INVESTIGATION REPORT:
The 48 hours after the grounding of the Nathan E. Stewart and its oil spill

MARCH 2017
A life ring from the Nathan E. Stewart floating in sheen of diesel oil.

**Details regarding the photographs contained in this report are contained in the Schedule of Photographs located at the end of this document.**
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1.0 GLOSSARY

1.1. GLOSSARY OF ORGANIZATIONS

1. The organizations involved in the Incident and response during the first forty-eight hours are referred to as follows:

- **HTC**: Heiltsuk Tribal Council
- **HIRMD**: Heiltsuk Integrated Resource Management Department
- **Coast Guard**: The Canadian Coast Guard
- **DFO**: Department of Fisheries and Oceans
- **Kirby**: Kirby Corporation including subsidiaries, owners of Nathan E. Stewart and DBL-55
- **MOE**: British Columbia Ministry of Environment
- **TC**: Transport Canada
- **TRG**: The Response Group a contractor of Kirby
- **TSB**: Transportation Safety Board of Canada
- **UC**: Unified Command, consisting of 1 representative from each of four organizations (HTC, Kirby, federal and provincial governments)
- **USCG**: United States Coast Guard
- **WCMRC**: Western Canada Marine Response Corporation

1.2. GLOSSARY OF VESSELS

2. The non-Heiltsuk vessels involved in the Incident and response during the first forty-eight hours are as follows:

- **Kirby vessels**
  - **NES**: Nathan E. Stewart, owned by Kirby

- **Coast Guard vessels**
  - **Bartlett**: Coast Guard
  - **Bartlett 1**: Coast Guard (workboat)
  - **Cape Farewell**: Coast Guard
  - **Cape St. James**: Coast Guard
  - **John P. Tully**: Coast Guard

- **Shearwater vessels**
  - **Central Coaster**: Shearwater
  - **Clowhom Spirit**: Shearwater (operating on behalf of WCMRC)
  - **Gulf Rival**: Shearwater
  - **Haisea Guardian**: Shearwater
  - **Mar-Ell Mist**: Shearwater (operating on behalf of WCMRC)

- **Other vessels**
  - **Eagle Bay**: WCMRC
  - **Diligence**: North Arm Transportation
  - **Inkster**: RCMP

*** All Heiltsuk vessels are referred to as such.
1.3. LIST OF SCHEDULES

<table>
<thead>
<tr>
<th>SCHEDULE</th>
<th>DATE</th>
<th>ITEM</th>
<th>PAGE NO.</th>
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<td>Oct. 17, 2016 – Oct. 20, 2016</td>
<td>Emails between L. Fong &amp; Coast Guard re Requests for Documents</td>
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<td>Oct. 15, 2016</td>
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<td>Letter from L. Fong to R. Dick, TC re Heiltsuk Access to Information and TC’s Communication</td>
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<td>Letter from R. Dick, TC to L. Fong re response to Oct. 17/18th emails requesting disclosure; disclosure to be discussed</td>
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<td>Oct. 28, 2016</td>
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<td>Nov. 10, 2016</td>
<td>Emails between D. Bertrand and R. Dick, TC re reiterating Oct. 28th requests and confirmation of an intention to discuss possible approaches</td>
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<td>Nov. 13, 2016 – Nov. 15, 2016</td>
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<td>Letter D. Bertrand to W. Braul re request for information and documents</td>
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<td>Letter from M. Poisson, TSB to D. Bertrand re denying HTC’s request to attend as an observer at the investigations of the sinking of the Nathan E. Stewart</td>
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<td>Letter from D. Bertrand to R. Dick, TC re follow-up to Oct. 28, 2016 request for documents for which access was refused</td>
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<td>SCHEDULE</td>
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<td>18</td>
<td>Oct. 15, 2016</td>
<td>Letter from Chief Slett to Kirby Offshore re HTC formally requests to interview the crew of the Nathan E. Stewart (the “Crew”) as soon as possible and before they depart Bella Bella</td>
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<td>19</td>
<td>Oct. 15, 2016</td>
<td>Letter from Chief Slett to Coast Guard re HTC formally requests to interview the Crew as soon as possible and before they depart Bella Bella</td>
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<td>20</td>
<td>Oct. 16, 2016 – Oct. 18, 2016</td>
<td>Emails between Coast Guard and L. Fong re Coast Guard denying HTC’s request to interview the Crew</td>
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<td>23</td>
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<td>Feb. 24, 2016</td>
<td>Letter from I. Forget, PPA to Kirby re Renewal of Waiver Confirmation until March 1, 2017</td>
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<td>Email from B. Young, PPA to Chief Slett re Copy of Letter Revoking Kirby’s Waiver</td>
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<td>Gitxaala Nation v. Canada 2016 FCA 187</td>
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<td>32</td>
<td>Oct. 15, 2016</td>
<td>Unified Command Situation Report 09:30am</td>
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<td>33</td>
<td>N/A</td>
<td>RIR 16-020 NES (AIS track history FRE-SFC 1)</td>
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<td>34</td>
<td>N/A</td>
<td>RIR 16-020 NES (AIS track history FRE-SFC 2)</td>
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<td>AIS picture of the Nathan E. Stewart wreck location and track (Ingmar Lee)</td>
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<td>Area 7 - Pacific Region Sanitary Closures and Emergency Closure Areas</td>
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<td>38</td>
<td>Nov. 19, 2016</td>
<td>Unified Command Situation Report 1700 HRS</td>
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</tbody>
</table>
2.0 HEILTSUK NATION JURISDICTION

3. Shortly after 1:00 a.m. on October 13, 2016, the Nathan E. Stewart ("NES"), the tug connected to the barge DBL-55 (the "Barge"), and together known as an Articulated Tug-Barge ("ATB"), ran aground in Seaforth Channel. At approximately 9:00 a.m., the NES sank. It spilled diesel and other pollutants at and around the ancient Village of Q’vúqvai, Gale Passage (also referred to as Gale Creek), in the territory of the Q’vúqvaýáitx̌v Tribe (the “Incident”). The Barge that the NES was pushing was also damaged. The NES and the Barge are owned by subsidiaries of Kirby Corporation.

4. The Incident occurred within the traditional territories of Heiltsuk. The boundaries of Heiltsuk’s traditional territories are defined by the tribal areas of five tribal groups: the Wúyalit x̌v; Yísdait x̌v; Wúi’it x̌v; Q’vúqvaýáitx̌v, and ’Xáix̌áis; (collectively the “Heiltsuk Nation”).

5. Heiltsuk Nation is a self-governing nation that has occupied its territories since time immemorial, and which exercises aboriginal rights, including rights to steward and harvest its resources, throughout its traditional territories. Heiltsuk has never surrendered their ancient rights to the lands and marine areas of their traditional territories, nor their duty to look after them.

6. Heiltsuk’s relationship to the lands and marine areas is ancient, complex and sacred. Since time immemorial Heiltsuk has managed their territory with respect and reverence for the life it sustains, using knowledge of marine and land resources passed down for generations. Over hundreds of generations Heiltsuk has maintained a healthy and functioning environment.

7. Heiltsuk’s Gvi’ilás, are a set of customary laws which are the overarching system that applies to Heiltsuk’s traditional territories and all people within those territories. The Gvi’ilás are a complex and comprehensive system that embodies values, beliefs, teachings, principles, practices and consequences. Heiltsuk’s authority (7àxuài) derives from their ownership and connection to their land and marine areas. The Gvi’ilás direct Heiltsuk to balance the health of the land with the needs of the people.

8. The tribal areas of the above-noted five tribal groups define the boundaries of Heiltsuk’s traditional territories. Heiltsuk has never surrendered their ancient rights to these lands and marine areas nor their duty to look after them. Heiltsuk will continue to manage all Heiltsuk marine areas, lands, and resources according to Gvi’ilás and traditional knowledge.

9. Heiltsuk Tribal Council ("HTC") is Heiltsuk Nation’s governing organization. HTC resolved that its Chief Councillor conduct an inquiry into the circumstances of the grounding of the ATB and the resulting oil-spill, and the first forty-eight hours of the response, and to produce a report of her investigation. HTC also directed an adjudication of any contravention of the Gvi’ilás, or traditional laws, derived from 7àxuài.
Kirby Corporation, Transport Canada ("TC"), the Transportation Safety Board ("TSB"), and other government organizations were asked to provide information and documentation of their activities in Heiltsuk territory relating to the sinking of the NES and the consequent oil spill. Although informed of Heiltsuk’s aboriginal right of self-government, these organizations failed or refused to provide the requested information and documentation.

This Report briefly summarizes relevant events leading up to the spill, including Heiltsuk’s objection to oil tankers travelling in Heiltsuk waters, and its support of a tanker moratorium in B.C. coastal waters.

This Report also sets out a chronology of the first forty-eight hours involving the grounding of the ATB, the sinking of the NES, the oil entering the marine environment, response efforts by Heiltsuk, and the attendance of other organizations.

The investigation was not able to address the conduct of the crewmembers of the ATB prior to the grounding and oil spill, as Kirby, TC and the TSB refused to provide requested information. Consequently, the Report relies primarily on information and documents provided by Heiltsuk first responders, the Canadian Coast Guard ("Coast Guard") and Unified Command ("UC"), which included one representative from HTC.

This Investigation Report does not address events relating to UC or events at the Incident Command Post ("ICP"); events after the first forty-eight hours; financial, environmental or health impacts of the Incident; or remediation conducted as a response to the Incident.

The Nathan E. Stewart view of the bow, above and below the surface of the water.
### 3.0 INVESTIGATION

#### 3.1. DOCUMENTS

3.1.1. Requests

15. The chart below depicts the document requests made by Heiltsuk Tribal Council to Kirby and various government organizations.

<table>
<thead>
<tr>
<th>DATE OF REQUEST</th>
<th>REQUEST MADE TO</th>
<th>REQUESTED DOCUMENT(S)</th>
<th>RESULT OF REQUEST</th>
<th>REFERENCE</th>
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<tbody>
<tr>
<td>Oct. 16, 2016</td>
<td>Kirby Corporation</td>
<td>Electronic data and documentation regarding the tug and barge. [Requested during meeting]</td>
<td>Failed to respond.</td>
<td>--</td>
</tr>
<tr>
<td>Oct. 17, 2016</td>
<td>Kirby Corporation</td>
<td>All documentation in any form about the Incident including ship logs, incident reports, and statements from the crew. Also requested current and historical information about the barge.</td>
<td>Failed to respond.</td>
<td>Schedule 3</td>
</tr>
<tr>
<td>Oct. 18, 2016</td>
<td>TC</td>
<td>Access to information regarding the oil spill, tug sinking, and barge stranding incidents.</td>
<td>Failed to respond substantively: TC agreed to work with HTC through Heiltsuk Nation Planning Committee (via letter dated Oct. 28, 2016) (Schedule 5).</td>
<td>Schedule 4</td>
</tr>
<tr>
<td>DATE OF REQUEST</td>
<td>REQUEST MADE TO</td>
<td>REQUESTED DOCUMENT(S)</td>
<td>RESULT OF REQUEST</td>
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</table>
| Oct. 28, 2016   | TC              | Relating to the Tug-Barge: ship’s particulars; any U.S. Coast Guard documents relating to the manning or operation of Tug-Barge; any Canadian government agency documents relating to the manning or operation of the Tug-Barge in Canadian waters; and ship’s certificates or equivalents.  
Relating to the Incident: officer and crew lists; crew training records; any record of correspondence between Pacific Pilotage Authority and owner/operator with respect to BC coast transit, before and after Incident; any correspondence from tug to owner/operator regarding the voyage and the Incident; any documents regarding fueling of the tug for the voyage; copy of paper chart in use at time of Incident; Passage Plan for BC coast transit generally, and for voyage specifically; any document prepared by the master or crew relating to passage planning or navigation for the voyage; any electronic record of passage for the voyage; course recorder printouts; helm recorder printouts; GPS printouts; any VDR (voyage data recorder) data relating to the Voyage of the Tug-Barge, any radar or other electronic record of the voyage, certificates/seaman’s book of the master and crew; deck logbook for the voyage, engine logbook for the voyage, engine room maintenance log for the past twelve months, oil record book for the last twelve months, master’s standing orders, bell book, master’s notebook, general arrangement (plan of the tug), tank and piping diagram, plan of tanks and valves, specifically relating to tanks breached in this Incident, plan of tank shutoff values for tanks breached in this Incident, incident reports or other written statements filed or provided by the officers or crew of the Tug-Barge, reports of transcripts concerning interviews of officers or crew of the Tug-Barge, reports of analyses concerning testing of samples of polluted water concerning diesel, oil or other pollutants, and written reports, whether initial or final, about the Incident and about response operations, including any pollution incident reports, or pollution incident report forms. | Denied request due to ongoing investigation (verbally at Federal Heiltsuk Steering Committee on Nov. 21, 2016 and via letter dated Dec. 13, 2016). | Schedule 6 |
<table>
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<tr>
<th>DATE OF REQUEST</th>
<th>REQUEST MADE TO</th>
<th>REQUESTED DOCUMENT(S)</th>
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<tr>
<td>Undated</td>
<td>Pacific Pilotage Authority</td>
<td>Oral request from meeting in late October.</td>
<td>List of Masters and mates on vessels operated by Kirby Offshore Marine, LLC who have experience in BC Coastal waters.</td>
<td>Schedules 26, 27 and 28</td>
</tr>
<tr>
<td>Nov. 13, 2016</td>
<td>Kirby Corporation</td>
<td>Requested the general barge &amp; tug particulars; Tank Plan / Capacity Plan for barge and the tug; general arrangement drawings for barge and tug; drawings showing the mid section of the barge; and details of the coupling system.</td>
<td>Failed to respond.</td>
<td>Schedule 9</td>
</tr>
<tr>
<td>DATE OF REQUEST</td>
<td>REQUEST MADE TO</td>
<td>REQUESTED DOCUMENT(S)</td>
<td>RESULT OF REQUEST</td>
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<tr>
<td>Nov. 15, 2016</td>
<td>Kirby Corporation</td>
<td>Followed up on request from Nov. 13, 2016.</td>
<td>Failed to respond.</td>
<td>Schedule 9</td>
</tr>
<tr>
<td>Nov. 16, 2016</td>
<td>TC</td>
<td>Requested the general barge &amp; tug particulars; Tank Plan / Capacity Plan for barge and the tug; general arrangement drawings for barge and tug; drawings showing the mid section of the barge; and details of the coupling system.</td>
<td>Failed to respond.</td>
<td>Schedule 10 and 11</td>
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<tr>
<td>Nov. 24, 2016</td>
<td>Kirby Corporation</td>
<td>Followed up on request from Nov. 13, 2016.</td>
<td>Denied request due to participating in regulatory processes and stated cannot disclose documents subject to investigation (via email dated Dec. 14, 2016) (Schedule 13).</td>
<td>Schedule 12 (and 13)</td>
</tr>
<tr>
<td>Dec. 5, 2016</td>
<td>Kirby Corporation</td>
<td>Relating to the Tug-Barge: ship’s particulars; any U.S. Coast Guard documents relating to the manning or operation of Tug-Barge; any Canadian government agency documents relating to the manning or operation of the Tug-Barge in Canadian waters; ship’s certificates or equivalents; and all technical documents (including the general barge &amp; tug particulars, Tank Plan/Capacity Plan for barge and tug, general arrangement drawings for barge and tug, drawings showing mid section of the barge, and details of the coupling system); Operation/SMS (Safety Management System) Manual extracts re pollution prevention; Vessel Incident Action Plan/Response Plan; and WCMRC Membership Agreement or contract. Relating to the Incident: officer and crew lists; crew training records; any record of correspondence between Pacific Pilotage Authority and owner/operator with respect to BC coast transit, before and after Incident; any correspondence from tug to owner/operator regarding the voyage and the Incident; any documents regarding fueling of the tug for the voyage; copy of paper chart in use at time of Incident;</td>
<td>Denied request due to participating in regulatory processes and stated cannot disclose documents subject to investigation (via email dated Dec. 14, 2016) (Schedule 13).</td>
<td>Schedule 14 (and 13)</td>
</tr>
<tr>
<td>DATE OF REQUEST</td>
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<td>Passage Plan for BC coast transit generally, and for voyage specifically; any document prepared by the master or crew relating to passage planning or navigation for the voyage; any electronic record of passage for the voyage; course recorder printouts; helm recorder printouts; GPS printouts; any VDR (voyage data recorder) data relating to the Voyage of the Tug-Barge, any radar or other electronic record of the voyage, certificates/seaman's book of the master and crew; deck logbook for the voyage, engine logbook for the voyage, engine room maintenance log for the past twelve months, oil record book for the last twelve months, master's standing orders, bell book, master's notebook, general arrangement (plan of the tug), tank and piping diagram, plan of tanks and valves, specifically relating to tanks breached in this Incident, plan of tank shutoff values for tanks breached in this Incident, incident reports or other written statements filed or provided by the officers or crew of the Tug-Barge, reports of transcripts concerning interviews of officers or crew of the Tug-Barge, reports of analyses concerning testing of samples of polluted water concerning diesel, oil or other pollutants, and written reports, whether initial or final, about the Incident and about response operations, including any pollution incident reports, or pollution incident report forms.</td>
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A deadline of December 12, 2016, was imposed for this request.
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<tr>
<th>DATE OF REQUEST</th>
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<tr>
<td>Dec. 5, 2016</td>
<td>TSB</td>
<td>Relating to the Tug-Barge: ship’s particulars; any U.S. Coast Guard documents relating to the manning or operation of Tug-Barge; any Canadian government agency documents relating to the manning or operation of the Tug-Barge in Canadian waters; ship’s certificates or equivalents; and all technical documents (including the general barge &amp; tug particulars, Tank Plan/Capacity Plan for barge and tug, general arrangement drawings for barge and tug, drawings showing mid section of the barge, and details of the coupling system); Operation/ SMS (Safety Management System) Manual extracts re pollution prevention; Vessel Incident Action Plan/Response Plan; and WCMRC Membership Agreement or contract. Relating to the Incident: officer and crew lists; crew training records; any record of correspondence between Pacific Pilotage Authority and owner/operator with respect to BC coast transit, before and after Incident; any correspondence from tug to owner/operator regarding the voyage and the Incident; any documents regarding fueling of the tug for the voyage; copy of paper chart in use at time of Incident; Passage Plan for BC coast transit generally, and for voyage specifically; any document prepared by the master or crew relating to passage planning or navigation for the voyage; any electronic record of passage for the voyage; course recorder printouts; helm recorder printouts; GPS printouts; any VDR (voyage data recorder) data relating to the Voyage of the Tug-Barge, any radar or other electronic record of the voyage, certificates/seaman’s book of the master and crew; deck logbook for the voyage, engine logbook for the voyage, engine room maintenance log for the past twelve months, oil record book for the last twelve months, master’s standing orders, bell book, master’s notebook, general arrangement (plan of the tug), tank and piping diagram, plan of tanks and valves, specifically relating to tanks breached in this Incident, plan of tank shutoff values.</td>
<td>Denied request due to ongoing investigation (via letter dated Jan. 9, 2017) (Schedule 16).</td>
<td>Schedule 15 (and 16)</td>
</tr>
<tr>
<td>DATE OF REQUEST</td>
<td>REQUEST MADE TO</td>
<td>REQUESTED DOCUMENT(S)</td>
<td>RESULT OF REQUEST</td>
<td>REFERENCE</td>
</tr>
<tr>
<td>-----------------</td>
<td>-----------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>---------------------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Dec. 5, 2016</td>
<td>TC</td>
<td>for tanks breached in this Incident, incident reports or other written statements filed or provided by the officers or crew of the Tug-Barge, reports of transcripts concerning interviews of officers or crew of the Tug-Barge, reports of analyses concerning testing of samples of polluted water concerning diesel, oil or other pollutants, and written reports, whether initial or final, about the Incident and about response operations, including any pollution incident reports, or pollution incident report forms. A deadline of December 9, 2016, was imposed for this request.</td>
<td>Denied request due to ongoing investigation (via letter dated Dec. 13, 2016) (Schedule 8).</td>
<td>Schedule 17 (and 8)</td>
</tr>
</tbody>
</table>

Aerial view of diesel oil sheen at the shore of Gale Creek.
3.1.2. Limited Access to IAP Software

16. The IAP Software is a database for incident management administered by The Response Group ("TRG")\(^1\), who is a contractor of Kirby.

17. HTC requested and was provided periods of access to the IAP Software between October 2016 and February 2017.

18. The IAP Software provided only limited information with respect to the events occurring within the first forty-eight hours of the grounding, which was largely used to confirm information from interviews.

### 3.2. INTERVIEWS

3.2.1. Requests

<table>
<thead>
<tr>
<th>DATE OF REQUEST</th>
<th>REQUEST MADE TO</th>
<th>REQUESTED DOCUMENT(S)</th>
<th>RESULT OF REQUEST</th>
<th>REFERENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oct. 15, 2016</td>
<td>Kirby Corporation</td>
<td>7 crew members of the NES</td>
<td>Failed to respond.</td>
<td>Schedule 18</td>
</tr>
<tr>
<td>Oct. 17, 2016</td>
<td>Kirby Corporation</td>
<td>7 crew members of the NES</td>
<td>Failed to respond.</td>
<td>Schedule 3</td>
</tr>
<tr>
<td>Oct. 15, 2016</td>
<td>Coast Guard</td>
<td>7 crew members of the NES</td>
<td>Denied request (via email from TC on Oct. 16, 2016) (Schedule 20).</td>
<td>Schedule 19 (and 20)</td>
</tr>
<tr>
<td>Nov 2016</td>
<td>All Heiltsuk first responders involved in the response during the first forty-eight hours</td>
<td>Heiltsuk first responders</td>
<td>Responded: 17 Heiltsuk first responders were interviewed.</td>
<td>--</td>
</tr>
</tbody>
</table>

3.2.2. Witnesses

19. The investigation team tasked by HTC interviewed or otherwise collected information from, *inter alia*, fifteen witnesses who were first responders within the first forty-eight hours of the grounding of the NES.

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\(^1\) More information on the IAP Software can be found here: [http://www.responsegroupinc.com/Client/iap-software](http://www.responsegroupinc.com/Client/iap-software)
4.0  **NATHAN E. STEWART AND DBL-55**

4.1. **KIRBY CORPORATION**

4.1.1. Tug and Barge Business

20. Kirby Corporation and its subsidiaries ("Kirby") operates the largest inland and offshore marine barge fleets in the United States. It is the "premier tank barge operator in the United States, transporting bulk liquid products throughout the Mississippi River System, on the Gulf Intracoastal Waterway, along all three U.S. Coasts, and in Alaska and Hawaii". ²

21. Kirby conducts operations in both Marine Transportation and Diesel Engine Services. In the Marine Transportation business segment, its offshore marine company is Kirby Offshore Marine LCC.³ Kirby primarily provides transportation services by tank barge to inland and coastal markets in the Marine Transportation segment. The products transported and distributed include: refined petroleum products; products from pipelines; petrochemicals; black oil, including crude oils and natural gas condensate; coal; limestone rock and bulk sugar.⁴

22. Kirby Offshore Marine claims to be the, “largest United States operator of coastal tank barges and towing vessels participating in the regional distribution of refined petroleum products, black oil and crude oil, as well as the distribution of petrochemicals between Petroleum Administration and Defense Districts.” The Pacific Division of Kirby Offshore Marine operates vessels that trade between San Diego, California, and Barrow, Alaska. The Pacific Division fleet consists of tank barges that can carry between 26,000 to 193,000 barrels and tugboats that have between 2,000 to 11,000 horsepower.⁵

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² See www.kirbycorp.com
³ See www.kirbycorp.com/about/
⁴ See www.kirbycorp.com/marine-transportation/
⁵ See www.kirbycorp.com/marine-transportation/offshore-marine/
4.1.2. Oil Spill History

23. After searching Canadian legal databases, it was concluded that there is no record of Kirby being involved in litigation in Canada.

24. The following list includes previous oil spill incidents involving Kirby:

a. October 2016 - Subsea 7 Facility (Kirby Inland Marine LP): In October 2016, a barge towed by tug *Capt. Jim Green* collided with a dock at a Subsea 7 facility near Port Isabel in South Padre Island, Texas, breaching the oil tank and causing a spill of eighteen tons of low-sulfur diesel fuel. The accident occurred in Intercoastal Waterway, a 3,000-mile inland waterway along the Atlantic and Gulf of Mexico coasts of the U.S. The incident resulted in pollution damage to the environment of the waterways.6

b. June 2015 – Houston Ship Channel (Kirby Inland Marine LP): In June 2015, a section of the Houston Ship Channel was briefly shut down after the release of an estimated 23,000 gallons of naphtha (“PTN”) from a tank barge owned by Kirby Inland Marine LP that had been involved with an allision, impacting a cargo tank. The barge was carrying approximately 30,000 barrels of naphtha.7

c. March 2014 – Galveston Bay (Kirby Inland Marine LP): A barge owned by Kirby Inland Marine LP collided with a bulk carrier, *Summer Wind*, owned by Cleopatra Shipping Agency Ltd. in Galveston Bay, Texas on March 22, 2014. The barge had been carrying 924,000 gallons of bunker fuel oil, and one of the barge’s oil tanks was breached, causing approximately 168,000 gallons of fuel to leak into the water. The spill resulted in damage to migratory bird habitat.8

Subsequently, charter fishing businesses and others filed a class-action lawsuit against Cleopatra Shipping Agency Ltd. and Kirby Inland Marine.9

In a settlement reached in September 2016, Kirby Inland Marine LP agreed to pay $4.9 million in civil penalties to settle claims stemming from the oil spill.10

The case filed by the charter fishing businesses was filed in the US District Court, Galveston Division, on March 24, 2014.11

Subsequently, Kirby Inland Marine LP filed a claim against the insurer of the *Summer Wind* ship,12 alleging that the *Summer Wind*’s negligence was the cause of the collision and subsequent oil spill.13

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7 Mike Schuler, “Barge Allision: Naphtha Spill Closes Houston Ship Channel,” GCaptain (June 11, 2015), online: GCaptain (<www.gcaptain.com>).


9 Ryan Holeywell, “Spilled oil may bring stiff penalties for company,” Houston Chronicle (March 26, 2014), online: Houston Chronicle (<www.houstonchronicle.com>).

10 Tim Ahmann, “Kirby Inland Marine to pay $4.9 million penalty over oil spill,” Reuters (Sep. 27, 2016), online: Reuters (<www.reuters.com>).


25. The following list includes previous claims of negligence involving Kirby Corporation:

a. *Taira Lynn Marine Ltd. No. 5, LLC v. Jays Seafood Inc.*: On June 19, 2001, the *M/V MR. BARRY* and its tow, the *T/B KIRBY 31801*, allided with the Louisa Bridge in St. Mary Parish, Louisiana. Kirby Inland Marine, L.P. owned the barge; Taira Lynn Marine, Inc. owned and operated the tug; and the Louisiana Department of Transportation and Development owns the bridge. The cargo on the barge, a gaseous mixture of propylene/propane, discharged into the air as a result of the allision. A mandatory evacuation of all businesses and residences within a certain radius of the Louisa Bridge was ordered.

Fourteen businesses and business owners brought claims to recover damages under general maritime law and various pieces of legislation. The primary issue on appeal was whether claimants who suffered no physical damage to a proprietary interest can recover for their economic losses as a result of a maritime allision.

*Taira Lynn*, Kirby Inland and the State filed motions for partial summary judgment on the grounds that claimants' recovery for economic losses unaccompanied by damage to a proprietary interest was barred by case law precedent.

The Court decided in favor of the appellants. The claimants suffered no physical damage to their property. The claims were barred by case law precedent.14

b. *Union Pacific Railroad Company, Appellant, v. Kirby Inland Marine, Inc. of Mississippi, a/k/a/ Brent Transportation Company, in personam and the M/V Miss Dixie, its engines, tackle, fixtures and appurtenances, etc., in rem, Appellees.*: On May 5, 1996, the *M/V MISS DIXIE*, a river barge towboat on the Mississippi River owned and operated by Kirby Inland Marine, Inc., allided with the Clinton Bridge causing damage to the bridge and the *M/V MISS DIXIE*.

On October 10, 1999, the Appellant, the owner of the Clinton Bridge, started an action alleging the damage to its bridge was caused by the negligence of the crew of the *M/V MISS DIXIE* and/or by the unseaworthiness of that vessel. Kirby denied that the crew was negligent or that the vessel was unseaworthy and argued that the Appellant was negligent in the construction, design, care and maintenance of the Clinton Bridge.

The United States Coast Guard had labelled the Clinton Bridge “an unreasonable obstruction to navigation.” The issue before the court was whether the bridge was an unsafe bridge. The Court found that when the United States Coast Guard labels a bridge ‘an unreasonable obstruction’, it is in order to facilitate the funding process to alter the bridge. The court did not accept that the respondents had produced evidence of the obstructive character of the bridge.

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This decision arose following a settlement, the terms of which indicated that Kirby would pay a lesser amount if the court found that the presumption that a vessel’s crew is negligent when a vessel strikes a stationary object such as a bridge did not apply. The Court found that the presumption did apply.15

26. For further information on incidents involving Kirby that did not result in litigation, the Transportation Safety Board of Canada (“TSB”) maintains a database with information about American marine incidents, accidents and occurrences.16

4.2. **NATHAN E. STEWART AND DBL-55**

4.2.1. HTC Inspection

27. The information contained in this Section was obtained from the Damage Survey Report (Schedule 21), which was prepared by Mark Bentley, a Manager and Principal Surveyor of Independent Marine Consulting (Pacific) Ltd. Mr. Bentley conducted a damage survey of the Barge on November 12, 2016, at Vancouver Drydock Co. in North Vancouver, B.C., and of the NES on November 28, 2016, at Schnitzer Steel Canada Ltd. in Surrey, B.C.

28. On and around November 9, 2016, HTC requested that TC provide access to the Barge in Vancouver Drydock Co. in North Vancouver so that HTC could have a Principal Surveyor and an HTC representative inspect the barge. On November 9, 2016, TC followed up with HTC to confirm its interest in conducting the inspection, and HTC confirmed its interest the following day. (Schedule 22)

29. Kirby initially objected to an HTC representative accompanying the surveyor, with reference to a need for safety training and a security pass, and insurance issues (Schedule 23). Following much discussion, HTC’s representative was able to attend to inspect the barge with the Principal Surveyor.

30. The Principal Surveyor and the HTC representative inspected the Barge on November 12, 2016.

31. The Principal Surveyor and the HTC representative inspected the NES on November 28, 2016.

32. Through legal counsel, HTC made a request to Kirby, TC, and the TSB, for the following information which the Principal Surveyor sought for his report:

   a. General barge & tug particulars;
   b. Tank Plan / Capacity Plan for barge and the tug;
   c. General arrangement drawings for barge and tug;
   d. Drawings showing the mid section of the barge; and
   e. Details of the coupling system.

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16 See www.ntsb.gov/Pages/default.aspx
33. Kirby objected to TC and the TSB providing the requested documents (Schedule 11). Kirby refused to provide the requested information (Schedule 13). Accordingly, the information in the Damage Survey Report was limited to what was publicly available.

4.2.2. Tug Particulars

34. As outlined in Section 4.1 of the Damage Survey Report, shown below are the particulars of the NES.

<table>
<thead>
<tr>
<th>Type</th>
<th>Tug</th>
</tr>
</thead>
<tbody>
<tr>
<td>IMO Number</td>
<td>8968210</td>
</tr>
<tr>
<td>Flag / Home port</td>
<td>USA / New York</td>
</tr>
<tr>
<td>Built</td>
<td>2007 at Hope Services, Inc., Dulac, Louisiana</td>
</tr>
<tr>
<td>GT / NT</td>
<td>300 / 90</td>
</tr>
<tr>
<td>Length</td>
<td>30.48m</td>
</tr>
<tr>
<td>Breadth (molded)</td>
<td>9.75m</td>
</tr>
<tr>
<td>Depth</td>
<td>4.18m</td>
</tr>
<tr>
<td>Class</td>
<td>ABS</td>
</tr>
<tr>
<td>Owners</td>
<td>Kirby Offshore Marine Operating LLC</td>
</tr>
<tr>
<td>Managers</td>
<td>Kirby Offshore Marine Pacific LLC</td>
</tr>
</tbody>
</table>
35. Further information on the particulars of the NES can be found in Section 4.1 of the Damage Survey Report (see page 4 of Schedule 21).

4.2.3. Barge Particulars

36. As outlined in Section 4.2 of the Damage Survey Report, shown below are the particulars of the Barge.

<table>
<thead>
<tr>
<th>Type</th>
<th>OPA-90 Compliant Oil Barge</th>
</tr>
</thead>
<tbody>
<tr>
<td>IMO Number</td>
<td>N/A</td>
</tr>
<tr>
<td>Flag / Home port</td>
<td>USA / Portland</td>
</tr>
<tr>
<td>Built</td>
<td>2011 at Zidell Marine Corporation, Portland, Oregon</td>
</tr>
<tr>
<td>GT / NT</td>
<td>4,276 / 2,521 / 9,167</td>
</tr>
<tr>
<td>Length</td>
<td>91.44m</td>
</tr>
<tr>
<td>Breadth (molded)</td>
<td>23.77m</td>
</tr>
<tr>
<td>Depth</td>
<td>7.32m</td>
</tr>
<tr>
<td>Class</td>
<td>ABS</td>
</tr>
<tr>
<td>Owners</td>
<td>Kirby Offshore Marine Operating LLC</td>
</tr>
<tr>
<td>Managers</td>
<td>Kirby Offshore Marine Pacific LLC</td>
</tr>
</tbody>
</table>

37. Further information on the particulars of the Barge can be found in Section 4.2 of the Damage Survey Report (see page 6 of Schedule 21).

4.2.4. Articulated Tug and Barge (ATB)

38. Section 4.3 of the Damage Survey Report says:

“Together, the tug NATHAN E. STEWART and barge DBL-55 form an Articulated Tug and Barge unit or ATB. During transit, the bow of the tug sits in the v-notch in the stern of the barge and is connected to the barge via a coupling system allowing the tug and barge to pitch independently of each other but roll and yaw as one unit.” (see pg. 8 of Schedule 21)

39. The Damage Survey Report discusses the observations of the coupling system during the damage survey on November 28, 2016 (see pg. 8 of Schedule 21). The information on the coupling system of the NES was requested but not provided.

40. The IAP set out that the coupling system between the NES and the Barge was a JAK pin system. An articulated barge is considered a single vessel under the Pacific Pilotage Regulations, C.R.C., c. 1270, section 9(2):
Ships Subject to Compulsory Pilotage

9 (1) Every ship over 350 gross tons that is not a pleasure craft and every pleasure craft over 500 gross tons is subject to compulsory pilotage.

(2) For the purposes of subsection (1), if a ship is part of an arrangement of ships, then the combined tonnage of all the ships in the arrangement of ships is taken into consideration in determining whether the ship is subject to compulsory pilotage. (emphasis added)

4.3. ADDITIONAL INFORMATION ON THE NATHAN E. STEWART AND DBL-55

4.3.1. Oil Spill History of the NES

41. On December 18, 2011, en route to Skagway, Alaska, the NES and the Barge were involved in what Alaskan government officials characterized as a “potential spill” (see final Situation Report released on December 21, 2011 at Schedule 24).

42. At 2:40 p.m. on December 18, 2011, the United States Coast Guard (“USCG”) reported to the Alaska Department of Environmental Conservation that the NES and its Barge, an articulated tug/barge system, were adrift twenty miles west of Cape Fairweather. The crew of the vessel had reported to the USCG a loss of power to the starboard engine at 1:00 p.m. after a series of thirty-foot seas washed over the vessel and water entered the air intakes. The vessel later lost power in the port engine. The starboard engine remained non-operational but partial power was restored to the port engine. However, the port engine’s partial power was not enough to navigate the vessel during the storm. At approximately 11:00 p.m. that same day, the weather improved and the tug/barge was able to transit southeast.

43. At the time of incident, the NES was reported to have 45,000 gallons of diesel and 500 gallons of lube oil on board and the Barge was reported to have 2.2 million gallons of diesel fuel, 1,208 gallons of aviation fuel and 700 gallons of other petroleum products on board.

44. The final Situation Report released on December 21, 2011 (Schedule 24) outlined that the incident was a “potential spill” but indicated no source control as “there ha[de] been no release”. The final Situation Report also indicated that no natural resources were affected. It was anticipated that on December 23, 2011, the NES and the Barge were to be either escorted or towed to Seattle for repairs.
4.3.2. Route

45. The NES is believed to have transited the British Columbian Coast via the Inside Passage every ten to fourteen days delivering bulk fuel from the United States to Alaska. However, the exact route is unknown as this information was not disclosed to HTC.

46. A local community member reported, based on his historical observations, the NES would typically travel north after filling up in Burnaby, Anacortes Island, or Birch Bay, through the Salish Sea, Johnstone Straight, past Cape Caution and Fitz Hugh Channel. This individual claims that the NES went through Lama Pass past Bella Bella for a number of years. More recently instead of the Lama Pass Route, it would avoid Bella Bella by going up Johnston and Return Channels.

47. On October 13, 2016, the NES was pushing the empty barge from Ketichikan Alaska, towards Vancouver, British Columbia.

48. As acknowledged by Coast Guard personnel on marine traffic channels during the first few hours after the Incident, First Nations groups had been expressing their concerns specifically about the NES over the radio as it travelled through their territories on the coast. One specific example relates when the NES was travelling northbound in Wright Sound, approaching Hartley Bay and going up Grenville Channel. Coast Guard personnel indicated that because the NES has a fuel barge, First Nations groups would repeatedly assert that the NES had been instructed not to come through their territory and was not welcome in the inside waters. Coast Guard personnel indicated that Heiltsuk members might have done this as well.\(^\text{17}\)

49. Chief Marilyn Slett has confirmed that Heiltsuk was never consulted by Canada about the NES transporting oil through its territories, including waters where Heiltsuk performs commercial and food, social and ceremonial (“FSC”) harvesting.

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\(^{17}\) Canadian Coast Guard - VHF Recording, October 13, 2016, [RIR 16-020 Nathan E. Stewart, October 13, 2016, (audio with TimeTalk) - 2:30:05]
4.4. PACIFIC PILOTAGE AUTHORITY

50. The Pacific Pilotage Authority (PPA) is a federal Crown Corporation with a mandate to provide safe and efficient marine pilotage services on the west coast of Canada. The PPA’s jurisdiction encompasses the entire coast of British Columbia.\(^{18}\)

51. The *Pacific Pilotage Regulations* state that international vessels of 350 gross tons or larger are subject to compulsory pilotage (i.e., must have a Canadian marine pilots onboard) while in the compulsory pilotage areas of the PPA. However, section 10 of the *Pacific Pilotage Regulations* allows for an exemption of this requirement for vessels that are under 10,000 gross tons. A vessel is eligible for the coastal waiver exemption if all persons in charge of deck watch meet certain requirements, which include holding specific certification and experience.\(^{19}\)

52. Pilots protect against serious mishaps on marine highways.\(^{20}\) A local pilot possesses specialized knowledge regarding the waters off B.C.’s coast, and would be familiar with the course in and out of Seaforth Channel. The admissions process to become a B.C. coast pilot hinges on the candidate’s knowledge of and experience in local waters (the entire B.C. Coast). Employment as a pilot with the PPA requires a minimum of 700 days as a Master on the B.C. coast, or 365 days as a Master on the B.C. coast and 547 additional days in the region while holding a *Watchkeeping Mate’s* certificate; or 1,000 days on the B.C. coast while holding a *Watchkeeping Mate’s* certificate. Local pilots then complete an additional apprenticeship, which may last from nine to twenty-four months.\(^{21}\)

53. Chief Marilyn Slett has confirmed that Heiltsuk was never consulted by the PPA, or by Canada, about the PPA issuing a coastal waiver exemption relating to the NES or the Barge, despite ATB operating as an oil tanker and despite Heiltsuk’s expressed concerns about oil tankers in Heiltsuk waters.

54. In the absence of an exemption, non-pleasure vessels over 350 gross tons\(^{22}\) within the compulsory pilotage areas must have at least two Pilots on board for any voyage during which the ship would require the services of a pilot for a period exceeding eight consecutive hours, or for a distance exceeding 105 consecutive nautical miles.\(^{23}\)

55. On February 9, 2015, Kirby requested a renewal of their Canadian pilotage waiver from the PPA (Schedule 25). On February 24, 2016, the PPA confirmed that Kirby’s coastal waiver from compulsory pilotage was renewed until March 1, 2017 (Schedule 26). Accordingly, at the time of the Incident, the NES held a coastal waiver exemption.

\(^{18}\) Pacific Pilotage News Release, October 24, 2016; For more information, see [www.ppa.gc.ca/text/index-e.html](http://www.ppa.gc.ca/text/index-e.html)

\(^{19}\) Pacific Pilotage Regulations, CRC c.1270, s. 10

\(^{20}\) [https://www.youtube.com/watch?v=cdEYH15ojV4](https://www.youtube.com/watch?v=cdEYH15ojV4)

\(^{21}\) Pacific Pilotage Website, located online on January 24, 2017 at: [https://www.ppa.gc.ca/text/documents/How_to_become_a_pilot_eng.pdf](https://www.ppa.gc.ca/text/documents/How_to_become_a_pilot_eng.pdf)

\(^{22}\) Pacific Pilotage Regulations, CRC c.1270, s. 9(1)

\(^{23}\) Pacific Pilotage Regulations, CRC c.1270, s. 9(1)(a) and (b).
56. Following the Incident, on October 16, 2016, the PPA sent a letter to Kirby immediately revoking the BC coast pilotage waivers held by all Kirby vessels and marine officers. The letter further stated that all Kirby vessels to which the *Pacific Pilotage Regulations* applied must have a PPA-licensed pilot onboard when sailing within the compulsory pilotage waters of BC (Schedule 27).

57. When Mr. Obermeyer, the CEO of the PPA, shared the letter with HTC on October 26, 2016, he declined to disclose the reason for the suspension as the TSB had assumed responsibility for the accident report and the PPA could not disclose anything pertaining to the Incident until the TSB released its report. (Schedule 28).

58. The communication log provided by the Coast Guard included a map showing the NES’s route on October 13, 2016, and that the NES missed an eastward course correction into the Seaforth Channel. Approximately 10 minutes after missing the eastward course correction, the Vessel ran aground at Edge Reef, near the mouth of Gale Greek on Athlone Island.

59. According to the PPA, a pilot only gives advice as to course corrections, while the Master or Captain retains control of the vessel. Had a local pilot waiver not been issued, a minimum of two people would have been on watch – a pilot, and the Master or Captain.

60. On October 24, 2016, the PPA issued a news release on the new and interim measures of the PPA Waiver System. The news release outlined additional conditions that were placed on vessels that held waivers, as well as the route restrictions for all vessels transporting petroleum products through compulsory pilotage areas. In particular, the northern section of the Inside Passage was restricted and vessels were directed to follow a route between the Mainland and Haida Gwaii after leaving Gordon Channel at the northeast corner of Vancouver Island. In adverse weather conditions and only when cleared by vessel traffic, a vessel could proceed through Laredo and Principe by entering Laredo Sound or Browning Entrance. The PPA added a condition, for all waivers, of two people on the bridge at all times, one being the waiver holder (Schedule 29).
5.0 WORLD CLASS SPILL RESPONSE

5.1 CANADA

5.1.1. Background

61. Canada has responsibility over navigation and shipping, as well as over fisheries, under section 91(10) and (12) of the Constitution Act, 1867.

62. TC is the lead federal regulatory agency responsible for Canada’s “Marine Oil Spill Preparedness and Response Regime”. In particular, TC is responsible for the governance of the regime. The regime was built in 1995 on a “partnership” between government and industry. The Coast Guard leads the response and is responsible for conducting spill management during ship-source oil spills in Canadian waters. However, primary responsibility for responses lies with industry. According to a Report to Parliament on the regime, the regime requires that industry have capacity to clean up its own spills, through vessels having arrangements with a TC-certified response organization. The Coast Guard is to have capacity to complement the regime capacity, to serve as a “safety net”.

63. In 2013, the federal government appointed an independent expert panel to review Canada’s spill response preparedness and response system. The expert panel released its first report with forty-five recommendations for strengthening oil tanker safety in Canada, to achieve what Canada has called a “World Class Tanker Safety” system. In May 2014, Canada announced new measures to achieve a world-class tanker safety system in Canada, based on recommendations from its expert panel, as well as other studies and engagement projects. Improvements were to address oil spill preparedness and response planning, implement an Incident Command System, and assist Aboriginal communities to access training and equipment to allow for participation in marine emergency preparedness.

5.1.2. Spill Response Requirements

64. Under the Canada Shipping Act and its regulations, any vessel of 400 gross tonnage that carries oil as cargo or as fuel, and any “oil tanker” of 150 gross tonnage or more (meaning any vessel built to carry oil as cargo), must have an arrangement with a response organization, in respect of the quantity of oil that it carries, and in respect of the waters where it navigates. Vessel operators must have oil pollution emergency plans on board. In the event of a spill, a response organization (i.e., Western Canadian Marine Response Corporation) is to respond to the spill. The Coast Guard is to monitor the overall response.

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29 For further information on the on Canada’s Marine Oil Spill Preparedness and Response Regime, see: http://www.wtc.gc.ca/eng/marinesafety/bers-regime-menu-1780.htm.
30 For further information on the on Canada’s Marine Oil Spill Preparedness and Response Regime, see: http://www.wtc.gc.ca/eng/marinesafety/bers-regime-menu-1780.htm.
5.1.3. Liability and Compensation

65. This report does not address the compensation scheme under the regime in detail, but as background, with respect to spills of oil used as fuel for the ship (i.e., “bunker” fuel), the Marine Liability Act (the “MLA”) adopts the “Bunkers Convention”, which is an international convention under which “shipowners” are responsible for “pollution damage” caused by spills of bunker fuel.31 A different international convention applies to spills of oil carried as cargo. However, the MLA also imposes limitations on liability that sets an upper limit on the liability of shipowners, based on the gross tonnage of the vessel.32 These limitations set a limit on the liability of shipowners for all claims, including claims for losses resulting from infringements of rights, and claims for response costs. If a claim exceeds a limitation amount, claimants must look to recover the balance of their claims from the Ship-source Oil Pollution Fund, which is a fund of money maintained by Canada.33 The nature and extent of the damages the Fund covers is not, however, certain.

5.1.4. No Consultation

66. As part of Canada’s expert panel producing two reports relating to Canada’s “World Class Tanker System”, a number of First Nations organizations participated in stakeholder discussions, including Coastal First Nations. Chief Marilyn Slett confirms, however, that Coastal First Nations does not represent Heiltsuk Nation with respect to title and rights, and that Canada has not consulted with Heiltsuk about potential adverse impacts of the MLA or the World Class Tanker System, on Heiltsuk’s aboriginal title and rights.

5.2. BRITISH COLUMBIA

5.2.1. Background

67. Currently, section 80 of the Environmental Management Act, S.B.C. 2003, c. 53, authorizes, but does not require, the provincial government to act to address any hazard or threat, or long-term impacts on the environment, from a spill, and to bill persons responsible for the spill.

5.2.2. Amendments (Not Yet In Force)

68. On May 10, 2016, the B.C. Legislative Assembly passed Bill 21, introduced on February 29, 2016, which amends the Environmental Management Act. The changes received royal assent on May 19, 2016, but are not yet in force. These changes came after several years of engagement with industry, First Nations and local government, during which, in June 2015, the B.C. government made an announcement that it planned to proceed with developing and implementing a world-leading spill response regime.34 However, as it is the federal government’s primary responsibility to ensure that a marine spills regime is in place, the changes by the B.C. government mostly addressed land-based oil spills.35

32 See MLA, Schedule 1.
33 See MLA, section 101.
34 For further information, see: http://www2.gov.bc.ca/gov/content/environment/air-land-water/spills-environmental-emergencies/spill-preparedness-and-response-bc. Further engagement materials and events can be found here: http://www2.gov.bc.ca/gov/content/environment/air-land-water/spills-environmental-emergencies/spill-preparedness-and-response-bc/spill-response-engagement/engagement-materials/engagement.
69. The Backgrounder released on the new legislation described the effects of the amendments as being to

a. “enshrine” in legislation the “polluter pay principle” by requiring individuals or corporations responsible for a spill to clean it up;

b. create clearer requirements for spillers in terms of spill response, and recovery plans including environmental restoration;

c. enable the certification of a “preparedness response organization” (or “PRO”);

d. “ensure” development of “area response plans” and “geographic response plans”;

e. give ministers authority to create advisory committees to obtain advice from experts, and representatives from local governments and First Nations;

f. provide statutory immunity to government against legal action for any decisions relating to any government spill response work;

g. create new offences and penalties.36

70. The amendments repeal section 80, and add various sections, including sections 91.1 to 91.71, relating to spill preparedness, response and recovery.37 Under the new provisions (once they come into force), a “responsible person” must address the threats or hazards caused by a spill (s. 91.2(2)) and carry out an approved recovery plan (s. 91.2(4)-(6)). Under the amendments, the government may also take action (s. 91.4), for which the responsible person must pay (s. 91.4(3) and (4)), but no one may sue the government in relation to anything done or not done to address a spill unless done or omitted in bad faith (s. 91.4(8) and (9)).

71. As many amendments are not yet in force, they cannot apply to the Incident. Also notably, while the amendments make “responsible persons” liable for spills, the doctrine of federal paramountcy prevents provincial legislation from overriding federal legislation. This means that Kirby may seek to rely on limitations of liability under the MLA.

5.2.3. No Consultation

72. The BC government sought public input from citizens, stakeholders and First Nations regarding the proposed changes to the Environmental Management Act, introduced in February 2016, by participating in on-line discussion web site.38 A compilation of individual submissions from those who requested them to be posted39 includes submissions by Wet’suwet’en First Nation. Chief Marilyn Slett confirms, however, BC has not consulted with Heiltsuk about changes to the Environmental Management Act. To date, no details of the Oceans Protection Plan has been provided to Heiltsuk in relation to improving marine safety and responsible shipping, and protecting their marine environment.

38 See http://engage.gov.bc.ca/spillresponse
39 Compilation of Individual Submissions From Those Who Requested Them To Be Posted, accessed on-line on January 25, 2017 at:
5.3. **AFTER THE OIL SPILL**

73. On November 7, 2016, Prime Minister Justin Trudeau announced the government’s $1.5-billion national Oceans Protection Plan. The federal government explained that the Oceans Protection Plan “improves marine safety and responsible shipping, protects Canada’s marine environment, and offers new possibilities for Indigenous and coastal communities.”


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A crane raising the sunken *Nathan E. Stewart* from Seaforth Channel.
6.0 HEILTSUK NATION’S POSITION ON OIL TANKERS

6.1. MARINE USE PLAN

74. Along with other coastal First Nations, Heiltsuk has approved the Central Coast First Nations Marine Use Plan, under which Central Coast First Nations oppose tanker and condensate shipping through their territories.\(^{41}\) They note, in a summary of their Marine Spatial Plan, that oil and gas tankers are not permitted in the territories.\(^{42}\) (Schedule 30)

6.2. SUPPORT FOR A TANKER MORATORIUM

75. Chief Marilyn Slett has advised that in November 2010, Heiltsuk joined with a coalition of First Nations, as well as commercial fishing and environmental groups, to call on the federal government to ban oil tankers from the region. More recently, Heiltsuk supported Prime Minister Trudeau’s instruction to ministers in November 2015 to formalize a ban on oil tanker traffic along the north coast.

6.3. ENBRIDGE NORTHERN GATEWAY PIPELINE PROJECT

76. Given the risks of significant adverse spill impacts on aboriginal rights, Heiltsuk has opposed oil tankers in its waters, especially where government has made decisions without adequate information about risks that spills present to marine resources important to Heiltsuk.\(^{43}\)

77. In 2012 and 2013, due to limited resources, Heiltsuk participated to the extent possible in the National Energy Board’s Joint Review Process for the Enbridge Northern Gateway Pipeline Project, which was to involve 190-250 tankers per year.\(^{44}\) When the Governor in Council approved project certificates, Heiltsuk and Kitasoo/’Xáídáis First Nation applied for judicial review to the Federal Court of Appeal, and successfully challenged the Governor in Council’s decision. The Federal Court of Appeal confirmed that the Crown had failed to properly consult with Heiltsuk, Kitasoo/’Xáídáis and other First Nations about possible adverse spill effects on their aboriginal rights.\(^{45}\) (Schedule 31)

78. The certificate for the Project was quashed, and Canada subsequently elected to conduct no further consultations.

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\(^{41}\) Central Coast First Nations Marine Use Plan, Executive Summary, at page 14.
\(^{42}\) Ibid., at page 26.
\(^{43}\) In 2013, Heiltsuk and other First Nations signed the Save the Fraser Declaration, a declaration banning tar sands pipelines and tankers from crossing British Columbia.
\(^{44}\) Transcripts of Heiltsuk members’ testimony is available on the CEAA/NEB public registry for the Enbridge Northern Gateway Project Joint Review Panel: http://gatewaypanel.review- examen.gc.ca/rf-m/index-en.html
\(^{45}\) Gitxaala Nation v. Canada, 2016 FCA 187.
7.0 GALE PASS AND SEAFORETH CHANNEL

7.1. LOCATION OF INCIDENT

79. Heiltsuk’s territory consists of extensive land and marine areas, including offshore waters that encompass, *inter alia*, the Goose Island Group and Banks, and that include Campbell Island and Bella Bella. Heiltsuk’s territory includes but is not limited to twenty-three reserves. Heiltsuk’s territory is centrally located in the Great Bear Rainforest, which is the subject of numerous forest and marine conservation initiatives, including most recently the Queen’s Commonwealth Canopy on September 25, 2016.

80. The ATB ran aground in Seaforth Channel, approximately 11.5 nautical miles west of Bella Bella, British Columbia, at a location determined to be 52.14.46N, 128.23.160W (Schedule 32). The ATB, consisting of the NES and the Barge, ran aground on Edge Reef on Athlone Island. Edge Reef is at the mouth of Gale Creek, near Heiltsuk Koqui Indian Reservation No. 6 and the ancient village site of Q’vúqvaï, in the territory of the Heiltsuk Q’vúqvaïx̌Tribе.

81. The affected area is part of the Inside Passage, the main marine shipping route between the United States and Alaska on the Pacific Coast.

82. Since time immemorial Heiltsuk have harvested marine and other resources. Harvesting and management of their traditional territories is integral to the distinctive culture of Heiltsuk.

83. Gale Creek and the marine area near Athlone Island is a rich ecosystem that Heiltsuk traditionally harvested using sustainable practices. Thereby, the Athlone Island and Gale Creek area was ecologically intact prior to the Incident. Gale Creek has traditionally served as one of Heiltsuk’s main harvesting sites. It provided Heiltsuk with many food species for FSC purposes and commercial purposes. The removal of Gale Creek as a viable harvesting area will both reduce FSC resources available to Heiltsuk and limit opportunities for teaching effective stewardship through traditional cultural practices.

84. Heiltsuk harvests at least twenty-five food species from the affected area. Gale Creek itself is the location of the majority of Heiltsuk’s manila clam commercial harvest. The affected area is also a significant habitat for an endangered species, the northern abalone. Commercial harvests in the affected area also include red sea urchin, sea cucumber, salmon, and herring spawn on kelp (“SOK”). The kelp canopy in the affected area is habitat for sea otters and is harvested to provide kelp for FSC and commercial SOK harvests throughout Heiltsuk territory.
7.2. CHIEFTAINSHIP OF AREA

85. As stated above, the ATB ran aground on Edge Reef on Athlone Island at the mouth of Gale Creek, where the Heiltsuk Koqui Indian Reservation No. 6 and the ancient village site of Q’vũqvai are located, in the territory of the Heiltsuk Q’vúqváitx̌ Tribe.

86. The Chief of the Q’vúqváitx̌ Tribe and the traditional title holders are Hemas ‘Qa’aiit, Hemas Dhadhiyasila, Hemas Gáluyakas, Hemas Máxvmvisagmi, Hemas Wókas, Hemas Gáñmláxa, Hemas Hiyaspat, and Hemas Duquaíla.
A killer whale is spotted in Seaforth Channel on Oct. 23, 2016.

Sinking of the Nathan E. Stewart, diesel oil sheen on water.
Diesel-soaked marine resources and washed-up containment booms

Broken up containment boom on the beach nearby the sunken Nathan E. Stewart

Sinking of the Nathan E. Stewart, diesel oil on pebbled beach.
8.0 EVENTS OF OCTOBER 13, 2016 (DAY 1)

87. Summaries of the interviews of Heiltsuk first responders conducted by the investigation team are provided in Section 10.0 of this report.

8.1. CHRONOLOGY OF EVENTS

88. **10:50 p.m.**: On October 12, 2016, at approximately 10:50 p.m., the NES reported passing Freeman Point, next to the village of Klemtu, and that it was heading towards Idle Point, which is past Gale Creek (Schedule 33). As identified in the Communication Log shared by the Coast Guard, the master of the vessel was Sean P. Connor. The vessel was carrying seven crew members.

89. **12:50 a.m.**: At approximately 12:50 a.m., the NES missed at least one course change eastward into Seaforth Channel. As a result of the missed course change, the NES headed off course towards Gale Creek. Vessel tracking records indicate no attempt to alter course prior to running aground on Edge Reef over ten minutes later (Schedule 33 and 34).

90. **1:00 a.m.**: Shortly after 1:00 a.m., the Barge ran aground at Edge Reef on Athlone Island, at the mouth of Gale Creek in Seaforth Channel (at Latitude 52.14.46N, 128.23.160W, approximately 0.2 nautical miles from shore). At the time, the weather was moderate rain and winds of 10 knots. A screenshot taken by a local first responder indicates the NES was travelling at 7 knots when the Barge ran aground (Schedule 35 & Schedule 36).

The NES contacted Prince Rupert Traffic through the VHF to advise that the Barge had run aground, and that it was an empty petroleum barge. The NES communicated its intention to hold fast at that time, and requested Coast Guard assistance. The NES crew communicated that crew were on the Barge, inspecting to see if the vessel was taking on any water.

91. **1:16 a.m.**: At approximately 1:16 a.m., Prince Rupert Traffic broadcast the Incident and requested assistance from any vessels nearby.

92. **2:00 a.m.**: Due to the configuration of the ATB, the NES had been pushing the Barge. Although the Barge ran aground shortly after 1:00 a.m., the NES was reported to have run aground at approximately 2:00 a.m.

93. **2:20 a.m.**: The first vessel to arrive on scene was a Coast Guard vessel, the Cape St. James, at approximately 2:20 a.m. After arriving, the Cape St. James asked the NES if they wanted the Coast Guard to try to pull the vessel off the rocks or evacuate the crew. The NES communicated they did not want to try to pull the vessel off the rocks, and did not want to evacuate the crew, as there was no danger of sinking, the vessel was not taking on water at the time, and no lives were in danger. The NES asked the Cape St. James to stand by. The NES later informed Prince Rupert Coast Guard Radio that their Response Organization had been contacted.
4:10-6:00 a.m.: Between approximately 4:10 a.m. and 6:00 a.m., the NES reported that fuel tanks have been breached, fuel was being lost to the environment, and the vessel was taking on water in the bilge. NES also reported attempts to deploy containment booms and that fuel would be pumped from the NES to the Barge. At approximately 4:30 a.m., Dale Bull, an Environmental Emergency Response Officer of the British Columbia Ministry of Environment (“MOE”), phoned and spoke with Kelly Brown, the Director of the Heiltsuk Integrated Resource Management Department (“HIRMD”), to inform Heiltsuk Nation of the Incident.

95. Mr. Brown called Mr. Bull back soon after, to confirm no breach, which Mr. Bull confirmed.

96. Mr. Bull called Mr. Brown shortly after 5:00 a.m. to inform him of a breach in the NES, and that it was leaking diesel. Mr. Bull informed Mr. Brown that the NES was attempting to use containment booms, and to pump fuel from the NES to the Barge.

97. Low tide occurred at approximately 5:20 a.m. Around this time, the Cape St. James reported to Prince Rupert Coast Guard Radio that there was 550 feet of boom at the Bella Bella lifeboat station, and 450 feet of boom at Shearwater.

98. 6:30-7:30 a.m.: At approximately 6:30 a.m., a Coast Guard vessel, the John P. Tully, while en route to the Incident site, was diverted to Shearwater Marina to pick up oil pollution equipment. The John P. Tully was reported to have picked up oil spill response materials from the Bella Bella lifeboat station.

99. At approximately 6:30 a.m., the first Heiltsuk first responders arrived on scene in their own vessel (“HN5”). This individual remained on scene until approximately 7:30 a.m. During this time, the individual observed two other Heiltsuk vessels arrive on scene and two Coast Guard vessels on scene, the Cape St. James and Bartlett 1.

100. At approximately 7:00 a.m., the NES reported losing power, due to a complete valve failure, and water in the engine room. At approximately 7:30 a.m., the NES reported using three pumps to extract water from the vessel. The John P. Tully was anticipated to arrive at about 7:30 a.m.

101. 7:50-8:20 a.m.: At approximately 7:50 a.m., the NES reported the pumps were effective and dewatering was beginning. However, between approximately 8:00 a.m. and 8:10 a.m., the NES reported the breaches were increasing and requested a pump from the Cape St. James, which was delivered to the NES. By 8:20 a.m., the first tugboat, the Haisea Guardian, arrived on scene.

102. 8:50-9:20 a.m.: At approximately 8:50 a.m., the NES reported that six pumps were operational. Soon after, at approximately 9:00 a.m., the NES reported that six pumps could not keep up with the ingress of water.

103. At approximately 9:00 a.m., another Coast Guard vessel, the Bartlett, arrived on scene, and assumed operational command from the Cape St. James shortly after.
9:26 a.m.: The NES began to sink at 9:26 a.m. The crew of the NES abandoned ship onto the Barge. One person reportedly fell into the water but was immediately recovered by a shipmate. No injuries were reported. The NES remained attached to the Barge at that time.

At the time of the NES sank, four Heiltsuk vessels were on scene. Three more Heiltsuk vessels arrived within an hour of the NES sinking.

Before the NES sank, Heiltsuk first responders reported a loud grinding sound of the NES against the rocks. Also before the NES sank, Heiltsuk first responders requested that boom be placed around Gale Creek and that the NES be pulled off the reef. Neither request was met.

Heiltsuk observers reported that the tug sank within seconds. Heiltsuk observers described the water around the tug instantly turning grey, green, brown, "milky" or like "waste water", and with a "sheen of diesel that did not allow you to see more than a few inches from the surface of the water. Further, Heiltsuk observers reported the strong smell of the diesel, which they recognized immediately.

Heiltsuk observers stated that within an hour of the sinking, the diesel sheen had spread for about a kilometre radius around the NES, entering the mouth of Gale Creek.

9:26-9:40 a.m.: The crew evacuated the Barge onto the Bartlett 1, and were taken to the Bartlett.
110. 10:00-11:00 a.m.: The crew of the NES returned to the Barge to secure a line from the Barge to the \textit{Haisea Guardian}, to keep the barge off the rocks and shore of Gale Creek. A Heiltsuk vessel assisted the Coast Guard in securing the line from the Barge to the \textit{Haisea Guardian}. Around the same time, three Heiltsuk vessels and the \textit{Bartlett 1} were between the Barge and the shore, pushing the Barge away from the shore, to keep the barge off the rocks and shore. The Heiltsuk vessels and the \textit{Bartlett 1} successfully kept the barge off of the rocks and shore of Gale Creek.

111. 10:30 a.m.-12:00 p.m.: Between approximately 10:30 a.m. and 12:00 p.m., Heiltsuk vessels contacted the Coast Guard and requested boom to deploy in the affected areas, but were told by the Coast Guard to contact the response team. Some Heiltsuk vessels reported they had attempted to contact the response team for approximately two hours.

112. At 11:00 a.m., the \textit{Clowhom Spirit}, a vessel owned by Shearwater was reported over the radio to be acting on behalf of WCRMRC. Some Heiltsuk first responders reported seeing that the vessel arrived on the scene with some oil spill response materials onboard. Heiltsuk representatives on scene were told the vessel was supposed to have arrived around 9:30 a.m.

113. Once the \textit{Clowhom Spirit} arrived on scene, they advised Heiltsuk vessels who were requesting that the booms they were carrying be laid, that they were unable to deploy boom without authorization from WCRMRC, and were waiting for authorization to do so. Without providing any further explanation, the \textit{Clowhom Spirit} left to pick up an individual on the response team from Bella Bella, and then returned to the scene.

114. Heiltsuk first responders reported that the Coast Guard was to manage authority until approximately 12:00 p.m. and authority was to transfer to the response team, but expressed much confusion as to whether this occurred.

115. 12:00-2:00 p.m.: At approximately 12:00 p.m., almost three hours after the NES sank; the \textit{Bartlett} notified Heiltsuk vessels that the \textit{Clowhom Spirit} could distribute booms to be deployed. Booms were deployed for the first time since the NES sank. Five Heiltsuk vessels on scene helped to deploy boom at the mouth and shore of Gale Creek. Heiltsuk vessels reported that the \textit{Clowhom Spirit} had brought insufficient boom to cover the mouth of Gale Creek.

116. During this time, a Heiltsuk vessel departed the scene to obtain more oil spill response material from Bella Bella, and arrived back on scene with more oil response materials. Heiltsuk vessels deployed this material.

117. At around 1:45 p.m., Kirby personnel conducted an over-flight.

118. At around 2:00 p.m., Heiltsuk first responders reported they were unable to place booms in Gale Creek due to the current. Various complications in deploying the boom occurred, such as difficulties due to the current, tide, weather, and lack of training or instruction provided to Heiltsuk first responders.
119. At approximately 1:30 p.m., the Mar-Ell Mist, a vessel owned by Shearwater, arrived on scene carrying Heiltsuk leadership representatives and Kirby personnel. The Kirby personnel onboard were the first Kirby employees to attend the Incident site. It was reported that the Coast Guard told Kirby it was their responsibility to take charge at this time. WCMRC (the response company) or Resolve Marine Group (the salvage company; “Resolve” or “Resolve Marine Group”) had not yet arrived.

120. Heiltsuk representatives reported a lot of confusion about who was taking charge of the situation.

121. 2:30 p.m.: At approximately 2:30 p.m., Department of Fisheries and Oceans (“DFO”) reportedly arrived on scene to conduct sampling. DFO did not participate in the response and were reported to have remained on scene for about an hour.

122. 3:00 p.m.: At approximately 3:00 p.m., a Heiltsuk hereditary Chief boarded the Bartlett to advise of sensitive areas to boom. This individual had extended his support over the radio at various times throughout the day, but had not been asked to board the Bartlett to assist until this time.

123. 3:30 p.m.: The Mar-Ell Mist picked up the crew of the NES from the Bartlett and transported the crew back to Shearwater. During the trip to Shearwater, Heiltsuk leadership representatives onboard asked the crewmembers questions about the Incident, but the crewmembers did not provide any information. When the Mar-Ell Mist dropped off the crew of the NES, it picked up more oil response material. The John P. Tully departed the scene at approximately 3:30 p.m.

124. 3:30-5:00 p.m.: Between approximately 3:30 p.m. and 5:00 p.m., Heiltsuk vessels continued to attempt to set booms in Gale Creek, but the booms proved ineffective due to the current. Some Heiltsuk first responders reported that booms were breaking before the whole boom was even deployed, due to the anchors not being strong enough to hold in the current. Heiltsuk first responders on another Heiltsuk vessel reported that the Bartlett had directed them to place boom between the Barge and the beach, but the tide was low and swells were large. This resulted in a close call for the Heiltsuk vessel, and the crew decided to leave the scene due to safety concerns.

125. 5:30 p.m.: At approximately 5:30 p.m., the Mar-Ell Mist returned to the Incident site from Shearwater with two crew members of the NES who boarded the Barge to assist in dive-team preparations. Around this time, Resolve Marine Group reportedly arrived on scene.

126. 6:00 p.m.: At about 6:00 p.m., the first response vessel, the Eagle Bay, arrived. The Eagle Bay reportedly deployed 1,000 feet of boom in Gale Creek. Heiltsuk first responders explained that neither the Haisea Guardian nor the Bartlett had directions for the vessel, and informed the vessel to go to Bella Bella to obtain directions.

Also around 6:00 p.m., the dive crew arrived on scene on the Clowhom Spirit. At about 6:30 p.m., the Clowhom Spirit reported on the VHF that their vessel had bumped the bottom and lost an engine. Due to this occurrence, the dive team operations were stood down.
6:30-7:00 p.m.: Between 6:30 p.m. and 7:00 p.m., the Haisea Guardian advised that the NES looked as though it was slipping off the back of the Barge. By 6:40 p.m. the Tug had separated from the Barge and the Barge floated free while the Tug remained hard aground. The Haisea Guardian was instructed to gently pull on the Barge to see if it would pull free, [off the beach] which it did. The Haisea Guardian then took the Barge in tow.

Another tugboat on scene, the Diligence, inspected the Barge at this time. The Haisea Guardian took the Barge in tow and awaited anchor instructions.

7:00 p.m.: At approximately 7:00 p.m., two Heiltsuk first responders arrived on scene to begin a nightshift in Gale Creek to monitor the Incident site. All response vessels were stood down by 7:00 p.m. At approximately 7:00 p.m., another Heiltsuk vessel transferred Kirby personnel to the Incident scene.

7:30-9:00 p.m.: At approximately 7:30 p.m., a meeting was held at the Heiltsuk band office where the Incident Command Post (“ICP”) was eventually set up on Heiltsuk’s request. Both WCMRC and Resolve Marine Group attended this meeting. The anchoring of the Barge was discussed. Determining where to anchor the Barge reportedly took about two hours. Heiltsuk first responders reported that originally the response team wanted to anchor the Barge in Spiller Channel, but Heiltsuk first responders insisted the Barge be anchored in Dundavan Inlet for safety reasons.

It was reported at approximately 8:00 p.m. that a Kirby representative and a naval architect would inspect the Barge for stability.

11:00 p.m.: UC established a Situation Report protocol for field operations.

12:00 a.m.: By about midnight, the Barge was anchored in Dundavan Inlet.
8.2. SPECIFIC ISSUES

An overview of the issues reported by Heiltsuk first responders concerning Day 1 of the Incident is as follows:

a. One Heiltsuk first responder explained that Shearwater (acting on behalf of WCMRC) did not have proper vessels to assist in deploying boom as the Haisea Guardian and Mar-El Mist could not get into the affected area. Other Heiltsuk first responders reported that a Shearwater vessel did not have instructions to deploy the boom that it had brought, and after a trip back to Bella Bella, it returned to deploy boom but discovered it did not have sufficient boom.

b. Heiltsuk first responders were not given any safety instructions or any direction on how to use the oil spill response materials before deploying boom.

c. The weather as well as the tide and current made deploying boom difficult for Heiltsuk first responders. Further, the booms deployed were ineffective in the waters, reported to only work in currents of up to 1.5 knots, when the currents near the Incident site were often higher. Heiltsuk first responders reported that there was very little containment done the first day and that boom was not placed around the NES the first day.

d. To prevent the Barge from grounding against the rocky shore, and to attach a towline, three Heiltsuk first responders and one Coast Guard working boat placed themselves and their punts in a dangerous position between the rocky beach and the Barge, in an effort to push the Barge.

e. Most Heiltsuk first responders that responded to the Incident during the first and second day reported that they experienced ill health effects due to handling or smelling the diesel.

f. There were various occasions when Heiltsuk first responders requested to assist or offered advice over the radio, but their requests and offers were not acknowledged or responded to by other organizations on scene.

g. Heiltsuk first responders reported an immense amount of confusion regarding who had authority and who was to give direction on scene throughout the day.

Kirby did not disclose the reasons for the ATB/NES missing the course change, who was on watch at the time, and whether that individual held a waiver from the Pacific Pilotage Authority.

Throughout the Communication Log shared by the Coast Guard, a Coast Guard employee noted twice that the Incident would be a “high media event” due to local First Nation opposition to the fuel tanker traffic and the NES in particular. It was also observed that there is “no such thing as an empty fuel barge” as there is always some kind of residue after a fuel barge has been used.
Other observations made by Heiltsuk first responders on the first day included the following:

a. contaminated kelp beds and wildlife were in the affected area;

b. fuel was observed on the surface of the water so thick that the water could not be seen below it;

c. many commented that the pollution in the water was so thick it looked like herring spawn; and

d. slick was observed west out to Cape Swain.
9.0 EVENTS OF OCTOBER 14, 2016 (DAY 2)

9.1. CHRONOLOGY OF EVENTS

138. During Day 2, HTC organized check-ins, food, fuel for field crews and Heiltsuk first responder boats.

139. **4:00 a.m.-6:00 a.m.**: Between 4:00 a.m. and 6:00 a.m., the Heiltsuk first responders who were monitoring the Incident site overnight smelled diesel inside Gale Creek and observed that the booms had broken loose as a result of the tide. Due to this occurrence, the Heiltsuk first responders moved to the outside of Gale Creek.

140. **8:00 a.m.**: A Heiltsuk first responder reported they spoke to a Coast Guard crew member and were told the captain of the NES had fallen asleep.

141. **8:00 a.m.-10:00 a.m.**: Between approximately 8:00 a.m. and 10:00 a.m., a Heiltsuk first responder attended a helicopter over-flight and observed that diesel had spread all along the shoreline near the Incident site, approximately “1-2 miles” along the shore of the south side of Seaforth Channel and through Gale Pass.

142. **9:00 a.m.**: By approximately 9:00 a.m., two or more Heiltsuk vessels were on scene to assist. The Heiltsuk vessels were provided with boom and anchors and told to place the boom wherever these individuals thought would be beneficial.

143. **WCMRC was reported to be on site at this time with skimming capabilities.**

144. **10:00 a.m.**: By 10:00 a.m., a UC briefing had started at the ICP in Heiltsuk’s band office.

145. **11:00 a.m.**: By about 11:00 a.m., four or more Heiltsuk vessels were on scene. One Heiltsuk first responder reported a boom placed around the NES and across Gale Creek at this time.

146. **12:00 p.m.**: At about 12:00 p.m., Kirby personnel arrived on scene. Shortly after, a diver hired by Kirby assessed the tug and observed product coming from the starboard tank (at a rate of one quart every ten minutes). The diver attempted to secure the leak with duct tape and garbage bags but was unable to do so. As the diver did not have the proper equipment to secure the leak, the diver departed for Bella Bella to retrieve more gear.

147. **Also at about 12:00 p.m., the Mar-Ell Mist departed Bella Bella for the Incident site, with Kirby personnel onboard. A Heiltsuk representative onboard reported that, at that time, it was discovered the Barge, then anchored in Dundavan Inlet, had spill response materials onboard not used the previous day. The Mar-Ell Mist travelled to Dundavan Inlet to retrieve some of the spill response equipment from the Barge.**
148. 12:30 p.m.: The Mar-Ell Mist arrived on scene at about 12:30 p.m. A Heiltsuk first responder on the Mar-Ell Mist observed the Gulf Rival skimming Seaforth Channel. At this time, a Heiltsuk first responder was informed that a barge with personal protection equipment ("PPE") would arrive at approximately 2:00 p.m. that day, but that the Coast Guard had provided the Heiltsuk first responders with gloves.

The Gulf Rival was used as a response centre on scene and the Central Coaster, another Shearwater vessel, was being discussed to be used to collect salvage.

149. 2:30 p.m.: At about 2:30 p.m., divers arrived back on scene to repair the leaks in the NES’s fuel tanks.

150. 3:00 p.m.: At approximately 3:00 p.m., Kirby personnel contacted local boats about replacing broken booms in Gale Creek by helicopter. However, because the opportunity had been missed that day to replace the broken boom (due to the tide), the booms were staged along the shore of Gale Creek so the boom could be set at high tide the next day, around 11:00 a.m.

151. 3:00 p.m.: A Heiltsuk hereditary Chief boarded the Bartlett at approximately 3:00 p.m. until 9:00 p.m. that evening to advise of sensitive areas to boom.

152. 4:00 p.m.: The barge with PPE reportedly arrived on scene at 4:00 p.m.

153. 4:30 p.m.: By 4:30 p.m., UC received reports that the leaks in the NES’s fuel tanks were sealed.

154. 4:30 p.m.: The Eagle Bay travelled to the Barge (anchored in Dundavan Inlet) to retrieve further oil spill response materials onboard, but reported shortly afterwards that the materials contained tears and holes.

155. 5:00 p.m.: By approximately 5:00 p.m., Heiltsuk vessels were stood down for the day. Nine Heiltsuk vessels were reported to have attended on scene that day.

156. Shortly after 5:00 p.m., Kirby personnel conducted an underwater survey of the Barge, still anchored Dundavan Inlet.

157. Evening: Later that evening, Heiltsuk first responders reported to UC that the absorbent pads sank when deployed. UC directed that all absorbent pads deployed be picked up.
9.2. SPECIFIC ISSUES

An overview of the issues reported by Heiltsuk first responders concerning Day 2 of the Incident is as follows:

a. Booms set in Gale Creek had broken throughout the night and needed to be replaced. Boom continued to be faulty and ineffective in the waters.

b. Absorbent pads were used for containment on Day 2, but as these pads sank when deployed, UC directed all absorbent pads be picked up.

c. Skimming efforts were used on Day 2, but Heiltsuk first responders observed that they were ineffective because the sheen had already dispersed.

d. Containment boom was not placed around tug until sometime during the morning on Day 2.

e. Spill response material on the Barge had not been used during Day 1, despite a lack of equipment.
f. Difficulties with setting boom due to weather, tide and the current persisted. An opportunity to set boom again in Gale Creek on Day 2 was missed, so that the boom had to be staged to be set by helicopter the next day.

g. Heiltsuk first responders reported they observed parties involved in the response still trying to organize operations. There was still confusion on Day 2 about who was in charge.

159. Safety guidelines were issued during the day of October 14, 2016. Advice about protective matters were provided to some Heiltsuk first responders. Not all first responders were given advice to avoid contact with diesel fuel and fumes, given First Aid advice, and given advice to seek medical attention if they experienced diesel exposure symptoms.

160. DFO issued an emergency closure for bivalve shellfish harvesting in Area 7, Gale Creek and the affected area. Listed species included intertidal clams, razor clams, geoducks, horseclams, oysters, and scallops by trawl (Schedule 37).
10.0 INTERVIEWS

161. Harvey Humchitt (DAY 1)

I received a call from the Director of HIRMD at 5:00 a.m. to inform me of the Incident. He knew that the NES had run aground as he had been informed by MOE. We did not know how bad it was at this time and we were originally given the wrong location.

We left Bella Bella at around 6:45 a.m. in one of the HIRMD boats. On our way out to the Incident site, we could hear conversations between NES and Prince Rupert Coast Guard Radio (“PRCGR”). At one point, the NES said they had compromised one of the fuel tanks and there was water coming into the bilge quickly. The NES was asking the Coast Guard to provide more pumps for them. We arrived on scene at approximately 7:30 a.m. When we arrived, we were not told what to do; we were not given any resources. At 7:30 a.m., NES told PRCGR that they would lose power on the vessel soon and would be in contact with their hand-held VHF. Before the tug sank, I asked the Captain of the Bartlett if they could drop the anchor from the barge in order to keep the barge off the rocks. This was not done. When we arrived, there were a few Heiltsuk punts out there. The Coast Guard vessel, the Cape St. James was also out there. Later, the RCMP came on scene. Quite a bit later on first day, the Clowhom Spirit (Shearwater vessel) was out there with booms. After the NES sank, there was diesel all over the beaches, the rock, the whole area. Approximately twenty minutes after the tug sank, we could see the diesel spread all over Gale Pass and smell it. All the clam beds had been compromised. The Bartlett showed up about 11:00 a.m.-12:00 p.m. At about 4:30 p.m., I went aboard the Bartlett to point out some cultural features, clam beds, and areas of concern. We came back to Bella Bella around 7:00 p.m. and went straight into meetings until about 9:30-10:00 p.m.

That day, I saw a lot of chaos; I did not see any real measures taken to avoid the eventual sinking of the NES. It took a long time for oil booms to be deployed and there was really no on-scene commander or incident commander on scene. The booms supplied were booms from Coast Guard, Bella Bella and Shearwater but the booms were all inadequate. The booms were not the proper type for the conditions out there. There was no communication, no on-scene command, no clear direction on actions to be taken to try and mitigate the situation. It was a light wind but the tides and currents were strong. We spent a lot of the day waiting for instructions. It was very upsetting to see how much damage was done in such a short time.

My family and I harvest for personal, social or ceremonial purposes in the area where the incident happened. We collect clams, cockles and shellfish and I used to harvest manila clams for commercial sale from the area. This event has been emotionally and physically draining, it is not something you can turn on and off because you are always involved with it. I know that we have a lot of work to do still. We need to ensure that Heiltsuk are involved with any kind of incident like this, need to be able to take control of any situation where an oil spill like this could be avoided. This event has affected Heiltsuk way of life in many ways. For example, the commercial clam harvesting as well as clam harvesting for food and ceremonial use cannot be done until we find out what happens to seafood that have been impacted.
Harvey Humchitt (DAY 2)

I responded on the second day because I was worried about the damage done by the vessel going down on the first day. I volunteered my time and there were no requests for any assistance. By this time, WCMRC was on scene. Shearwater was also on scene. They were deploying boom and pads and trying to collect diesel near Gale Passage.

I went on a helicopter flight with some of the people from Kirby and UC at 10:00 a.m. It was disturbing to see all of the diesel in the water and how quickly it had spread through Seaforth Channel. There was diesel all along the shoreline by the incident site, it covered one-to-two miles on the Seaforth side and in through Gale Pass right up inside to the tidal rapids.

I arrived on scene on the Coast Guard inflatable vessel. I could still smell the diesel very strongly, when we were on site we had to drive away from the incident site because the diesel was so strong. I was an observer on the Bartlett from 3:00 p.m. until the evening. The UC requested that I observe and point out sensitive areas like compromised clam beds and fish traps. The Bartlett was there to maintain marine traffic and records of people that were involved in responding to incident and assisting with setting out the booms. The crew on the Bartlett kept good radio logs and the crew was very accommodating. Everyone was still trying to get themselves organized at this time. The booms continued to be faulty, it took a little while before they finally got the booms around the NES stabilized and containing the spill that was coming from the boat itself. The focus was on containment this day, booms and absorbent pads were used.

There were many Heiltsuk boats on scene. There were also non-Heiltsuk vessels on scene: Bartlett, Gordon Reid, Tully, Cape St. James and Haisea Guardian.

I returned home at 6:30 p.m. The Tully resumed command over the marine traffic and the Bartlett was off for the day. When we returned to the Command Centre, we let them know that when absorbent pads were put in the water, they sink to the bottom. UC instructed boats to go out and pick them all up. There was a concern from UC and those pads were to be picked up immediately.

There are fish traps and a reserve on the eastern side of Gale Pass, around the tidal rapids. Eventually the whole area of Gale Pass was affected by the incident. I observed impacted kelp beds on the Seaforth side.
Christopher Ingmar Alan Lee

When I first arrived on scene, I only saw the Coast Guard and one of the guardian boats (HIRMD boat).

I first saw the NES in the Inside Passage about five years ago. I learned that it was doing regular traffic in the Inside Passage. The NES carried slightly less than 10,000 deadweight tonnes of petroleum product. The vessels take about thirty to fifty trips a year.

I first became aware of the incident on October 13 when I received a phone call at 6:30 a.m. from Robert Johnson. He told me to look at my AIS ship tracker and that the NES had run aground. I could see from the track on the AIS tracker that the NES had hit at 9 knots. I waited until first light and got into the boat and headed out with another person. We got there about 7:30 a.m., we went out on Pacific Wild 1 (Pacific Wild boat). We could see the Coast Guard vessel on the scene and could see the tanker and tug on the rocks. At that time, a guardian watchmen vessel was there, the Coast Guard zodiac, and Cape Farewell was there. Within an hour of us arriving, three more Heiltsuk vessels showed up. When we first got there, they attempted to put a boom out but it was ineffective.

We saw the crew being taken off the tug and the tug sink. We saw the crew abandon ship and climbed down the ladder into the Coast Guard zodiac, once the tug sank they got onto the barge and were rescued from the barge. They were taken to the Bartlett. I was very concerned because the tug was sunk but the barge was moving with three more hours of rising tide. I was wondering why didn't they bring a line with them, I wondered why they just abandoned the barge.

The NES lost all power immediately upon sinking and remained suspended and locked to its barge by its locking pins. I heard the Captain of the Haisea Guardian state, on the radio, at least twice, that he was unable to attempt to pull the stricken vessels off the rocks, because the sunken NES was acting as an anchor, securing both vessels to the reef.

As soon as the tug sank, the water instantly turned grey. We could see debris floating off of the sunken tug. Within minutes, there was a diesel slick on the water and we saw the slick going into Gale Pass at 9:30 a.m. on the day of the wreck. We could smell the diesel fumes right away. It was sickening, I got a headache from the fumes.

We were the first ones into Gale Pass after the tug sunk. As soon as we got into Gale Pass, there was already a diesel slick in there. I called this in but felt rushed off the radio, like they thought we were tying up the radio. Harvey Humchitt later made two requests for booms to be brought into Gale Pass. Right at the entrance to Gale Pass is a Heiltsuk village site.

An hour after the sinking, the crew came back and we saw that Coast Guard and crew of the NES attempting to extend a line from barge to the Haisea Guardian (Shearwater tug). There was a rope on the barge and the tug got as close as safety could to the wreck. The rope extending from the barge was not going to be long enough to get towards the Haisea Guardian and we helped pull
the rope out and connect the *Haisea Guardian* to the barge. The barge was not equipped with a suitably strong, nor sufficiently long emergency tow cable, to be used for the purpose of pulling the tug and barge clear of danger. I heard the Captain of the *Haisea Guardian* state, on the radio, two times, that he was unable to attempt to pull the stricken vessels off the rocks without breaking the cable that had been deployed from the barge, *DBL-55.*

Throughout the day, there were no instructions given. There were no measures being taken to contain the diesel. It was all Heiltsuk helping with the booms. People were doing their best to get booms across Gale Pass.

Northern Lights boat (Shearwater) with Bobby Martin came clearly loaded with materials but it appeared that they were not authorized to let anyone use it.

We left around 2:00 p.m. I heard they got the barge off the rocks around 5:00 or 6:00 p.m. that night.

My wife was there either the day after the sinking or the day after that helping but no one got any breathing apparatus, no training. I went out there seven times between the wreck and when the NES was taken out of the water. The booms were useless and were clearly only for optics. Nothing was being recovered. It became clear that nothing can get petroleum product out of the water; once it is in the ocean, it is unrecoverable.

Two safety issues that concerned me: (1) barge was moving, tug hard aground, needed to have a proper tow rope to pull the barge (same thing happened in 2011 incident involving the NES and 3 tow lines were broken); and (2) the NES was not able to be manually released from the barge, needed power to release the pins but because the tug was sunk could not do that.

There is a family who lost one of their family members at sea and put grave on the beach near the wreck. That particular site is important and sacred to their family. Two weeks after the wreck, I got some images of the cross and the wreck.

I am not Heiltsuk, I am here by the good graces of the Heiltsuk Nation. When we first came to Bella Bella, we were living in South India and they were looking for someone to study sandhill cranes and my wife was interested in it. I had been here before. We have been living here for about ten years now. Gale Pass was a very big sandhill crane nesting area so we were out there a lot. It is a very special place for us. We might have caught fish while out there, don’t think we dug any clams but we did see the clam gardens. This incident is incredibly upsetting. I have predicted it for years.
Pamela Reid (DAY 1)

I received a text message from a HIRMD employee who told me the incident occurred and an email from Marilyn Slett. Travis Hall and I were directed to go with them on the Mar-Ell Mist with Bobby Martin. I think we made it out about 1:00 p.m. in the afternoon. We arrived at 1:37 p.m. Nathan Haugh was introduced as lead, other Kirby personnel by the name of Lousie Adette, Scott Pratt, Troy Thompson were there.

We were not asked to do anything. We were asked some questions, from Louie, he asked what were the most important areas. I said that the whole area was important, explained that we lived seasonally off the ocean. I asked a variety of questions. I was told that the NES was not classified as a tanker. I suggested best to collaborate with people already on the ground, like HIRMD, Harvey Humchitt, ex-fisherman, who had been on grounds as well. Harvey gave an update on the marine radio. They had travelled all the way to Cape Swain and Milbanke. They were seeking booms to cover the area. That's when the Kirby team requested a paper map, wanted to know who they could speak with who had been coordinating spill containment. I suggested Kelly Brown, Harvey Humchitt and a Shearwater employee.

When we showed up no one had gloves or masks. There was no spill equipment on the Mar-Ell Mist. We brought some food. Kirby’s response team has radios. They did not have a map. They hadn’t thought to bring anyone local to assist in making plans, which is why we pushed to have representative on board. At that time, my understanding was that the only equipment deployed was from Shearwater, which has the formal West Coast Response team, but that they did not deploy everything, and that some things were on their way. Still waiting for Resolve contractor representative. Kirby arrived before the formal response team.

When we arrived, the smell was significant, did experience headaches within an hour of getting there, sheen was widespread, I think everyone was experiencing headaches at that point.

When we arrived, there were three local HIRMD boats and two other local boats from the community assisting with deploying booms. Around 2:00 p.m. the last ten spill kits were deployed. We had pulled them off the Arch-Rival (Shearwater tug-and barge) and brought them to the punts. Kirby had spoken to some of the local reps who were informed about the tide and how it runs through the Creek. They waited for the tide to go out before they put the booms in hopes that would cause the sheen to run out. There were a few other local people coming out and supporting the response. There did not seem to be a plan. Kirby was asking Coast Guard questions, Coast Guard saying it was up to the responsible party about the call to be made, this was confusing. Everyone was still waiting for the official Resolve team to come and address the spill but it felt like the damage was already happening while we were waiting.
Heiltsuk boats were directing the team from Shearwater with the booms. Shearwater’s team was respectful. The Heiltsuk were placing booms on right side of Gale Creek. Around 2:30 p.m. or so, first responders were told to hold booms around Gale Creek until 4:30 p.m. to wait for the tide. Around 2:30 p.m. two crew members from Kirby and Coast Guard who deployed booms around the tug and barge. DFO was doing water samples, Kirby suggested air monitoring as well but not sure what was to be sampled. There were no warnings about health effects of diesel.

Coast Guard shared they had ten sections of 50ft booms. Harvey had extended his support and expertise a number of times throughout the day but Coast Guard didn’t take him up on it. It wasn’t until about 3:00 p.m. that Coast Guard came on the radio and said that now that the dust was settled Harvey could come onboard. At that time Bobby Martin offered to get more boom from Shearwater as it would be faster with the Mar-Ell Mist. Kirby said it wanted to pick up the crew. The Arch-Rival (the slower vessel) went back to get the rest of the materials. Instead Kirby wanted to pick up the crew with the Mar-Ell Mist. The John P. Tully departed the scene about 3:30 p.m.

When we picked up seven NES crew members on the Mar-Ell Mist from the Bartlett. The Resolve fellows started to speak to them. They talked about trash pumps that went down. Travis asked direct questions but they refused to answer. We ran them back to Shearwater around 3:30 p.m. to pick up more booms. The crew indicated that they deployed five or six booms at the time of the incident. We arrived back on scene at 4:30 p.m.

Two NES crew members, Sean Connor and Jay Giblin returned to the spill site with us. The crew boarded the barge to get the dive team ready. We arrived back in Bella Bella at 5:30 p.m. or 5:45 p.m.

The Eagle Bay, the first official response boat aside from Shearwater, arrived from Prince Rupert at about ten minutes to 6:00 p.m. that night. The dive crew showed up at about 6:00 p.m. The Clowhom Spirit was dropping off the dive team, there was five of them. The Eagle Bay was authorized to deploy 2000ft of boom. Kirby was determining where to situate boom. Clowhom Spirit came back on radio at about 6:30 p.m., they said they bumped the bottom and lost an engine. As a consequence, a decision was made to stand down dive team. At about 6:40 p.m., a helicopter arrived.

The barge separated from the tug at about 7:00 p.m. Coast Guard told Kirby to check with Resolve at Incident Command for further direction. Kirby asked Coast Guard where a safe anchorage was. They checked the barge to see if there was any damage, the Diligence was the other tug taking a look at the barge. Haisea Guardian suggested anchoring in Spiller Channel. I pointed out that those were herring grounds, and we would have to ensure no environmental risks with anchoring there. We headed back to Shearwater at 7:30 p.m.

We got back to the band office for a meeting and discussed a boat log, decontamination, and developing a situation report. I found it a bit offensive, they had not appreciated the situation yet. They talked about the plan for the next day but it still seemed unorganized and the communication was poor.
On way back, I observed Gale Creek had been double boomed. On way back Kirby said it wanted to set up a decontamination station and log book for vessels going in and out. There was no decontamination of any vessels that responded to the spill until the third day even though we kept asking about it. Other than the local efforts, no one was prepared. Kirby showed up without a map. They had a report with them but should have started with local knowledge. It was confusing about who was responsible to make the call, that’s why Heiltsuk just started putting out booms. We used all the spill response equipment from our local fuel company. The booms were ineffective. It was just crisis management on the first day.

Diesel was everywhere in Seaforth Channel, I could see the sheen everywhere, the smell was very strong. I saw diesel on the beach and the kelp. There was so much emotion behind this. Our values were different than the response team, the magnitude of how this affected us was different and they did not understand that.
On Day 2, we returned to Chambers to debrief. UC was established. It was confirmed that Travis and I would continue to work with them on site. Resolve was there at this time; Trevor Davie was the Resolve lead. We departed in the afternoon shortly after lunch time for the spill site with Troy Thompson (Kirby) and Trevor Davies (Resolve). Our role was to collaborate and support the process as representatives of HTC.

We still had not been dedicated any equipment but we were assured that barges were coming up with equipment and gear. Trevor told me a barge with PPE would arrive at 2:00 p.m. but it arrived around 4:00 or 5:00 p.m. On the way out to the spill site, it was discovered that the barge in Dundavan had spill equipment on it. We picked up some of this spill equipment on route.

We arrived at Gale Creek at about 2:30 p.m. The Gulf Rival was still skimming Seaforth Channel. We went over to the Gulf Rival to drop off the equipment. The Gulf Rival was used as the response centre as it had equipment from Shearwater as well. We found out that the Coast Guard provided gloves to the local boats. It was determined that the Central Coaster, another Shearwater barge, would possibly be used for salvage materials.

Kirby representatives did not start reaching out again to local boats about getting into Gale Creek until 3:00 p.m. The Hazel Em and Mar-El Mist could not make it in. They were saying the booms had broken over night and needed to be replaced. The plan was to drop the boom by helicopter, about 2,500ft boom, to be staged on Gale Creek and set the next day at 11:00 a.m. during high tide.

It was unclear who was taking lead and who was establishing a plan. There was no plan for spill site and it was frustrating. I was unclear on what UC’s role was as well as the various other agencies present.

There was placement of some absorbent boom around the tug. Another layer of boom was placed as the dive teams noticed that the tug was still leaking. The Eagle Bay, the skimmer boat, picked up more boom from DBL-55. By about 4:30 p.m., the Eagle Bay arrived at the barge to retrieve the boom but then the Eagle Bay reported that the boom it had picked up was useless, it had tears and holes.

I didn’t know the name of the barges with the equipment from Resolve, there were two of them that arrived. The booms that had been staged by the helicopter were not laid across Gale Creek the next day.

On the second day, we were getting headaches from the diesel. I started using my vest as a mask, the stench made my nauseous. The sheen was everywhere, all of Seaforth.
I was woken up by my wife at about 2:30 a.m. and she said she got a message from someone in Klemtu who said there was a fuel barge that ran aground in Seaforth Channel. I just got off work so it did not phase me until the next day. I went out without thinking about it because I knew the boat would sink and I knew the damage it would cause. I wanted to go protect the area and to do my best to help. I did not receive any instructions or given any equipment when I arrived. The first day I was beside the tug, no more than 500ft away from it. I went in my own boat, which is an open boat, 27ft herring punt, the Latoya Marie. I arrived at 8:30 a.m. I saw two HIRMD boats, a few herring punts, few small aluminum speed boats, the big Coast Guard boat (Bartlett along with Bartlett 1) with the local Coast Guard boat (Bella Bella 1), and the Cape St. James. The Pacific Wild 1 was out there. From the angle I first saw the tug and barge, it looked like it was right up on the shore. The tug was not moving but the barge was swaying. This had gone on for a few hours. There were local boats on the inside trying to push the barge off the rocks but I did not know this at the time. By 10:00 a.m., the Clowhom Spirit showed up with a bunch of people.

Near the old village area is in Gale Creek, the whole shoreline was covered in fuel.

For the first couple of days, we tried to set boom on the outside of Gale Creek. We were trying to figure it out on our own because we were not trained properly. The Coast Guard gave us absorbent pads and we were told to put them in the affected areas. We got back to Bella Bella after dark during the first few days. After this, we were told not to touch any contaminated product. After this, we just had monitoring duty.

There were no noticeable containment measures taken until the boom was set a few days later. The most difficult part was the weather; the booms were not made for the weather. Other problems were lack of proper equipment and properly trained people. I experienced headaches from the diesel. I saw many impacted wildlife and plants.

I am hurt, upset, and angered by this. I had two kids under sixteen out there and this area was where we showed them how to provide for their families. My family gets eighty to ninety percent of what we harvest out of that area: clams, cockles, kelp, seaweed, halibut, rockcod, lingcod, salmon, mussels, to name a few – for personal, social and ceremonial purposes. I am a commercial clam digger, I restarted again last year.
Robert Johnson (DAY 1)

I became aware of the incident from Facebook at 6:00 a.m. I first went out in my own boat at 6:30 a.m., the ShawnaMarie. At this time, I saw two Heiltsuk vessels, the Cape St. James, and the Bella Bella 1. The only non-HN was the Coast Guard. That was it until 7:30-7:45 a.m. when I returned to base.

At that time, I returned to base and got direction from HIRMD to respond to the scene on the Nation 1 (HIRMD boat). I got back on scene minutes after the NES had sunk. We were tasked to drop myself on the beach to walk the beach and get photos. I was with another HIRMD employee. We did not receive any equipment, no safety instruction. Another Heiltsuk first responders had returned home to get whatever the community had in terms of spill response materials.

I observed soiled beaches, soiled shoreline. Shorelines that we can no longer send our kids out to play on. There was zero attempt to contain the spill even though Heiltsuk members requested this. We were told there would be an oil spill response team on scene at 10:30 a.m., we finally made contact with the Gulf Rival and the Clowhom Spirit. Their reply back to us was that they were not authorized at that time to deploy any boom and we needed to wait for authorization from oil response headquarters in Vancouver and Prince Rupert. Around 2:00 p.m., the Gulf Rival contacted the Nation 1 and stated that they had boom ready to go. Another Heiltsuk first responder had previously returned home to get whatever the community had in terms of spill response materials and came back on scene with the ShawnaMarie with boom. The first time that booms were deployed was at 2:00 p.m. There was lack of equipment and we were pulling it off on our own boats. I saw two vessels pulling their food harvesting equipment to secure the booms. The weather posed difficulty, the booms were constantly breaking. The booms were only supposed to be used for tidal waters of up to 1.5 knots.

I returned home at 4:30 p.m. I came back home to switch boats, get more gear and have dinner.

Even today, this has not sunken in yet. I have a family and personal connection to the affected area. My family and I harvest for personal, social and ceremonial: halibut, rockcod, seaweed, clams, cockles, sea urchin, sea cucumber, etc.

I am disgusted. The NES missing his turn; the lack of response; the lack of equipment; and the lack of communication during the first few days. I experienced headaches from the diesel that felt like a migraine. I observed impacted wildlife. The NES ran into the heart of the Heiltsuk territory. In the area, there are nine salmon rivers, fifty-six clam beds, eighteen cockle beds and one of the last areas known by very few HN members that have an abundance of an endangered animal.
Robert Johnson (DAY 2)

I came in at the end of Day 1, changed boats and then went right back out. HIRMD requested that another HIRMD employee and I stay for an overnight shift. We went out on theMisla. We were told to go out there, drop the anchor and sit there. We anchored inside Gale Creek. The night shift started at 18:00 and we arrived in Bella Bella at 10:00 a.m., left the scene at 9:30 a.m. Throughout the night it was just the tug boat and Bartlett on scene. We thought we were safe inside Gale Creek but the boom broke around 4:00 a.m., which caused the smell of diesel to become overwhelming so we had to move from the inside of Gale Creek to the outside of it. The tides caused the booms to break. We both stayed awake for the whole shift. We had no interactions with anyone else and the radio was quiet throughout the night.

There were no Heiltsuk vessels on scene at first light. Around 7:30 a.m., boats started to show up. There were two Heiltsuk vessels and the Bella Bella 1 with Heiltsuk representatives onboard were all there that day. The Bella Bella 1 was the only non-Heiltsuk vessel there at the time we were there. We both came home with really bad headaches that morning.

I talked to the Coast Guard that morning and they stated that the watchmen of the NES had fallen asleep at the wheel.

This event has affected my family and I by taking away from us a lot of the seafood and sea medicine that we harvest. I would say ninety percent of my diet consists of the seafood that I gather. The incident was completely avoidable. There is no reason for any vessel of any size to be near these shores unless we are going to camp or harvest our food. With the bells and equipment on vessels nowadays, even a junior watchman would know something was wrong.
169. William Humchitt

I became aware of the incident when Robert Johnson texted me at 8:00 a.m. Kelly Brown requested my assistance and I wanted to see if I could help in any way. I was asked to help put out some of the booms across Gale Creek. I was not given any resources or equipment, and no safety instructions. On the first day, I went to the mouth of Gale Creek, the north end. I took my own vessel, which is a herring skiff.

I arrived on scene about 9:15 a.m. or 9:30 a.m. The tug and barge were along the shore; the front of the barge was bouncing off the rock. The tug was hitting the bottom pretty hard. The tug had sunk just before I got there. The water was all green around the tug. On the first day, there were four Heiltsuk vessels out there. The Coast Guard was out there, RCMP showed up about the same time as me. The spill response boats from Shearwater showed up about 2:00 p.m.

From the time I arrived until 2:30 p.m., I was just observing. We started putting out the boom to soak up the diesel across Gale Creek. First the direction was to go on the inside of the barge and help them push it out from the beach. The Coast Guard and three punts pushed the barge out. After we pushed the barge out, we sat around for awhile and then we started putting the booms across Gale Creek.

We put some booms out then I had to leave. Shearwater started to put boom out way later. There was a delay because there were not enough people on their boats. There were no booms placed around the tug on the first day.

I left the scene about 3:30 p.m. and went to Spiller Channel. I arrived back in Bella Bella at 7:00 p.m.

I was observing and questioning why they were taking so long to respond to the spill. They did not have the right equipment or the personnel to deploy the first response and when they did, it was too late.

I have a family connection to an area close by. I have collected seaweed, clams and cockles from the area. I harvest bottom fish for commercial sale from the affected area. I am sure there is going to be a long-term effect but it is kind of early to predict other than the impact on the clam diggers.

170. Melvin R. Innes Sr.

Harvey phoned me to tell me about the incident at 7:00 a.m., that is how I first became aware. We knew this was going to happen one day. We as a crew went out as volunteers. It was such a horror show to see all those boats drifting around out there. It was very sad to see. Now I know how people felt in Hartley Bay. We kept asking what was going on, there was no response. Nobody seemed have control of the situation.

Kelly, Harvey and another HIRMD employee were the first ones out there. I went out there on the CKP. We monitored. That afternoon, the Coast Guard boat was trying to push the barge out so Kelly and about five other boats went to help. We got a line on the barge. Later on, we went to the beach and were setting boom. We did not have the right equipment to get the job done. We were given a lot more direction after the second day, none during the first or second. They tried hard to contain but the weather and tides kept breaking up the booms.
Kelly Brown

I was only on the ground for the first day. I received a call from MOE, Dale Bull, at 4:30 a.m. He informed that the NES had run aground near Dearth Island. I called him back at 4:40 a.m. to reconfirm exactly what he was telling me. He informed me that it was a tug and barge, he said there was no breach at that time. I tried to start calling Mike and Harvey from about 4:30 a.m. until 5:10 a.m. I did some research into the vessel. Dale Bull called me back at 5:20 a.m. and said that there were breaches and the tug was leaking diesel. I asked about booms and they said they were trying their best to get the booms on the water. I talked to Harvey at 5:45 a.m. ten minutes later, I spoke with Mike. By 6:45 a.m., we were on the boat and heading to the incident. We arrived on the scene at 7:05 a.m. Harvey Humchitt, another HIRMD employee and I were on the Misla. Cape St. James was also on site, the crew said they had been there since 1:10 a.m. We observed the Pacific Wild boat. We already noticed diesel on the water when we first arrived, there was a lot.

Between 7:05 a.m. and when tug sank, there was a lot of activity with Coast Guard and the NES. Another Coast Guard vessel had shown up. They were trying to bring pumps onto the boat so they would not sink. They were transferring two more just before the tug sank. At 8:20 a.m., the first tug arrived on the scene. Another smaller open boat was also there. The tug went down at approximately 9:30 a.m. All we heard on the radio was “we sunk”. We were at the bow of the barge at the time, we swung around and went to the back and noticed a lot of debris coming off the tug. The water was a light, brownish colour within the incident area. The water almost looked like herring spawn. The colour spread all the way to Cape Swain.

There were three Heiltsuk vessels there. We were waiting for booms. We were informed and understood through radio that Shearwater had been asked to act on behalf of WCMRC. Shearwater was given responsibility to begin laying out booms. Shearwater was expected to arrive between 9:00 and 9:30 a.m. but they did not show up until after 11:00 a.m. Shearwater arrived and immediately took off again. I asked the punts to go and grab booms to set in Gale Creek. Shearwater did not have proper resource to take the booms into the beach area, they only had a tug and the Mar-Ell Mist so could not get into area. Heiltsuk vessels were trying to set those booms in Gale Creek. Shearwater not being able to respond to this oil spill. The Mar-Ell Mist stayed on site for forty minutes then took off. The tug came out with full gear, headed back in and came back out.

The first attempt to lay a boom out was at noon, maybe later. At 11:45 a.m., we came back to refuel and on the way back I heard they were going to set up the ICP. I immediately called Marilyn when I got to Bella Bella fuel dock and told her that the ICP needed to be in Bella Bella. I reported the oil spill was bad. She agreed and immediately started making contact to set up ICP in Bella Bella.

Between 1:30 and 3:00 p.m., they wanted to push the barge out. They had a dingy trying to push the barge, we ran 3 Heiltsuk punts there pushing out the barge with the Coast Guard. The barge was pushed out so it was not pushed into the ground around the incident site.
The RCMP came in around 3:30-4:00 p.m. that day. The RCMP said they were called between 12:00-1:00 a.m. and that the NES requested a tow but the RCMP did not have capabilities and told the NES to call the Coast Guard. There were two Coast Guard vessels on the scene throughout the day. DFO came in around 2:30 p.m. or so, came to take some samples from ECCC, went towards the vessel. DFO spent about an hour there and left.

At about 6:20 p.m., Heiltsuk first responders would get the boom half way and the boom would be breaking because the anchors were not strong. There was one boom around the vessel and basically pushed right against the vessel. It was too dangerous around the vessel so had to leave it.

As we were getting ready to leave around 6:40 p.m., WCMRC arrived on the scene at 6:50 p.m. WCMRC asked what was required of them, neither the *Haisea Guardian* or the *Bartlett* had any directions and told them it was better if went into Bella Bella to find out what they should be doing. When we left, the tug was still connected to the barge. There was a lot of oil in the water and very little boom. All Heiltsuk boats had stood down due to safety reasons. The Coast Guard and the two tugs remained on the scene.

We got into the band office at 7:30 p.m.; WCMRC arrived to the meeting shortly after.

There was very little containment during Day 1. We were given booms but no anchors. I asked Harvey to take the lead to coordinate between ourselves and Shearwater, to get the booms from their boats to our punts. Nobody out there but the Heiltsuk were trying to put booms on the water. Heiltsuk people were the only ones concerned about getting boom in there to protect Gale Creek. The *Bartlett* and the *Haisea Guardian* did not know about procedures. The Coast Guard said they were only responsible for rescue, they did offer the booms they had and their water pump to the NES. It was very confusing; no one knew what to do.

My brothers and I salmon fish in the area. My brothers go for shellfish and kelp. With the oil spill and the three deaths the community, my wife got very sick. The way we have talked about it amongst my family is it was like a death. This incident has disrupted the life of every Heiltsuk person.

Jeff Brown

I responded because I harvest foods in that area and I wanted to assist. I was given no equipment. I went to Gale Creek on a HIRMD boat. When we arrived, only the Coast Guard was there. I did one night-shift at the scene. I changed boom when I was working at the scene. Kirby directed me to change the boom.

The village site in that area was affected. The response was inadequate, poorly organized. No measures were taken in response to the pollution. This affected me and our traditional way of life deeply.

I use this area frequently. My family and I harvest food for personal, social and ceremonial purposes.
Jordan Wilson (DAY 1)

I received a text from my boss telling me the NES had run aground and asked if I was interested in going out to the scene with Ingmar to document what was happening. I was made aware at 7:30 a.m. and left for the site at 8:00 a.m. I felt this was serious and wanted to go see the extent of the damage and see if we could assist in any way. When we arrived on site, I had no real instruction. I was encouraged by Ingmar to take as many pictures and videos as I could. I was supplied with a work boat to get there by Pacific Wild but that was it. I was given no safety gear or instruction (other than from Ingmar). There was chatter on the radio about pleasure crafts in the area, the RCMP said that if interfering, the vessels needed to clear out.

We arrived at 8:30 a.m. When we got there, the Cape St. James was there. The small Coast Guard boat close by (Bella Bella 1) and one of the Guardian Watchmen boats (Kingfisher). Shortly after, another Heiltsuk vessel arrived on scene. The Bartlett arrived on scene shortly after. Haisea Guardian and several other vessels form Bella Bella arrived shortly after. Several other vessels arrived on scene and assisted.

At 10:40 a.m., the Haisea Guardian managed to successfully attach a line to the barge in an attempt to keep the barge away from rocky reefs and shore which would have been catastrophic for barge. With help of Coast Guard as well as several local boats from Bella Bella, the barge was pointed in a safer direction and held in place for several hours. They successful attached a high-strength specter line, which was not strong enough to pull the barge or tug but rather to keep in a safer direction. Ingmar and myself assisted in bringing the line from the Haisea Guardian to Coast Guard boat because they did not have enough line. The Coast Guard boat (“BB1”) attempted to take line from the barge to Haisea Guardian but Haisea Guardian could not get close enough because of reef. We took the line from Haisea Guardian to the Coast Guard vessel. After this happened, efforts were made for two hours to contact the salvage company who were to take charge of the situation. It was like they were not aware of the severity of the situation, the salvage company acted very casually.

There was a sheen of diesel that did not allow you to see more than a few inches underneath the surface of the water. In a maximum of an hour, there was a one kilometer radius of diesel slick around the casualty site including in the mouth of Gale Creek; the slick spread very fast. The weather was awful so it spread it. There was a very strong odour in the air when the tug went down.

That day we focused on documenting with photo and video as much as we could.

The only measure to keep tug afloat was transferring pumps to the NES. There was just too much water coming into the NES and the pumps could not keep up. The tide was rising and as the tide rose, it took the NES off the rock it was on and it was submerged within minutes.
On diesel containment, several hours after the sinking, the **Clowhom Spirit** (Shearwater) arrived and was carrying numerous booms and other equipment to attempt to contain but he was given no instruction and did not deploy any of that equipment for several hours. Ingmar had tried to hail the vessel but received a reply that he was waiting for instruction and did not want to do anything until receiving instructions. I believe he returned to Shearwater before coming back and deploying the boom. There was no attempt to clean anything that we saw on the first day.

The RCMP arrived on scene several hours after.

A few hours after we arrived, we went into Gale Creek. A few hours after that, went back to Bella Bella.

We left the scene at 13:30 p.m. and arrived in Bella Bella at 14:30 p.m. We came back at that time because we felt that we could no longer do anything to lend assistance and we were both feeling rather sick. I felt nauseous and light-headed throughout the day.

I observed impacted plants and wildlife. There are two to three dozen archeological sites within 2-3km radius of the site itself. There are culturally modified trees, ancient clam beds, old canoe skids, old village sites (I believe). It was very hard to watch because we know it is a very important area for the Heiltsuk people. We both felt anger and sadness throughout the day and weeks to come. Members of my family go clam digging (commercial) there, it is a beautiful place. We have also harvested kelp for SOK in that area (commercial). We will not be able to harvest here for years to come; I would be afraid to swim there nowadays. Heiltsuk traditional way of life will be affected; there are hundreds of people that go there to harvest and to visit the cultural sites.
Jordan Wilson (DAY 2)

We wanted to go out again to see if there was any progress made in containing the spill because we had been out the first day. There was one contamination boom around the tug itself and across Gale Pass but that was it. We arrived around 11:00 a.m. It was high tide and just the top of the tower of the NES was exposed. As the tide went down, the water level went down to the door of the wheelhouse. At high tide, it was at the top of the door of the wheelhouse. The tug and barge had separated; there were no efforts to contain the contaminant other than the initial boom that was there.

I did not receive any instructions or safety gear from anyone when I was there. I was only given the project camera and boat to get out there. That day, we returned to the casualty site and took photos and videos of the casualty. We stayed for two hours to monitor. It looked like nothing was being done. The weather was worse on the second day.

I was with another first responder on the Pacific Wild boat. There were Heiltsuk vessels in the area and I believe they were assisting with putting boom across Gale Creek, at the mouth of Gale Pass. I think the RCMP might have been there. The Bartlett was there as well.

There was still a vast amount of diesel in the water; there was a 2-3km radius of leaked diesel about the casualty site in both directions. Again, there was a strong smell. The diesel continued to pour into Gale Creek. We knew we should not stay long because of the health effects from the day before so we only stayed for two hours.

We went back to Bella Bella at 1:00 p.m. or 1:30 p.m.

On our way out, we had seen the DBL-55 anchored in Dundavan Inlet. It still had its contamination booms from when had tried to contain diesel escaping as the tug was sinking. The booms were still attached to the tug, just sitting there, probably doing more harm than good.

I knew most of the damage had been done, you could see the amount of diesel that was in the water. I observed that the kelp beds near the site were highly contaminated.
Megan Humchitt

Simon went upstairs at about 7:00-7:30 a.m. and came downstairs and told me that a tanker had run aground. I went upstairs and saw that my dad had written down the location. We listened to the chatter on the radio for a few minutes; at which point we decided to go out to the spill site and see if we could help. We got ready and left to the incident site about 7:45-8:00 a.m. It was such a serious incident so there was no question about going, I felt compelled to be out there to witness what was happening and see if we could help at all. We went out on the CKP. We had five people onboard. On the first day the following boats were out there: six Heiltsuk vessels; Clowhom; Bartlett; RCMP vessel (Inkster); and Haisea Guardian (tug).

When we first arrived, there were boats milling about. We were one of the first boats – the Pacific Wild boat and the Bartlett was there before us. The guardians came right behind us. No one came over to us when we got there, we basically just sat there and watched as the tug and barge rolled in the swells. We could hear the tug grinding on the rocks. At that time, it was mid-tide and going up. Just before the tug sank, the Coast Guard had actually gone onboard the NES.

When the tug sank, there was tons of diesel everywhere. The tug took seconds to sink. There was discolouration of the water, it was milky, it looked like the herring spawn. We watched as debris just drifted away. We heard one of the crew members fell in the water when the tug sank but they were pulled up right away. The Coast Guard kept saying that the salvage company needed to come to call the shots so we waited; it was around noon that it all got started.

I got off the punt for one part and got onto the HIRMD boat. The punts that were there had gone to the other side of the barge and were basically pushing it from the beach side along with the Coast Guard dingy so that the Haisea Guardian (tug) could get a towline on it. They were pushing it to get the towline on it so the barge did not swing into the beach. They had to wait for permission from the salvage company to do anything with the barge. I had heard Kelly and my dad kept trying to talk to the Coast Guard telling them they need to pull the barge before the tug sank and there was basically radio silence, the Coast Guard did not respond.

The tug had already sunk and the Clowhom Spirit came out with booms but did not unload the booms to us, they said they had to wait until a person from the salvage company had arrived. The Clowhom Spirit got there around 11:00 a.m. but just drove around. The Clowhom Spirit left the spill site and went back to Bella Bella to pick up the salvage person at the airport and bring them back out. During this time, we drove all the way up to narrows to see how far the oil slick had gone. It was all the way up into the narrows. It spread really fast. Another thing we did while waiting was go up to the cabin, walked on the beach and the beach was covered in diesel. This was during when the Clowhom Spirit returned to Bella Bella to pick someone up.

When the Clowhom Spirit came back, we drove up the Clowhom Spirit and asked for the booms. They finally started unloading booms onto the local punts that were there. They gave us the booms but did not say much, only told our crew to put the booms around Gale Creek. Our crew
went over to mouth of the Gale Creek and started to lay booms across. At this time, the tide was starting to drop so it was more difficult for booms to be strung across. I think it was 12:30 p.m. when we first strung the booms we had, which were the foam booms that had been given to us by the Clowhom. There were probably about three string of boom that we tried to put across the mouth of Gale but the booms did not reach all the way. After the Clowhom Spirit got back again, around 2:00 p.m., we got the rest of the booms. We tried to go inside Gale Creek and put booms through the narrower part but the current would not allow us to string any boom.

Around 4:00 p.m., we tried to set the boom inside of Gale Creek and then travelled to the Bartlett, which was positioned just off the spill site. They loaded us with booms and two anchors. They also put one of the Coast Guard members on our punt. They requested that we boom inside the spill site between rocks and barge. The tide was low so the rocks on the reef were exposed. There were big swells. The Coast Guard zodiac came in with us. We went close to the rocks, dropped an anchor and tried to pull boom forward. It was pretty impossible to get the boom in the right position because lack of space and the big swells. We had a very close call in the swells so we left the area and said we were not going to place boom there anymore.

We left around 5:30 p.m. because it was getting dark and we had placed all the boom we had.

There was no boom placed around the tug during the first day. I don’t know when they got that boom around the tug but it was not the first day. They did not tell us anything about anything. We did not receive any instructions about how long the booms are supposed to be in the water.

Difficulties faced were: communication, tides, swells, and equipment. If we had placed the booms at high tide, we would’ve probably been able to place booms in narrow passages but because we had taken so long and the tide had gone out, we could not place them. Other issues were that three of our crew got really sick after the first day. There is the village site in Gale Creek and oil was definitely on that beach. I observed a lot of impacted kelp beds.

It was really hard, very heartbreaking to watch. I have a connection to the area as a Heiltsuk person, I have not spent a lot of time there as a kid spent a lot of time in Seaforth Channel, around Ivory Island. We harvest food from the affected area, such as, yaga, salmon, halibut, clams (we buy from people that harvest from there), cod, and lingcod. My dad has harvested for commercial purposes from the affected area. This has affected our family and community quite profoundly, the fear for the future of that area is immense. Increased tanker traffic is very concerning. When our environment is sick, we are sick. I feel like this had made our community sick. It affects Heiltsuk traditional life as Heiltsuk people are so tied to places and if those places are devastated then it will affect the traditional way of life in a huge way, it has an effect on the people who harvest, and on the stories.
Rodnal P. Brown

I became aware of the incident through Facebook and the VHF; I found out at approximately 6:00 a.m. I had a morning charter scheduled with English tourists. We headed back to Bella Bella between 2:30 and 3:00 p.m. (we had been up in Roscoe).

Matt Lewis (Kirby) contacted me through Kelly Brown and asked me to do a charter for their company that evening. I have a crew boat that seats six people and has a cabin. I left the village just after 6:00 p.m. and got home after 12:30 a.m. or 1:00 a.m. on October 14, 2016. I was provided with fuel. I was given no safety gear (had all my own). I picked up five people from Shearwater and went to the incident site. I was asked to bring the crew out to the barge and asked to standby as they moved the barge away from the incident site – it took about five hours. Before moving the barge to Dundavan, they did an inspection of the barge. The barge was anchored in Dundavan at 12:00 a.m. After, I drove all five people back to Shearwater then went back to Bella Bella and tied up for the night. Someone from Kirby on my boat was giving directions to the move the barge. They moved the barge because they did not want the barge to be punctured and pour more diesel into the water. Their biggest difficulty was the wind and waves; there were 4-5ft chops as they were preparing to anchor the boat. We spent two hours to figure out where to anchor the boat safely, needed sufficient amount of space. Both the North Arm Diligence (a vessel that does fuel runs from Vancouver) and the Haisea Guardian stayed with the barge throughout the night. There was no containment after the barge was anchored.

One of the young men on the NES at the time of the incident had mentioned to one of his superiors (Matt) that he had not taken his drug and alcohol test results off of the barge (I heard while driving to the incident site from Shearwater that evening around 6:00 p.m.). I heard that each time they leave a port they have to do a test to make sure they were capable of conducting their duties on the water; this applies to anyone running a commercial vessel. They need to have drug and alcohol tests prior to when they depart.

When I arrived on scene, it was just beginning to get dark and I could smell the diesel. There was so much breakage so could not see the diesel on the water but could really smell it.

There was another vessel en route to come go back out to the incident scene which was one of the HIRMD boat, Hakai Warrior or other boat. Two HIRMD employees had anchored out in their cabin the first night.

I am still affected by headaches that I was not having before. There are clam beds right inside Gale Creek and clam beds in Seafort Channel. At the end of the first day, I was pretty distraught because I knew this was an important harvesting areas for seaweed, halibut, cod, clams, all species we survive off of throughout the winter are found there. My wife and I are angry and distraught over this incident. I have a personal interest in the area, traditionally we take clams out of there before Christmas. My family and I harvest for personal, social and ceremonial purposes: clams, seaweed, cod, snapper, halibut and sockeye are found in the surrounding areas. This will affect Heiltsuk traditional harvesting for some time.
We were in bed when we heard Harvey up early and rushing around. The radio was on full blast. Eventually I got up to check what was going on, I saw the notes that Harvey had taken which said a vessel had gone down in Seaforth. This happened at about 7:00-7:30 a.m. I just wanted to go see what was happening out there so we took some family and other members of the community in Harvey’s punt and made our way out there.

When we arrived, we were given no instructions or safety gear. We went right to Edge Reef, once we saw the boats we figured that was the spot. We arrived at 9:00 a.m. We talked to crew of other boats when first got there, basically waiting for someone to take charge. We saw the tug and barge really close to the shore. We saw local Coast Guard boat (Cape Farewell), a few HIRMD boats and two other punts. The Bartlett was there too. They were just observing the scene and did not seem like anyone had a plan, just monitoring the radio. There was no equipment at the time. There was a small sheen there already. The barge had already dropped a boom on the starboard side and the boom was just hanging off the side. The barge was grinding on the rocks, there was a swell, there were moments when the swell took the barge way up. Even the trained Coast Guard crew were very cautious.

After the tug sank, I could see the diesel oil mixing with the seawater. At first it had a very brown and murky colouration and was bubbling. I could smell it immediately. It started spreading and then went to a white, milky colouration.

Eventually the Clowhom Spirit showed up with booms but they were just doing circles. Everyone was just waiting for someone to command the boats. Clowhom Spirit eventually took off and came back. Eventually the Bartlett told us we could grab booms from the Clowhom Spirit. While we were grabbing the booms, there was a spill response guy who handed over the booms to us, never told us how to connect them or how to set them (we did not know who this person worked for).

We came back at 6:30 p.m. All the booms might have been distributed. We had spent all day out there, had a close call, were exhausted, all fed up and tired because could not set the boom properly.

Once I got home, I immediately felt like I was starting to get really sick, feverish. I knew it was more than just exhaustion. I was sick for four days with a fever, body aches, and headaches. It was a very sad site, I don’t have the same connection to the land but it still had a huge effect, these things are so preventable, it did not need to happen. I was new to the area so do not know where the archeological sites are. I have a connection through marriage to the area. Our extended family commercially harvests from the area. The whole situation was tiring, and cause very constant anger and sadness. People here have such a deeper connection to the land than I will ever have but I can understand it. It is similar to when someone’s child is sick.
Walter Campbell Sr. (DAY 1)

We were getting ready to go to work down in Kisameet and decided to go to Seaforth to check it out and see how we could help. I went out with four others. We went out on the CKP. We left at around 8:30 a.m. We arrived about 10:00 a.m. The Bartlett was there, we talked to them and told them we would be standing by if needed anything. Communication when we got there was pretty good, we were told to keep in touch and everyone was informed not to go near the barge and tug. The Coast Guard was in charge. The barge and tug were still up on the rocks. The tug was dead in the water and taking on water. The crew was in the process of pumping fuel out of fuel tanks from the tug to the barge, they managed to get some fuel off but not all of it. We were there when the tug went down, a few hours after arriving. The tug was still hanging onto the barge. An hour after the tug went under, we started to smell the fuel so we knew there was a leak. You could really smell the diesel. There was oil all over Seaforth, it was worse the second day.

There was not much to do after the tug went down, just watch. We were not given much direction the first day, just not to get too close. We did not know how to respond to situations like this.

A bit later, a crew on the Bartlett 1 wanted to go set a deflection boom near the barge and tug. This was very tough in the swell. The tide was so strong and the boom was useless in that kind of tide. We had a close call so we got out there, it was too dangerous. A few hours later they wanted to get a towline onto the barge so had four boats pushing the barge out to get a towline on the barge. We could barely move the barge because it was getting knocked around. Two Heiltsuk vessels and the workboat from the Bartlett were helping as well. There were other Heiltsuk vessels but were standing by on the perimeter. More people started to show up later and during the second day. Other non-Heiltsuk vessels that were on scene were the Clowhom Spirit, Mar-Ell Mist, and the RCMP.

We came back to Bella Bella around 4:30-5:00 p.m. because it was getting dark and there was nothing else we could help out with.

I got sick from the diesel exposure for about four days. I had an infection in my chest and had to go on antibiotics for six days. I was dizzy and felt light-headed with headaches. There is a bay west from the spill site where many indicators of habitation had been identified so we set up a boom in that area to keep the fuel out. It could have been a summer camp or village site. There are fish traps inside of Gale Creek. There is a reserve close to the mouth of Gale Creek, close to where the cabin is. There are culturally modified trees inside the wreck site and inside the lagoon on the west shore.

It was sad to see, I used to fish in that area. I have a personal and social connection to the area. I used to go jigging out there for lingcod and rockcod and trolling for spring and coho. I went commercial clam digging inside Gale Pass for manila clams for a few years. It is devastating, there will be an effect on the environment and food. This will affect people in different ways. Everyone knew this was going to happen and it should not have happened. There will be no clam digging there for awhile, who knows what will happen to the species in that area.
Walter Campbell Sr. (DAY 2)

We already went out on Day 1 and figure they would need help so we went out again. I was with four others. We went out on the CKP. We arrived at 9:00-9:30 a.m. We went back to the spill site and checked out a few areas along Cape Swain and near Ivory Island. When we got out there, they gave us some booms and told us to go set them wherever we thought it might be beneficial to protect the beaches because there was already oil all over the place – we were given booms, anchors and ropes. There was a lot of oil on the water and it smelled very strongly. We were looking for contamination this day. The Coast Guard was still contacting for vessels coming in and out but the response team had the reins at this point, they were the experts. We would look and report to the response team then they would go and check it out and decide what to do about it.

They were trying to put a containment boom around the tug in place and it was not in place by the end of the day. There were many difficulties: the tide was too strong and the weather was bad. We were putting out booms and absorbent pads. Someone else went to pick up the absorbent pads a few days later. The barge still had a line on it and they were trying to release it from the tug. There were so many Heiltsuk vessels out there. The Bartlett was there along with the John P. Tully and a few tugs. We left the scene at 4:00-4:30 p.m. that day.

Emotionally, I felt worse than the first day – the oil was all over the beaches and the smell was stronger. I did not have any spill response training but a few other crew members did so I took direction from them. It was good to see our people out there, we were the first ones out there, which is usually the case. I think when something like this happens, timing is really crucial and there should have been a crew out there when they know there was going to be spill. It is a very difficult area because of the rocks, very dangerous so Heiltsuk people took their lives in their hands by going out there. I would like to see a spill response centre close by so they can be there in a few hours. We also need more spill response training.

Photographs and video footage of the incident were provided by some of the interviewees. Not all of the photographs provided have been included within the report. However, copies of photographs will be made available to the Committee/Panel.
11.0 OVERVIEW OF LATER EVENTS

181. Only on October 15, 2016 did the distribution of personal protective equipment, including clean-up gloves and suits with safety training, become a part of the daily pre-dispatch morning briefing. An HTC community notice was distributed that day stating that the safe exposure limit for diesel fuel is 100mg/m3. WCMRC vessels were equipped with equipment able to detect unsafe levels of fumes. Responders were informed of further safety equipment located on specific vessels owned by Shearwater and the Coast Guard.

182. On October 15, 2016 an HTC community notice observed that the operation was one of mitigation, and that fuel spill recovery had been ineffective.

183. Based on the fuel recovered, it is estimated that the following volumes were released into the environment (Schedule 38):
   a. 28,412 gallons of diesel; and
   b. 592 gallons of lubricants.

184. On October 16, 2016 the PPA revoked all of Kirby’s pilotage exemptions.

185. On October 20, 2016 the Barge reached Vancouver drydock for inspection. A small amount of diesel spilled from the Barge upon its removal from the water. The Barge was found to have been damaged and was repaired and then removed to U.S. waters by Kirby.

186. On October 20, 2016 the First Nations Health Authority circulated a substantive warning regarding diesel exposure. Children under age sixteen were advised to avoid inhaling diesel due to their increased vulnerability. FNHA also warned of long-term health effects arising from diesel exposure.

187. By the end of the first week, multiple government and response organizations and over 200 additional people had arrived in Bella Bella to address the grounding of the NES and its oil spill.

188. On October 24, 2016 the PPA announced interim measures for some but not all ships transporting petroleum cargo. (Addressed in more detail above.)

189. On November 14, 2016 the Nathan E. Stewart was raised, after being dragged 300 metres across the ocean floor, through a northern abalone habitat, to a salvage barge. The operation required that several thousand northern abalone be relocated before the towing. The Tug was later moved to drydock in Vancouver, and Heiltsuk was informed that the Tug would be recycled given its condition of disrepair.

190. DFO’s chemical contamination closure of bivalve shellfish in parts of Area 7 is still in effect. Heiltsuk also issued a broader fisheries closure notice to the community. Heiltsuk’s closure of the FSC fishery remains in effect.

191. Heiltsuk has not specifically been advised how Canada’s Oceans Protection Plan will be utilized in relation to implementing marine safety and resource shipping, and protection of their marine environment.
The *Nathan E. Stewart* being removed from Seaforth Channel on November 14, 2016

The *Nathan E. Stewart* being transported out of Heiltsuk territory on November 17, 2016
The below photos of the NES were taken from the Damage Survey Report prepared by HTC’s marine surveyor, Mark Bentley. The report can be found at Schedule 21.

<table>
<thead>
<tr>
<th>General view of tug from forward showing bottom damage</th>
<th>View from port side looking aft at upset bottom</th>
</tr>
</thead>
<tbody>
<tr>
<td>View from port across to starboard showing extent of bottom damage at forward end</td>
<td>View from port across to starboard showing extent of bottom damage at midships area</td>
</tr>
<tr>
<td>Deformed and buckled aft part of centreline vertical keel</td>
<td>General view along starboard side showing heavy deformation of shell plating and cooler</td>
</tr>
<tr>
<td>View of starboard side from forward</td>
<td>Close up of damage to starboard cooler &amp; recess</td>
</tr>
<tr>
<td>Inside of Captains cabin</td>
<td>View of main wheelhouse</td>
</tr>
<tr>
<td>View aft along starboard main engine</td>
<td>View to starboard showing auxiliary generator</td>
</tr>
</tbody>
</table>
Crew from the *D.B. General*, from Seattle Washington preparing to raise the sunken *Nathan E. Stewart* from Seaforth Channel.
<table>
<thead>
<tr>
<th>Day</th>
<th>Time</th>
<th>Summary</th>
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</thead>
<tbody>
<tr>
<td>Wednesday, January 11, 2017</td>
<td>1:06:27 PM Pacific Standard Time</td>
<td>Subject: RE: Log Book and black box</td>
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**Emails between L. Fong & Coast Guard re Requests for Documents**

**SCHEDULE 1**

**Emails between L. Fong & Coast Guard re Requests for Documents**

**Emails between L. Fong & Coast Guard re Requests for Documents**
INVESTIGATION REPORT: THE 48 HOURS AFTER THE GROUNDING OF THE NATHAN E. STEWART AND ITS OIL SPILL

Letter from L. Fong to R. Dick, TC re Heiltsuk Access to Information and TC’s Communication | Page 01

Letter from R. Dick, TC to L. Fong re response to Oct. 17/18th emails requesting disclosure; disclosure to be discussed | Page 01
Letter from A. Callicum to TC re request for TC to disclose information within its possession & control | Page 01

<table>
<thead>
<tr>
<th>ITEM</th>
<th>DESCRIPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td>master and crew lists;</td>
</tr>
<tr>
<td>(b)</td>
<td>any record of correspondence between Pacific Pilotage Authority and owner/operator with respect to BC coast transit, before and after incident;</td>
</tr>
<tr>
<td>(c)</td>
<td>any record of correspondence between Pacific Pilotage Authority and owner/operator regarding the voyage and the incident with “voyage” meaning from time of departure to the time of grounding on or about October 13, 2016, and following the grounding of the “voyage”;</td>
</tr>
<tr>
<td>(d)</td>
<td>any correspondence from tug to owner/operator regarding the voyage and the incident;</td>
</tr>
<tr>
<td>(e)</td>
<td>any record of correspondence between owner/operator and transport Canada personnel attending at the site of the incident;</td>
</tr>
<tr>
<td>(f)</td>
<td>the ship’s certification, or equivalents, and without limiting the foregoing,</td>
</tr>
<tr>
<td>(g)</td>
<td>the ship’s certification, or equivalents, and without limiting the foregoing,</td>
</tr>
<tr>
<td>(h)</td>
<td>the ship’s certification, or equivalents, and without limiting the foregoing,</td>
</tr>
<tr>
<td>(i)</td>
<td>any U.S. Coast Guard documents relating to the manning or operation of the Tug-Barge;</td>
</tr>
<tr>
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<tr>
<td>(m)</td>
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<tr>
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</tr>
<tr>
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<tr>
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</tr>
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<td>any record of correspondence between owner/operator and transport Canada personnel attending at the site of the incident;</td>
</tr>
</tbody>
</table>

Letter from A. Callicum to TC re request for TC to disclose information within its possession & control | Page 02

Letter from A. Callicum to TC re request for TC to disclose information within its possession & control | Page 03

Letter from A. Callicum to TC re request for TC to disclose information within its possession & control | Page 01

Letter from A. Callicum to TC re request for TC to disclose information within its possession & control | Page 02

Letter from A. Callicum to TC re request for TC to disclose information within its possession & control | Page 03

SCHEDULE 6

OTHERWISE PERMITTING THE TUG-BARGE TO, INTER ALIA, ENTER OR LEAVE A PORT IN CANADIAN WATERS UNDER SECTION 73 OF THE CANADA MARINE ACT;

(2) any records (e.g., international tonnage certificates) indicating the gross tonnage of the Tug-Barge;

(5) Class Oil Pollution Prevention Certificate;

(6) Class Document of Compliance Special requirements for Ships Carrying Dangerous Goods;

(7) ship’s standing orders;

(8) Class inspection reports or surveys concerning the vessel;

(9) Class inspection reports or surveys concerning the vessel;

(10) WCMRC Membership Agreement or contract.

2. IN RELATION TO THE INCIDENT:

(a) the ship’s particulars, and without limiting the foregoing,

(b) any record of correspondence between Pacific Pilotage Authority and owner/operator with respect to BC coast transit, before and after incident;

(c) any record of correspondence between Pacific Pilotage Authority and owner/operator regarding the voyage and the incident with “voyage” meaning from time of departure to the time of grounding on or about October 13, 2016, and following the grounding of the “voyage”;

(d) any record of correspondence between Pacific Pilotage Authority and owner/operator regarding the voyage and the incident with “voyage” meaning from time of departure to the time of grounding on or about October 13, 2016, and following the grounding of the “voyage”;

(e) any record of correspondence between Pacific Pilotage Authority and owner/operator with respect to BC coast transit, before and after incident;

(f) any record of correspondence between Pacific Pilotage Authority and owner/operator regarding the voyage and the incident with “voyage” meaning from time of departure to the time of grounding on or about October 13, 2016, and following the grounding of the “voyage”;

(g) any correspondence from tug to owner/operator regarding the voyage and the incident;
Emails between D. Bertrand and R. Dick, TC re reiterating Oct. 28th requests and confirmation of an intention to discuss possible approaches | Page 01

SCHEDULE 8

Letter from R. Dick, TC to Chief Slett re declining to disclose information due to TSB investigation | Page 02
Emails between L. Fong & D. Rossi re HTC request for information regarding the specifications for the Tug & Barge | Page 01

Emails between L. Fong & D. Rossi re HTC request for information regarding the specifications for the Tug & Barge | Page 02
Emails Y. Myers, TC to K. Seaby re suggestion for HTC to make request for specifications for the Tug & Barge to Kirby  | Page 03

Emails Y. Myers, TC to K. Seaby re suggestion for HTC to make request for specifications for the Tug & Barge to Kirby  | Page 04

Emails Y. Myers, TC to K. Seaby re suggestion for HTC to make request for specifications for the Tug & Barge to Kirby  | Page 05
SCHEDULE 11

In my previous email, I was asking you to provide us with the necessary information. Obviously, the transportation company or the third-party disclosed all the documents. We have now obtained the transportation company's documents. The transportation company will be pleased to help facilitate access to the tug by fast-tracking security clearances for terminal access pursuant to our authority under the Canadian Transportation Act, 2001.

Once again, TC will be pleased to help facilitate access to the tug by fast-tracking security clearances for terminal access pursuant to our authority under the Canadian Transportation Act, 2001.

Please be advised that we have also made this request of Kirby Corporation. We would be pleased to receive these documents from either source.

Sincerely,
KASSIE K. SEABY
Articled Student
Ng Aries Fong | Lawyers

T: 604.331.1155
F: 604.677.5410
E: kassie@ngariss.com

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www.ngariss.com
see our blog, suite210: www.ngariss.com/blogs/suite-210/ and in Dispute: www.ngariss.com/blog/in-dispute/

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From: Kassie Seaby [mailto:kassie@ngariss.com]
Date: Monday, November 14, 2016 at 4:20 PM

Re: Heiltsuk First Nation re Kirby Oil Spill

Dear Ms. Myers,

Thank you for your email and commitment to inform us of when we will be able to have the Heiltsuk surveyor and representative inspect the tug.

Additionally, further to Heiltsuk's inspection of the barge, Mr. Bentley has requested the following:

1. General barge & tug particulars;
2. Tank Plan / Capacity Plan for barge and tug;
3. General arrangements drawings for barge and tug;
4. Drawings showing the mid section of the barge; and
5. Details of the cooling system.

This is intended to provide the planned schedule as soon as possible, so as to avoid any unnecessary delays. The intention at this time is to conduct the work as quickly as possible once the tug has been delivered.

Please let me know if you have any questions or concerns. Thank you.

Kind Regards,

Kassie Seaby

Yvette Myers

Regional Director, Marine Safety and Security
Transport Canada, Pacific Region / Government of Canada
yvette.myers@tc.gc.ca
Tel: 604-331-1155 / TTY: (613) 990-4500

-----Original Message-----
From: Heryet, Trevor [mailto:trevor.heryet@tc.gc.ca]
Sent: November 16, 2016 9:33 AM

To: Myers, Yvette; Rossi, Dionysios
Cc: Heryet, Trevor; Dick, Robert; Marilyn Slett; Lisa Fong; Andrea Kreutz; Sukhdeo, Mimi; Yeung, To For
Subject: Re: Heiltsuk First Nation re Kirby Oil Spill

Dear Mr. Heryet and Mr. Dick,

When the tug is transported down to AMIX Recycling facility, Heiltsuk Tribal Council (“HTC”) would like to be advised of the tug’s location as soon as possible so that we can complete the inspection. To avoid the situation that arose following:

1. We would like to be notified when the tug is available for inspection; and 2. Can you both clarify your positions with respect to when the tug can be viewed.

Once again TC will be pleased to help facilitate access to the tug by fast-tracking security clearances for terminal access pursuant to our authority under the Canadian Transportation Act, 2001.

Once again, TC will be pleased to help facilitate access to the tug by fast-tracking security clearances for terminal access pursuant to our authority under the Canadian Transportation Act, 2001.

Please be advised that we have also made this request of Kirby Corporation. We would be pleased to receive these documents from either source.

Sincerely,
KASSIE K. SEABY
Articled Student
Ng Aries Fong | Lawyers

T: 604.331.1155
F: 604.677.5410
E: kassie@ngariss.com

210-900 Howe Street
Vancouver, BC, Canada V6Z 2M4

www.ngariss.com
see our blog, suite210: www.ngariss.com/blogs/suite-210/ and in Dispute: www.ngariss.com/blog/in-dispute/

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--- Original Message ---
From: Lisa Fong [mailto:lisa@ngariss.com]
Date: November 09-10, 10:09 AM

Subject: Re: Heiltsuk First Nation re Kirby Oil Spill

Dear Mr. Heryet and Mr. Dick,

Thank you for the letter. Heiltsuk’s executive director, Mr. Colman has already followed up with turf setting out the Nation’s request.

Chief Stant advised that Transport Canada advised him it would answer factual questions. Accordingly, please advise the following:

1. Is the Nathan E Stewart’s barge still being held in Vancouver Drydock? If not, please advise of the location of the barge as it is being held. If the barge is not being held by Transport Canada, please advise if another member of the Federal family, as referenced in your letter, is holding the barge if or is declining to advise where the barge is, please advise.

2. Will the Nathan E Stewart, after removal from Heiltsuk waters, be taken to Vancouver Drydock?

Thank you for your assistance.

Regards,

Lisa C. RING
Ng Aries Fong (Lawyers)

T: 604.331.1155
F: 604.677.5410
E: lisa@ngariss.com

210-900 Howe Street
PO Box 180
Vancouver, BC, Canada V6Z 2V4

www.ngariss.com
see our blog, suite210: www.ngariss.com/blogs/suite-210/ and in Dispute: www.ngariss.com/blog/in-dispute/

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SCHEDULE 11

From: Heryet, Trevor [mailto:trevor.heryet@tc.gc.ca]
Sent: October-28-16 4:46 PM
To: Test=test.com
Cc: Dick, Robert; Young, Kim
Subject: Your correspondence to Robert Dick of October 17th and 18th.

Dear Ms. Lisa Fong,

On behalf of Robert Dick, please see the attached correspondence.

Best regards,

Trevor J. Heryet
Executive Regional Director Issues and Program Management, Pacific Region Directeur régional enceintes et des programmes, Région du Pacifique
Tel: 604-666-3789 Transport Canada / Transports Canada
820 - 800 Burrard Street / 800, Rue Burrard, pièce 820 Vancouver, BC (C-B) V6Z 2B.

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SCHEDULE 12

Emails L. Fong & K. Seaby with Y. Myers, TC et al re inspection of Barge by HTC representatives and D. Rossi’s objection to disclosure of documents | Page 05

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Email request by D. Jones on behalf of HTC to D. Rossi for specifics re the Tug & Barge | Page 01

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Email request by D. Jones on behalf of HTC to D. Rossi for specifics re the Tug & Barge | Page 02

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INVESTIGATION REPORT: THE 48 HOURS AFTER THE GROUNDING OF THE NATHAN E. STEWART AND ITS OIL SPILL
SCHEDULE 13

Letter D. Bertrand to W. Braul re request for information and documents | Page 02

W. Braul Email response to D. Bertrand – Kirby denies HTC’s request for documents due to TS8 investigation | Page 02

SCHEDULE 14

W. Braul Email response to D. Bertrand – Kirby denies HTC’s request for documents due to TS8 investigation | Page 02

Letter D. Bertrand to W. Braul re request for information and documents | Page 01

Letter D. Bertrand to W. Braul re request for information and documents | Page 01
SCHEDULE 14

CENTRAL COAST LAW CORPORATION

possession | Page 01

SCHEDULE 15

CENTRAL COAST LAW CORPORATION

possession | Page 02

INVESTIGATION REPORT: THE 48 HOURS AFTER THE GROUNDING OF THE NATHAN E. STEWART AND ITS OIL SPILL

Letter D. Bertrand to W. Braul re request for information and documents | Page 00

Letter D. Bertrand to W. Braul re request for information and documents | Page 04
CENTRAL COAST LAW
CORPORATION

(f) copy of paper chart in use at time of incident;
(g) Passage Plan for BC coast transit generally, and for the Voyage specifically;
(h) any document prepared by the master or crew relating to passage planning or navigation for the Voyage;
(i) any electronic record of passage planning for the Voyage;
(j) course recorder printouts;
(k) GPS records;
(l) any LORAN (long range) data relating to the Voyage of the Tug-Range;
(m) any notes or other electronic record of the Voyage;
(n) certificate / seaman’s book of the master and crew;
(o) Chart book for the Voyage;
(p) Logbook for the Voyage;
(q) Engine logbook for the Voyage;
(r) Engine room maintenance log for the past twelve months;
(s) OIL Record Book extracts for last twelve months;
(t) Master’s standing orders;
(u) Ball book;
(v) Master’s Notebook;
(w) general arrangement (plan of the tug);
(x) tank and piping diagram;
(y) plan of tanks and valves, specifically relating to tanks breached in this incident;
(z) plan of tank shutoff valves for tanks breached in this incident;
(aa) incident reports or other written statements filed or provided by the officals or crew of the Tug-Range;
(ab) reports or transcripts concerning interviews of officials or crew of the Tug-Range;
(ac) reports or analyses concerning testing of samples of polluted water concerning diesel, oil or other pollutants; and
(ad) written reports, whether initial or final, about the Incident and about response operations, including any pollution incident reports, or pollution incident report forms.

HTC asks that Transport Canada share such information that is available to it by providing copies to our office. We will gladly cover any reasonable copying expenses.

If Transport Canada does not have particular information, we ask that it identify the missing information. We also request your any reasons for refusal in writing.

Please supply these documents by 4:30PM PST on December 9, 2016. We will consider any failure to produce the above requested documents by this deadline as a refusal to comply with HTC’s investigation.

If you have any questions or concerns, feel free to contact me.

Yours truly,
DANIEL BERTRAND
CENTRAL COAST LAW CORPORATION

cc: Marilyn Slett, Chief Councilor, Heiltsuk Tribal Council,
Lisa Fong, Ng Ariss Fong
Kassie Seaby, Ng Ariss Fong

TRANSPORTATION SAFETY BOARD
Bureau de la sécurité des transports du Canada

Ms. Daniel Bertrand
Central Coast Law Corporation
P.O. Box 91
106 Waglisla Street
Bella Bella BC V0T 1Z0
Canada

Dear Ms. Bertrand,

I am writing on behalf of the Transportation Safety Board of Canada with regard to the sinking of the tug Nathan E. Stewart.

Further to your telephone conversation with our General Counsel, Patrick Hunt, please accept this letter as a written response to your email of December 8, 2016 regarding investigations into the sinking of the tug Nathan E. Stewart.

Sincerely,

M. Poisson
Assistant Commissioner
Transportation Safety Board of Canada

[Letter from M. Poisson, TSB to D. Bertrand re denying HTC’s request to attend as an observer at the investigations of the sinking of the Nathan E. Stewart | Page 01]

[Letter from M. Poisson, TSB to D. Bertrand re denying HTC’s request to attend as an observer at the investigations of the sinking of the Nathan E. Stewart | Page 02]
Letter from M. Poisson, TSB to D. Bertrand re denying HTC’s request to attend as an observer at the investigations of the sinking of the Nathan E. Stewart | Page 01

Letter from Chief Slett to Kirby Offshore re HTC formally requests to interview the crew of the Nathan E. Stewart (the “Crew”) as soon as possible and before they depart Bella Bella | Page 01
1. INTRODUCTION / SCOPE OF WORK

At the request of Ng Ariss Fong, representatives of the Heiltsuk First Nation, the undersigned has carried out both damage surveys of the tug NATHAN E. STEWART and oil barge DBL-55 following their grounding off Bella Bella, British Columbia on October 13, 2016. The location and date of surveys were as follows:

- Tug NATHAN E. STEWART: November 28, 2016 at Schnitzer Steel Canada Ltd., Surrey, BC...
- Oil barge DBL-55: November 12, 2016 at Vancouver Drydock, North Vancouver & November 28, 2016 at Subclaret Steel, Survey

3. REQUESTED INFORMATION

In connection with the surveys of the NATHAN E. STEWART and oil barge DBL-55, the undersigned, via Ng Ariss Fong, requested the following initial information from the tug/barge owners’ attorneys to aid in the preparation of this (and possibly subsequent) report(s):

- Tug & barge particular
- Deck Plan & Capacity Plan for barge and tug
- General arrangement Drawings for barge and tug
- Mobility Section for tug
- Details of the coupling system between tug and barge

This information was not provided.

As a consequence, the information available to assist in the preparation of this report was limited to that available from public sources.
#### 1.2. Barge DBL-55

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<thead>
<tr>
<th>Tag / Barge Coupling System</th>
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<tr>
<td><strong>Starboard Side Anchor Windlass</strong></td>
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<td><strong>Cargo Control System</strong></td>
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<tr>
<td><strong>Emergency Power Generation Equipment</strong></td>
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#### SCHEDULE 21

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<td><strong>Deadweight</strong></td>
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<td><strong>4,276</strong></td>
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</table>

#### 4.2. Barge DBL-55

The barge is a double hull, OPA-90 compliant tank barge built 2011 by Zidell Marine Corporation, Portland, OR. The barge has a raked stern and stern with two deck slots and a vortex in the transom to accommodate a push tug. The stern deck is equipped with oil coupling system coupling plates attached to port and starboard of the stern to accommodate the corresponding coupling pins from the tug (see below for further description).

The cargo area is subdivided by four transverse corrugated bulkheads and one transverse corrugated bow (DBL-55) and stern (DBL-55). Cargo tanks 2A & 3A (isolated) are further subdivided by a single transverse corrugated bulkhead forming separate outer and inner tanks (2Ahit, 2A, 3Ahit, and 3A). Cargo tanks 4A & 5A (isolated) have total number of cargo tanks is four.

A few photos of the damaged tug are provided below for illustration.

![View of tug main deck looking forward from aft](image)

![View of starboard side of tug looking forward](image)

![View of stern of DBL-55](image)

![View of centreboard side of DBL-55 looking aft](image)

![View of tug main deck looking forward from aft](image)

![View of auxiliary wheelhouse looking down](image)

NATHAN E STEWART DBL-55 - Damage Survey Report (Rev1) IMC Ref. 10807.16.63 | Page 07

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**NATHAN E STEWART DBL-55 - Damage Survey Report (Rev1) IMC Ref. 10807.16.63**

| Page 08
INVESTIGATION REPORT: THE 48 HOURS AFTER THE GROUNDING OF THE NATHAN E. STEWART AND ITS OIL SPILL

5. DAMAGE DESCRIPTION

5.1. Tug NATHAN E STEWART

The tug was salvaged from the grounding location and transported to a floating barge at Schnitzer Steel in Surrey, BC for (it is understood) eventual disposal. A survey of the damage was carried out on November 28, 2016 at Schnitzer Steel and the following damages found...

**Hull Structure**
- Entire bottom structure very heavily upset and deformed over full width from the bow aft to approximately 10m forward of stern (in way of 1st rudder). Maximum upset is approximately 5m in height with numerous branches and punctures in the deformed bottom plating.
- All 2m length of centreline vertical keel extension heavily buckled and deformed.

**General**
- Deformed and buckled astern section of centreline vertical keel.
- Maximum upset of shell plating and cooler.
- View of port side from forward.
- View of starboard side from forward.
- View of port side from quarter. Missing rudders and cooler & damaged propeller shanks.
- View of port side quarter. Missing rudders and cooler & damaged propeller shanks.
- Lower edge of port side vertical shell deformed and punctured from just aft of cooler recess forward to just aft of port coupling.
- Portboard side vertical shell deformed heavily buckled, punched in and punctured from approximately 10m forward of stern forward to starboard coupling. Cooler, rudder, grid and cooler damaged in area.
- Port part quarter of side shell plating and bottom plating, from just forward of shank roots and round to centreline heavily deformed and set up with numerous punctures.

**Rudders, Propellers, Propeller Shafts and Brackets**
- Both port and starboard rudder stocks broken off in way of hull penetrations and rudders (with lower port of stock) recovered separately to barge. One rudder (port side) determined whilst badly deformed and set up over off edge over half height from bottom. Other rudder (port side) recovered separately to barge. Both rudder stocks broken off at approximately 1m forward of port coupler and were recovered separately to barge. Port propeller (still attached to shaft) blade also extremely heavily deformed.
- Port propeller (still attached to shaft) blade also extremely heavily deformed with one blade bent at 90 degrees and into its neighbouring blade.
- Port propeller shaft bent in way of propeller connection. Shaft bracket still around shafting but detached from it’s connection to the hull.
- Starboard propeller shaft significantly bent upwards in way of location of missing propeller bracket. Starboard propeller not attached to shaft and propeller root missing.
- Port and starboard propeller roots detached from hull and both very heavily deformed and chomped with one rudder tore in a half (other half missing).

**Other**
- View of stern with missing rudders, rudder stock.
- View of stern looking across to port side showing extent of bottom damage at forward end.
- View of port side looking across to starboard showing extent of bottom damage at forward end.
- View of port side looking across to starboard showing extent of bottom damage at midships area.
- View from port side looking forward showing extent of bottom damage at forward end.
- View from port side looking forward showing extent of bottom damage at midships area.
- View from port side looking forward showing extent of bottom damage at midships area.
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- View from port side looking forward showing extent of bottom damage at midships area.
Superstructure, Wheelhouse and Accommodation

- All interior spaces, with the exception of the raised auxiliary wheelhouse, had been submerged and flooded with all surfaces, fittings and equipment coated with an oily water mixture. All compartments filled with debris from loose equipment, supplies and personal effects. Extensive damage to fixtures, fittings and equipment from floating objects and water immersion.

- One of the recovered propeller nozzles
- Section of other recovered propeller nozzle

Machinery Spaces

- All equipment submerged and flooded with all associated water damage to components and equipment. All surface coatings with oily water mixture. Loose spare parts and equipment scattered throughout machinery spaces.
- Engine room floor gratings and machinery space equipment mountings pushed up and disturbed due to extensive bottom damage with attendant damage to equipment and piping systems.
- Both main gearless housing shattered and main engine bed plate fractured. Engine and gearboxes separated and gearboxes displaced aft. Engine flexible coupling torn.

A more detailed inspection of the machinery space was not possible due to lack of safe access due to the damaged and oil-coated floor plating and deck of lighting.

Page 14
Coupling System

During inspection of the pin room, the inboard end covers of the coupling cylinders had been removed along with the hydraulic/parametric connections and the pins themselves withdrawn from the cylinders. This was reportedly done by the salvage divers in order to pass heavy chains through the open cylinders from one side of the vessel to the other as part of the operation to salvage the tug.

The removed pins were lying on the bottom of the pin room, covered by and surrounded by debris. One of the pins was found to have been fractured/sheared off approximately half way along its length approximately 100mm from the inboard end of the pin. It was not possible to determine if this was the port or starboard pin. The other half of the pin was located forward of the tug with its associated rubber, starboard pin cover and nipples. The fracture surface had off-set, uneven, rough appearance and had not been cut.

The interior of the coupling cylinders and pin guides appeared to be relatively undamaged.

Approx. Frame 31-33 Starboard Side:

• Two indents in flat boom flooring at turn of bilge - each indent approximately 1m in length.  Indent approximately 0.5m in both locations.

Approx. Frame 32-34 Port Side:

Boom flooring and double bottom strake buckled up to height of approximately 2m from baseline. Length of upset along port side strake Approximately 11m with the length tapering down to zero at approximately 5m inboard from port side shell. Port side shell edge indents located up to height of approximately 0.5m from baseline. Weight of upset is approximately 1.5m. Multiple fractures and tears in bottom plating in way.

The interior of the coupling cylinders and pin guides appeared to be relatively undamaged.

Internal view of port coupling cylinder Internal view of starboard coupling cylinder

Port coupling housing with end cover & pin removed

Port coupling housing with end cover & pin removed

Port hull plating and double bottom structure

- Approx. Frame 32-33 Port Side:
  - Two indents in flat bottom plating at turn of bilge - each indent approximately 1m in length.

- Approx. Frame 21-22 Port Side:
  - One indent in flat bottom plating at turn of bilge - indent approximately 0.5m in length.

- Approx. Frame 21-22 Port Side:
  - Two indents in flat bottom plating at turn of bilge - each indent approximately 0.5m in length.

- Approx. Frame 23-24 Port Side:
  - Two indents in flat bottom plating at turn of bilge - each indent approximately 1m in length.
Approx. Frame 13-20 Port & Starboard Side: Very large set up of bojom plating extending across breadth of vessel from approximately Frame 13-20 Port. View from port looking forward.

View from port looking forward.

Large tear in bojom plating at Frame 25-29 Port looking longitudinally across vessel's breadth.

Inside of #4 double bottom void showing deformation in way of set-up at Frame 25-29 Port.

• Approx. Frame 13-20 Port & Starboard Side: Large set up of bojom plating extending across breadth of vessel from approximately Frame 13-20 Port and approximately 8m along starboard side. Port and starboard side shell plating in way are buckled up to height of approximately 2m from baseline. Height of setup is approximately 2m over entire width. Multiple fractures and tears in bottom plating in way.

View from port looking forward.

Large tear in bottom plating.

View inside #4 double bottom void showing heavily deformed longitudinal and plating.

View inside #4 double bottom void showing heavily deformed longitudinal and plating.

• Approx. Frame 3-5 Port Side: Large indent in way of turn of the bilge at transition from flat bottom to forward side. Indent measures approximately 3m long x 2m wide with inset of approximately 0.25m.

• Approx. Frame 1 Starboard Side: Series of small indents in bojom plating approximately 2m inboard from starboard side in way of forward rake. Affected area approximately 3m x 2m with maximum inset of approximately 75mm.

• Approx. Frame 3-4 Starboard Side: Indent in way of turn of the bilge just forward of transition from flat bottom to forward side. Indent approximately 2m x 2m with maximum inset of approximately 100mm.

• Approx. Frame 6 Starboard Side: Small indents in rounded bilge plating approximately 1m x 1m with maximum inset of approximate 50mm.

• Approx. Frame 3-5 Port Side: Multiple indents in way of forward rake on port side socket plate.

• Approx. Frame 1 Starboard Side: Starboard side socket plate did show indications of heavy contact, impact and scoring in way of the 2nd from bottom hole and the guide plates located above and below the hole. The corresponding hole and guide plates on the port side socket plates were not similarly affected.

Port side socket plate condition.

Starboard side socket plate condition.

Clamping System:

Except as noted below the port and starboard socket plates within the stern v-notch appear to be relatively undamaged so far as could be seen through there were signs of light impact and scoring on all the guide plates. This could be from normal operation.

The starboard side socket plate did show indications of heavy contact, impact and scoring in way of the 2nd from bottom hole and the guide plates located above and below the hole. The corresponding hole and guide plates on the port side socket plates were not similarly affected.
6. REPAIRS

6.1. Tug NATHAN E. STEWART

Based on the extent of grounding and associated damage to the hull, equipment and appendages as well as the invasion of all machinery & equipment in salt water, it is my understanding that NATHAN E. STEWART cannot be economically repaired and the tug is a constructive total loss.

6.2. Oil Barge DBL-55

Repairs will require cropping and renewal to as-built condition of all affected hull structure as noted above. It is estimated that total weight of all repairs will amount to approximately 300 tonnes and repairs will require dry docking.

7. OTHER MATTERS OF RELEVANCE

The damage observed appeared to be entirely contained within the double bottom space below the cargo area and did not extend above, or cause a breach on the top side of the tug. However, there was some slight upward deflection of the bottom plating in moderate to slight deflection of some side strakes which may have caused some limited bottom damage.

The cargo tank internally inspected (P76) was without any traces of oil residue.

Survey made without prejudice.

December 13, 2016 at Vancouver, BC

Mark Bentley, Principal Surveyor
INDEPENDENT MARITIME CONSULTING (PACIFIC) LTD.

INVESTIGATION REPORT: THE 48 HOURS AFTER THE GROUNDING OF THE NATHAN E. STEWART AND ITS OIL SPILL
Emails between Y. Myers, TC, D. Rossi and L. Fong re HTC and HTC's Marine Surveyor denied access to inspect the Barge | Page 04

SCHEDULE 22

Dear Mr. Myers,

I hereby advise that you are required to undertake the following:

1. Undertake immediate action to ensure that the Barge is properly secured and isolated from its present location.
2. Ensure that the Barge is removed from the immediate vicinity of the shore.
3. Undertake all necessary steps to prevent any further release of the oil from the Barge.

Failure to comply with these requirements may result in further legal action being taken against you and your company.

Sincerely,

[Signature]

Emails between Y. Myers, TC, D. Rossi and L. Fong re HTC and HTC's Marine Surveyor denied access to inspect the Barge | Page 05

SCHEDULE 23

Okay, thanks! We've put together a list of contacts that everyone is in place and to know what the limits are.

I'm hoping that it will be easy.

D. Rossi

On behalf of [Company Name]

Emails between D. Rossi, Y. Myers, TC & L. Fong re Access To Barge; L. Fong denying HTC access to barge is the opposite of collaboration | Page 01

We had anticipated that Transport Canada and TC would not provide access to the barge in Vancouver. Indeed, it was only after we had written to the President of Canadian Corporate, the CEO of the company, and the Minister of Transport that we were able to arrange a meeting with the appropriate officials.

However, we are pleased to report that the meeting was constructive and that a written agreement has been reached.

Regarding:

Lisa C. Fong

[Contact Information]

This e-mail and any attachments are confidential and may be privileged.

If you are not the intended recipient, please notify us immediately by returning this message and do not copy, or distribute it.

Emails between D. Rossi, Y. Myers, TC & L. Fong re Access To Barge; L. Fong denying HTC access to barge is the opposite of collaboration | Page 02
The crew of the vessel reported a loss of power to the starboard engine to the USCG at 1:00 PM. Transportation representatives, engine technicians and USCG Sector Juneau Prevention staff from Seattle and is estimated to arrive in Skagway on December 23. The 95-foot commercial tug with six crew members aboard. The tug was towing the Barge and was adrift 20 miles west of Cape Fairweather. The tug has 45,000 gallons of diesel and 500 gallons of lube oil on board. The cargo on the tug was en route to Skagway. The tug has 45,000 gallons of diesel and 500 gallons of lube oil on board. The cargo on the tug was en route to Skagway. As of 9:30 AM on December 21, 2011: The Tug DBL-55 and Tug Nathan E Stewart will offload its cargo. Upon arrival the vessels were met by K-Sea Transportation’s 300-foot fuel barge, Le Cheval Rouge. There has been no release.

BARGE NAME: Nathan E Stewart

SOURCE: 11119935001

reserved to barge.

UNIFIED COMMAND AND PERSONNEL:

USCG (Sector Juneau)

K-Sea Transportation

NMFS

USDA Forest Service

USCG (Sector Juneau)

NMFS

USDA Forest Service

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INVESTIGATION REPORT: THE 48 HOURS AFTER THE GROUNDING OF THE NATHAN E. STEWART AND ITS OIL SPILL

SCHEDULE 27

Letter from PPA to Kirby re Kirby Waiver Revoked as of Oct. 16, 2016 (redacted version)

SCHEDULE 28

Email from B. Young, PPA to Chief Slett re Copy of Letter Revoking Kirby’s Waiver
NEWS RELEASE

Date Issued: 24 October 2016
Subject: Pacific Pilotage Authority (PPA) Waiver System, New and Interim Measures
Geographic Area: Compulsory Pilotage Waters, BC

Details:
After a review of the recent Nathan E. Stewart spill incident in Bella Bella, the Pacific Pilotage Authority (PPA) is announcing new and interim measures regarding waiver exemptions for ships and ships transporting petroleum cargo products.

Currently, ships over 350 gross tons but under 10,000 gross tons (mostly tugs and barges) are granted waivers if the operator meets certain conditions. Effective immediately, the following additional conditions will be implemented for these vessels:

- Every ship holding a waiver exemption a compulsory pilotage area must notify the PPA and provide a list of the waiver holder’s name.
- Every ship must have two people on the bridge at all times, one of whom must be the waiver holder.
- Every ship may be subject to random checks by the PPA.
- Every ship may be asked to supply the PPA with log extracts to indicate who was on the bridge at a specific time.

The Master is to be on the bridge during the following times:

- First Narrows (Vancouver Harbour)
- Second Narrows (Vancouver Harbour)
- Fraser River transit
- Seymour Narrows
- Race and Current passage
- Blackney Pass, Weymouth Pass and Broughton Pass
- Bella Bella
- Brett Passage
- Generic Channel from Lower Juan to Morning Reef

Additional route restrictions (subject to consultations with affected industry stakeholders) will also be put in place for all vessels transporting petroleum products through the compulsory pilotage area. These restrictions will not apply to vessels delivering fuel to remote locations and communities on the BC Coast.

- The northern portion of the Inside Passage is off limits (Gore Range Channel, Princess Royal Channel, Finlayson Channel, Sandrift Channel, Lamma Pass and Fisgard Channel).
- Vessels are to follow a route between the Mainland and Haida Gwaii after leaving Gordon Channel at the north end of Vancouver Island.
- In adverse weather conditions and after clearance with vessel traffic, the vessel can proceed through Laredo and Prince Rupert by entering via Laredo Sound or Browning Entrance.

A five-day implementation period will apply to vessels carrying petroleum who are subject to these additional route restrictions and are already in, or in transit to, these areas.

Quick Facts
- The Pacific Pilotage Authority is a Crown corporation created in 1972 under the Pilotage Act. Its mandate is to provide safe, reliable and efficient marine pilotage and related services in the coastal waters of British Columbia, including the Fraser River.

Quotes
"The Pacific Pilotage Authority strives to be a world leader in marine pilotage. Part of this goal is learning from and adapting to challenges. The lessons learned from the Nathan E. Stewart incident, and the measures introduced today, will help us increase the safe, reliable and efficient marine pilotage of B.C.'s coastal waters for certain vessels."

Kevin O'Brien
Chief Executive Officer

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The Pacific Pilotage Authority is online at [http://www.paa.bc.ca](http://www.paa.bc.ca).
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Vision

The Heiltsuk, Kitasoo/Xai’xais, Nuxalk and Wuikinuxv Nations assert our rights and title to our respective territories and recognize the obligation bestowed upon us by our ancestors to manage our marine resources based on our traditional laws, knowledge and values. These values respect our balance with nature, recognize the connection between the land and sea, and understand the importance of educating our children and leaving resources for our children’s children. Using our traditional laws and knowledge, and through a co-jurisdictional relationship with other levels of government, we will create a healthy marine environment, a strengthening of our cultural, spiritual, linguistic, political and social freedoms, and a sustainable economy that employs our people.
The Central Coast First Nations’ territories are the heart of the Great Bear Rainforest. Our territories are known for their old growth forests, productive salmon systems and diverse land and marine ecosystems.

Plan Development

The Central Coast First Nations Marine Use Plan is a strategic document to guide the management of human activities in the territories of the Heiltsuk, Kitselas/Xai’xais, Nuxalk and Wuikinuxv Nations. The Plan is comprehensive and covers jurisdiction, resource management, economic development and capacity needs across all sectors of the marine market and non-market economy.

The overarching goal is to realize a sustainable balance between ecosystem health, social and cultural well-being, and economic development. To this end, the Plan utilizes an ecosystem-based approach to resource use.

The Central Coast First Nations Marine Use Plan is a harmonized reflection of the goals, objectives and strategies of the Heiltsuk, Kitselas/Xai’xais, Nuxalk and Wuikinuxv Nations. Nation-level plans were developed by community-based marine use planning committees and technical working groups. The committees were comprised of a broad cross section of elders, hereditary chiefs, elected councilors, commercial fish harvesters, and representatives from related Nation-level agencies and departments. The committees’ work was supported by technical staff from a variety of fields including: project management, biology, strategic planning, geographic information systems technology, and research.

Community input was integral to the successful completion of the Plan. To achieve a high level of input the Nation-level committees undertook a series of community-based research studies, held feasts and open houses to receive feedback on plan components, and participated in community outreach events.

Guiding Principles

1. Ensure conservation of natural and cultural resources
   Conservation of natural and cultural resources is the highest priority of the Central Coast Marine Use Plan. Natural and cultural resources must be sustained to maintain and safeguard our direct connection to our territories and their resources.

2. Ensure Central Coast First Nations’ priority access to resources for cultural and sustenance use
   Maintaining Central Coast First Nations’ access to all areas of our territories is essential for cultural and sustenance purposes. The rights and opportunities of Central Coast First Nations to hunt, fish, harvest, trap and otherwise use the land and sea resources for cultural, spiritual, sustenance, economic and trade uses must be assured and take precedence over all other uses, except conservation.

3. Enable appropriate Central Coast First Nations’ commercial use of resources
   For too long our communities have sat on the sidelines while others have reaped the benefits of the resources in our territories. Central Coast First Nations’ economic development and diversification is required to create both employment and entrepreneurial opportunities.

4. Enable appropriate non-First Nations’ commercial and recreational use of resources
   For non-First Nations’ use of land, water and other resources to be supported by the Central Coast First Nations, respect must be demonstrated for each Nation’s title and rights, culture, and the natural resources that continue to sustain that culture. Priority will be given to local non-First Nations’ economic development. Non-First Nations’ commercial interests in our territories must also commit to providing viable and sustainable economic opportunities for our people.
Key Policy Statements

While our Plan is comprehensive and we expect to work with a number of parties to realize its implementation, there are a number of specific issues that are a priority to the Central Coast First Nations. We expect to work with government, our neighboring communities and industry to address these issues as soon as possible.

**Co-jurisdiction / Shared decision-making**

Central Coast First Nations maintain rights and title over our entire territories. In the past, consultation about resource harvesting and development in our territories has been inconsistent and for the most part inadequate. Moving forward, we believe decisions about the activities in our territories must be made in conjunction with the Central Coast First Nations, on a co-jurisdiction basis. As with the Provincial and Federal governments, resource extraction and development in our territories must require the approval of our Nations.

**Government revenue sharing**

In order for the Central Coast First Nations to reach our authority, resource management, and economic goals we will need to significantly increase our institutional, human and capital capacity. In particular, we require a stable source of capital to manage our territories. Currently, the Federal and Provincial governments receive significant revenue revenues and fees from the resource wealth in our territories. We want a share of that wealth and will work with both levels of government to realize revenue sharing agreements.

**Stock restoration and rehabilitation**

The health of many of the fish stocks in our territories are a pressing concern to the Central Coast First Nations. We maintain that immediate action through improved management, increased funding for enforcement and spatial planning must occur to return stock numbers to sustainable levels. This work needs to start now and the Central Coast First Nations are eager to work with government and stakeholders to this end.

Priority access to FSC

Harvest of resources from our territories is an important part of the contemporary and ongoing activities of the Central Coast First Nations, providing resources for food, medicine, fuels, building materials, and economic and spiritual uses. However, we are finding it increasingly difficult to access fish for food, social and ceremonial purposes. Our people have to go further and stay out for longer periods to feed their families. We believe that areas must be set aside for the exclusive use of local people. By doing this, we will ensure priority access for local people, while at the same time creating refuge from industrial activity and intensive commercial and recreational fishing for marine species.

**Monitoring and enforcement**

Policy and regulation will only lead to sustainable practices with sufficient monitoring and enforcement. The government’s current approach to monitoring activities in our territories is usually inadequate. Successful implementation of our Plan requires that the Central Coast First Nations are able to directly enforce our laws, plans, policies and guidelines.

**Territorial-based economic development**

We have stood witness to resources leaving our territories in record numbers with no benefit to our Nations or communities. In commercial fisheries alone, catch value from our territories was over $18 million in 2007. Ecosystem-based management requires that social and economic well-being is achieved at a local level. Policy changes must occur to ensure that industry development and resource extraction in our territories benefits local communities. A key component of this is the development of impact-benefit agreements between First Nations and businesses operating in our territories.

**Bottom trawling**

The destructive and destructive nature of bottom trawling is inconsistent with our beliefs and EBM. Bottom trawling should be prohibited throughout the Central Coast.
Climate Change

Climate change has the potential to have significant negative impacts on our marine territories through rising ocean levels, ocean acidification, increasing ocean temperatures, shifting weather patterns, and spreading of exotic species. These impacts will affect our community, economy, and the health of our ecosystems. While we cannot solve the climate change issue within the confines of our marine plan we have taken two types of actions to try to reduce the impacts on our environment:

- Increasing resiliency of species and ecosystems. A larger genetic pool, and healthier species populations and ecosystems will better enable species to respond to a changing climate. We plan to increase the resiliency of species and ecosystems through spatial planning, reduced harvesting and mitigation of other human impacts.
- Aligning industry development and economic goals with environmental beliefs and interests. Each industry was scrutinized for its impact on the environment and climate. In most cases, we present mitigation strategies that we believe will allow industry and a healthy environment to co-exist in our territories. In other cases, such as off-shore oil gas, we believe the environmental and climate impacts are too great to justify development.

We live here. We drink the water, we breathe the air, we eat the fish, we eat the crabs. Who better knows about the area than those who grew up on the water?

- Alex Chartrand

Monitoring and Enforcement

As with all policies and management decisions, the success of our Plan will depend on its implementation. While the Heiltsuk, Klúuvi/Kat-Xinle, Slaa’aal and Wuikinuxv have always maintained that we have sovereign right to rule our territories, other levels of government do not recognize this right. This lack of recognition affects all Central Coast First Nations’ management and is a considerable barrier to effective management of our territorial resources.

Monitoring and enforcement of resource use in Central Coast First Nations’ territories requires staff, training, agreed upon authority, transportation, facilities, equipment and capital. It is highly preferable to have Central Coast personnel in monitoring and enforcement positions, as they bring cultural and local knowledge to the positions, have more credibility with the community, and are likely to have lower turnover rates.

Successful implementation of our Plan requires that the Central Coast First Nations are able to directly enforce our plans, laws, policies and guidelines.

Our Plan reflects our goals for our economy, our communities, our environment and the climate.
**Marine Resource Management**

**Land and coastal tenures**

The provincial tenuring system permits the use of Crown land and resources for various industrial activities including: mining, forestry, aquaculture, tourism operations, and energy development. In 2009, the Central Coast First Nations signed a ground-breaking agreement with the Provincial government. This Resolution Protocol introduced a new collaborative, coordinated and efficient approach to land and resource engagement and decision-making. The Central Coast First Nations acknowledges that this Protocol is an important step toward shared decision-making and look forward to implementing a greater influence on what happens within our territories.

While many tenured activities are addressed directly in our Plan, we believe all industries in our territories need to mitigate their impact on our environment through waste and pollution reduction strategies. This requires greater Central Coast First Nations control over the monitoring and enforcement of waste and pollution infringements.

**Off-shore oil and gas**

Central Coast First Nations currently support the moratorium on off-shore oil and gas exploration and development. This includes opposition to mining and seismic testing, off-shore oil and gas operations, as well as pipeline development, and tanker and condensate shipping through our territories.

**Alternative energy**

There are great opportunities to use tidal, hydro, tides and waves to generate electricity on the Central Coast. However, our geography also presents some challenges. The length of our coastline is long distances to the transmission grid and difficulty in accessing high potential areas.

While often promoted as a green alternative to conventional energy generation, tidal, hydro, tidal and wave energy have potential for negative social and environmental impacts. Despite the potential impacts, Central Coast First Nations believe that the alternative energy sector can be developed and managed in a sustainable manner, which maintains the natural environment for future generations.

Any alternative energy developments in our territories must be accompanied with an Impact-Benefit Agreement with the Nation, which ensures sustainable development and management of the project and a fair return to our people in the form of revenue sharing and employment.

**Aquaculture**

The Central Coast First Nations have practiced forms of aquaculture for thousands of years, including shellfish gardens that were owned and managed by families, and salmon habitat management and enhancement projects that were the property of extended family groups.

The Central Coast First Nations are very receptive to shellfish and aquatic plant aquaculture development. We believe it offers a sustainable economic development opportunity that aligns with our goals for a conservation-based economy for our territories.

**Salmon**

The relationship between salmon and Central Coast First Nations cannot be overstated. For over 11,000 years our culture, social structures, and economy have been based on the abundance of salmon in our territories.

Today, salmon are no less important to our people. Yet, we have stood silent as good and poor management for 150 years. The result is a fishery in crisis. Salmon runs are at historical lows, commercial fisheries cannot make enough in a single year to pay their expenses, the commercial recreational fishery has been forecast to lose as much as 25 to 50% of value to meet our MSY needs. We believe we need to return management of the salmon fishery to our people.

We, as a Nation, must manage the salmon for over 11,000 years, and given the opportunity we could do so again.

Sustainable salmon fisheries will require equitable international treaties on salmon rights, more precise and timely monitoring of stocks in our territories, a decreased commercial and recreational fishing effort, and improved enhancement and habitat rehabilitation efforts.

The relationship between salmon and Central Coast First Nations cannot be overstated.
**Eulachon**

Prior to European contact, a vast network of trails used by generations of First Nations existed throughout BC, “this trail system was the life-blood of the native culture and economy”. The grease trail from the coast to the interior was so important that the trails connecting the communities were known as “grease trails.”

The dramatic decline of the Central Coast eulachon populations in the 1990s occurred during the most significant salmon-travel activity in Queen Charlotte Sound. The impact of the by-catch was amplified as it occurred in the subsistence areas inhabited by Central Coast eulachon, which is one of the smaller eulachon populations.

Management practices for fisheries and industries that impact eulachon populations must adopt the precautionary principle and limit all possible impacts on eulachon numbers. Of paramount importance is the establishment of a moratorium on all shrimp and drag-trawl fisheries on the Central Coast.

**Recreation and tourism**

The Central Coast First Nations are open to capturing the range of economic, social, and environmental benefits that can be realized through strategic and planned participation in the tourism sector.

The obvious benefits of tourism in the region must be balanced with the associated negative social, cultural, and environmental impacts. For example, the increase in marine and kayak fishing and associated moorage and camping has resulted in conflicts in areas used by our people as food gathering camps, clan increasing areas and seaweed grounds. Sound management that minimizes impacts on wildlife and natural areas, and respects First Nations’ rights and cultural practices will lead to a vibrant and sustainable tourism industry on the Central Coast.

**Commercial recreational fishery**

The recreational fishery plays an important role in the social and economic life of many British Columbians. In the past twenty years, sport fishing has become a hundred million dollar industry. However, sport fishing also has negative environmental, social, and cultural impacts, which are felt acutely by Central Coast First Nations. These include: impact on cultural resources, few local benefits, pressure on scarce salmon runs, overfishing, catch and release mortality, and poor monitoring and enforcement. Our Plan outlines management strategies that address the negative environmental, social, and cultural impacts of the sport fishery in our territories. The foundation of these changes must come from protocol agreements between sport lodges and our Nations.

**Food, social and ceremonial**

Our people have an ancient, deep and abiding relationship to our territories. This relationship exists on many levels: spiritual, cultural, ceremonial, and material among them. The continuing importance of resources that are harvested from the land is an indication of the strength of our culture and attachment to the land.

Ensuring that our people have adequate access to marine resources for FSC purposes is of primary importance to the Nations. Current management practices are not sufficient to uphold DFO’s “doctrine of priority”. We believe upholding the doctrine of priority requires changing current importance to the Nations. Current management practices are not sufficient to uphold DFO’s “doctrine of priority”. We believe upholding the doctrine of priority requires changing current management practices. A trial abalone FSC tidal harvest in our territories could also improve monitoring of abalone and subsequent ballooning of the commercial fishery in the 1970s led to a steep decline in abalone population numbers and the protection of Northern abalone under Canada’s Species at Risk Act.

We are very alarmed by the continued decline of such a culturally important species and believe that a concerted effort needs to be put in place to reduce the impacts of poaching and increasing brood stock. A trial abalone FSC trial harvest in our territories could also improve monitoring of abalone stocks and provide our people with the opportunity to harvest abalone again, without significantly impacting brood stock.
Economic Development

Unemployment on the Central Coast is significantly higher than the National average. A diverse marine sector, once the dominant employer in our communities, are almost non-existent. Yet, over 90% of our people believe that a priority should be placed on marine based economic development.

The Plan’s goals, objectives and strategies for economic development aim to create a winning model industries the foundation of the Central Coast economy, while taking into consideration the carrying capacity of the ecosystems in our territories and recognizing our Nations’ distinct and unique.

In order to support our people have strong natural links to an economic activity, such as commercial and sport fishing, seafood processing, shellfish aquaculture, and tourism, we seek to create partnerships as well as facilitate major resource and operations within the industry. In emerging industries, such as shipping, transportation and alternative energy, we seek to partner with experienced companies in a manner that benefits our Nations and the developer.

Building Capacity

In order for our Nations to be able to reach our authority, resource management, and economic goals we will need to significantly increase our institutional, human and capital capacity. Specifically, we need to establish institutions to ensure resource use in our territories, capital to employ management staff and to fund management and research activities, and educational opportunities to help permanently maintain employment opportunities in marine-related positions from government and management to clerks and Guardian Watchmen.

We will work collaboratively with government, industry, NGOs, and other interested partners to improve our capacity to achieve the goals outlined in our Plan.

INVESTIGATION REPORT: THE 48 HOURS AFTER THE GROUNDING OF THE NATHAN E. STEWART AND ITS OIL SPILL

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Marine Spatial Plan

Allowable activities in each marine use zone

<table>
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<th>Human Use</th>
<th>Marine Sanctuary</th>
<th>Marine Conservancy</th>
<th>Habitat Management Zone</th>
<th>Aquaculture</th>
<th>Ecotourism / recreational activities</th>
<th>Non-fishing commercial vessels</th>
<th>Commercial fishing and recreational vessels (no extraction)</th>
<th>Transportation infrastructure developments</th>
<th>Alternative energy</th>
<th>Non-renewable energy</th>
<th>Education and research</th>
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1. Recreational diving is not permitted in Marine Sanctuaries.
2. Oil and gas tankers are not permitted in the territories.
3. Anchorages are permitted in the Habitat Management Zone.
4. Transportation infrastructure would be limited to developments that support alternative energy projects.

Future Challenges/Implementation

Central Coast First Nations take responsibility for and an interest in all resources in our territories. However, for federal and provincial governments, marine jurisdiction is a complex issue. We will use this plan to engage all levels of government in creating positive change in our marine territories. At the same time, we recognize that government may not be willing to address some of the issues in our plan. As such, we will engage the local community, industry, environmental organizations, and other third parties to implement our plan. Mechanisms for realizing plan implementation include:

- Securing joint-management agreements with government to give the Central Coast First Nations jurisdiction and governing authority over our marine environment and its resources, which enables revenue and benefit sharing, and provides for equitable First Nations participation in economic development and capacity building;
- Acquiring specific resource tenures and licences through government negotiation, existing programs, and market buy-back;
- Developing partnerships with industry, environmental organizations, and other third parties through memorandums of understanding, and impact-benefit or joint venture agreements;
- Affirming Aboriginal rights and title to our lands and resources through treaty, litigation and other means, as appropriate.

Ideally, the vast majority of the goals and objectives in this plan will be achieved through direct negotiations with Provincial and Federal Governments, and stakeholders. This will require the same spirit of cooperation and mutual respect that occurred during the land use planning negotiations. It will also require an open-minded willingness to move toward a more sustainable and equitable future for our marine territories and people.

Contact Information

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<thead>
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</tbody>
</table>

We are connected to mother earth – we are a spirit like the rocks and salmon – we must respect this — what we do to the land will happen to us... If we do not respect our resources no one will.

- Nanlık visioning feast

Everything we do here is not about us. It is about our children and grand children.

- Gary Housty

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Gitxaala Nation v. Canada 2016 FCA 187

Between

Gitxaala Nation, Gitga’At First Nation, Haisla Nation, The Council of the Haisla Nation, and Peter Luntin 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 Hohblock Tribal Council on behalf of all, members of the Heiltsuk Nation, Martin Louie, on his own behalf, and on behalf of Nuxalk Whut'en and on behalf of the Nuxalk Whut'en Band Fred Sam, on his, own behalf, on behalf of all Nuxalk Whut'en, and on, behalf of the Nuxalk Band Uliflor, Forestethics, Advocacy Association, Living Oceans Society, Raincoast Conservation Foundation, Federation of British Columbia Naturalists, carrying on business as BC Nature, Applicants and Appellants, and

Her Majesty the Queen, Attorney General of Canada, Minister of the Environment, Northern Gateway Pipelines Inc., Northern Gateway Pipelines Limited Partnership, and National Energy Board, Respondents,

and

The Attorney General of British Columbia, Amnesty International and the Canadian Association of Petroleum Producers, Interveners

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2016 CarswellNat 2577

Federal Court of Appeal
Vancouver, British Columbia
Dawson, Stratus and Ryan J.J.A.

Heard: October 1-2 and October 5-8, 2015.
(364 para.)

Aboriginal law — Aboriginal status and rights — Duties of the Crown — Fair dealing and reconciliation — Consultation and accommodation — Application for judicial review of Order in Council and certificates of approval for Northern Gateway pipeline project allowed — Order and Certificates quashed — Governor in Council made reasonable order based on report of Joint Review Panel following multi-year review process, giving due consideration to economic, environmental, cultural factors — However, Canada failed to fulfil duty to consult with First Nations peoples in course of review process — First Nations not provided with adequate time to contribute and denied information about strength of title claims as they impacted depth of consultation required — Concerns raised by First Nations remained unaddressed at time of Order.

Environmental law — Environmental assessments — Canadian Environmental Assessment Act — Decisions of Governor in Council — Public consultation and participation — Aboriginal issues — Application for judicial review of Order in Council and certificates of approval for Northern Gateway pipeline project allowed — Order and Certificates quashed — Governor in Council made reasonable orders based on report of Joint Review Panel following multi-year review process, giving due consideration to economic, environmental, cultural factors — However, Canada failed to fulfil duty to consult with First Nations peoples in course of review process — First Nations not provided with adequate time to contribute and denied information about strength of title claims as they impacted depth of consultation required — Concerns raised by First Nations remained unaddressed at time of Order.

Environmental law — Environmental assessment — Canadian Environmental Assessment Act — Decisions of Governor in Council — Public consultation and participation — Aboriginal issues — Application for judicial review of Order in Council and certificates of approval for Northern Gateway pipeline project allowed — Order and Certificates quashed — Governor in Council made reasonable orders based on report of Joint Review Panel following multi-year review process, giving due consideration to economic, environmental, cultural factors — However, Canada failed to fulfil duty to consult with First Nations peoples in course of review process — First Nations not provided with adequate time to contribute and denied information about strength of title claims as they impacted depth of consultation required — Concerns raised by First Nations remained unaddressed at time of Order — Canadian Environmental Assessment Act, ss. 2, 3, 19, 29, 30, 31, 33.

Natural resources law — Oil and gas — Conservation and licensing — Federal regulation —
Applications by several First Nations and environmental advocacy groups and Unifor for judicial review of an Order in Council, requiring the National Energy Board (Board) to issue Certificates of Public Convenience and Necessity concerning the Northern Gateway pipeline project, and for judicial review of a report issued by a Joint Review Panel (Panel) that was considered by the Governor in Council in making the Order. The applicants also appealed from the Certificates. The project consisted of two, 1,780 kilometer pipelines and associated facilities, intended to transport oil from Alberta to BC for loading onto tankers for export, and to transport condensate from tankers in BC to Alberta for distribution to Alberta markets. The project, if approved, could operate for 50 years or more. Northern Gateway submitted a preliminary information package on the project to the Board and the Canadian Environmental Assessment Agency in 2005. In 2006, the project was referred to a Review Panel. Aboriginal groups were part of the review process, which included a review phase, a pre-hearing phase, a hearing phase, a post-report phase and a regulatory/permitting phase. Near the end of 2009, an agreement was signed by the Board and Canadian authorities regarding the process. The formal approval process commenced in 2010. Public input was sought and hearings were arranged at three locations. Between September 2012 and June 2013, the Panel conducted final hearings. The Panel ultimately found that the project was in the public interest, recommending that approval Certificates be issued subject to 209 conditions requiring plans, studies and assessments to be considered and assessed by the Board. The Panel recommended that the Governor in Council conclude that the adverse environmental effects from the project would not be significant, and that significant adverse effects that certain caribou and bear populations would experience were justified. The Governor in Council accepted the Panel’s findings and issued the Certificates, noting that the project would diversify Canada’s energy export markets and would contribute to Canada’s long-term economic prosperity.

HEL D: Application allowed. The Order and the Certificates issued thereunder were quashed. While the Order was acceptable and defensible on the facts and the law and was reasonable, the Governor in Council could not make it because Canada failed to fulfill its duty to consult with the First Nations peoples. Canada exercised good faith and designed a good framework to fulfill its duty to consult, but failed in executing that framework. The Governor in Council gave due consideration to the recommendations it received and engaged in a proper balancing of economic, cultural, environmental and other factors in making its decision. However, the review process involved multiple failures on the part of the Canadian authorities to engage, dialogue and grapple with concerns expressed in good faith by all of the applicant/appellant First Nations. This phase was intrinsically linked along with no good reason. No answers were given when First Nations raised questions. The Panel did not amend its final report to address the concerns expressed in the fourth phase of the process. Information should have been freely exchanged about Canada’s views on the strength of the First Nations’ claims to aboriginal rights and title, as this was crucial in determining the depth of consultation that was required. It was unclear from the Order whether the Governor in Council was satisfied that Canada had met the duty to consult.

Statutes, Regulations and Rules Cit ed:
Canada Evidence Act, R.S.C. 1985, c. E-5, s. 39
Canada Environmental Assessment Act, 2012, S.C. 2012, c. 19, s. 2, s. 5, s. 5(1), s. 5(2), s. 19, s. 29, s. 29(1), s. 29(2), s. 30, s. 30(1), s. 30(2), s. 31, s. 31(1), s. 31(2), s. 31(3), s. 31(4), s. 32
Canadian Environmental Assessment Act, 1992, s. 37
Constitution Act, 1982, s. 35(1)
Constitution Act, 1867, c. 9, s. 10, s. 13
Interpretation Act, R.S.C. 1985, c. I-21, s. 31(2)
Jobs, Growth and Long-Term Prosperity Act, S.C. 2012, c. 19,
National Energy Board Act, R.S.C. 1985, c. N-7, s. 33, s. 33, s. 52(1), s. 52(2), s. 52(3), s. 52(4), s. 52(10), s. 52(11), s. 53(1), s. 53(2), s. 54, s. 54(1), s. 54(2), s. 54(3), s. 54(s), s. 73, s. 77, s. 84, s. 87, s. 103
Counsel:
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Michael Lee Ross, Grace A. Jackson, Benjamin Ralston, for the Applicant/Appellant, Gitga’at First Nation.
Jennifer Griffith, Allan Donovan, Mary Anne Valliant, for the Applicant/Appellant, Haisla Nation.
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Reasons for judgment were delivered by Dawson and Stratas J.A. Dissenting and separate reasons were delivered by Bryant J.A., and Cullen J. A summary of our reasons in support of this conclusion can be found at paragraphs 325-332, below.

In reaching this conclusion, we rely to a large extent on facts not in dispute, including Canada’s own factual assessments and its own officials’ words. Further, in reaching this conclusion, we have not extended any existing legal principles or fashioned new ones. One consequence follows from the application of legal principles previously settled by the Supreme Court of Canada to the undisputed facts. This conclusion follows from the application of legal principles previously settled by the Supreme Court of Canada to the undisputed facts.
Thus, for the following reasons, we would quash the Order in Council and the Certificates that were issued under them. We would remit the matter back to the Governor in Council for prompt redetermination.

For the convenience of the reader, we offer an index to these reasons:

A. The Project
   (1) Introduction
   (2) The beginning
   (3) The process gets underway
   (4) The parties' participation in the approval process
   (6) Consultation with Aboriginal groups: Phase IV
   (7) The Order and the Certificates
   (8) Future regulatory processes

B. The parties
   (1) Introduction
   (2) Preliminary issues
     (a) The standing of certain parties
     (b) The admissibility of affidavits
   (3) The legislative scheme in detail
     (a) The report stage: the National Energy Board Act requirements
     (b) The report stage: the Canadian Environmental Assessment Act, 2012 requirements
     (c) Consideration by the Governor in Council
   (4) Characterization of the legislative scheme

C. The approval process for the Project
   (1) Introduction
   (2) The beginning
   (3) The process gets underway
   (4) The parties' participation in the approval process

D. Legal proceedings
   (1) Standard of review
   (2) The Governor in Council's decision was reasonable under administrative law principles

E. Reviewing the administrative decisions following administrative law principles
   (1) Introduction
   (2) Preliminary issues
     (a) The standing of certain parties
     (b) The admissibility of affidavits
   (3) The legislative scheme in detail
     (a) The report stage: the National Energy Board Act requirements
     (b) The report stage: the Canadian Environmental Assessment Act, 2012 requirements
     (c) Consideration by the Governor in Council
   (4) Characterization of the legislative scheme

F. The duty to consult Aboriginal peoples
   (1) Legal principles
   (2) The standard to which Canada is to be held in fulfilling the duty
   (3) The consultation process
   (4) The alleged flaws in the consultation process
     (a) The Governor in Council prejudged the approval of the Project
     (b) The framework of the consultation process was unilaterally imposed upon the First Nations
     (c) Inadequate funding for participation in the Joint Review Panel and consultation processes
     (d) The consultation process was over-delegated
   (e) Canada either failed to conduct or failed to share with affected First Nations its legal assessment of the strength of their claims to Aboriginal rights or title
   (f) The Crown consultation did not reflect the terms, spirit and intent of the Haida Agreements
   (g) The Joint Review Panel Report left too many issues affecting First Nations to be decided after the Project was approved
   (h) The consultation process was too generic: Canada and the Joint Review Panel looked at First Nations as a whole and failed to address adequately the specific concerns of particular First Nations
   (i) After the Report of the Joint Review Panel was finalized, Canada failed to consult adequately with First Nations about their concerns and failed to give adequate reasons
   (j) Canada did not assess or discuss title or governance rights and the impact on those rights
The Project significantly affects a number of the First Nations who are parties to these proceedings. In no particular order, these parties are as follows:

- Gitxaala Nation: Portions of the oil and condensate tanker routes for the Project are located within the Gitxaala's asserted traditional territory. The proposed Project would create a port in the Gitxaala's asserted territory for the delivery of oil to Kitimat. The energy workers it represents are employed in oil and gas exploration, transportation, refining and conservation in this industry. The energy workers it represents are employed in oil and gas exploration, transportation, refining and conservation in this industry.

- Haisla Nation: The Haisla Nation is the Indigenous Peoples of Haida Gwaii. Haida Gwaii means "islands of the people," and is an archipelago of more than 150 islands, extending roughly 250 kilometers, with roughly 4,300 kilometers of shoreline. No place is further than 20 kilometers from the sea. All proposed tanker routes go through or are near to the marine portion of the territory asserted by the Haisa. In the southern portion of Haida Gwaii lies Gwaii Haanas, a Haida-protected area and national park reserve that contains a UNESCO World Heritage Site called "Gwaii Haanas" or "sGaan-gwaay." The Gitxaala Nation identified four ecocentres and three oceanographic areas of significance for the Project and a number of these surround Haida Gwaii.

- Metlakatla: Metlakatla is a community of Metlakatla that has a historical relationship with the Nisga’a Nation. The Nisga’a Nation and Metlakatla have a history of conflict that extends back to the late 19th century. The Project has the potential to affect the Nisga’a Nation’s traditional territory, which includes lands surrounding Metlakatla. The Nisga’a Nation has expressed concern about the potential impacts of the Project on their traditional territory.

- Nisga’a Nation: The Nisga’a Nation is the Indigenous Peoples of the Nisga’a Nation. The Nisga’a Nation and Metlakatla have a history of conflict that extends back to the late 19th century. The Project has the potential to affect the Nisga’a Nation’s traditional territory, which includes lands surrounding Metlakatla. The Nisga’a Nation has expressed concern about the potential impacts of the Project on their traditional territory.

- Gitga’at First Nation: The Gitga’at First Nation is an Indigenous Peoples of the Northwest Coast of British Columbia. The Gitga’at First Nation has expressed concern about the potential impacts of the Project on their traditional territory, which includes lands surrounding Metlakatla.

- Gitxsan Nation: The Gitxsan Nation is the Indigenous Peoples of the Gitxsan Nation. The Gitxsan Nation has expressed concern about the potential impacts of the Project on their traditional territory, which includes lands surrounding Metlakatla.

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In February 2009, the Agency released the Government of Canada’s framework for consulting with Aboriginal groups regarding the Project. This framework, found in a document entitled Approach to Crown Consultation for the Northern Gateway Project, outlined a comprehensive five-phase consultation process:

- **Phase I: Preliminary Phase.** During this Phase, there would be consultation on the draft Joint Review Panel agreement and information would be provided to Aboriginal Groups on the mandates of the National Energy Board and the Canadian Environmental Agency and the Joint Review Panel process.
- **Phase II: Pre-hearing Phase.** Information would be given to Aboriginal groups concerning the Joint Review Panel process and groups would be encouraged to participate in the process.
- **Phase III: The Hearing Phase.** During this Phase, the Joint Review Panel would hold its hearings. Aboriginal groups would be encouraged to participate and to provide information to help the Joint Review Panel in its process and deliberations. During this phase, the Crown was to participate and to facilitate the process by providing expert scientific and regulatory advice.
- **Phase IV: The Post-Report Phase.** Following the release of the Report of the Joint Review Panel, the Crown was to engage in consultation concerning the Report and on any project-related concerns that were outside of the Joint Review Panel’s mandate. For this purpose, the Canadian Environmental Assessment Agency was to be the contact point. This was to take place before the Governor in Council’s decision whether certificates for the Project should be issued under section 54 of the National Energy Board Act.
- **Phase V: The Regulatory/Permitting Phase.** During this phase, further consultation was contemplated concerning permits and authorizations to be granted for the Project, if approved.

**SCHEDULE 31**

In February 2009, the Agency released a new draft Joint Review Panel agreement, amended to respond to concerns raised during the initial comment period. A public comment period regarding the new draft agreement followed. Although the public comment period closed in mid-April 2009, submissions and comments from Aboriginal groups continued to be accepted until August 2009. During this time, the Crown offered to meet with Aboriginal groups to discuss the draft Joint Review Panel agreement and how consultation with them would be carried out. In particular, the Gitga’at, the Gitxaala and the Haisla met with the Crown.

Near the end of 2009, the mandate of the Joint Review Panel and the process for the assessment of the Project began to be finalized. The National Energy Board and all federal "responsible authorities" within the meaning of the Canadian Environmental Assessment Act signed an agreement entitled Project Agreement for the Northern Gateway Pipelines Project in Alberta and British Columbia. The Canadian Environmental Assessment Agency issued a document entitled Scope of the Factors - Northern Gateway Pipeline Project, Guidance for the assessment of the environmental effects of the Northern Gateway Project. Finally, the Agency issued letters to certain Aboriginal groups providing all of these documents and a table setting out the consideration given to comments made by Aboriginal groups.

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**Phase V: The Regulatory/Permitting Phase.** During this phase, further consultation was contemplated concerning permits and authorizations to be granted for the Project, if approved.

**38** In July 2010, the Joint Review Panel issued its first procedural direction. It sought comment from the public, including Aboriginal groups, concerning a draft list of issues, the information that Northern Gateway should be required to file over and above that submitted with its application, and locations for the Joint Review Panel’s oral hearings. To this end, the Joint Review Panel received written comments and received oral comments at hearings held at three locations.

**39** The Joint Review Panel considered what it had heard and decided certain things. It required Northern Gateway to file additional information to address certain issues specific to the Project and certain risks posed by the Project. The Joint Review Panel stated that this information had to be provided before it could issue a hearing order. It also revisited the list of issues and commented on the locations for its hearings.

**40** Staff for the Joint Review Panel conducted public information sessions between 2010 and July 2011 and online workshops from November 2011 to April 2013. By March 31, 2011, Northern Gateway submitted additional information in response to the Joint Review Panel’s decision.

**41** In July 2011, the Joint Review Panel issued a hearing order. In that order, it described the procedures to be followed in the joint review process and gave notice that the hearings would start on January 10, 2012.

**42** Around this time, the Joint Review Panel received a report setting out a technical review of marine aspects of the Project. Initiated in 2008 at the request of Northern Gateway, this technical review, known as the Technical Review of Marine Terminal Systems and Transshipment Stacks of TERRIGUL, was conducted by a review committee chaired by Transport Canada, staffed by representatives of other federal departments and, among other things, advised by a technical consultant acting on behalf of the Haisla and the Kitasoo/Xai’xais Council.

**58** Shortly afterward, the Canadian Environmental Assessment Agency and the National Energy Board also registered as government participants in the proceedings. A number of government agencies – Natural Resources Canada, Aboriginal Affairs and Northern Development Canada, Environment Canada, and Transport Canada – and, enacting the Canadian Environmental Assessment Act, 2012. The National Energy Board also established a Joint Review Panel Secretariat working in concert with the Canadian Environmental Assessment Agency to provide support to the Joint Review Panel.

**43** Around this date, the Joint Review Panel received a report setting out a technical review of marine aspects of the Project. Initiated in 2008 at the request of Northern Gateway, this technical review, known as the Technical Review of Marine Terminal Systems and Transshipment Stacks of TERRIGUL, was conducted by a review committee chaired by Transport Canada, staffed by representatives of other federal departments and, among other things, advised by a technical consultant acting on behalf of the Haisla and the Kitasoo/Xai’xais Council.

**44** Also around this time, there were some legislative changes. Originally, the environmental assessment was to be conducted in accordance with the Canadian Environmental Assessment Act that was introduced in 1992. But in mid-2012, the Jobs, Growth and Long-Term Prosperity Act, S.C. 2012, c. 34 became law, repealing the 1992 version of the Canadian Environmental Assessment Act and amending the National Energy Board Act. The joint review process for the Project, already underway, was continued under these amended provisions. Henceforth the reference to the Canadian Environmental Assessment Act, 1992 unless otherwise referenced.

**45** A month after these statutory amendments became law, and in accordance with these amendments, the Minister of the Environment and the Chair of the National Energy Board directed that the Joint Review Panel act in its environmental assessment as part of the recommendation report under section 52 of the National Energy Board Act in no later than December 31, 2013. They also finalized an amendment to some of the agreements discussed above and the terms of reference of the Joint Review Panel.

**46** Proceeding under the 2012 legislation, the Joint Review Panel had two main tasks. First, it had to provide a report under section 52 of the National Energy Board Act. Second, in that report it was to include recommendations arising from the environmental assessment conducted under Canadian Environmental Assessment Act, 2012. submissions 2012. Overall, the report was to:

- recommend whether the requested certificates should be issued;
- outline the terms and conditions that should be attached to any certificates issued by the Board for the Project;
- provide recommendations based on the environmental assessment.

**47** In September 2012, the Joint Review Panel conducted what is called "final hearings." This last phase of the hearing process ended in June 2013. During this stage, the parties asked questions, filed written arguments and made oral submissions.

**48** Overall, the parties had ample opportunity to participate in the Joint Review Panel process and potentially afforded themselves of.

**49** The parties’ participation in the appeal process.

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**62** Overall, the parties had ample opportunity to participate in the Joint Review Panel process and potentially afforded themselves of.

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Following these meetings and discussions, on May 22, 2014, Canada issued a report number of Aboriginal groups including the Gitga’at, the Gitxaala, the Haida, the Haisla, the Heiltsuk, the Kitasoo, the Nisga’a, the Tsilhqot’in and the Yinka Dene Alliance. For present purposes, Phase IV began with the Crown sending letters to representatives of Aboriginal groups, including the First Nations parties in these proceedings will continue to have opportunities to provide input and participate in fulfilment of these conditions. The Joint Review Panel also recommended that the Governor in Council conclude that: (2) the conditions outlined in the Joint Review Panel’s Report for the Enbridge Northern Gateway Project, vol. 2, Considerations: Report of the Joint Review Panel for the Enbridge Northern Gateway Project, vol. 1, connections to the environment and society, and to the protection of forests, waters, and wildlife.

52 The conditions deal with such matters as environmental management and monitoring, emergency preparedness and response, and the delivery of economic benefits. Northern Gateway says that these conditions represent an investment of $2 billion on its part. Aboriginal groups, including the First Nations parties in these proceedings will continue to have opportunities to provide input and participate in fulfilment of these conditions. The Joint Review Panel also recommended that the Governor in Council conclude that:

* potential adverse environmental effects from the Project alone are not likely to be significant;
* adverse effects of the Project, in combination with effects of past, present and reasonably foreseeable actions or activities are likely to be significant for certain woodland carbon pools and grizzly bear populations; and
* the significant adverse cumulative effects in relation to woods, wildlife, and waters and resources for the benefit of future generations. The Haisla also expressed their concerns about the Project.

53 The Joint Review Panel also recommended that the Governor in Council conclude that:

* Gitxaala Nation. The Gitxaala participated in all parts of the Joint Review Panel process, including submitting technical and Aboriginal evidence, oral traditional evidence, attending hearings, and participating extensively in the final round of submissions. During the process, the Gitxaala filed a traditional use study that describes their culture, property ownership system and laws and how the Project will interfere with their use and occupation of their lands, water and resources. The Haisla also submitted a historic and ethnographic report and an archaeological site summary supporting their claim to exclusive use and occupation of their asserted lands. The Haisla also tendered statements and oral histories from hereditary chiefs and elders outlining the Haisla’s history, their use and occupation of their asserted lands, and their efforts to protect their lands, waters and resources for the benefit of future generations. The Haisla also expressed their concerns about the Project.

54 Following the release of the Report of the Joint Review Panel, the process of consultation with Aboriginal groups entered Phase IV of the consultation framework. A detailed description of what happened during this phase is set out below.

55 For present purposes, Phase IV began with the Crown sending letters to representatives of Aboriginal groups in December 2013, seeking input on how the Joint Review Panel’s recommendations and conclusions addressed their concerns. Officials from the Canadian Environmental Assessment Agency and other federal departments held meetings with representatives from Aboriginal groups to discuss concerns. Federal representatives met with a number of Aboriginal groups including the Gitga’at, the Gitxaala, the Haisla, the Heiltsuk, the Kitasoo and the Yinka Dene Alliance (which includes the Nisga’a and the Naadíhussels). Following these meetings and discussions, on May 22, 2014, Canada issued a report concerning its consultation: Report on Aboriginal Consultation Associated with the Environmental Assessment.

56 At this point, it is perhaps appropriate to note that this is not a case where the proponent of the Project, Northern Gateway, declined to work with Aboriginal groups. Far from it. Once the pipeline argument with comments on proposed conditions, and made oral reply argument. They submitted a 336-page Marine Traditional Knowledge Study describing traditional harvesting activities, and attended hearings in many localities. Overall, the Gitxaala submitted 7,400 pages of written material, oral testimony from 27 community members and 11 expert reports on various subjects, including Northern Gateway’s risk assessment methodology, oil spill modelling, and the fate and behavior of spilled diluted bitumen. Among other things, the Gitxaala expressed deep concern about the specific effects the Project could have on asserted rights and title.

57 The Haisla Nation. The Haisla also participated in all parts of the Joint Review Panel process, including submitting technical and Aboriginal evidence, oral traditional evidence, attending hearings, and participating extensively in the final round of submissions. During the process, the Haisla filed a traditional use study that describes their culture, property ownership system and laws and how the Project will interfere with their use and occupation of their lands, water and resources. The Haisla also submitted a historic and ethnographic report and an archaeological site summary supporting their claim to exclusive use and occupation of their asserted lands. The Haisla also tendered statements and oral histories from hereditary chiefs and elders outlining the Haisla’s history, their use and occupation of their asserted lands, and their efforts to protect their lands, waters and resources for the benefit of future generations. The Haisla also expressed their concerns about the Project.

58 In all, Northern Gateway engaged with over 80 different Aboriginal Groups across various regions of Alberta and British Columbia. It employed many methods of engagement, spending $10.8 million in capacity funding to interested Aboriginal groups. It also implemented an Aboriginal Traditional Knowledge program, spending $5 million to fund studies in that area.

59 The Governor in Council had before it the Report of the Joint Review Panel and it also had other material before it that it was not disclosed in these proceedings. Canada asserted privilege over that material under section 39 of the Canada Evidence Act, R.S.C. 1985, c. C-5.

60 On June 17, 2014, the Governor in Council issued Order in Council P.C. 2014-809. On June 28, 2014, the Order in Council was published in the Canada Gazette.

61 Balancing all of the competing considerations before it, the Governor in Council accepted “the [Joint Review] Panel’s finding that the Project, if constructed and operated in full compliance with the conditions set out in Appendix 1 of Volume 2 of the Joint Review Panel’s Report, is and will be required by the present and future public convenience and necessity.” It “accepted[s] the Panel’s recommendation.” It added that “the Project would diversify Canada’s energy export markets and would contribute to Canada’s long-term economic prosperity.

62 As for matters raised by the environmental assessment, the Governor in Council found that, taking into account the implementation of mitigation measures, “the Project is not likely to cause significant environmental effects” within the meaning of subsection 5(1) of the Canadian Environmental Assessment Act, 2012. However, the Project would cause significant adverse environmental effects to certain populations of woodland caribou and grizzly bear within the meaning of subsection 5(2) of the Canadian Environmental Assessment Act, 2012 but these effects were “justified in the circumstances.” Exercising its authority under subsections 53(1) and 53(2) of the Canadian Environmental Assessment Act, 2012, the Governor in Council established conditions with which Northern Gateway must comply, which conditions were set out in Appendix 1 of Considerations: Report of the Joint Review Panel for the Enbridge Northern Gateway Project, vol. 2.

63 In light of the foregoing, exercising its power under section 54 of the National Energy Board Act, the Governor in Council directed the National Energy Board to issue Certificates of Public Convenience and Necessity to Northern Gateway for the Project in accordance with the terms and conditions set out in the Joint Review Panel’s Report.
D. Legal proceedings

61 The following notices of application for judicial review challenge the Report of the Joint Review Panel:

* Federation of British Columbia Naturalists d.b.a. BC Nature v. Attorney General of Canada et al. (A-394-14)

62 In complicated cases such as this, it is prudent to have in mind the proper methodology for reviewing administrative decisions.

63 Some of the administrative decisions have been challenged by way of appeal, others by way of application for judicial review. Regardless of how they have been challenged, we are to review them in the same way, namely the way we proceed when considering applications for judicial review: Canada (Citizenship and Immigration) v. Khosa, 2009 SCC 12, [2009] 1 S.C.R. 339.

64 Broadly speaking, in judicial reviews, we deal with any preliminary issues, determine the standard of review, use that standard of review to assess the administrative decisions to see if the court should interfere, and then, if we consider interference to be warranted, decide what remedy, if any, should be granted. See generally Canada (Attorney General) v. Boogaard, 2015 FCA 150, 2015 FCA 151, 2015 FCA 152, 2015 FCA 153; Delaro v. Canada (Attorney General), 2015 FCA 117, 472 N.R. 171, at paragraphs 26; Builda v. Canada (Citizenship and Immigration), 2015 FCA 139, 473 N.R. 283, at paragraphs 27-28.

65 However, in complicated cases with many moving parts like this one, it often is useful to begin at a more basic level. What exactly is being reviewed?

66 In this case, we have a statutory scheme for the approval of projects, such as the Project in this case, involving the participation of a Joint Review Panel, the Governor in Council, and the National Energy Board. As part of their participation, each makes a decision of sorts. But in the end, are there really three decisions for the purposes of review?

67 Before pursuing the methodology of review, it is often useful to characterize the decision or decisions in issue in light of the legislative scheme within which they rest. After all, the legislative scheme is the law of the land. Absent constitutional objection, the legislative scheme must always bind us and guide the analysis.

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64 On the same day, at the behest of the Governor in Council, the National Energy Board issued a decision statement under subsection 54(1) of the National Energy Board Act. The Decision Statement summarized what the Governor in Council had decided on the Joint Review Panel’s recommendations as made as a result of the environmental assessment. The Decision Statement reads as follows:

The Governor in Council has decided, after considering the [Joint Review Panel’s] report together with the conditions proposed in it, that the [Project] is not likely to cause significant adverse environmental effects referred to in subsection 5(1) of the Canadian Environmental Assessment Act, but it is likely to cause significant environmental effects referred to in subsection 5(2) of the Canadian Environmental Assessment Act [to] certain populations of woodland caribou and grizzly bear as described in the [Joint Review Panel’s] report.

The Governor in Council has also decided that, pursuant to subsection 52(4) of the Canadian Environmental Assessment Act, the significant adverse environmental effects that the [Project] is likely to cause to certain populations of woodland caribou and grizzly bear are justified in the circumstances.

The Governor in Council has established the 209 conditions set out by the [Joint Review Panel] in its report as the conditions in relation to the environmental effects referred to in subsections 5(1) and (2) of the Canadian Environmental Assessment Act [with which] [Northern Gateway] must comply.

65 A day later, on June 18, 2014, following the direction of the Governor in Council, the National Energy Board issued to Northern Gateway two certificates: Certificate OC-060 for the pipeline and associated facilities and Certificate OC-061 for the condensate pipeline and associated facilities.

66 In July 2014, a month after the Governor in Council made its Order in Council and the Board issued its two Certificates, as part of Phase IV of the consultation framework, the Crown wrote a number of Aboriginal groups, including some of the parties to these proceedings, offering other approvals under federal and provincial legislation. Northern Gateway will also have to apply for this purpose.

67 The issuance of the Certificates by the National Energy Board is not the final step before construction of the Project starts. Further regulatory processes will have to be pursued. Northern Gateway must obtain:

* Routing approval. Northern Gateway must apply for and receive approval from the National Energy Board for the detailed route of the Project.
* Consent from the Secretary of State for Environment, Food and Rural Affairs (Secretary of State) for the Project to cross 145 kilometres of nature reserves.
* Consent from the Secretary of State to the development and operation of the Project.
* An Order in Council under the historic land claims agreements.

68 Given the Project’s size and its proximity to environmentally sensitive areas, several environmental assessments have been conducted in or around the Project area, including:

* ForestEthics Advocacy Association et al. v. Attorney General of Canada et al. (A-439-14);
* Federation of British Columbia Naturalists d.b.a. BC Nature v. Attorney General of Canada et al. (A-474-14); and
* British Columbia Forest Alliance et al. v. Attorney General of Canada et al. (A-475-14).

69 In reviewing the administrative decisions in this case, involving the participation of a Joint Review Panel, the Governor in Council, and the National Energy Board, we are to review them in the same way, namely, the way we proceed when considering applications for judicial review: Canada (Citizenship and Immigration) v. Khosa, 2009 SCC 12, [2009] 1 S.C.R. 339. Absent constitutional objection, the legislative scheme must always bind us and guide the analysis. Thus, we shall review the administrative decisions following administrative law principles and then assess whether Canada fulfilled its duty to consult with Aboriginal peoples concerning the Project. 71 Thus, we shall review the administrative decisions following administrative law principles and then assess whether Canada fulfilled its duty to consult with Aboriginal peoples concerning the Project. 73

E. Reviewing the administrative decisions following administrative law principles

1. Introduction

74 This is a complicated case, with appeals and judicial reviews concerning three different administrative decisions: the Report of the Joint Review Panel, the Order in Council made by the Governor in Council and the Certificates made by the National Energy Board.

75 In complicated cases such as this, it is prudent to have in mind the proper methodology for reviewing administrative decisions.

76 Some of the administrative decisions have been challenged by way of appeal, others by way of application for judicial review. Regardless of how they have been challenged, we are to review them in the same way, namely the way we proceed when considering applications for judicial review: Canada (Citizenship and Immigration) v. Khosa, 2009 SCC 12, [2009] 1 S.C.R. 339.

77 Broadly speaking, in judicial reviews, we deal with any preliminary issues, determine the standard of review, use that standard of review to assess the administrative decisions to see if the court should interfere, and then, if we consider interference to be warranted, decide what remedy, if any, should be granted. See generally Canada (Attorney General) v. Boogaard, 2015 FCA 150, 2015 FCA 151, 2015 FCA 152, 2015 FCA 153; Delaro v. Canada (Attorney General), 2015 FCA 117, 472 N.R. 171, at paragraphs 26; Builda v. Canada (Citizenship and Immigration), 2015 FCA 139, 473 N.R. 283, at paragraphs 27-28.

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80 Before pursuing the methodology of review, it is often useful to characterize the decision or decisions in issue in light of the legislative scheme within which they rest. After all, the legislative scheme is the law of the land. Absent constitutional objection, the legislative scheme must always bind us and guide the analysis.

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81 Therefore, we shall examine certain preliminary issues raised by the parties. Then we shall analyze the legislative regime with a view to understanding the nature of the administrative decisions made here. Then we shall proceed to the substance of review and, if necessary, proceed to remedy.

(2) Preliminary issues

(a) The standing of certain parties

82 Northern Gateway challenges the standing of the Coalition, BC Nature and Unifor to maintain their proceedings.

83 To have direct standing in a proceeding challenging an administrative decision, a party must show that the decision affects its rights, imposes legal obligations upon it, or prejudicially affects it in some way. Case Law for Human Rights of B.C. Native Communities v. Oliver, 2010 FCA 307, 409 N.R. 296; British Columbia Mall Canada Ltd. v. Canada (M.N.R.), [1976] 2 F.C. 500 (C.A.); Irving Shipbuilding Inc. v. Canada (A.G.), 2009 FCA 116, [2010] 2 F.C.R. 488.

84 On the evidence before us, we are persuaded that the legal or practical interests of these parties are sufficient to maintain proceedings. Above, at paragraph 15, we have set out these parties’ interests. We also note that they are all active interveners before the Joint Review Panel, participating in much of its process. In our view, these parties have direct standing to maintain their proceedings.

85 In support of its submission that these parties did not have standing, Northern Gateway invokes this Court’s decision in Forest Ethics Advocacy Association v. Canada (National Energy Board), 2014 FCA 245, [2015] 4 F.C.R. 75.

86 In that case, this Court held that Forest Ethics did not have standing to apply for judicial review of interlocutory National Energy Board decisions concerning a pipeline, on the basis that it was not a party to the Ninemile Pipeline Project and was not affected by the Board’s decisions in any of its reports.

87 In that case, the report of the National Energy Board was prepared under the National Energy Board Act, and contained in its report must be based on certain criteria:

(a) the environmental impact of the project; and
(b) the availability of oil, gas or any other commodity to the pipeline.

88 In making its recommendation, the Board [here the Joint Review Panel] must act on the assumption that the Board has set out all relevant criteria and conclusions of law, based on a substantial body of evidence presented to the Board.

89 Under subsection 35(1) of the National Energy Board Act, 2012, the Board is required to issue a certificate approving the project, if the Board determines that the project is in the public interest.

90 If Northern Gateway’s challenge to the standing of the Coalition, BC Nature and Unifor is accepted, then we shall proceed to the substance of review and, if necessary, proceed to remedy.

(b) The admissibility of affidavits

91 In that case, the affidavit of Chief Councillor Ellis was filed with the Court, such as the Affidavit of Chief Councillor Ellis and most of the exhibits to the Affidavit of Acting Chief Clarence Isen. We agree. Again, in determining this matter, we disregarded argumentative portions in the evidence, and that did not affect our determination.

(3) The legislative scheme in detail

92 This is the first case to consider this legislative scheme, one that integrates elements from the National Energy Board Act and the Canadian Environmental Assessment Act, 2012 and culminates in substantial decision-making by the Governor in Council. It is unique; there is no analogue in the statutory book. Accordingly, cases that have considered other legislative schemes are not relevant to our analysis.


94 Broadly speaking, under this legislative scheme, the proponent of a project applies for a certificate approving the project.

95 In response to the application, information is gathered, evaluations are made, an...
(v) the economic feasibility of the pipeline;

(d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and

(v) any public interest that in the Board’s opinion may be affected by the issuance of the certificate or the dismissal of the application.

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Once made, the report is “final and conclusive” but this is “subject to sections 53 and 54” of the National Energy

104 Subsections 52(4) to 54(10) place the Board (here the Joint Review Panel) on a strict time

line to issue its report:

(4) The report must be submitted to the Minister within the time limit specified by the

Chairperson. The specified time limit must be no longer than 15 months after

day on which the applicant has, in the Board’s opinion, provided a complete

application. The Board shall make the time limit public.

environmental assessment process. In this case, this was required. The Project was a “designated project” within the meaning of section 2 of the Canadian Environmental Assessment Act, 2012. Accordingly, under subsection 52(3), the report also had to set out an environmental assessment conducted under that Act:

52. (3) If the application relates to a designated project within the meaning of section 2 of the Canadian Environmental Assessment Act, 2012, the report must also set out the Board’s environmental assessment prepared under that Act in respect of that project.

52. (3) Si la demande vise un projet désigné au sens de l’article 2 de la Loi

canadienne sur l’évaluation environnementale, le rapport doit également inclure l’évaluation environnementale de ce projet établie par l’Office sous le régime de cette loi.

109 Environmental assessments are to include assessments of the matters set out in sections 3 and 5 of the Canadian Environmental Assessment Act, 2012. For present purposes, we need only offer a general summary of these matters. They include changes caused to the air, land or sea and the

habits that inhabit these areas. They also include consideration of matters specific to the Project and its specific effects on the environment and informing who inhabits it. And they include the effects upon Aboriginal peoples’ health and socio-economic conditions, physical and cultural heritage, the

use of lands and resources for traditional purposes, and any structures, sites or things that are of

historical, archaeological, palaeontological, or architectural significance.

110 What is submitted to the Governor in Council is not the whole environmental assessment but rather only a report of it. Under section 29 of the Canadian Environmental Assessment Act, 2012, the report must offer recommendations concerning the subject matter found in paragraph 31(a)(e) of the Canadian Environmental Assessment Act, 2012 – i.e., the existence of significant adverse environmental effects and whether or not those effects can be justified.

111 Section 29 of the Canadian Environmental Assessment Act, 2012 provides as follows:

29. (1) If the carrying out of a designated project requires that a certificate be issued in accordance with an order made under section 54 of the National Energy

Act, the responsible authority with respect to the designated project must ensure that the report concerning the environmental assessment of the designated project sets out

(a) its recommendation with respect to the decision that may be made

under paragraph 31(a)(e) in relation to the designated project, taking into

consideration the issue of environmental effects and whether or not those effects can be justified.
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account the implementation of any mitigation measures that it set out in the report;
and
(b) its recommendation with respect to the follow-up program that is to be implemented in respect of the designated project.

(2) The responsible authority submits its report to the Minister within the meaning of section 2 of the National Energy Board Act as the same time as it submits the report referred to in subsection 52(1) of that Act.

(3) Subject to sections 30 and 31, the report with respect to the environmental assessment is final and conclusive.

29. (1) Si la réalisation d’un projet désigné requiert la délivrance d’un certificat au titre d’un décret pris en vertu de l’article 54 de la Loi sur l’Office national de l’énergie, l’autorité responsable à l’égard du projet veille à ce que figure dans le rapport d’évaluation environnementale relatif au projet :

a) sa recommandation quant à la décision pouvant être prise au titre de l’alinéa 31(1)(a) relativement au projet, compte tenu de l’application des mesures d’aménagement qu’elle précise dans le rapport;

b) sa recommandation quant au programme de suivi devant être mis en œuvre relativement au projet.

(2) Elle présente son rapport au ministre au sens de l’article 2 de la Loi sur l’Office national de l’énergie au même moment où elle lui présente le rapport visé au paragraphe 52(1) de cette loi.

(3) Sous réserve des articles 30 et 31, le rapport d’évaluation environnementale est définitif et sans appel.

(4) **Consideration by the Governor in Council**

112 With the report prepared in accordance with the foregoing provisions of the National Energy Board Act and Canadian Environmental Assessment Act, 2012, the Governor in Council may make its decision concerning the application for the certificate by the proponent, here Northern

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Gateway.

113 Overall, the Governor in Council has three options:

(1) It can “direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report” paragraph 54(1)(c) of the National Energy Board Act. If this option is pursued, the Board has no discretion. It must grant the certificates within seven days: subsection 54(5) of the National Energy Board Act. As part of its consideration, the Governor in Council must consider whether significant adverse environmental effects will be caused and, if so, whether the effects “can be justified in the circumstances.”

Depending on its decision, it may have to impose conditions that must be complied with: section 53 of the Canadian Environmental Assessment Act, 2012. It does this through the mechanism of a “decision statement” it can cause the Board to issue: section 31 of the Canadian Environmental Assessment Act, 2012.

(2) It can “direct the Board to dismiss the application for a certificate” paragraph 54(1)(b) of the National Energy Board Act. If this option is pursued, the Board has no discretion. It must dismiss the certificates within seven days: subsection 54(5) of the National Energy Board Act.

(3) It can ask the Board to reconsider its recommendations in its report or any terms and conditions, or both, of the certificate issued under section 31 of the National Energy Board Act; subsection 30(1) of the Canadian Environmental Assessment Act, 2012. It can specify exactly what issue or issues are to be reconsidered and specify a time limit for the reconsideration: subsection 53(2) of the National Energy Board Act: subsection 30(2) of the Canadian Environmental Assessment Act, 2012. After its reconsideration is completed, the Board submits its reconsideration report. Then the Governor in Council considers the reconsideration report and decides again among these three options.

114 By law, the Governor in Council must choose one of these options within three months and only can take longer if it passes a specific order to that effect: subsection 54(3) of the National Energy Board Act.

115 For reference, section 31 of the Canadian Environmental Assessment Act, 2012, referred to above, provides as follows:

31.(1) Après avoir étudié la question, l’autorité responsable, ou un comité que l’autorité a nommé pour cet effet, en arrive à une conclusion qui doit être communiquée à l’autorité responsable.

31.(2) Au même moment où elle lui présente le rapport visé au paragraphe 54(1) de la Loi sur l’Office national de l’énergie :

a) décide, compte tenu de l’application des mesures d’aménagement précisées dans le rapport d’évaluation environnementale ou, s’il y en a un, le rapport de réexamen, que la réalisation du projet, selon le cas :

(i) n’est pas susceptible d’entrainer des effets environnementaux négatifs et importants;

(ii) est susceptible d’entrainer des effets environnementaux négatifs et importants qui sont justifiables dans les circonstances;

(iii) est susceptible d’entrainer des effets environnementaux négatifs et importants qui ne sont pas justifiables dans les circonstances;

b) donne à l’autorité responsable instruction de faire une déclaration qu’elle remet au promoteur du projet dans laquelle :

(i) elle donne avis de la décision prise par le gouvernement en conseil en vertu de l’alinéa a) relativement au projet,

(ii) si cette décision est celle visée aux sous-alinéas (i) ou (ii), elle énonce les conditions que le promoteur est tenu de respecter relativement au projet, à savoir la mise en œuvre des mesures d’aménagement et le programme de suivi précisés dans le rapport d’évaluation environnementale ou, s’il y en a un, le rapport de réexamen.

(2) The conditions that are included in the decision statement regarding the environmental effects referred to in subsection 52(2), that are directly linked or necessarily incidental to the exercise of a power or performance of a duty or function by a federal authority and that would permit the designated project to be carried out, in whole or in part, take effect only if the federal authority exercises the power or performs the duty or function.

(3) The responsible authority must issue to the proponent of the designated project the decision statement that is required in accordance with the order relating to the designated project within seven days after the day on which that order is made.

(4) The responsible authority must ensure that the decision statement is posted on the Internet site.

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necessarily accessible and all attributes qu'une autorité fédérale doit effectuer

(3) Les termes de cette déclaration doit faire

(4) Elle est effectuée suite à l'alinéa sur le site Internet.

La déclaration fait à titre d'auto-arrêté au projet désigné est

répétée faire partie du certificat délivré au titre du décret pris en vertu de l'article 54 de la Loi sur l'Office national de l'énergie relativement au projet.

116 For reference, section 54 of the National Energy Board Act, referred to above, provides as follows:

54. (1) After the Board has submitted its report under sections 52 or 53, the Governor in Council may, on the recommendation of the Minister, by order,

(a) direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report; or

(b) direct the Board to dismiss the application for a certificate.

(2) The order must set out the reasons for making the order.

(3) The order must be made within three months after the Board's report under sections 52 or 53 is sent to the Minister. The Governor in Council may, on the recommendation of the Minister, by order, extend that time limit by any additional period or periods of time. If the Governor in Council makes an order under subsections (3)(i) or (ii), the period that is taken by the Board to complete its reconsideration and to report to the Minister is not to be included in the calculation of the time limit.

(4) Every order made under subsection (1) or (3) is final and conclusive and is binding on the Board.

(5) The Board shall comply with the order made under subsection (1) within seven days after the day on which it is made.

(6) A copy of the order made under subsection (1) must be published in the Canada Gazette within 15 days after it is made.

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54. (1) Une fois que l'Office a présenté son rapport en application des articles 52 ou 53, le gouverneur en conseil peut, par décret :

(a) donner à l'Office instruction de délivrer un certificat à l'égard du pipeline ou d'une partie de celui-ci et de l'autorité des conditions figurant dans le rapport;

(b) donner à l'Office instruction de rejeter la demande de certificat.

(2) Le gouverneur en conseil énonce, dans le décret, les motifs de celui-ci.

(3) Le décret est pris dans les trois mois suivant la remise, au titre de l'article 52, du rapport au ministre. Le gouverneur en conseil peut, par décret pris sur la recommandation du ministre, proroger ce délai une ou plusieurs fois. Dans le cas où le gouverneur en conseil prend un décret en vertu des paragraphes 53(1) ou (9), la période que prend l'Office pour effectuer le réexamen et faire rapport n'est pas comprise dans le calcul du délai imposé pour prendre le décret.

(4) Les décisions prises en vertu des paragraphes (1) ou (3) sont définitives et sans appel et font l'Office.

(5) L'Office est tenu de se conformer au décret pris en vertu du paragraphe (3) dans les sept jours suivant sa prise.

(6) Une copie du décret pris en vertu du paragraphe (1) est publiée dans la Gazette du Canada dans les quinze jours de sa prise.

117 For reference, section 30 of the Canadian Environmental Assessment Act, 2012, referred to above, which provides for consideration of the environmental recommendations set out in the report, provides as follows:

30. (1) After the responsible authority with respect to a designated project has submitted its report with respect to the environmental assessment under section 29, the Governor in Council may, by order made under section 53 of the National Energy Board Act, refer any of the responsible authority's recommendations set out in the report back to the responsible authority for reconsideration.

(2) The order may direct the responsible authority to conduct the reconsideration taking into account any factor specified in the order and it may specify a time limit within which the responsible authority must complete its reconsideration.

(3) The responsible authority must, before the expiry of the time limit specified in the order, if one was specified, reconsider any recommendation specified in the order and prepare and submit to the Minister within the meaning of section 2 of the National Energy Board Act a report on its reconsideration.

4. In the reconsideration report, the responsible authority must

(a) if the order refers to the recommendation referred to in paragraph 29(1)(a):

(i) confirm the recommendation or set out a different one with respect to the decision that may be made under paragraph 31(1)(a) in relation to the designated project, and

(ii) confirm, modify or replace the mitigation measures set out in the report with respect to the environmental assessment; and

(b) if the order refers to the recommendation referred to in paragraph 29(1)(b), confirm the recommendation or set out a different one with respect to the follow-up program that is to be implemented in respect of the designated project.

(5) Subject to section 31, the responsible authority reconsideration report is final and conclusive.

(6) After the responsible authority has submitted its report under subsection (3), the Governor in Council may, by order made under section 53 of the National Energy Board Act, refer any of the responsible authority's recommendations set out in the report back to the responsible authority for reconsideration. If it does so, subsections (2) to (5) apply. However, in subparagraph 4(a)(ii), the reference to the mitigation measures set out in the report with respect to the environmental assessment is to be read as a reference to the mitigation measures set out in the reconsideration report.

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29. (1) L'autorité responsable, dans le délai précisé – le cas échéant – dans le décret, réexamine toute recommandation visée par le décret, établit un rapport de réexamen et le présente au ministre au sens de l'article 2 de la Loi sur l'Office national de l'énergie.

(4) Dans son rapport de réexamen, l'autorité responsable :

(a) si le décret vise la recommandation prévue à l'alinéa 29(3)(i) :

(i) d'une part, confirme celle-ci ou formule une autre recommandation quant à la décision pouvant être prise au titre de l'alinéa 31(1)(a) relativement au projet;

(ii) d'autre part, confirme, modifie ou remplace les mesures d'atténuation précisées dans le rapport d'évaluation environnemental;

(b) si le décret vise la recommandation prévue à l'alinéa 29(3)(ii), confirme celle-ci ou formule une autre recommandation quant au programme de suivi devant être mis en œuvre relativement au projet.

(5) Sous réserve de l'article 31, le rapport de réexamen est définitif et sans appel.

(6) Une fois que l'autorité responsable a présenté son rapport de réexamen en vertu du paragraphe (3), le gouverneur en conseil peut, par décret pris en vertu de l'article 53 de la Loi sur l'Office national de l'énergie, renvoyer toute recommandation figurant au rapport à l'autorité responsable pour réexamen.

118 And, finally, for reference, here is the reconsideration power under section 53 of the National Energy Board Act, referred to above:

53. (1) After the Board has submitted its report under section 52, the Governor in Council may, by order, refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration.

(2) The order may direct the Board to conduct the reconsideration taking into account any factor specified in the order, and it may specify a time limit within

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which the Board shall complete its reconsideration.

(3) The order is binding on the Board.

(4) A copy of the order must be published in the Canada Gazette within 13 days after it is made.

(5) The Board shall, before the expiry of the time limit specified in the order, if one was specified, reconsider its recommendation or any term or condition referred back to it, as the case may be, and prepare and submit to the Minister a report on its reconsideration.

(6) In the reconsideration report, the Board shall

(a) if its recommendation was referred back, either confirm the recommendation or set out a different recommendation; and

(b) if a term or condition was referred back, confirm the term or condition, state that it no longer applies or replace it with another one.

(7) Regardless of what the Board sets out in the reconsideration report, the Board shall also set out in the report all the terms and conditions, that is, considers necessary or desirable, in the public interest, to which the certificate would be subject if the Governor in Council were to direct the Board to issue the certificate.

(8) Subject to section 54, the Board's reconsideration report is final and conclusive.

(9) After the Board has submitted its report under subsection (5), the Governor in Council may, by order, refer the Board's recommendation, or any of the terms or conditions, set out in the report, back to the Board for reconsideration. If it does so, subsections (2) to (8) apply.

**S**.

(1) Une fois que l'Office a présenté son rapport en vertu de l'article 52, le gouverneur en conseil peut, par décret, renvoyer la recommandation ou toute condition figurant au rapport à l'Office pour réexamen.

(2) Le décret précise tout facteur dont l'Office doit tenir compte dans le cadre du réexamen ainsi que le délai à l'effet.

(3) Le décret est notifié à l'Office.

(4) Une copie du décret est publiée dans le Courrier du Canada dans les quinze jours à compter de sa prise.

(5) L'Office, dans le délai précisé – le cas échéant – le cas échéant – dans le décret, rectifie le

124 Under this legislative scheme, the Governor in Council alone is to determine whether the process of assembling, analyzing, assessing and studying is so deficient that the report submitted does not qualify as a “report” within the meaning of the legislation:

* In the case of the report or portion of the report setting out the environmental assessment, subsection 29(3) of the Canadian Environmental Assessment Act, 2012 provides that it is “final and conclusive.” But this is “[s]ubject to sections 30 and 31.” Sections 30 and 31 provide for review of the report by the Governor in Council and, if the Governor in Council so directs, reconsideration and submission of a reconsideration report by the Governor in Council.

* In the case of the report under section 52 of the National Energy Board Act, subsection 32(1) of the National Energy Board Act provides that it is “final and conclusive,” but this is “[s]ubject to sections 55 and 54.” These sections empower the Governor in Council to consider the report and decide whether to make a new decision.

125 In the matter before us, several parties brought applications for judicial review against the Report of the Joint Review Panel. Within this legislative scheme, those applications for judicial review are not to lie. No decision about legal or practical interests had been made. Under this legislative scheme, as set out above, any deficiency in the Report of the Joint Review Panel was to be considered only by the Governor in Council, not this Court. It follows that these applications for judicial review should be dismissed.

126 Under this legislative scheme, the National Energy Board also does not really decide anything, except in a formal sense. After the Governor in Council decides that a proposed project should be approved, it directs the National Energy Board to issue a certificate, with or without a decision statement. The National Energy Board does not have an independent discretion to exercise or an independent discretion to make after the Governor in Council has decided the matter. It simply does what the Governor in Council has directed in its Order in Council.

127 In the matter before us, some parties filed notices of appeal against the Certificates issued by the National Energy Board. They, along with others, filed notices of application against the Governor in Council's Order in Council directing the National Energy Board to grant the Certificates. In our view, under this legislative regime, the primary attack must be against the Governor in Council's Order in Council, as it prompts the automatic issuance of the Certificate. If the Governor in Council's Order in Council falls, then our view the Certificates issued by the National Energy Board automatically fall as a consequence. As mentioned at the start of these reasons, since we would quash the Order in Council, the Certificates issued as a result of the Order in Council must also be quashed.

128 With a full appreciation of the legislative scheme and our conclusion that the Governor in Council's Order in Council is the decision that is to be reviewed, we can now consider the standard of review.

129 Of some of the parties before us submitted that the standard of review of the Order in Council made by the Governor in Council in this case has already been determined by this Court: Council of the Innu of Ekuanitshit v. Canada (Attorney General), 2014 FCA 189, 376 D.L.R. (4th) 348.

130 In Innu of Ekuanitshit, the Governor in Council made an order in council approving a governmental response to a joint review panel established under the 1992 version of the Canadian Environmental Assessment Act. Among other things, this Court found that a failure to properly follow the earlier processes under the Canadian Environmental Assessment Act could invalidate the later order in council.

131 Many of the applicants/appellants in First Nations argue that the processes under the Canadian Environmental Assessment Act, 2012 in this case were not properly followed and so, on the authority of Innu of Ekuanitshit, the Order in Council in this case should be quashed.

132 On the surface, Innu of Ekuanitshit seems analogous to the case before us. In both cases, an order in council was made after a process under federal environmental assessment legislation had been followed. However, a closer inspection reveals that, in fact, Innu of Ekuanitshit was based on a fundamentally different statutory framework. To understand the differences, Innu of Ekuanitshit must be examined more closely.

133 In Innu of Ekuanitshit, this Court considered a decision made by three federal departments and a later order made by the Governor in Council approving the decision. The order and the decision came after an environmental assessment process had been followed concerning a hydroelectric project.

134 The Governor in Council’s order in council approved the federal government’s response to a report of a joint review panel established under the 1992 version of the Canadian Environmental Assessment Act. The order in council was made under section 37 of that legislation.

135 In considering the Governor in Council’s order in council, this Court asked itself whether the Governor in Council and the departments “had respected the requirements of the 1992 version of the Canadian Environmental Assessment Act” before making their decisions” (at paragraph 39). It held at paragraphs 40–41 that it could interfere with the Governor in Council’s order only if it found that the legislative process was not properly followed before it made its decisions, it made its...
decision without regard for the purposes of the Act or its decision had no basis in fact.

136 Of course, we are bound by this Court's decision in Ekuanitshit. However, in our view, it does not set out a standard of review that must be applied to the Governor in Council in circumstances where the decision-making body is not the same.

137 To assess the standard of review, we cannot adopt a one-size-fits-all approach to a particular administrative decision-maker. Instead, in assessing the standard of review, it is necessary to understand the specific decision made in light of the provision authorizing it, the structure of the legislative scheme, and the overall purposes of the legislation.

138 The standard of review of the decision of the Governor in Council in Ekuanitshit may make some sense where this Court is reviewing a decision by the Governor in Council to approve a decision made by others based on an environmental assessment. The Governor in Council's decision is broad largely on the environmental assessment. A broader range of policy and other diffuse considerations do not bear in significantly.

139 In the case at bar, however, the Governor in Council's decision — the Order in Council — is the product of its consideration of recommendations made to it in the report. The decision is not simply a consideration of an environmental assessment. And the recommendations made to the Governor in Council cover much more than matters disclosed by the environmental assessment — instead, a number of matters of a polycentric and diffuse kind.

140 In conducting its assessment, the Governor in Council has to balance a broad variety of matters, most of which are more properly within the realm of the executive, such as economic, social, cultural, environmental and political matters. It will be recalled that under subsection 52(2), matters such as these must be included in the report that is reviewed by the Governor in Council.

141 The amorphous nature and the breadth of the discretion that the Governor in Council must exercise is best by the fact that the section 52 report receives can include "any public interest that in the National Energy Board's opinion may be affected by the issuance of the certificate or the dismissal of the application": subsection 52(2) of the National Energy Board Act.

142 In assessing the scope of an administrative decision-maker's discretion, it is sometimes helpful to consider the nature of the body that is exercising the discretion: (ibid., above, at paragraph 76). In section 54 of the National Energy Board Act and in section 30 of the Canadian Environmental Assessment Act, 2012, Parliament has designated the Governor in Council as the body to receive and consider the section 52 report. The Governor in Council is the Governor General, acting on the advice of the Prime Minister and the Cabinet. (For that reason, throughout these reasons, we have referred to the Governor in Council as "the body". In recognition of its.

143 In the case at bar, however, the Governor in Council's decision — the Order in Council — is the product of its consideration of recommendations made to it in the report. The decision is not simply a consideration of an environmental assessment. And the recommendations made to the Governor in Council cover much more than matters disclosed by the environmental assessment — instead, a number of matters of a polycentric and diffuse kind.

144 Similarly, some decisions may be made by administrative decision-makers more likely to be the expertise and experience of the executive rather than the courts. On these, courts must afford administrative decision-makers a greater margin of appreciation: see, e.g., Disaster, at paragraph 22; Bourgari, at paragraph 62; Forest Ethics, at paragraph 82.

145 Recently, this Court usefully contrasted two types of administrative decision-makers, the individual involving courts to review decision-making. The latter less so:

146 For present purposes, one might usefully contrast two types of administrative decision-makers. As one example, a decision made by the executive branch, where an administrative decision-maker assesses the conduct of an individual or known group of individuals against concrete criteria, the potential effects upon the legal or practical interests of the interests of the individual or large, and the matters lie somewhat within the ken of the courts. A good example is a professional disciplinary proceeding where an individual is charged with violations of a disciplinary code and the individual faces serious legal or practical consequences such as restrictions, prohibitions or penalties. At the other end are matters where an administrative decision-maker assesses something broader and more diffuse, using polycentric, subjective or fuzzy criteria to decide the matters, criteria that are more typically within the ken of the executive and less so within the.

147 In the case at bar, however, the Governor in Council's decision — the Order in Council — is the product of its consideration of recommendations made to it in the report. The decision is not simply a consideration of an environmental assessment. And the recommendations made to the Governor in Council cover much more than matters disclosed by the environmental assessment — instead, a number of matters of a polycentric and diffuse kind.

148 The Governor in Council is the Governor General, acting on the advice of the Prime Minister and the Cabinet. (For that reason, throughout these reasons, we have referred to the Governor in Council as "the body". In recognition of its.

149 To similar effect, a majority of this Court recently said the following: (i) The legislative scheme in this case is unique, some administrative decision-makers, like the Governor in Council here, are empowered to make decisions on the basis of broad public interest considerations, along with economic and policy considerations, and weigh them against detrimental effects. A good example is the decision of the Alberta Utilities Commission in FortisAlberta Inc. v. Alberta (Utilities Commission), 2015 ABCA 295, 389 D.L.R. (4th) 1. In words apposite to this case, the Alberta Court of Appeal upheld the Commission's decision, given it a very broad margin of appreciation (at paragraphs 171-172).

150 Although the legislative scheme in this case is unique, some administrative decision-makers, like the Governor in Council here, are empowered to make decisions on the basis of broad public interest considerations, along with economic and policy considerations, and weigh them against detrimental effects. A good example is the decision of the Alberta Utilities Commission in FortisAlberta Inc. v. Alberta (Utilities Commission), 2015 ABCA 295, 389 D.L.R. (4th) 1. In words apposite to this case, the Alberta Court of Appeal upheld the Commission's decision, given it a very broad margin of appreciation (at paragraphs 171-172).

151 The legislative scheme in this case is unique, some administrative decision-makers, like the Governor in Council here, are empowered to make decisions on the basis of broad public interest considerations, along with economic and policy considerations, and weigh them against detrimental effects. A good example is the decision of the Alberta Utilities Commission in FortisAlberta Inc. v. Alberta (Utilities Commission), 2015 ABCA 295, 389 D.L.R. (4th) 1. In words apposite to this case, the Alberta Court of Appeal upheld the Commission's decision, given it a very broad margin of appreciation (at paragraphs 171-172).

152 The words of all these courts are apposite here: the Governor in Council here, is entitled to a very broad margin of appreciation in making its discretionary decision upon the widest considerations of policy and public interest under sections 53 and 54 of the National Energy Board Act.

153 We acknowledge that on some occasions, the Governor in Council makes decisions that have authority. See generally A. B. Alston and M. Bociu, House of Commons Procedure and Practice, 2d ed. (Ottawa: Editions York Blair, 2009) at pages 28-23 and 28-32; Constitution Act, 1867, sections 9, 10 and 13.
some legal context. On these occasions, signified by specific legislative language, the margin of appreciation courts afford to the Governor in Council will be narrower: see, e.g., Canadian National Railway Co. v. Canada (Attorney General), 2014 SCC 40, [2014] 3 S.C.R. 135. Global Wireles...

154 But in this case, the Governor in Council’s discretionary decision was based on the widest considerations of policy and public interest assessed on the basis of policy, subjective or intangible criteria and shaped by the view of economics, cultural considerations, environmental considerations, and the broader public interest.

155 The economic benefit associated with the construction and operation of a transportation system that will help to unlock Alberta’s oil resources and make those resources more readily available worldwide outweighs the detrimental effects, actual or potential, including those effects on the environment and, in particular, the matters under the Canadian Environmental Assessment Act, 2012. To what extent will the conditions that Northern Gateway must satisfy -- many concerning technical matters that can be evaluated and weighed only with expertise -- alleviate those concerns? And in light of all of these considerations, was there enough high-quality information for the Governor in Council to balance all the considerations and properly assess the matter? These are the sorts of questions this legislative scheme remits to the Governor in Council. Under the authorities set out above that are binding upon us, we must give the Governor in Council the widest margin of appreciation over these questions.

(6) The Governor in Council's decision was reasonable under administrative law principles

156 In our view, the following reasons and based on the record before the Governor in Council, we are not persuaded that the Governor in Council’s decision was unreasonable on the basis of administrative law principles.

157 The Governor in Council was entitled to assess the sufficiency of the information and recommendations it had received. Balance all the considerations -- economic, cultural, environmental and otherwise -- and come to the conclusion it did. To make it otherwise would be to second guess the Governor in Council’s appreciation of the facts, its choice of policy, its access to scientific expertise and its evaluation and weighing of competing public interest considerations, matters very much outside of the remit of the courts.

158 This conclusion, however, does not end the analysis.

159 Before us, all parties accepted that Canada owes a duty of consultation to Aboriginal peoples concerning the Project. All parties accepted that if that duty were not fulfilled, the Order in Council cannot stand. In our view, these concessions are appropriate.

160 Section 54 of the National Energy Board Act does not refer to the duty to consult. However, in 2012, when Parliament enacted section 54 in its current form, the duty to consult was well-established in our law. As all parties before us recognized, it is inconceivable that section 54 could operate in a manner that avoids the duty to consult. Very express language would be required to bring about that effect. And if that express language were present in section 54, tenable arguments could be made that section 54 is inconsistent with the recognition and affirmation of Aboriginal rights under subsection 35(1) of the Constitution Act, 1982 and, thus, invalid. A number of the First Nations before us were prepared, if necessary, to assert these arguments and they filed Notices of Constitutional Question to that effect.

161 It is a well-recognized principle of statutory interpretation that statutory provisions that are capable of multiple meanings should be interpreted in a manner that preserves their constitutionality. Eldridge v. British Columbia (Attorney General), [1997] 1 S.C.R. 624, 155 D.L.R. (4th) 377, at paragraphs 32, 39, 41, 67, 78, 84, 90, 92, 97, and 105. Parliament is presumed to wish its legislation to be valid and have force; it does not intend to legislate provisions that are invalid and of no force.

162 Further, it is a well-recognized principle of statutory interpretation that interpretations that lead to absurd or inequitable results should be avoided: Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031, 125 D.L.R. (4th) 385, at paragraph 65.

163 Section 54 of the National Energy Board Act and the associated sections constituting the legislative scheme we have described above can be interpreted in such a way as to respect Canada’s duty to consult and to remain valid. We interpret these sections in that way.

164 Under section 52 of the National Energy Board Act, the National Energy Board, or here the Joint Review Panel, submits its report to a coordinating Minister who brings the report before the Governor in Council, along with any other membranes or information. There is nothing that prevents coordinating Minister, or any other Minister who is assigned responsibility for the matter, from bringing to the Governor in Council information necessary for it to satisfy itself that the duty to consult has been fulfilled, to recommend that further conditions be added to any certificate for the project issued under section 54 to accommodate Aboriginal peoples or to ask the National Energy Board to redetermine the matter and consider making further conditions under section 53.

165 Here, subsection 31(2) of the Interpretation Act, R.S.C. 1985, c. 1-21, is relevant. It provides that where a statute gives to a public official the power to do a thing, all powers necessary to allow that person to do the thing are also given. Subsection 31(2) provides as follows:

31 (2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.

166 The Governor in Council’s ability to consider whether Canada has fulfilled its duty to consult and to impose conditions is a power necessary for the Governor in Council to exercise its power under sections 53 and 54 of the National Energy Board Act. Similarly, the activities of the coordinating Minister and his delegates in considering the duty to consult are necessary matters that they can exercise in accordance with subsection 31(2) of the Interpretation Act.

167 We are fortified in this conclusion by the relationship between the Crown and the Governor in Council. The duty to consult is imposed upon the Crown. As explained in paragraph 142, above, the Governor in Council is frequently the initiator of the Crown’s exercise of executive authority. Given the Governor in Council’s relationship with the Crown, it stands to reason that the Governor in Council has the necessary power in section 54 of the National Energy Board Act to consider whether the Crown has fulfilled its duty to consult and, if necessary, to impose conditions.

168 Thus, we are satisfied that under this legislative scheme the Governor in Council, when considering a project under the National Energy Board Act, must consider whether Canada has fulfilled its duty to consult. Further, in order to accommodate Aboriginal concerns as part of its duty to consult, the Governor in Council must necessarily have the power to impose conditions on any certificate it issues to the National Energy Board to issue.

169 While the parties did not seriously dispute whether the duty to consult could co-exist and be fulfilled in a way that avoids the duty to consult. Very express language would be required to bring about that effect. And if that express language were present in section 54, tenable arguments could be made that section 54 is inconsistent with the recognition and affirmation of Aboriginal rights under subsection 35(1) of the Constitution Act, 1982 and, thus, invalid. A number of the First Nations before us were prepared, if necessary, to assert these arguments and they filed Notices of Constitutional Question to that effect.

170 To what extent will the conditions that Northern Gateway must satisfy -- many concerning technical matters that can be evaluated and weighed only with expertise -- alleviate those concerns? And in light of all of these considerations, was there enough high-quality information for the Governor in Council to balance all the considerations and properly assess the matter? These are the sorts of questions this legislative scheme remits to the Governor in Council. Under the authorities set out above that are binding upon us, we must give the Governor in Council the widest margin of appreciation over these questions.

(6) The Governor in Council’s decision was reasonable under administrative law principles

171 In our view, the following reasons and based on the record before the Governor in Council, we are not persuaded that the Governor in Council’s decision was unreasonable on the basis of administrative law principles.

172 The duty arises when the Crown has actual or constructive knowledge of the potential existence of Aboriginal rights or title and contemporaneous conduct that might adversely affect those rights or title: Haida Nation, at paragraph 35; Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 41, [2010] 2 S.C.R. 650, at paragraph 36.

173 When the claim to title is weak, the Aboriginal interest is limited or the potential infringement is minor, the duty of consultation lies at the low end of the consultation spectrum. In such a case, the Crown may be required only to give notice of the contemplated conduct, disclose relevant information and discuss any issues raised in response to the notice: Haida Nation, at paragraph 43. When a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high, the duty of consultation lies at the high end of the spectrum. While the precise requirements will vary with the circumstances, in this type of case a deep consultation process might entail: the opportunity to make submissions; formal participation in the decision-making process; and, the provision of written reasons to show that Aboriginal concerns were considered and how those concerns were factored into the decision: Haida Nation, at paragraph 44.

174 It is now settled law that Parliament may choose to delegate procedural aspects of the duty to consult to a tribunal. Tribunals that consider resource issues that impinge on Aboriginal interests may be given: the duty to consult; the duty to determine whether adequate consultation has taken place; both duties; or, no duty at all. In order to determine the mandate of any particular tribunal, it is relevant to consider the powers conferred on the Tribunal by its constituent legislation, whether the tribunal is empowered to consider questions of law and what remedial powers the tribunal possesses: Rio Tinto, at paragraphs 55 to 65.

175 Thus, for example in Talke River Tribal First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74, [2004] 4 S.C.R. 550, the Supreme Court accepted that an environmental assessment process was sufficient to satisfy the procedural requirements of the duty to consult. At paragraph 40 of the Court’s reasons, the Chief Justice wrote that the provinces did not have to develop special consultation measures to address the First Nation’s concerns “outside of the process provided for by the [B.C. environmental legislation], which specifically set out a scheme that required consultation with affected Aboriginal peoples”. Subsequently, in Belobrov v. Little Salmon Caribou First Nations, 2010 SCC 53, [2010] 3 S.C.R. 103, at paragraph 39, the Supreme Court interpreted Talke River as saying that participation in a forum created for other purposes may satisfy the duty to consult “if it substantiates an appropriate level of consultation is provided” (emphasis in original).
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177 In Taku River, the Supreme Court also recognized that project approval is "simply one stage in the process by which the development moves forward," at paragraph 45. Thus, outstanding First Nation concerns could be more effectively considered at later stages of the development process. It was expected that throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown would continue to fulfill its duty to consult, and if required, accommodate.

178 When the Crown relies on a regulatory or environmental assessment process to fulfill the duty to consult, such reliance is not delegation of the Crown's duty. Rather, it is a means by which the Crown can be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated. Haida Nation, at paragraph 53.

179 The consultation process does not dictate a particular substantive outcome. Thus, the consultation process does not give Aboriginal groups a veto over what can be done with land pending final proof of their claim. Nor does consultation acquiesce to a duty to agree; rather, what is required is a commitment to a meaningful process of consultation. Put another way, perfect satisfaction is not required. The question to be answered is whether the regulatory scheme, when viewed as a whole, accommodates the Aboriginal right in question. Haida Nation, at paragraphs 42, 48 and 62.

180 Good faith consultation may reveal a duty to accommodate. Where there is a strong prima facie case establishing the claim and the consequence of proposed conduct may adversely affect the claim in a significant way, the honour of the Crown may require steps to avoid irreparable harm or to minimize the effects of infringement: Haida Nation, at paragraph 47.

181 Good faith is required on both sides in the consultation process. "The common thread on the Crown's part must be the intention of substantially addressing [Aboriginal] concerns as they are raised [...] through a meaningful process of consultation": Haida Nation, at paragraph 42. At the same time, Aboriginal claimants must not frustrate the Crown's reasonable good faith attempt, nor should they take unreasonable positions to thwart the government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: Haida Nation, at paragraph 42.

(2) The standard to which Canada is to be held in fulfilling the duty

182 Canada is not to be held to a standard of perfection in fulfilling its duty to consult. In this case, the subjects on which consultation was required were numerous, complex and dynamic, involving many parties. Sometimes in attempting to fulfill the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfill the duty, there will be difficult judgments call on which reasonable minds will differ.

183 In determining whether the duty to consult has been fulfilled, "perfect satisfaction is not required," just reasonable satisfaction: Ahousaht v. Canada (Minister of Fisheries and Oceans), 48 and 62.

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* Direct engagement by Canada with affected Aboriginal groups, both before and after the Joint Review Panel process. This consultation included consideration of the mandate of the Joint Review Panel.

* Participation by Canada in the Joint Review Panel process in order to effectively and meaningfully:
  i. gather, distribute and assess information concerning the Project's potential adverse impacts on Aboriginal rights and interests;
  ii. address adverse impacts to Aboriginal rights and interests by assessing potential environmental effects and identifying mitigation and avoidance measures; and
  iii. ensure, to the extent possible, that specific Aboriginal concerns were heard and, where appropriate, accommodated.

* The provision of almost $4,000,000 to participate funding by Canada to 46 Aboriginal groups to assist their involvement in the Joint Review Panel process and related Crown consultations.

The provisions the concerns of Aboriginal groups explaining how their concerns were considered and addressed.

190 As noted above, and to reiterate, Canada's framework for consultation had five distinct phases:

1. Phase I provided for Canada's direct engagement with Aboriginal groups before the Joint Review Panel process, including consultation on the draft Joint Review Panel Agreement and the mandate of the Joint Review Panel.

2. Phase II required Canada to provide information to Aboriginal groups about the pending Joint Review Panel process.

3. Phase III provided for participation in the Joint Review Panel process by Canada and Aboriginal groups.

4. Phase IV provided for additional, direct consultations between Canada and Aboriginal groups after the Joint Review Panel process, but before the Governor in Council considered the Project.

5. Phase V would provide additional consultation on permits or authorizations that Canada might be requested to issue after the Governor in Council's decision on the Project.

(4) The alleged flaws in the consultation process


184 The Supreme Court of Canada has expressed it this way:

Perfect satisfaction is not required; the question is whether the regulatory or government scheme "viewed as a whole, accommodates the collective Aboriginal right in question": (R. v. Gladstone, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648, at paragraph 170). What is required is not perfection, but reasonableness. As stated in (R. v. Nikal, [1998] 1 S.C.R. 1013, 133 D.L.R. (4th) 658, at paragraph 130), "... information and consultation the concept of reasonableness must come into play... So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

Haida Nation, at paragraph 62.

185 Therefore, the question is whether "reasonable efforts to inform and consult" were made. In applying this standard, we have been careful not to hold Canada to anything approaching a standard of perfection.

186 But here, in executing Phase IV of its consultation framework, Canada failed to make reasonable efforts to inform and consult. It fell well short of the mark.

(3) The consultation process

187 As explained above, from the outset of the Project, Canada acknowledged its duty to engage in deep consultation with the First Nations potentially affected by the Project owing to the significance of the rights and interests affected. Canada submits that, consistent with its duty, it first undertook a consultation process consisting of five phases to more than 80 Aboriginal groups, including all of the First Nations in this proceeding.

188 The First Nations agree that Canada was obligated to provide deep consultation. However, they assert a number of flaws in the consultation process that rendered it inadequate. In this section of the reasons, we will review the nature of the consultation process, briefly describe the most salient concerns expressed about the process, and consider whether Canada fulfilled its duty to consult.

189 Canada describes the consultation process to include:

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applicant/appellant First Nations are:

(a) The Governor in Council prejudged the approval of the Project.

(b) Canada's consultation framework was eminently imposed on the First Nations; there was no consultation on it.

(c) Canada provided inadequate funding to facilitate the participation of First Nations in the Joint Review Panel process and other consultation processes.

(d) The consultation process was over-delegated: the Joint Review Panel was not a legitimate forum for consultation and it did not allow for discussions between Canada and affected First Nations.

(e) Canada either failed to conduct or failed to be fair and open to the assessment of the strength of the First Nations' claims to Aboriginal rights or title.

(f) The Crown consultation did not reflect the terms, spirit and intent of certain agreements between Canada and the Haida.

(g) The Report of the Joint Review Panel left too many issues affecting First Nations to be decided after the Project was approved.

(h) The consultation process was too generic. Canada and the Joint Review Panel looked at First Nations as a whole and failed to address adequately the specific concerns of particular First Nations.

(i) After the Report of the Joint Review Panel was finalized, Canada failed to consult adequately with First Nations about their concerns; it also failed to give reasons showing that Canada considered and factored them into the Governor in Council's decision to approve the Project.

(j) Canada did not assess or discuss First Nations' title or governance rights, nor was the impact on those rights factored into the Governor in Council's decision to approve the Project.

We shall examine each of these in turn.

(a) The Governor in Council prejudged the approval of the Project

192 The Gitxsan argue that Canada did not consult in good faith and one manifestation of this is that the outcome of the approval process was pre-ordained. In support of this submission, the Gitxsan point to:

* Statements made by the then Minister of Natural Resources reported in the Globe and Mail in July, 2011 that the Project “is in the national interest” and that discussions among Ministers will touch on ways of “improving the regulatory system so it is less duplicative, so it is more fair, transparent and independent – but takes into account the need for expediency review.”

* The adoption of a process that excluded real consideration of title and

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The final Joint Review Panel Agreement required the Joint Review Panel to:

- consider and address all Project-related Aboriginal issues and concerns within its mandate;
- conduct its review in a manner that facilitated the participation of Aboriginal peoples;
- receive evidence from Northern Gateway regarding the concerns of Aboriginal groups;
- receive information from Aboriginal peoples related to the nature and scope of potentially affected Aboriginal and treaty rights; and
- include recommendations in its report for appropriate measures to avoid or mitigate potential adverse impacts or infringements on Aboriginal and treaty rights and interests.

Finally, Canada communicated with all of the Aboriginal applicants/appellants in this proceeding in November and December 2009 so as to ensure that they were aware of the modifications made to the Joint Review Panel process, the ongoing consultation activities and the ongoing availability of funding.

In our view, the evidence establishes that the outset Canada acknowledged its duty of deep consultation with all affected First Nations. In Phase I, it provided information about the implications of the affected First Nations, sought and obtained comments on the proposed consultation process as initially outlined in the draft Joint Review Panel Agreement, and reasonably addressed concerns expressed by First Nations by incorporating significant revisions into the Joint Review Panel Agreement.

We will address in more detail below the submission that the Joint Review Panel was not a legitimate forum for consultation. However, we are satisfied that there was consultation about Canada’s framework for consultation. It was not unilaterally imposed. It was reasonable.

The Haida adopt this submission.

202 The Kitneoo and the Heiltsuk argue that the Crown failed to consult with them about the five-phase review process, the impact of using a hearing process to engage in consultation, and the timing or scope of Canada’s consultation in Phase IV of the consultation framework.

We disagree that the initial engagement with affected First Nations and the subsequent consultation during the draft Joint Review Panel Agreement [i.e., Phase I] were flawed or unreasonnable. As a matter of law, the Crown has discretion as to how it structures the consultation process and how the duty to consult is met. Cold Lake First Nations v. Alberta (Treaty, Parks & Recreation), 2013 ABCA 443, 556 A.R. 259, at paragraph 39. What is required is a reasonable process, not perfect consultation: Haida Nation, at paragraph 62.

204 Phase I consultation included the following steps:

- Following receipt of a preliminary information package submitted by Northern Gateway, the National Energy Board, in consultation with other responsible federal authorities, requested that the then Minister of the Environment refer the Project to a review panel. On September 29, 2006, the Minister referred the Project to a review panel and released the draft Joint Review Panel agreement for a 60-day comment period. A number of comments were received from Aboriginal groups. Thereafter, Northern Gateway put the Project on hold.

- Following submission of the Project by Northern Gateway, Canada, through the Canadian Environmental Assessment Agency, contacted over 80 Aboriginal groups to advise them of the Project and of opportunities to participate in the Joint Review Panel process and the related Crown consultation process. The Agency provided information to groups for whom Canada had a duty to consult. Other Aboriginal groups subsequently contacted the Agency expressing interest in the Project and were provided with information. Some Aboriginal groups were contacted but chose not to participate in the Joint Review Panel or Crown consultation process. The Agency communicated with Aboriginal groups throughout the consultation process. It requested input on the draft Joint Review Panel Agreement, provided information on opportunities for participation in the Joint Review Panel, and subsequently consulted on the Report of the Joint Review Panel advisory board, considering the available information and consultation and communication strategy.

- Canada significantly modified the Joint Review Panel process in response to concerns expressed by affected Aboriginal groups. Examples of such modifications include:

  - in response to concerns raised by the Haida and the Gitgat that the Project’s marine components, including marine shipping, were not within the mandate of the Joint Review Panel, Canada changed the scope of its reviews to include the marine transportation of oil and condensate.
  - We disagree that the initial engagement with affected First Nations and the subsequent consultation was outlined in a document entitled “Aboriginal Consultation Framework,” which was made available to Aboriginal groups in November 2009.

- Canada significantly modified the Joint Review Panel process in response to concerns expressed by First Nations by incorporating significant revisions into the Joint Review Panel Agreement.

208 We will address in more detail below the submission that the Joint Review Panel was not a legitimate forum for consultation. However, we are satisfied that there was consultation about Canada’s framework for consultation. It was not unilaterally imposed. It was reasonable.

(e) Inadequate funding for participation in the Joint Review Panel and consultation processes

209 The Kitneoo and the Heiltsuk argue that the process required significant legal assistance and significant travel expenses because the Joint Review Panel hearings were held in Prince Rupert and Terrace, British Columbia. They point to the fact that even though approximately 35 Aboriginal communities participated in the Project, only 12 First Nations cross-examined witnesses panels. This was significant travel expenses because the Joint Review Panel hearings were held in Prince Rupert and Terrace, British Columbia. They point to the fact that even though approximately 35 Aboriginal communities participated in the Project, only 12 First Nations cross-examined witnesses panels. The Kitneoo say they could not afford to provide expert reports or retain experts to review thePropen's extensive data. The Heiltsuk sought funding of $422,877 for all phases, but received only $96,000. In Phase IV, the Kitneoo sought funding of $110,410 but received $14,400.

210 We have carefully reviewed the second affidavits of Douglas Neudorf and Marilyn Slett, which contains the evidence filed in support of the submissions. Without doubt, the level of funding provided was inadequate to adequately and reasonably fund the consultation process. However, the affidavits do note how the amount sought was calculated, or detail any financial resources available to the First Nations outside of that provided by Canada. As such, the evidence fails to demonstrate that the funding available was inadequate to reasonably fund the consultation process.

(d) The consultation process was over-delegated

211 The Haida point to many asserted flaws flowing from the Crown’s reliance on the Joint Review Panel process to discharge, at least in part, its duty to consult. The Haida submit that:

- meaningful consultation requires a two-way dialogue whereas the Joint Review Panel process was one-way; and
- the Joint Review Panel did not assess the nature and scope of each First Nation’s claimed Aboriginal rights and it did not assess the potential infringement of Aboriginal rights by the Project.

212 To this, the Heiltsuk add that the formalities of the quasi-judicial tribunal process led to friction between them and the Joint Review Panel and restrictions on the Heiltsuk’s ability to provide all of the information they wished to provide for consultation purposes.

213 We have not been persuaded that the consultation process was over-delegated or that it was
There are four more concerns expressed by the applicant/appellant First Nations. We view Canada correctly acknowledged its obligation to consult deeply with the Haida, yet engaged in a deep and specific level of consultation and accommodation with it. They submit that the Haida argue that these agreements reinforce and individualize Canada's obligation to maintain the honour of the Crown.

We reject the assertion that Canada failed to assess the strength of the First Nations' claims. The assertion is unsupported by the evidence.

The Haida have concluded a number of agreements with Canada and British Columbia to establish collaborative management of all of the territorial and portions of the marine area in Haida Gwaii. These agreements are:

* the 1993 Gwaii Haanas Agreement;
* the 2010 Gwaii Haanas Marine Agreement;
* the 2007 Strategic Land Use Plan Agreement;
* the 2009 Ksan'as Gtxa'Kin'ax arch Reconciliation Protocol;
* the Memoranda of Understanding with Canada for cooperative management and planning of the Gwaii Haanas (Bowman Seamount).

227 The Haida argue that these agreements reinforce and individualize Canada's obligation to engage in a deep and specific level of consultation and accommodation with it. They submit that Canada followed only a "generic" consultation process, with the result that the Governor in Council's decision to approve the Project failed to respect the Haida Agreements.

228 In our view, Canada correctly acknowledged its obligation to consult deeply with the applicant/appellant First Nations, including the Haida. This deep consultation required the highest level of consultation possible, short of consent. The Haida Agreements do not, in our view, modify or add to that obligation.

229 There are four more concerns expressed by the applicant/appellant First Nations. We view these as overlapping and interrelated. They all focus primarily on Canada's execution of Phase IV of the consultation framework. Therefore, it is convenient to deal with them together.

(e) The Joint Review Panel Report left too many issues affecting First Nations to be decided after the Project was approved

(f) The consultation process was too generic: Canada and the Joint Review Panel looked at First Nations as a whole and failed to address adequately the specific concerns of particular First Nations

(i) After the Report of the Joint Review Panel was finalized, Canada failed to consult adequately with First Nations about their concerns and failed to give adequate reasons

(j) Canada did not assess or discuss title or governance rights and the impact on those rights

230 To this point we have rejected the arguments advanced by the applicant/appellant First Nations that Canada's execution of the consultation process was unsatisfactory or unsatisfactory. However, for the reasons developed below, Canada's execution of the Phase IV consultation process was unnecessarily flawed and fell well short of the mark. Canada's execution of Phase IV failed to maintain the honour of the Crown.

231 We begin our analysis on this point by briefly setting forth some of the relevant legal principles that speak to what constitutes a meaningful process of consultation.

Based on the significant evidence filed by the Haida Nation in the joint review panel process, the federal government is currently updating its strength of claim evaluation and depth of consultation assessment and will provide a description of the results of this updated assessment to the Haida Nation once this work is completed and ready to be released. The results of this updated assessment will be shared with potentially affected Aboriginal groups prior to consultation on the Panel's environmental assessment report (Phase IV of the consultation process). [Emphasis added]

221 Canada never provided the Haisla with a copy of its updated strength of claim and depth of consultation analysis and assessment.

222 However, as set out in the portion of the letter extracted above, the Minister made no commitment to provide the actual legal analysis to the Haisla. He committed to providing only a description of the analysis, which we construe to be an informational component. In Phase IV, the Haisla were advised only in a general sense of the informational component. They were told that the preliminary strength of claim assessment "support the Haisla Nation as having strong prior [sic] face claim to both Aboriginal rights and title within lands claimed as part of the Haisla traditional territory." Exhibit 10 to the affidavit of Ellis Rose, at page 132 of Haisla's Compendium.

223 It is to be remembered that the strength of claim plays an important role in the nature and content of the duty to consult. Canada must disclose information on this and discuss it with affected First Nations. On this, Canada fell short. We say more about this below. But for present purposes we do not accept that Canada was obligated to share its legal analyses.

(f) The Crown consultation did not reflect the terms, spirit and intent of the Haida Agreements

226 The Haida have concluded a number of agreements with Canada and British Columbia to establish collaborative management of all of the territorial and portions of the marine area in Haida Gwaii. These agreements are:

* the Memorandum of Understandings with Canada for cooperative management and planning of the Gwaii Haanas (Bowman Seamount);
Further, the Report of the Joint Review Panel covers only some of the subjects on which consultation was requested. Its terms of reference were narrower than the scope of Canada’s duty to consult. One example of this is the fact that Aboriginal subjects that, by virtue of section 5 of the Canadian Environmental Assessment Act, 2012, must be considered in an environmental assessment are a small subset of the subjects that make up Canada’s duty to consult.

In addition, in the Joint Review Panel’s process:

* The proponents, Northern Gateway, made no assessment of the Project’s impact on Aboriginal title; Cross-examination of Enbridge witnesses, Haisla Compendium, at pages 973, 975 and 976.
* Similarly, the Joint Review Panel made no determination regarding Aboriginal rights or the strength of an Aboriginal group's claim to an Aboriginal right or title. Report of the Joint Review Panel, at page 47.
* Northern Gateway confined its assessment of the Project's impact on Aboriginal and treaty rights to an assessment of the potential impacts upon the rights to harvest and use land and resources. Cross-examination of Enbridge witnesses, transcript, v. 149, line 22980; Report of the Joint Review Panel, at page 42.
* In assessing the various rights that Aboriginal peoples enjoy, including hunting, fishing and gathering rights, Northern Gateway did not look specifically at a single community’s rights. Rather it looked at rights generally speaking. Cross-examination of Enbridge witnesses, transcript, v. 112, lines 9960-9963.
* The Joint Review Panel accepted this approach and relied upon it to conclude that the Project would not significantly adversely affect the interests of Aboriginal groups that use lands, waters or resources in the Project area. Report of the Joint Review Panel, at pages 49-50.

As for the status of the consultation process at the start of Phase IV, this was Canada’s first opportunity — and its last opportunity before the Governor in Council’s decision — to engage in direct consultation and dialogue with affected First Nations on matters of substance, not procedure, concerning the Project. Cross-Counsel Report. Exhibit A to the affidavit of Jim Clarke (the Director General: Operations of the Major Project Management Office, Natural Resources Canada).

The Haisla noted that the Joint Review Panel had determined that the Project was consistent with Canada’s duty to consult.

As the Haisla observed at their consultation meeting, no explanation "from anyone at all" had ever been provided for the rush "and that's a problem." The Haisla Phase IV consultation meeting notes of March 3, 2014 and April 8-9, 2014 are offered in the abstract. Concerning specific matters dealt with in the Report may be more important than earlier opinions and recommendations that were provided in a process we would characterize as falling well short of the minimum standards prescribed by the Supreme Court in its jurisprudence.

The Haisla Phase IV consultation meeting notes of March 3, 2014 and April 8-9, 2014 are a small subset of the subjects that make up Canada’s duty to consult. One example of this is the fact that Aboriginal subjects that, by virtue of section 5 of the Canadian Environmental Assessment Act, 2012, must be considered in an environmental assessment are a small subset of the subjects that make up Canada’s duty to consult.

The Haisla asked that Canada defer consideration of the Project. Throughout the consultation, the Haisla asked that Canada defer consideration of the Project.

During the March Meeting, the Haisla Nation asked the Crown representatives to extend the timeline for consultation. Mr. Clarke advised that the timelines were driven by legislation which they themselves were not authorized to extend. We pointed out that the relevant legislation provided the Crown with an ability to extend the timelines. Mr. Clarke conceded that this was correct. The Haisla Nation therefore asked the Crown representatives to ask the Minister to extend the timelines for the decision to allow meaningful consultation. Mr. Clarke agreed to do so.

During the April Meeting, Mr. Clarke told us that he had communicated the Haisla Nation’s request to extend the deadlines to the Minister of Natural Resources. Mr. Clarke acknowledged that the Minister had failed to respond to this request. In our May 7, 2014 letter we requested again that a decision on the Project be delayed to allow meaningful consultation to take place. The Crown refused. [Emphasis added]

The Haisla Phase IV consultation meeting notes of March 3, 2014 and April 8-9, 2014 are consistent with this evidence.

As the Haisla observed at their consultation meeting, no explanation "from anyone at all" had ever been provided for the rush "and that's a problem." The Haisla Phase IV consultation meeting notes of March 3, 2014 and April 8-9, 2014 are consistent with this evidence.

The Haisla asked that Canada defer consideration of the Project. Specifically, the Haisla requested that the decision be delayed to allow for scientific studies. Taylor Cross, Deputy Chief Councillor of the Haisla, gave evidence that:

107. During the March Meeting, the Haisla Nation asked the Crown representatives to extend the timeline for consultation. Mr. Clarke advised that the timelines were driven by legislation which they themselves were not authorized to extend. We pointed out that the relevant legislation provided the Crown with an ability to extend the timelines. Mr. Clarke conceded that this was correct. The Haisla Nation therefore asked the Crown representatives to ask the Minister to extend the timelines for the decision to allow meaningful consultation. Mr. Clarke agreed to do so.

108. During the April Meeting, Mr. Clarke told us that he had communicated the Haisla Nation’s request to extend the deadlines to the Minister of Natural Resources. Mr. Clarke acknowledged that the Minister had failed to respond to this request. In our May 7, 2014 letter we requested again that a decision on the Project be delayed to allow meaningful consultation to take place. The Crown refused. [Emphasis added]

The Haisla Phase IV consultation meeting notes of March 3, 2014 and April 8-9, 2014 are consistent with this evidence.

109. As the Haisla observed at their consultation meeting, no explanation “from anyone at all” had ever been provided for the rush “and that’s a problem.”
377. Q. Would you say that the Heiltsuk’s concerns about potential impacts on hunting in one of the items that was fully discussed?
A. I would say, no, it wasn’t.

328. Q. What about trapping?
A. I would say, no, it wasn’t.

329. Q. How about marine spills? Was there a discussion about how marine spills may have negative effects on the environment?
A. Yes, in many different parts of the meeting.

330. Q. Was there a discussion of how Haisla rely on marine resources in the exercise of their Aboriginal rights?
A. I believe so.

331. Q. Could you point me to that in the meeting notes?
A. I have multiple Adobe references to where marine spills were discussed but that specific item I can’t point you to right now.

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333. Q. So do you not recall going into that level of detail?

325. A. I don’t recall if that was specifically part of the discussion.

255 A further problem in Phase IV was that, at least three instances, information was put before the Government in Council that did not accurately portray the concerns of the affected First Nations. Canada was less than willing to hear the First Nations on this and to consider, if necessary, correct the information.

266 The first instance involved the Kitasoo. On June 9, 2014, Messrs. Maracle (the Crown Consultation Coordinator) and Clarke wrote acknowledging some of the Kitasoo’s concerns expressed during Phase IV and enclosing that portion of the Crown Consultation Report that outlined its position and summarized its concerns.

257 Counsel for Kitasoo responded by letter dated June 17, 2014, identifying several inaccuracies in the letter of Messrs. Maracle and Clarke and the Consultation Report. Points made included the following:

- The Crown’s letter incorrectly represented the Kitasoo’s position respecting mitigation.
- The Consultation Report states “[t]he shipping route would cross the northwestern portion of the Kitasoo/Xai’xais First Nation for approximately 43 km. The confined channel assessment area is approximately 56 km from the proposed shipping route.” This was incorrect and inconsistent with the Kitasoo’s evidence that its territory extended into the confined channel assessment area.
- The information provided in the Crown Consultation Report was insufficient. By presenting the Kitasoo’s concerns in a summary and high-level fashion, the decision-maker had insufficient information to assess the Kitasoo’s outstanding concerns respecting the Project.

258 As counsel’s information was conveyed to Canada only on the date the decision to approve the Project was made, the record before us does not demonstrate that these errors were corrected or brought to the attention of the Government in Council.

259 On June 9, 2014, a similar letter was sent to the Heiltsuk. Again, its counsel responded by letter dated June 17, 2014. Errors and omissions identified by counsel included:

- an incorrect representation of the Heiltsuk’s position on mitigation.

260 In the letter of June 17, 2014, counsel argued insufficient information was provided to the decision-maker that would allow assessment of the Heiltsuk’s outstanding concerns. As was the case with the letter sent by counsel for the Kitasoo, this letter was only received the day the decision to approve the Project was made.

261 The final example comes from the June 9, 2014 letter with appended extracts of the Crown Consultation Report received by the Nadleh and the Nak’azdli. In a letter dated June 16, 2014, the Yinka Deni Alliance Coordinator highlighted issues and inaccuracies in this letter:

- an incorrect statement that the “proposed shipping lane would be between 30 and 70 km north of the northern and western boundaries of the traditional territories.” The Heiltsuk’s evidence was that the proposed southern approach would be intersected with a significant portion of the Heiltsuk’s traditional territory.
- an incorrect representation of the Heiltsuk’s position on equity participation.
- a failure to identify the central issue raised by the Heiltsuk regarding the lack of baseline work and the lack of spill modelling in the Open Water Area.

262 As with the Kitasoo and the Heiltsuk, the Nadleh and the Nak’azdli also responded to Canada asserting that the Governor in Council did not have sufficient information to make a decision. The record does not demonstrate that the Governor in Council had this information before making its decision. While Canada did respond acknowledging the errors in the Phase IV discussions, it did not indicate any steps taken to correct the errors or state what effect, if any, this had on the Governor in Council’s decision. July 14 letter, Major Book of Documents, page 469.

263 Also of significant concern is the lack of meaningful dialogue that took place in Phase IV.

264 During the consultation meetings, Aboriginal groups were repeatedly told that Canada’s representatives were:

- working on the assumption that the Governor in Council needed to make the decision by June 17, 2014.
- tasked with information gathering, so that their goal was to get the best information to the decision-makers;
- not authorized to make decisions;
- required to complete the Crown Consultation Report by April 16, 2014.

265 When the role of Canada’s representatives is seen in light of this, it is of no surprise that a number of concerns raised by Aboriginal groups—in our view, concerns very central to their legitimate interests—were left unconsidered and unaddressed. This fell short of the conduct necessary to meet the duty to consult. There are several examples.

266 At the consultation meeting on April 22, 2014, the Kitasoo made detailed submissions about why the Project’s impacts on their Aboriginal rights could not be assessed without what they referred to as the “missing information.” The Kitasoo representatives explained that they required information about spill modelling and assessment, the behaviour (or fate) of bitumen in the water, the baseline marine inventory and what the spill recovery would look like. Thereafter, Chief Clark Robinson asked Canada’s representatives “who will engage in consultation, will you?” Canada’s response was delivered by two of its representatives: Joseph Whiteside, a senior policy analyst with Natural Resources, and Brett Maracle, the Crown Consultation Coordinator. Their response shows little in terms of facilitating consultation; indeed, it shows just how short of the mark the Phase IV consultation was.

Joseph Whiteside: Building on what I just said—well, we’re not decision makers, our job is to collect information to make sure that within the individual expertise of Environment Canada, Transport Canada, my department, Natural Resources and others, we fully understand what we’re trying to tell us, and so the decision making is at a different level. Particularly on the matter of funding. They haven’t given us the funding approval yet—maybe they will. But, our job is to take the best recommendations forward that we can. We may have some questions as the afternoon unfolds, to detail more of what was in your slide presentation— I assume we have a copy of the slide presentation. That will help our analysis as well.

Brett Maracle: And considered.

Joseph Whiteside: and considered.

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Chief Clerk Robinson: Will you make a recommendation on consultation?

Joseph Whiteside: Well, one of the things we can look at, is based on what your community and others have said - that they are seeking. I think [sic] far from the hereditary chiefs said this morning, you're looking for an additional level of consultation beyond what has already been engaged in prior to panel, through the panels. Still Canada continues to say we rely on the, to the extent possible to meet the duty to consult, and then using this phase IV to build on the work of the panel to make sure we fully understand what Aboriginal communities are saying.

To identify where you believe there are gaps, and I think [sic] fair to a list of the presentation is talking gaps in the analytical framework that you believe critically need to be filled, and then to see what more can be done. It may well be possible to take to put forward a recommendation, and I can't say what's in the Cabinet submission because I don't make that decision. In whether (Cabinet) feels there is a critical consultation work that needs to be engaged in, specifically whether the decision is one we can in the particular project, may well be in the matter the Ministers may work to bring forward further information about consultation, can't say the door is closed, and can't say what the consultation mechanism may be, as we as a team may have to do some work on to assist our seniors.

Chief Clerk Robinson: We don't agree that there has been any consultation.

[Emphasis added] [sic throughout]

267 In our view, the Kispiox never received Canada's explanation why the missing information was not required and why Canada rejected the assertion that the Kispiox had not been adequately consulted.

268 The Heiltsuk made similar submissions to the Kispiox in their Phase IV consultation meeting with Canada in terms of requiring additional information to assess the impacts on their Aboriginal rights. Particularly concerning for the Heiltsuk was that there was insufficient information regarding the risk of an oil spill on a resource over which the Heiltsuk have an Aboriginal right to fish on a commercial basis: see the Heiltsuk's closing submissions to the Joint Review Panel, extract book, Tab 19.

269 During the consultation meeting, elected leader and Chief Councillor Cecil Reid described the risk of an oil spill to herring-spawn-on-kelp -- a resource over which the Heiltsuk have an Aboriginal right to fish on a commercial basis: see the Heiltsuk's closing submissions to the Joint Review Panel, extract book, Tab 19.

270 Joseph Whiteside, a senior policy analyst with Natural Resources, responded along the same lines as he did at the Kispiox meeting:

Our responsibility is to collect the information we have and be as responsive to the questions and concerns we've heard in the last day and a half, and to be as responsive back to, within the time that we have, to provide some information and try and build some understanding. Our main responsibility is to take your views back and integrate them into the report that we have to prepare, so that our senior managers and all up to the Minister are fully aware of the perspective of the Heiltsuk Nation before the proposal that will be before the Cabinet by mid-June.

271 When Chief Councillor Marilyn Slett asked Canada's representatives if Canada would be available for further consultations with the Heiltsuk on this matter, Canada's Crown Consultation Coordinator, Brett Maracle, replied, "I can't say, because that would be basically the [Minister's] agreeing to [a] delay of the process." The Heiltsuk never received an explanation why the missing information concerning a resource necessary for their maintenance was not required.

272 Deputy Chief Councillor Taylor Cross of the Haisla also provided evidence of the following unsolicited concerns:

(1) Despite a representative from Transport Canada attending the March and April Meetings, we did not have time to discuss Canada's Tanker Safety Export Panel Report or our concerns with that report. We therefore requested that the Crown reply to our concerns regarding that report in writing. To the best of my knowledge, Transport Canada has not yet replied to our concerns in writing or otherwise.

273 The Haisla feared no better when they raised concerns about errors in the Report of the Joint Review Panel. For example, during the consultation meetings, Canada's representatives agreed that hundreds of culturally modified trees exist at the proposed terminal site, notwithstanding that the Report of the Joint Review Panel stated that there were none. He agreed that many culturally modified trees would be destroyed by the Project and that this would have an impact on the Haisla. Canada then offered no suggestion as to how the impacts to the Haisla's culturally modified trees could be avoided or accommodated.

274 Deputy Chief Councillor of the Haisla, Taylor Cross, also gave evidence that Canada's representatives, including Jim Clarke, repeatedly stated that they had to accept the findings of the
conclude that during the Phase IV process, the parties were entitled to much more in the nature of information, consultation and explanation from Canada regarding the specific and legitimate concerns they put to Canada.

288 The dialogue necessary to fulfill the duty to consult was also frustrated by Canada’s failure to disclose necessary information it had about the affected First Nations’ strength of claims to rights and title. We stress information, as opposed to the legal assessments we discussed above at paragraphs 218-223. Canada’s attitude to the sharing of information absolutely is that this is unworkable. Strength of claims was an important matter that had to be considered in order for the consultation in Phase IV to be meaningful. We would explain it this way:

289 The consultation process in Phase IV was not to be a forum for the final determination and resolution of Aboriginal claims to rights and title. We agree, based on the Supreme Court’s reasoning in Haida Nation, that this was appropriate: the duty to consult is not a duty to determine unresolved issues. But disclosure by Canada of information concerning the affected First Nations’ strength of claims to rights and title was needed for another reason.

290 In law, the extent and strength of the claims of affected First Nations affect Canada’s level of obligation to consult and, if necessary, accommodate. It also defines the subjects over which dialogue must take place: a broad and strong claim to rights and title over an asserted territory means that broad subjects within that territory must be discussed and, perhaps, must be accommodated. Looking specifically at the case before us, Canada accepted that the obligation to consult was deep. But dialogue had to take place regarding what that meant. What subjects were on the table? How deep did the dialogue and, if necessary, accommodation have to go?

291 The case law is clear that Canada, acting under the duty to consult, must dialogue concerning the impacts that the proposed project will have on affected First Nations and to communicate its findings to the First Nations: Mikisew Cree First Nation, at paragraph 55. But contrary to that case law, Canada repeatedly told the affected First Nations that it would not share a matter fundamental to identifying the relevant impacts — information concerning the strength of the affected First Nations’ claims to Aboriginal rights and title.

292 For discussions during Phase IV to be fruitful and the dialogue to be meaningful, this had to happen. And, as we noted above, in a letter dated April 18, 2012, then Minister of the Environment committed to do just that — to provide a description of its strength of claim and depth of consultation assessment.

293 But Canada never provided the Haisla with that description. The evidence of Chief Ross of the Haisla shows that during Phase IV Canada relied on that commitment and avoided defining exactly what was to be played in the consultations:

99. There was no genuine discussion of the Haisla Nation’s strength of claim at the March and April Meetings. At the March Meeting, the Haisla Nation raised the importance of openly discussing Aboriginal rights and title — a topic [the Joint Review Panel] had avoided entirely — and asked the Crown representatives to share the Crown’s views of the strength of claims. In his letter dated April 18, 2012, the Minister of Environment had committed to sharing the Crown’s views of the strength of claims to rights and title and said that the Crown would work to disclose the strength of claims in order for consultation to be meaningful, and so that we would not proceed in the light of material information concerning the strength of claims. Strength of claims was an important matter that had to be considered in order for the consultation in Phase IV to be meaningful. We would explain it this way:

100. The Environment Canada representatives, Mr. Brett Maracle and Analise Saely, stated that, based on a preliminary analysis, they were of the view that the Haisla Nation had a strong Aboriginal title claim to the terminal site, a strong Aboriginal title claim to portions of the pipeline right-of-way within Haisla Territory, as well as a strong claim to Aboriginal rights to fish and harvest marine resources in parts of the Kitimat River, Kitimat River East Arm, and in the Douglas Channel. We asked that the Crown provide details as to what portions of the pipeline route they conceded Haisla Nation has a strong Aboriginal title claim to and what areas of water the Crown has conceded Haisla Nation has a strong claim of Aboriginal rights in. The Crown representatives stated they would seek permission to disclose the Crown’s actual strength of claim analyses, including further analyses of strength of claim along the pipeline route. A copy of a March 11, 2014 letter to the Crown documenting at page 4 some of what the Crown submitted in terms of the Haisla Nation’s strength of claim is found at pages 930 to 929 of Exhibit H to this my Affidavit. This letter, however, contains an error. On page 4, the letter incorrectly states that the Crown explicitly agreed that the Haisla Nation has a high strength of claims to Aboriginal Territory. In fact, the Crown representatives only explicitly admitted that the Haisla Nation has a strong claim to title at the terminal site and portions of the pipeline route, as well as a strong claim to fishing and harvesting rights in the aforementioned waters.

101. Shortly after the March Meeting, the Crown sent a letter to the Haisla Nation with a generic and deliberately vague statement about our Nation’s strength of claim to this my Affidavit. The letter makes a follows at page 2:

As discussed during our meetings on March 4 and 5, Canada’s preliminary strength of claim assessment is based on the information the Haisla Nation has provided to the Panel and in correspondence with government officials. Without making any determination of the Haisla Nation’s Aboriginal rights or title claims, our preliminary assessment of that information, for the sole purpose of the consultation process for this proposed project, is that it appears the Haisla Nation has a strong Aboriginal right [sic] to fish and harvest the marine resources described in the letter of March 24, 2014.

The Haisla asked, not for an adjudication of their rights, but for Canada’s assessment of the strength of their claim as they had asserted governance and title rights, i.e. far more than just harvesting rights. Brent Maracle responded that Canada had already gone through many ministerial levels to get approval for the statement about the strength of claim that was provided in Canada’s correspondence. Jim Clarke also advised they had very high expertise and had written this disclosure.

298 When asked if Canada agreed that the Gitxaala was owed a deep level of consultation, Mr. Maracle advised that he had not approved to say so. When further pressed, he repeated that Canada had tried to give as much information as it could about the rights of the Gitxaala, and what Canada representatives were able to share they had confirmed. Jim Clarke also advised they had written very heavily on this.

299 When asked if Canada agreed that the Gitxaala was owed a deep level of consultation, Mr. Maracle advised that he didn’t have approval to say so. When further pressed, he repeated that Canada had tried to give as much information as it could about the rights of the Gitxaala, and what Canada representatives were able to share they had confirmed. Jim Clarke also advised they had written very heavily on this.

300 Canada has a high strength of claim to Aboriginal title to the terminal site itself and to portions of the pipeline right-of-way. Our request for clarity and for disclosure of the Crown’s strength of claim analysis resulted in a statement which effectively told us nothing about the Crown’s view of the strength of our claim in relation to non-timber resources.

103. At the April Meeting, the issue of strength of claim was again raised, as was the deliberately vague strength of claim language in the March 24 letter. We expressed concern that such language was entirely unhelpful for the consultation process. Mr. Maracle and Mr. Jim Clarke, of the Major Project Management Office, told us that they were limited in what they were authorized to disclose. Specifically, Mr. Maracle stated that he had sought to disclose more and had drafted a letter that had not disclosed the strength of claim, but that his superiors had directed him to disclose nothing beyond what was in the letter quoted above. Mr. Clarke stated that he has been told to seek the disclosure of the Crown’s strength of claim analysis. He explicitly confirmed that the Minister of Natural Resources had directed that they not disclose and ordered that no further disclosure be made. We asked Mr. Clarke if he could explain the rationale behind the Crown’s refusal to share an analysis of the Haisla Nation strength of claim. He stated that he could not.

We stated that the effect of Canada’s refusal to share strength of claim analysis was that Minister Kent’s promise would be broken. The Crown representatives had no explanation. We copied a letter of May 7, 2014 expressing frustration with the Crown’s approach to Phase IV consultation is found at pages 1054 to 1056 of Exhibit H to this my Affidavit. [Emphasis added]

294 The experience of the Gitxaala was not dissimilar. By letter dated March 28, 2014, they were informed that Canada accepted the Gitxaala had a strong prorogative claim “to an Aboriginal right to fish and harvest shellfish and other marine resources for food, social and ceremonial purposes in the area claimed as part of the Gitxaala Nation traditional territory.”

295 Thereafter, the notes of the Phase IV consultation meeting held on April 3, 2014 show that the...
On cross-examination, Jim Clarke confirmed "Canada has not provided a detailed impact assessment to the Gitxaala, nor would Canada consider that to be a normal part of an environmental assessment process." Perhaps such an assessment is not part of an environmental assessment process — but the Supreme Court has held it to be a necessary part of meaningful consultation.

Again, we refer to the affidavit of Chief Ross on this point:

306 At the March meeting, we asked the Crown representatives to provide us with a list of the allegations of the Haisla Nation's Aboriginal rights and title that the Crown had identified as flowing from the Project. Mr. Maracle stated that this was work in progress but that he would try to get that information to us as soon as possible. However, at the April meeting, Mr. Maracle stated that his supervisor had misunderstood any discussion of the Crown's assessment of Aboriginal rights and title. In fact, Mr. Maracle told us that Canada had a document that set out the Haisla Nation's strength of claim, the severity of impacts from the Project, and the depth of consultation required, but that the Crown representatives had been forbidden from sharing that. We asked Mr. Maracle if he knew what the rationale was for his supervisors directing him to not provide this information. Mr. Maracle stated that he did not know. [Emphasis added]

304 This evidence is again consistent with the notes of the consultation meeting held on April 8 and 9, 2014, except that at the meeting Mr. Maracle stated that the direction precluding disclosure came from the Ministerial level.

305 We are satisfied that neither the Gitxaala nor the Haisla were unmanned. Rather, the higher level of government directed that information vital to the assessment of the required depth of consultation (Canada's understanding of the strength of the right claimed and the potential impact of that right) not be shared with any First Nation.

306 We note that Canada does not argue that it was not obliged to consult with respect to title and governance matters. Rather, it argues that it reasonably accommodated potential impacts on assertions of Aboriginal title and governance claims to the point of Project development.

307 This is similar to the strategy that Canada employed with respect to disclosing its strength of claim assessments at the Phase IV consultation meetings. It was Canada's view that a dialogue regarding the context and extent of a particular right claimed was unnecessary and it attempted to focus the meetings on mitigation and minimization of impacts. For example, at the April 3 meeting, the Gitxaala asked Canada "When Canada says it's taking the rights at face value, what does that mean? That it accepts Gitxaala has these rights?" Brent Maracle for Canada responded "No, it means considering whether there are measures that could address these impacts."

308 In our view, it was not consistent with the duty to consult and the obligation of fair dealing for Canada to simply assert the Project's impact would be mitigated without first discussing the nature and extent of the rights that were to be impacted. In order for the applicant/appellant First Nations to assess and comment upon the impacts of the Project on their rights there must first be a respectful dialogue about the asserted rights. One cannot simply state that the impacts have been acknowledged, a failure to consult cannot be justified by moving directly to accommodation. To do so is inconsistent with the principle of fair dealing and reconciliation.

309 While we agree with Canada that the consultation process was not a proper forum for the negotiation of title and governance matters, similar to other asserted rights, affected First Nations were entitled to a meaningful dialogue about the strength of their claim. They were entitled to know Canada's information and views concerning the context and strength of their claims so they would know and would be able to discuss with Canada what was in play in the consultations, the subjects on which Canada might have to accommodate, and the extent to which Canada might have to accommodate. Canada's failure to be candid on this point, particularly in light of the initial commitments made in the letter of the Minister of the Environment dated April 11, 2012 (discussed at paragraphs 220 and 292, above), was legally unacceptable. Canada's failure frustrated the sort of genuine dialogue the duty to consult is meant to foster.

310 We now consider the adequacy of Canada's reasons.

311 In the present case, Canada was obliged at law to give reasons for its decision directing the National Energy Board to issue the Certificates. The source of this obligation was two-fold. As we develop in more detail below, in the present circumstances where a requirement of deep consultation existed, the Crown was obliged to give reasons. Additionally, subsection 54(2) of the National Energy Board Act requires that where the Government in Council orders the National Energy Board to issue a certificate, the order “must set out the reasons for making the order.”

312 Canada argues that the requirement to give reasons was met for the following reasons:
- Neither the National Energy Board Act nor the Canadian Environmental Assessment Act, 2012 require the Governor in Council to expressly address the adequacy of consultation in the order, nor to provide reasons in relation thereto.
- To the extent that the fulfillment of the duty to consult required reasons to be provided with respect to Canada's assessment of Aboriginal concerns and the impact those concerns had, the June and July letters addressed the information and issues arising in the consultation process to the point of the Governor in Council's decision. * Added to the other aspects of the record and the lengthy consultation process in this case that unfolded over several years, the June and July letters only accomplish this purpose.
- Read together with the findings and recommendations found in the Report of the Joint Review Panel, the Order in Council allows the parties and the
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326 The Project is large and has been in the works for many years. But the largeness of the Project means that its effects are also large. Here, lavishly, many of the potentially detrimental effects appear to have been eliminated or mitigated as a result of Northern Gateway’s design of the Project, the voluntary undertakings it has made, and the 209 conditions imposed on the Project. But by the time of Phase IV consultations, legitimate and serious concerns about the effect of the Project upon the interests of affected First Nations remained. Some of these were concluded by the Joint Review Panel but many of these were not, given the Joint Review Panel’s terms of reference. The Phase IV consultations, when the Report of the Joint Review Panel were meant to provide an opportunity for dialogue about the Report and to fill in the gaps.

327 However, the Phase IV consultations did not sufficiently allow for dialogue, nor did they fill the gaps. In order to comply with the law, Canada’s officials must be empowered to dialogue on all subjects of genuine interest to affected First Nations, to exchange information freely and candidly, to provide explanations, and to complete their task to the level of reasonable fulfilment. That means that, including any new proposed conditions, need to be formulated and shared with Northern Gateway for input. And, finally, these recommendations and any necessary information must be to be placed before the Governor in Council for its consideration. In the end, it has not been demonstrated that any of these steps took place.

328 In our view, this problem likely would have been solved if the Governor in Council granted a short extension of time to allow these steps to be pursued. But in the face of the requests of affected First Nations for more time, there was silence. As best as we can tell from the record, these requests were never conveyed to the Governor in Council, let alone considered.

329 Based on this record, we believe that an extension of time in the neighborhood of four months — just a fraction of the time that has passed since the Project was first proposed — might have sufficed. Consultation to a level of reasonable fulfilment might have further reduced some of the detrimental effects of the Project identified by the Joint Review Panel. And it would have furthered the constitutionally-significant goals the Supreme Court has identified the duty to consult — the honourable treatment of Canada’s Aboriginal peoples and Canada’s reconciliation with them.

330 At the end of Phase IV of the consultation process the Governor in Council. As we have explained above at paragraphs 159-168, under this legislative scheme the ultimate responsibility for considering whether the duty to consult has been fulfilled and whether necessary action be taken in response thereto lies with the Governor in Council and no one else. As a matter of law, the Governor in Council had to receive and consider any new information or new recommendations stemming from the concerns expressed by Aboriginal peoples during the consultation and, if necessary or appropriate, react, for example by imposing further conditions on any certificates it was inclined to grant.

331 Did the Governor in Council fail to fulfill this legal obligation? In its Order in Council, the

332 The Governor in Council decided to acknowledge only the existence of consultations by others during the process. It did not say more despite the requirement to provide reasons under section 54 of the National Energy Board Act and under the duty to consult. The Governor in Council had to provide reasons to show that it fulfilled its legal obligation. It did not do so.

333 Overall, bearing in mind that only reasonable fulfilment of the duty to consult is required, we conclude that in Phase IV of the consultation process — including the execution of the Governor in Council’s role at the end of Phase IV — Canada fell short of the mark.

334 For the foregoing reasons, the Order in Council must be quashed. The Order in Council designated that the National Energy Board issue the Certificates. Now that the basis for the Certificates is a nullity, the Certificates are also a nullity and must be quashed. The matter is remitted to the Governor in Council for redetermination.

335 In that redetermination, the Governor in Council is entitled to make a fresh decision — one of the three options identified at paragraph 113 above, including the making of additional conditions discussed at paragraphs 159-168 above — on the basis of the information and recommendations before it based on its current views of the broad policies, public interests and other considerations that bear upon the matter. For example, if the Governor in Council, in looking at the matter afresh, considers that the environmental recommendations are unsatisfactory because the environmental assessment should have been conducted differently, it may exercise its discretion under section 53 to have the National Energy Board redetermine the matter.

336 But if the Governor in Council decides in that redetermination to have Certificates issue for the Project, it can only make that decision after Canada has fulfilled its duty to consult with Aboriginal peoples, in particular, at a minimum, only after Canada has re-done in Phase IV consultation, a matter that, if well-organized and well-executed, need not take long.

337 As a result of that consultation, Canada may obtain new information that affects the Governor in Council’s assessment whether Canada has fulfilled its duty to consult. It may prompt Canada to accommodate Aboriginal concerns by recommending that additional conditions be added to the Project. It may also affect the balance of considerations under section 54 of the National Energy Board Act. Thus, any new information and new recommendations must be placed before the Governor in Council.

338 It goes without saying that as a matter of procedural fairness, all affected parties must have an opportunity to comment on any new recommendations that the coordinating Minister proposes to make to the Governor in Council.

339 This leaves the Governor in Council in the same position as it was immediately before it first issued the Order in Council. All the powers that were available to it before are available to it now.

340 We thank the parties for the great assistance they have provided to the Court throughout.

STRATAS J.A.

INVESTIGATION REPORT: THE 48 HOURS AFTER THE GROUNDING OF THE NATHAN E. STEWART AND ITS OIL SPILL

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Page 90
intervention. In the Project approval process, the Crown had the obligation to fulfill the duty to consult. As a result, any explanation to why the duty to consult was adequately discharged rested with the Crown, not the Governor in Council. The Majority Reasons (paragraph 351) appear to take issue with the Governor in Council's reference in the Order in Council to "consultations by others." I do not accept this as a valid criticism because, at least implicitly, it places an obligation on the Governor in Council to directly engage in Haida consultations with respect to the Project, rather than to simply determine the adequacy of the consultations that were undertaken by the Crown.

361 In my view, the Crown's reasons for concluding that it had met its duty to consult are readily apparent:

* an extensive consultation process was created, documented and implemented through the Aboriginal Consultation Framework, the Joint Review Panel Project approval process and the Phase IV consultations;
* all of the applicant/appellant First Nations were encouraged to participate in the process and received, or were entitled to receive, funding in respect of their participation;
* the Crown acknowledged the potential impacts of the Project on the Usu Rights; and
* many of the First Nations' concerns were accommodated through the 209 conditions detailed in the Report.

362 The Crown's reasoning was, in my view, adequately demonstrated by the Report, the Phase IV consultation meetings, the Crown Consultation Report and the correspondence from the Crown to the First Nations who engaged in the Phase IV consultations. A more explicit explanation from the Crown was not required. Furthermore, in my view, the Governor in Council had no obligation to repeat the reasons providing exercise.

363 In my view, it is apparent from the Order in Council that the Governor in Council determined that the Crown's duty to consult had been met, thereby satisfying the condition precedent to the exercise of its power to issue the Order in Council. With respect, I find it difficult to accept that, notwithstanding the brevity of the reference to Crown consultation in the Order in Council, there is any doubt that the Governor in Council considered and determined the critical issue of whether or not the Crown had met its duty to consult obligations. As discussed above, at a minimum, the Governor in Council had the Phase IV Consultation Report before it, both of which clearly addressed this issue and both of which the Governor in Council was presumed to have reviewed. For the reasons that I have given, I conclude that the duty to consult was met in the circumstances and the Governor in Council was correct in so acknowledging. As no other defect has been demonstrated, the Order in Council should stand.

364 For the foregoing reasons, I would dismiss the appeals and appeals with costs.

Ryer J.A.
**INVESTIGATION REPORT: THE 48 HOURS AFTER THE GROUNDING OF THE NATHAN E. STEWART AND ITS OIL SPILL**

**SCHEDULE 32**

---

**UNIFIED COMMAND SITUATION REPORT**

**STH**

- *Incident:* Nathan E. Stewart incident
- *Incident Start Date:* October 26, 2019
- *Current Date/Time:* October 29, 2019, 09:30

**Location**

- Strait of Belle Isle, approximately 13 miles west of Bell Island

**Situation**

The Nathan E. Stewart and Bella della Fuente are on the rocks at 1020Z (10:20 AM) PST yesterday morning. The ice was located in Canadian Waters at 52°14.438N, 132°47.136W. The entrance to St. John’s Channel. The tug remains aground on Atholmore Island, approximately 3600 feet from Bella della Fuente at the north end of Cavanal Island. Water around the vessel is very weak, with no signs of water ingress. The ship is aground on shallow water and is in a specific area of known shoals. The captain was informed by the VTS to proceed to St. John’s Channel for further assistance.

---

**UNIFIED COMMAND SITUATION REPORT**

- **Reports**
  - **SAFETY**
    - No incidents have been reported related to biocides or reponse
  - **USCG/BCWS**
    - Work is being coordinated with all CEI agencies and the Canadian Coast Guard
  - **Tracking**
    - The NCC/BCWS will continue to monitor the situation

---

**UNIFIED COMMAND SITUATION REPORT**

- **Environment**
  - **BC Ministry of Environment**
    - Coordinating efforts with environmental agencies
  - **NCC/BCWS**
    - Tracking and reporting on current conditions

---

**UNIFIED COMMAND SITUATION REPORT**

- **Biological**
  - **NCC/BCWS**
    - Monitoring the effects of the spill on local wildlife

---

**UNIFIED COMMAND SITUATION REPORT**

- **Unified Commander**
  - Captain Doug MacGrady (Coast Guard Commandant)
  - Deputy Commandant (Deputy Commander)
  - John Wertime (Deputy Commander)

---

**UNIFIED COMMAND SITUATION REPORT**

- **Unified Commander**
  - Captain Doug MacGrady (Coast Guard Commandant)
  - Deputy Commandant (Deputy Commander)
  - John Wertime (Deputy Commander)

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**UNIFIED COMMAND SITUATION REPORT**

- **Unified Commander**
  - Captain Doug MacGrady (Coast Guard Commandant)
  - Deputy Commandant (Deputy Commander)
  - John Wertime (Deputy Commander)
UNIFIED COMMAND SITUATION REPORT

Warnings (in effect)

No warnings in effect.

Lee Deery
Responsible Party's Incident Commander

Jeff Hardy
Federal Incident Commander

John Spenv
Provincial Incident Commander

William Houck
First Nation Incident Commander

UNIFIED COMMAND SITUATION REPORT

Tides

UNIFIED COMMAND SITUATION REPORT

UNIFIED COMMAND SIGNATURES:

Unified Command Situation Report 09:30am | Page 05

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SCHEDULE 33

RIR 16-020 NES (AIS track history FRE-SFC 1)

SCHEDULE 34

RIR 16-020 NES (AIS track history FRE-SFC 2)
<table>
<thead>
<tr>
<th>Date/Time</th>
<th>Action/Event/Notes</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/14/2016 16:25</td>
<td>Unified Command has established a sit rep protocol for field operations. All operations to radio the CCG Headquarters for authority.</td>
<td>2</td>
</tr>
<tr>
<td>10/14/2016 15:36</td>
<td>Picked up 350’ of boom in Gale Creek (same location as before). Double boomed and environmental response center.</td>
<td>2</td>
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<tr>
<td>10/14/2016 12:10</td>
<td>Canadian CG will relay to on-scene commander.</td>
<td>2</td>
</tr>
<tr>
<td>10/14/2016 11:50</td>
<td>Tug DILLIGENCE also on scene w/tug. Boom is around tug. Tug is lying on its port side with 15-20 list. Upper house is visible.</td>
<td>2</td>
</tr>
<tr>
<td>10/14/2016 11:05</td>
<td>Gear oil, lube oil, and hydraulic oil sealed with splash zone.</td>
<td>2</td>
</tr>
<tr>
<td>10/14/2016 10:15</td>
<td>M/V Eagle Bay deployed 1000’ of boom in Gale Creek (same location as before). Double boomed and environmental response center.</td>
<td>2</td>
</tr>
<tr>
<td>10/14/2016 09:40</td>
<td>Pre pared By Brown, Ayla, Updated 01/16/2017 16:26 GMT -8:00</td>
<td>2</td>
</tr>
<tr>
<td>10/14/2016 04:10</td>
<td>Instructed all response resources to stand down for the evening. HAISEES GUARDIAN has barge in tow.</td>
<td>2</td>
</tr>
<tr>
<td>10/14/2016 01:05</td>
<td>Date/Time</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>10/13/2016 22:41</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Incident Commander:</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Vessel Bartlett on Channel 83A at 1000, 1300, and 1600 with a situation status report.</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>[10/13/2016 13:45]</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>INCIDENT ACTION PLAN SOFTWARE</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>© TRG</td>
<td>1</td>
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<tr>
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<tr>
<td></td>
<td>SCHEDULE 35</td>
<td>1</td>
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<tr>
<td></td>
<td>ICS 201-2 - Summary of Current Actions</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Version Name: Initial Response</td>
<td>1</td>
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<tr>
<td></td>
<td>Prepared By Brown, Ayla, Updated 01/16/2017 16:26 GMT -8:00</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Pre pared By Brown, Ayla, Updated 01/16/2017 16:26 GMT -8:00</td>
<td>2</td>
</tr>
</tbody>
</table>
SCHEDULE 36

AIS picture of the Nathan E. Stewart wreck location and track (Ingmar Lee)

SCHEDULE 37

Area 7 - Pacific Region Sanitary Closures - Closure 7.ee

Harvesting of bivalve shellfish is prohibited within the waters and intertidal foreshore of a portion of Area 7, described as waters within DFO stocking areas 7-8, 7-9, 7-12, 7-19, 7-20, 7-21, 7-22, 7-23, 7-24, and 7-32.

Closed until further notice

Area 7 - Pacific Region Sanitary Closures and Emergency Closure Areas
INVESTIGATION REPORT: THE 48 HOURS AFTER THE GROUNDING OF THE NATHAN E. STEWART AND ITS OIL SPILL

UNIFIED COMMAND SITUATION REPORT
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**1800 ON WATER WEATHER REPORT (19 Nov 2016)**

**MV Nathan E. Stewart, Seaford Channel**

**CCGS Ocean Rook**

**CCGS Gordon Reid:**
At anchor in Seaford Channel (52° 14.00' N 129° 23.64' W)

**Weather at Gordon Reid:**

- **Wind:** N25°E
- **Swell:** 0.3 m, w-sw
- **Visibility:** 12+ NM
- **Temp:** 5.6 C
- **Pressure:** 1024 mbar

**Environment Canada Marine Forecast—Central Coast from Moresby Island to Prince Island (V90):**

- **Gale warning in effect:** wind west 15 knots or more southeast 25 to 35 knots over southern sections. Wind becoming northeast 10 to 15 Sunday evening.

**Observations:**

SCAT: FOG forces work today. Due operations at UTS site within riding today. All vessels about down.

---

**Unified Command Situation Report 1700 HRS | Page 06**

**Marine Weather Statement**

**Technical Marine Synopsis**

Issued 4:05EST PST 19 November 2016

- **Wind:** 15 knots or more.
- **Visibility:** 12+ NM.
- **Temperature:** 5.6 C.
- **Pressure:** 1024 mbar.

**Environment Canada Marine Forecast—Central Coast from Moresby Island to Prince Island (V90):**

- **Gale warning in effect:** wind west 15 knots or more southeast 25 to 35 knots over southern sections. Wind becoming northeast 10 to 15 Sunday evening.

**Observations:**

SCAT: FOG forces work today. Due operations at UTS site within riding today. All vessels about down.

---

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**Unified Command Situation Report 1700 HRS | Page 07**
SCHEDULE OF PHOTOGRAPHS

Cover Photo: Kyle Artelle, November 12, 2016; Beach photograph of the Nathan E. Stewart and booms.

Photo 1: April Bencze, October 22, 2016; A life ring from the Nathan E. Stewart floating in sheen of diesel oil, at p. 2.

Photo 2: April Bencze, October 22, 2016; The Nathan E. Stewart view of the bow, above and below the surface of the water, at p. 8.

Photo 3: Tavish Campbell & April Bencze; October 26, 2016; Aerial view of diesel oil sheen at the shore of Gale Creek, at p. 15.

Photo 4: Kyle Artelle, November 8, 2016; Aerial view of the upper portion of the Nathan E. Stewart bridge, flying bridge and booms in rough water, at p. 21.

Photo 5: Kyle Artelle, November 10, 2016; Aerial view of the top portion of the Nathan E. Stewart’s flying bridge with ineffective booms and diesel oil sheen, at p. 23.

Photo 6: April Bencze, October 22, 2016; Looking at the back of the Nathan E. Stewart bridge with boom in the foreground, at p. 24.


Photo 8: Kyle Artelle, November 14, 2016; A crane raising the sunken Nathan E. Stewart from Seaforth Channel, at p. 30.

Photo 9: Tavish Campbell & April Bencze, October 23, 2016; Aerial view of the sunken Nathan E. Stewart, broken booms and oil sheen, at p. 33.

Photo 10: April Bencze, October 23, 2016; A killer whale is spotted in Seaforth Channel, at p.34 (top photo).

Photo 11: Tavish Campbell & April Bencze, October 22, 2016; Sinking of the Nathan E. Stewart, diesel oil sheen on water, at p. 34 (bottom photo).

Photo 12: Kyle Artelle, November 12, 2016; Diesel-soaked marine resources and washed-up containment booms, at p. 35 (top photo).

Photo 13: Kyle Artelle, November 12, 2016; Broken up containment boom on the beach nearby the sunken Nathan E. Stewart, at p. 35 (middle photo).

Photo 14: April Bencze, October 23, 2016; Sinking of the Nathan E. Stewart, diesel oil on pebbled beach, at p.35 (bottom photo).

Photo 15: Jordan Wilson, October 13, 2016; The Nathan E. Stewart attached to DBL-55 just after sinking at 10:09 a.m., at p. 38.
Photo 16: Jordan Wilson, October 13, 2016; The crew of the *Nathan E. Stewart* evacuating *DBL-55* onto a Coast Guard zodiac, at p. 41.

Photo 17: Robert Johnson, October 13, 2016; Photograph of Guardian Watchman, at p. 43.

Photo 18: Jordan Wilson, October 13, 2016; View of the *Nathan E. Stewart* sinking while still attached to *DBL-55*, at p. 46.

Photo 19: Jordan Wilson, October 14, 2016; Other vessels at the scene of the Incident on October 14, 2016, at p. 47.

Photo 20: Jordan Wilson, October 14, 2016; View of flying bridge of sunken *Nathan E. Stewart* with booms, and shore in background, at p. 54.

Photo 21: Robert Johnson, October 13, 2016; Photograph of the diesel oil from the *Nathan E. Stewart* on the beach, at p. 58.

Photo 22: Jordan Wilson, October 13, 2016; Diesel oil sheen on the water at 10:52 a.m., at p. 63.

Photo 23: Kyle Artelle, November 14, 2016; The *Nathan E. Stewart* being removed from Seaforth Channel, at p. 72 (top photo).

Photo 24: Tavish Campbell, November 17, 2016; The *Nathan E. Stewart* being transported out of Heiltsuk territory, at p. 72 (bottom photo).

Photo 25: Kyle Artelle, November 13, 2016; Crew from the *D.B. General*, from Seattle Washington preparing to raise the sunken *Nathan E. Stewart* from Seaforth Channel, at p. 74.
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