh and Nak'azdli prior to making the Order;

d. Mandating mediation between the Crown and the Applicants to enable consultation and where required accommodation regarding the Applicants' *prima facie* governance rights in relation to the Project;

e. In the alternative to subparagraph (d), declaring that the Crown must consult with the Applicants and where required accommodate regarding their *prima facie* governance rights in relation to the Project;

f. Granting the Applicants costs of and incidental to this Application, including the motion for leave to bring this Application;

g. In the event that this Application is dismissed, directing that the Applicants shall not be required to pay costs to the Respondents, pursuant to Rule 400 of the *Federal Courts Rules*; and

h. Granting such further relief as this Honourable Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 21ST day of May, 2015 at Vancouver, British Columbia.

Cheryl Sharvit
Counsel for the Applicants

Gavin Smith
Counsel for the Applicants

PART V – TABLE OF AUTHORITIES

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Appendix 2: Legislation

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