Court File No.: A-437-14

FEDERAL COURT OF APPEAL

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B E T W E E N:

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

Applicants and appellants

and

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Respondents

and

THE ATTORNEY GENERAL OF BRITISH COLUMBIA,
AMNESTY INTERNATIONAL and
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Interveners

MEMORANDUM OF FACT AND LAW OF THE APPLICANT/APPELLANT HAISLA NATION

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MEMORANDUM OF FACT AND LAW OF THE

APPLICANT/APPELLANT HAISLA NATION

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PART I – CONCISE STATEMENT OF FACT

1. The Applicant/Appellant Haisla Nation ("**Haisla**") relies on the Agreed Statement of Facts[1] and the other specific facts referenced in this submission.

2. Haisla will be profoundly impacted by the proposed Project because:

   a. The proposed pipelines would cut across 85km of Haisla Territory, parallel to the Kitimat River and across numerous fish-bearing tributaries to the River;

   b. The proposed terminal site, which contains over 800 culturally modified trees, is located in the heart of Haisla Territory, across Kitimat Arm from Haisla's main residential reserve, Kitamaat IR No. 2.

   c. Tanker traffic associated with the Project would travel through Haisla Territory to and from the proposed terminal. [2]

3. Haisla is the only Aboriginal Nation claiming Aboriginal title to the terminal site or to the proposed pipeline right-of-way on the west side of Kitimat Arm.[3]

4. Haisla set out the basis for and nature of its Aboriginal title and rights and Haisla cultural heritage in its Final Argument to the Joint Review Panel ["**JRP**"], and relies on that submission.[4]

5. Haisla set out the way in which the Project will impact the lands, water and resources of Haisla Territory, Haisla Aboriginal rights and title and Haisla cultural heritage in its Final Argument to the JRP, and relies on that submission.[5]

6. The majority of the oil which will be transported on the pipeline is diluted bitumen ("**dilbit**").[6] How dilbit behaves when released to the environment and the

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[1] *Agreed Facts* **[Book of Major Documents ["MB"], Vol 1, Tab 1]**.
[2] Exhibit E9-6-26, p 2 **[Haisla Compendium of References ["HCR"], Vol 1, Tab 1, HCR p 1]**; Affidavit of Jim Clarke affirmed February 4, 2015 **["Clarke Affidavit"]**, Exhibit A at p 64 **[HCR, Vol 1, Tab 2A, HCR p 13]**. All page references in footnotes are to adobe page numbers, unless otherwise indicated.
[3] Affidavit #1 of Ellis Ross affirmed January 21, 2015 ["**Ross Affidavit**"], para 15 **[HCR, Vol 1, Tab 3, HCR p 122]**; Exhibit E9-6-28, p 17 **[HCR, Vol 2, Tab 4, HCR p 724]**; Exhibit E9-21-12, pp 27-28 **[HCR, Vol 2, Tab 4, HCR pp 725-726]**.
[4] Exhibit D80-104-2, paras 35-185 **[HCR, Vol 2, Tab 5, HCR pp 729-764]**.
[5] Exhibit D80-104-2, paras 186-189, 1052-1089, 1523-1535, 1627-1635 **[HCR, Vol 2, Tab 5, HCR pp 764-765, 772-778, and 782-786]**.
[6] JRP Report Vol 1, hardcopy ["**HC**"] p 4 **[Basic Common Book of Documents ["CB"], Vol 1, Tab 20, CB p 360]**.

toxicity of dilbit are not well understood.[7]

7. Haisla law, *nuyem*, requires the Haisla people to be stewards of Haisla Territory and to protect the lands, water and resources of Haisla Territory for future generations.[8] Haisla has taken a number of significant steps to do so, including rehabilitating the Kitimat River.[9]

8. Haisla participated fully in the JRP process.[10] After the JRP Report was issued, Canada met with Haisla twice, over the course of a total of four days.[11] This was the only opportunity Haisla had to discuss substantive concerns about the Project directly with Crown representatives.[12]

9. Haisla has filed for judicial review of the JRP Report and the Governor in Council ["**GiC**"] Decision, and has appealed the issuance of the National Energy Board ["**NEB**"] Certificates.[13]

PART II – POINTS IN ISSUE

10. The following points are in issue:

a. Did the JRP comply with the requirements of the *Canadian Environmental Assessment Act, 2012*[14] ["***CEAA, 2012***"] and the *Amended Agreement Between the National Energy Board and the Minister of Environment Concerning the Joint Review of the Northern Gateway Project*[15] ["***Amended JRP Agreement***"] in its environmental assessment of the Project?

b. What is the appropriate remedy?

c. If the JRP Report is found invalid, can the GiC Decision still stand?

d. Did the Crown meet its obligation to consult?

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[7] JRP Report Vol 1, HC pp 48, 65 and 74 **[CB, Vol 1, Tab 20, CB pp 404, 421, and 430]**; JRP Report Vol 2, HC pp 97-99, **[CB, Vol 2, Tab 21, CB pp 536-538]**; Transcript Vol 167, lines 17452-17462 **[HCR, Vol 2, Tab 6, HCR pp 812-813]**.
[8] Ross Affidavit, paras 6-7 **[HCR, Vol 1, Tab 3, HCR pp 119-120]**.
[9] Ross Affidavit, paras 8-21 **[HCR, Vol 1, Tab 3, HCR pp 120-123]**.
[10] Ross Affidavit, paras 56-57 **[HCR, Vol 1, Tab 3, HCR pp 135-137]**.
[11] Ross Affidavit, para 94 **[HCR, Vol 1, Tab 3, HCR p 150]**.
[12] Ross Affidavit, para 62 **[HCR, Vol 1, Tab 3, HCR p 138]**.
[13] Haisla Nation v Canada (Minister of Environment) et al, Amended Notice of Application, A-63-17; Haisla Nation v AG of Canada et al, A-447-14; Haisla Nation v AG of Canada et al, A-522-14 **[CB, Vol 1, Tabs 5, 12, and 18]**.
[14] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52.
[15] *Amended Agreement Between the National Energy Board and the Minister of Environment Concerning the Joint Review of the Northern Gateway Project* (3 August 2012)[**MB, Vol 1, Tab 10]**.

e. Did the Crown consider relevant factors in its public interest assessment?

f. Are the reasons provided in support of the Decision adequate?

g. What is the appropriate remedy?

h. If the Decision is found invalid, can the Certificates still be valid?

PART III - SUBMISSIONS

A. OVERVIEW

11. The JRP Report cannot stand up to judicial scrutiny for the following reasons:

a. It failed to meet the requirements of *CEAA, 2012* and the *Amended JRP Agreement*;

b. It made findings that are:

i. based on misapprehension of the evidence before it;
ii. not supported by or are contradicted by the evidence; or
iii. not supported by a rationale.

12. The Decision of the GiC to approve the Project ought to be quashed because:

a. It relies on a JRP Report which is fundamentally flawed;

b. It was reached without meaningful consultation with or accommodation of Haisla;

c. It relies on an assessment of public interest that did not consider impacts to Aboriginal rights; and

d. It is not supported by the required reasons.

13. As advised by the directions of Justice Stratas, Haisla relies on the submissions of other Applicants, where indicated.[16]

B. THE JRP REPORT FAILS TO MEET *CEAA, 2012* REQUIREMENTS

14. Haisla adopts the submissions of the Applicant BC Nature regarding the standard of review for the alleged *CEAA, 2012* errors.

15. The *Amended JRP Agreement* incorporates the requirements of *CEAA, 2012*, which requires[17] the assessment of environmental effects, including:

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[16] Stratas, JA Direction of April 20, 2015 **[MB, Vol 1, Tab 57]**.

[17] *Alberta Wilderness Assn v Canada (Minister of Fisheries and Oceans)*, [1999] 1 FCR 483 (FCA), [1998] FCJ No 1746 (QL) [*Alberta Wilderness* cited to FCJ] (the assessment of these effects is mandatory at para 17); relying on *Friends of the Oldman River Society v Canada (Min of Transport)*, [1992] 1 SCR 3, 88 DLR (4th) 1.

> 5(1) … (c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on … (ii) physical and cultural heritage, (iii) the current use of lands and resources for traditional purposes, or (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance;[18]

16. The environmental effects to be taken into consideration under s 5(1)(c) are indirect, as opposed to direct, effects. These are effects that flow from changes to the environment caused by the Project. Even if the change to the environment may not be determined to be significant, *CEAA, 2012* requires an assessment of the effects of that change to the environment on the elements delineated in s 5(1)(c), and a determination of whether those effects are significant.[19]

17. The *Amended JRP Agreement* also incorporates the factors to be considered under *CEAA, 2012*, including:

> 19(1)(*a*) the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project.[20]

18. The JRP was required to review the Project in a careful and precautionary manner,[21] and the *Amended JRP Agreement* incorporated the reporting requirements under *CEAA, 2012*, by requiring the JRP to "set out the Panel's rationale, conclusions and recommendations".[22] (Underlining added).

1. JRP Erred by Not Assessing Effects on Haisla Cultural Heritage

19. Neither *CEAA, 2012* nor the *Amended JRP Agreement* includes a definition of cultural heritage, but the language of *CEAA, 2012* provides guidance on what cultural heritage is.[23] *CEAA, 2012* refers to both physical heritage and cultural heritage. Thus, cultural heritage must be something other than physical heritage. *CEAA, 2012* also refers to a structure, site or thing of historical, archaeological, paleontological or

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[18] *CEAA, 2012*, s 5. These factors must also be considered in the Canadian context generally where the Project requires a federal authority to exercise a power, as here (s 5(2)).
[19] Beverly Hobby, *Canadian Environmental Assessment Act: An Annotated Guide* (Toronto: Thomson Reuters Canada Limited, 2015) (loose-leaf revision 16), pp 24.8-24.11.
[20] *CEAA, 2012*, s 19.
[21] *CEAA, 2012*, ss 4(1)(b) and 4(2); *Amended JRP Agreement*, s 6.3 **[MB, Vol 1, Tab 10, MB p 221]**.
[22] *CEAA, 2012*, s 43; *Amended JRP Agreement*, s 9.1 **[MB, Vol 1, Tab 10, MB p 222]**.
[23] See *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at paras 26-27, [2002] 2 SCR 559.

architectural significance independently of its reference to cultural heritage.[24] Thus cultural heritage must be understood to refer to something other than a physical structure or thing.

20. Haisla provided the JRP with extensive evidence of its cultural heritage and how the Project may impact Haisla cultural heritage.[25] The JRP made no finding that Haisla cultural heritage is not as described by Haisla and made no findings at all about impacts to Haisla cultural heritage specifically.

21. The JRP Report recommended that the Project is not likely to cause significant adverse environmental effects in Canada on cultural heritage,[26] but included no analysis of cultural heritage and no reasons for its finding that the Project is not likely to cause significant adverse effects on cultural heritage.

22. The JRP Report used the term "cultural heritage" only three times. Once when it included a definition of environmental effects which includes the term "cultural heritage" in an Appendix,[27] once when it acknowledged that Aboriginal people had told the JRP of their efforts to maintain and build their cultural heritage,[28] and once when it provided its recommendations.[29]

23. The JRP has simply failed to assess impacts to Haisla cultural heritage and the JRP's finding that there will be no significant adverse effects on cultural heritage should be quashed.

2. JRP Erred by Not Assessing Effects on Haisla Current Use

24. The JRP's finding that, during construction and routine operations, there would not be a significant adverse effect on the ability of Aboriginal groups to use lands, waters, or resources for traditional purposes in the Project area[30] is not reasonable. It was arrived at without regard to the evidence before the JRP and failed

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[24] See *CEAA 2012*, s 5(1)(c).
[25] Exhibit D80-104-2, paras 172 -185, 216-217, 628, 1078-1089, 1532-1534, and 1643 **[HCR, Vol 2, Tab 5, HCR pp 760-764, 766-767, 776-778, 784 and 787-788]**; Transcript Vol 8, lines 3916, 3960-3962, 3975-3977, 3980, 3985-3986, 4046-4050, 4075-4101, 4137-4138, 4219-4235, and 4237-4239 **[HCR, Vol 2, Tab 7, HCR pp 815-829]**; Exhibit D80-23-2, pp 21-25, 30-35, 36-37, 38-40, 63-64, 65-67, and 68-70 **[HCR, Vol 2, Tab 8, HCR pp 830-853]**; Exhibit D80-23-3, pp 14-15, 21-24, 30-32, 34-42, and 77-79 **[HCR, Vol 2, Tab 8, HCR pp 854-869]**.
[26] JRP Report Vol 2, HC p 311 **[CB, Vol 2, Tab 21, CB p 750]**.
[27] JRP Report Vol 2, HC p 404 **[CB, Vol 2, Tab 21, CB p 843]**.
[28] JRP Report Vol 1, HC p 25 **[CB, Vol 1, Tab 20, CB p 381]**.
[29] JRP Report Vol 2, HC p 311 **[CB, Vol 2, Tab 21, CB p 750]**.
[30] JRP Report Vol 2, HC p 50 **[CB, Vol 2, Tab 21, CB p 489]**.

to consider whether changes caused by the Project to the environment would have a significant effect on Haisla current use of land and resources for traditional purposes.

25. In reaching its conclusions regarding the Project-wide effect on Aboriginal groups as a whole, the JRP relied on the Northern Gateway ["**NGP**"] assessment of significance of impacts to biophysical resources.[31] The JRP is clear that it adopted the nexus between impacts to biophysical resources and impacts to the ability to continue to use lands, waters, and resources for traditional purposes within the Project area put forward by NGP.[32] As a result, the JRP relied on the determination of significance of the direct effects of the Project on the environment in assessing significance of indirect effects.

26. Further, the JRP did not consider what the effect of the Project would be on Haisla's use of lands, waters and resources for traditional purposes. Instead, the JRP made a global, Project-wide assessment of Project impacts on Aboriginal groups as a whole.[33]

27. The JRP found that the effects from construction and operation of the Project would be temporary. This ignores the indirect effect of the Project, which is that Haisla and Haisla members will no longer be able to access the terminal site and the waters in front of the terminal for the duration of the Project.

28. Had the JRP complied with the mandatory requirement of assessing the indirect effects of the Project on Haisla's use of lands, waters and resources for traditional purposes, it would have had to conclude that the Project would permanently impair Haisla's ability to use the lands, waters and resources at the terminal site for the lifetime of the Project. It would then have had to consider whether this was a significant adverse effect on Haisla current use of land and resources for traditional purposes.

29. The JRP's failure to the assess the effect of the exclusion of Haisla and Haisla members from the terminal site and marine safety zone for the lifetime of the Project undermines the basis for and reasonableness of its conclusion on the significance of effects on the use of lands, waters and resources for traditional purposes. This finding cannot attract deference, and should be quashed.

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[31] JRP Report Vol 2, HC p 49 **[CB, Vol 2, Tab 21, CB p 488]**.
[32] JRP Report Vol 2, HC p 50 **[CB, Vol 2, Tab 21, CB p 489]**.
[33] JRP Report Vol 2, HC p 307 **[CB, Vol 2, Tab 21, CB p 746]**: "On balance, the Panel finds that …" (Underlining added).

3. JRP Findings Regarding Culturally Modified Trees are Unreasonable

30. The JRP recognized Culturally Modified Trees ["**CMTs**"] as heritage resources that are important to Aboriginal communities as demonstrations of their historical and continuing use, occupation, and cultural affinity with the land.[34]

31. The JRP found that "there would be no significant adverse effects to heritage resources, including any heritage resources of significance to Aboriginal groups during construction and routine operations".[35] This finding is not reasonable because it is based on a misapprehension of the evidence and because the Project will require the felling of a significant number of Haisla CMTs at the terminal site.

a) CMTs are Present at the Terminal Site

32. The JRP made an obvious and egregious error when it stated that there are no CMTs at the proposed terminal site. The evidence before the JRP was that the terminal site contains over 800 pre-1846 and post-1846 CMTs.[36] In its Final Written Argument, Haisla pointed out to the JRP the evidence before it regarding the presence of over 800 CMTs at the terminal site.[37] Yet the JRP completely overlooked this evidence when it wrote in its Report that NGP had said there were no CMTs at the terminal site[38] and Haisla stated that CMTs were near the terminal site.[39]

33. The statements in the JRP Report, when considered in the context of the evidence before the JRP, demonstrate that the JRP made this finding of fact without regard to the material before it. [40] It was simply not open to the JRP to ignore the uncontroverted evidence regarding the presence of hundreds of CMTs at the terminal site.[41]

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[34] JRP Report Vol 2, HC p 276 **[CB, Vol 2, Tab 21, CB p 715]**.
[35] JRP Report Vol 2, HC p 276 **[CB, Vol 2, Tab 21, CB p 715]**.
[36] Exhibit B1-5, p 17 **[HCR, Vol 2, Tab 9, HCR p 872]**; Exhibit B3-18, p 139 **[HCR, Vol 2, Tab 9, HCR p 873]**; Exhibit B3-24, p 54 **[HCR, Vol 2, Tab 9, HCR p 874]**; Transcript Vol 104, lines 29738-29781 **[HCR, Vol 2, Tab 9, HCR pp 875-879]**.
[37] Exhibit D80-104-2, paras 121, 137, 139, and 1103-1110 **[HCR, Vol 2, Tab 5, HCR pp 747-748, 753 and 779-781]**.
[38] JRP Report Vol 2, HC p 175 **[CB, Vol 2, Tab 21, CB p 614]**.
[39] JRP Report Vol 2, HC p 275 **[CB, Vol 2, Tab 21, CB p 714]**.
[40] *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paras 60-61, 282 DLR (4th) 413; see also *Bains v Canada (Minister of Employment and Immigration*), [1993] FCJ No 497 (QL) at 5, (1993) 63 FTR 31 (FCTD) [*Bains* cited to FCJ].
[41] *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC D-53 at para 17, 1998 CanLII 8667 (FC) [*Cepeda-Gutierrez*].

34. The nature of the JRP's misapprehension of the evidence before it completely undermines the reliability of its findings and conclusions regarding the Project's impacts on CMTs and in particular on Haisla CMTs at the terminal site.

b) JRP's Conclusion on Mitigation is Unreasonable

35. The JRP Report concluded that impacts to CMTs could be mitigated by referring to provincial requirements regarding pre-1846 CMTs and by including a condition that NGP file a plan to protect and manage post-1846 CMTs.[42]

36. The evidence before the JRP, however, does not reasonably support any conclusion other than that the construction of the terminal would result in the extensive destruction of Haisla CMTs:

a. NGP's plans are to clear the majority of the vegetation at the terminal site, meaning that extensive destruction of post-1846 CMTs would be required for construction.[43]

b. NGP plans to clear at least 150ha of the 220 ha fenced area.[44] This leaves the possibility of only 70 ha remaining uncleared.

c. CMT archaeological site FlTe33 covers 90% of the terminal site, or 198ha.[45] Thus, at least 128 ha of FlTe33 will have to be cleared for construction.[46]

d. NGP's site development plan for the terminal site demonstrates the extent of the clearing required. Post-construction tree planting in no way mitigates the destruction of CMTs.[47]

37. Had the JRP properly understood the evidence before it, the JRP would have had to conclude that a large number of the CMTs at the terminal site would have to be destroyed. The JRP would then have had to consider whether this effect was significant. Without this analysis the JRP's findings cannot stand. The JRP's findings

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[42] JRP Report Vol 2, HC p 276 **[CB, Vol 2, Tab 21, CB p 715]**; Conditions 95-98, JRP Report Vol 2, HC p 381 **[CB, Vol 2, Tab 21, CB p 820]**.
[43] Transcript Vol 146, lines 19198-19199 **[HCR, Vol 2, Tab 10, HCR pp 880-881]**; Transcript Vol 104, lines 29738-29781 **[HCR, Vol 2, Tab 9, HCR pp 875-879]**.
[44] Exhibit B3-1, pp 41-42 **[HCR, Vol 2, Tab 11, HCR pp 882-883]**. Clearing of 110ha of forested land base and 40ha of cutblocks.
[45] 90% of 220 ha = 198 ha.
[46] Transcript Vol 104, lines 29758 to 29766 **[HCR, Vol 2, Tab 9, HCR pp 877-878]**; Even if all of the 70ha which remain uncleared are on the 198ha CMT site, 128ha of the CMT site will still be cleared.
[47] Exhibit B184-9 **[HCR, Vol 2, Tab 12, HCR p 884]**; Exhibit B3-18, pp 48 and 52 **[HCR, Vol 2, Tab 12, pp 885-886]**.

that there would be no significant adverse effects to heritage resources of significance to Aboriginal groups during construction and routine operation should be quashed. [48]

4. JRP Erred in Assessing Significance of Adverse Effects of a Spill

38. The JRP failed to conduct its assessment in a precautionary manner when considering effects of a large spill and has not assessed whether a large spill in Haisla Territory would have significant adverse environmental effects on Haisla current use of land and resources for traditional purposes or on Haisla cultural heritage.

39. Haisla relies on the submissions of the Applicants Forestethics et al. regarding the JRP's errors in the assessment of the effects of spilled diluted bitumen and of the risks of geohazards and on the submissions of the Applicant BC Nature regarding the JRP's failure to meet *CEAA, 2012* requirements to assess environmental effects of accidents or malfunctions.

40. The JRP found that a large oil spill would result in significant adverse environmental effects. The JRP also found that these effects would not be permanent and widespread.[49] The JRP concluded that after mitigation, the likelihood of significant adverse environmental effects resulting from Project malfunctions or accidents is very low.[50] Despite stating this repeatedly, however, the JRP has not set out a cogent rationale for this finding. Further, the approach taken to the environmental assessment and the JRP's analysis do not provide support for the conclusion as it relates to effects of an accident or malfunction on Haisla.

41. A reading of the whole of the Report suggests that the finding that the likelihood of significant adverse environmental effects resulting from Project malfunctions or accidents is very low is based on the JRP's subordinate findings that:

a. a large oil spill will not result in widespread effects;[51]

b. effects of a large oil spill will be temporary;[52] and

c. a large spill is unlikely to occur.[53]

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[48] *Athabasca Chipewyan First Nation v British Columbia Hydro and Power Authority*, 2001 FCA 62 at para 27, [2001] 3 FCR 412.
[49] JRP Report Vol 2, HC p 129 **[CB, Vol 2, Tab 21, CB p 568]**. See also JRP Report Vol 2, HC pp 12, 50 and 168 **[CB, Vol 2, Tab 21, CB pp 451, 489 and 607]**.
[50] JRP Report Vol 2, HC pp 13 and 168 **[CB, Vol 2, Tab 21, CB pp 452 and 607]**.
[51] JRP Report Vol 2, HC p 168 **[CB, Vol 2, Tab 21, CB p 607]**.
[52] JRP Report Vol 2, HC p 168 **[CB, Vol 2, Tab 21, CB p 607]**.
[53] JRP Report Vol 2, HC pp 12, 146, and 148 **[CB, Vol 2, Tab 21, CB pp 451, 585, and 587]**.

42. The JRP report confounds the analysis of the geographic and temporal extent of effects with the likelihood of effects. As a result, the JRP's determination of likelihood alone cannot be relied on as the rationale for the conclusion.

43. The JRP reached its conclusion about the environmental effects of accidents or malfunctions in the absence of either an analysis of expected effects of a spill or an established standard for the recovery of the environment after a large spill of dilbit.[54] The JRP simply determined that, although significant, the adverse effects from an accident or malfunction would not be widespread or permanent without attaching geographic or temporal parameters to those two terms, respectively, to constitute a proper analysis of effects.

44. Further, since there is no standard to which the proponent can be held for the recovery of the environment after a large spill of dilbit, [55] the JRP's analysis did not provide the foundation for a determination of significance.

45. The JRP relied on the recovery of the biophysical environment to determine that the effects will not be permanent. In doing so, the JRP relied on a definition of recovery that contemplates a return to a functioning ecosystem. But the JRP did not consider whether a return to functioning ecosystems is recovery for the purpose of current use of land and resources by Haisla or Haisla cultural heritage.[56]

46. The studies relied on in NGP's Recovery Document did not include recovery information for many of the fish species in the Kitimat River or for species in the Project area.[57] When Haisla asked NGP to provide information about how many of the species assessed in the Recovery Document were found in the Project area, the JRP refused to compel the disclosure of this information.[58] As a result, the JRP did not have before it evidence of recovery times for species present in Haisla Territory and relied on by Haisla.[59]

47. The JRP's conclusion that the effects of a large spill would not be widespread[60] does not address the significance of effects of an accident or

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[54] *Greenpeace Canada v Canada (Attorney General)*, 2014 FC 463 at para 244, [2014] FCJ No 515 (QL) [*Greenpeace*].
[55] JRP Report Vol 2, HC p 124 **[CB, Vol 2, Tab 21, CB p 563]**.
[56] JRP Report Vol 2, HC p 129 **[CB, Vol 2, Tab 21, CB p 576]**.
[57] Exhibit B204-1 **[HCR, Vol 2, Tab 13, HCR pp 887-888]**; Transcript Vol 140, lines 11857-11916 **[HCR, Vol 2, Tab 13, HCR pp 889-895]**.
[58] Transcript Vol 140, lines 11857 to 11916 **[HCR, Vol 2, Tab 13, HCR pp 889-895]**.
[59] Transcript Vol 140, lines 11912-11914 **[HCR, Vol 2, Tab 13, HCR pp 894-895]**.
[60] Widespread: found or distributed over a large area of number of people; *Oxford Dictionary of English*, 3rd ed, *sub verbo* "widespread".

malfunction in Haisla Territory, on Haisla use of lands, water or resources, or on Haisla cultural heritage. The assessment was conducted on a Project-wide basis and cannot substitute for an assessment of the effects to Haisla current use or Haisla cultural heritage.

48. The evidence before the JRP regarding potential spills in Haisla Territory was that:

a. a large spill would cause significant adverse environmental effects;[61]

b. the exact nature of the adverse effects could differ widely as a result of many variables;[62]

c. the Kitimat River is a high-risk, high-consequence area,[63] comprising important and sensitive fish habitat,[64] for which there is no safe volume of dilbit release;[65]

d. there are a minimum of 74 potential spill pathways from the pipeline which could reach the Kitimat River;[66]

e. spill response in the Upper Kitimat would be difficult due to access issues;[67]

f. a spill into the Kitimat River could cause significant adverse effects to fish populations which might not be reversible;[68]

g. a spill into the Kitimat River could cover a stretch of river over 65 km long and eventually reach the Kitimat River estuary and marine waters;[69]

h. a spill into Kitimat Arm at the terminal could extend across the Arm to the opposite shoreline at Kitamaat IR No. 2.[70]

49. An impact can be significant even if it is limited to a local discrete area.[71] The premise that an effect cannot be significant merely because it is not "widespread"

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[61] JRP Report Vol 2, HC p 129 **[CB, Vol 2, Tab 21, CB p 575]**.
[62] Exhibit B39-3, p 50 **[HCR, Vol 2, Tab 14, HCR p 896]**.
[63] Transcript Vol 88, lines 8870-8871 **[HCR, Vol 2, Tab 15, HCR pp 897-898]**.
[64] Transcript Vol 88, line 8715; Transcript Vol 107, lines 3356-3359 **[HCR, Vol 2, Tab 16, HCR pp 899-901]**.
[65] Transcript Vol 88, lines 8719-8720 **[HCR, Vol 2, Tab 16, HCR p 900]**.
[66] Exhibit B20-23, pp 2-6; Exhibit B20-24; Exhibits B109-14 to B109-23 **[HCR, Vol 2, Tab 17, HCR pp 902-923]**.
[67] Transcript Vol 147, lines 19778 -19780 and 19835 **[HCR, Vol 2, Tab 18, HCR pp 924-925]**.
[68] Transcript Vol 99, lines 22830-22832; Transcript Vol 146, lines 18793-18796, 18970 and 18994 **[HCR, Vol 2, Tab 19, HCR pp 926-931]**.
[69] Exhibit B80-3, p 61; Transcript Vol 100, lines 24141 **[HCR, Vol 2, Tab 20, HCR pp 932-933]**.
[70] Exhibit B3-22, pp 92 and 113 **[HCR, Vol 2, Tab 21, HCR pp 934-935]**.

must therefore be rejected outright. Further, both localized and non-permanent effects can result in significant adverse effects on Haisla use of lands, water and resources and on Haisla cultural heritage.

50. The JRP recognized the disruptive nature of a large spill to the use of land and resources by Aboriginal people.[72] Further, the JRP's findings that recovery of functioning ecosystems will occur did not preclude the JRP from concluding that adverse effects could last several years to multiple decades.[73] The JRP also acknowledged that localized populations or species may be permanently affected.[74] What the JRP did not recognize was the extent to which these effects could have adverse effects on Haisla current use and on Haisla cultural heritage.

51. If one of the localized species or populations permanently affected by a spill were one of the cornerstone species of Haisla culture – such as eulachon, salmon or shellfish - the result would be a significant adverse effect on Haisla current use and Haisla cultural heritage.

52. In the context of Haisla Territory and from Haisla's perspective, the potential impacts of a spill are significant.[75] The JRP had before it evidence of the tainting of eulachon and the effect that the tainting of eulachon has had on Haisla cultural heritage.[76] The JRP also had before it evidence of Haisla cultural heritage and the importance that resource access, gathering and processing plays in Haisla cultural heritage.[77]

53. The JRP conclusion that after mitigation, the likelihood of significant adverse environmental effects resulting from project malfunctions or accidents is very low should be quashed.

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[71] *West Vancouver v British Columbia*, 2005 FC 593 at para 86, [2006] 3 FCR D-63.
[72] JRP Report Vol 2, HC pp 50 and 307 **[CB, Vol 2, Tab 21, CB pp 489 and 746]**.
[73] JRP Report Vol 2, HC pp 12, 130 and 147 **[CB, Vol 2, Tab 21, CB pp 451, 569 and 586]**.
[74] JRP Report Vol 2, HC p 129 **[CB, Vol 2, Tab 21, CB p 568]**.
[75] Exhibit D80-104-2, paras 916-930 **[HCR, Vol 2, Tab 5, HCR pp 768-771]**.
[76] Transcript Vol 8, lines 3851 and 4229-4235 **[HCR, Vol 2, Tab 7, HCR pp 814 and 827-828]**.
[77] Transcript Vol 8, lines 3980, 4084-4086, 4095-4101, 4137-4138, and 4239 **[HCR, Vol 2, Tab 7, HCR pp 818, 822-825 and 829]**; Exhibit D80-23-2, pp 21-25, 30-35, 36-37, 38-40, 63-64, 65-67, and 68-70 **[HCR, Vol 2, Tab 8, HCR pp 830-853]**; Exhibit D80-23-3, pp 14-15, 21-24, 30-32, 34-42, and 77-79 **[HCR, Vol 2, Tab 8, HCR pp 854-869]**.

5. Remedy

54. Where the JRP findings or conclusions have been quashed, the issue should be sent back for reconsideration.[78]

C. THE GOVERNOR IN COUNCIL DECISION IS UNLAWFUL

55. If this Court agrees that any of the findings in the JRP Report did not meet the requirements of *CEAA, 2012* and the *Amended JRP Agreement*, then the GiC Decision is not valid. Haisla adopts the submissions of the Applicant Unifor addressing the review of the GiC's exercise of its statutory powers.

D. NO MEANINGFUL CROWN CONSULTATION WITH HAISLA

1. Crown's Duty to Consult Haisla

56. Haisla's concerns about impacts to Haisla Aboriginal rights and title flowing from the Decision have not been addressed by the Crown through an adequate or meaningful consultation process.

57. Haisla adopts the submissions of the Applicants Nadleh and Nak'azdli on the law of consultation and accommodation.

58. The duty to consult is a constitutional duty invoking the honour of the Crown. It must be met.[79] A Crown decision should not proceed until consultation has been adequate to discharge the honour of the Crown. The remedy for a breach of the duty to consult can include the quashing of the impugned decision.[80]

59. The Supreme Court of Canada has recently confirmed that Aboriginal title includes not just the right of first refusal with respect to Crown land management or usage plans, but the right to exclusively occupy the land, to proactively use and manage the land, and to benefit from the economic fruits of the land.[81] The transfer

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[78] *Pembina Institute for Appropriate Development v Canada (AG)*, 2008 FC 302 at para 80, [2008] 4 FCR D-12 [*Pembina*].

[79] *Rio Tinto Alcan v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 75, [2010] 2 SCR 650 [*Rio Tinto*].

[80] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 69, [2005] 3 SCR 388 [*Mikisew Cree*]. *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470, 178 DLR (4th) 666 [*Halfway River*].

[81] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 117-118 and 169, 1997 CanLII 302 (SCC) [*Delgamuukw*]; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 67, 74-75 and 94, [2014] 2 SCR 256 [*Tsilhqot'in*].

of Aboriginal title land to a third party is more than just a "meaningful diminution" of these ownership rights. It is the most complete impairment of the right possible.[82]

60. The scope of consultation owed to Haisla with respect to potential infringement of Aboriginal title is at the highest possible end of the spectrum described by the Supreme Court of Canada in *Haida*.[83] The Supreme Court of Canada has recently confirmed that where a claim is particularly strong, the Aboriginal interest must be preserved, pending final resolution of the claim.[84]

61. The issuance of Certificates under the *National Energy Board Act* ["***NEB Act***"] is the primary regulatory decision required for the Project to proceed. Section 30 of the *NEB Act* is a complete bar to the operation of a pipeline in the absence of a Certificate issued under the *NEB Act*.[85] Without the Certificates, the Project cannot proceed.

62. Even if the Decision is considered a "strategic, higher level" or planning decision, the duty to consult is triggered. This is because regulatory decisions that flow from the Decision will have direct adverse impacts on land use.[86] If consultation "is to be meaningful, [it] cannot be postponed to the last and final point in a series of decisions", since "[o]nce important preliminary decisions have been made and relied upon by the proponent and others, there is clear momentum to allow a project".[87]

63. While NGP will be required to meet other regulatory hurdles before it can construct and operate its Project, it is the Certificates that breathe life into the Project and create the momentum that facilitates the adverse impacts on Haisla Aboriginal rights and title. The potential for future consultation, which is not conceded to exist, cannot save the defective Decision. The Crown's duty to consult in connection with a

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[82] *Tsilhqot'in*, *supra* note 81 at para 124.

[83] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 43-44, [2004] 3 SCR 511 [*Haida*].

[84] *Tsilhqot'in*, *supra* note 81 at para 91.

[85] *National Energy Board Act*, RSC 1985, c N-7, s 30.

[86] *Rio Tinto*, *supra* note 79 at para 44; *Squamish Nation v British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991 at paras 137-147, 66 BCLR (5th) 137; *Hupacasath First Nation v Canada (Foreign Affairs)*, 2013 FC 900 at para 57, 438 FTR 210.

[87] *The Squamish Nation et al v British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320 at paras 74-75, 34 BCLR (4th) 280; see also *Haida*, *supra* note 83 at para 76; *Sambaa K'e Dene First Nation v Duncan*, 2012 FC 204 at para 165, 3 FCR D-1; *Gitxaala Nation v Canada (Transport, Infrastructure and Communities)*, 2012 FC 1336 at para 40, 421 FTR 169 [*Gitxaala*].

pipeline project must be fulfilled at some point before the GiC has given final approval for the issuance of an NEB Certificate.[88]

64. Further, the *NEB Act* grants powers to companies with Certificates for the construction and operation of pipelines, including the right to take land and property necessary for the construction, maintenance and operation of its pipeline and to construct roads, buildings, wharves, and docks.[89] While taking Crown land requires the consent of the Crown, the NEB Certificates provide authorization for taking interests in fee simple lands without the consent of the owner.

65. Haisla holds the fee simple interest in two parcels of land which NGP proposes to cross with its pipeline right-of-way. The raising of a fee simple title does not extinguish Aboriginal title.[90] By acquiring this land, Haisla has mitigated the infringement of its Aboriginal title which resulted from the issuance of a fee simple interest to a third party. The Decision, by granting NGP the right to take an interest in this land, re-infringes Haisla's ability to choose how this land will be used.

66. The Project requires the taking of land and resources and the alteration of land and resources to which Haisla asserts Aboriginal title and on which Haisla members exercise other Aboriginal rights.[91] The use to which Haisla Aboriginal title land would be put is inconsistent with the way Haisla would chose to use this land.[92]

67. This is not a situation like the one addressed by this Court in *Council of the Innu of Ekuanitshit v Canada (Attorney General)*,[93] where the claim and the seriousness of adverse impact from the Project can be characterized as limited:

a. The Crown has agreed that Haisla has a strong *prima facie* claim to Aboriginal title to the terminal site and portions of the pipeline right-of-way. Canada also agreed that Haisla has a strong *prima facie* claim to hunt, fish and gather freshwater and marine species in the Kitimat River, Kitimat Estuary, Kitimat Arm and portions of Douglas Channel.[94]

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[88] *Brokenhead Ojibway Nation v Canada (Attorney General)*, 2009 FC 484 at para 21, 345 FTR 119 [*Brokenhead*].
[89] *NEB Act*, s 73.
[90] *Delgamuukw*, *supra* note 81 at para 175.
[91] Ross Affidavit, paras 24-25 **[HCR, Vol 1, Tab 3, HCR pp 124-125]**.
[92] Ross Affidavit, paras 126-127 **[HCR, Vol 1, Tab 3, HCR p 161]** and Exhibit H pp 1054-1066 at 1061 **[HCR, Vol 1, Tab 3F, HCR pp 658-670 at p 665]**.
[93] *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189 at para 106, 376 DLR (4th) 348 [*Innu of Ekuanitshit*].
[94] *Agreed Facts*, paras 111-112 **[MB, Tab 1, MB pp 25-26]**.

b. Haisla has provided evidence that shows it meets all the requirements to demonstrate sufficient occupation to support a claim of Aboriginal title to the terminal site and pipeline right-of-way land;

c. Haisla has filed a Writ seeking a declaration of Aboriginal title to the land; and

d. Haisla has included the terminal site and a portion of the pipeline right-of-way land in a treaty land selection offer presented to the Crown.[95]

74. The Project has the potential to infringe asserted Haisla Aboriginal rights and title by the alienation of the right-of-way and terminal site land. The infringement being proposed is of the highest level because:

a. It permits the use of these lands by a third party for an indeterminate period;

b. It dedicates the lands to a use that Haisla would not choose and for a project that contravenes Haisla's stewardship principles for the proactive use and management of its Aboriginal title lands, both at the terminal site and on the pipeline route, and elsewhere in its Territory;

c. It deprives the present and future Haisla generations of their right to exclusively occupy the land, to use if for modern economic purposes and to enjoy the economic fruits of the land. The fact that a large corporation selects a particular site for a huge industrial Project underlines the economic value of the land and the magnitude of the Aboriginal title infringement;

d. It infringes Haisla Aboriginal rights by creating the risk of a massive spill of dilbit into Haisla rivers and other waters, thereby putting at risk the resources Haisla members rely on and that are fundamental to Haisla culture and cultural heritage.

75. The impugned Decision offered no compensation for this deep infringement of Aboriginal title. Of course, the provision of economic benefits alone may not suffice to address impacts to Aboriginal title, as this ignores the fundamental Aboriginal title element of choosing the use to which Aboriginal title land is put. Haisla's choice of how to use its Aboriginal title land is informed by Haisla assessment of risk, and because of the nature of the product to be transported, the risk

[95] Ross Affidavit, para 13 **[HCR, Vol 1, Tab 3, HCR p 121]** and Exhibit C **[HCR, Vol 1, Tab 3A, HCR pp 170-176]**.

associated with the Project is assessed as significantly higher than the risk associated with other projects, such as an LNG project.[96]

76. The Crown's obligation to consult with Haisla was at the highest end of the spectrum enunciated in *Haida*. It was required to be a rich[97] and robust process that could address Haisla's concerns.

2. Canada's Consultation was Process Procedurally Flawed

77. Canada unilaterally selected an approach to consultation which seeks to rely on the JRP process, to the extent possible, to discharge its obligation to consult.

78. Canada has claimed it has engaged in deep consultation.[98] The fact that Canada chose to label its consultation process "deep" does not mean that it actually was deep. Deep consultation requires much more than affording those affected opportunities to participate in regulatory review proceedings. While the precise requirements of deep consultation will vary from case to case, steps may include: finding a satisfactory interim solution; the opportunity to make submissions and formally participate in the decision-making process; demonstrably integrating Aboriginal concerns into the decision; and the provision of written reasons showing that Aboriginal concerns were considered, and how they impacted the decision.[99]

79. In Haisla's case, due to its strong claim to Aboriginal rights and title, as well as the severe impact the Project will have on these, Canada's approach to consultation was deeply flawed and entirely insufficient.

80. Haisla clearly enunciated its concerns with both the Project and Canada's approach to consultation on many occasions, including in its February 3, 2014 letter to Canada. This letter set out how Haisla will be impacted by the Project, Haisla's concern with Canada's consultation process, Haisla's concerns with the JRP process, Haisla's concerns with the Project and recommendations for changes to proposed Project conditions. Haisla sought meaningful two-way discussion of all these issues.[100] On May 30, 2014, Haisla provided an annotated version of this letter to the

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[96] Ross Affidavit, para 127 **[HCR, Vol 1, Tab 3, HCR p 161]**; Clarke Affidavit, Exhibit D, Vol 3, p 195 **[HCR, Vol 1, Tab 2C, HCR p 46]**.

[97] *Rio Tinto, supra* note 79 at para 36.

[98] Transcript Vol 173, line 26565 **[HCR, Vol 2, Tab 22, HCR p 936]**; Transcript Vol 174, lines 26858-26866 **[HCR, Vol 2, Tab 22, HCR pp 937-938]**.

[99] *Haida*, *supra* note 83 at para 44; *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2008 FCA 212 at para 39, 297 DLR (4th) 722; *Halfway River*, *supra* note 80 at para 160.

[100] Ross Affidavit, Exhibit H, pp 829-903 **[HCR, Vol 1, Tab 3F, HCR pp 517-591]**.

Canadian Environmental Assessment Agency and specifically requested that these be made available to decision-makers.[101]

81. Whether by deliberate design or unfortunate lack of foresight, the Crown's consultation with Haisla suffered from the following shortcomings:

a. it was unilaterally developed and imposed;

b. it was not followed in good faith;

c. it was founded in a misplaced reliance on the JRP process;

d. it was artificially limited and constrained;

e. it relies on promises of future consultation that are hollow;

f. it did not address or demonstrably integrate Haisla's concerns into the Decision; and

g. it failed to provide any accommodation for potential infringement of Haisla asserted Aboriginal rights and title.

82. The conduct of the Crown must be viewed as a whole to answer the simple question: did the Crown act with diligence to pursue the fulfilment of its obligations?[102] Just as an Aboriginal group must not be left with "an empty shell" of a treaty promise,[103] an Aboriginal group must not be left with an empty shell of a consultation promise.

83. Governments will only be allowed to rely on regulatory processes to meet consultation obligations where "*in substance* an appropriate level of consultation is provided" during that process.[104] The process that occurred pursuant to Canada's Consultation Framework has not addressed the concerns of Haisla. The consultation turns out to have been hollow and designed to create the appearance of consultation when, in fact, all the process did was allow Haisla to "blow off steam". [105]

a) Unilateral Imposition of its Consultation Framework

84. The honour of the Crown is engaged whenever there is a potential for adverse impact, <u>including during the establishment of a review process</u> for a major

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[101] Ross Affidavit, paras 28-30 **[HCR, Vol 1, Tab 3, HCR pp 127-128]** and Exhibits D and F **[HCR, Vol 1, Tabs 3B and 3D, HCR pp 177-179 and 253-293]**.
[102] *Manitoba Metis Federation Inc.* v *Canada (Attorney General)*, 2013 SCC 14 at para 83, [2013] 1 SCR 623 [*Manitoba Metis*].
[103] *Ibid* at para 80.
[104] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 39, [2010] 3 SCR 103.
[105] *Mikisew Cree, supra* note 80 at para 54.

pipeline.[106] Haisla repeatedly requested the opportunity to work together with Canada to develop a consultation process that could be meaningful and that would ensure Haisla's concerns could be heard and meaningfully addressed.[107] Instead, Canada chose, unilaterally, to "integrate" consultation in the JRP process.[108]

85. Haisla had the opportunity to make comments on a draft JRP Agreement which was developed unilaterally by Canada, but was not consulted on the Crown consultation process itself. [109]

86. Haisla identified its concerns with the proposed JRP process and the Crown's consultation process as outlined in the Consultation Framework to Canada.[110] Rather than challenge the process, however, Haisla chose to engage to the extent possible in good faith, relying on the promise of opportunities to meet with Canada, to discuss matters beyond the mandate of the JRP, and on consultation that would take place after the JRP Report was issued. Challenging the process before it had been allowed to run its course would have been premature.

87. The Federal Court confirmed in *Gitxaala Nation v Canada* that it was premature to judge the adequacy of the consultation on the Project before it had reached its conclusion, and that the appropriate time for a challenge was when the "Crown ultimately fails to fulfill its overarching duty to consult". [111] That point was reached when the GiC issued its Decision.

b) Canada Failed to Adhere to its Consultation Framework

88. Canada did not adhere to the representations it made in its Consultation Framework regarding the process that would be followed for consultation. This demonstrates an absence of transparency and an absence of good faith in the

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[106] *Rio Tinto*, *supra* note 79 at para 44, referencing *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354 at para 110, 303 FTR 106 [*Dene Tha'*] aff'd 2008 FCA 20, (2008) 378 NR 251 (FCA) (*sub nom Canada (Environment) v Imperial Oil Resources Ventures Ltd*).

[107] Ross Affidavit, paras 31, 37 and 39 **[HCR, Vol 1, Tab 3, HCR pp 128-130]** and Exhibit H, pp 15-29, 51-57, 98-99 and 153-157 **[HCR, Vol 1, Tab 3F, HCR pp 317-340 and 346-350]**.

[108] Ross Affidavit, paras 35, 38, and 40-41 **[HCR, Vol 1, Tab 3, HCR pp 129-130]**; Letter from Canada to Haisla (14 July 2014) at HC p 16 [Letter to Haisla from Canada] **[MB, Vol 2, Tab 33, MB p 394]**.

[109] Ross Affidavit, paras 40-41 **[HCR, Vol 1, Tab 3, HCR p 130]**.

[110] Ross Affidavit, paras 40 and 49-54 **[HCR, Vol 1, Tab 3, HCR pp 130 and 133-135]** and Exhibit H, pp 139-143, 153-157, 295-301, 353-359, 389-395, 422-427, 429-435, 455-458, 460-462, 464-470, and 474-480 **[HCR, Vol 1, Tab 3F, HCR pp 341-398 and 400-406]**.

[111] *Gitxaala*, *supra* note 87 at para 54.

consultation process and was procedurally unfair, as it undermined Haisla's legitimate expectations of the process.

89. Canada's Consultation Framework stated that the JRP would consider asserted Aboriginal rights and title and the way in which the Project would impact on these rights and title. [112] It did not.

90. Canada's Consultation Framework promised that Canada would consult directly on matters that fell outside the mandate of the JRP at any time.[113] Despite repeated requests from Haisla to meet with decision-makers to discuss accommodation of the impacts of the Project on Haisla Aboriginal rights,[114] including Aboriginal title, Canada refused to meet.[115]

91. Canada's Consultation Framework stated that Canada would ensure that federal departments were active participants in the JRP process, so that the environmental assessment and consultation records were as accurate and complete as possible.[116] Yet, Canada refused to provide any evidence about Haisla's Comprehensive Claim to the JRP and provided only limited written evidence to the JRP.[117] Moreover, during oral questioning of federal department witnesses, the witnesses were unable to provide evidence relevant to the assessment of the Project, thereby frustrating a clear understanding of Project impacts.[118]

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[112] Aboriginal Consultation Framework for the Northern Gateway Pipeline Project, HC p 1 ["**Consultation Framework**"] [**MB, Vol 1, Tab 3, MB p 81**].
[113] Consultation Framework, HC p 7 [**MB, Vol 1, Tab 3, MB p 87**].
[114] Ross Affidavit, para 62 **[HCR, Vol 1, Tab 3F, HCR p 138]** and Exhibit H, pp 295-301, 429-435, 460-462, 474-480, 502, 571-573, 575-577, and 610-618 **[HCR, Vol 1, Tab 3F, HCR pp 351-357, 378-384, 389-391, 400-407, 412-417, and 425-433]**.
[115] Ross Affidavit, para 62 **[HCR, Vol 1, Tab 3, HCR p 138]** and Exhibit H, pp 455-458, 472, 515-516, 537-538, 602, and 623-625 **[HCR, Vol 1, Tab 3F, HCR pp 381-388, 399, 408-411, 424 and 434-436]**; Cross-examination of Jim Clarke (Canada) by Haisla Nation **["Cross-examination of Clarke by Haisla"]**, p 75 line 17 to p 78 lines 6 and 21-25 **[HCR, Vol 2, Tab 23, HCR pp 939-942]**.
[116] Consultation Framework, HC p 4 [**MB, Vol 1, Tab 3, MB p 84**].
[117] Ross Affidavit, para 66 **[HCR, Vol 1, Tab 3, HCR p 139]**; Exhibit E9-21-12, pp 26-27 **[HCR, Vol 2, Tab 24, HCR pp 943-944]**; Transcript Vol 167, lines 16555-16557, 16742-16750, 16862-16865, 16867-16872, 17544-17547, and 17561-17573 **[HCR, Vol 2, Tab 24, HCR pp 945-952]**; Transcript Vol 168, lines 17857-17858 and 17895-17896 **[HCR, Vol 2, Tab 24, HCR pp 953-954]**; Transcript Vol 173, lines 26596-26599 **[HCR, Vol 2, Tab 24, HCR pp 955-956]**.
[118] Ross Affidavit, para 67 **[HCR, Vol 1, Tab 3, HCR pp 139-140]**; Transcript Vol 108, lines 3968-3978 and 3992-3999 **[HCR, Vol 2, Tab 25, HCR pp 957-960]**;

92. The Crown's failure to provide information which was, in Haisla's view, relevant to the assessment of the Project and its impacts both demonstrates a failure to adhere to Canada's promises of its engagement in the JRP process and contravenes the requirement that consultation provide all "necessary information in a timely way".[119]

c) Misplaced Reliance on the JRP Process

93. The Crown's reliance on the JRP process in discharging its duty to consult is misplaced. Meaningful consultation requires two-way dialogue, whereas the JRP process was antithetical to two-way dialogue. The JRP process was a quasi-judicial process constrained by rules of evidence and procedure in which the Crown and Haisla had no direct engagement with one another. It did not allow for any two way dialogue. It was just information gathering.[120] Further, Canada relied on the fact that the JRP process had been established and was occurring to avoid having any substantive discussions with Haisla about Project impacts.[121]

94. As is evident from the JRP Report, the JRP process did not, in substance, amount to an appropriate level of consultation: it did not assess the nature of Haisla's asserted Aboriginal rights, it did not assess the strength of Haisla's claim, and it did not assess the potential infringements of Haisla Aboriginal rights by the Project or the Decision. It did not "report on information received directly from Aboriginal groups on impacts to rights", contrary to what the Crown had promised.[122] All the JRP did with Haisla's extensive submissions and evidence in relation to these various matters was to cross-reference their location in an Appendix to the JRP Report.[123] Haisla expected its Aboriginal rights evidence to be carefully considered. Instead the JRP simply provided a table: a clerical function that could have been performed by anyone.

Transcript Vol 167, lines 17557-17573 **[HCR, Vol 2, Tab 25, HCR pp 961-963]**; Transcript Vol 170, lines 21583-21590 **[HCR, Vol 2, Tab 25, HCR pp 964-965]**.

[119] *Halfway River*, *supra* note 80 at paras 159-160, endorsed in *Mikisew Cree*, *supra* note 80 at para 64.

[120] Ross Affidavit, Exhibit H, pp 353-359 at p 356 **[HCR, Vol 1, Tab 3F, HCR pp 358-364 at 361]**; Transcript Vol 173, line 26351 **[HCR, Vol 2, Tab 26, HCR p 966]**.

[121] Cross-examination of Clarke by Haisla, p 75 line 17 to p 78 line 6 **[HCR, Vol 2, Tab 23, HCR pp 939-942]**.

[122] Ross Affidavit, Exhibit H, pp 353-359 at p 354 **[HCR, Vol 1, Tab 3F, HCR pp 358-364 at 359]**.

[123] Ross Affidavit, paras 74-75 **[HCR, Vol 1, Tab 3, HCR p 143]**; JRP Report Vol 2, HC p 45 and Appendix 8, HC p 415 **[CB, Vol 2, Tab 21, CB pp 484 and 854]**.

95. Further, the JRP process was not designed to address Project impacts on Haisla's Aboriginal title,[124] and the JRP was relying on the Crown's commitment to consult with Aboriginal groups after the issuance of its Report.[125]

96. This Court recently found in *Innu of Ekuanitshit* that a joint review panel report was "determinative".[126] That report made findings about the exercise of Aboriginal rights which were not disputed and included specific references to the Innus of Ekuanitshit's evidence, made findings specific to various Aboriginal groups, and actually reported the information provided by and concerns raised by each affected Aboriginal group.[127]

97. Here, Canada cannot rely on the JRP process or Report to discharge its obligation to consult because the process did not assess impacts to Aboriginal rights and did not assess Project environmental effects in the context of Haisla but did so at the Project-wide level. Canada knew that Haisla and other Aboriginal groups had challenged the findings of the JRP Report.[128]

98. Further, impacts to Aboriginal title were not raised by the Innu of Ekuanitshit, but they have been raised by Haisla and other Aboriginal groups. The Crown has conceded Haisla's strong *prima facie* claim to Aboriginal title to the terminal site and to pipeline right-of-way lands.

99. As the JRP review process progressed, obvious shortfalls emerged, such as NGP's acknowledgement that its assessment of impacts to Aboriginal rights was limited to the assessment of "rights to harvest, essentially," or the current use of land and resources for traditional purposes,[129] and that it had not considered consulted with Haisla regarding Aboriginal title.[130] Then the JRP issued a Report that failed to make any findings regarding Aboriginal rights and title or recommendations for avoidance or mitigation,[131] despite the Crown's anticipation that it would make an

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[124] *Brokenhead*, *supra* note 88 at para 44.
[125] JRP Report Vol 2, pp 39 and 41 **[CB, Vol 2, Tab 21, CB pp 478 and 480]**.
[126] *Innu of Ekuanitshit*, *supra* note 93 at para 101.
[127] *Ibid* at paras 102 and 112; Ross Affidavit, Exhibit M, HC pp 162-163 and 174-175 **[HCR, Vol 1, Tab 3G, HCR pp 689-690 and 701-702]**.
[128] Cross-examination of Clarke by Haisla, p 28 line 16 to p 29 line 5 **[HCR, Vol 2, Tab 27, HCR 967-968]**.
[129] Transcript Vol 149, line 22890 **[HCR, Vol 2, Tab 28, HCR p 969]**; see also Transcript Vol 104, lines 29955-29957 **[HCR, Vol 2, Tab 28, HCR pp 970-971]**.
[130] Ross Affidavit, para 76 **[HCR, Vol 1, Tab 3, HCR p 144]**; Transcript Vol 114, lines 12736-12741 **[HCR, Vol 2, Tab 29, HCR pp 972-973]**; Transcript Vol 153, lines 27873-27875 and 28097-28112 **[HCR, Vol 2, Tab 29, HCR pp 974-976].**
[131] Ross Affidavit, para 75 **[HCR, Vol 1, Tab 3, HCR p 143]**; JRP Report Vol 2, HC p 47 **[CB, Vol 2, Tab 21, CB pp 486]**.

assessment of potential effects on Aboriginal rights.[132] The Crown had an obligation to make changes based on information that emerged during the process,[133] including procedural changes to the consultation process, to ensure it could be meaningful.[134] The Crown did not adjust its consultation process to address these shortfalls.

100. As anticipated in *Rio Tinto*, Haisla and other Aboriginal groups have had to resort to this Court to seek redress because Canada is seeking to rely on a tribunal structure and process that was incapable of dealing with the potential adverse effects of the Project on Aboriginal rights.[135]

d) Consultation was Severely and Artificially Limited and Constrained

101. The Crown did not meet with Haisla to discuss more than procedural matters until after the JRP Report was issued.[136] Haisla expected that these meetings would provide for a meaningful two-way discussion about the Project, its impacts on Haisla Aboriginal rights and title, and appropriate accommodation measures.[137] In April of 2010, Canada had committed to seeking Haisla's input regarding consultation on the JRP Report.[138] Canada reneged on this promise and imposed a process with restricted timelines[139] and funding, [140] which would prove insufficient to meaningfully address Haisla concerns.

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[132] Ross Affidavit, Exhibit H, pp 455-458 at 456 **[HCR, Vol 1, Tab 3F, HCR pp 385-388 at 386]**.
[133] *Taku River River Tlingit First Nation v Tulsequah Chief Mine Project*, 2004 SCC 74 at para 29, [2004] 3 SCR 550.
[134] *Cold Lake First Nations v Alberta (Tourism, Parks and Recreation)*, 2013 ABCA 443 at para 34, 566 AR 259, leave to appeal to SCC refused, 2014 CanLII 24499 (SCC); Exhibit E9-6-07, p 53 **[HCR, Vol 2, Tab 30, HCR p 977]**.
[135] *Rio Tinto*, *supra* note 79 at para 63; see also *Haida*, *supra* note 83 at para 51.
[136] Clarke Affidavit, Exhibit A, pp 27-30 **[HCR, Vol 1, Tab 2A, HCR pp 9-12]**; Cross-examination of Clarke by Haisla, p 36 line 23 to p 37 line 10 and p 76 lines 5-16 **[HCR, Vol 2, Tab 31, HCR pp 978-980]**.
[137] Ross Affidavit, para 92 **[HCR, Vol 1, Tab 3, HCR pp 149-150]** and Exhibit H, pp 829-903 at pp 860-861 and pp 905-911 at pp 908-909 **[HCR, Vol 1, Tab 3F, HCR pp 517-591 at 548-549 and 592-598 at 595-596]**.
[138] Ross Affidavit, para 47 **[HCR, Vol 1, Tab 3, HCR p 132]** and Exhibit H, pp 353-359 at p 354 and pp 591-596 at p 596 **[HCR, Vol 1, Tab 3F, HCR pp 358-364 at 359 and 418-423 at 423]**.
[139] Ross Affidavit, paras 87-88 **[HCR, Vol 1, Tab 3, HCR pp 147-148]** and Exhibit H, pp 810-819 **[HCR, Vol 1, Tab 3F, HCR pp 503-512]**.
[140] Ross Affidavit, para 89 **[HCR, Vol 1, Tab 3, HCR pp 148-149]** and Exhibit H, pp 680-699, 701-702, and 763-774 **[HCR, Vol 1, Tab 3F, HCR pp 437-470]**.

102. Canada's own testimony reveals that the Crown never intended these meetings to be more than an elaborate one-way information gathering process[141] after which the Crown would unilaterally assess the need for or possibility of accommodation without any opportunity for real two-way dialogue.[142] The process was designed to insulate decision-makers from any engagement with Haisla, and to result in a decision made on the basis of distilled information which is cloaked in secrecy as a result of the invocation of Cabinet privilege.[143]

e) Artificially Constrained Timelines

103. Consultation was hampered by time constraints. Haisla identified concerns regarding time constraints early and sought amendments to timelines that would allow for meaningful consultation.[144] Canada responded that it was working to complete the consultation within the time limits it had set out.[145] The Crown could easily have avoided these artificial time constraints by agreeing to meet with Haisla earlier in the process or by extending legislated timelines.[146] It chose not to.

104. At the March meetings, Haisla formally requested that the timelines for the Decision be extended to allow for meaningful consultation. Canada's representatives advised that they did not have the authority to agree but that Cabinet did, and agreed to take it back to their supervisors.[147] Reporting back on this, Canada's representatives told Haisla that they had put the issue of a time extension to their superiors but had not received any feedback on that point.[148]

105. Canada has since advised that Canada did not put forward Haisla's request for an extension of time allocated to consultation to Cabinet at that time. If the request

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[141] Cross-examination of Clarke by Haisla, p 22 lines 13-18 **[HCR, Vol 2, Tab 32, HCR p 981]**.
[142] Transcript Vol 174, lines 26873-26874 **[HCR, Vol 2, Tab 33, HCR p 982]**; Clarke Affidavit, Exhibit D, Vol 3, pp 194, 195, 199, 203, and 429-430 **[HCR, Vol 1, Tab 2C, HCR pp 45-48 and 65-66]**; Cross-examination of Clarke by Haisla, p 22 lines 13-18 **[HCR, Vol 2, Tab 32, HCR p 981]**, p 50 line 16 to p 51 line 1 and p 85, line 19 to p 86, line 21 **[HCR, Vol 2, Tab 33, HCR pp 987-988 and 990-991]**.
[143] Cross-examination of Clarke by Haisla, p 5 line 20 to p 13 line 15 **[HCR, Vol 2, Tab 34, HCR pp 992-1000]**; s 39 Certificate **[MB, Vol 2, Tab 39]**.
[144] Ross Affidavit, para 90 **[HCR, Vol 1, Tab 3, HCR p 149]** and Exhibit H, pp 787-808 **[HCR, Vol 1, Tab 3F, HCR pp 481-502]**; Clarke Affidavit, Exhibit D, Vol 3, pp 375-376 **[HCR, Vol 1, Tab 2C, HCR pp 53-54]**.
[145] Ross Affidavit, para 91 **[HCR, Vol 1, Tab 3, HCR p 149]** and Exhibit H, pp 824-827 at 825 **[HCR, Vol 1, Tab 3F, HCR pp 513-516 at 514]**.
[146] *CEAA, 2012*, ss 54(3)-(6).
[147] Ross Affidavit, paras 107-108 **[HCR, Vol 1, Tab 3, HCR p 155]**; Clarke Affidavit, Exhibit D, Vol 3, pp 375-376 **[HCR, Vol 1, Tab 2C, HCR pp 53-54]**.
[148] Clarke Affidavit, Exhibit D, Vol 3, p 376 **[HCR, Vol 1, Tab 2C, HCR p 54]**.

was ever put forward to Cabinet at all, it was in the memorandum to Cabinet, in the form of one of the options provided by Canada's consultation team as a result of its meetings with Haisla and other Aboriginal groups.[149] This memorandum was not provided to Cabinet until early June,[150] about 3 months after Haisla made its request in a meeting with Canada's representatives.

106. With all three aspects of the Project planned for Haisla Territory, the impacts from the Project on Haisla are both deep and broad. Haisla and Canada identified a list of issues which should form the basis for engagement during the consultation meetings.[151] Due to time constraints, many of these were never addressed and most were not addressed in a substantive way.[152]

107. Time constraints cannot be relied on by the Crown to avoid meeting its duty to consult, especially where the Crown itself is responsible for or has contributed to any shortness of time.[153] Canada could have extended the timeline but chose not to.

3. Consultation did not Address Substantive Concerns

a) Consultation did not Address Matters Beyond the JRP Mandate

108. A number of matters were either not dealt with by the JRP or were not dealt with adequately by the JRP. Haisla identified these matters to Canada and sought to engage in meaningful consultation to address them.[154]

109. In particular, the JRP made no findings whatsoever about the potential impacts of the Project on Haisla Aboriginal title or other Aboriginal rights.[155]

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[149] Cross-examination of Clarke by Haisla, p 15 line 16 to p 19 line 25 **[HCR, Vol 2, Tab 35, HCR pp 1003-1007]**.
[150] Cross-examination of Clarke by Haisla, p 7 line 23 to p 8 line 6 **[HCR, Vol 2, Tab 34, HCR pp 994-995]**.
[151] Ross Affidavit, para 96 **[HCR, Vol 1, Tab 3, HCR p 150]** and Exhibit H pp 905-911 and 913-916 **[HCR, Vol 1, Tab 3F, HCR pp 592-602]**.
[152] Ross Affidavit, paras 114-118 **[HCR, Vol 1, Tab 3, HCR pp 157-159]**; Affidavit #1 of Taylor Cross affirmed January 19, 2015, paras 6-7 **[HCR, Vol 2, Tab 36, HCR pp 1008-1014]**; Cross-examination of Clarke by Haisla, p 99 line 16 to p 102 line 7 **[HCR, Vol 2, Tab 36, HCR pp 1015-1018]**.
[153] *Gitxsan v British Columbia (Minister of Forests),* 2002 BCSC 1701 at para 91, 10 BCLR (4th) 126.
[154] Ross Affidavit, paras 92-93 **[HCR, Vol 1, Tab 3, HCR p 149-150]** and Exhibit H pp 829-903 **[HCR, Vol 1, Tab 3F, HCR pp 517-591]**.
[155] Ross Affidavit, paras 74-75 **[HCR, Vol 1, Tab 3, HCR p 143]**; JRP Report Vol 2, HC p 47 **[CB, Vol 2, Tab 21, CB p 486]**.

Canada, however, did not discuss Haisla Aboriginal title and the way in which the Project would infringe this right in any meaningful way.[156]

b) Promise to Provide Strength of Claim Analysis not Fulfilled

110. Canada was unwilling to engage in an open, transparent and reciprocal discussion with Haisla about its Aboriginal rights and title and the impacts of the Project on Haisla Aboriginal rights and title.

111. Although the BC Court of Appeal has ruled that an Aboriginal group is not at law entitled to be provided with a strength of claim assessment by a Crown decision maker, "the extent to which parties will share with each other the content of an assessment of the strength of claim will depend on the circumstances faced by them".[157] Minister of Environment Kent told Haisla in April 2012 that Canada would share its strength of claim analysis once the JRP had provided its Report.[158] The Crown then reneged, [159] demonstrating a lack of transparency and an absence of good faith in the consultation process.

c) No Discussion of Impacts

112. Canada was also unwilling to engage in an open, transparent and reciprocal discussion with Haisla about the potential impacts of the Project on Haisla's asserted Aboriginal rights and title. Haisla set out how the Project would impact Haisla Aboriginal rights and title in its Final Written Argument before the JRP.[160] In its two meetings with Canada's representatives, Haisla asked Canada's representatives to disclose the infringements of Haisla Aboriginal rights which Canada had identified would flow from the Decision.[161] Canada's representatives told Haisla that their superiors had directed them not to disclose this.[162]

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[156] Clarke Affidavit, Exhibit D, Vol 3, pp 207, 377 and 379 **[HCR, Vol 1, Tab 2C, HCR pp 50 and 55-56]**.
[157] *Halalt First Nation v British Columbia*, 2012 BCCA 472 at para 124, [2013] 1 WWR 791.
[158] Ross Affidavit, para 99 **[HCR, Vol 1, Tab 3, HCR p 151]** and Exhibit H, pp 623-625 at 624 **[HCR, Vol 1, Tab 3F, HCR pp 434-436 at 435]**.
[159] Ross Affidavit, paras 99-103 **[HCR, Vol 1, Tab 3, HCR pp 151-153]**; Clarke Affidavit, Exhibit D, Vol 3, pp 376-377 **[HCR, Vol 1, Tab 2C, HCR pp 54-55]**.
[160] Exhibit D80-104-2, paras 186-189, 1052-1089, 1523-1535, 1627-1635, 1640-1642 **[HCR, Vol 2, Tab 5, HCR pp 764-765, 772-778 and 782-787]**.
[161] Ross Affidavit, para 106 **[HCR, Vol 1, Tab 3, HCR pp 154-155]**; Clarke Affidavit, Exhibit D, Vol 3, pp 205 and 380 **[HCR, Vol 1, Tab 2C, HCR pp 49 and 57]**.
[162] Ross Affidavit, para 106 **[HCR, Vol 1, Tab 3, HCR pp 154-155]**; Clarke Affidavit, Exhibit D, Vol 3, p 380 **[HCR, Vol 1, Tab 2C, HCR p 57]**.

113. Consultation includes an informational element which required the Crown to disclose what it anticipated to be the potential adverse effects of the Project on Haisla Aboriginal rights and title.[163]

114. The Decision by Canada to direct its representatives to not have an open, transparent discussion with Haisla about strength of claim and impacts prevented the discussions from being based on a common understanding of the rights at issue and the potential impacts to those rights. This frustrated the discussion of the impacts the Project will have on Haisla's Aboriginal rights and title and hampered the consultation process.

115. Haisla left the meetings with no information from the Crown as to what it viewed the impacts of the Project to be on Haisla Aboriginal rights and title. Haisla still does not know.

d) No Ability for Direct Engagement on Substantive Matters

116. Canada sent representatives to meet with Haisla who had no ability to make accommodations within the process, to discuss substantive matters related to the Project, or to accommodate infringements of Haisla's Aboriginal rights and title.

117. Haisla asked Canada to discuss an alteration to the Project that considered the transportation of a different product, such as natural gas.[164] Haisla asked Canada to consider a Project that avoided Douglas Channel and the Kitimat River watershed. Canada's representatives advised that they could only discuss the Project as proposed.[165] This clearly contravenes the principle that a meaningful consultation process must be open to considering changes to the Project.[166]

118. Haisla asked for a delay in decision-making so that additional information could be obtained on geohazards in the Kitimat River Valley and on how dilbit behaves when spilled. Canada's representatives could not agree to this.[167]

119. Further, Haisla was offered no opportunity for engagement on Canada's evaluation of Haisla's assertion of Aboriginal title.[168]

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[163] *Mikisew Cree*, *supra* note 80 at para 64.
[164] Ross Affidavit, para 127 **[HCR, Vol 1, Tab 3, HCR p 161]**.
[165] Ross Affidavit, para 129 **[HCR, Vol 1, Tab 3, HCR p 162]**; Clarke Affidavit, Exhibit D, Vol 3, p 207 **[HCR, Vol 1, Tab 2C, HCR p 50]**.
[166] *Haida*, *supra* note 83 at para 46.
[167] Cross-examination of Clarke by Haisla, p 49 line 15 to p 50 line 12 **[HCR, Vol 2, Tab 33, HCR pp 986-987]**.
[168] Cross-examination of Clarke by Haisla, p 84 line 5 to p 86 line 21 **[HCR, Vol 2, Tab 33, HCR pp 989-991]**.

120. In sum, Canada's representatives were in a position to receive information from Haisla, but were not in a position to provide information back to Haisla from Project decision-makers.[169] They were also not authorized to agree to or offer any accommodation during the meetings.[170]

e) Future Consultation is a Hollow Promise

121. The majority of future federal regulatory authority for the Project rests with the NEB.[171] The *NEB Act* creates a series of steps for the construction and development of pipeline projects, and ascribes regulatory oversight for these steps to the NEB itself.[172] The NEB has also assumed the primary role for determining whether a s. 35 *Fisheries Act* authorization may be required.[173] The NEB has been found to be a quasi-judicial tribunal with no obligation or ability to consult with Aboriginal groups. [174] Canada has confirmed that the NEB does not consult at the leave to open stage.[175] As such, Haisla anticipates no future opportunity for consultation about the *NEB Act* requirements.

122. Haisla sought ongoing involvement in future NEB regulatory oversight of the Project through the integration of engagement and consultation requirements as conditions to the Certificates.[176] The JRP ignored these requests, recommending only very limited involvement of Aboriginal groups in future NEB regulatory matters.[177]

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[169] Cross-examination of Clarke by Haisla, p 13 line 11 to p 15 line 7 **[HCR, Vol 2, Tab 34, HCR pp 1000-1002]**; Clarke Affidavit, Exhibit D, Vol 3, p 203 **[HCR, Vol 1, Tab 2C, HCR p 48]**.
[170] Cross-examination of Clarke by Haisla, p 46 line 6 to p 50 line 15 **[HCR, Vol 2, Tab 33, pp 983-987]**.
[171] Ross Affidavit, paras 147-148 **[HCR, Vol 1, Tab 3, HCR p 167]** and Exhibit H, pp 824-827 **[HCR, Vol 1, Tab 3F, HCR pp 513-516]**, and Exhibit T **[HCR, Vol 1, Tab 3I, HCR pp 721-723]**; Letter to Haisla from Canada **[MB, Vol 2, Tab 33, MB p 399]**.
[172] *NEB Act*, ss 30-40, and 45-48.
[173] Canada, National Energy Board, "Memorandum of Understanding between the National Energy Board and Fisheries and Oceans Canada for Cooperation and Administration of the Fisheries Act and the Species at Risk Act Related to Regulating Energy Infrastructure" (16 December 2013), online: <https://www.neb-one.gc.ca/bts/ctrg/mmrndm/2013fshrcnscnd-eng.html>.
[174] *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159 at 184 (a-c), 1994 CanLII 113 (SCC). Endorsed in *Standing Buffalo Dakota First Nation v Enbridge Pipelines Inc*, 2009 FCA 308 at para 34, [2010] 4 FCR 500.
[175] Clarke Affidavit, Exhibit B, p 2281 **[HCR, Vol 1, Tab 2B, HCR p 44]**.
[176] Exhibit D80-104-2, paras 1670-1739 **[HCR, Vol 2, Tab 5, HCR pp 789-811]**; Ross Affidavit, para 128 **[HCR, Vol 1, Tab 3, HCR pp 161-162]** and Exhibit H, pp 829-903 at p 853 **[HCR, Vol 1, Tab 3F, HCR pp 517-591 at 541]**; Cross-

123. During its two meetings with Canada, Haisla raised this issue and explained why it was seeking the conditions to include a role for Haisla.[178] Haisla asked the Crown to send the conditions back for reconsideration so that, amongst other matters, ongoing engagement and consultation requirements could be integrated into them.[179] Canada's representatives could just take note and bring this back to decision-makers, as they had no authority to substantively address this or offer alterations. The Crown took no steps to accommodate this concern and failed to seek reconsideration of the conditions.[180]

124. The Certificate conditions provide no meaningful role for Haisla in future NEB regulatory oversight.[181] The promise of further consultation is thus illusory, as it is entirely possible that there will be no future federal decision triggering the duty to consult.

f) Haisla Concerns not Addressed or Demonstrably Integrated into the Decision

125. Canada's consultation was not timely, but rather meetings were left to the very last minute after the JRP recommended Project approval and shortly before the Decision deadline, such that there was no opportunity for flexibility within the process, or alterations to the Project to address Haisla's concerns.

126. The lack of a fair, open and transparent process and the inability to have a frank discussion about impacts also prevented a reasonable discussion about how to address Haisla's concerns by, for instance, minimizing or providing accommodation for impacts[182] and integrating the concerns into the Decision.[183]

127. After the first of two meetings, on March 24, 2014 and with a deadline of April 16, 2014 for completing consultation meetings, Canada provided to Haisla a table that purported to set out Haisla's concerns with the Project and how, in

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examination of Clarke by Haisla, p 48 line 17 to p 49 line 14 **[HCR, Vol 2, Tab 33, HCR pp 985-986]**.

[177] Ross Affidavit, para 85 **[HCR, Vol 1, Tab 3, HCR p 147]**.

[178] Clarke Affidavit, Exhibit D, Vol 3, pp 222-223, 383, and 386 -387 **[HCR, Vol 1, Tab 2C, HCR pp 51-52 and 58-60]**.

[179] Clarke Affidavit, Exhibit D, Vol 3, p 405 **[HCR, Vol 1, Tab 2C, HCR p 61]**.

[180] GiC Decision, PC 2014-809, (2014) C Gaz I, 1645 [**CB, Vol 3, Tab 22**].

[181] Ross Affidavit, paras 85 and 148 **[HCR, Vol 1, Tab 3, HCR p 147 and 167]** and Exhibit T **[HCR, Vol 1, Tab 3I, HCR pp 721-723]**.

[182] *Haida*, *supra* note 83 at para 47.

[183] *Mikisew Cree*, *supra* note 80 at para 64.

Canada's view, these had been addressed through either the proponent's commitments or the JRP's proposed Certificate conditions.[184]

128. Canada's table did not accurately capture Haisla's concerns and in many instances identified proponent commitments and JRP conditions that did not actually address the concerns.[185] Had this table been provided earlier, or had there been more time, there could have been a reasonable discussion of Haisla concerns and whether they had been or how they should be addressed. The process did not allow for this.

129. Instead, Haisla sent Canada a revised table that set out the extent to which Canada's table had failed to capture Haisla concerns and the extent to which Haisla concerns had not been addressed.[186] This information appears to have been dismissed by the Crown as not providing "any new information to decision-makers".[187] Thus, a critical aspect of what the consultation process should have been about – what are the concerns and have they been addressed? – was deliberately ignored by the Crown.[188]

130. The Decision itself, which approved the Project exactly as recommended by the JRP, makes it clear that none of Haisla's outstanding concerns raised with Canada after the issuance of the JRP Report resulted in any changes or revised conditions, or influenced the Decision in any way.

131. Further, the Decision itself fails to show that Haisla concerns were considered and what impact they had on the Decision. Although Canada provided two letters to Haisla which purport to address some Haisla concerns,[189] neither of these letters demonstrate how Haisla's concerns about Project impacts were considered and demonstrably integrated into the Decision.

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[184] Ross Affidavit, para 136 **[HCR, Vol 1, Tab 3, HCR p 164]** and Exhibit H, pp 946-1000 **[HCR, Vol 1, Tab 3F, HCR pp 603-657]**.
[185] Ross Affidavit, para 137 **[HCR, Vol 1, Tab 3, HCR p 164]**; Clarke Affidavit, Exhibit D, Vol 3 pp 407-408 **[HCR, Vol 1, Tab 2C, HCR pp 63-64]**.
[186] Ross Affidavit, paras 28-30 **[HCR, Vol 1, Tab 3, HCR pp 127-128]** and Exhibit E **[HCR, Vol 1, Tab 3C, HCR pp 180-252]**.
[187] Ross Affidavit, para 139 **[HCR, Vol 1, Tab 3, HCR p 165]**; Letter to Haisla from Canada at HC p 20 [**MB, Vol 2, Tab 33, MB p 398**].
[188] Cross-examination of Clarke by Haisla, p 40 lines 5-23, p 42 line 4 to p 43 line 4, and p 44 lines 5-12 **[HCR, Vol 2, Tab 37, HCR pp 1019-1022]**.
[189] Ross Affidavit, paras 144 and 153 **[HCR, Vol 1, Tab 3, HCR pp 166-168]** and Exhibit R **[HCR, Vol 1, Tab 3H, HCR pp 717-720]**; Letter to Haisla from Canada [**MB, Vol 2, Tab 33**].

132. Finally, it is clear from Canada's own materials that impacts of the Project on Haisla Aboriginal title have not been addressed by either NGP or JRP conditions.[190]

133. The Supreme Court of Canada has been clear that impacts must be minimized to the extent possible.[191] In order to minimize impacts through consultation, the parties must first discuss impacts and how the Project could be changed to minimize impacts. This did not occur. Canada cannot delegate this to the proponent,[192] and Canada confirmed that it did not, in fact, delegate to NGP.[193]

g) Canada Failed to Offer any Accommodation

134. The Supreme Court of Canada has recognized that consultation "that excludes from the outset any form of accommodation would be meaningless." [194] The Project will result in the dedication of land to which Haisla has a very strong claim of Aboriginal title to a purpose that is incompatible with the way Haisla would choose to use that land, and for a project that is inconsistent with Haisla's stewardship obligations for that land and the rest of its Territory. Despite this profound impact, the Crown failed to offer or provide any reasonable accommodation for that impact.

135. Despite numerous suggestions from Haisla regarding accommodative measures,[195] Canada failed to alter the Project <u>in any respect</u> or accommodate Haisla in <u>any other way</u>.[196]

136. Haisla proposed a delay in decision-making to allow for additional scientific studies so that the Crown could make a scientifically informed decision.[197] The JRP acknowledged that further investigation was needed into geohazards and the how

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[190] Ross Affidavit, paras 136-137 **[HCR, Vol 1, Tab 3, HCR p 164]** and Exhibit H, pp 946-1000 **[HCR, Vol 1, Tab 3F, HCR pp 603-657]**; Clarke Affidavit, Exhibit D, Vol 3, p 379 **[HCR, Vol 1, Tab 2C, HCR p 56]** and Vol 5, p 1200 ff at pp 1311-1322 **[HCR, Vol 1, Tab 2D, HCR pp 102-114]**.
[191] *Haida, supra* note 83 at para 47.
[192] *Ibid* at para 53.
[193] Exhibit E9-21-12, pp 1-3 **[HCR, Vol 2, Tab 38, HCR pp 1023-1025]**.
[194] *Mikisew Cree, supra* note 80 at para 54.
[195] Ross Affidavit, paras 119-131 **[HCR, Vol 1, Tab 3, HCR pp 159-162]** and Exhibit H, pp 1054-1066 **[HCR, Vol 1, Tab 3F, HCR pp 658-670]** and Exhibit G at p 22 **[HCR, Vol 1, Tab 3E, HCR pp 294-316 at 315]**; Clarke Affidavit, Exhibit A, pp 67, 70-72 and 222-247 at pp 238-247 **[HCR, Vol 1, Tab 2A, HCR pp 14-43]**.
[196] Ross Affidavit, para 131 **[HCR, Vol 1, Tab 3, HCR p 162]**; Letter to Haisla from Canada at HC p 2 [**MB, Vol 2, Tab 33, MB p 380]**; GiC Decision [**CB, Vol 3, Tab 22**].
[197] Ross Affidavit, paras 121-124 **[HCR, Vol 1, Tab 3, HCR pp 159-160]** and Exhibit G at p 22 **[HCR, Vol 1, Tab 3E, HCR pp 294-316 at 315]**; Clarke Affidavit, Exhibit A, p 72 **[HCR, Vol 1, Tab 2A, HCR p 17]**.

dilbit behaves when released into the environment.[198] Canada acknowledged that additional study of the fate and behaviour and the biological effects of dilbit and oceanographic modelling are intended to "provide the science foundation for informed decision making".[199] In other words, the foundation for scientifically informed decision-making on the Project did not exist at the time of the Decision. Yet Canada refused to delay the Decision despite Haisla's request and despite knowing Haisla's concerns were legitimate.

137. Canada's representatives agreed with Haisla that a large spill of dilbit in Haisla Territory would have significant effects on Haisla.[200] Haisla raised a number of concerns about the conditions proposed by the JRP and sought integration of Haisla concerns into those conditions.[201] Haisla asked Canada to send these conditions back to the JRP for reconsideration.[202] Haisla asked that Canada impose additional conditions. Canada's representatives made note of this request, but ultimately Canada refused and made no changes to the conditions.[203]

138. In its letters of June 9, 2014 and July 14, 2014, Canada sought to justify its Decision in light of concerns raised by Haisla. The June 9, 2014 letter outlines what Canada had heard from Haisla during meetings.[204] The July 14, 2014 letter confirms that Canada accepted the Project exactly as recommended by the JRP and made no changes to the Project or to conditions.[205] It demonstrates that Canada largely dismissed the concern raised by Haisla by reference to the JRP process and conditions proposed by the JRP, thereby ignoring Haisla's views that the JRP process had not addressed its concerns and the acknowledgment of its own representatives that the concerns were legitimate.

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[198] JRP Report, Vol 2, Condition Nos 145-147 & 169, pp 387 & 389 [**CB, Vol 2, Tab 21, pp 826 and 828**],
[199] Ross Affidavit, para 125 **[HCR, Vol 1, Tab 3, HCR p 160]**; Letter to Haisla from Canada at HC p 8 [**MB, Vol 2, Tab 33, MB p 386**].
[200] Clarke Affidavit, Exhibit D, Vol 3, p 406 **[HCR, Vol 1, Tab 2C, HCR p 62]**.
[201] Clarke Affidavit, Exhibit D, Vol 3, pp 436-470 at p 453 ff **[HCR, Vol 1, Tab 2C, HCR pp 67-101 at 84 ff]**.
[202] Ross Affidavit, para 128 **[HCR, Vol 1, Tab 3, HCR pp 161-162]**; Clarke Affidavit, Exhibit A pp 222-247 at 238-247 **[HCR, Vol 1, Tab 2A, HCR pp 18-43]**.
[203] Ross Affidavit, para 131 **[HCR, Vol 1, Tab 3, HCR p 162]**; Letter to Haisla from Canada at HC p 19 [**MB, Vol 2, Tab 33, MB p 397**].
[204] Ross Affidavit, Exhibit R **[HCR, Vol 1, Tab 3H, HCR pp 717-720]**.
[205] Ross Affidavit, para 131 **[HCR, Vol 1, Tab 3, HCR p 162]**; Letter to Haisla from Canada [**MB, Vol 2, Tab 33**].

139. The July 14, 2014 letter, which is in parts identical to similar letters sent to other Aboriginal groups,[206] is particularly dismissive of Haisla's concern that the Project will infringe Haisla Aboriginal title to the terminal site and the pipeline right-of-way. After advising that resource development processes are not venues for determining Aboriginal rights, Canada referred to the process NGP used to select the terminal site as justification for the potential infringement of Haisla Aboriginal title, relying on the JRP's finding regarding NGP's route and terminal selection and consideration process.[207] This was despite the record being clear that neither NGP nor the JRP considered impacts to Haisla Aboriginal title,[208] and that Canada was of the view that an environmental assessment process is not "a place to deal with rights and title".[209]

140. The July 14, 2014 letter does not provide any indication that Canada determined that there are no potential impacts to Haisla asserted Aboriginal title or that those impacts have been avoided, minimized or accommodated.[210] Further, in Canada's own document dated June 11, 2014, Haisla Aboriginal title was identified as an ongoing issue which had not been addressed by NGP or the JRP's Terms and Conditions.[211]

141. The consultation process did not, therefore, allow for any meaningful possibility of accommodation, particularly with respect to impacts to Haisla Aboriginal rights and title. It was meaningless: merely an opportunity to blow off steam.[212] The Decision was exactly the same with the consultation occurring as it would have been had there been no consultation at all.

4. The Decision must be Quashed for Breach of Duty to Consult

142. Canada's consultation process was, in substance, inadequate to discharge the honour of the Crown, given the nature of Haisla's asserted Aboriginal rights, the

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[206] Letters from Canada to Gitxaala, Gitga'at, Haida, Kitasoo, Heiltsuk, Coastal First Nations and Yinka Dene Alliance (14 July 2014) [**MB, Vol 2, Tabs 31-32, 34-38**].
[207] Letter to Haisla from Canada at HC p 17 [**MB, Vol 2, Tab 33, MB p 395**].
[208] See paras 99 and 148-153, *infra*; Exhibit B1-2 pp 41-44 **[HCR, Vol 2, Tab 39, HCR pp 1026-1029]**; Exhibit B1-5 pp 15-17 **[HCR, Vol 2, Tab 9, HCR pp 870-872]**.
[209] Clarke Affidavit, Exhibit D, Vol 3, p 377 **[HCR, Vol 1, Tab 2C, HCR p 55]**.
[210] Cross-examination of Clarke by Haisla, p 60 line 15 to p 61 line 5 **[HCR, Vol 2, Tab 40, HCR pp 1030-1031]**.
[211] Clarke Affidavit, Exhibit D, Vol 5, p 1200 ff at pp 1531-1533 **[HCR, Vol 1, Tab 3D, HCR pp 102 and 115-117]**; Cross-examination of Clarke by Haisla, p 78 lines 21-25 **[HCR, Vol 2, Tab 23, HCR p 942]**.
[212] *Mikisew Cree*, *supra* note 80 at para 54.

strength of Haisla's claim to those rights, and the extent of the impacts of the Project on those rights. Despite this, the Crown proceeded to make the Decision.

143. The Supreme Court of Canada has confirmed that where consultation and accommodation is found to be inadequate, the government decision can be suspended or quashed.[213]

144. The Crown, acting honourably, cannot be allowed to cavalierly run rough-shod over Haisla's Aboriginal interests.[214] Yet this is what has happened in the context of the Decision. The degree and extent of the Crown's failure to meaningfully consult with Haisla about the impacts of the Project and its potential effects on Haisla Aboriginal rights and title means a quashing of the Decision is the appropriate remedy in these circumstances. A declaration to that effect will not suffice to promote reconciliation and maintain the honour of the Crown. The Decision should be set aside.

E. THE CROWN FAILED TO CONSIDER IMPACTS TO ABORIGINAL RIGHTS IN ITS PUBLIC INTEREST ASSESSMENT

145. The JRP was required to provide its recommendation whether or not the proposed Project is required for the present and future public convenience and necessity.[215]

146. Haisla submits that the Crown was required to consider whether the Project would impact Aboriginal rights as part of the public interest assessment.

1. The JRP did not Assess Impacts to Aboriginal Rights

147. The JRP received information on the nature and scope of potential or established Aboriginal rights and the effects the Project may have on those rights, including Haisla Aboriginal rights and title.[216]

148. It is clear from the JRP Report, however, that the JRP did not assess impacts to Haisla Aboriginal rights as part of its public interest assessment. While the JRP Report refers to Haisla's assertion of Aboriginal title to areas required for the Project's pipeline and terminal site,[217] the JRP did not identify this as a key concern

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[213] *Tsilhqot'in*, *supra* note 81 at para 79.
[214] *Haida*, *supra* note 83 at para 27.
[215] *NEB Act*, s 52; *Amended JRP Agreement*, s 9.1 [**MB, Vol 1, Tab 10, MB p 222**].
[216] JRP Report Vol 2, HC p 45 and Appendix 8, HC pp 414-416 **[CB, Vol 2, Tab 22, CB p 484 and CB pp 853-855]**.
[217] JRP Report Vol 2, HC p 38 **[CB, Vol 2, Tab 21, CB p 477]**.

or make any determination of Aboriginal rights,[218] and the JRP Report provides no analysis of how the Project might impact Haisla asserted Aboriginal rights and title.

149. Although the JRP was not mandated to make final determinations about the strength of an Aboriginal group's claim respecting Aboriginal rights, it was not prohibited from making any preliminary or *prima facie* determinations,[219] and was not constrained by the *Amended JRP Agreement* in what it could consider in its public interest assessment.[220]

150. The JRP did not use the term "Aboriginal interests" to refer to asserted but not yet proven Aboriginal rights.[221] Instead, the JRP appears to use the terms "Aboriginal interests", "interests of Aboriginal people" and "current use of lands, waters, and resources for traditional purposes" synonymously to describe what Aboriginal groups had told the JRP about how they currently use lands, waters and resources.[222] Further, although the JRP Report refers to the "rights and interests of Aboriginal groups" in the context of information provided to it,[223] the JRP's findings are more limited and refer to effects on the "ability of Aboriginal people to continue to use lands, waters, or resources for traditional purposes".[224]

151. Despite a catch-all statement that it considered all the evidence before it, the JRP's Report provides no indication that it considered evidence of Haisla's asserted Aboriginal title to the land required for the pipeline and terminal site, of the strength of Haisla's claim to Aboriginal title to that land, or of the extent to which that Aboriginal title would be impacted by the Project. The JRP Report also makes it clear that it has made no assessment of adequacy of consultation.[225]

152. The absence of any reference in the JRP Report to the fact that Haisla will be prevented from choosing how that land will be used is indicative of the JRP's failure to consider how the Project will affect Haisla Aboriginal title. Haisla will be stripped of its right to exclusively occupy the terminal site. The Haisla right to use the land for modern economic purposes will be taken away and given to a private corporation.

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[218] JRP Report Vol 2, HC pp 45 and 47 **[CB, Vol 2, Tab 21, CB pp 484 and 486]**.
[219] Aboriginal Consultation Framework, HC p 8 **[MB, Vol 1, Tab 3, MB p 88]**.
[220] *Amended JRP Agreement*, s 4.1, HC p 5 **[MB, Vol 1, Tab 10, MB p 220]**.
[221] *Haida*, *supra* note 83 at paras 27 and 50-53; Exhibit D80-104-2 at para 188 and note 58 **[HCR, Vol 2, Tab 5, HCR pp 764-765]**.
[222] See JRP Report Vol 1, HC p 25 **[CB, Vol 1, Tab 20, CB p 381]**; JRP Report Vol 2, HC pp 47, 49 **[CB, Vol 2, Tab 21, CB pp 472, 479, 485, 488, 493 and 495]**.
[223] JRP Report Vol 2, HC pp 45-48 **[CB, Vol 2, Tab 21, CB pp 484-487]**.
[224] JRP Report Vol 2, HC p 49 (col 1 para 2) **[CB, Vol 2, Tab 21, CB p 488]**.
[225] JRP Report Vol 2, HC p 41 **[CB, Vol 2, Tab 21, CB p 480]**.

153. In summary, there is no indication that the JRP considered or assessed the impacts that the Project would have on Haisla Aboriginal title.[226]

2. The Public Interest Assessment did not Consider Aboriginal Rights

154. In its assessment of public interest under the *NEB Act*, the JRP was entitled to have regard to any public interest that in its opinion may be affected by the issuance of a Certificate.[227]

155. The public interest must include a consideration of Aboriginal rights protected by s 35 of the *Constitution Act, 1982*,[228] and potential impacts on those rights:

> The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*. As Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?" (para. 42).[229]

156. By its nature, the JRP may have been constrained in what it could assess under *CEAA, 2012*. The first step in assessing potential impacts to Aboriginal rights is to understand the nature and the extent of the right claimed.[230] The limitations placed on a joint review panel that was performing an environmental assessment was recognized by the Federal Court in *Dene Tha'*:

> Since the JRP cannot evaluate the legal legitimacy of an Aboriginal rights claim, it can only make determinations in respect of adverse impacts to current Aboriginal usage of territory.[231]

This does not mean, however, that impacts to Aboriginal rights were not a relevant factor for the public interest determination required under the *NEB Act*.

157. Further, the *Amended JRP Agreement* required the Panel to be fully informed about potential impacts of the Project on Aboriginal rights. Given the extensive record of information before the JRP regarding Haisla's Aboriginal rights, including Aboriginal title, the JRP could not simply ignore Haisla's claim that the Project will infringe its Aboriginal title.

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[226] JRP Report Vol 2, HC p 49 **[CB, Vol 2, Tab 21, CB p 488].**
[227] *NEB Act*, s 52(2)(e).
[228] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[229] *Rio Tinto, supra* note 79 at para 70, referring to the BC Court of Appeal decision. The *Utilities Commission Act* at issue, like the *NEB Act*, referred to the consideration of any other factor considered relevant to the public interest.
[230] *Halfway River, supra* note 80 at para 180. See also *Mitchell v MNR*, 2001 SCC 33 at para 14, [2001] 1 SCR 911.
[231] *Dene Tha', supra* note 87 at para 35.

158. The JRP described public interest as "the interest of all Canadians. The public interest includes environmental, social, and economic considerations."[232] In its assessment of benefits compared to burdens, the JRP Report stated that the Project "would not significantly adversely affect the ability of Aboriginal groups to maintain, pursue, and strengthen their traditional and cultural activities, and would not significantly adversely affect the interests of Aboriginal groups that use lands, waters, or resources in the project area."[233]

159. The JRP's analysis of the benefits and burdens makes no reference to the burden that would result from substantially depriving Haisla of the benefit of the terminal site lands by alienating this valuable and strategic land to a third party.

160. Haisla's assertion of Aboriginal title to the terminal site in particular was a critical piece of evidence placed before the JRP which has been completely ignored. When a critical piece of evidence is ignored without explanation, this suggests an erroneous finding of fact; a blanket statement that the tribunal has considered all the evidence is not enough to provide an assurance that evidence has been considered, especially when the evidence omitted from discussion in the reasons squarely contradicts the finding of fact. [234]

161. This is not a situation where the JRP has recommended that the Project is in the public interest despite the potential adverse effects on Haisla Aboriginal rights and title, it is a situation where the JRP has failed to consider the potential impacts of the Project on Haisla Aboriginal rights and title in reaching its conclusions.

162. The JRP's Report fails to provide any rationale for why impacts to Haisla's Aboriginal rights, including Aboriginal title, have no bearing on the public interest assessment.

3. GiC did not Assess Relevant Factors in its Public Interest Assessment

163. As a result of the JRP's failure to consider potential impacts to Haisla Aboriginal rights, including Aboriginal title, its recommendations regarding public interest cannot be relied on to support the GiC Decision. Yet the GiC appears to be relying wholly on the JRP Report for its determination that the Project is in the public interest. [235]

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[232] JRP Report Vol 1, HC p 11 **[CB, Vol 1, Tab 20, CB p 367]**.
[233] JRP Report Vol 2, HC p 50 **[CB, Vol 2, Tab 21, CB p 489]**.
[234] *Cepeda-Gutierrez, supra* note 41 at para 17, relying on *Bains*, *supra* note 40.
[235] Ross Affidavit, para 149 **[HCR, Vol 1, Tab 3, HCR p 168]**; GiC Decision [**CB, Vol 3, Tab 22, CB p 859**].

164. An assessment of public interest requires an assessment of the overall public good a project may create and its potential negative aspects.[236] The potential negative aspects of the Decision include infringement of asserted Aboriginal rights, including Haisla Aboriginal title. This aspect of the Decision must be considered. The JRP did not consider it.

165. The Supreme Court of Canada has recognized the importance of reconciliation of the interests of Aboriginal people with the interests of broader Canadian society.[237] An assessment of public interest that does not consider the infringement of constitutionally protected Aboriginal rights ignores a critical element of the public interest: does the approval of the Project have the potential to undermine reconciliation and thereby taint the honour of the Crown?[238]

166. The consultation process that occurred with Haisla and the Crown's Decision demonstrate that the Crown relied exclusively on the JRP's public interest assessment to support the Decision.[239]

167. The GiC, by relying on the JRP's public interest assessment, has determined that the Project is in the public interest without considering whether the Project will infringe Aboriginal rights and whether the Crown's obligation to consult has been discharged. Haisla respectfully submits that as a result of the GiC's failure to consider these important elements of public interest, the Decision is unreasonable and cannot attract deference.

F. THE CROWN FAILED TO PROVIDE ADEQUATE REASONS

168. Haisla adopts the submissions of Forestethics, et al. regarding the GiC's failure to provide reasons.

169. In addition to the GiC's statutory duty to give reasons, a duty to give reasons is also established as a result of the significant impact that the Decision has on Haisla and on Haisla's constitutionally protected Aboriginal rights. The Decision directly and deeply affects Haisla since it will completely impair its right to determine how its claimed Aboriginal title land is used. To use the language of this Court, Haisla has

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[236] Canada, *Pipeline Regulation in Canada: A Guide for Landowners and the Public* Revised September 2010 (Calgary: NEB, 2010) at p 1, online: <http://www.neb-one.gc.ca/prtcptn/lndwnrgd/lndwnrgd-eng.pdf>.
[237] *Delgamuukw*, *supra* note 81 at para 186; *Tsilhqot'in*, *supra* note 81 at para 82.
[238] *Sparrow v R*, [1990] 1 SCR at 1100 (d-e), 1990 CanLII 104 (SCC).
[239] Letter to Haisla from Canada, HC pp 2 and 12 [**MB, Vol 2, Tab 33, MB pp 380 and 390**].

"an interest in knowing" why this "profoundly important decision"[240] affecting it is made as it is.

170. The obligation to give reasons is also a necessary component of a reasonable consultation process. Canada has a constitutional obligation to adequately consult prior to making a decision that could adversely affect Aboriginal rights and title. Moreover, the adequacy of Crown consultation is an issue that Haisla raised with Canada before, during, and after the JRP process. Thus, it follows that an adequate discussion or reasons surrounding the nature and adequacy of Crown consultation should have been provided as part of the Decision.

171. The Decision provides no substantive discussion or reasoning surrounding the adequacy of consultation, or of any steps taken by Canada to meet its consultation obligations. In fact, all the Decision says with respect to consultation is:

> … Whereas the Crown has undertaken a process of consultation and accommodation with Aboriginal groups relying on the work of the Panel and additional consultations with Aboriginal groups …[241]

This desultory statement cannot be said to meet procedural fairness requirements. The reasons fail to provide Haisla with any understanding of how consultation and potential impacts on Haisla Aboriginal rights and title weighed into the GiC's analysis, of how Haisla's concerns regarding the consultation process were considered, or of why the GiC came to the conclusion it did.[242]

G. NEB CERTIFICATES ISSUED UNLAWFULLY

172. Haisla adopts the submissions of the Applicant Unifor that set out that if the GiC Decision is quashed, the Certificates are a nullity.

PART IV – ORDER SOUGHT

173. Haisla seeks the following declarations or orders:

a. A declaration that the JRP Report does not meet *CEAA, 2012* requirements.

b. An order that the following findings of the JRP be set aside or quashed:

   i) that the project is not likely to cause significant adverse environmental effects in Canada on cultural heritage;

   ii) that, during construction and routine operations, there would not be a significant adverse effect on the ability of Aboriginal groups to continue to

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[240] *Gardner v Canada (Attorney General)*, 2005 FCA 284 at para 28, [2005] FCJ No 1442 (QL).
[241] Governor in Council Order PC 2014-809 [**CB, Vol 3, Tab 22, CB p 859**].
[242] *Haida*, *supra* note 83 at para 44.

use lands, waters, and resources for traditional purposes within the Project area;

iii) that there would be no significant adverse effects to heritage resources; and

iv) that, after mitigation, the likelihood of significant adverse environmental effects resulting from project malfunctions or accidents is very low.

c. An order that the JRP Report be referred back for reconsideration;

d. A declaration that the GiC Decision was not supported by a valid JRP Report;

e. A declaration that the GiC Decision was made without meaningful consultation with the Haisla Nation;

f. A declaration that the GiC Decision was based on a public interest determination that failed to consider relevant factors;

g. A declaration that the GiC Decision does not contain required reasons;

h. An Order quashing the GiC Decision; or

i. In the alternative, an order remitting the matter back to the Crown for a court-supervised consultation and accommodation process and a writ of prohibition preventing any further regulatory authorizations from being issued in the interim; and an order returning the Decision to the GiC for the provision of reasons and a writ of prohibition preventing any further regulatory authorizations from being issued in the interim.

j. A Declaration that the NEB Certificates are null and void as they are not supported by a valid GiC Decision and Order; or, in the alternative, an Order quashing the Certificates;

k. The Haisla Nation's cost of and incidental to the Applications and Appeal, including the motions for leave;

l. An order that the Haisla Nation shall not be required to pay costs of the Applications and Appeal to the Respondents, pursuant to Rule 400 of the *Federal Courts Rules*, in the event they are dismissed; and

m. Such other relief as this Court deems appropriate.

All of which his respectfully submitted this 20th day of May, 2015.

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PART V – LIST OF AUTHORITIES

Appendix A: Statutes or Regulations

Statutes

Citation	Provisions cited
Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52	ss 4, 5, 19, 43, 54
Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11	s 35
National Energy Board Act, RSC 1985, c N-7	ss 30-40, 45-48, 52, 73

Appendix B: Authorities

Case Law

Citation
Ahousaht First Nation v Canada (Fisheries and Oceans), 2008 FCA 212, 297 DLR (4th) 722
Alberta Wilderness Assn v Canada (Minister of Fisheries and Oceans), [1999] 1 FCR 483 (FCA), [1998] FCJ No 1746 (QL)
Athabasca Chipewyan First Nation v British Columbia Hydro and Power Authority, 2001 FCA 62, [2001] 3 FCR 412
Bains v Canada (Minister of Employment and Immigration), [1993] FCJ No 497 (QL), (1993) 63 FTR 31 (FCTD)
Beckman v Little Salmon/Carmacks First Nation, 2010 SCC 53, [2010] 3 SCR 103
Bell ExpressVu Limited Partnership v Rex, 2002 SCC 42, [2002] 2 SCR 559

Citation
Brokenhead Ojibway Nation v Canada (Attorney General), 2009 FC 484, 345 FTR 119
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Greenpeace Canada v Canada (Attorney General), 2014 FC 463, [2014] FCJ No 515(QL).
Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511
Halalt First Nation v British Columbia, 2012 BCCA 472, [2013] 1 WWR 791

Citation
Halfway River First Nation v British Columbia (Ministry of Forests), 1999 BCCA 470, 178 DLR (4th) 666
Hinzman v Canada (Minister of Citizenship and Immigration), 2007 FCA 171, 282 DLR (4th) 413
Hupacasath First Nation v Canada (Foreign Affairs), 2013 FC 900, 438 FTR 210
Manitoba Metis Federation Inc. v *Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623
Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 SCR 388
Mitchell v MNR, 2001 SCC 33, [2001] 1 SCR 911
Pembina Institute for Appropriate Development v Canada (AG), 2008 FC 302, [2008] 4 FCR D-12
Quebec (Attorney General) v Canada (National Energy Board), [1994] 1 SCR 159, 1994 CanLII 113 (SCC)
Rio Tinto Alcan v Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 SCR 650
Sambaa K'e Dene First Nation v Duncan, 2012 FC 204, 3 FCR D-1
Sparrow v R, [1990] 1 SCR, 1990 CanLII 104 (SCC)
The Squamish Nation et al v British Columbia (Minister of Sustainable Resource Management), 2004 BCSC 1320, 34 BCLR (4th) 280
Squamish Nation v British Columbia (Community, Sport and Cultural Development), 2014 BCSC 991, 66 BCLR (5th) 137
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Citation
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