

HEILTSUK TRIBAL COUNCIL

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.

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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 FarewellCoast GuardCape St. JamesCoast GuardJohn P. TullyCoast Guard

Shearwater vessels

Central Coaster Shearwater

Clowhom Spirit Shearwater (operating on behalf of WCMRC)

Gulf RivalShearwaterHaisea GuardianShearwater

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

SCHEDULE	DATE	ITEM	PAGE NO.
1	Oct. 17, 2016 – Oct. 20, 2016	Emails between L. Fong & Coast Guard re Requests for Documents	76
2	Oct. 15, 2016	Search and Rescue (SAR) Mission Report (Coast Guard)	77
3	Oct. 17, 2016	Emails between L. Fong & W. Braul <i>et al</i> , re request for access to crew by Heiltsuk; request for documents	78
4	Oct. 18, 2016	Letter from L. Fong to R. Dick, TC re Heiltsuk Access to Information and TC's Communication	79
5	Oct. 28, 2016	Letter from R. Dick, TC to L. Fong re response to Oct. 17/18th emails requesting disclosure; disclosure to be discussed	79
6	Oct. 28, 2016	Letter from A. Callicum to TC re request for TC to disclose information within its possession & control	80
7	Nov. 10, 2016	Emails between D. Bertrand and R. Dick, TC re reiterating Oct. 28th requests and confirmation of an intention to discuss possible approaches	81
8	Dec. 13, 2016	Letter from R. Dick, TC to Chief Slett re declining to disclose information due to TSB investigation	81
9	Nov. 13, 2016 – Nov. 15, 2016	Emails between L. Fong & D. Rossi re HTC request for information regarding the specifications for the Tug & Barge	82
10	Oct. 28, 2016 – Nov. 17, 2016	Emails Y. Myers,TC to K. Seaby re suggestion for HTC to make request for specifications for the Tug & Barge to Kirby	82
11	Oct. 28, 2016	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	84
12	Nov. 24, 2016 & Jan. 11, 2017	Email request by D. Jones on behalf of HTC to D. Rossi for specifics re the Tug & Barge	85
13	Dec. 5, 2016 – Dec. 14, 2016	W. Braul Email response to D. Bertrand – Kirby denies HTC's request for documents due to TSB investigation	86
14	Dec. 5, 2016	Letter D. Bertrand to W. Braul re request for information and documents	86
15	Dec. 5, 2016	Letter D. Bertrand to P. Huot, TSB re request for information and documentation in their possession	87
16	Jan. 9, 2017	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 <i>Nathan E. Stewart</i>	88
17	Dec. 5, 2016	Letter from D. Bertrand to R. Dick, TC re follow-up to Oct. 28, 2016 request for documents for which access was refused	89

SCHEDULE	DATE	ITEM	PAGE NO.
18	Oct. 15, 2016	Letter from Chief Slett to Kirby Offshore re HTC formally requests to interview the crew of the <i>Nathan E. Stewart</i> (the "Crew") as soon as possible and before they depart Bella Bella	89
19	Oct. 15, 2016	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	89
20	Oct. 16, 2016 – Oct. 18, 2016	Emails between Coast Guard and L. Fong re Coast Guard denying HTC's request to interview the Crew	90
21	Jan. 13, 2017	NATHAN E STEWART DBL-55 - Damage Survey Report (Rev1) IMC Ref. 10807.16.63	91
22	Nov. 9, 2016 – Nov. 10, 2016	Emails between Y. Myers, TC, D. Rossi and L. Fong re HTC and HTC's Marine Surveyor denied access to inspect the Barge	97
23	Nov. 9, 2016 – Nov. 10, 2016	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	98
24	Dec. 21, 2011	Alaska Department of Environmental Conservation Situation Report re the <i>Nathan E. Stewart</i>	100
25	Feb. 9, 2015	Letter Kirby to PPA re Pilotage Waiver Renewal Request	101
26	Feb. 24, 2016	Letter from I. Forget, PPA to Kirby re Renewal of Waiver Confirmation until March 1, 2017	102
27	Oct. 16, 2016	Letter from PPA to Kirby re Kirby Waiver Revoked as of Oct. 16, 2016 (redacted version)	103
28	Oct. 26, 2016	Email from B. Young, PPA to Chief Slett re Copy of Letter Revoking Kirby's Waiver	103
29	Oct. 24, 206	NEWS RELEASE PPA re New and Interim Measures for Waiver System	104
30	Current	Central Coast First Nation Marine Use Plan - Executive Summary	105
31	June 23, 2016	Gitxaala Nation v. Canada 2016 FCA 187	113
32	Oct. 15, 2016	Unified Command Situation Report 09:30am	137
33	N/A	RIR 16-020 NES (AIS track history FRE-SFC 1)	139
34	N/A	RIR 16-020 NES (AIS track history FRE-SFC 2)	139
35	Jan. 16, 2017	ICS 201-2 - Summary of Current Actions – Initial Response for Oct. 14, 2016	140
36	Oct. 13, 2016	AIS picture of the <i>Nathan E. Stewart</i> wreck location and track (Ingmar Lee)	141
37	N/A	Area 7 - Pacific Region Sanitary Closures and Emergency Closure Areas	141
38	Nov. 19, 2016	Unified Command Situation Report 1700 HRS	142

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 *Qvúqvayáitxv* 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 xv*; *Yísdait xv*; *Wúi\'it xv*; *Qvúqvayáitxv*, and *Xáixáis*; (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 (*Tàxuài*) 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.

- 10. 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.
- 11. 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.
- 12. 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.
- 14. 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.

DATE OF REQUEST	REQUEST MADE TO	REQUESTED DOCUMENT(S)	RESULT OF REQUEST	REFERENCE
Oct. 16, 2016	Kirby Corporation	Electronic data and documentation regarding the tug and barge. [Requested during meeting]	Failed to respond.	
Oct. 17, 2016	Coast Guard	All recoverable items on board the NES, including the log book and black box.	Responded: Could not provide Log Book/Deck Log because not in possession of Coast Guard (via email dated Oct. 20, 2016).	Schedule 1 (and 2)
			Provided Marine Communications and Traffic Services data for NES on approximately Oct. 24, 2016 (confirmed via email dated Oct. 20, 2016).	
			Provided a copy of the Search and Rescue Report (Schedule 2).	
Oct. 17, 2016	Kirby Corporation	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.	Failed to respond.	Schedule 3
Oct. 18, 2016	TC	Access to information regarding the oil spill, tug sinking, and barge stranding incidents.	Failed to respond substantively: TC agreed to work with HTC through Heiltsuk Nation Planning Committee (via letter dated Oct. 28, 2016) (Schedule 5).	Schedule 4

DATE OF REQUEST	REQUEST MADE TO	REQUESTED DOCUMENT(S)	RESULT OF REQUEST	REFERENCE
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 logbook for the voyage, engine room maintenance log for the last 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, 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

DATE OF REQUEST	REQUEST MADE TO	REQUESTED DOCUMENT(S)	RESULT OF REQUEST	REFERENCE
Undated	Pacific Pilotage Authority	Oral request from meeting in late October.	List of Masters and mates on vessels operated by Kirby Offshore Marine, LLC who have experience in BC Coastal waters.	Schedules 26, 27 and 28
			Letter of Feb. 24, 2016 to Capt. Pete Pawlicki regarding waiver from compulsory pilotage renewed until March 1, 2017.	
			Letter of Oct. 16, 2016 to Kirby Corporation regarding the revocation of BC coast pilotage waivers for all Kirby vessels and marine officers.	
			On Oct. 26, the PPA declined to disclose the reason for its suspending Kirby's pilotage waiver until the TSB released its report.	
Nov. 10, 2016	ТС	Reiterated request in Oct. 28, 2016 letter.	Denied request due to ongoing investigation (via letter dated Dec. 13, 2016) (Schedule 8).	Schedule 7 (and 8)
Nov. 13, 2016	Kirby Corporation	Requested the general barge & 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.	Failed to respond.	Schedule 9

DATE OF REQUEST	REQUEST MADE TO	REQUESTED DOCUMENT(S)	RESULT OF REQUEST	REFERENCE
Nov. 15, 2016	Kirby Corporation	Followed up on request from Nov. 13, 2016.	Failed to respond.	Schedule 9
Nov. 16, 2016	ТС	Requested the general barge & 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.	Failed to respond.	Schedule 10 and 11
Nov. 24, 2016	Kirby Corporation	Followed up on request from Nov. 13, 2016.	Denied request due to participating in regulatory processes and stated cannot disclose documents subject to investigation (via email dated Dec. 14, 2016) (Schedule 13).	Schedule 12 (and 13)
Dec. 5, 2016	Kirby Corporation	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 & 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;	Denied request due to participating in regulatory processes and stated cannot disclose documents subject to investigation (via email dated Dec. 14, 2016) (Schedule 13).	Schedule 14 (and 13)

DATE OF REQUEST	REQUEST MADE TO	REQUESTED DOCUMENT(S)	RESULT OF REQUEST	REFERENCE
		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 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, plan of transcripts concerning interviews of 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 12, 2016, was imposed for this request.		

DATE OF REQUEST	REQUEST MADE TO	REQUESTED DOCUMENT(S)	RESULT OF REQUEST	REFERENCE
Dec. 5, 2016	TSB	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 & 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.	Denied request due to ongoing investigation (via letter dated Jan. 9, 2017) (Schedule 16).	Schedule 15 (and 16)
		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		

DATE OF REQUEST	REQUEST MADE TO	REQUESTED DOCUMENT(S)	RESULT OF REQUEST	REFERENCE
		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.		
Dec. 5, 2016	TC	Reiterated request in Oct. 28, 2016 letter and requested photos, all related documentation and all data that can be derived from any equipment removed from the tug and barge before HTC conducted the inspections of the vessels.	Denied request due to ongoing investigation (via letter dated Dec. 13, 2016) (Schedule 8).	Schedule 17 (and 8)
		A deadline of December 12, 2016, was imposed for this request.		



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.
- HTC requested and was provided periods of access to the IAP Software between October 2016 17. and February 2017.
- The IAP Software provided only limited information with respect to the events occurring within the 18. first forty-eight hours of the grounding, which was largely used to confirm information from interviews.

3.2. **INTERVIEWS**

3.2.1. Requests

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

3.2.2. Witnesses

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

¹ More information on the IAP Software can be found here: 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

² See <u>www.kirbycorp.com</u>

See <u>www.kirbycorp.com/about/</u>

⁴ See <u>www.kirbycorp.com/marine-transportation/</u>

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 3000-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. <u>June 2015 Houston Ship Channel (Kirby Inland Marine LP)</u>: 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

⁶ Gordon Smith, "Kirby Maritime's tug collided with dock at Subsea 7 facility in Texas and caused spill of low-sulfur diesel fuel" Maritime Herald (Oct. 13, 2016), online: Maritime Herald www.maritimeherald.com.

Mike Schuler, "Barge Allision: Naptha Spill Closes Houston Ship Channel" GCaptain (June 11, 2015), online: GCaptain www.gcaptain.com.

Emma G. Fitzsimmons, "Crews work to contain oil barge's leak", New York Times (March 23, 2014) online: New York Times www.nytimes.com>.

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

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

¹¹ 3G Fishing Charters LLC v. Kirby Inland Marine LP, No. 3:14-cv-00107, S.D. Texas. Court filling can be found here: http://bloximages.newyork1.vip.townnews.com/galvnews.com/content/tncms/assets/v3/editorial/f1/4/f749545c-bc3a-11e3-a4e0-001a4bcf6878/533f1ba9184bc.pdf.pdf

¹² Kirby Inland Marine LP v. Shipowners Insurance and Guaranty Co. Ltd., No. 15-303, S.D. Texas.

¹³ Lexis Legal News, "Ship Owner seeks finding that Insurer owes coverage for Insured's negligence" (Nov. 3, 2015), online: Lexis Legal News http://www.lexislegalnews.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 favour of the appellants. The claimants suffered no physical damage to their property. The claims were barred by case law precedent.¹⁴

b. <u>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.</u>: 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.

¹⁴ Taira Lynn Marine Ltd. No. 5, LLC v Jays seafood Inc., 444 F.3d 371, 2006 U.S. App. LEXIS 7307, 2006 A.M.C. 1055, 62 Env't Rep. Cas. (BNA) 1129, 36 Envtl. L. Rep. 20061 (5th Cir. La. 2006). Please note that this case did not involve personal injury, physical damage, or the claims of commercial fishermen.

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.

¹⁵ Union Pac. R.R. v. Kirby Inland Marine, Inc., 296 F.3d 671, 2002 U.S. App. LEXIS 18215, 2002 A.M.C. 1865, 59 Fed. R. Serv. 3d (Callaghan) 820, 59 Fed. R. Evid. Serv. (CBC) 820 (8th Cir. lowa 2002).

¹⁶ See <u>www.ntsb.gov/Pages/default.aspx</u>



Upper portion of the Nathan E. Stewart bridge, flying bridge and booms in rough water.

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

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

Туре	Tug
IMO Number	8968210
Flag / Home port	USA / New York
Built	2007 at Hope Services, Inc., Dulac, Louisiana
GT / NT	300 / 90
Length	30.48m
Breadth (molded)	9.75m
Depth	4.18m
Class	ABS
Owners	Kirby Offshore Marine Operating LLC
Managers	Kirby Offshore Marine Pacific LLC

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.

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

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).
- 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.
- 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[d] 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.



Aerial view of the top portion of the Nathan E. Stewart flying bridge with ineffective booms and diesel oil sheen.

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.
- 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.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.



Looking at the back of the Nathan E. Stewart bridge with boom in the foreground.

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
- 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
- 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 tons²² 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
- 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 <u>www.ppa.gc.ca/text/index-e.html</u>

¹⁹ Pacific Pilotage Regulations, CRC, c 1270, s 10.

²⁰ https://www.youtube.com/watch?v=cdEYH15ojV4&t=24s

Pacific Pilotage Website, located online on January 24, 2017 at: https://www.ppa.gc.ca/text/documents/How_to_become_a_pilot_eng.pdf

²² Pacific Pilotage Regulations, CRC, c. 1270, s. 9(1).

Pacific Pilotage Regulations, CRC c. 1270, s. 16(1)(a) and (b).



Crew members moving from the sinking Nathan E. Stewart onto barge DBL-55, October 13, 2016.

- 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).
- 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.
- 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).

WORLD CLASS SPILL RESPONSE 5.0

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.
- TC is the lead federal regulatory agency responsible for Canada's "Marine Oil Spill Preparedness 62. 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.²⁴ The Coast Guard leads the response and is responsible for conducting spill management during ship-source oil spills in Canadian waters.²⁵ 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.²⁶ 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, 27 to achieve what Canada has called a "World Class Tanker Safety" system. 28 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.²⁹ 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.30

Transport Canada, National Oil Spill Preparedness and Response Regime, found here: https://www.tc.gc.ca/eng/marinesafety/oep-ers-regime-menu-1780.htm.

For further information on the on Canada's Marine Oil Spill Preparedness and Response Regime, see: http://www.tc.gc.ca/eng/marinesafety/preparedness-response-ship-source-oil-spills-4514.html. See "Marine Oil Spill Preparedness and Response Regime: Report to Parliament, 2006-2011", Transport Canada report TP 14539E, at page 7, available at

http://www.tc.gc.ca/media/documents/marinesafety/TP14539E.pdf.

See http://www.tc.gc.ca/media/documents/mosprr/transport_canada_tanker_report_accessible_eng.pdf

See http://www.tc.gc.ca/media/documents/marinesafety/world-class-tanker-safety.pdf.

See the Canada Shipping Act, 2001, S.C. 2001, c. 26, especially s. 167, and the Environmental Response Arrangements Regulations, SOR/2008-275.

For further information on the on Canada's Marine Oil Spill Preparedness and Response Regime, see: http://www.tc.gc.ca/eng/marinesafety/preparedness-response-ship-source-oil-spills-4514.html.

5.1.3. Liability and Compensation

This report does not address the compensation scheme under the regime in detail, but as 65. 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)

On May 10, 2016, the B.C. Legislative Assembly passed Bill 21, introduced on February 29, 2016, which 68. 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

See Marine Liability Act, S.C. 2001, c. 6, Schedule 8.

³² See MLA, Schedule 1

See MLA section 101

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 $materials \ and \ events \ can be found here: \underline{http://www2.gov.bc.ca/gov/content/environment/air-land-water/spills-environmental-emergencies/spill-preparedness-and-response-bc/spill-environmental$ response-engagement/engagement-materials#engagement.

Government of B.C., News Release, "New legislation to enable world-leading provincial spills regime" (29 February 2016) online: BC Gov News https://news.gov.bc.ca/releases/2016ENV0008-000302.

- 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.

³⁶ Government of B.C., News Release, "New legislation to enable world-leading provincial spills regime" (29 February 2016) online: BC Gov News https://news.gov.bc.ca/releases/2016ENV0008-000302.

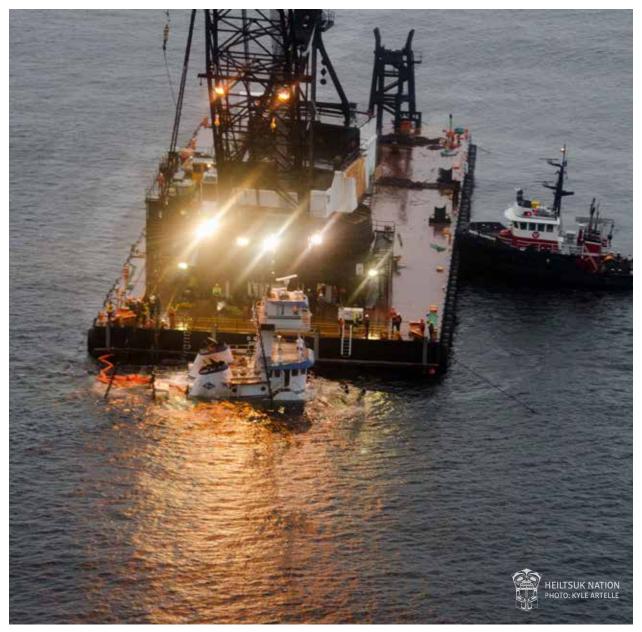
³⁷ https://www.leq.bc.ca/Paqes/BCLASS-Legacy.aspx#%2Fcontent%2Fdata%2520-%2520ldp%2Fpaqes%2F40th5th%2F3rd_read%2Fqov21-3.htm

³⁸ See http://engage.gov.bc.ca/spillresponse

Compilation of Individual Submissions From Those Who Requested Them To Be Posted, accessed on-line on January 25, 2017 at: http://www2.gov.bc.ca/assets/gov/environment/air-land-water/spills-and-environmental-emergencies/docs/consultation-submissions-2014.pdf

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." 40



A crane raising the sunken Nathan E. Stewart from Seaforth Channel.

⁴⁰ More information on the Oceans Protection Plan can be found here: https://www.tc.gc.ca/eng/oceans-protection-plan.html.

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/ Xáixáis 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/ Xáixáis 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.

⁴¹ Central Coast First Nations Marine Use Plan, Executive Summary, at page 14.

¹² 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/clf-nsi/pblcrgstr/pblcrgstr-eng.html.

⁴⁵ Gitxaala Nation v. Canada, 2016 FCA 187.

7.0 GALE PASS AND SEAFORTH 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'vúqvai*, in the territory of the Heiltsuk *Ávúqvaýáitžv* Tribe.
- 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

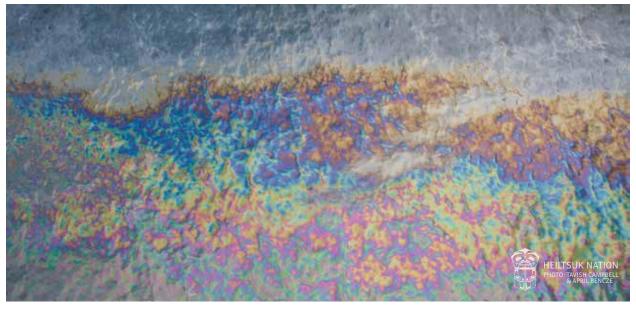
- As stated above, the ATB ran aground on Edge Reef on Athlone Island at the mouth of Gale Creek, where the Heiltsuk Koqui Indian Reservation No. 6 and the ancient village site of *Q'vúqvai* are located, in the territory of the Heiltsuk *Qvúqvaýáitžv* Tribe.
- 86. The Chief of the *Qvúqvaýáitžv* Tribe and the traditional title holders are Hemas *'Qa'ait*, Hemas *Dhadhiyasila*, Hemas *Gáluyakas*, Hemas *Máxvmvisagmi*, Hemas *Wákas*, Hemas *Gáğmláxa*, Hemas *Hiyaspat*, and Hemas *Duquaĭila*.



Aerial view of the sunken Nathan E. Stewart, broken booms and oil sheen.



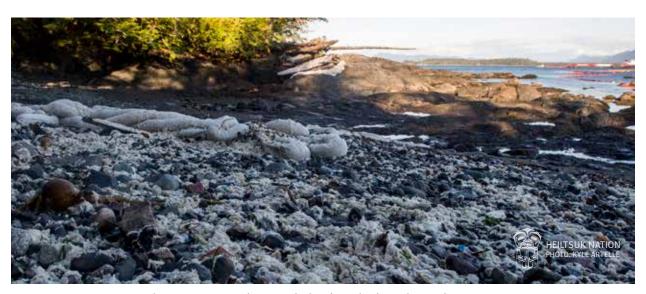
A killer whale is spotted in Seaforth Channel on Oct. 23, 2016.



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.

- 94. **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.
- 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.
- 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.
- 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.
- 105. 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.
- 106. 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.
- 107. 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.
- 109. **9:26-9:40** a.m.: The crew evacuated the Barge onto the *Bartlett 1*, and were taken to the *Bartlett*.



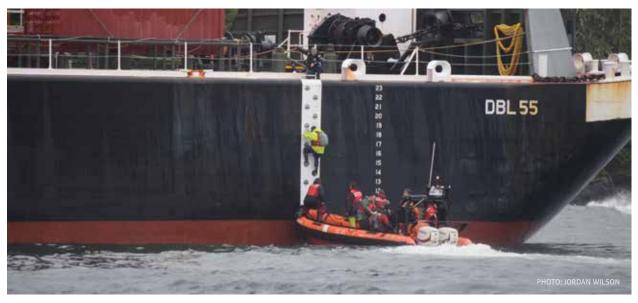
The Nathan E. Stewart attached to the DBL-55 just after sinking at 10:09 a.m. on October 13, 2016

- 10:00-11:00 a.m.: The crew of the NES returned to the Barge to secure a line from the Barge to the *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 *Haisea Guardian*. Around the same time, three Heiltsuk vessels and the *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 *Bartlett 1* successfully kept the barge off of the rocks and shore of Gale Creek.
- 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.
- At 11:00 a.m., the *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.
- Once the *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 *Clowhom Spirit* left to pick up an individual on the response team from Bella Bella, and then returned to the scene.
- 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 Bartlett notified Heiltsuk vessels that the 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 Clowhom Spirit had brought insufficient boom to cover the mouth of Gale Creek.
- 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.
- 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.

- 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.
- 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.
- **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.
- 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.
- 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.

- 127. 6:30-7:00 p.m.: 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.
- 128. Another tugboat on scene, the Diligence, inspected the Barge at this time. The Haisea Guardian took the Barge in tow and awaited anchor instructions.
- 129. 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 130. 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 131. inspect the Barge for stability.
- **11:00** p.m.: UC established a Situation Report protocol for field operations. 132.
- **12:00** a.m.: By about midnight, the Barge was anchored in Dundavan Inlet. 133.



The crew of the Nathan E. Stewart evacuating DBL-55 onto a Coast Guard zodiac on October 13, 2016.

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-Ell 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.
- 135. 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.

- 137. Other observations made by Heiltsuk first responders on the first day included the following:
 - contaminated kelp beds and wildlife were in the affected area; a.
 - fuel was observed on the surface of the water so thick that the water could not be seen b. below it;
 - many commented that the pollution in the water was so thick it looked like herring spawn; C. and
 - d. slick was observed west out to Cape Swain.



Photograph of Guardian Watchman on October 13, 2016.

9.0 EVENTS OF OCTOBER 14, 2016 (DAY 2)

9.1. CHRONOLOGY OF EVENTS

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



View of the Nathan E. Stewart sinking while still attached to DBL-55 on October 13, 2016.

9.2. SPECIFIC ISSUES

- 158. 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.
- 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).



Other vessels at the scene of the Incident on October 14, 2016.

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.

162. 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.

163. 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.

164. 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.



View of flying bridge of sunken Nathan E. Stewart with booms, and shore in background on October 14, 2016.

165. Pamela Reid (DAY 2)

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-Ell 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.

166. Russell A. Windsor

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.

I don't remember the time. All I remember was the captain of the NES, I heard the tug kick into gear, he was trying to reverse off the rocks and his propellers were hitting the bottom and he couldn't move. He was trying to time it right with the swells but couldn't. Every time he moved the tug, it went further into the shore. It moved about 100ft into the shore towards the Gale Creek system. The tug sank. All I saw after the tug sunk was brown, what looked like waste water, spewing out of the tug. All you could smell was diesel. No one told us to clear the area, we were endangering our health.

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.

167. 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.



Diesel oil from the sinking of the Nathan E. Stewart on the beach on October 13, 2016.

168. 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 the *Misla*. 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.

171. 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 sunk. 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.

172. **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.

173. **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.



Diesel oil sheen on the water at 10:52 a.m. on October 13, 2016.

174. 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.

175. **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.

176. 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 Seaforth 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.

177. Simon Aufderheide

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.

178. 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.

179. 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.

180. 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

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



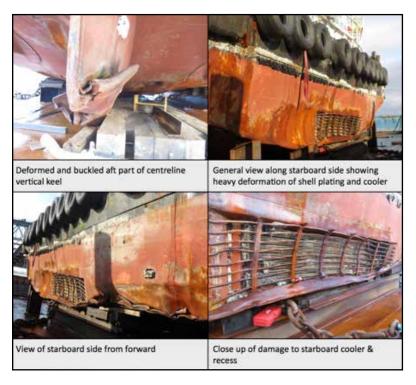
The Nathan E. Stewart being transported out of Heiltsuk territory on November 17, 2016

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.

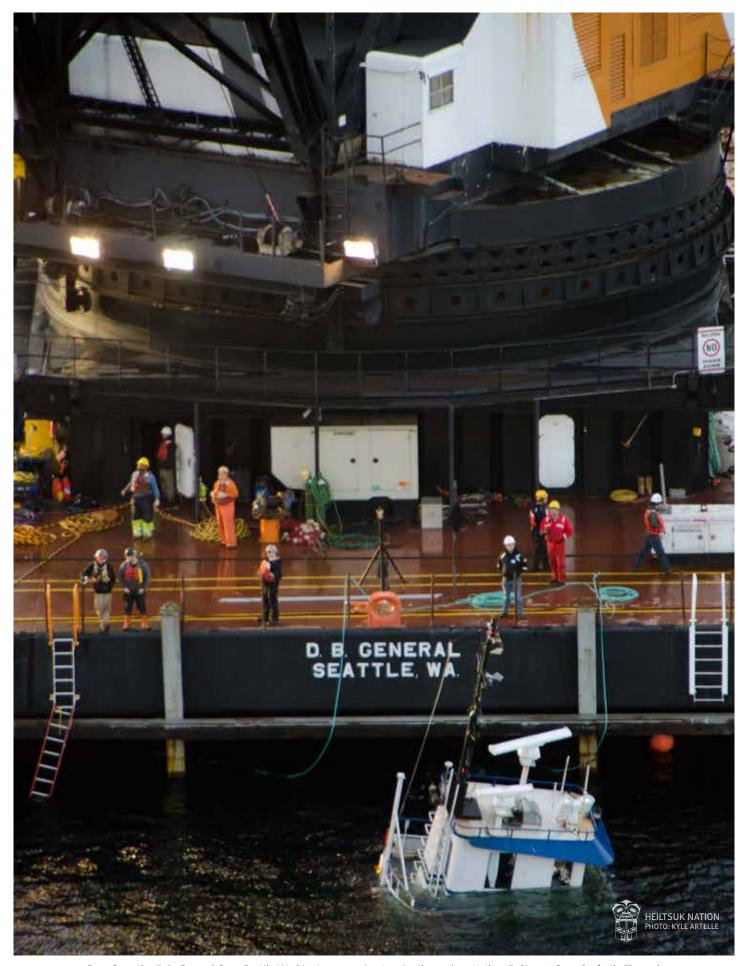




View of main wheelhouse







Crew from the D.B. General, from Seattle Washington preparing to raise the sunken Nathan E. Stewart from Seaforth Channel.



HEILTSUK TRIBAL COUNCIL INVESTIGATION REPORT: SCHEDULES

Wednesday, January 11, 2017 at 1:56:27 PM Pacific Standard Time

Subject: RE: Log Book and black box

Thursday, October 20, 2016 at 7:11:15 PM Pacific Daylight Time

From: Wootton, Brian

Lisa Fong

Daniel Bertrand, 'Marilyn Slett', Andrea Kreutz, Kassie Seaby, Girouard, Roger, Murdock, Philip, Girouard, Roger CC:

Hi Lisa.

Just an update on what I've found out today regarding your questions below

- 1) Our Marine Communications and Traffic Services centre in Prince Rupert has finished collecting and Our wanter Communications and rains between control expert is a first market of the manifest contenting and recording the raidio communications between control center and the Nathan E. Stewart on the night of the grounding. The data is enrouse Use Gase. A CGG representative will hand deliver a disc a early as Monday or Tuesday (subject to the movement of CGG relief personnel and weather opportunities for Ifying). I am In copying Phil Murrdock here — who is relieving me tooling the Canadian Coast Guard IC — will add this to his own open action tracker for follow-up with you will be compared to the canadian Coast Guard IC — his will add this to his own open action tracker for follow-up with you will be compared to the canadian Coast Guard IC — his will add this to his own open action tracker for follow-up with your control of the canadian Coast Guard IC — his work and the canadian Coast Guard IC — his work and the canadian coast Guard IC — his work and the ca next week.
- Regarding the matter of the Deck Log from the Nathan E. Stewart I have been advised that the
 Captain abandoned ship with the log in his possession. I believe that the custody of the log going
 forward is being dealt with by counsel for the Owner and counsel for Transport Canada.

I encourage you to discuss the state of the evidence with Transport Canada representatives who I've been advised will visit the Community tomorrow.

Brian Wootton Canadian Coast Guard Unified Command

From: Wootton, Brian
Sent: Thursday, October 20, 2016 12:06 PM
To: Lisa Fong' Kisa@ngariss.org>
Cc: Daniel Bertrand cothertrand@centralcoastlaw.ca>; 'Marilyn Slett' <MSlett@heiltsuknation.ca>; Andrea
Kreutz <andrea@ngariss.org>; Kassie Seaby <kassie@ngariss.org>; Girouard, Roger <Roger.Girouard@dfompo.gc.ca>; Murdock, Philip < Philip.Murdock@dfo-mpo.gc.ca>

Subject: RE: Log Book and black box

I will contact the Superintendent of MCTS today to find out how our data collection is progressing.

Just for clarity though the Coast Guard won't be able to help with your Log Book request – we (CCG) do not manage investigations or the seizure of documentation in a case such as the Nathan E. Stewart. I did ask Transport Canada about your request and am lead to believe that there is/Jwas no' flukeb took' per so do the Tug. I am not yet aware of whether the Log Book made it off the tug or not, but will confirm for you once

Emails between L. Fong & Coast Guard re Requests for Documents | Page 01

As for the issue of black boxes or voyage recorders, and the deck log, I will have to enquire with Transport Canada and report back accordingly.

Regards.

Brian Wootton Canadian Coast Guard Unified Command

From: Lisa Fong [mailto:lisa@ngariss.org]
Sent: Monday, October 17, 2016 6:49 PM

To: Wootton, Brian <a href="https://brian.com/brian-br

Further to today's discussion, can you let me know whether all recoverable items on board the Nathan E. Stewart has been preserved for the Transport Canada's investigation. This would include the log book, and any black box

Thank you,

LISA C. FONG

Ng Ariss Fong | Lawyers

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

210-900 Howe Street

Vancouver, BC, Canada V6Z 2M4

see our blog, suite210; www.ngariss.com/blog

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Emails between L. Fong & Coast Guard re Requests for Documents | Page 03

Transport Canada confirms for CCG. (In some Search & Rescue cases the crew will work until the last

With regard to what I have discussed about CCG information sharing – our intention is to provide the Helitsuk Nation with what Coast Guard does possess - which should include the radio communications between the tug and the Coast Guard radio operators during the early incident hours. We may also have the AIS (Automatic Information System) track history for the vessel leading up to the grounding. It requires some effort to gather this type of data and I am confident that that work is underway. I will advise with ETA today.

I note for yourself and the Leadership group for the Heiltzuk Nation that I myself will be relieved by Philip Murdock tomorrow. Philip is the Superintendent for Environmental Response in Coast Guard's Western Region. He will take on the Incident Command role for the Canadian Coast Guard and Federal Government for the next week. (We will be trying to establish a rotation of our key personnel as the incident will conti as we focus in the dars/weeks ahead on sampling, SCAT, and certainly including completion of the remova the tug from the marine environment).

From: Lisa Fong [mailto:lisa@ngariss.org]
Sent: Thursday, October 20, 2016 11:26 AM

Sent: Impusady October 10, 2010 11:20 AW

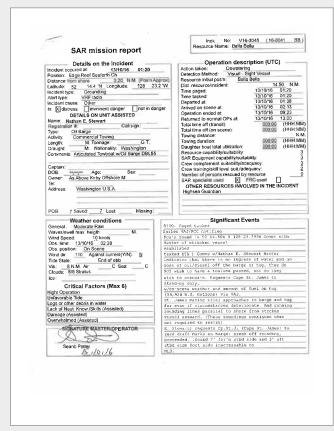
To: Wootton, Brian (<u>Rinan, Wootton)@flo-mpo.gc.ca</u>>
Cc: Daniel Bertrand <<u>li>dbertrand@entrand.castlaw.ca</u>>; Marilyn Slett <<u>MSlett@heiltsuknation.ca</u>>; Andrea
Kreutz <u>candra@heansis.car</u>>; Kassis <u>eably <assie@ngariss.org></u>
Subject: RE: Log Book and black box

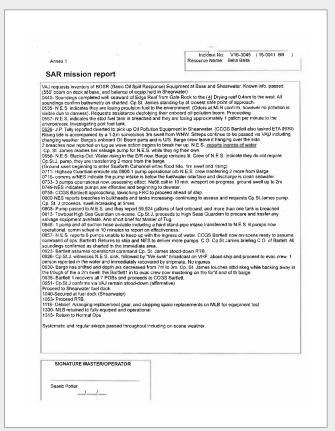
How are you doing with the assembly of the information?

From: Wootton, Brian [mailto:Brian.Wootton@dfo-mpo.gc.ca]
Sent: October-17-16 7:53 PM
To: Lisa Fong Cc: Daniel Bertrand; 'Marilyn Slett'; Andrea Kreutz; Kassie Seaby Subject: RE: Log Book and black box

Further to our meeting this afternoon, I have requested CCG Western Region assemble the Marine Communications and Traffic Services information that we have pertaining to the Nathan E. Stewart casualty. This may include vessel track history and radio communications between the vessel and our Marine Traffic Radio operators. I will in turn relay a copy of this information to you as soon as I have it in hand.

Emails between L. Fong & Coast Guard re Requests for Documents | Page 02





Search and Rescue (SAR) Mission Report (Coast Guard) | Page 01

Search and Rescue (SAR) Mission Report (Coast Guard) | Page 02

Subject: Kirby Oil Spill - Response and Meeting

Date: Monday, October 17, 2016 at 9:40:30 PM Pacific Daylight Time

From: Lisa Fong
To: Youden, Mark, Braul, Wally, Drew.Williams@kirbycorp.com, Jaquish, Allison

CC: Kassie Seaby, Daniel Bertrand, andrea@ngariss.com

Dear Mr. Braul, Mr. Youden, Ms. Jaquish and Mr. Williams,

Thank you for your email and your summary of the items discussed at yesterday evening's meeting. We wish to clarify some of the information you outlined and to provide some of the requested information.

In response to the points made in your previous email:

- 1. Chief Slett's letter of October 15, 2016 requested that your client provide access to the crew for Chel sterk is letter of october 13, 2019 requirement as way to Vancouver. Tou advised that you would respond a case at one or work of the state of t
- 2. We request all documentation in any form about the incident including ship logs, incident reports, and we request an occurrentation in any time addition, we ask for current and indistrict influence reports, and statements from the crew. In addition, we ask for current and indistrict information about the barge. I understand you propose that we enter a document disclosure protocol before your client will share documentation. Please forward your draft proposed document disclosure protocol for our review.
- 3. You advised that your client intends to reimburse Heiltsuk for all reasonable costs associated with response efforts. We understand that Kirby is interested in setting up an operational account for reasonable expenses incurred by Heiltsuk. We request that this account be set up as soon as with an initial amount of \$500,000. Heiltsuk sue of the account will be strictly without prejudice to its right to dain any other damages or further reasonable compensation. Below are categories of the daily operating costs Heilsuk Nation has incurred since the spill incident on October 14, 2016 and also the anticipated commercial clam harvest loss for 2016.
 - a. Operational costs, including but not limited to:
 - All collaborative developing, assessment and clean-up efforts under Unified Command, including but not limited to:
 o Shoreline (Jean-up Assessment Plan
 o Ephemeral Sampling Plan

 - o Sampling already conducted
 - Fuel for boats

 - Food Additional staff time
 - Boat charter costs
 - Recovery equipment Freight costs
 - Lodging

 - Stationary costs (pens, paper, etc.) and Wi-Fi

Page 1 of 4

b. Short-term commercial costs, including but not limited to:

2016 Commercial clam harvest (anticipated to be about \$200,000 based on last year's catch number of 100,000 lbs sold at \$1.85 per lb.)

Lunderstand you will be providing a draft agreement regarding these operational expen commercial compensation for 2016 for our review. Kindly forward at your earliest convenience

- 5. In response to your statement regarding an agreement to commence negotiations related to a compensation/damages protocol, Helitsuk is not in a position to negotiate compensation or damages for short, medium or long term damages and where had reasonable opportunity to assist damages. Monetheless, we are open to hearing any proposats regarding these in the future. Our emphasis at this time is on meeting the short-term quantifiable damages listed above.
- 7. In response to your statement regarding the *Pilotoge Act* waiver/exemption materials you would provide us, we clarify that we requested that Kirby Corporation waive the exemption for any other vessels going through Heilstuk retritor at yetserday evening? moreing. The news reports today indicate that Kirby has lost its exemption for all its barges travelling through Heilstuk's waters. We ask that you confirm the loss of the exemption on all Kirby's barges or if we are incorrect than to provide the requested waiver.

We are available to meet at 3:30pm at HIRMD (in the morning, we will try to find a space closer to the Band Office). Please let us know if you are agreeable to this time.

LISA C. FONG Ng Ariss Fong | Lawyers

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

210-900 Howe Street

P.O. Box 160 Vancouver, BC, Canada V6Z 2M4

www.ngariss.com

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Emails between L. Fong & W. Braul et al. re request for access to crew by Heiltsuk; request for documents | Page 01

Emails between L. Fong & W. Braul et al. re request for access to crew by Heiltsuk; request for documents | Page 02

From: Youden, Mark [malto:Mark Youden@gowlingsdg.com]
Sent: October 17-16-253 PM
Sent: Missingsder

Hello Chief Councillor Marilyn Slett, Daniel and Lisa,

We write in response to your letters dated October 15, 2016, and to follow-up from last night's meeting.

First, we'd like to thank you for meeting with us. We felt it was a productive meeting and that we were able to carefully run through key assues.

Generally, our discussions covered broad areas and how we will work together to develop solutions. Those areas were:

- Helitsuk Tribal Council's request to interview the crew of Nathan E. Stewart, Financial matters short, medium and long term; Kirby operations in Helitsuk Territory, and Pilotage Act waiver/exemption status.

To respond to your immediate requests, we confirm the following

- look of your immediate requests, we commit the colored is 2019 with regards to crew interviews in the near future. Similarly, we will respond to halfsale it's request to have a Hellistuk representative on-board Kripty vessels in the near future.

 We also agreed to provide publicly available information with regards to the Prograph de valowinchings and the program of the pro

With us here for the coming days, we suggest that we arrange a meeting to advance these discussions as early as tomorrow. If agreeable, please provide us with your availability.

Mark Youden

GOWLING WLG

T +1 604 891 2793 My Assistant Miriam Bird, T +1 804 443 7629, <u>meriam bedi®g</u>pwlingw<u>ig.com</u>

Gowling WLG (Canada) LLP 559 Burrard Street, Suite 2300, Bentall 5 Vancouver, BC V6C 2BS Canada

Page 3 of 4

Emails between L. Fong & W. Braul et al. re request for access to crew by Heiltsuk; request for documents | Page 03



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Emails between L. Fong & W. Braul et al. re request for access to crew by Heiltsuk; request for documents | Page 04



2 Additionally, it has been reported that the exemption that allowed the tag, Nathan E. Stewart, and barge to operate in the Seaforth Channel without a pilot from the Pacific Pilotage Authority onboard has been revoked. Furthermore, it was reported that the exemptions have been revoked for all vessels operated by Kirby Corporation. Please confirm this at your earliest convenience. Sincerely, NG ARISS FONG Shung Lisa C. LCF/ks Ce: client

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

Letter from L. Fong to R. Dick, TC re Heiltsuk Access to Information and TC's Communication | Page 02

SCHEDULE 5



Letter from R. Dick, TC to L. Fong re response to Oct. 17/18th emails requesting disclosure; disclosure to be discussed | Page 01

bell tsuk tringl COUNCIL



VIA E-MAIL (pacific-pacifique@tc.gc.ca)

October 28, 2016

Transport Canada

Dear Sir or Madam:

Re: Grounding of the tug Nathan E. Stewart and tanker barge DBL 55 at Seaforth Channel

write on behalf of Heiltsuk Tribal Council ("HTC"). We ask that this letter be forwarded mmediately to the Transport Canada personnel addressing the above-noted situation.

HTC represents Heiltsuk First Nation, within whose traditional entertriorial waters the tug, Nathan E Stewart, and its tanker barge, DBL 55 (the Tug-Barge'), ran aground on or about October 13, 2016, and into which that vessel has been leaking, inter aila, diesel oil (the 'Incident'). The incident has and continues to impact HTC's asserted aboriginal title and its aboriginal rights of harvest relating to, *inter* aila, clam beds and sea-life contaminated by the spill, and is profoundly affecting the community.

We understand that Transport Canada is responsible for investigating ship source po occurrences. We were also directed by Transport Canada personnel attending at the Incide to address document concerns through its offices.

Heiltsuk peoples are going to great lengths to support spill response operations. In the spirit of advancing reconciliation, HTC writes to ask that Transport Canada share the following information in its possession or control, so that HTC may investigate the Incident, address the Incident with the owner-operators of the Tug-Barge, and best serve the needs of its membership.

In relation to the Tug-Barge:
 (a) ship's particulars, and without limiting the foregoing
 (a) ship's particulars, and without limiting the foregoing
 (1) any records indicating the current owner(s) of the Tug-Barge, and
 (2) any records (e.g., International Tonnage Certificates) indicating the gross tonnage of the Tug-Barge;
 (b) any U.S. Coast Guard documents relating to the manning or operation of the Tug-Barge;
 (c) any Canadian government agency documents relating to the manning or operation of the tug and barge in Canadian waters, and without limiting the foregoing, any certificate of insurance relating to the Tug-Barge either issued under the Canada Marine Act, or

BOX 880, WAGLISLA, BRITISH COLUMBIA V0T 120 TEL (250) 957-2381 FAX (250) 957-2544

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

> betlások áribal CORPCIL



- (!) Master's standing orders;
 (u) Bell 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;
 (2) plan of tank shutoff valves for tanks breached in this incident;
 (aa) incident reports or other written statements filed or provided by the officers or crew of the Turg-Barrer.
- (aa) incident reports or other whiterin seatments and a picture of the Tug-Barge;
 (bb) reports or transcripts concerning interviews of officers or crew of the Tug-Barge;
 (cc) reports or analyses concerning testing of samples of polluted water concerning diesel, oil or other pollutants; and
 (dd) 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 Transport Canada identify the missing information. If Transport Canada should decline to provide particular information, we ask that Transport Canada provide its reasons for refusing to assist in writing.

Andy Callicum, Executive Director Heiltsuk Tribal Council

BOX 880, WAGLISLA, BRITISH COLUMBIA VOT 120 TEL (250) 957-2381 FAX (250) 957-2544

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

bettsuk tringt COUNCIL



otherwise permitting the Tug-Barge to, inter alia, enter or leave a port in Canadian under section 73 of the Canada Marine Act; (d) ship's certificates, or equivalents, and without limiting the foregoing,

- p's certificates, or equivalents, and without limiting the foregoing,
 (1) Flag state inspections;
 (2) Class certificate;
 (3) SMS certificate;
 (4) Class Safety Construction Certificate;
 (5) Class Oll Pollution Prevention Certificate;
 (6) Class Document of Compliance Special requirements for Ships Carrying Dangerous Good of Compliance Special requirements for Ships Carrying Dangerous Good of Ship Control of Compliance Special requirements for Ships Carrying (7) Shipboard Oil Pollution Emergency Plan; and
 (6) Class inspection reports or surveys of any kind for last two years;
 (e) Operation / ShiS (Safety Management System) Manual extracts re pollution prevention;
- (f) Vessel Incident Action Plan / Response Plan; and (g) WCMRC Membership Agreement or contract.
- (g) WCMRC Membership Agreement or contract.

 2. in relation to the Incident:
 (a) officer and crew lists;
 (b) crew training records;
 (c) any record of correspondence between Pacific Pilotage Authority and owner/operator with respect to BC coast transit, before and after incident;
 (d) any correspondence from Jug to owner/operator regarding the voyage and the incident (with Yoyage' meaning from time of departure to the time of grounding on or about Cobber 13, 2016, and following the grounding (the Yoyage');
 (e) any documents regarding fueling of the Jug for the Voyage;
 (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) course recorder printouts;
 (i) GPS records;
 (m) any VDR (voyage data recorder) data relating to the Voyage of the Tug-Barge;
 (n) any radar or other electronic record of the Voyage;
 (o) certificates / seamns book of the master and crew;
 (p) Deck logbook for the Voyage;
 (i) Engine room maintenance log for the past twelve months;
 (s) Oil Record Book extracts for last twelve months;

BOX 880, WAGLISLA, BRITISH COLUMBIA V0T 120 TEL (250) 957-2381 FAX (250) 957-2544

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



Emails between D. Bertrand and R. Dick, TC re reiterating Oct. 28th requests and confirmation of an intention to discuss possible approaches | Page 01

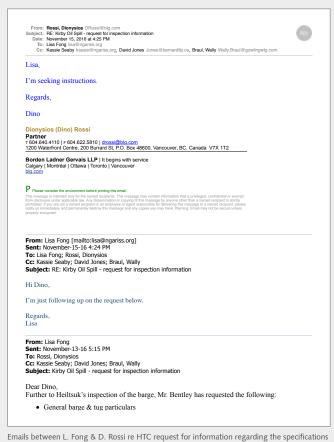
SCHEDULE 8





Letter from R. Dick, TC to Chief Slett re declining to disclose information due to TSB investigation | Page 02

Letter from R. Dick, TC to Chief Slett re declining to disclose information due to TSB investigation | Page 01



- Tank Plan / Capacity Plan for barge and the tug
 General arrangement drawings for barge and tug
 Drawings showing the mid section of the barge

Details of the coupling system
 I understand these are common requests in a vessel survey and not out of the ordinary. We are agreeable to the Access Agreement applying to this disclosure.

As some of these documents may be large in size, drop box may be used if that is acceptable Regards,

LISA C. FONG Ng Ariss Fong | Lawyers

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

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Emails between L. Fong & D. Rossi re HTC request for information regarding the specifications for the Tug & Barge | Page 02

for the Tug & Barge | Page 01

SCHEDULE 10

Subject: RE: Heiltsuk First Nation re Kirby Oil Spill Date: Thursday, November 17, 2016 at 8:20:42 AM Pacific Standard Time
From: Mycrs, Yvette 'Kassie Seaby', Rossi, Dionysios Heryet, Trevor, Dick, Robert, Marilyn Slett, Lisa Fong, Andrea Kreutz, Sukhdeo, Mimi, Yeung, To For, Weldon, Jane, Madgin, Philippe Dear Ms. Seaby, Good morning and thank you for your email. Please be advised that TC Marine Salety and Security recently decided to stop the compliance inspection of the Nathan E Stewart and commence with a safety investigation pursuant to the Countd Shipping Act, 2001. As such, I am working with our legal counset to review the file and determine what documents are permissible to share at this time. I realize that this may be frustrating, but as you can appreciate, for the integrit joth the meeting factor creation information cannot be shared. May I suggest that you can cannot be shared. May I suggest that you can cannot be shared. May I suggest that you can cannot be shared. With respect to access to the tug for inspection purposes, TC will facilitate access to the terminal and any port pass requirements, however, as was done with the barge, arrangements will need to be negotiated between Helistian darkiny. TC will certainly provide a schedule so that there is no conflict with the TSB or TC inspection or any unnocessary delays. Please let me know if further clarification is required. Thank you. Kind Regards, Yvette Regional Director, Marine Safety and Security
Transport Canada, Pacific Region / Government of Canada
yvotte.mvers@tc.gc.ca / Tel: 604-666 5474 / TTY; (613) 990-4500 From: Kassie Seaby [mailto:kassie@ngariss org]
Sent: Wednesday, November 16, 2015 9:33 AM
To: Myers, Ywelf Cyvlete Myers@pt (pc.co...) Ross.) Dionysios «DRossi@blg.com»
Cr. Henyet. Trevor «trevor henye@ic.gc.ca.»; Ross.) Dionysios «DRossi@blg.com»
Cr. Henyet. Trevor «trevor henye@ic.gc.ca.»; Dick, Bobert «Robert.Dick@ic.gc.ca.»; Marilyn Slett
Khister@heitsMarion.ca...): List forger (sla@ngariss.org.) Andrea Neutz-*candrea@ingariss.org.
Mimi «nmin.subhdeo@it.gc.ca»; Vaung. To for «Tofan/Yeung@ic.gc.ca»; Weldon, Jane
«Jane.weldon@ic.gc.ca»; Madgin, Philippe «Philippe.Madgin@ic.gc.ca»; Zec.ca»; Dross (sla@ngin.philippe.Weldon@ic.gc.ca»)
Subject: Ret. Heitsusk First Nabrone Nikby Oil Spall Page 1 of 5

Dear Ms. Meyers. 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 Heitsuk's inspection of the bange, Mr. Bentley has requested the following:

1. General barge & Lutg particulars;

2. Tank Plan / Capacity Plan for bange and the Lug:

3. General arrangement drawings for barge and Lug;

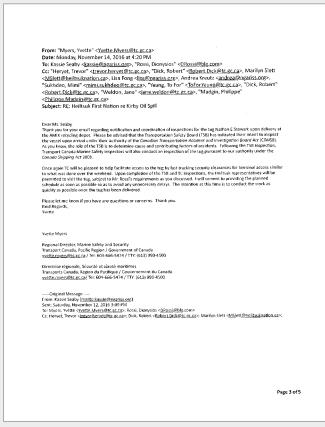
4. Drawings showing the mid section of the barge; and

5. Details of the couping system. I understand these are common requests in a vessel survey and not out of the ordinary. As Mr. Rossi is aware, we are agreeable to the Access Agreement applying to this disclosure. As some of these documents may be large in site, drop box may be used if that is acceptable. 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 Ariss Fong | Lawyers T: 604.331.1155 F: 604.677.5410 E: <u>kassie@ngariss.com</u> 210-900 Howe Street Vancouver, BC, Canada V6Z 2M4 see our blog, suite 210: $\underline{www.ngariss.com/blogs/suite-210/} \ and \ in Dispute: \\ \underline{www.ngariss.com/blogs/indispute/} \ and \\ \underline{suite-210/} \ and \\\underline{suite-210/} \ and \\\underline{suite-210/} \ and \\\underline{suite-210/} \ and \\\underline{suite$ This e-mail and any attachment(s) are confidential and may be privileged. If you are not the intended recipient, please notify us immediately by return e-mail, delete this e-mail and do not copy, use or Page 2 of 5

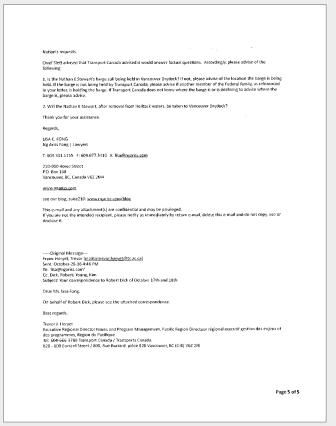
Emails Y. Myers ,TC to K. Seaby re suggestion for HTC to make request for specifications for

Emails Y. Myers ,TC to K. Seaby re suggestion for HTC to make request for specifications for the Tug & Barge to Kirby | Page 02

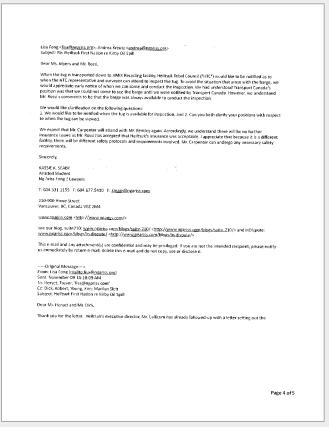
the Tug & Barge to Kirby | Page 01



Emails Y. Myers , TC to K. Seaby re suggestion for HTC to make request for specifications for $\ensuremath{\mathsf{E}}$ 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 05



Emails Y. Myers , TC to K. Seaby re suggestion for HTC to make request for specifications for $\ensuremath{\mathsf{E}}$ the Tug & Barge to Kirby | Page 04



om: Rosal, Dionyalos Difosal@big.com
ect. RE: Helstax First Nation in Krity OII Spill
ster. November 16, 2016 at 9.38 AM
To. Kasse Seaby Ausenberg Margan, Myers, Yvetta Yvetta Myers@tt.gc.ca.
To. Kasse Seaby Ausenberg Margan, Myers, Yvetta Yvetta Myers@tt.gc.ca, Mariny Sleft Millett@helstaxination
to Kasse Seaby Ausenberg Margan, Mariny Margan, Mariny Sleft Millett@helstaxination
tass@ngarias.org, Andrea Kreutz Landes@ngarias.org, Sokhdeo, Milm imit askindso@tt.gc.ca, Yeung, To For
To For Yeung@tt.gc.ca, Wedon, Jane jane weldor@tt.gc.ca, Madgin, Philippe Philippe Madgin@tt.gc.ca a. Lisa Fond

As I previously advised counsel yesterday, I am taking instructions on the document request from my client. Obviously, until those instructions are confirmed, my client objects to the third-party disclosure of any documents conscripted or obtained by Transport Canada (or any other regulatory agency) in the course of its compliance inspection or investigation

ios (Dino) Rossi

 Partner

 f 604.640.4110 | F 604.622.5810 | drossi@blg.com

 1200 Waterfront Centre, 200 Burrard St, F.O. Box 48600, Vancouver, BC, Canada V7X 1T2

Borden Ladner Gervais LLP | It begins with service Calgary | Montréal | Ottawa | Toronto | Vancouver blg.com

From: Kassie Seaby [mailto:kassie@ngariss.org]

Sent: November-16-16 9:33 AM

Weldon, Jane: Madgin, Philippe

Subject: Re: Heiltsuk First Nation re Kirby Oil Spill

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 the tug;

- General arrangement drawings for barge and tug; Drawings showing the mid section of the barge; and Details of the coupling system.

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 01

representatives will be permitted to visit the tug, subject to Mr. Rossi's requirements as you discussed. I will commit to providing 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,
Yvette

Yvette Myers

Regional Director, Marine Safety and Security Transport Canada, Pacific Region / Government of Canada yvette.myers@tc.gc.ca / Tel: 604-666-5474 / TTY: (613) 990-4500

Directrice régionale, Sécurité et sûreté maritimes Transports Canada, Région du Pacifique / Gouvernement du Canada yvette.myers@tc.gc.ca/ Tel: 604-666-5474 / TTY: (613) 990-4500

-----Original Message----From: Rassic Scaby [mailto:kassic@ngariss.org]
Sent: Saturday, November 12, 2016 3:09 PM
To: Myers, Yvette Yvette:Myers@lc.gc.gas: Rossi, Dionysios Dlok@lc.gc.gas: Marilyn Slett

**Childer@hellikhation.gas*: Lish Fong dlok@lc.gc.gas: Marilyn Slett

**MStett@hellikhation.gas*: Lish Fong dlok@lc.gc.gas: Andrea Kreutz andrea Kreutz andrea Kreutz andrea & gariss.org>
Subject: Re: Heiltsuk First Nation re Kirby Oil Spill

Dear Ms. Myers and Mr. Rossi.

When the tug is transported down to AMIX Recycling facility, Heilbask Tribal Council ("HTC") would like to be notified as to when the HTC representative and surveyor can attend to inspect the fug. To avoid the situation that arose with the barge, we would appreciate early notice of when we can come and conduct the inspection. We had understood Transport Canada's position was that we could not come to see the barge until we were notified by Transport Canada. However, we understand Mr. Rossi's comments to be that the barge was always available to conduct the inspection.

We would like clarification on the following questions:

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.

We expect that Mr. Carpenter will attend with Mr. Bentley again. Accordingly, we understand there will be no further insurance issues as Mr. Rossi has accepted that Heiltsuk's insurance was acceptable. I appreciate that because it is a different facility, there will be different safety protocols and requirements involved. Mr. Carpenter can undergo any necessary safety requirements.

KASSIE K. SEABY Articled Student Ng Ariss Fong | Lawyers

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

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

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 03

I understand these are common requests in a vessel survey and not out of the ordinary. As Mr. Rossi is aware, we are agreeable to the Access Agreement applying to this disclosure. As some of these documents may be large in size, drop box may be used if that is acceptable.

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

KASSIE K. SEABY

Ng Ariss 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 inDispute: www.ngariss.com/blogs/in-dispute/

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From: "Myers, Yvette" < Yvette.Myers@tc.gc.ca
Date: Monday, November 14, 2016 at 4:20 PM

Date: Monday, November 14, 2016 at 4:20 PM
To: Kassic Seaby kassic.Dionysios" kassic.Dionysios" kassic@ngariss.org kassic.Dionysios" kassic.Dionysios kassic.gc.gc.ga karilyn Slett kassic.gc.ga kassic.gc.ga kassic.gc.ga kassic.gc.ga kassic.gc.gc.ga kassic.gc.ga kassic.gc.gc.ga kassic.gc.gc.ga <a href="kassic.Dionysios.g

Dear Ms. Seaby

Dear Ms. Seaby,

Thank you for your email regarding notification and coordination of inspections for the tug Nathan E Stewart upon delivery at the AMIX recycling depot. Please be advised that the Transportation Safety Board (TSB) has indicated their insent to inspect the vessel upon arrival under their authority of the Canadian Transportation Accident and Investigation Board Act (CTAISB). As you know, the role of the TSB is to determine cause and contributing factors of accidents. Following the TSB inspection, Transport Canada Marine Safety Inspectors will also conduct an inspection of the tug pursuant to our authority under the Canada Shipping Act 2001.

Once again TC will be pleased to help facilitate access to the tug by fast tracking security clearances for terminal access similar to what was done over the weekend. Upon completion of the TSB and TC inspections, the Heiltsuk

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 02

www.ngariss.com www.ngariss.com/

see our blog, suite210: www.ngariss.com/blogs/suite-210/ and inDispute: www.ngariss.com/blogs/suite-210/ and inDispute: www.ngariss.com/blogs/suite-210/ and inDispute: www.ngariss.com/blogs/suite-210/ and inDispute: www.ngariss.com/blogs/in-dispute/ <a href="

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-Original Message

Thank you for the letter. Heiltsuk's executive director, Mr. Callicum has already followed-up with a letter setting out the

Chief Slett advised that Transport Canada advised it would answer factual questions. Accordingly, please advise of the

1. Is the Nathan E Stewart's barge still being held in Vancouver Drydock? If not, please advise of the location the barge 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 Transport Canada does not know where the barge is 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.

LISA C. FONG Ng Ariss Fong | Lawyers

T: 604.331.1155 F: 604.677.5410 E: lisa@ngariss.com 210-900 Howe Street

P.O. Box 160 Vancouver, BC, Canada V6Z 2M4

see our blog, suite210: www.ngariss.com/blog

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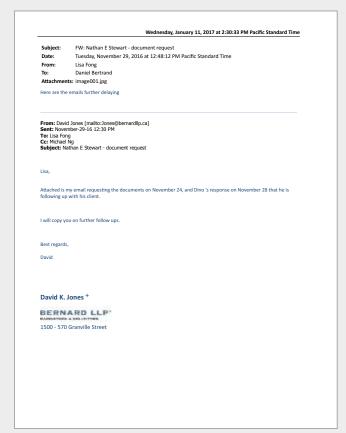
Emails L. Fong & K. Seaby with Y. Myers, TC et al re inspection of Barge by HTC representatives and D. Rossi's objection to disclosure of documents | Page 04

From: Heryet, Trevor [mailto:trevor.heryet@tc.gc.ca] Sent: October-28-16 4:46 PM Cc: Dick, Robert; Young, Kim
Subject: Your correspondence to Robert Dick of October 17th and 18th On behalf of Robert Dick, please see the attached correspondence. Trevoi. 7. Feryes.

Executive Regional Director Issues and Program Management, Pacific Region Directeur régional executif gestion des enjeux et des programes, Région du Pacifique
Tel: 604-665-3789 Transport Canada
\$20 - 800 Burrard Street / 800, Rue Burrard, pièce 820 Vancouver, BC (C-B) V6Z 2J8

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

SCHEDULE 12



Vancouver, BC, V6C 3P1, Canada T: 604.661.0609 C: 604.644.4057 F: 604.681.1788 F. DOM-DEPARTABLE.

Signess Departable.

W: www.bernardlip.ca

W: www.bernardlip.ca

W: www.bernardlip.ca

which is a second of the second of Please note the email address above is for general email communication only and not as an address for service pursuant to Rule 4-2 of the Rules of Court. From: David Jones
Sent: Thursday, November 24, 2016 11:05 AM
To: Dino Rossi drossi drossi drossi@blg.com>
Subject: Nathan E Stewart Any progress on Mark Bentley 's request for the following documents for tug and barge? General barge & 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
 Details of the coupling system David K. Jones + BERNARD LLP 1500 - 570 Granville Street

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

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

om: Braul, Wally Wally Braul@gowlingwig.com lect: RE: HTC Investigation into the Sinking of the Nathan E. St late: December 14, 2016 at 8:21 AM To: Daniel Bertrand dbertrand@centralcoastiaw.ca C: Kassie Seaby kassie@ngariss.org, Lisa Fong lisa@ngaris



Dear Mr. Bertrand:

I have spoken with Mr. Rossi (copied, who was also mentioned in your letter) respecting your request. We recall from our respective conversations (on October 15 and 17 and November 13, 15 and 28, 2016) that HTC counsel asked for many of the information items listed in your letter dated December 5, 2016. Our advice was that Kirby was cooperating fully with regulatory bodies and had provided a substantial body of information (including information requested in your December 5 letter). Those bodies will presumably in due course disclose their course of action. In doing so, they will need to determine whether it is appropriate to disclose documents which at present are being treated as confidential. As stated verbally to HTC counsel, Kirby expressed serious concern that it would be improper to disclose information that is the subject of current investigations which in turn may lead to prosecutions and other proceedings against the Kirby companies and individuals. Our view has not changed. These concerns also apply to the vessel-related documents that we understand have been more recently requested by the HTC surveyor. Moreover, having consulted with its own surveyor, Kirby understands that it is possible for the HTC surveyor to assess the damage sustained by the vessel during the grounding incident based on the information that he obtained during the vessel surveys that have been carried out on behalf of the HTC to date. For all of these reasons, Kirby is unable to produce the documents that should be treated confidentially.

Our client, however, is open to considering a non-disclosure agreement, where at least some of the sought documents can be viewed only by certain HTC counsel and certain named persons at the HTC and will not otherwise be distributed. We would be pleased to discuss a possible non-disclosure agreement.

Wally Braul

T +1 403 298 1039 My Assistant: Maria Lindgren, T +1 403 298 1991, maria.lindgren@gowlingwlg.com

From: Daniel Bertrand [mailto:dbertrand@centralcoastlaw.ca]
Sent: December-05-16 12:54 PM
To: Braul, Wall
Cc: Kassie Seaby; Lisa Fong; Marilyn Slett
Subject: HTC Investigation into the Sinking of the Nathan E. Ste

Please see the attached letter

Daniel Bertrand | Lawyer CENTRAL COAST LAW CORPORATION

F dhertrand@centralcoastlaw.ca

W. Braul Email response to D. Bertrand – Kirby denies HTC's request for documents due to TSB investigation | Page 01

Important Notice to Recipient: This e-mail may contain informati

Gowling WLG (Canada) LLP is a member of Gowling WLG, an international law firm which consists of independent and autonomous entities providing services around the world. Our structure is explained in more detail at www.gowlingwig.com/legal.

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

SCHEDULE 14

CENTRAL COAST LAW

CORPORATION

via email: Wally.Braul@gowlingwlg.com

GOWLING WLG 1600. 421 7th Ave Calgary Alberta T2P 4K9

Re: HTC INVESTIGATION INTO THE SINKING OF THE NATHAN E. STEWART

I am legal counsel for the Heiltsuk Tribal Council ("HTC") in its investigation of the sinking of the Nathan E. Stewart. At this time our investigation is focused on the cause of the accident and steps taken to contain its impact during the first 46 hours.

At this point we have not received a formal response to our various requests for documents and information. Our requests have included a letter from Lisa Fong to Jim Guirdy and Drew Williams on October 15, 2016, an email from her to Kirby's legal counsel on October 17, 2016, and Ms. Fong's requests regarding items under 2(e) below made to Dionysious Rossi on November 13, 15 and 28.

We reiterate our requests for the following that may be in Kirby Offshore Marine's ("Kirby's") possession or control:

- Particulars and all related documents concerning accident prevention measures taken by Kirby Offshore in British Columbia; In relation to the Tug-Barge;

 (a) ship's particulars, and without limiting the foregoing 1.

(1) any records indicating the current owner(s) of the Tug-Barge,

and

(2) any records (e.g., International Tonnage Certificates) indicating the gross tonnage of the Tug-Barge;
(b) any U.S. Coast Guard documents relating to the manning or operation of the Tug-Barge;

(c) any Canadian government agency documents relating to the manning or operation of the tug and barge in Canadian waters, and without limiting

PO Box 931 T 250.957.7274 106 Waglisla Street E dbertrand@ce Bella Bella BC V0T 1Z0

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

CENTRAL COAST LAW

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the foregoing, any certificate of insurance relating to the Tug-Barge either issued under the Canada Marine Act, or otherwise permitting the Tug-Barge to, inter alia, enter or leave a port in Canadian waters under section 73 of the Canada Marine Act, (d) ship's certificates, or equivalents, and without limiting the foregoing,

(1) Flag state inspections:

(2) Class certificates; (3) SMS certificate;

(4) Class Safety Construction Certificate; (5) Class Oil Pollution Prevention Certificate

(6) Class Document of Compliance Special requirements for Ships

Carrying Dangerous Goods;
(7) Shipboard Oil Pollution Emergency Plan; and

(8) Class inspection reports or surveys of any kind for last two

(6) Udass linguization responsibility of the chinical documents, including but not limited to:

(1) General barge & tug particulars;

(2) Tank Plan / Capacity Plan for barge and the tug;

(3) General arrangement drawings for barge and tug;

(4) Drawings showing the mid section of the barge; and

(5) Details of the coupting system.

(7) Operation / SMS (Safety Management System) Manual extracts recultifun convention;

pollution prevention;

(g) Vessel Incident Action Plan / Response Plan; and (h) WCMRC Membership Agreement or contract.

In relation to the Incident: (a) officer and crew lists;

(b) All transcripts, notes, and recordings of any interviews conducted with crew members;

(b) orew training records;
(c) any record of correspondence between Pacific Pilotage Authority and owner/operator with respect to BC coast transit, before and after incident; (d) any correspondence from tug to 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 (the "voyage");
(e) any documents regarding fueling of the tug for the Voyage;
(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;

PO Box 931 T 250.957.7274 106 Waglisla Stree E dbertrand@cer Bella Bella BC V0T 1Z0

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

CENTRAL COAST LAW

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(j) course recorder printouts;(k) helm recorder printouts;

(I) GPS records; (m) any VDR (voyage data recorder) data relating to the Voyage of the Tug-Barge:

(n) any radar or other electronic record of the Voyage;
(o) certificates / seaman's book of the master and crew;
(p) Deck logbook for the Voyage;
(q) Engine logbook for the Voyage;
(g) Engine room maintenance log for the past twelve months;
(s) Oil Record Book extracts for last twelve months;
(u) Bell book;
(v) Master's standing orders;

(v) Master's Notebook:

(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;
(2) plan of tank shutoff valves for tanks breached in this incident;
(as) incident reports or other written statements filed or provided by the
officers or crew of the Tug-Barge;
(bb) reports or transcripts concerning interviews of officers or crew of the
Tug-Barge;
(cc) reports or analyses concerning testing of samples of polluted water
concerning diesel, oil or other pollutants; and
(dd) 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 Kirby share such information that is available to it by providing copies to our office. We will gladly cover any reasonable copying expens

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

Please supply these documents by **4:30PM PST on December 12, 2016.** We will consider any failure to produce the above requested documents by this deadline as a refusal to comply with HTC's investigation

PO Box 931 106 Waglisla Street Bella Bella BC V0T 1Z0

Letter D. Bertrand to W. Braul re request for information and documents | Page 03

CENTRAL COAST LAW CORPORATION

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

DANIEL BERTRAND

CENTRAL COAST LAW CORPORATION

PO Box 931 106 Waglisla Street Bella Bella BC V0T 1Z0 Canada 4

E dbertrand@centralcoastlaw.ca

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

SCHEDULE 15

CENTRAL COAST LAW

CORPORATION

via email: patrizia.huot@bst-tsb.gc.ca

PATRIZIA HUOT, GENERAL COUNSEL TRANSPORT SAFETY BOARD OF CANADA

Dear Ms. Huot.

Re: INVESTIGATIONS INTO THE SINKING OF THE NATHAN E. STEWART

I remain legal counsel for the Heiltsuk Tribal Council ("HTC") in its investigation of the sinking of the Nathan E. Stewart.

TRANSPORTATION SAFETY BOARD INVESTIGATION

Heiltsuk Tribal Council takes the position that it has a direct interest in the subject-matter of your mension finds Counts also see position that it has a unlest interest in the subject-matter or your investigation under the Canadian Transportation Accident Investigation and Safety Board Act, SC 1989, c 3, ss. 23(2) and 24(2) as the sinking of the Nathan E. Stewart occurred in its territory and has affected the lands and waters on which Helitsuk members rely for their food and traditional way of life. Due to the large volume of ship traffic traversing the Inside Passage in its territory, HTC also has a direct continuing interest in ensuring similar accidents do not occur in

We also note the duty of the crown in its dealings with First Nations, the duty to consult, and the government's commitment to reconciliation. Accordingly, we request that HTC be appointed as an observer and that it be permitted to exercise all the rights and privileges listed in the Transportation Safety Board Regulations, SOR/2014-37, s. 11.

HEILTSUK TRIBAL COUNCIL INVESTIGATION

Further to HTC's independent investigation, we also request the following that may be in your

- Particulars and all related documents concerning accident prevention measures taken by Kirby Offshore in British Columbia;
 In relation to the Tug-Barge:

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

Letter D. Bertrand to P. Huot, TSB re request for information and documentation in their

(1) any records indicating the current owner(s) of the Tug-Barge, and

possession | Page 01

Canada

CENTRAL COAST LAW

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(2) any records (e.g., International Tonnage Certificates) indicating the gross tonnage of the Tug-Barge;
(b) any U.S. Coast Guard documents relating to the manning or operation of the Tug-Barge;

to the Tug-Battle. (c) any Canadian government agency documents relating to the manning or operation of the tug and barge in Canadian waters, and without limiting the foregoing, any certificate of insurance relating to the Tug-Barge either issued under the Canada Marine Act, or otherwise permitting the Tug-Barge to, inter alia, enter or leave a port in Canadian waters under section 73 of the Canada Marine Act,

(d) ship's certificates, or equivalents, and without limiting the foregoing,

- (1) Flag state inspections;
- (2) Class certificates:
- (3) SMS certificate
- (4) Class Safety Construction Certificate;
- (5) Class Oil Pollution Prevention Certificate: (6) Class Document of Compliance Special requirements for Ships
- Carrying Dangerous Goods; (7) Shipboard Oil Pollution Emergency Plan; and
- (8) Class inspection reports or surveys of any kind for last two
- years; (e) All technical documents, including but not limited to:
- (e) All technical documents, including but not limited to:

 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.
 (f) Operation / SMS (Safety Management System) Manual extracts repollution prevention;
 (g) Vessel Incident Action Plan / Response Plan; and
- (h) WCMRC Membership Agreement or contract.
- 3. In relation to the Incident:

 - (b) All transcripts, notes, and recordings of any interviews conducted with crew members

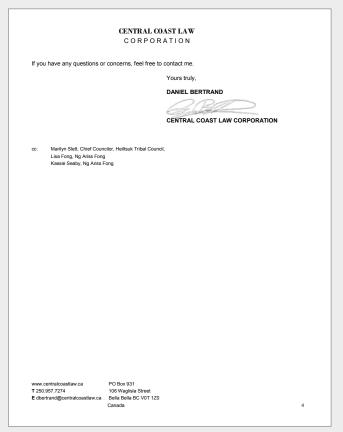
crew members; (b) crew training records; (c) any record of correspondence between Pacific Pilotage Authority and owner/operator with respect to BC coast transit, before and after incident; (d) any correspondence from tug to owner/operator regarding the voyage and the incident (with "voyage" meaning from time of departure to the time of grounding on or about October 13, 2016, and following the grounding (the "Voyage")); (e) any documents regarding fueling of the tug for the Voyage;

PO Box 931 106 Waglisla Street Bella Bella BC V0T 1Z0 Canada

Letter D. Bertrand to P. Huot, TSB re request for information and documentation in their possession | Page 02

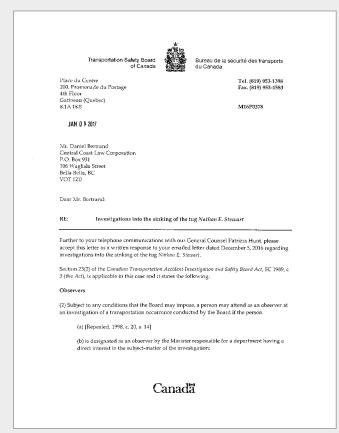
CENTRAL COAST LAW CORPORATION (f) copy of paper chart in use at time of incident: (g) Passage Plan for BC coast transit generally, and for the Voyage specific party of pourment prepared by the master or crew relating to passage planning or navigation for the Voyage; (i) any electronic record of passage planning for the Voyage; (i) course recorder printouts; (i) GPS records; (ii) GPS records; (iii) GPS records; (iii) GPS records; (iii) GPS records; (iv) All party of the Voyage of the Tug-Barge; (iv) any radar or other electronic record of the Voyage; (iv) Certificates / seaman's book of the master and crew; (p) Deck logbook for the Voyage; (iv) Engine room maintenance log for the past twelve months; (iv) Master's standing orders; (iv) Bell book; (iv) Master's Notebook; (iv) Master's Notebook; (iv) general arrangement [plan of the tug]; (ix) tank and piping diagram; (iv) plan of tanks and valves, specifically relating to tanks breached in this incident; (iv) plan of tanks and valves, specifically relating to tanks breached in this incident; (iv) plan of tanks and valves, specifically relating to tanks breached in this incident; (iv) plan of tanks and valves, specifically relating to tanks breached in this incident; (iv) plan of tanks and valves, specifically relating to tanks breached in this incident; (iv) plan of tanks shutoff valves for tanks breached in this incident; (iv) plan of tanks shutoff valves for tanks breached in this incident; (iv) plan of tanks shutoff valves for tanks breached in this incident; (iv) plan of tanks shutoff valves for tanks breached in this incident; (iv) plan of tanks shutoff valves for tanks breached in this incident; (iv) plan of tanks shutoff valves for tanks breached in this incident; (iii) plan of tanks shutoff valves for tanks breached in this incident; (iv) plan of tanks shutoff valves for tanks breached in this incident; (iii) plan of tanks shutoff valves for tanks breached in this incident; (iii) plan of tanks shutoff valves for tanks breached in this incident. (iii) plan

Letter D. Bertrand to P. Huot, TSB re request for information and documentation in their possession $\,\mid\,$ Page 03



Letter D. Bertrand to P. Huot, TSB re request for information and documentation in their possession | Page 04

SCHEDULE 16





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 \mid 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 \mid Page 02

CENTRAL COAST LAW CORPORATION

via email: robert.dick@tc.gc.ca

December 5, 2016

ROBERT DICK, REGIONAL DIRECTOR GENERAL PACIFIC REGION TRANSPORT CANADA

Dear Mr. Dick.

Re: INVESTIGATIONS INTO THE SINKING OF THE NATHAN E. STEWART

I remain as legal counsel for the Helltsuk Tribal Council ("HTC") in its investigation of the sinking of the Nathan E. Stewart. I write further to Andrew Caliform's letter of October 28, 2016, for various documents and particulars in Transport Canada's possession or control. You refused access to these documents and particulars at the Federal Helltsuk Steering Committee on November 21, 2016. Accordingly, we request that you provide your reasons for refusal in

We understand that during its inspection of the Nathan E. Stewart's Barge, Transport Canada removed a VHF, GPS, and possibly other items before HTC had an opportunity to inspect these items. Accordingly, we request photos, all related documents, and all data that can be derived from these items. We will gladly cover any reasonable copying expenses.

Please supply these documents by the 4:30PM PST on Monday December 12, 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

Marilyn Slett, Chief Councilor, Heiltsuk Tribal Council, Lisa Fong, Ng Ariss Fong

Kassie Seaby, Ng Ariss Fong

T 250.957.7274 106 Waglisla Street
E dbertrand@centralcoastlaw.ca Bella Bella BC V0T 1Z0

PO Box 931

at the investigations of the sinking of the Nathan E. Stewart | Page 01

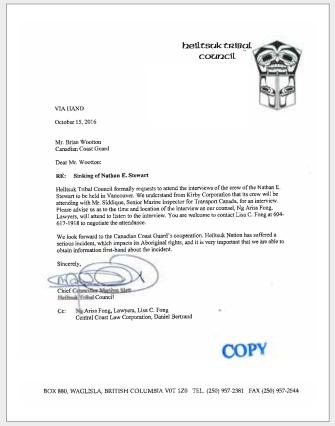
Letter from M. Poisson, TSB to D. Bertrand re denying HTC's request to attend as an observer

beiltsak tribal coupcil October 15, 2016 Kirby Offshore Marine, LLC 2700 West Commodore Way Scattle, WA 98199 ATT'N: Mr. Jim Guidry and Mr. Drew Williams RE: Sinking of Nathan E. Stewart Heiltsuk Tribal Council formally requests to interview the crew of the Nathan E. Stewart as soon as possible and before they depart Bella Belia. We are advised by Kirby personnel that the crew is currently staying at Shearwater Resort. We can make ourselves available immediately to conduct an interview. You are welcome to attend the interview. Please respond to this request immediately, provide a time and place for the interview. If convenient, we can arrange for the interview to be conducted at the Band Council office. Our counsel, Lisa C. Fong or Daniel Bertrand will conduct the interview of your crew. You have indicated to Heiltsuk Tribal Council that Kirby Corporation will be cooperative and we see this as an example of your commitment to cooperating with us. Ng Ariss Fong, Lawyers, Lisa C. Fong Central Coast Law Corporation, Daniel Bertrand COPY

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

BOX 880, WAGLISLA, BRITISH COLUMBIA VOT 1Z0 TEL. (250) 957-2381 FAX (250) 957-2544

SCHEDULE 19



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 | Page 01

Date: Tuesday, October 18, 2016 at 12:18:33 PM Pacific Daylight Time
From: Lisa Fong

Dick, novert

"lisa@ngariss.com", roger.girouard@dfo-mpo.gc.ca, Bishop, Jaime, "Marilyn Slett"

Mr. Dick,

Please the attached letter of today.

LISA C. FONG Ng Ariss Fong | Lawyers

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

210-900 Howe Street

P.O. Box 160 Vancouver, BC, Canada V6Z 2M4

www.ngariss.com

This e-mail and any attachment(s) are confidential and may be privileged. If you are not the intended recipient, please notify us immediately by return e-mail, delete this e-mail and do not copy, use or disclose it.

From: Lisa Feng Sentt October-17-16 7:27 PM Ter: Lisa Feng, Dick, Robert Cc: Isselhoganiss.com; roger girouard@ctfo-npo.gc.ca; Behlop, Jalime; 'Manlyn Slett' Subject: RE: response to your letter of October 15; 2016

I write further to my email below to express the Hellstuk's offence that Transport Canada would speak with the National Observer about the crew interviews but not provide information to Hellstuk:

³While the Transportation Safety Board of Canada has not yet Baunched an investigation into the crash, Mohan Raman, its manager of regional operations for the Marine-Pacific, told National Observer that its representatives are interviewing the seven-member crew of the Nathan E. Stewart tug. None were injured during the incident, but Raman said the interviews could take the entire day.² [National Observer, ³Diesel Containment Failing After Spill on B.C. Coast², October 17, 2016]

LISA C. FONG Ng Ariss Fong | Lawyers T: 604.331.1155 F: 604.677.5410 E: iisa@ngariss.com 210-900 Howe Street

P.O. Box 160 Vancouver, BC, Canada V6Z 2M4

Regards,

see our blog, suite210: www.ngariss.com/blog

This e-mail and any attachment(s) are confidential and may be privileged. If you are not the intended recipient, please notify us immediately by return e-mail, delete this e-mail and do not copy, use or disclose it.

We look forward to your response to our request for a teleconference.

From: Usa Fong
Sent: October 17-16 6:39 PM
To: Undi, Robert
Cc: Bisalingarias, com': <u>roger.giouser@dif-mpo.gc.ca</u>; Bishop, Jaime; 'Marilyn Siett'
Subject: RE: rosponse to your letter of October 15, 2016

Thank you for your email. I confirm that Transport Canada has declined Heiltsuk's request to sit in on the crew interviews.

At this time, Hellsuk has no access to information from the crew involved in the oil spill, tug sinking, and barge stranding incidents that have occurred in their territory. Hellsuk has asked both Transport Canada and Kithy Corporation to provide access to the crew but neither has provided access. We understand Transport Canada has ordered that the crew members Ify out of the territory today to Vancouver. We understand the crew is from Texas and therefore have concerns about their flexing Canada purisdiction.

Page 2 of 4

Emails between Coast Guard and L. Fong re Coast Guard denying HTC's request to interview the Crew | Page 01

Emails between Coast Guard and L. Fong re Coast Guard denying HTC's request to interview the Crew | Page 02

Helitsuk is very concerned that Canada does not respect the fact that these events occurred in its marine territory, impacts an important food and commercial resource, impacts the well-being of its people, and creates a number of significant concerns for the Nation about passage in their waters. The fact of Transport Canada effectively preventing Helitsuk from pursuing its own investigation by defining access to key information is inconsistent with Canada's good of reconlidation with Helitsuk.

We believe it would be useful to have a teleconference to discuss Transport Canada's position on Heilitsuk's investigation of these incidents in its territorial waters. Please let us know when you are available tomorrow morning or Webnisday morning.

LISA C. FONG Ng Ariss Fong | Lawyers

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From: Dick, Robert [mailto:kobert.Dick@tc.or.c3]
Sent: October-16-16 10:03 PM
To: Yeappton@beitsuknation.co.
To: Yeappton@beitsuknation.co.
Cc: Tiss@ngariss.com/; pggergiftogard@dfo-mpo.gc.ca; Bahop, Jaime; Dick, Robert
Subject: response to your letter of October 15, 2016

Dear Chief Councillor Marilyn Slett,

We are writing to confirm receipt of your letter dated October 15, 2016, addressed to Mr. Brian Wooton, Canadian Coast Guard. This correspondence was forwarded to Transport Canada for reply as the assessmen of marine safety and security materies is within the jurisdiction of Transport Canada. Given the late hour LID PM Pacific) and that unfortunately you and I have not been able to connect tonight, I wanted to reply formally but assess you to look forward to discussing those and other matters with you directly when your schedule permits.

Page 3 of 4

We understand that the Heiltsuk Nation is requesting to attend crew interviews to be conducted by Transport Canada, with a view to obtaining further information about the Nathan E. Stewart incident, as it may have significant impact on the Heilsuk Nation.

Transport Canada is committed to engaging with the Heilitsuk Nation in a meaningful and responsive way, in order to: inform you of the steps being taken to assess and investigate this incident and the information available on the extent of the spill and remediation action; and identify paths to enable remediation of harm, all to the full extent of the law. That said, in order to ensure that the fairness and impartiality of Transport Canada's Insport opposes; so not a risk of being undermined should any enforcement ensures utilizative be carried out, notably on the basis of a potential allegation of appearance of partiality towards the interests of an injured that oarry attention gluring interviews, and for practical reasons, to ensure that witnesses are as open and forthcoming in their recounting of events, so as to best ensure accurate information for purposes of securing safety and security, we are unable to include aggrieved third party representatives as part of the official interview process.

We are committed to ensuring that all available measures to remediate this incident are carried out, and to engaging with the Helitsuk Nation in this endeavor. I would welcome the opportunity to discuss how best we can ensure that you and Council have the information you require for your community.

I can be reached via this email, at 604-666-5848 or by cell at 613-614-3432.

Regards

Regional Director General Pacific Region Transport Canada | Government of Canada robert.dick@tc.gc.ca | Tel: 604-666-5849 | TTY: 888-675-6863

Directeur Général Régional Région du Pacifique Transports Canada | Gouvernement du Canada robert dick@ic.gc.ca | Tél.: 604-666-5849 | ATS: 888-675-6863

Emails between Coast Guard and L. Fong re Coast Guard denying HTC's request to interview the Crew | Page 03

Emails between Coast Guard and L. Fong re Coast Guard denying HTC's request to interview the Crew | Page 04



DAMAGE SURVEY REPORT



Vessel	Tug NATHAN E. STEWART/Oil Barge DBL-55
Casualty	Grounding off Bella Bella, British Columbia
Date	October 13, 2016
Survey	November 12, 2016 at Vancouver Drydock, North Vancouver & November 28, 2016 at Schnitzer Steel, Surrey
Prepared For	Ng Ariss Fong / Heiltsuk First Nation
Client Reference	Pending
IMC Reference	10807.16.63

Marine Surveyors & Consultants - Hull and P&I Correspondent

October 13, 2016 - Grounding Off Bella Bella, British Columbia IMC Ref. 10807.16.63	Rev. 1

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5.1. Tug NATHAN E STEWART	
Rudders, Propellers, Propeller Shafts and Nozzles	
Superstructure, Wheelhouse and Accommodation	
Machinery Spaces	
Coupling System	
5.2. Oil Barge DBL-55	
AJT Skegs	
Coupling System	
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> NATHAN E. STEWART/OBL-SS Client Ref. Pending ber 13, 2016 - Grounding Off Bella Bella, British Columbia 10807.16.63 Rev. 1

1. INTRODUCTION / SCOPE OF WORK

At the request of Ng Ariss Fong, attorneys representing the Heiltsuk First Nation, the undersigned has carried out brief 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 Co., North Vancouver, BC
- The circumstances surrounding the grounding itself and causation is not addressed in this report.

2. ATTENDING REPRESENTATIVES

The following persons were present at the both the surveys of the tug NATHAN E. STEWART and barge DBL-55:

Name	Company	Function
Marc McAllister	McAllister Marine Survey & Design Ltd.	Surveyor representing Tug and barge owner's interests
Steve Carpenter	N/A	Representative of the Heiltsuk First Nation
Mark Bentley	Independent Maritime Consulting (Pacific) Ltd.	Surveyor appointed by attorneys for the Heiltsuk First Nation

3. REQUESTED INFORMATION

In connection with the surveys of the NATHAN E. STEWART and 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 possible subsequent) report(s).

- Barge & tug particulars
 Tank Plan / Capacity Plan for barge and the tug
- General Arrangement Drawings for barge and tug
 Midship Section for barge
 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.

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4. TUG / BARGE INFORMATION

[Note: The general description below is limited in scope and specificity due to the time for, and circumstances of, the surveys as well as the lack of any drawings & information.]

4.1. Tug NATHAN E STEWART

Туре	:	Tug
IMO Number	:	8968210
Flag / Home port	:	USA / New York
Built	1	2007 at Hope Services, Inc., Dulac, Louisiana
GT / NT	:	302 / 90
Length	:	30.48m
Breadth (molded)	:	9.75m
Depth	:	4.18m
Class	:	ABS
Owners	:	Kirby Offshore Marine Operating LLC
Managers	:	Kirby Offshore Marine Pacific LLC

NATHAN E. STEWART is a 30.48m steel tug built 2007 and operated by Kirby Offshore Marine LLC. The vessel has a steel hull of conventional shape with twin shafts & nozzles and twin spade rudders. Coolers for machinery equipment cooling are provided in recessed housings in the port and starboard vertical sides.

The machinery space is situated amidships with two Cummins V-16 KTA-50-M main engines driving fixed pitch, 4-blade stainless steel propellers via gearboxes. Two auxiliary engines and generators are provided for electrical power generation.

Forward and aft of the machinery space are fuel oil tanks (three abreast forward and two abreast aft). The steering gear compartment is located aft of the aft fuel tanks in the transom area under the open main deck. The twin rudders are hydraulically operated and mechanically connected to each other.

Forward of the forward fuel tanks is the "pin room" containing the coupling pins and associated structure & systems for the tug/barge coupling system (see below). Below the pin room is understood to be the fresh water tanks). Forward of the pin room is the forward void space. On the open aft main deck are located the main towing winch, just aft of the deckhouse structure with the hydraulically operated towing pinion the aft gunwale.

The deckhouse main deck level contains the machinery space entrance port side and CO2 room at the aft end. Moving forward into the deckhouse is the mess room/Jounge on port side with the galley on the starboard side with the companioway (stairway) up to the 2nd deck between. Forward of the mess room & galley are three cabins and washrooms

The deckhouse second level contains the captains cabin on the port side and a washroom on the starboard side. Immediately aft, on the open deck are the main engine stacks with machinery space

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ventilation inlets/exhausts. On the open deck, starboard side facing aft is the enclosed operating location for the aft winch.

The main wheelhouse is located on the third level of the deckhouse forward occupying the full width of the deckhouse with single console forward containing engine, steering and navigation equipment and controls. Located on an extended column approximately 5m above the main wheel house is a small, enclosed auxiliary wheelhouse for navigation when pushing.

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



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4.2. Barge DBL-55

-		
Туре	:	OPA -90 Compliant Oil Barge
IMO Number	:	N/A
Flag / Home port	:	USA / Portland
Built	:	2011 at Zidell Marine Corporation, Portland, Oregon
GT / NT / DWT	:	4,276 / 2,521 / 9,167
Length	:	91.44m
Breadth (molded)	:	23.77m
Depth	:	7.32m
Class	- :	ABS
Owners	:	Kirby Offshore Marine Pacific LLC
Managers	:	Kirby Offshore Marine Pacific LLC

DBL-55 is an 91.44m double hull, OPA-90 compliant oil tank barge built 2011 by Zidell Marine Corporation, Portland, OR.

The barge has a raised stem and stern with twin skegs aft and a v-notch in the transom to accommodate a pusher tug. The stem notch is equipped with JAK coupling system socket plates attached to port and starboard of the notch to accommodate the corresponding coupling pins from the tug (see below for further description).

The cargo area is subdivided by five transverse corrugated bulkheads and one centreline corrugated bulkhead forming six pairs of cargo tanks numbered #1 P&S through #6 P&S. Cargo tanks #2 P&S (only) are each further subdivided by a longitudinal corrugated bulkhead forming separate inner and outer tanks (#2PI, #2PO, #2SI and #3SO). Hence total number of cargo tanks is fourteen.

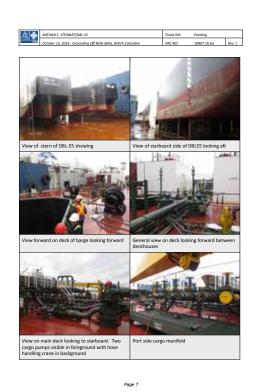
can'ts (ext.), ext.), ext. and ext.), reflect total number of cargo area, and separated from it by plain transverse builkneads. On either side, between the side shell and cargo area, and separated from it by plain transverse builkneads. On either side, between the side shell and cargo area, are six sets of void side transversely continuous, running under the vesself from port to starboard forming the double bottom structure. The side void width is 1m wide and double bottom height is 1.75m. The hull structure is longitudinally framed with transverse floors and web from Service and the structure is the structure of the structure

nul structure is originally rames with transverse notos an awe or transe. Three vertical critiqual cargo pumps (capacity unknown) are located on the main deck amidships and driven by prime movers located in the port and starboard deckhouses. Details of prime movers and associated power generation equipment is unknown. Cargo manifolds are installed port and starboard with sets of cargo loading/discharge connections; plus vapour connections. No details of the cargo piping system are known though it is undestood it provides for three cargo-type type segregation.

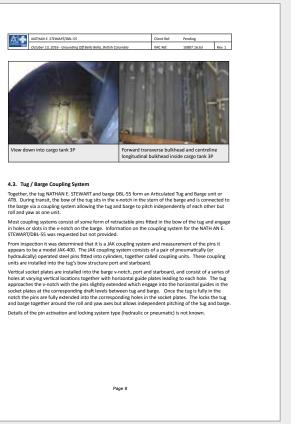
Two, 3-ton hose handling (& oil-spill boom handling) jib cranes are located port and starboard adjacent to the cargo manifolds. A pair of hydraulic mooring winches are provided both forward and aft plus an anchor windlass, anchor and anchor cable forward.

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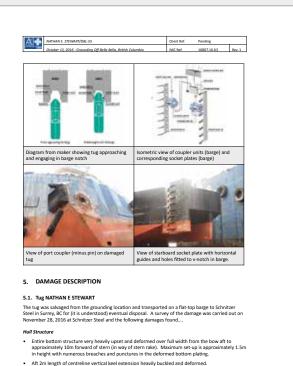
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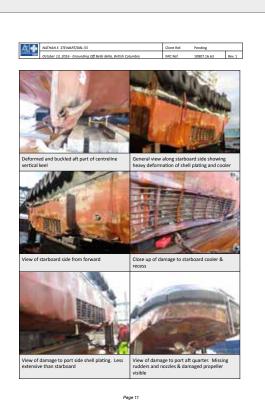


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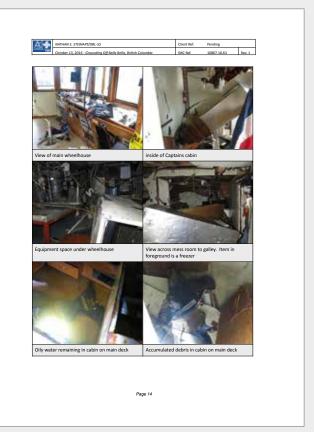
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NATHAN E STEWART DBL-55 - Damage Survey Report (Rev1) IMC Ref. 10807.16.63) | Page 12

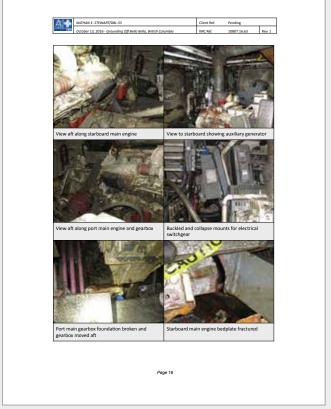


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2017-01-13 10807 - NATHAN E STEWARTDBL-55 - Survey Report (Rev2) | Page 16

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During inspection of the pin room, the inboard end covers of the coupling cylinders had been removed along with the hydraulic/pneumatic connections and the pins themselves withdrawn from the cylinders. This war popentedly 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.

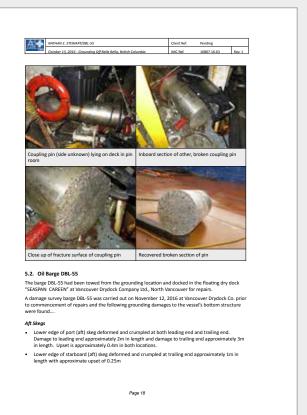
open cylinders from one side of the vessel to the other as part of the operation to salvage the tug. The removed pin swee hying on the bottom of the pin room, covered in advarrounded by debris. One of the pins was found to have been fractured/sheared off approximately half way along its length (approximately 700mm 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 on the barge with the recovered rudders, starboard propeller and nozzles. The fracture surface had a flat, uniform, rougl brittle appearance and had not been cut.

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



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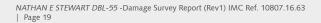


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Bottom Platina and Double Bottom Structure

- <u>Approx. Frame 32-34 Port Side:</u> Two indents in flat bottom plating at turn of bilge each indent approximately 2m x 1m.
- Approx. Frame 29 Port Side: One indent in flat bottom plating at turn of bilge indent
 approximately 3m x 1m.
- <u>Approx. Frame 31-33 Starboard Side:</u> Two indents in flat bottom plating at turn of bilge each indent approximately 1m x 0.5m.





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Approx. Frame 13-20 Part 8. Starboard Side: Very large set up of bottom plating extending across entire breadth of bottom. Longitudinal length of set-up along port side is approximately 12m and approximately 8m along starboard side. Port and starboard side shell blige trafkes in way are buckled up to height of approximately 2m from baseline. Height of set-up is approximately 2m over entire width. Multiple fractures and tears in bottom plating in way.

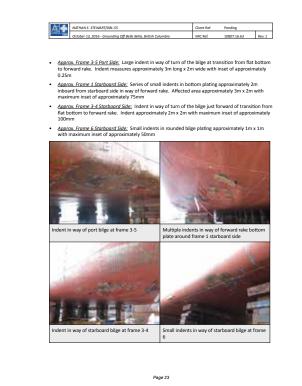


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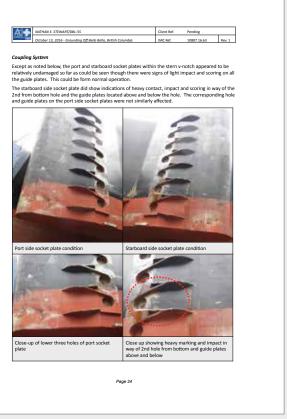
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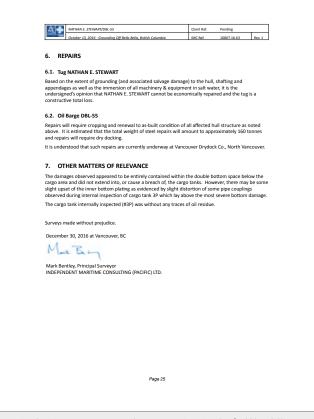
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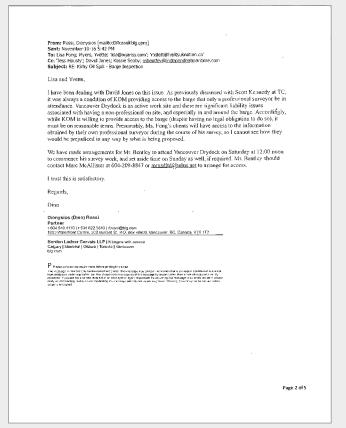




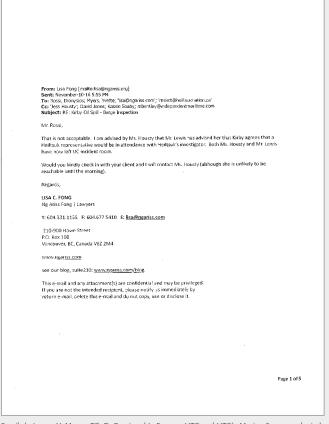
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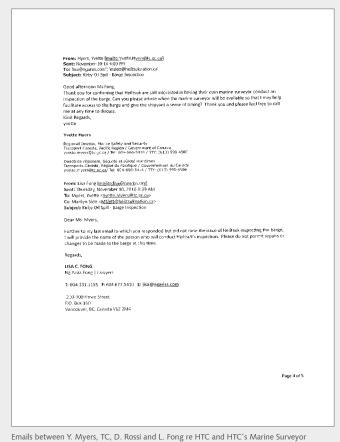
Emails between Y. Myers, TC, D. Rossi and L. Fong re HTC and HTC's Marine Surveyor denied access to inspect the Barge | Page 02



Emails between Y. Myers, TC, D. Rossi and L. Fong re HTC and HTC's Marine Surveyor denied access to inspect the Barge | Page 01



Emails between Y. Myers, TC, D. Rossi and L. Fong re HTC and HTC's Marine Surveyor denied access to inspect the Barge | Page 03



denied access to inspect the Barge | Page 04

see our blog, selection governments committing

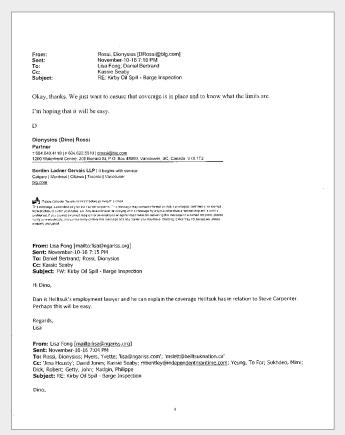
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Emails between Y. Myers, TC, D. Rossi and L. Fong re HTC and HTC's Marine Surveyor denied access to inspect the Barge | Page 05

SCHEDULE 23



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 \mid Page 01

We had understood that Transport Canada and TSB would not provide access to the barge in Vancouver Drydock and so it was only yesterday morning that Ms. Myers asked Chief Selt if Hellstuk wished to send an investigator. We have asked about access to both the crew, incident information, and the up-barge early no but our requests have gone substantively unanswered or have been denied (with the exception of access to the barge now). Please send me your proposed insurance terms and a copy of the access agreement that incorporates Mr. Carpenter's attendance (or provide me with a WORO version that I can revise). I will have access to Chief Slett to sign any documents between 8-10 tomorrow morning. Regards, Ng Ariss Fong | Lawyers T: 604.331.1155 F: 604.677.5410 E: lisa@ngariss.com 0-900 Howe Street P.O. Box 160 Vancouver, BC, Canada V6Z 2M4 www.ngariss.com see our blog, suite210: www.ngariss.com/blog This e-mail and any attachment(s) are confidential and may be privileged. If you are not the intended recipient, please notify us immediately by return e-mail, delete this e-mail and do not copy, use or disclose it. From: Rossi, Dionysios [maito:DRossi@blg.com]
Sent: November:10-16 6:54 PM
To: Liss Fong, Myers, Yester, il-sa@mganss.com'; inslett@helitsuknation.ca'
Cc: Jess Housty; David Jones; Kassie Seaby; <u>mbernley@independentmaritine.com</u>; Yeung, To For; Sukhdeo, Mirri;
Dick, Robert: Getty, John; Medgin, Philippe
Subject: RE: Kirby Oil Spill - Barge Inspection Thanks for the clarification and your additional comments. I note that the barge has been at Vancouver Drydock for three weeks and that it has been inspected by a number of regulators, so I simply cannot accept the suggestion that KOM is rushing the process in any way. Look, my client does not want to be unreasonable about this. If we can come to terms on the insurance issue and if Mr. Carpenter agrees to be bound by the terms and conditions set out in the access agreement that I sent over to David today, let's proceed on Saturday. I trust this will work. We will need the access agreement signed before the survey work can proceed

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

Dionysios (Dino) Rossi Partner 1200 4.640.4110 1 F.644.622.5810 | dross/62810.com 1200 Watertreet Centre, 200 Burnerd 5t, P.O. Box 48800, Vancouver, BC, Canada V/X 112

Borden Ladner Gervais LLP | It begins with service Calgary Montréal | Ottawa | Toronto Vancouver

From: Lisa Fong [mailto:lisa@ngariss.org]
Sent: November:10-16 6:43 PM
To: Ross, Ibonyosis; Myers, Yvette; "isa@ngariss.com"; "mslett@heiltsuknation.ca"
Cc: "Jess Housty"; David Jones; Kassie Seaby; <u>mbentler@independentmaritime.com</u>; Yeung, To For; Sukhdeo, Hirni;
Dick, Robert; Getty, John; Medial, Philippe
Subject: RE: Kirby Oil Spill - Barge Inspection

I understand the rush to get the inspection conducted is because Kirby would like to start repairs on Monday. To accommodate, Helltsuk's investigator and it's representative have arranged time over the weekend. If this timing does not work for your client then I propose the repairs can start after we sort out when a safety debrief can be conducted for the Helltsuk representative, what sort of insurance would be acceptable, and after the Heiltsuk investigator and representative attend to inspect the barge.

Lappreciate that you have not been on site in Bella Bella and perhaps, do not work with First Nations. Your client and their staff who have been in Bella Bella these many weeks have learned that it is important for Heiltusk to be engaged in the response processes, witness the truth of the events ground truthing, and add their local and traditional knowledge to processes. Ground-truthing is very important to helitusk fa and most First National and denying Helitusk a representative to witness an event would be for the community akin to trying to hide the truth of an event.

From a Nation to Nation perspective, Heiltsuk has been advised by Canada that it will collaborate with Heiltsuk in this spill response and investigation. Refusing Heiltsuk access to the barge and later, the tug-will not be collaboration but the opposite.

LISA C. FONG

Ng Ariss Fong | Lawyers

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

210-900 Howe Street P.O. Box 160

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 03

Vancouver, BC, Canada V6Z 2M4

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From: Rossi, Dionysios [mailto:DRossi@blg.com]
Sents thowenther:10-16 of 16 PM
To: Hypers, Verset: Las Fong; "Issa@rgariss.com;" mslett@heitsuknation.ca"
Cc: "Jess Housty!; David Jones; Kassi@ Seaby; mbentley@independentmanitime.com; Yeung, To For; Sukhdeo, Mimi;
Dick, Robert; Gotty, John; Hadaph, Philips
Subject: Re: Kirty oil Spail: - Barge fisspection

Yvetto.

I'm sorry, but I am not sure that I can do that. The shippard already had to make arrangements to call in personnel over a long weekend—at additional cost to KOM—in order ensure that the surveyor appointed by the Heitistak would be provided with access to the barge. I do not know if those employees are the same people who would provide any required safety training to any non-professionals on site.

More importantly, there are significant safety issues associated with having someone in and around the barge in its current state. That is why KOM has specifically insisted that the surveyor retained by the Heiltsuk have proper professional liability insurance coverage as a condition of access. I cannot see how we can deal with this issue with respect to another attendee.

I raised this issue specifically with Mr. Ferguson in our initial discussions regarding access to the barge, so I do not understand how this could still be an issue. I also do not understand why Lisa thinks providing the surveyor alone with access is unacceptable, when her client will have access to all of the information that he obtains. What is to be gained by having an additional person present?

I will confirm instructions with my client, but I do not expect them to change.

Dionysios (Dino) Rossi

Partner

± 604.640.4110 | F 604.622.5810 | drossidable som
1200 Waterfront Centre, 200 Rurrard St. P.O. Sox 46600, Vancouver, BC. Carnada V7X 1T2

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 04

Borden Ladner Gervais LLP | It begins with service Calgary | Montréal | Ottawa | Toronto | Vancouver blo.com

From: Myers, Yvette [mailto:Yvetto_Myers@itc.gc.ca]
Sent: November-(0-16-5:57 PM
Tor: Liss Fong; Jisa@agairs.ccm; 'misetti@heiltsuknation.ca'
Tor: Liss Fong; Jisa@agairs.ccm; 'misetti@heiltsuknation.ca'
Cc: 'Jess Housty', Rossi, Dionysios; David Jones; Kassie Seaby; mjentley@independentmaritime.com; Yeung, To For;
Subdeo, Mini; Olic, Robert; Getty, John; Madgin, Philippe
Subject: RE: Kirby Oil Spill - Barge Inspection

Thank you for your prompt response and for copying all parties involved. TC will provide what assistance we can to help expedite access to the barge. In order to help facilitate next steps and ensure we have a common understanding;

- a) Mr. Rossi- can you please confirm that you will organize the necessary safety briefings for the Heiltsuk
- b) Capt. Yeung- can you please ensure the necessary arrangements are made for a port pass/or security access for the Heilfisuk representatives to the Vancouver Drydock and barge on Sat. I have copied John Getty from Marine. Security to help expedite if required.

Eastly, please advise if any party would like to have a TC Marine Safety Inspector accompany the group? Thank you.

Kind Regards,

Yvette Myers

Dear Ms. Myers.

Regional Director, Marine Safety and Security
Transport Canada, Pacific Region / Government of Canada
yvette.mvers@tc.gc.ca / Tel: 604-666-5474 / TTY: (613) 990-4500

Directrice régionale, Sécunté et sûreté maritimes Transports Canada, Région du Pacífique / Gouvernement du Canada yvette.myers@tc.gc.ca/ Tel: 604-666-5474 / TTY: (613) 990-4500

From: Lisa Fong [mailto:lisa@ngariss.org]
Sent: Thursday, November 10, 2016 5:10 PM

Sent: Thursday, November 10, 2016 5:10 PM

Ton Myers, Yvette C<u>ivette Myers@tc.gc.ca</u>>; "lisa@ngariss.com' <<u>lisa@ngariss.com</u>>; "inslett@heiltsuknation.ca'
<a href="mailto:subariion.ca"

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 05

We have arranged for Mr. Mark Bentley and our Heiltsuk representative, Steve Carpenter to attend for an inspection. I am advised that they will be trying to coordinate for an inspection on Saturday.

I understand Mr. Carpenter will need to get safety training and a security pass. Please assist if you can in this regard. I understand from our Heiltsuk representative in the incident room here in Sella Bella that Mr. Matt Lewis of Kirby says that a 20 minute video is what is needed for a safety briefing. There appears to be some concern as to whether Mr. Carpenter can achieve the safety briefing and obtain a port pass before the repairs, which Mr. Rossi advises Kirby would like to commence on Monday.

Lam copying our Heiltsuk representative in incident command, Jess Housty, our marine lawyer, Mr. David Jones, Mr. Dino Rossi, Kirby's lawyer, and Mr. Bentley, our investigator.

Thank you for your assistance,

LISA C. FONG

Ng Ariss Fong | Lawyers

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From: Myers, Yvette [mailto:Yvette.Myers@tc.gc.ca]
Sent: November-10-16 4:00 PM
To: "isa@ngariss.com"; 'mslett@heiltsuknation.ca'
Subject: Kirby Oil Spill - Barge Inspection

Good afternoon Ms Fong

Thank you for confirming that Helitsuk are still interested in having their own marine surveyor conduct an inspection of the barge. Can you please advise when the marine surveyor will be available so that I may help facilitate access to the barge and give the shipyard a sense of timing? Thank you and please feel free to call me at any time to discuss. Kind Regards. vvette

Yvette Myers

Regional Director, Manne Safety and Security
Transport Canada, Pacific Region / Government of Canada
yvettg,myers@tc.gc.ca / Tel: 604-666-5474 / TTY: (513) 990-4500

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 06

Directrice régionale, Sécurité et sûreté maritimes Transports Canada, Région du Pacifique / Gouvernement du Canada <u>yvette.myers@tc.gc.ca</u>/ lel: 604-666-5474 / 1TY: (613) 990-4500

From: Lisa Fong [mailto:lisa@ngariss.org]
Sent: Thursday, November 10, 2016 8:39 AM
To: Myers, Yvette <<u>Yvette.Myers@tc.gc.ca</u>> Cc: Marilyn Slett < MSlett@heiltsuknation.ca> Subject: Kirby Oil Spill - Barge Inspection

Further to my last email to which you responded but did not raise the issue of Heiltsuk inspecting the barge, I will provide the name of the person who will conduct Heiltsuk's inspection. Please do not permit repairs or changes to be made to the barge at this time.

LISA C. FONG Ng Ariss Fong | Lawyers

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

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Begin forwarded message

From: "Myers, Yvette" <<u>Yvette Myers@tc.gc.ca</u>>
Date: November 9, 2016 at 3:21:29 PM PST
To: Marilyn Slett <<u>MSlett@heiltsuknation.ca</u>>
Subject: Barge Inspection

Good afternoon Marilyn,
It was nice to see you at the announcement on Monday.
I just their to call and left a voice missage; however, I thought I would also drop you a quick note for the
purpose of my call. Please be advised that I have been informed that the Barge DBLSS, which is located
at the Vancouver Drydock, is ready to commence repairs. I also understand from my colleague Scott
Kennedy, that there was some initial interest expressed by Heiltsuk to conduct an inspection of the
barge.

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 07

Prior to granting Kirby permission to proceed with the repairs, can you please advice if there is still interest in conducting an inspection? If so, would you like TC to facilitate access to the barge between Kirby and the Heiltsul Marine Surveyor? Please let me know how you wish to proceed. I can be reached at (604) 666-5470 and I will assist however I can. Thank you. Yvette

Yvette Myers

Regional Director, Marine Safety and Security Transport Canada, Paci/c Region / Government of Canada <u>yvette.myers@tc.gc.ca</u> / Tel: 604-666-5474 / TTY: (613) 990-4500

Directrice régionale, Sécurité et sûreté marktimes Transports Canada, Région du Pacifique / Gouvernement du Canada yvette, myers@tc.gc.ca/ Tel: 604 666:5474 / TTY; (613) 990-4500

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 08

SCHEDULE 24

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION Division of Spill Prevention and Response Prevention and Emergency Response Program

SITUATION REPORT As of 9:30 AM on December 21, 2011

INCIDENT NAME: Tug Nathan E Stewart and Fuel Barge SITREP #: 3 & Final

SPILL NUMBER: 11119935001 LEDGER CODE: 14321060

TIME/DATE OF SPILL: This is a potential spill. At 2.40 PM on December 18, 2011, the United State Coast Guard (USCG) reported to the Alaska Department of Environmental Conservation (ADEC) that the Tug Nathan Stewart and Barge DBL-53, an articulated tughange system, were adit 70: miles used of Cape Fairweather. The crew of the vessel reported a loss of power to the starboard engine to the USCG at 1:00 PM.

TIME/DATE OF SITUATION REPORT: 12:00 PM on December 21, 2011

TIME/DATE OF THE NEXT REPORT: This is the final report

TYPE/AMOUNT OF PRODUCT SPILLED. No spill has occurred at this time. The Tug Nathan E Stewart is a 95-foot commercial tug with six crew members aboard. The tug was towing the Barge DBL-55, a 300-foot fuel barge, en route to Skagway. The tug has 45,000 gallons of diesel and 500 gallons of lube oil on board. The cargo on board the fuel barge is reported to be 2.2 million gallons of diesel fuel, 1028 gallons of aviation fuel and 700 gallons of other petroleum products.

LOCATION: The Tug Le Cheval Rouge, Tug Nathan E Stewart and Barge DBL-55 are currently moored in

CAUSE OF SPILL: This is a potential spill. The crew of the Tug Nathan E Stewart reported to the USCG that a series of 30-foot seas washed over the vessel, and water entered the engine air intakes. Power was lost in both the starboard and prot regines. The starboard engine remains non-operational, but partial power has been restored to the port engine. The power in the port engine was not enough to fully navigate the vessels during the severe weather on December 18. At 10-56 PM on December 18 the weather improved enough to allow the tug and barge to transit

POTENTIAL RESPONSIBLE PARTY (PRP): K-Sea Transportation

RESPONSE ACTION: At 4:54 PM on December 20, the Tug Le Cheval Rouge with Barge DBL-55 and Tug Nathan E Stewari in stern tow departed Mud Bay for Skagway. The Le Cheval Rouge and tow arrived in Skagway a 9:29 AM on December 21, where Barge DBL-55 will offload its cargo. Upon arrival the vessels were met by K-Sea Transportation representatives, engine technicians and USCG Sector Juneau Prevention staff.

SOURCE CONTROL: There has been no release

RESOURCES AFFECTED: There were no natural resources affected.

FUTURE PLANS AND RECOMMENDATIONS. The Tug Allair, owned by K-Sea Transportation, is en from Seattle and is estimated to arrive in Skagway on December 23. The Allair will, depending on the condition to Allain Eskewar's engines, either escort or tow the Nathan E Severar and DBL-35 to Seattle for repairs.

WEATHER: Today – Gale warning. Rain with winds out of the south at 35 knots diminishing in the afternoon. Seas 7 feet. Tonight – Rain with snow late. Winds out of the south at 25 knots diminishing to 20 knots. Seas 5 feet. Tomorrow – Rain and snow. Winds out of the south at 15 knots. Seas 3 feet.

Tug Nathan E Stewart Sitrep # 3 & Final

12/21/2011

Page 2 of 2

UNIFIED COMMAND AND PERSONNEL:
F.O.S.C.: Capt. Scott Bornemann, USCG
S.O.S.C.: Scot W. Tierman, ADEC

FOR ADDITIONAL INFORMATION CONTACT: Crystal Smith, ADEC, 907-465-5346

As more spill information and photographs become available they will be posted at:

AGENCY/STAKEHOLDER NOTIFICATION LIST

This situation report was distributed to the agencies listed on the standard distribution list, which includes the Governor's office, Senator Begich's office, SECC, DOI, NMFS, and USFWS. This situation report was also distributed to the following agencies and stakeholders and stakeholders.

Agency	Name	Sent Via	Additional Info	Telephone	Fax	
K-Sea Transportation	Clark Jennison		cjennison@k-sea.com			
Senate Dist. C	Senator Al Kookesh	Fax	session	465-3473	465-2827	
House Dist. 5 Representative Bill Thomas Fax session		session	465-3732; 766-3581	465- 2652; 766-3592		
USCG (Sector Juneau)	Lt. Ryan Erickson	Email	ryan.r.erickson@uscg.mil	463-2835	463-2445	
USCG (Sector Juneau)	Cdr. Matt Jones	Email	Matt.n.jones@uscg.mil	463-2452		
USCG (Sector Juneau)	Cdr. Kurt Clarke	Email	Kurt.a.clarke@uscg.mil	463-2475		
USCG (Sector Juneau) Capt. Scott Email Scott Bornemann		Scott.w.bornemann@uscg.mil	463-2836			
USCG (Sector Juneau)	MSTC James Highfill	Email	James.L.Highfill@uscg.mil	463-2461		
USDA Forest Service - Tongass Env. Engineer			772-5850	772-5896		
USDA Forest Service - Yakutat Ranger District	A Forest Service - District Ranger Email labenson@fs.fed.us		784-3359	784-3457		
NMFS	Jon Kurland	Email	Jon.kurland@noaa.gov	586-7638	586-7358	
ADF&G	Joe Hitselberger	Email	joe.hitselberger@alaska.gov	465-4346	465-4759	
Yakutat Tlingit Tribe President Victoria Fax Demmert			784-3238	784-3595		
SEAPRO General Manager Email dave@seapro.org Dave Owings		dave@seapro.org	225-7002	247-1117		
ADNR	Doug Sanvik	Email	Doug.sanvik@alaska.gov	465-3513		

Alaska Department of Environmental Conservation Situation Report re the Nathan E. Stewart

Alaska Department of Environmental Conservation Situation Report re the Nathan E. Stewart | Page 02



Name	Company	License	Expiration date
Ainsworth, Dennis	Kirby Offshore Marine	U5A000170936	25-Sep-2017
Biegel, Victor	Kirby Offshore Marine	U5A000094312	2-Mar-2016
Black, Kenneth	Kirby Offshore Marine	U5A000333276	24-Mov-2020
Campos, Randall	Kirby Offshore Marine	U5A000233453	6-Mar-2019
Castle, Robert	Kirby Offshore Marine	U5A000281964	12-Aug-2030
Comstock, Kevin	Kirby Offshore Marine	U5A000224481	19-Dec-2018
Connor, Seun	Kirby Offshore Marine	U5A000236674	27-Mar-2019
Cornwell, William	Kirby Offshore Marine	U5A000120679	5-May-2016
Cortes, Jose M.	Kirby Offshore Marine	U5A000314879	4-Dec-2020
Crauthers, Amos	Kirby Offshore Marine	U5A000301801	16-Dec-2020
DaSilva, Jonathan	Kirby Offshore Marine	U5A000147936	4-May-2017
Davis, Joseph	Kirby Offshore Marine	U5A000092346	19-Apr-2016
Davis, Ricky	Kirby Offshore Marine	U5A000194505	18-Apr-2018
Drage, Eric	Kirby Offshore Marine	U5A000255157	7-Juli-2019
Draper, Dean	Kirby Offshore Marine	U5A000145385	20-Mar-2017
Echeverio, Ronald	Kirby Offshore Marine	U5A000097247	23-Mar-2016
Efron, Alexander	Kirby Offshore Marine	U5A000267157	22-Sep-2009
Engblom, Donald	Kirby Offshore Marine	U5A000237181	1-Apr-2019
Gomowad, Antonette	Kirby Offshore Marine	U5A000145451	21-Mar-2017
Gordy, Howard	Kirby Offshore Marine	U5A000127863	1-Nov-2016
Gorman, Shane	Kirby Offshore Marine	USA000328350	8-Dec-2020
Hansen, Russell	Kirby Offshore Marine	USA000117110	2-Aug-2016
Hart, Duane	Kirby Offshore Marine	USA000247618	30-May-2019
Healy, Thomas	Kirby Offshore Marine	USA000313452	26-Oct-2020
Hegge, Richard	Kirby Offshore Marine	USA000208496	18-04-2018
Hepworth, Jeffrey	Kirby Offshore Marine	USA000132122	7-Dec-2016
Hom, Robert	Kirby Offshore Marine	USA000135237	4-Jan-2017
Johnson, Charles	Kirby Offshore Marine	USA000120578	1-Sep-2016
Justice, Luke	Kirby Offshore Marine	U5A000200817	30-May-2018
Kaeli, Samuel Karuza, Mark	Kirby Offshore Marine Kirby Offshore Marine	USA000222849 USA000144244	3-0ec-2018 13-Mar-2017
Karuza, Mark Keim, Andrew	Kirby Offshore Marine	USA000344244 USA000348749	13-Mar-2017 30-lun-2019
Koskovich, Scott	Kirby Offshore Marine	U5A000298749	23-Apr-2008
Kurth, Paul	Kirby Offshore Marine	USA000315393	13-00-2020
Ladd, Donald	Kirby Offshore Marine	U5A000206970	9-M-2018
Ladd, Stanley	Kirby Offshore Marine	U5A000267651	18-Nov-2019
Lafleur, Janon	Kirby Offshore Marine	U5A000227296	27-lan-2019
Lange, Charles	Kirby Offshore Marine	U5A000135667	9-ian-2017
Law, Samuel	Kirby Offshore Marine	U5A000149700	5-May-2017
McCarthy, William	Kirby Offshore Marine	USA000311864	27-04-2020
McDonald, Ward	Kirby Offshore Marine	U5A000345304	20-Mar-2017
Mescalf, Robert	Kirby Offshore Marine	U5A000271293	15-Aug-2017
Milligan, Edwin	Kirby Offshore Marine	USA000334594	2-Mar-2021
Minture, Erik	Kirby Offshore Marine	USA000267678	4-Nov-2029
Morton, Joel	Kirby Offshore Marine	USA000330847	2-feb-2021
Mountford, David	Kirby Offshore Marine	USA000229685	10-feb-2029

Letter Kirby to PPA re Pilotage Waiver Renewal Request | Page 01

Letter Kirby to PPA re Pilotage Waiver Renewal Request | Page 02

Ohnemus, Chr.	by Offshore Marine	U5A000100937	13-Apr-2006	
O'Malley, Tevi O'Shea, Brend	by Offshore Marine by Offshore Marine	U5A000324688	25-Mov-2020	
		U5A000290293	9-Mar-2020	
Overturf, Dale Peyser, Kevin	by Offshore Marine	USA000237029 USA000241786	28-Nov-2019 6-Apr-2016	
Potuin, Jesse	by Offshore Marine by Offshore Marine	USA000120917	30-Aug-2016	
Powers, Ryan	by Offshore Marine	USA000152724	7-May-2017	
Remmem, Tob	by Offshore Marine	USA000132724 USA000141776	24-Feb-2017	
Rosier, Philipp	by Offshore Marine	USA000172643	10-Out-2017	
Ryan, Alan	by Offshore Marine	U5A000136972	20-lan-2017	
Salter, Robert	by Offshore Marine	U5A000158147	13-Jun-2017	
Scott, Vernon	by Offshore Marine	U5A000324893	9-Dec-2020	
Sidorski, Jacek	by Offshore Marine	U5A000117160	2-Aug-2016	
Smith, David	by Offshore Marine	U5A000253600	3-Feb-2020	
Spigolon, Davi	by Offshore Marine	USA000285939	19-Apr-2017	
Stravers, Kevin	by Offshore Marine	U5A000224391	18-Dec-2018	
Sullivan, Mark	by Offshore Marine	U5A000122953	23-Sep-2006	
Valadics, Carlor	by Offshore Marine	U5A000129091	14 Nov-2016	
Velie, Steven	by Offshore Marine	U5A000277814	3-May-2016	
Wall, Gregory	by Offshore Marine	USA000219756	30-Oct-2018	
Webb, Daniel	by Offshore Marine	U5A000241998	19-May-2019	
Wheble, Matth	by Offshore Marine	USA000146324	26-Mar-2017	
Wulf, Nicholas	by Offshore Marine	U5A000323230	22-Sep-2020	

Letter Kirby to PPA re Pilotage Waiver Renewal Request | Page 03



Letter from I. Forget, PPA to Kirby re Renewal of Waiver Confirmation until March 1, 2017 Page 01

Administration de principe de Parélliper Consair.

Parelle Printige Authority Consols

HART, DUANEL. HEALY, THOMAS E. HEGGE, RICHARD L.	KIRBY OFFSHORE MARINE KIRBY OFFSHORE MARINE KIRBY OFFSHORE MARINE	USA 117110		Updated	F 11 Remarks
HEALY, TIKOMAS E. HEGGE, RICHARD I.			08/02/2016	02/10/2012	0 0
HEGGE, RICHARD L.		USA 247618 USA 313452	05/30/2019	02/19/2015	0 0 4
	KIRBY OFFSHORE MAKINE		07/18/2018	02/19/2015	0 0
	KIRBY OFFSHORE MARINE		12/07/2016	02/10/2012	0 0
	KIRBY OFFSHORE MARINE		01/04/2017	02/19/2015	0 0
JOHNSON, CITARLES C	KIRBY OFFSHORE MARINE	USA 120578	09/01/2016	10/18/2011	6 47
	KIRBY OFFSHORE MARINE		05/30/2018	02/19/2015	0 0
	KIRBY OFFSHORE MARINE		12/03/2018	02/19/2015	0 0 4
	KIRBY OFFSHORE MARINE KIRBY OFFSHORE MARINE		03/13/2017 06/30/2019	02/19/2015	0 7 0
	KIRBY OFFSHORE MARINE		04/23/2018		0,0
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	KIRBY OFFSHORE MARINE		07/09/2018	08/13/2013	0 41
	KIRBY OFFSHORE MARINE		11/18/2019	02/23/2016	0 0 0
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	KIRBY OFFSHORE MARINE		01/09/2017	02/19/2015	0 0
	KIRBY OFFSHORE MARINE		07/27/2020	02/23/2016	0 1
	KIRBY OFFSHORE MARINE		03/20/2017	06/20/2013	0 0
	KIRBY OFFSHORE MARINE		08/15/2017	10/22/2012	0 0
	KIRBY OFFSHORE MARINE		03/02/2021		0 0
	KIRBY OFFSHORE MARINE		11/04/2019	02/19/2015	0 0
	KIRBY OFFSHORE MARINE		02/82/2021		0 0
	KIRBY OFFSHORE MARINE		02/16/2019	02/19/2015	0 2
	KIRBY OFFSHORE MARINE KIRBY OFFSHORE MARINE		03/09/2020	02/23/2016	0.3
	KIRBY OFFSTORE MARINE		04/13/2016	01/30/2013	0 0
	KIRBY OFFSHORE MARINE		11/28/2019	02/19/2015	0 0 Also with Olympic Tee & Bargo
	KIRBY OFFSHORE MARINE		01/05/2016	10/27/2014	0 16
	KIRBY OFFSHORE MARINE		03/30/2016	02/10/2012	0 1 1
	KIRBY OFFSHORE MARINE		05/07/2017	01/30/2013	0 24
	KIRBY OFFSHORE MARINE		02/24/2017		0 6
	KIRBY OFFSHORE MARINE		01/20/2017	02/19/2015	0 0
	KIRBY OFFSHORE MARINE		06/13/2017	09/14/2012	0 1 0
	KIRBY OFFSHORE MARINE		12/09/2020	02/23/2016	0 0 0
	KIRBY OFFSHORE MARINE		04/62/2016	02/10/2012	0 6
SMITH DAVID M	KIRBY OFFSHORE MARINE	USA 233600	02/03/2020		0 D;
	KIRBY OFFSHORE MARINE		DI/19/2017	09/14/2012	0 0 .
	KIRBY OFFSHORE MARINE		12/18/2018	02/19/2015	0 0
	KIRBY OFFSHORE MARINE		09/23/2016 11/14/2016	02/19/2015	0 0 3
	KIRBY OFFSHORE MARINE		95/03/2016	02/19/2015	0 0 0
	KIRBY OFFSHORE MARINE		10/30/2018	02/19/2015	0 0
	KIRBY OFFSHORE MARINE		05/19/2019		0 0
WHEBLE, MATTHEW J.	KIRBY OFFSHORE MARINE		03/26/2017		0 0
WULF, NICHOLAS V.	KIRBY OFFSHORE MARINE	USA 323230	_09/22/2020	02/23/2016	0 0

Letter from I. Forget, PPA to Kirby re Renewal of Waiver Confirmation until March 1, 2017 | Page 03

Company information for "KIRBY OFFSHORE MARINE"

Vessel Name	Vessel Type
ANTARES - 5855 ITC	Baige
BISMARK SEA - 606 FFC	Tug
CAPELLA - 5790 ITC	Barge
CASCADES - 4721 ITC	Barge
DBL 106 - 7129 FFC	Barge
D68L 54 - 4276 FCC	Barge
DBI. 55 - 4256 FFC	Barge
DBI, 77 - 5917 FC	Barge
DBL 78 - 5664 FTC	Barge
DBL 79 - 6149 IYC	Barge
DENEB - 5855 ITC	Barge
DUBLIN SEA - 1040 ITC	Tog
EL LOBO GRANDE II - 563 FI	Tog
JAVA SEA - 416 ITC	Tue
JOHN BRIX - 194 FFC	Tog
KAYS POINT - 4696 ITC	Barge
LEO - 5954 ITC	Hatge
NATHAN E. STEWART - 302	Tug
NOKEA - 183 ITC	Tug
PACIFIC CHALLENGER - 43	Tug
PACIFIC EAGLE - 224 FTC	Tog
PACIFIC FREEDOM - 347 II	Tog
PACIFIC NAVEN - 347 ITC	Tog
PACIFIC WOLF - 485 FFC	Tug
PARACION - 149 ITC	Tug
PURSET SOUNDER - 1870 FFC	
SASANOA - 5159 ITC	Barge
SCORPIUS - 382 ITC	Ting
SEA HAWK - 189 ITC	Tue
SIRIUS - 726 TIC	Tug

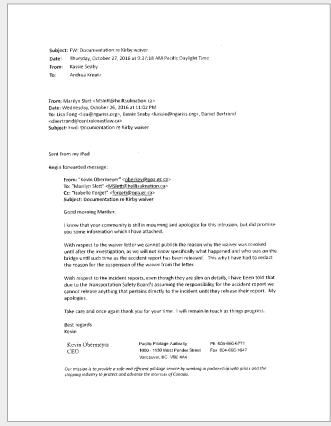
Master Name	Company Name	Licence	Expiry	Updated	F	н	Remarks
AINSWORTH, DENNIS	KIRBY OFFSHORE MARINE	USA 170936	09/25/2017	02/25/2014	. 0	8	
BIEGEL, VICTOR J	KIRBY OFFSHORE MARING	USA 94312	03/02/2016	02/10/2012	0	25	
BLACK, KENNETH A.	KIRBY OFFSHORE MARINE	USA 333276	03/30/2016	02/23/2016	0	9.	l
CAMPOS, RANDALL G	KIRBY OFFSHORE MARINE	USA 233453	03/06/2019	02/19/2015	0	33	T
CASTLE ROBERT J	KIRBY OFFSHORE MARINE	USA 281964	08/12/2020	02/19/2015	0	j e	[
COMSTOCK, KEVIN	KIRBY OFFSHORE MARINE	USA 224481	12/19/2018	02/19/2015	0	0	
CONNOR, SEAN P	KIRBY OFFSHORE MARINE	USA 236674	03/27/2019	11/10/2015	0	21	[
CORNWELL, WILLIAM F, BI	KIRBY OFFSHORE MARINE	USA 120679	05/05/2016	02/10/2012	10	9	
CORTES, JOSE M	KIRBY OFFSHORE MARINE		12/04/2020	02/23/2016	10	12	
CRAUTHERS, AMOS L	KIRBY OFFSHORE MARINE	USA 301801	12/16/2020	02/23/2016	0	0	
DASILVA, KINATHAN R	KIRBY OFFSHORE MARINE	USA 147936	05/04/2017	02/19/2015	0	0	
DAVIS, JOSEPH SEARS	KIRBY OFFSHORE MARINE	USA 92346	04/19/2016	05/02/2011	10	0	
DAVIS, RICKY LEE	KIRBY OFFSHORE MARINE	USA 194505	04/18/2013	08/29/2013	0	2	
DRAGE, ERIC JON	KIRBY OFFSHORE MARINE	USA 255157	07/07/2019	02/19/2015	iŭ	25	
DRAPER, DEAN W.	KIRBY OFFSHORE MARINE	USA 145385	03/20/2017	06/19/2012	U	6	
ECHEVERIO, RONALD II	KIRBY OFFSHORE MARINE	USA 97247	03/23/2016	02/10/2012	: 0	0	
EFRON, ALEXANDER H.	KIRBY OFFSHORE MARINE	USA 267157	09/22/2019	07/21/2015	10	0	
ENGBLOM, DUNALD H	KIRBY OFFSHORE MARINE	USA 237181	04/01/2019	02/19/2015	0	6	REINSTATED MARCH 2011 AS
GOMOWAD, ANTONETTE M	KIRBY OFFSHORE MARINE	USA 145451	03/21/2017	02/19/2015	0	0	
GORDY, BOWARD W. III	KIRBY OFFSHORE MARINE		11/01/2016	02/19/2015	0	1	
CORMAN, SHANE J	KIRBY OFFSHORE MARINE	USA 328350	12/08/2020	02/23/2016	0	1	

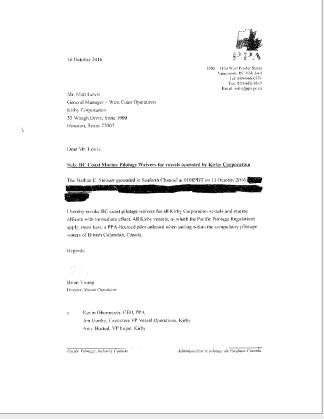
Letter from I. Forget, PPA to Kirby re Renewal of Waiver Confirmation until March 1, 2017 | Page 02



Letter from PPA to Kirby re Kirby Waiver Revoked as of Oct. 16, 2016 (redacted version) | Page 01

SCHEDULE 28





Email from B. Young, PPA to Chief Slett re Copy of Letter Revoking Kirby's Waiver | Page 01

Email from B. Young, PPA to Chief Slett re Copy of Letter Revoking Kirby's Waiver | Page 02

PACIFIC PILOTAGE AUTHORITY

1000 – 1130 West Pender Street Vancouver, B.C V6E 4A4



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 tugboat 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 entering a compulsory pilotage area must notify the PPA and provide a list of the waiver holders' names
- Every ship must have <u>two</u> people on the bridge at all times, one of whom must be the waiver holder;
- 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 transits:
 - a. First Narrows (Vancouver Harbour)
 b. Second Narrows (Vancouver Harbour)
 - c. Fraser River transit

 - Seymour Narrows
 Race and Current passage
 Blackney Pass, Weynton Pass and Broughton Pass
 - g. Bella Bella
 - h. Boat Bluff
 - i. Grenville Channel from Lowe Inlet 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 areas. These restrictions will not apply to vessels delivering fuel to remote locations and communities on the BC Coast.

- The northern section of the inside passage is off limits (Grenville Channel, Princess Royal Channel, Finlayson Channel, Seaforth Channel, Lama Pass and Fitzhugh Channel).
- Vessels are to follow a route between the Mainland and Haida Gwaii after leaving Gordon Channel at the north east corner of Vancouver Island.
- ☑ In adverse weather conditions and after clearance with vessel traffic, the vessel can proceed through Laredo and Principe 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.

Ouick facts

mandate is to provide safe, reliable and efficient marine pilotage and related services in the coastal waters of British Columbia, including the Fraser River.

"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 Obermeyer Chief Executive Officer

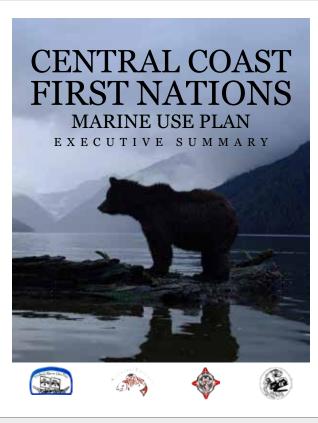
Contact

Brian Young Director of Marine Operations 604-666-8668 brian@ppa.gc.ca

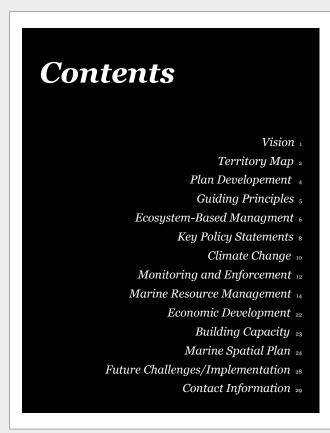
The Pacific Pilotage Authority is online at $\underline{\text{http://www.ppa.gc.ca/}}$.

NEWS RELEASE PPA re New and Interim Measure for Waiver System | Page 01

NEWS RELEASE PPA re New and Interim Measure for Waiver System | Page 02



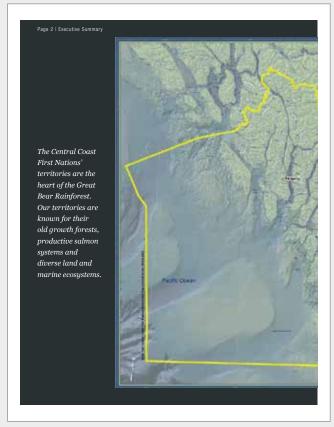
Central Coast First Nation Marine Use Plan - Executive Summary | Page 01



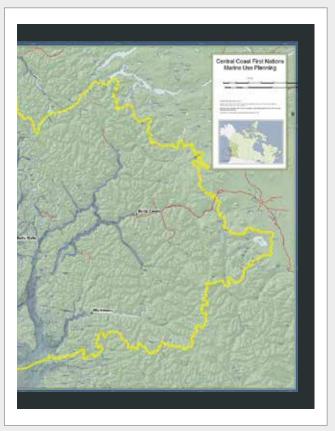
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Vision The Heiltsuk, Kitasoo/Xai'Xais, Nuxalk and Wuikinuxv Nations assert our rights and title to our respective territories and recognize the obligation bestowed upon us by our ancestors to manage our marine resources based on our traditional laws, 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.

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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, Kitason/Xai/Xais, Nuxalk and Wuikinuw Xaitons. The Plan is comprehensive and covers jurisdiction, resource management, economic development and capacity needs across all sectors of the marine market and non-market 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 The Central Coast First Nations Marine Use Plan is a harmonized reflection of the goals, objectives and strategies of the Heilisuk, Kitasoo/Xai/Xais, Nuxalk and Wuikimuxv 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 committee's work was supported by technical staff from a variety of fields including: project management, biology, strategic planning, global information systems technology, and preserved. 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. The governance and management direction, economic initiatives and capacity development needs outlined in the Central Coast First Nations Marine Use Plan reflect the collective interests of the Heiltsuk, Kitasoo/Xai'Xais, Nuxalk and Wuikinuxv people. The Plan is a living document. It will be updated as new information about our territories comes to light. This includes reviewing the Plan with local communities to ensure it meets our collective interests. We believe that together First Nations and local non-First Nations can enhance plan outcomes and improve implementation of the Plan's goals and objectives.

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Guiding Principles Ensure conservation of natural and cultural resources Marine Use Plan. Natural and cultural resources must be sustained to maintain and safeguard our direct connection to our territories and their resources. Ensure Central Coast First Nations' priority access to resources for cultural and sustenance use 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. **Enable appropriate Central Coast First Nations'** commercial use of resources For too long our communities have sat on the side-lines while others have realized economic development and diversification is required to create both employment and entrepreneurial 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

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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 neighbouring communities and industry to address

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 resource revenues and taxes 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 actions through improved management, increased funding for enhancement 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 ceremonial 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 woefully inadequate. Successful implementation of our Plan requires that the Central Coast First Nations are able to directly enforce our plans, laws, policies and guidelines.

Territorial-based economic development

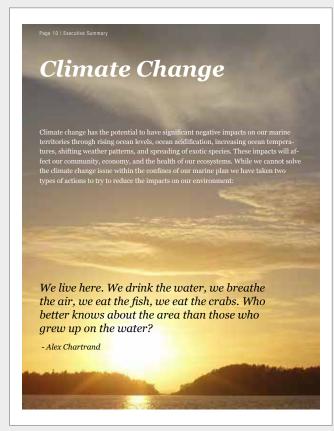
We have stood witness to resources leaving our territories in record numbers with no benefit to our Nations or communities. In commercial fisheries alone, catch value from our territories was or \$18 million in 2007. Ecosystem-based management requires that social and economic well-being is achieved 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 unselective and destructive nature of bottom trawling is inconsistent with our beliefs and EBM. Bottom trawling should be prohibited throughout the Central Coast.

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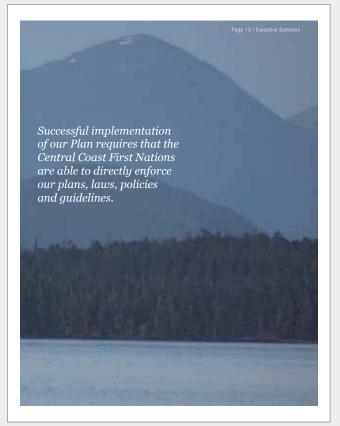
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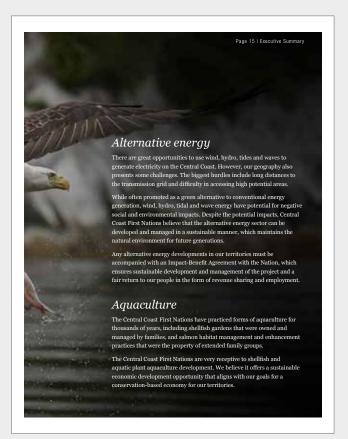
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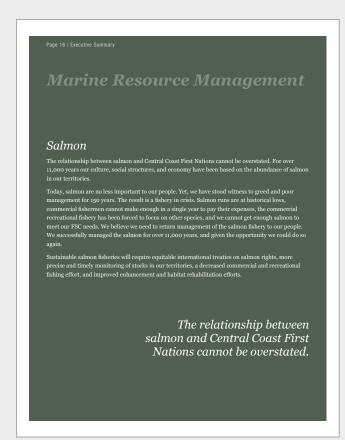
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Marine Resource Management

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 trade from the coast to the interior was so important that the trails connecting the communities were known as "grease trails."

The drastic decline of the Central Coast eulachon populations in the 1990s occurred during the most significant shrimp trawl activity in Queen Charlotte Sound. The impact of the by-catch was amplified as it occurred in the offshore 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 touring and associated moorage and camping has resulted in conflicts in areas used by our people as food gathering camps, clam harvesting 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.

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Marine Resource Management

Shipping and transportation

Numerous industrial marine development proposals are being pursued within the Pacific North Coast Integrated Management Area of British Columbia. Several new terminal and marine transportation projects for North Coast ports in Prince Rupert, Kitimat and Stewart are at various levels of development. Of particular concern is that several of these projects include the marine transport of hydrocarbons.

While all of the ports in the Central Coast are small 'remote ports' and none of the new developments are proposed in our territories they will significantly increase the amount of marine traffic in the area, thereby potentially increasing the frequency and severity of accidents and associated spills. At the same time, small commercial and transient vessels continue to travel our territorial waters. The resulting release of sewage, grey water, bilge water, and garbage continue to be of serious concern to our Nations.

Improved regulation, better monitoring and enforcement, and the ability to respond quickly and effectively to local spills which threaten natural resources are needed to ensure these visitors do not better our marine resources.

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Marine Resource Management

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 small salmon runs, over fishing, 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 cultures 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 fisheries management practices to incorporate traditional knowledge and the wisdom of our elders, mitigating and preventing external anthropogenic and natural impacts on fisheries resources, and establishing Marine Conservancies, which allow for First Nations' FSC access.

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Marine Resource Management

Northern abalone

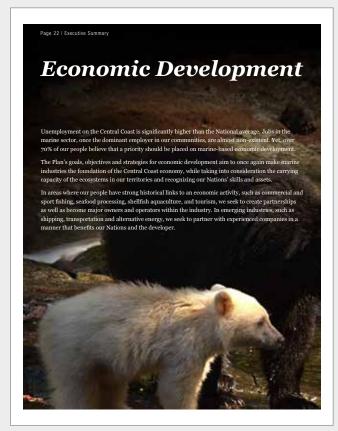
Northern abalone have always been an important component of our diet and economy. Central Coast First Nations traditionally picked abalone in the intertidal zone. This insured that there was always sufficient brood stock to support a healthy abalone population. The advent of SCUBA diving and subsequent 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 tha a concerted effort needs to be put in place to reduce the impacts of poaching and increasing brood stock. A trial abalone FSC tidal 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.

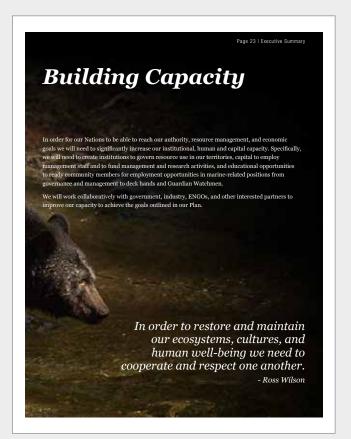
We are very alarmed by the continued decline of such a culturally important species and believe that a concerted effort needs to be put in place to reduce the impacts of poaching and increasing brood stock.

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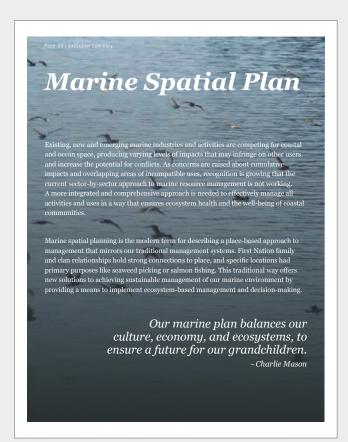
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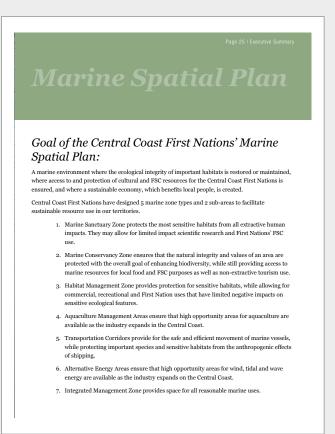
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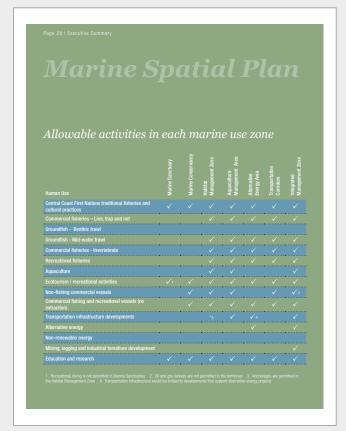
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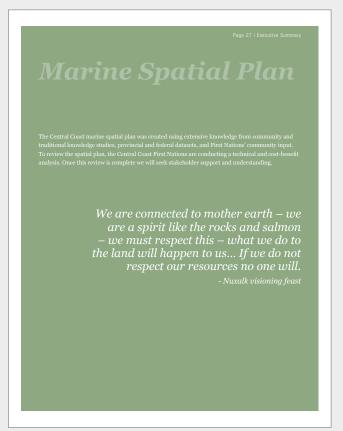
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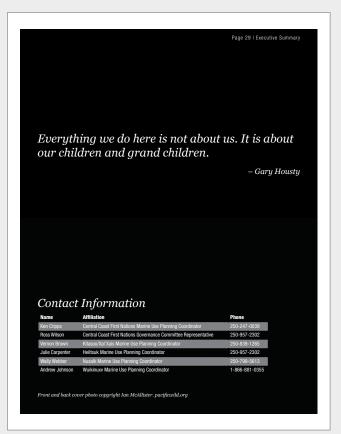
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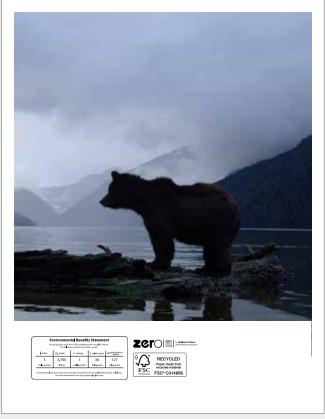
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SCHEDULE 31

Page 1

Case Name: Gitxaala Nation v. Canada

Between

Gitxaala Nation, Gitga'At First Nation, Haisla Nation, The Council of the Haida Nation, and Peter Lantin suing on his own behalf and on, behalf of all citizens of the Haida Nation Kitasoo Xai'Xais Band Council on behalf of all members of the Kitasoo Xai'Xais Nation and Heiltsuk Tribal Council on behalf of all, members of the Heiltsuk Nation, Martin Louie, on his own behalf, and on behalf of Nadleh Whut'en and on, behalf of the Nadleh Whut'en Band Fred Sam, on his, own behalf, on behalf of all Nak'azdli Whut'en, and on, behalf of the Nak'azdli Band Unifor, Forestethics, Advocacy Association, Living Oceans Society, Raincoast Conservation Foundation, Federation of British Columbia Naturalists, carrying on business as BC Nature, Applicants and Appellants, and Her Majesty the Queen, Attorney General of Canada, Minister of the Environment, Northern Gateway Pipelines Inc., Northern Gateway Pipelines Limited Partnership, and National Energy Board, Respondents, and

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

[2016] F.C.J. No. 705

[2016] A.C.F. no 705

2016 FCA 187

1 C.E.L.R. (4th) 183

269 A.C.W.S. (3d) 85

2016 CarswellNat 2576 2016 CarswellNat 2577

Gitxaala Nation v. Canada 2016 FCA 187 | Page 01

485 N R 258

kets A-437-14 (lead file), A-56-14, A-59-14, A-63-14, A-64-14; A-67-14, A-439-14, A-440-14, A-442-14, A-443-14, A-445-14, A-446-14, A-447-14, A-448-14, A-514-14, A-517-14, A-520-14, A-522-14

Federal Court of Appeal

Dawson, Stratas and Ryer JJ.A.

Heard: October 1-2 and October 5-8, 2015. Judgment: June 23, 2016.

(364 paras.)

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 pienie 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, 5, 19, 29, 30, 31, 53.

Natural resources law -- Oil and gas -- Conservation and licensing -- Federal regulation --

National Energy Board -- Environmental impact -- Environmental assessment -- Pipelines -- Inter-provincial -- 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 Panel following multi-year review process, giving due consideration to economic, environmental, cultural factors -- However, Canada falled fulfill 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 -- National Energy Board Act, ss. 2, 52, 53, 54.

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 1,178 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 had the support of 60 per cent of the Aboriginal communities along the pipelines' right of way. The remaining communities' members were among the applicants. 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 Pern-hearing phase, a phaser japhase, 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 ginificant adver

HELD: 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 fulfil its duty to consult with the First Nations peoples. Canada exercised good faith and designed a good framework to fulfil its duty to consult, but failed in executing that framework. The Governor in Council gave due consideration to

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Lisa Fong, Julia Hincks, for the Applicants/Appellants, Kitasoo Xai'xais Band Council and Heiltsuk

Cheryl Sharvit, Gavin Smith, for the Applicants/Appellants, Martin Louie, On His Own Behalf andOn Behalf of Nadleh Whut'en and On Behalf of the Nadleh Whut'en Band, Fred Sam, On His Own Behalf andOn Behalf of All Nak'azdii Bai'u Whut'en and On Behalf of the Nak'azdii Bai'u Shari Sh

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Barry Robinson, Karen Campbell, for the Applicants/Appellants, Forestethics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation.

Chris D. Tollefson, Anthony Ho, for the Applicant/Appellant, Federation of Be Naturalists, Carrying On Business As Be Nature.

Jan Brongers, Ken Manning, Dayna Anderson, Liliane Bantourakis, Sarah Bird, for the Respondents, Her Majesty the Queen, Attorney General of Canada and the Minister of the Fnvironment.

E. David D. Tevender, Q.C., Bernard J. Roth, Laura K. Estep, for the Respondents, Northern Gateway Pipelines Inc. and Northern Gateway Pipelines Limited Partnership.

Andrew R. Hudson, for the Respondent, National Energy Board.

Angela Cousins, for the Intervener, Attorney General of British Columbia.

Colleen Bauman, Justin Safayeni, for the Intervener, Amnesty International.

Lewis L. Manning, Keith B. Bergner, Toby Kruger, for the Intervener, Canadian Association of Petroleum Producers.

Reasons for judgment were delivered by Dawson and Stratas JJ.A. Dissenting and separate reasons were delivered by Ryer J.A.

1 DAWSON and STRATAS JJ.A.:— Before the Court are nine applications for judicial review of Order in Council P.C. 2014-809. That Order required the National Energy Board to issue two

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 hurried 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 Cited:

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 39

Canadian 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(3), s. 30, s. 30(1), s. 30(2), s. 31, s. 31(1)(a), s. 31(5), s. 53, s. 53(1), s. 53(2)

Canadian Environmental Assessment Act, 1992, s. 37

Constitution Act, 1982, s. 35(1)

Constitution Act, 1867, s. 9, s. 10, s. 13

Federal Courts Rules, S.O.R /98-106, Rule 81

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. 2, s. 33, s. 40, s. 52, s. 52(1), s. 52(2), s. 52(3), s. 52(4), s. 52(10), s. 52(11), s. 53, s. 53(1), s. 53(2), s. 54(1), s. 54(1) (a), s. 54(2), s. 54(3), s. 54(5), s. 75, s. 74, s. 87, s. 103

Counce

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Certificates of Public Convenience and Necessity, on certain conditions, concerning the Northern Gateway Project. That Project, proposed by Northern Gateway Pipelines Inc. and Northern Gateway Pipelines Limited Partnership, consists of two pipelines transporting oil and condensate, and related facilities.

- 2 Also before the Court are five applications for judicial review of a Report issued by a review panel, known as the Joint Review Panel, acting under the Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, section 52 and the National Energy Board Act, R.S.C. 1985, c. N-7, as amended. The Governor in Council considered the Joint Review Panel's Report when making its Order in Council.
- 3 And also before the Court are four appeals of the Certificates issued by the National Energy Board.
- 4 All of these proceedings have been consolidated. These are our reasons for judgment in the consolidated proceedings. In conformity with the order consolidating the proceedings, the original of these reasons will be placed in the lead file, file A-437-14, and a copy will be placed in each of the other files.
- 5 As seen above, three administrative acts -- the Order in Council, the Report and the Certificates -- are all subject to challenge. But, as explained below, for our purposes, the Order in Council is legally the decision under review and is the focus of our analysis.
- 6 Applying the principles of administrative law, we find that the Order in Council is acceptable and defensible on the facts and the law and is reasonable. The Order in Council was within the margin of appreciation of the Governor in Council, a margin of appreciation that, as we shall explain, in these circumstances is broad.
- 7 However, the Governor in Council could not make the Order in Council unless Canada has also fulfilled the duty to consult owed to Aboriginal peoples.
- 8 When considering whether that duty has been fulfilled $-i\,\epsilon_n$, the adequacy of consultation we are not to insist on a standard of perfection; rather, only reasonable satisfaction is required. Bearing in mind that standard, we conclude that Canada has not fulfilled its duty to consult. While Canada exercised good faith and designed a good framework to fulfil its duty to consult, execution of that framework in particular, one critical part of that framework known as Phase IV fell well short of the mark. A summary of our reasons in support of this conclusion can be found at paragraphs 325-332, below.
- 9 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. Our conclusion follows from the application of legal principles previously settled by the Supreme Court of Canada to the undisputed

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were issued u redetermination	or the following reasons, we would under them. We would remit the r	natter back	to the Gover	nor in Council for prompt
11 For the	convenience of the reader, we on	iei ali ilidex	to these reas	sons.
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C. The	approval process for the Project		[19]	
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	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	[218]
(f)	The Crown consultation did not reflect the terms, spirit and intent of the Haida Agreements	[226]
(g)	The Joint Review Panel Report left too many issues affecting First Nations to be decided after the Project was approved	[230]
(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	[230]
(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	[230]
(j)	Canada did not assess or discuss title or governance rights and the impact on those rights	[230]

(5) Conclusion [325]

G. Remedy [333]

H. Proposed disposition [342]

A. The Project

- 12 The Northern Gateway Project consists of two 1,178 kilometer pipelines and associated facilities. One pipeline is intended to transport oil from Bruderheim, Alberta to Kitimat, British Columbia. At Kitimat, the oil would be loaded onto tankers for delivery to export markets. The other pipeline would carry condensate removed from tankers at Kitimat to Bruderheim, for distribution to Alberta markets.
- 13 The associated facilities include both tank and marine terminals in Kitimat consisting of a number of oil storage tanks, condensate storage tanks, tanker berths and a utility berth. Kitimat would be a much busier place, with 190-250 tanker calls a year, some tankers up to 320,000 tons deadweight in size.
- 14 If built, the Project could operate for 50 years or more.
- 15 Behind the Project are Northern Gateway Pipelines Limited Partnership and Northern Gateway Pipelines Inc. For the purposes of these reasons, it is not necessary to distinguish between the two and so the term "Northern Gateway" shall be used throughout for both or either.
- 16 Northern Gateway is not alone behind the Project. It has 26 Aboriginal equity partners representing almost 60% of the Aboriginal communities along the pipelines' right-of-way, representing 60% of the area's First Nations' population and 80% of the area's bombined First Nations and Métis population. Northern Gateway continues to discuss long term partnerships with a number of Aboriginal groups and expects that the number of equity partners will increase.

B. The parties

- 17 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

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pumping station would also be located on the Nak'azdli's asserted territory The Nadleh and the Nak'azdli are members of the Carrier Sekani Tribal Council, whose comprehensive claim has been accepted by Canada for reconst

- * Haida Nation. The Haida 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 kilometres, with roughly 4,700 kilometres of shoreline. No place is further than 20 kilometres from the sea. All proposed tanker routes go through or are next to the marine portion of the territory asserted by the Haida. In the southern portion of Haida Gwaii is Gwaii Haanas, a Haida protected area and national park reserve that contains a UNESCO World Heritage Site called "San gway" or "anastims." Northern Gateway identified nine ecosections and twelve oceanographic areas of significance for the Project and a number of these
- 18 Other parties before the Court claim a strong interest in the Project:
 - * ForestEthics Advocacy Association. This non-profit environmental protection society has a long history of advocating for changes in the extraction of natural resources, protecting endangered forests and wild places, educating and informing the public and working with governments and others in pursuit of these objectives.
 - Living Oceans Society. This non-profit society advances science-based policy recommendations to achieve the conservation of oceans and the communities that depend upon them. It has been involved in researching and proposing policy for oil and gas development as it affects the marine
 - * Raincoast Conservation Foundation. This is a group of conservationists and scientists dedicated to protecting the lands, waters and wildlife of coastal British Columbia through peer-reviewed science and grassroots advocacy and the use of a full-time university lab, a research station and a
 - B.C. Nature. This is a federation of naturalists and naturalist clubs representing more than 5,000 people. It wishes to maintain the integrity of British Columbia's ecosystems and rich biodiversity. To this end, it engages in public education and coordinates a science-based program that identifies, conserves and monitors a network of habitats for bird populations.
 - Unifor. This is a labour union that represents many energy and fisheries
 workers in Canada. The energy workers it represents are employed in oil
 and gas exploration, transportation, refining and conservation in

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Gitxaala maintain that the tanker traffic resulting from the Project would affect its Aboriginal rights, including title and self-governance rights. Its

main community, Lach Klan, is roughly 10 kilometres from the tanker routes. Also near the tanker routes are fifteen of its reserves, several harvesting areas, traditional village sites, and spiritual sites. Haisla Nation. A portion of the pipelines, the entire Kitimat terminal and a portion of the tanker route are within territory claimed by the Haisla upon

which they assert rights to hunt, fish, trap, gather, use timber resources and govern. Canada accepted the Haisla's comprehensive claim for

framework agreement with the Haisla for treaty negotiations.

Gitga'at First Nation. All ships coming or going from the Kitimat terminal must pass through the Gitga'at's asserted territory. They have fourteen reserves along the proposed shipping route; indeed, the route is just two

negotiations decades ago and twenty years ago, Canada entered into a

kilometres from the main Gitga'at community at Hartley Bay, British

Kitasoo Xai'Xais Band Council. This party is the body that governs the

people. Their asserted territory includes a number of coastal islands and surrounding waters and mainland territory next to inlets and fjords.

Heiltsuk Tribal Council. This party governs the Heiltsuk Nation. The Heiltsuk Nation is a band of Aboriginal peoples amalgamated from five

tribal groups located on the central coast of British Columbia. They assert a claim to 16,658 square kilometres of land and nearshore and offshore

waters on the central coast of British Columbia. Their main community is Bella Bella, on Campbell Island. Tankers approaching Kitimat from the southern approach will travel through the Heiltsuk's asserted territory.

Nadleh Whut'en and Nak'azdli Whut'en. They are part of the Yinka Dene or Dakelh people. Yinka Dene means "people of the earth" or "people for

affiliation of Dakelh people with clans that include hereditary leaders, land and resource management territories known as "keyoh" or "keyah," and a system of governance known as "bahlats" as an institution to govern the keyoh/keyah and clans. The pipelines would cross approximately 50 kilometres of the Nadleh's asserted territory and cross 86 watercourses on

their land, 21 of which are fish-bearing waters. The pipelines would cross approximately 110 kilometres of the Nak'azdli's asserted territory and cross 167 watercourses on their land, 60 of which are fish-bearing waters. A

the land." Dakelh means "travellers on water." They have a governance system founded in ancestral laws, key elements of which include the

Kitasoo Xai'Xais Nation, a band of Aboriginal peoples comprised o Tsimshian Kitasoo people and Heiltsuk language speaking Xai'Xais

Tankers will cross their territory.

petrochemical and plastics industries. A number of its members work in production and refining facilities in Alberta and British Columbia that are to be served by the Project. The fisheries workers are located across Canada. On the west coast, Unifor represents commercial fishers and fish plant workers who rely on healthy fish stocks and fish habitats.

C. The approval process for the Project

(1) Introduction

- 19 The challenges associated with the approval process for the Project were immense. Massive in size and affecting so many diverse groups and geographic habitats in so many different ways, the Project had to be assessed in a sensitive, structured, efficient, yet inclusive manner.
- 20 By and large with the exception of certain aspects of Canada's execution of the duty to consult, to which we return later in these reasons — the assessment and approval process was set up well and operated well. Given the challenges, this was no small achievement.

(2) The beginning

- 21 In late 2005, Northern Gateway Pipeline submitted a preliminary information package to the National Energy Board and the Canadian Environmental Assessment Agency.
- 22 In early 2006, the Board, after consulting with various federal authorities, recommended that the Minister of the Environment refer the Project to a review panel. In the autumn, the Minister of the Environment referred the Project to a review panel to be conducted jointly under the National Energy Board Act and the Canadian Environmental Assessment Act. That review panel was known as the Joint Review Panel because it had two tasks. First, it was to prepare a report under section 52 of the National Energy Board Act for the consideration of the Governor in Council. Second, owing to the fact that the Project was a "designated project" within the meaning of section 2 of the Canadian Environmental Assessment Act, the Joint Review Panel was to conduct an environmental assessment of the Project and provide recommendations to the Governor in Council under section 30 of the Canadian Environmental Assessment Act.
- 23 The terms of reference for the Joint Review Panel needed to be settled. Those terms of reference were to appear in an agreement between the National Energy Board and the Minister of the Environment. In September 2006, the Canadian Environmental Assessment Agency released a draft of that agreement for comment. This was an opportunity for the public and, specifically, Aboriginal groups, to provide their views.
- 24 The review process was paused in late 2006 at the request of Northern Gateway which wanted time to complete various commercially necessary tasks. Those tasks were completed by mid-2008 when Northern Gateway requested the review process resume. In particular, it requested that the

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draft agreement setting the terms for the Joint Review Panel be finalized.

- 25 Throughout this time, Aboriginal groups continued to have an opportunity to comment on the draft agreement. And in late 2008-early 2009, the Canadian Environmental Assessment Agency specifically contacted Aboriginal groups to advise them about the Project and to inform them of opportunities to participate in proceedings before the Joint Review Panel and the related process of consultation with the Crown. Much more on this will be discussed below
- 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 time, 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 was contemplated concerning permits and authorizations to be granted for the Project, if approved.
- 27 In February 2009, the Canadian Environmental Assessment Agency also 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

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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

- 28 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 Environment 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.
- 29 Shortly afterward, the Canadian Environmental Assessment Agency and the National Energy Board issued the Agreement Between the National Energy Board and the Minister of the Environment concerning the Joint Review of the Northern Gateway Pipeline Project. In this agreement, Canada committed to a "whole of government" approach to Aboriginal engagement and consultation, including reliance, to the extent possible, on the consultation efforts of Northern Gateway and the Joint Review Panel.
- 30 Also appended to this agreement as an appendix were the terms of reference for the Joint Review Panel. These terms of reference included process requirements for the Joint Review Panel to follow during its review of the Project. And in January 2010, in accordance with that agreement, the Minister of the Environment and the Chair of the National Energy Board appointed three persons to serve on the Joint Review Panel.
- 31 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.
- The Canadian Environmental Assessment Agency acted as Canada's "Crown Consultation Coordinator" for the Project.

- 33 With these preliminary matters completed, the approval process formally began.
- 34 In May 2010, Northern Gateway filed an application requesting certificates from the National Energy Board for the Project, an order under Part IV of the National Energy Board Act approving the toll principles for service on the pipelines and such further relief as required.

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- 35 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.
- 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 revised the list of issues and commented on the locations for its hearings.
- 37 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
- 38 In May 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.
- 39 Around the same time, the Crown consulted with representatives of some of the Aboriginal groups who are applicants/appellants in these proceedings, including the Gitga'at, the Gitxaala, the Haida, the Haisla and the Heiltsuk, Also in 2011, a number of Aboriginal groups, including most of the Aboriginal groups who are parties to these proceedings, and a number of public interest groups registered to intervene in the proceedings before the Joint Review Panel.
- A number of government agencies -- Natural Resources Canada, Aboriginal Affairs and Northern Development Canada, Fisheries and Oceans Canada, the Canadian Coast Guard, Transport Canada, and Environment Canada -- also registered as government participants in the proceedings. All interveners and government agencies had to file written evidence with the Joint Review Panel by one week before the start date for the hearings.
- 41 Through its Participant Funding Program, the Canadian Environmental Assessment Agency provided funding to certain public and Aboriginal groups to facilitate their participation in the Joint Review Panel process and Crown consultation activities
- 42 As scheduled, on January 10, 2012, the Joint Review Panel's hearings began. The first set of hearings was known as the "community hearings." The Joint Review Panel travelled to many local communities and received letters of comment and oral statements, including statements from representatives of Aboriginal groups. At one point, the Joint Review Panel and other interven accompanied representatives of the Gitxaala on a boat tour of a portion of their asserted traditional territory

- 43 Around this time, the Joint Review Panel received a report setting out a technical review of marine aspects of the Project. Initiated in 2004 at the request of Northern Gateway, this technical review, known as the Technical Review Process of Marine Terminal Systems and Transhipment Sites or "TERMPOL", was conducted by a review committee chaired by Transport Canada, staffed by representatives of other federal departments and, among other things, assisted by a technical consultant acting on behalf of the Haisla and the Kitimat Village 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, that was introduced in 1992. But in mid-2012, the Johs, Growth and Long-Term Prosperity Act, S.C. 2012, e. 19 became law, repealing the 1992 version of the Canadian Environmental Assessment Act, enacting the Canadian Environmental Assessment Act, 2012, and amending the National Energy Board Act. The joint review process for the Project, already underway, was continued under these amended provisions. Hereafter, in these reasons, unless otherwise noted, references to the Canadian Environmental Assessment Act, 2012 and the National Energy Board Act refer to the 2012 versions of these statutes.
- 45 A month after those statutory amendments became law, and in accordance with the 45 A month after those statutory amendments became law, and in accordance with those amendments, the finitiser of the Envision Energy Board directed that the Joint Review Panel submit its environmental and seasonsment as part of the recommendation report under section 52 of the Madinan Energy Board Are to later than December 31, 2013. They also finalized amendments 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 to provide a report under section \$2 of the National Energy Board Act. Second, in that report it wa also to include recommendations flowing from the environmental assessment conducted under Canadian Environment Assessment Act, 2012: subsection 29(1). 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;
 present recommendations based on the environmental assessment.
- 47 In September 2012, the Joint Review Panel conducted what it called "final hearings." This last phase of the hearing process ended in June 2013. During this stage, the parties asked questions, filed written argument and made oral argument.
 - (4) The parties' participation in the approval pro
- 48 Overall, the parties had ample opportunity to participate in the Joint Review Panel process and generally availed themselves of it:

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- Gitxaala Nation. The Gitxaala participated in all parts of the Joint Review Panel process, including making information requests, submiting technical reports, written and oral Aboriginal evidence, and attending 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 behaviour 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.
- * 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 and elected 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.
- Haisla also expressed their concerns about the Project.

 * Kitasoo Xai'Xais Band Council. The Kitasoo submitted brief written evidence, oral evidence at a community hearing and filed final written aroument.
- * Heiltsuk Tribal Council. The Heiltsuk submitted written evidence, answered an information request, gave oral evidence at a community hearing, conducted some cross-examination of witnesses for Northern Gateway and Canada, and submitted final argument.
- * Nadleh Whut'en and Nak'azdli Whut'en. These parties made submissions to the Crown regarding the draft joint review agreement and the manner in which Canada was engaging in consultation during Phase I of the consultation process. The Yinka Dene Alliance, of which the Nadleh and the Nak'azdli were a part, elected not to intervene before the Joint Review Panel, but a keyoh within the Nak'azdli Whut'en system of governance did intervene.
- * Haida Nation. The Haida participated in all parts of the Joint Review Panel process. They made information requests, submitted written technical and Aboriginal evidence, provided oral Aboriginal evidence attended hearings to question Northern Gateway witnesses, submitted a final written

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argument with comments on proposed conditions, and made oral reply argument. They submitted a 336-page Marine Traditional Knowledge Study describing traditional harvesting activities, both historically and currently, locations of harvesting, and the time of year that harvesting is undertaken for various species throughout Haida Gwaii. The Haida and Canada collaborated on Living Marine Legacy Reports over six years culminating in 2006. These reports, totalling 1,247 pages, provide baseline inventories of marine plants, invertebrates, birds and mammals along the

- coastline of Haida Gwaii.

 * ForestEthics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation (hereafter, the "Coalition"). The Coalition participated in the Joint Review Panel process as interveners, providing written evidence and written responses to information requests regarding that evidence, submitting written information requests to other parties, offering witnesses, questioning other parties' witnesses and making submissions.
- * B.C. Nature. B.C. Nature participated in the Joint Review Panel process as a joint intervener with Nature Canada. It tendered written evidence, provided written responses to information requests regarding that evidence, questioned the witnesses of other parties, provided late written evidence, offered witnesses on that evidence, filed several motions and made
- * Unifor. The predecessor unions of this national union participated in the Joint Review Panel process as interveners. They adduced expert evidence, exchanged information requests and responses, presented witnesses for questioning, and offered final argument.
- 49 Needless to say, the involvement of Northern Gateway and Canada throughout the Joint Review Panel process was massive. In Canada's case, as mentioned above, a number of departments and agencies registered with the Joint Review Panel process as government participants. They filed written evidence, information requests and responses to information requests. They also offered witnesses for questioning on the evidence provided.

(5) The Report of the Joint Review Panel

- 50 On December 19, 2013, the Joint Review Panel issued a two volume report: Connections: Report of the Joint Review Panel for the Enbridge Northern Gateway Project, vol. 1 and Considerations: Report of the Joint Review Panel for the Enbridge Northern Gateway Project, vol. 2
- 51 The Joint Review Panel found that the Project was in the public interest. It recommended that the applied-for certificates be issued subject to 209 conditions. The conditions require a number of

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plans, studies and assessments to be considered and assessed by the National Energy Board and other regulators in the future. The 209 conditions include requirements that Northern Gateway provide onegoing and enduring opportunities for affected Aborgianal groups to have input into the continuing planning, construction and operation of the Project through a variety of plans, programs and benefits. A number of the conditions were offered by Northern Gateway during the process. Along with those 209 conditions, Northern Gateway made over 450 voluntary commitments.

- 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.
- 53 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 activities or actions are likely to be significant for certain woodland caribou herds and grizzly bear populations; and
 - for certain woodland caribou herds and grizzly bear populations; and
 the significant adverse cumulative effects in relation to the caribou and
 grizzly bear populations are justified in the circumstances.

(6) Consultation with Aboriginal groups: Phase IV

- 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 Haida, the Haisla, the Heilstak, the Kitasoo and the Yinka Dene Alliance (which includes the Nak'azdli and the Nadleh).
- 56 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.
- 57 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

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corridor for the Project was defined in 2005, Northern Gateway engaged with all Aboriginal groups, both First Nations and Métis, with communities located within 80 kilometres of the Project corridor and the marine terminal. Northern Gateway engaged with other Aboriginal groups beyond that area to the extent that they self-identified as having an interest because the corridor crossed their traditional territory.

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, giving \$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.

(7) The Order and the Certificates

- 59 TheGovernor in Council had before it the Report of the Joint Review Panel.It also had other material before it that 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 JJoint 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 JJoint Review Panel's | Report, is and will be required by the present and future public convenience and necessity." It "accept[ed] 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.

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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 made as a result of the environmental assessment. The Decision Statement reads

> 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 53(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 oil 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 explanations concerning the comments they had made and the Governor in Council's Order in Council, To the same effect was an earlier letter written in June 2014, just before the Governor in Council made its Order in Council approving the Project. We will consider these letters, along with other facts concerning what took place during Phase IV, in more detail below.

(8) Future regulatory processes

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:

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- Routing approval. Northern Gateway must apply for and receive approval from the National Energy Board for the detailed route of the Project. Owners of land and those whose interests may be adversely affected will have an opportunity to file objections. In approving a route, the National Energy Board must take into account all representations made to it at a public hearing and consider the most appropriate methods of construction and its timing. The National Energy Board has the power to attach conditions to its approval. See generally sections 33-40 of the National Energy Board Act.
- Acquisition of land rights. Northern Gateway must acquire land rights for the Project in Alberta and British Columbia from private landowners of provincial Crowns by voluntary agreements, right-of-entry orders or Governor-in-Council consent. In some instances, it must pay compensation for acquisition of or damage to land. See generally sections 75, 77, 84, 87-103 of the *National Energy Board Act*.
- Approval to start construction. Northern Gateway must apply for and receive leave from the National Energy Board to start construction of the Project, Under this process, Northern Gateway must satisfy all of the pre-construction conditions contained in the Certificates granted by the National Energy Board. As a practical matter, during this process, the detailed design and operation of the Project will be refined. Out of the 209 conditions attached to the Certificates, roughly 120 involve the preparation and filing of further information with the Board before construction can begin. Some of the conditions require Northern Gateway to report on its consultations with Aboriginal groups as part of its application for approval
- submitted to the National Energy Board.

 Approval to start operations. Before the Project can be operated, Northern Gateway must apply to the National Energy Board for approval. Among other things, it must satisfy the National Energy Board that the pipelines can be opened safely for transmission.
- Other approvals under federal and provincial legislation. Northern Gateway will also have to apply for these. The application process may involve the need for further consultation with Aboriginal groups. Much of this may take place under Phase V of the consultation framework.

D. Legal proceedings

- 68 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-59-14);

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- ForestEthics Advocacy Association et al. v. Attorney General of Canada et
- Gitxaaa Nation v. Minister of the Environment et al. (A-64-14):
- Haisla Nation v. Canada (Minister of Environment) et al. (A-63-14) (later
- Gitga'at First Nation v. Attorney General of Canada et al. (A-67-14).
- 69 The following notices of application for judicial review challenge the decision of the Governor in Council, namely Order in Council P.C. 2014-809:
 - Gitxaala Nation v. Attorney General of Canada et al. (A-437-14):
 - Federation of British Columbia Naturalists d.b.a. BC Nature v. Attorney General of Canada et al. (A-443-14);
 - ForestEthics Advocacy Association et al. v. Attorney General of Canada et
 - al. (A-440-14): Gitga'at First Nation v. Attorney General of Canada et al. (A-445-14);
 - The Council of the Haida Nation et al. v. Attorney General of Canada et al. (A-446-14);
 - Haisla Nation v. Attorney General of Canada et al. (A-447-14);
 - Kitasoo Xai'Xais Band Council et al. v. Her Majesty the Queen et al.
 - Nadleh Whut'en Band et al. v. Attorney General of Canada et al. (A-439-14);
 - Unifor v. Attorney General of Canada et al. (A-442-14).
- 70 The following notices of appeal were filed against the National Energy Board's decision to issue the Certificates (Certificate OC-060 and Certificate OC-061):
 - ForestEthics Advocacy Association et al. v. Northern Gateway Pipelines et al. (A-514-14):
 - Gitxaala Nation v. Attorney General of Canada et al. (A-520-14); Haisla Nation v. Attorney General of Canada et al. (A-522-14);
 - Unifor v. Attorney General of Canada et al. (A-517-14).
- 71 As mentioned above, these proceedings were all consolidated. This consolidated matter was one of the largest proceedings ever prosecuted in this Court, with approximately 250,000 documents and multiple parties before the Court. Seven months after the proceedings were consolidated and after several motions to resolve minor disputes, the consolidated proceedings were ready for hearing. This Court wishes to express its appreciation to the parties for their exemplary conduct in cuting the consolidated proceedings in an efficient and expeditious manner
- 72 Broadly speaking, the consolidated proceedings, taken together, seek an order quashing the administrative decisions in this case because, under administrative law principles, they are

unreasonable or incorrect. They also seek an order quashing the Order in Council and the Certificates because Canada has not fulfilled its duty to consult with Aboriginal peoples concerning the Project.

- 73 Thus, we shall review the administrative decisions following administrative law principles and then assess whether Canada fulfilled its duty to consult with Aboriginal peoples.
- 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 front of 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 revie 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 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, 87 Admin. L.R. (5th) 175, at paragraphs 35-37; Delios v. Canada (Attorney General), 2015 FCA 117, 472 N.R. 171, at paragraph 26; Budlakoti v. Canada (Citizenship and Immigration), 2015 FCA 139, 473 N.R. 283, at paragraphs 27-28.
- 78 However, in complicated cases with many moving parts like this one, often it is useful to begin at a more basic level. What exactly is being reviewed?
- 79 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?
- 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 legal rights, imposes legal obligations upon it, or prejudicially affects it in some way: League for Human Rights of BNai Brith Canada v. Odynsky, 2010 FCA 307, 409 N.R. 298; Rothmans of Pall Mall Canada Ltd. v. Canada (M.N.R.), [1976] 2 F.C. 500 (C.A.); Iving 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 18, we have set out these parties interests. We also note that they were 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 ForestEthics did not have standing to apply for judicial review of interlocutory National Energy Board decisions concerning who could participate in its hearing, the relevancy of certain issues, and the participation of an individual in the hearing. In the circumstances of that case, the National Energy Board's decisions did not affect ForestEthics' rights, impose legal obligations upon it, or prejudicially affect it in any way and so it did not have direct standing. Nor did it have standing as a public interest litigant under Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45, [2012] 2 S.C.R. 524. Instead, it was a classic "busybody" as that term is understood in the jurisprudence (at paragraph 33):

ForestEthics asks this Court to review an administrative decision it had nothing to do with. It did not ask for any relief from the Board. It did not seek any status from the Board. It did not make any representations on any issue before the Board. In particular, it did not make any representations to the Board concerning

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Governor in Council in a report. Overall, on the basis of everything put before it, the Governor in Council decides whether or not the certificate should be issued.

- 96 If the Governor in Council decides that a certificate may be issued, the Governor in Council may also cause the Board to issue a decision statement setting out conditions relating to the mitigation of environmental effects and follow-up measures. The decision statement becomes part of the certificate, i.e., the mitigation and follow-up measures must be complied with.
- 97 In cases of uncertainty, the Governor in Council may remit the matter back for reconsideration of the recommendations. After reconsideration, recommendations are sent back to the Governor in Council for decision.
- 98 We turn now to a more detailed analysis of the legislative scheme
- 99 In this case, the decision-making process under the National Energy Board Act was triggered by Northern Gateway applying for certificates for the Project.
- 100 In response to an application, there are two stages: a report stage and a decision stage. During the former, a report is prepared under the National Energy Board Act. In cases like this involving a "designated project" within the meaning of the Canadian Environmental Assessment Act, 2012, the report must include a report of an environmental assessment prepared under the Act. In short, in a case such as this, the report stage requires fulfilment of requirements under the National Energy Board Act and the Canadian Environmental Assessment Act, 2012.
- 101 Under this legislative scheme, the National Energy Board is assigned many responsibilities, particularly at the report stage. In this case, as mentioned, a Joint Review Panel was established. It was a "review panel" for the purposes of the Canadian Environmental Assessment Act, 2012 and stood in the shoes of the National Energy Board for the purposes of the report stage under the National Energy Board Act. So in this case, references in the legislation to the Board should be seen as references to the Joint Review Panel for the purposes of the report stage.

(a) The report stage: the National Energy Board Act requirements

- 102 First, under subsection 52(1) of the National Energy Board Act, a report has to be prepared and submitted to a coordinating Minister for transmission to the Governor in Council. Subsection 52(1) provides that the report is to set out a recommendation as to whether the certificates should be granted and, if so, what conditions, if any, ought to be attached to the certificates:
 - 52. (1) If the Board [here the Joint Review Panel] is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister, and make public, a report setting out

the three interlocutory decisions

87 The circumstances are completely different in the case at bar. Therefore, we reject Northern Gateway's challenge to the standing of the Coalition, BC Nature and Unifor to maintain proceedings.

(b) The admissibility of affidavits

- 88 In their memoranda, the Heiltsuk and the Kitasoo submit that the affidavits of Northern Gateway are "substantially submissions in affidavit form, and the whole of each...or alternatively the offending parts of each should be struck out." The Gitxaala have adopted these submissions.
- 89 Under Rule 81 of the Federal Courts Rules, S.O.R./98-106, affidavits offered in support of proceedings are to be "confined to facts within the deponent's personal knowledge."
- 90 We agree that some portions of the affidavits filed by Northern Gateway smack of submissions that should appear in a memorandum of fact and law, not an affidavit. In considering this consolidated proceeding, we disregarded the offending portions of Northern Gateway's affidavits. Northern Gateway's affidavits do contain admissible evidence that we have considered.
- 91 Northern Gateway also submitted that there were argumentative portions in other affidavits filed with the Court, such as the Affidavit of Chief Councillor Ellis and most of the exhibits to the Affidavit of Acting Chief Clarence Innis. We agree. Again, in determining this matter, we disregarded argumentative portions in the evidence, and this 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 statute book. Accordingly, cases that have considered other legislative schemes are not relevant to our analysis.
- 93 We must assess this legislative scheme on its own terms in light of the legislative text, the surrounding context, and Parliament's purpose in enacting the legislation: Re Rizzo & Rizzo Shoez. [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559. Where the legislative text is clear, as it is here, it will predominate in the analysis: Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, [2005] 2 S.C.R. 601.
- 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

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(a) its recommendation as to whether or not the certificate should be issued for all or any portion of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation; and

(b) regardless of the recommendation that the Board [here the Joint Review Panel] makes, all the terms and conditions that it considers necessary or desirable in the public interest to which the certificate will be subject if the Governor in Council were to direct the Board to issue the certificate, including terms or conditions relating to when the certificate or portions or provisions of it are to come into force.

* * *

52. (1) S'il estime qu'une demande de certificat visant un pipeline est complète, l'Office établit et présente au ministre un rapport, qu'il doit rendre public, où figurent :

a) sa recommandation motivée à savoir si le certificat devrait être délivré ou non relativement à tout ou partie du pipeline, compte tenu du caractère d'utilité publique, tant pour le présent que pour le futur, du pipeline;

b) quelle que soit sa recommandation, toutes les conditions qu'il estime utiles, dans l'intérêt public, de rattacher au certificat si le gouverneur en conseil donne instruction à l'Office de le délivrer, notamment des conditions quant à la prise d'effet de tout ou partie du certificat.

- ${\bf 103} \quad \text{Under subsection } 52(2), \text{the recommendation of the Board (here the Joint Review Panel)} \\ \text{contained in its report must be based on certain criteria:}$
 - 52. (2) In making its recommendation, the Board [here the Joint Review Panel] shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:
 - (a) the availability of oil, gas or any other commodity to the pipeline;
 - (b) the existence of markets, actual or potential;

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(c) 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

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

52. (2) En faisant sa recommandation, l'Office tient compte de tous les facteurs qu'il estime directement liés au pipeline et pertinents, et peut tenir compte de ce aui suit :

a) l'approvisionnement du pipeline en pétrole, gaz ou autre produit;

b) l'existence de marchés, réels ou potentiels;

c) la faisabilité économique du pipeline:

d) la responsabilité et la structure financières du demandeur et les méthodes de financement du pipeline ainsi que la mesure dans laquelle les Canadiens auront la possibilité de participer au financement, à l'ingénierie ainsi qu'à la construction du pipeline;

e) les conséquences sur l'intérêt public que peut, à son avis, avoir la délivrance du certificat ou le rejet de la demande.

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

> 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 the day on which the applicant has, in the Board's opinion, provided a complete application. The Board shall make the time limit public.

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- (5) If the Board requires the applicant to provide information or undertake a study with respect to the pipeline and the Board, with the Chairperson's approval, states publicly that this subsection applies, the period that is taken by the applicant to comply with the requirement is not included in the calculation of the time limit.
- The Board shall make public the dates of the beginning and ending of the period referred to in subsection (5) as soon as each of them is known.
- The Minister may, by order, extend the time limit by a maximum of three months. The Governor in Council may, on the recommendation of the Minister, by order, further extend the time limit by any additional period or periods of
- To ensure that the report is prepared and submitted in a timely manner, the Minister may, by order, issue a directive to the Chairperson that requires the Chairperson to

(a) specify under subsection (4) a time limit that is the same as the one specified by the Minister in the order;

(b) issue a directive under subsection 6(2.1), or take any measure under subsection 6(2.2), that is set out in the order; or

(c) issue a directive under subsection 6(2.1) that addresses a matter set out

- (9) Orders made under subsection (7) are binding on the Board and those made under subsection (8) are binding on the Chairperson.
- (10) A copy of each order made under subsection (8) must be published in the Canada Gazette within 15 days after it is made

- (4) Le rapport est présenté dans le délai fixé par le président. Ce délai ne peut excéder quinze mois suivant la date où le demandeur a, de l'avis de l'Office, complété la demande. Le délai est rendu public par l'Office
- Si l'Office exige du demandeur, relativement au pipeline, la communication de renseignements ou la réalisation d'études et déclare publiquement, avec l'approbation du président, que le présent paragraphe s'applique, la période prise par le demandeur pour remplir l'exigence n'est pas comprise dans le calcul du
- (6) L'Office rend publiques, sans délai, la date où commence la période visée au

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- paragraphe (5) et celle où elle se termine. Le ministre peut, par arrêté, proroger le délai pour un maximum de trois mois.
- Le gouverneur en conseil peut, par décret pris sur la recommandation du ministre, accorder une ou plusieurs prorogations supplémentaires.
- Afin que le rapport soit établi et présenté en temps opportun, le ministre peut, par arrêté, donner au président instruction :

a) de fixer, en vertu du paragraphe (4), un délai identique à celui indiqué

b) de donner, en vertu du paragraphe 6(2.1), les instructions qui figurent dans l'arrêté, ou de prendre, en vertu du paragraphe 6(2.2), les mesures qui figurent dans l'arrêté:

c) de donner, en vertu du paragraphe 6(2.1), des instructions portant sur une question précisée dans l'arrêté.

- (9) Les décrets et arrêtés pris en vertu du paragraphe (7) lient l'Office et les arrêtés pris en vertu du paragraphe (8) lient le président. Une copie de l'arrêté pris en vertu du paragraphe (8) est publiée dans la Gazette
- du Canada dans les quinze jours de sa prise

105 In this case, as noted above, the Joint Review Panel was under an order requiring it to finish its report by December 31, 2013.

106 As subsection 52(1) of the National Energy Board Act makes clear, the report is submitted to the "Minister," who is defined in section 2 of the National Energy Board Act as "such member of the Queen's Privy Council for Canada as is designated by the Governor in Council as the Minister for the purposes of this Act." The role of that coordinating Minister is to place the report before the Governor in Council for its consideration under sections 53 and 54.

107 Once made, the report is "final and conclusive" but this is "[s]ubject to sections 53 and 54" of the National Energy Board Act. These sections empower the Governor in Council to consider the report and decide what to do with it: subsection 52(11) of the National Energy Board Act.

(b) The report stage: the Canadian Environmental Assessment Act, 2012

108 The second thing that happened after Northern Gateway applied for the certificates was an

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 (2012), le rapport contient aussi l'évaluation environnementale de ce projet établi par l'Office sous le régime de cette loi.

109 Environmental assessments are to include assessments of the matters set out in sections 5 and 19 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 lifeforms that inhabit those areas. They also include consideration of matters specific to the Project and its specific effects on the environment and lifeforms who inhabit it. And they include the effects upon Aboriginal peoples' health and socio-economic conditions, physical and cultural heritage, the se 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(1)(a) of the Canadian Environmental Assessment Act, 2012 - i.e., the existence of significant advers 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* Board 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(1)(a) in relation to the designated project, taking into

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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 at 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'atténuation qu'elle précise dans le rapport;

b) sa recommandation quant au programme de suivi devant être mis en oeuvre 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.

(c) Consideration by the Governor in Council

112 Armed 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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113 Overall, the Governor in Council has three options:

Gateway

- (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)(a) 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. The Board must issue the decision statement within seven days and it forms part of the certificate: subsection 31(5) 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.
- 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: subsection 53(1) 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) After the responsible authority with respect to a designated project has

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submitted its report with respect to the environmental assessment or its reconsideration report under section 29 or 30, the Governor in Council may, by order made under subsection 54(1) of the National Energy Board Act

- (a) decide, taking into account the implementation of any mitigation measures specified in the report with respect to the environmental assessment or in the reconsideration report, if there is one, that the designated project
- (i) is not likely to cause significant adverse environmental effects,
- is likely to cause significant adverse environmental effects that can be justified in the circumstances, or
- (iii) is likely to cause significant adverse environmental effects that cannot be justified in the circumstances; and
- (b) direct the responsible authority to issue a decision statement to the proponent of the designated project that
- (i) informs the proponent of the decision made under paragraph (a)
- with respect to the designated project and,

 (ii) if the decision is referred to in subparagraph (a)(i) or (ii), sets out
 conditions which are the implementation of the mitigation
 measures and the follow-up program set out in the report with
 respect to the environmental assessment or the reconsideration
 report, if there is one that must be complied with by the proponent
 in relation to the designated project.
- The conditions that are included in the decision statement regarding the
 environmental effects referred to in subsection \$(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.
 The responsible authority must issue to the proponent of the designated project
- (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.
- The responsible authority must ensure that the decision statement is posted on

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the Internet site.

(5) The decision statement issued in relation to the designated project under subsection (3) is considered to be a part of the certificate issued in accordance with the order made under section 54 of the National Energy Board Act in relation to the designated project.

31. (1) Une fois que l'autorité responsable à l'égard d'un projet désigné a présenté son rapport d'évaluation environnementale ou son rapport de réexamen en application des articles 29 ou 30, le gouverneur en conseil peut, par décret pris en vertu du paragraphe 54(1) de la Loi sur l'Office national de l'énergie :

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

- (i) n'est pas susceptible d'entraîner des effets environnementaux
- négatifs et importants,

 (ii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui sont justifiables dans les circonstances,
- (iii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui ne sont pas justifiables dans les circonstances;

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

- elle donne avis de la décision prise par le gouverneur en conseil en vertu de l'alinéa a) relativement au projet,
- (iii) si cette décision est celle visée aux sous-alinéas a)(i) ou (ii), elle énonce les conditions que le promoteur est tenu de respecter relativement au projet, à savoir la mise en oeuvre des messures d'atténuation et du programme de suivi précisés dans le rapport d'évaluation environnementale ou, s'il y en a un, le rapport de réexamen.
- (2) Les conditions énoncées dans la déclaration qui sont relatives aux effets environnementaux visés au paragraphe 5(2) et qui sont directement liées ou

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nécessairement accessoires aux attributions qu'une autorité fédérale doit exercer pour permettre la réalisation en tout ou en partie du projet désigné sont

- subordonnées à l'exercice par l'autorité fédérale des attributions en cause. Dans les sept jours suivant la prise du décret, l'autorité responsable fait la déclaration exigée aux termes de celui-ci relativement au projet désigné et la remet au promoteur du projet.
- Elle veille à ce que la déclaration soit affichée sur le site Internet.
- (5) La déclaration faite au titre du paragraphe (3) relativement au projet désigné est réputée 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 section 52 or 53, the Governor in Council may, 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
 - (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 section 52 is submitted 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 subsection 53(1) or (9), 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.
 - 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.
 - 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'assortir des conditions figurant dans le rapport;

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

- 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. Les décrets pris en vertu des paragraphes (1) ou (3) sont définitifs et sans appel
- et lient l'Office.
- L'Office est tenu de se conformer au décret pris en vertu du paragraphe (1) dans les sept jours suivant sa prise.
- Une copie du décret pris en vertu du paragraphe (1) est publiée dans la Gazette du Canada dans les quinze jours de sa prise. (6)
- 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.
- 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

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the National Energy Board Act a report on its reconsideration In the reconsideration report, the responsible authority must

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

29(1)(a)

- 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 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.
- 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.

30. (1) Une fois que l'autorité responsable à l'égard d'un projet désigné a présenté son rapport d'évaluation environnementale en vertu de l'article 29, 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.

Le décret peut préciser tout facteur dont l'autorité responsable doit tenir compte dans le cadre du réexamen ainsi que le délai pour l'effectuer.

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- (3) 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 ational de l'énergie
- (4) Dans son rapport de réexamen, l'autorité responsable :

a) si le décret vise la recommandation prévue à l'alinéa 29(1)a):

- 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,
- d'autre part, confirme, modifie ou remplace les mesures d'atténuation précisées dans le rapport d'évaluation environnementale:

b) si le décret vise la recommandation prévue à l'alinéa 29(1)b), confirme celle-ci ou formule une autre recommandation quant au programme de suivi devant être mis en oeuvre 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. Les paragraphes (2) à (5) s'appliquent alors mais, au sous-alinéa (4)a/(ii), la mention des mesures d'atténuation précisées dans le rapport d'évaluation environnementale vaut mention des mesures d'atténuation précisées dans le rapport de 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.

- The order is binding on the Board
- A copy of the order must be published in the Canada Gazette within 15 days after it is made.
- 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.
- 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 supports it or replace it with another one.

- 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 it 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.
- Subject to section 54, the Board's reconsideration report is final and conclusive. 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.

 $\textbf{53.} \ (1) \ Une \ fois \ que \ l'Office \ a \ présenté son \ rapport \ en \ vertu \ de \ l' \ article \ 52, le$ gouverneur en conseil peut, par décret, renvoyer la recommandation ou toute condition figurant au rapport à l'Office pour réexamen.

- (2) Le décret peut préciser tout facteur dont l'Office doit tenir compte dans le cadre du réexamen ainsi que le délai pour l'effectuer Le décret lie l'Office.
- Une copie du décret est publiée dans la Gazette du Canada dans les quinze jours
- (5) L'Office, dans le délai précisé -- le cas échéant -- dans le décret, réexamine la

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assessments under other federal decision-making regimes. It is not for us to opine on the appropriateness of the policy expressed and implemented in this legislative scheme. Rather, we are to read legislation as it is written

- 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 52(11) of the National Energy Board Act provides that it too is "final and conclusive," but this is "[s]ubject to sections 53 and 54." These sections empower the Governor in Council to consider the report and decide what to do with it.
- 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 did not lie. No decisions 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 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 decision 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 Certificates, If the Governor in Council's Order in Council falls, then in our view the Certificates issued by the National Energy Board automatically fall as a consequence. As mentioned at the start of these

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recommandation ou toute condition visée par le décret, établit un rapport de

(6) Dans son rapport de réexamen, l'Office :

a) si le décret vise la recommandation, confirme celle-ci ou en formule une autre:

b) si le décret vise une condition, confirme la condition visée par le décret, déclare qu'il ne la propose plus ou la remplace par une autre

- (7) Peu importe ce qu'il mentionne dans le rapport de réexamen, l'Office y nentionne aussi toutes les conditions qu'il estime utiles, dans l'intérêt public, de rattacher au certificat si le gouverneur en conseil donne instruction à l'Office de délivrer le certificat
- Sous réserve de l'article 54, le rapport de réexamen est définitif et sans appel
- Une fois que l'Office a présenté son rapport au titre du paragraphe (5), le gouverneur en conseil peut, par décret, renvoyer la recommandation ou toute condition figurant au rapport à l'Office pour réexamen. Les paragraphes (2) à (8) s'appliquent alors.

(4) Characterization of the legislative scheme

- 119 This legislative scheme is a complete code for decision-making regarding certificate applications. Other statutory regimes are not relevant unless they are specifically incorporated into this code, and then only to the extent they are incorporated into the code.
- 120 The legislative scheme shows that for the purposes of review the only meaningful decision-maker is the Governor in Council
- 121 Before the Governor in Council decides, others assemble information, analyze, assess and study it, and prepare a report that makes recommendations for the Governor in Council to review and decide upon. In this scheme, no one but the Governor in Council decides anything.
- 122. In particular, the environmental assessment under the Canadian Environmental Assessment Act, 2012 plays no role other than assisting in the development of recommendations submitted to the Governor in Council so it can consider the content of any decision statement and whether, overall, it should direct that a certificate approving the project be issued
- 123 This is a different role -- a much attenuated role -- from the role played by environmental

reasons, since we would quash the Order in Council, the Certificates issued as a result of the Order in Council must also be quashed.

(5) Standard of review

- 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
- 129 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 applicant/appellant 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 Ekuanitshii 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 decision, it made its

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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's decision under the different and unique legislative scheme in this case.
- 137 In assessing 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 legislation and the overall purposes of the legislation.
- 138 The standard of review of the decision of the Governor in Council in Ekuanitshit may make 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 based largely on the environmental assessment. A broader range of policy and other diffuse considerations do not bear significantly in the decision.
- 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.
- 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 shown by the fact that the section 52 report it 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: Odynsky, 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 "it," in recognition of its practical status as a body of persons.) In Canada, executive authority is vested in the Crown -- the Crown also being subject to the duty to consult Aboriginal peoples -- and the Governor in Council is the advisory body, some might say the real initiator, for the exercise of much of that executive

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authority. See generally A. O'Brien and M. Bosc, *House of Commons Procedure and Practice*, 2d ed. (Cowansville: Éditions Yvon Blais, 2009) at pages 18-23 and 28-32; *Constitution Act*, 1867, sections 9, 10 and 13.

143 In Odynsky, this Court described the practical nature of the Governor in Council as follows (at paragraph 77):

> The Governor in Council is the "Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada": Interpretation Act, R.S.C. 1985, c.1-23, subsection 35(1), and see also the Constitution Act, 1867, sections 11 and 13. All the Ministers of the Crown, not just the Minister, are active members of the Queen's Privy Council for Canada. They meet in a body known as Cabinet. Cabinet is "to a unique degree the grand co-ordinating body for the divergent provincial, sectional, religious, racial and other interests throughout the nation" and, by convention, it attempts to represent different geographic, linguistic, religious, and ethnic groups: Norman Ward, Dawson's The Government of Canada, 6th ed., (Toronto: University of Toronto Press, 1987) at pages 203-204; Richard French, "The Privy Council Office: Support for Cabinet Decision Making" in Richard Schultz, Orest M. Kruhlak and John C. Terry, eds., The Canadian Political Process, 3rd ed. (Toronto: Holt Rinehart and Winston of Canada, 1979) at pages 363-394.

- 144 In the case before us, by vesting decision-making in the Governor in Council, Parliament implicated the decision-making of Cabinet, a body of diverse policy perspectives representing all constituencies within government. And by defining broadly what can go into the report upon which it is to make its decision — literally anything relevant to the public interest — Parliament must be taken to have intended that the decision in issue here be made on the broadest possible basis, a basis that can include the broadest considerations of public policy.
- 145 The standard of review for decisions such as this -- discretionary decisions founded upon the widest considerations of policy and public interest -- is reasonableness; Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 53.
- 146 Reasonableness has been described as a range of acceptable and defensible decisions on the facts and the law or a margin of appreciation over the problem before it: *Dunsmuir*, at paragraph 47. The notion of a range or margin suggests that different decisions, by their nature, will admit of a larger or smaller number of acceptable and defensible solutions: Catalyst Paper Corp. v. North Cowichan (District), 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23; Khosa, at paragraph 59; McLean v. British Columbia (Securities Commission), 2013 SCC 67, [2013] 3 S.C.R. 895, at paragraphs 37-41. For example, an issue of statutory interpretation where the statutory language is precise admits of fewer acceptable or defensible solutions than one where the language

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is wider and more amorphous, where policy may inform the proper interpretation to a larger extent.

- 147 Similarly, some decisions made by administrative decision-makers lie more within 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., Delios, at paragraph21; Boogaard, at paragraph 62; Forest Ethics, at paragraph 82.
- 148 Recently, this Court usefully contrasted two types of administrative decisions, the former inviting courts to review decision-making intensely, the latter less so

For present purposes, one might usefully contrast two types of administrative proceedings. At one end are matters 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 individual(s) are 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 matter, criteria that are more typically within the ken of the executive and less so the courts.

(Canada v. Kabul Farms Inc., 2016 FCA 143, at paragraph 25)

- 149 To similar effect, a majority of this Court recently said the following:
 - [W]here the decision is clear-cut or constrained by judge-made law or clear statutory standards, the margin of appreciation is narrow: see, e.g., [McLean v British Columbia (Securities Commission), 2013 SCC 67, [2013] 3 S.C.R. 895]; Canada (Attorney General) v. Abraham, 2012 FCA 266, 440 N.R. 201; Canada (Attorney General) v. Almon Equipment Limited, 2010 FCA 193, [2011] 4 F.C. 203; Canada (Public Safety and Emergency Preparedness) v. Huang, 2014 FCA 228, 464 N.R. 112....On the other hand, where the decision is suffused with subjective judgment calls, policy considerations and regulatory experience or is a matter uniquely within the ken of the executive, the margin of appreciation will be broader: see, e.g., [Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha, 2014 FCA 56, [2015] 2 F.C.R. 1006]; Rotherham Metropolitan Borough Council v. Secretary of State for Business Innovation and Skills, 2015 UKSC 6.

(Paradis Honey Ltd. v. Canada, 2015 FCA 89, 382 D.L.R. (4th) 720, at paragraph 136.)

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, giving it a very broad margin of appreciation (at paragraphs 171-172):

> The legislature has entrusted the Commission with a policy-laden role, which includes a strong public interest mandate: see, for example, ss. 16(1) and 17(1) of the Alberta Utilities Commission Act. Its mandate includes the creation of a balanced and predictable application of principles to the relationship between revenues, expenses and assets (both depreciable and non-depreciable) of utilities on the one hand, and the reasonable expectations of the ratepayers who receive and pay for services on the other. The treatment of stranded assets is, at its foundation, a policy issue informed by public interest considerations. The Commission's policy choice, as expressed in the [decision], is a legitimate and defensible one, and well within its legislated power.

> One must also bear in mind that the questions raised have political and economic aspects. Courts are poorly positioned to opine on such matters. Judicial review considers the scope or breadth of jurisdiction, but by legislative design the selection of a policy choice from among a range of options lies with the Commission empowered and mandated to make that selection.

(See also Trinity Western University v. The Law Society of Upper Canada, 2015 ONSC 4250, 126 O.R. (3d) 1, at paragraph 37; Odynsky, above, at paragraphs 81-82 and 86.)

- 151 The Supreme Court itself has recognized that "[a]s a general principle, increased deference is called for where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies." In its view, "[a] statutory purpose that requires a tribunal to select from a range of remedial options or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations will demand greater deference from a reviewing court." See Dr. Q. v. College of Physicians and Surgeons of British Columbia, 2003 SCC 19, [2003] 1 S.C.R. 226, at paragraphs
- 152 The words of all these courts are apposite here: the Governor in Council is entitled to a very broad margin of appreciation in making its discretionary decision upon the widest considerable 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

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some legal content. On these occasions, signalled by specific legislative language, the margin of appreciation courts afford to the Governor in Council will be narrow: see, e.g., Canadian National Ratiway Co. v. Canada (Attorney General), 2014 SCC 40, [2014] 2 S.C.R. 135; Globalive Wireless Management Corp. v. Public Mobile Inc., 2011 FCA 194, [2011] 3 F.C.R. 344.

- 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 polycentric, subjective or indistinct criteria and shaped by its view of economics, cultural considerations, environmental considerations, and the broader public interest.
- 155 Does 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 outweigh 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 staisty 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, for the foregoing 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 rule 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 ken 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,

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31. (2) Le pouvoir donné à quiconque, notamment à un agent ou fonctionnaire, de prendre des mesures ou de les faire exécuter comporte les pouvoirs nécessaires à l'exercice de celui-ci.

- 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 other Ministers concerning 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 that Parliament gave the Governor in Council 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 directs the National Energy Board to issue.
- 169 While the parties did not seriously dispute whether the duty to consult could co-exist and be accommodated under the National Energy Board Act, they did dispute whether Canada has fulfilled its duty to consult on the facts of this case. We turn to this issue now.

F. The duty to consult Aboriginal peoples

(1) Legal principles

- 170 At this point, it is helpful to discuss briefly the existing jurisprudence which has considered the scope and content of the duty to consult. As mentioned at the outset of these reasons, insofar as that jurisprudence applies to these proceedings, it is not in dispute.
- 171 The duty to consult is grounded in the honour of the Crown. The duties of consultation and, if required, accommodation form part of the process of reconciliation and fair dealing: Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511 at paragraph 32

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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 outst 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 those 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: *Ledridge v. British Columbia (Autorney General), [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577, at paragraph 32; R. v. Clarke, 2014 SCC 28, [2014] 1 S.C.R. 612, at paragraphs 14-15. 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 inequilable 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 memoranda or information. There is nothing that prevents that 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, I-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.

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- 172 The duty arises when the Crown has actual or constructive knowledge of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect those rights or title: Hadida Nation, at paragraph 35.
- 173 The extent or content of the duty of consultation is fact specific. The depth or richness of the required consultation increases with the strength of the prima facie. Aboriginal claim and the seriousness of the potentially adverse effect upon the claimed right or title: Haida Nation, at paragraph 39, Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 S.C.R. 650, at paragraph 36.
- 174 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 consultative 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.
- 175 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.
- 176 Thus, for example in Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74, [2004] 3 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 province 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 Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53, [2010] 3 SCR. 103, at paragraph 39, the Supreme Court interpreted Taku River as saying that participation in a forum created for other purposes may satisfy the duty to consult "if in substance 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 Fin 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 fulfil its duty to consult, and if required, accommodate,
- 178 When the Crown relies on a regulatory or environmental assessment process to fulfil 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 equate 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 consultative 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 attempts, 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 fulfil the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfil the duty, there will be difficult judgment calls 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),

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2008 FCA 212, 297 D.L.R. (4th) 722, at paragraph 54; Canada v. Long Plain First Nation, 2015 FCA 177, 388 D.L.R. (4th) 209, at paragraph 133; Yellowknives Dene First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development), 2015 FCA 148, 474 N.R. 350, at paragraph 56; Clyde River (Hamlet) v. TGS-NOPEC Geophysical Co. ASA, 2015 FCA 179, 474 N.R. 96, at paragraph 47.

184 The Supreme Court of Canada has expressed it this way:

Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "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., [1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658, at paragraph 110], "in ... 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 offered a deep, 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 obliged 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
- 189 Canada describes the consultation process to include:

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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:
 - gather, distribute and assess information concerning the Project's
 - potential adverse impacts on Aboriginal rights and interests; address adverse impacts to Aboriginal rights and interests by assessing potential environmental effects and identifying mitigation and avoidance measures; and
 - ensure, to the extent possible, that specific Aboriginal concerns were heard and, where appropriate, accommodated.
- The provision of almost 4,000,000 in participant funding by Canada to 46Aboriginal groups to assist their involvement in the Joint Review Panel
- process and related Crown consultations.

 The provision of written reasons to 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:
 - 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. Phase II required Canada to provide information to Aboriginal groups

 - about the pending Joint Review Panel process.

 Phase III provided for participation in the Joint Review Panel process by Canada and Aboriginal groups.
 - 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.

 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

applicant/appellant First Nations are:

- The Governor in Council prejudged the approval of the Project
- Canada's consultation framework was unilaterally imposed on the First (b) Nations; there was no consultation on it.

 Canada provided inadequate funding to facilitate the participation of First
- (c) Nations in the Joint Review Panel process and other consultation
- The consultation process was over-delegated: the Joint Review Panel was (d) not a legitimate forum for consultation and it did not allow for discussions between Canada and affected First Nations.
- Canada either failed to conduct or failed to share its assessment of the (e) strength of the First Nations' claims to Aboriginal rights or title.

 The Crown consultation did not reflect the terms, spirit and intent of
- certain agreements between Canada and the Haida.
- The Report of the Joint Review Panel left too many issues affecting First Nations to be decided after the Project was approved.
- 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.
- 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.
- 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 Gitxaala 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 Gitxaala 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 expeditious review.
 - The adoption of a process that excluded real consideration of title and

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- governance rights.
- * The legislative change in 2012 after the review process had begun that modified the powers of the National Energy Board, giving the Governor in Council the final decision-making power.
- 193 The Haida adopt this submission
- 194 In our view, the second and third concerns raised by the Gitxaala do not support its submission that Canada had prejudged the outcome. This is so because there are many possible explanations as to why the process was adopted and the powers of the National Energy Board were modified; many of those possible explanations do not lead to the conclusion that results were predetermined. Equivocal evidence cannot support an assertion of bias.
- 195 Of greater concern are the remarks attributed to the then Minister of Natural Resources. Notwithstanding the concern, the remarks are insufficient to establish bias.
- 196 In Imperial Oil Ltd. v. Quebec (Minister of the Environment), 2003 SCC 58, [2003] 2 S.C.R. 624, the Supreme Court observed that the content of the duty of impartiality varies according to the decision-maker's activities and the nature of the question it must decide.
- 197 In the present case, the decision-maker is the Governor in Council and the decision whether to approve the Project is politically charged, involving an appreciation of many, sometimes conflicting, considerations of policy and the public interest. The decision is not judicial or quasi-judicial.
- 198 In this circumstance, we accept that the duty of impartiality owed by the Governor in Council is not co-extensive with that imposed upon judicial or quasi-judicial decision-makers.
- 199 Thus, statements by individual members of Cabinet will not establish bias unless the person alleging such bias demonstrates that the statements are the expression of a final opinion on the question at issue. Put another way, it must be shown that the decision-maker's mind was closed such that representations to the contrary would be futile: Old St. Boniface Residents Association Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385.
- 200 The evidence of one Minister's comment made years before the decision at issue is insufficient to establish that the outcome of the Governor in Council's decision was predetermined.

(b) The framework of the consultation process was unilaterally imposed upon the First Nations

201 The Haisla argue that while it was given the opportunity to comment on the draft Joint Review Panel Agreement, it was not consulted on the Crown consultation process itself. Instead, they argue, Canada unilaterally chose to integrate consultation into the Joint Review Panel process.

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The Haida adopt this submission.

- 202 The Kitasoo 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.
- 203 We disagree that the initial engagement with affected First Nations and the subsequent consultation on the draft Joint Review Panel Agreement (i.e., Phase 1) were flawed or turneasonable. 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 (Tourism, Parks & Recreation), 2013 ABCA 443, 556 AR. 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 resubmission 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, advised on the availability of participant funding and met with Aboriginal groups to provide further clarification. Canada's approach to 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

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to concerns expressed by affected Aboriginal groups. Examples of such modifications include:

- in response to concerns raised by the Haisla and the Gitga'at 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 review to include the marine transportation of oil and condensate;
- in response to concerns raised by the Haisla respecting the capacity and expertise of the Joint Review Panel to undertake the environmental assessment review. (anada modified the Joint Review Panel selection process to ensure that he Joint Review Panel could retain expert consultants or special advisors if required; and
- in response to concerns raised by the Haisla, the Nak'azdli, the Gitga'at, the Gitxaala and the Nadleh about Aboriginal involvement in the Joint Review Panel process, Canada modified the Joint Review Panel Agreement so as to include provisions requiring that the Joint Review Panel conduct its review to facilitate the participation of Aboriginal peoples and that Northern Gateway provide evidence setting out the concerns of Aboriginal groups.
- 205 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.
- 206 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.
- 207 In our view, the evidence establishes that from the outset Canada acknowledged its duty of deep consultation with all affected First Nations. In Phase I, it provided information about the Project to 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

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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.

$(\ensuremath{\mathbf{c}})$ Inadequate funding for participation in the Joint Review Panel and consultation processes

- 209 The Kitasoo and the Heiltsuk argue that the process required significant legal assistance and Terrace, British Columbia. They point to the fact that even though approximately 35 Aboriginal communities registered as interveners, only 12 First Nations cross-examined witness panels and only two First Nations outstantially participated in the cross-examination hearings. The Kitasoo and the Heiltsuk say they could not afford to provide expert reports or retain experts to review the Proponent's extensive data. The Heiltsuk sought funding of \$421.877 for all phases, but received \$96,000. In Phase IV, the Kitasoo sought funding of \$110,410 but received \$14,000.
- 210 We have carefully reviewed the second affidavits of Douglas Neasloss and Marilyn Slett, which contain the evidence filed in support of the submissions. Without doubt, the level of funding provided constrained participation in the Joint Review Panel process. However, the affidavits do not explain how the amounts sought were 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 so inadequate as to render the consultation process unreasonable.

(d) The consultation process was over-delegated

- 211 The Haisla 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 Haisla submit that:
 - * meaningful consultation requires a two-way dialogue whereas the Joint Review Panel process was a quasi-judicial process in which the Crown and Haisla had no direct engagement; and
 - * the Joint Review Panel did not assess the nature and strength 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

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unreasonable for Canada to integrate the Joint Review Panel process into the Crown consultation

- 214 First, in Rio Tinto, at paragraph 56, the Supreme Court confirmed that participation by affected First Nations in a forum created for other purposes, such as an environmental assecan fulfil the Crown's duty to consult. The issue to be decided in every case is whether an appropriate level of consultation is provided through the totality of measures the Crown brings to bear on its duty of consultation.
- 215 In the present case, we are satisfied that Canada did not inappropriately delegate its obligation to consult to the Joint Review Panel - as evidenced by the existence of Phase IV of the consultation process in which there was to be direct consultation between Canada and affected Aboriginal groups following the Joint Review Panel process and before the Governor in Council considered the Project.
- 216 The Joint Review Panel process provided affected Aboriginal groups with the opportunity to learn in detail about the nature of the Project and its potential impact on their interests, while at the same time affording an opportunity to Aboriginal groups to voice their concerns. As noted above, the Joint Review Panel Agreement gave the Panel the mandate to receive information regarding potential impacts of the Project on Aboriginal rights and title, consider mitigation where appropriate and report on information received directly from Aboriginal groups about impacts upon their rights.
- Additionally, we accept the submission of the Attorney General that the Joint Review Panel had the experience and statutory mandate to address mitigation, avoidance and environmental issues relating to the Project.

(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

- 218 In this section of the reasons, we consider the assertion that Canada failed to conduct an assessment of the strength of the applicant/appellant First Nations' claims to Aboriginal rights and title. We also consider the assertion that Canada was obliged to disclose the analysis that led to its assessment of the strength of each First Nation's claim.
- 219 For example, the Gitxaala state that despite repeated requests, government officials responsible for consultation did not assess the strength of their claims to governance and title rights. Nor did they ever receive Canada's assessment of the strength of its claims. They submit this is an error of law that wholly undermined the consultation process. This argument is echoed by the
- 220 The Haisla make the additional point that by letter dated April 18, 2012, the then Minister of

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- the Memoranda of Understanding with Canada for cooperative management and planning of the sG aan K inghlas (Bowie 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.
 - (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 nel 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 unacceptable or unreasonable.

 However, for the reasons developed below, Canada's execution of the Phase IV consultation process was unacceptably flawed and fell well short of the mark. Canada's execution of Phase IV failed to
- 231 We begin our analysis on this point by briefly setting forth some of the relevant legal

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Based on the significant evidence filed by the Haisla Nation in the joint review panel process, the federal government is currently updating its strength of claim and depth of consultation assessment and will provide a description of this analysis to the Haisla Nation once this work is completed and ready to be released. The results of this updated assessment will be shared with potentially affected 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
- 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 "supports the Haisla Nation as having strong $prime [si\ c]$ facie claim to both Aboriginal rights and title within lands claimed as part of the Haisla traditional territory": Exhibit H to the affidavit of Ellis Ross, at page 152 of Haisla's Compendium
- 223 We reject the assertion that Canada failed to assess the strength of the First Nations' claims. The assertion is unsupported by the evidence
- 224 We also conclude that Canada was not obliged to share its *legal* assessment of the strength of claim. In *Halalt First Nation v. British Columbia*, 2012 BCCA 472, [2013] 1 W.W.R. 791, at paragraph 123, the British Columbia Court of Appeal observed that, inherently, a legal assessment of the strength of a claim is subject to solicitor-client privilege.
- 225 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 terrestrial 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 Kunst'aa Guu-Kunst'aayah Reconciliation Protocol;

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- 232 As explained above, the duty to consult is a procedural duty grounded in the honour of the Crown. 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. The "controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake": Haida Nation, at paragraph 45.
- 233 Meaningful consultation is not intended simply to allow Aboriginal peoples "to blow off steam" before the Crown proceeds to do what it always intended to do. Consultation is meaningless when it excludes from the outset any form of accommodation: Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 S.C.R. 388, at paragraph 54.
- 234 As the Supreme Court observed in Haida Nation at paragraph 46, meaningful consultation is not just a process of exchanging information. Meaningful consultation, "entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback." As submitted by Kitasoo and Heiltsuk, where deep consultation is required, a dialogue must ensue that "leads to a <u>demonstrably</u> serious consideration of accommodation (as manifested by the Crown's consultation-related duty to provide written reasons)..." [Emphasis added].
- 235 Further, the Crown is obliged to inform itself of the impact the proposed project will have on an affected First Nation and communicate its findings to the First Nation: Mikisew Cree First Nation, at paragraph 55.
- 236 Two final points are to be made. First, where the Crown knows, or ought to know, that its conduct may adversely affect the Aboriginal right or title of more than one First Nation, each First Nation is entitled to consultation based upon the unique facts and circumstances pertinent to it.
- 237 Second, where the duty to consult arises in a project like this, the duty to consult must be fulfilled before the Governor in Council gives its approval for the issuance of a certificate by the National Energy Board. This is because the Governor in Council's decision is a high-level strategic decision that sets into motion risks to the applicant/appellant First Nations' Aboriginal rights: Haida, at paragraph 76. Further, future consultation, as contemplated by the Joint Review Pa conditions, would not involve the Crown and future decision-making lies with the National Energy Board. Canada advised in the consultation process that the National Energy Board does not consu with First Nations at the leave to open stage.
- 238 Against this legal framework, we turn to the execution of Phase IV of the consultation process. We begin with a general comment about the importance of consultation at the beginning of Phase IV and the status of the consultation process at that time.
- 239 Phase IV was a very important part of the overall consultation framework. It began as soon as the Joint Review Panel released its Report. That Report set out specific evaluations on matters of great interest and effect upon Aboriginal peoples, for example matters involving their traditional

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culture, the environment around them, and, in some cases, their livelihoods, Specific evaluations call for specific responses and due consideration of those responses by Canada. Specific feedback regarding specific matters dealt with in the Report may be more important than earlier opinions offered in the abstract.

- 240 Further, the Report of the Joint Review Panel covers only some of the subjects on which consultation was required. 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.
- 241 In addition, in the Joint Review Panel's process
 - The proponent, Northern Gateway, made no assessment of the Project's impact on Aboriginal title: Cross-examination of Enbridge witness, 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 witness, transcript, v. 149, line 22890; 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 right. Rather it looked at rights "generally speaking": Cross-examination of Enbridge witness, transcript, 7. 112. lines 9990-9993.
 - 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.
- 242 As for the status of the consultation process at the start of Phase IV, this was Canada's first or the satus of the consultation process at the start of triase 17, tills was calladas first 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: Crown Consultation Report, Exhibit A to the affidavit of Jim Clarke (the Director General, Operations of the Major Project Management Office, Natural Resources Canada).
- 243 It is in this context that Canada entered Phase IV of the consultation process. Its goal was stated, in Canada's Aboriginal Consultation Framework, to be to:

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- 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, but 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]
- 248 The Haisla Phase IV consultation meeting notes of March 3, 2014 and April 8-9, 2014 are
- ${\bf 249} \quad \text{As the Haisla observed at their consultation meeting, no explanation "from anyone at all"}\\$ was ever provided for the rush "and that's a problem."
- Throughout the consultation, 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:
 - We further identified the lack of certainty surrounding the Crown's preparedness for potential spills of diluted bitumen as a reason to consider delaying Project approval. The Coast Guard Canada representative, Mr. Roger Girouard, could not say how long it would take Canada to be prepared to provide effective ocean-based spill response, even with an unlimited budget. Mr. Girouard further stated that ocean-based spill response requires additional information about the relevant waters, the nature of the products to be transported, and appropriate governance, management, and equipment requirements before it can be effective. We asked for a delay of the decision to allow for the proper scientific studies to take place. Canada's representatives told us they would place this request before decision-makers. If they did, it was ignored. [Emphasis added]
 - Ms. Maclean [of Environment Canada] stated that the spill modelling done conducted [sic] by Northern Gateway Pipelines Inc. and Northern Gateway Pipelines Limited Partnership (collectively "Northern Gateway") did not include stochastic modelling, which would have provided a better understanding about how environmental conditions would influence a spill. We asked for a delay of the decision until this modelling had been provided. Canada's representatives told us they would place this request before decision-makers. If they did, it was

seek to establish whether all concerns about potential project impacts on potential or established Aboriginal and treaty rights have been characterized accurately. It will also consult on the manner and extent to which any recommended mitigation measures might serve to accommodate these concerns, and whether there remain any outstanding issues.

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- 244 We turn now to consider Canada's execution of the process of consultation under Phase IV -would characterize as falling well short of the minimum standards prescribed by the Supreme Court in its jurisprudence.
- 245 Canada initiated Phase IV shortly before the Joint Review Panel issued its Report. In a letter dated December 5, 2013, Canada advised that:
 - consultation meetings would begin shortly after the release of the Report of
 - the Joint Review Panel;
 45 days was allotted to meet with all affected Aboriginal groups
 - the Report of the Joint Review Panel and a Crown Consultation Report would be used to inform the Governor in Council about whether to order the National Energy Board to issue a Certificate;
 - affected First Nations were given 45 days to advise Canada in writing of their concerns by responding to the following three questions:
 - Does the Panel Report appropriately characterize the concerns you raised during the Joint Review Panel process?
 - Do the recommendations and conditions in the Panel Report address some/all of your
 - Are there any "outstanding" concerns that are not addressed in the Panel Report? If so, do you have recommendations (i.e., proposed accommodation measures) on how to address them?
 - Such responses "must not exceed 2-3 pages in length and must be received by April 16, 2014."
- 246 The First Nations responded that the timelines were arbitrarily short and insufficient to provide for meaningful consultation: see, for example, the Haisla's letter of December 12, 2013, Exhibit H to the affidavit of Chief Councillor Ellis Ross, at page 787.
- 247 At consultation meetings, the First Nations requested that the timelines for consultation be extended. Evidence illustrating this is found in the affidavit of Chief Ellis Ross of the Haisla:

ignored. [Emphasis added]

- 251 While the Governor in Council was subject to a deadline for decision under subsection 54(3) of the National Energy Board Act, that subsection allows the Governor in Council, by order, to extend that deadline. The importance and constitutional significance of the duty to consult provides ample reason for the Governor in Council, in appropriate circumstances, to extend the deadline There is no evidence that Canada gave any thought to asking the Governor in Council to extend the
- 252 But even if Canada did not wish to ask the Governor in Council for an extension, we consider that a pre-planned, organized process of Phase IV consultation would have allowed Canada to receive in time all relevant views, discuss and consider them, provide any necessary explanations and, if appropriate, make suitable recommendations to the Governor in Council, including any further conditions to be added to any approval of the Project.
- 253 By and large, many of the First Nations' concerns were specific, focused and brief: Canada's actions in response equally could have been specific, focused and brief.
- Jim Clarke was involved in Phase IV and "acted as Canada's lead" on issues that involved the mandates of two or more government departments. Under cross-examination on his affidavit by counsel for Haisla, Mr. Clarke himself acknowledged that consultation on some issues fell well short of the mark:
 - Q. Now you indicated yesterday that you had to review the meeting notes to assess whether Canada and Haisla had been able to address the agenda items.

Generally is it your conclusion that Haisla and Canada had a full discussion of the items on the two agendas'

A. I focused my efforts in looking at the notes on the second agenda, and I apologize if that was not the understanding yesterday

I looked at specifically all the items under 7(c) of the second agenda, all the issues, the extent to which panel terms and conditions addressed concerns of potential impacts, those 20 items.

324. Q. And generally is it your conclusion that Haisla and Canada had a full discussion of those 20 items?

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A. I would say the general conclusion is that there was not a full discussion of those 20 items. There was discussion of a majority of those items. My assessment last evening was that there was discussion of 12 of 20 items.

327. Q. Would you say that the Haisla's concerns about potential impacts on hunting is one of the items that was fully discusse d?

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 marine 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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- 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 shipping lane intersected with a significant portion of the Heiltsuk's traditional territory
- an incorrect representation of the Heiltsuk's position on equity
- 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
- 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 Dene Alliance Coordinator highlighted issues and inaccuracies in this letter:
 - The letter inaccurately stated that, at the Phase IV consultation meeting, federal officials discussed Canada's priorities regarding oil spill prevention and response and discussed the opportunity for future involvement in oil spill planning and response when such dialogue did not occur.
 - The Crown failed to respond to the key concerns and impacts raised by the Nadleh and the Nak'azdli regarding the risks of an oil spill in their
- 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

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A. I don't recall if that was specifically part of the discussion

333. Q. So you do not recall going into that level of detail?

A. I don't. [Emphasis added]

- 255 A further problem in Phase IV was that, in at least three instances, information was put before the Governor 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 and, if
- 256 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 45 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 Governor 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 positon on mitigation

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- 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 this light, 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 undiscussed. This fell well 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, a 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

Joseph Whiteside: Building on what I just said - 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 you'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 funding approval authority 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.

So, part of our responsibility today is not to make decisions, or to tell you we have decisions that we can make. It is to tell you we will do the best job we ca in taking your recommendations forward so that they are properly understood within our respective departments.

Brett Maracle: And considered.

Joseph Whiteside: and considered.

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Chief Clark Robinson: Will [vou]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 - is that they are seeking, I think [it's] fair 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 panel, which Canada continues to say we rely on, 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 understood what Aboriginal communities are saying.

To identify where you believes [there] are gaps, and I think [it's] fair to describe a lot of the presentation is talking about 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. As to whether I Cabinet I feels there is ongoing consultation work that needs to be engaged lin regardless I of the whether the decision is pro or con on the particular project, that may well be an issue Ministers may wish to bring forward further information about consultation. I can't say the door is closed, and I can't say what the door on consultation may be, that part of the analysis, we as a team may have to do some work on to assist to assist our seniors.

Chief Clark Robinson: We don't agree that there has been any consultation.

[Emphasis added] [sic throughout]

- 267 In our view, the Kitasoo never received Canada's explanation why the missing information was not required and why Canada rejected the assertion that the Kitasoo had not been adequately consulted.
- 268 The Heiltsuk made similar submissions to the Kitasoo at 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 to herring-spaw-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.
- 269 During the consultation meeting, elected leader and Chief Councillor Cecil Reid described the importance of the herring industry to the Heiltsuk and the "horrific" consequences that an oil

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Joint Review Panel as set out in its Report. This was not so. Phase IV in part was an opportunity to address errors and omissions in the Report on subjects of vital concern to Aboriginal Peoples. The consequence of Canada's position was to severely limit its ability to consult meaningfully on accommodation measures.

- 275 The Gitxaala encountered the same problems with Canada during Phase IV. It also took the position that approval of the Project was premature and that further studies on matters arising from the Report of the Joint Review Panel were required. The notes of the April 3, 2014 consultation meeting show that Canada was asked "[c]an we get any response, any reasons why the additional work that we're asking for can't be undertaken? Can we talk about what can or can't be undertaken? We invite any discussion?"
- 276 Jim Clarke, for Canada, replied that "I don't want to raise your expectations. Typically we just use the Joint Review Panel as information for the decision. It is not typical to delay the legislative timeframe for decision. It doesn't mean it can't happen it's just not routinely done."
- 277 During this April 2014 consultation meeting, Canada acknowledged to the Gitxaala that an oil spill could have a catastrophic effect on the Gitxaala's interests. The Gitxaala's representatives went on to observe that the Gitxaala had filed many expert reports in the Joint Review Panel process. The Gitxaala's representatives asked what Canada's views were on a specific report dealing with navigation issues, and how Canada intended to take such report into account. Transport Canada's representative answered, "If we can get more answers we'll try." Answers on this critical issue were never forthcoming.
- 278 One final example occurred during the March 3, 2014, consultation meeting with the Haisla. The Haisla's representatives expressed concern at the extent to which paid lobbyists were talking to government officials and affecting the consideration of their concerns and asked for disclosure of lobbying efforts. Mr. Maracle responded that it was "hard for us to get [information] from Ministers, [and it would be] better if you [used] an [access to information request]." If information was available through an access request, it is difficult to see why it would not be provided through the consultation process particularly in light of the timelines Canada had imposed.
- 279 Based on our view of the totality of the evidence, we are satisfied that Canada failed in Phase IV to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations. Missing was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report, or to provide meaningful feedback in response to the material concerns raised. Missing was a real and sustained effort to pursue meaningful two-way dialogue. Missing was someone from Canada's side empowered to do more than take notes, someone able to respond meaningfully at some point.
- 280 Canada places great reliance on two letters sent to each affected First Nation on June 9, 2014 and July 14, 2014, the former roughly a week before the Governor in Council approved the Project,

spill would have on their livelihood. He then asked Canada's representative "[...] why did you come without the authority to discuss our concerns and react to them in a positive way so that we have some comfort that this thing is being taken seriously? ... How can you make a decision until all the information is in?"

270 Joseph Whiteside, a senior policy analyst with Natural Resources, responded along the same lines as he did at the Kitasoo meeting:

Our responsibility is to collect the information we have and be as responsive to the questions and issues 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 Ministers are fully aware of the perspective of the Heilstuk Nation brings forward on 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 [M]inister's agreeing to [a] delay of the process." The Heiltsuk never received an explanation why the missing information concerning a resource necessary for their sustenance was not required.
- 272 Deputy Chief Counselor Taylor Cross of the Haisla also provided evidence of the following unaddressed concerns:
 - 7. Despite a representative from Transport Canada attending the March and April Meetings, we did not have time to discuss Canada's Tanker Safety Expert 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 fared no better when they raised concerns about errors in the Report of the Joint Review Panel. For example, during the consultation meetings, Canada's representative 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

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the other after. In our view, for the following reasons, these letters were insufficient to discharge Canada's obligation to enter into a meaningful dialogue.

- 281 Aside from the errors found in the June 9, 2014 letter sent to the Kitasoo, the Heiltsuk, the Nadleh and the Nak'azdli, the content of the letters can at best be characterized as summarizing at a high level of generality the nature of some of the concerns expressed by the affected First Nation. Thus, the letter explained that during Phase IV, officials "noted [their] perspective on the extent which [your] concerns could be mitigated by various measures" without setting out what the Nations suggested mitigation measures were. To the limited extent the June 9, 2014 letter responded to a concern, it did so only in a generic fashion. In substance, no explanation was provided about what, if any, consideration had been given to the suggested mitigation measures.
- 282 To illustrate, to the extent a First Nation had raised a concern about the consequence of an oil spill, Canada responded that it "place[d] a high priority on preventative measures to avoid the occurrence of spills in the first place, and on enhancing response and recovery measures in the unlikely event of a spill." The letter went on to inform that "the Government of Canada has recently announced new measures to further enhance Canada's world-class pipeline safety and tanker safety systems."
- 283 The July 14, 2014 letters were lengthier and were intended "to respond to the many important issues you have raised, and to describe some of the next steps related to the Project." Given that the decision to approve the Project had already been made, and that consultation is to be complete prior to making the decision at issue, it is difficult to see these letters as fulfilling Canada's obligation to consult.
- 284 Moreover, again we characterize the content of the July letters as generic in nature, explaining that the Joint Review Panel had subjected the Project proposal "to a rigorous science-based review by an independent Panel." To the extent the letter addressed concerns expressed by the First Nation, those concerns were summarized at a general level and then responded to by reference to conditions imposed by the Joint Review Panel, by reliance upon the current marine safety regime, the possibility "there may be further interest in conducting geological and geotechnical sampling to gather additional information to better evaluate" hazards posed by geo-hazards, additional research and development on the fate of diluted bitumen and ongoing research.
- 285 It is fair to say the letters centered on accommodation measures.
- 286 However, the letters did not engage with the stated concerns that the Phase IV consultation process was rushed and lacked any meaningful dialogue. Nor did the letters engage with the repeatedly expressed concern that insufficient evidence was available to allow for an informed dialogue about the potential impacts of the Project on Aboriginal and treaty rights.
- 287 Following the authorities of the Supreme Court of Canada on the duty to consult, we

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conclude that during the Phase IV process, the parties were entitled to much more in the nature of information, consideration and explanation from Canada regarding the specific and legitimate concerns they put to Canada

- 288 The dialogue necessary to fulfil 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 218-225. Canada's attitude to the sharing of information about this is troubling. Strength of claims was an important matter that had to be considered in order for the consultation in Phase IV to be meaningful. We wish to explain why.
- 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 claims. 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, the then Minister of the Environment committed to do just that -- to provide a description of its strength of claim and depth
- But Canada never provided the Haisla with that description. The evidence of Chief Ross of the Haisla shows that during Phase IV Canada resiled from that commitment and avoided defining exactly what was in play during the consultations:
 - 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

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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 claim. In his letter dated April 18, 2012 the Minister of Environment had committed to sharing the Crown's results of its analysis of our strength of claim prior to the commencement of Phase IV of its Consultation Framework. We stressed that we needed to know of any disagreements regarding strength of claim in order for consultation to be meaningful, and so that we were not speaking at cross purposes.

- The Environment Canada representatives, Mr. Brett Maracle and Analise Saely, stated that, based on a preliminary assessment, 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 Kitamaat River, Kitamaat River or Estuary, and in the Douglas Channel. We asked that the Crown provide detail 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 told us they would seek permission to disclose the Crown's actual strength of claim analysis, including further analysis 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 admitted in terms of the Haisla Nation's strength of claim is found at pages 920 to 929 of Exhibit H to this my Affidavit. This letter, however, contains an error At page 4, the letter incorrectly states that the Crown explicitly agreed that the Haisla Nation has a high strength of claim to its entire Traditional 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
- 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 that was divorced from the Project area. The letter states as follows at page

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 have 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 supports the Haisla Nation as a having strong prime [sic] facie claim to both aboriginal rights and

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title within lands claimed as part of the Haisla traditional territory

A copy of the Crown's letter dated March 24, 2014 with this statement is found at pages 931 to 1,052 of Exhibit H to this my Affidavit

- 102. This carefully crafted statement came as a surprise to me, given that the Crown representatives had previously conceded the Crown's view that the Haisla Nation 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 had resulted in a statement which effectively told us nothing about the Crown's view of the strength of our claim in relation to the Project.

 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 Projects 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 did in fact disclose more regarding our strength of claim, but that his supervisors had directed him to disclose nothing beyond what was set out in the March 24 letter. Mr. Clarke told us that the Minister of Natural Resources himself had directed that the consultation team disclose nothing more than what was in the letter quoted above. Mr. Clarke stated that he had done his best to see the disclosure of the Crown's strength of claim analysis. He explicitly confirmed that the Minister of Natural Resources rejected this plea for disclosure 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 its analysis of the Haisla Nation strength of claim. He stated that he could not. We stated that the effect of Canada's failure to share its strength of claim analysis was that Minister Kent's promise would be broken. The Crown representatives had no explanation. A copy of our letter of May 7, 2014 expressing frustration with the Crown's approach to Phase IV consultation is found at pages 1,054 to 1,066 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 prima facie 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 Gitxaala 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. Brett 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 pushed very hard to get this disclosure

- 296 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's representatives were able to share they did share
- 297 Chief Moody then observed that somewhere a determination had been made that their rights were focused on subsistence harvesting. In answer to the question of whether the discussion would be limited to this determination of their rights he was told, "No, but that's all we are allowed to
- 298 Again, at the April 22, 2014 consultation meeting with the Kitasoo, Mr. Maracle repeated that Canada was not at that time sharing the strength of claim assessments. Aynslie Saely of Environment Canada then added that they were still getting information which would allow them to complete the depth of consultation assessment. When asked if Canada would share its ultimate conclusion and the information it relied on for assessing the strength of claim, Ms. Saely responded that such conclusion would be a cabinet confidence, and as such it was not information that could
- Three days later, the transcript of the April 25, 2014 consultation meeting with the Heiltsuk records Ms. Saely of Environment Canada advising that Canada had a strength of claim assessment but it was not something that could be shared. The stated rationale was that, as it had been prepared by the Department of Justice, it was protected by solicitor client privilege. When counsel for the Heiltsuk observed that while legal advice could not be disclosed, the result of the assessment could be disclosed, Ms. Saely responded that "[i]n terms of the directions that we received - that it is part of Cabinet confidence.
- 300 We do not accept that privileges in this case barred Canada's from disclosing factual information relevant to the consultation process
- 301 At the consultation meeting with the Gitxaala held on April 2, 3 and 4, 2014, in response to questions about the impacts of oil spills upon governance and other concerns, Canada's representatives advised that "Phase IV consultations are an opportunity to carefully consider the concerns of Gitxaala Nation regarding the potential adverse impacts of the propose (sic) Project."

 The question was then asked if that was the only answer the Gitxaala was going to get. Mr. Maracle responded "[t]his is the answer that's being provided, and some of this will form part of our impact

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- 302 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 information is not part of an environmental assessment process -- but the Supreme Court has held it to be a necessary part of meaningful consultation.
- 303 Again, we refer to the affidavit of Chief Ross on this point:
 - 106. At the March Meeting, we asked the Crown representatives to provide us with a list of the infringements 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 a 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 supervisors had prohibited any discussion of the Crown's assessment of infringements, In fact, Mr. Maracle told us that Canada had a document that sets out the Haisla Nation 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 singled out. Rather, the highest 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 content and extent of a particular right claim 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?" Brett 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

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Court to understand the decision and to determine whether it falls within the range of acceptable outcomes.

- 313 We accept the submission of the Attorney General that the Order in Council allows us to understand that the Governor in Council made its decision on the basis that it accepted the Joint Review Panel's finding that the Project will be required by present and future public convenience and necessity, and that the Project will diversify Canada's energy export markets and will contribute to Canada's long-term economic prosperity. This was sufficient to comply with the statutory requirement to give reasons in so far as the issues covered by the Joint Review Panel were concerned. But as far as the independent duty to consult is concerned, if tell well short of the mark.
- 314 Canada elected in these proceedings not to challenge, but to take at face value, assertions of Aboriginal rights and title. In some instances it has expressly acknowledged the existence of a strong prima facie case for a claim. For example, it has acknowledged the Heilisuk's right to a commercial herring-spawn-on-kelp fishery as recognized by the Supreme Court in R. v. Gladstone, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648. Given this, the importance of the claimed rights to Aboriginal groups, and the significance of the potential infringement of those rights, this is a case where deep consultation required written explanations of the sort described below to show that the Aboriginal groups' concerns were considered and to reveal the impact those concerns had on the Governor in Council's decision: Haida Nation, at paragraph 44.
- 315 We accept the submissions of counsel for the Kitasoo and the Heiltsuk that where, as in this case, the Crown must balance multiple interests, a safeguard requiring the Crown to set out the impacts of Aboriginal concerns on decision-making becomes more important. In the absence of this safeguard, other issues may overshadow or displace the issue of the impacts on Aboriginal rights.
- 316 Nor is the requirement to give reasons met by the Report of the Joint Review Panel or the June and July letters.
- 317 In its Report, the Joint Review Panel did not determine anything about Aboriginal rights or title and gave no explanation on how those non-assesde rights affected, if at all, its decision that the Project would not significantly adversely affect the interests of Aboriginal groups that use lands, waters or resources in the Project area. Thus, the Report of the Joint Review Panel -- under this legislative scheme, nothing more than a guidance document -- can shed no light on Canada's assessment of how the Project would impact upon asserted rights and title.
- 318 Similarly, as the Attorney General correctly conceded, the June and July letters are only capable of addressing issues up to the point of the Governor in Council's decision. Additionally, we addressed above the deficiencies of these letters as part of the consultation process. The letters' contents are not sufficient to show that the Governor in Council had proper regard for the asserted rights and how that appreciation of those rights factored into its decision to approve the Project.
- 319 The balance of the record that could shed light on this, i.e., the staff recommendations

nature and extent of the rights that were to be impacted. In order for the applicant/appellant First Nations to assess and consult upon the impacts of the Project on their rights there must first be a respectful dialogue about the asserted rights. Once the duty to consult is 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.

- 369 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 content 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 18, 2012 (discussed at paragraphs 220 and 292, above), was legally unacceptable. Canada's failure frustrated the sort of genutine 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 Governor 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 fulfilment 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 Councils 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 amply accomplish this purpose."
 - letters amply 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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flowing from the Phase IV consultation process, the ministerial recommendation to the Governor in Council and the information before the Governor in Council when it made his decision, are all the subject of Canada's claim to Cabinet confidence under section 39 of the Canada Evidence Act and thus do not form part of the record. Canada was not willing to provide even a general summary of the sorts of recommendations and information provided to the Governor in Council.

320 Finally and most importantly, on the subject of reasons, we note that the Order in Council contains only a single recital on the duty to consult. It records only that a process of consultation was pursued, nothing more:

Whereas the Crown has undertaken a process of consultation and accommodation with Aboriginal groups relying on the work of the Panel and additional consultations with Aboriginal groups;

- 321 Nowhere in the Order in Council does the Governor in Council express itself on whether Canada had fulfilled the duty to consult. This raises the serious question whether the Governor in Council actually considered that issue and whether it actually concluded that it was satisfied that Canada had fulfilled its duty to consult. All parties acknowledge that the Governor in Council had to consider and be satisfied on the issue of the duty to consult before it made the Order in Council.
- 322 Similarly, the Order in Council does not suggest that the Governor in Council received information from the consultations and considered it.
- 323 There is nothing in the record before us to assist us on these matters. This is a troubling and
- 324 Had the Phase IV consultation process been adequate, had the reasons given by Canada's officials during the consultation process been adequate and had the Order in Council referred to and adopted, even generically, that process and the reasons given in it, the reasons requirement might have been met. But that is not what happened. Here too, Canada fell short of the mark.

(5) Conclusio

325 We have applied the Supreme Court's authorities on the duty to consult to the uncontested evidence before us. We conclude that Canada offered only a brief, hurried and inadequate opportunity in Phase IV — a critical part of Canada's consultation framework — to exchange and discuss information and to dialogue. The inadequacies — more than just a handful and more than mere imperfections — left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored. Many impacts of the Project — some identified in the Report of the Joint Review Panel, some not — were left undisclosed, undiscussed and unconsidered. It would have taken Canada little time and little organizational effort to engage in meaningful dialogue on these and other subjects of prime importance to Aboriginal peoples. But this did not happen.

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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, laudably, 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 considered by the Joint Review Panel but many of these were not, given the Joint Review Panel's terms of reference. The Phase IV consultations after the Report of the Joint Review Panel were meant to provide an opportunity for dialogue about the Report and to fill 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 needed to 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. Then recommendations, including any new proposed conditions, needed to be formulated and shared with Northern Gateway for input. And, finally, these recommendations and any necessary information needed 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 neighbourhood 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 behind the duty to consult -- the honourable treatment of Canada's Aboriginal peoples and Canada's reconciliation with
- 330 At the end of Phase IV of the consultation process is 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 must be taken in response to it rests 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 enecessary or appropriate, react, for example by imposing further conditions on any certificates it was inclined to grant.
- 331 Did the Governor in Council fulfil this legal obligation? In its Order in Council, the

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Council's role at the end of Phase IV -- Canada fell short of the mark.

reasons to show that it fulfilled its legal obligation. It did not do so.

333 For the foregoing reasons, the Order in Council must be quashed. The Order in Council directed 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

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

332 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

- 334 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.
- 335 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 its Phase IV consultation, a matter that, if well-organized and well-executed, need not take long.
- 336 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 balancing of considerations under section 54 of the Natio Energy Board Act. Thus, any new information and new recommendations must be placed before the Governor in Council.
- 337 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.
- 338 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.

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- 339 This means that on redetermination, the Governor in Council will have the three options available to it, summarized at paragraph 113 above, as well as the discretionary power, as explained at paragraphs 159-168 above, to impose further conditions on the Certificates in order to accommodate the concerns of Aboriginal peoples.
- 340 This also means that upon receipt of any new information or any new recommendations, the Governor in Council is subject to the strict time limits for making its decision under subsection 54(3) of the Act.
- 341 Finally, we note that the Governor in Council must provide reasons for its decision in order to fulfil its obligations under subsection 54(2) and the duty to consult

H. Proposed disposition

- 342 For the foregoing reasons, we would dismiss the applications for judicial review of the Report of the Joint Review Panel in files A-59-14, A-56-14, A-64-14, A-63-14 and A-67-14.
- We would also allow the applications for judicial review of the Order in Council, P.C. 2014-809 in files A-437-14, A-443-14, A-440-14, A-445-14, A-446-14, A-447-14, A-448-14, A-439-14 and A-442-14 and quash the Order in Council. We would also allow the appeals in files A-514-14, A-520-14, A-522-14 and A-517-14 and quash the National Energy Board's Certificates OC-060 and OC-061.
- 344 We would further order that:
 - The matter is remitted to the Governor in Council for redetermination: At its option, the Governor in Council may receive submissions on the current record and, within the timeframe under subsection 54(3) of the National Energy Board Act calculated from the date submissions are complete, may redetermine the matter by causing it to be dismissed under
 - paragraph 54(1)(b) of the National Energy Board Act; If the Governor in Council does not pursue the option in paragraph (b) or if it pursues that option but does cause the matter to be dismissed at that time, the matter will remain pending before it; in that case, Phase IV consultation shall be redone promptly along with any other necessary consultation with a view to fulfilling the duty to consult with Aboriginal peoples in accordance with these reasons;
 - When the Attorney General of Canada is of the view that the duty under paragraph (c) and any procedural fairness obligations are fulfilled, she shall cause this matter to be placed as soon as practicable before the Governor in Council for redetermination, along with any new recommendations and any new relevant information; and
 - The Governor in Council shall then redetermine this matter in accordance

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with these reasons within the timeframe set out in subsection 54(3) of the National Energy Board Act, running from the time it has received any new recommendations and any new relevant information

- 345 If the parties are unable to agree on costs, we invite them to provide us with submissions of
- 346 We thank the parties for the great assistance they have provided to the Court throughout.

DAWSON LA

- 347 RYER J.A. (Dissenting Reasons): -- I have read the thorough reasons of the majority (the "Majority Reasons") and am in agreement with much of them. In particular, I agree that the Order in Council is unimpeachable from an administrative law perspective. However, with respect, I do not agree that it should be set aside on the basis that the Crown's execution of the Phase IV consultations was inadequate to meet its duty to consult. In my view, in the context of the overall Project-approval process, the execution of the Phase IV consultations was adequate, and I would dismiss the applications and appeals with costs
- 348 In preparing these reasons, I have adopted all of the defined terms contained in the Majority Reasons, except where otherwise stipulated.
- 349 As a starting point, it is my view that the only Aboriginal rights that are engaged by the Project are each First Nation's asserted rights in relation to the use and benefits of the lands and waterways that the Project will cross. Additionally, the Project may engage the Heiltsuk Nation's established right to use a portion of the offshore waters to conduct commercial herring-spawn-on-kelp fishery operations. In these reasons, I refer to each of these engaged asserted or established Aboriginal rights as a "Usage Right".
- 350 I reject any assertion that the construction and operation of the Project could affect the asserted governance rights or asserted Aboriginal title. These are purely legal rights that could not be damaged or extinguished by the activities undertaken in the course of the Project. An action that has the effect of sterilizing land near the Project right of way would, no doubt, damage a First
 Nation's ability to use and enjoy the flora and fauna that would otherwise have been situated on the sterilized land. However, the sterilizing action would have no impact upon the First Nation's ability to establish, at some future time, a right to Aboriginal title to, and governance rights in respect of, such land.
- 351 A detailed description of the history, size and scope of the Project is contained in the Majority Reasons and does not bear repeating. Suffice it to say that the Project is a massive undertaking, with an estimated cost of over \$7.9 billion. It also has the support of a majority of the affected First Nations, 26 of which accepted the Project proponent's offer to acquire an equity

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interest in the Project. In assessing the adequacy of the execution of the Phase IV consultations, it is important to consider these consultations in the context of the Project's duration, size and scope.

- 352 The Majority Reasons describe a number of alleged imperfections in the Crown's execution of the Phase IV consultations and conclude that such imperfections establish the Crown's failure to meet its duty to consult obligations. However, as acknowledged in the Majority Reasons, the standard to be met is that of adequacy and not perfection (Haida Nation at paragraphs 60-63).
- 353 In essence, the alleged imperfections are as follows
 - (a) the timelines for the Phase IV consultations were too short;
 - (b) the Crown Consultation Report contained inaccuracies in its portrayal of the First Nations' concerns, with the result that the Governor in Council had insufficient information to render its decision;
 - the dialogue that occurred in the Phase IV consultations was not meaningful; and
 - (d) the Crown did not share its strength of claim information
- 354 With respect, even assuming that these imperfections have been established, it is my view that taken together, in the context of such a large and complex project that has taken over 18 years to reach the present stage, they are insufficient to render the Phase IV consultations inadequate.
- 355 I wish to briefly address each of the four alleged imperfections. First, the timelines for the Phase IV consultations were statutorily imposed. The Majority Reasons criticize the Crown for failing to request an extension from the Governor in Council, but the Crown had no obligation to make such a request. Moreover, there has been no challenge, by way of judicial review, of the Crown's alleged failure to request an extension of the statutory timelines. The Majority Reasons offer the view that a short relaxation of the timelines in the neighbourhood of four months would have been sufficient to permit sufficient dialogue to take place and to fill any informational gaps. With respect, this view is speculative.
- 356 Secondly, because of the claim of Cabinet confidence, under section 39 of the Canada Evidence Act, this Court is unaware of the entirety of the materials that were before the Governor in Council when it made its decision. Accordingly, with respect, it is not possible for this Court to make any assessment of the adequacy of the materials that were before the Governor in Council when it made its decision. In any event, it is apparent that the Crown's summaries in the Crown Consultation Report, which contained the alleged inaccuracies, were not the only documents that were before the Governor in Council. Any such inaccuracies would have been apparent from a review of the Report, and the letters from First Nations which were appended to the Crown Consultation Report, both of which are presumed to have been reviewed by the Governor in Council. Thus, in my view, any inaccuracies in the Crown Consultation Report are insufficient to render the Crown's Phase IV consultations inadequate.

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intervention. In the Project-approval process, the Crown had the obligation to fulfill the duty to consult. As a result, any obligation to explain why the duty to consult was adequately discharged rested with the Crown, not the Governor in Council. The Majority Reasons (paragraph 331) 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 Usage 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 reason-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 Report and the Crown Consultation Report before it, both of which clearly addressed this issue and both of which the Governor in Council is 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 applications and appeals with costs RYER J.A.

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357 Thirdly, the Majority Reasons appear to conclude that the Crown failed to engage in a meaningful dialogue because some First Nations stated that they required further information regarding the Project's impacts, and the letters sent by the Crown following the Phase IV consultations addressed accommodation but not the First Nations' concerns regarding consultation. With respect, in my view, the requested information, by and large, related to matters that were considered by the Joint Review Panel or, in some instances, matters that were never placed before the Joint Review Panel, but should have been. The assertion of such imperfections in the Phase IV consultations represented an attack on the Report in a forum neither designed nor equipped to adjudicate its merits. Indeed, those First Nations have challenged the adequacy of the Report in this appeal, but to no avail. In addition, it is my view that a focus on accommodation in the letters is consistent with the Phase IV mandate to consider the efficacy of the "mitigation measures" put forth by the Joint Review Panel (Aboriginal Consultation Framework at page 8). Moreover, one may question the practical utility of engaging in ongoing discussions with respect to a concern that has been accommodated.

358 Finally, it is my view that the Crown made no error in failing to disclose its strength of claim assessments. It seems incongruous to stipulate that the consultation process was "not a proper forum for the negotiation of title and governance matters" (Majority Reasons at paragraph 309) and then to conclude that the Crown's "attitude to the sharing of information" regarding its assessment of the strength of the First Nation's claims in respect of such asserted rights was "troubling" (Majority Reasons at paragraph 288). This is especially so in light of the conclusion that the Crown, as a matter of law, had no obligation to share its assessment of the strength of each First Nation's claim in respect of asserted rights (Majority Reasons at paragraph 224). In my view, there is little, if anything, to distinguish between the Crown's "legal" assessment of a First Nation's claim and "information" the Crown has about the strength of such a claim. As the Majority Reasons stipulate, the Crown's legal assessment of the strength of a First Nation's claim is inherently subject to solicitor-client privilege. In my view, that privilege extends to the Crown's information upon which its legal assessment is based. To the extent that issues as to governance rights and Aboriginal title are live as between the Crown and any of the applicant/appellant First Nations, such issues ought to be pursued elsewhere as they are not, in my view, properly engaged by the Project-approval process. I agree that the Crown had no obligation to share its strength of claim assessments and, as a result, it is my view that this alleged failure does not establish the inadequacy of the Crown's Phase IV Consultations.

359 In my view, the Crown's participation in the Phase IV consultations was sufficient to fulfill the honour of the Crown, particularly in a process that dealt with a project of this duration, size and scope. In conclusion, it is my view that the alleged imperfections in the execution of the Phase IV consultations, which are stipulated in the Majority Reasons, are insufficient to demonstrate that the Crown's consultations were inadequate.

360 The Majority Reasons also conclude that the Governor in Council's reasons were inadequate In my view, there is no error in the Governor in Council's reasons that warrants this Court's

UNIFIED COMMAND SITUATION REPORT SITREP Seaforth Channel Incident Incident Start Date: Current Date/Time Location October 13, 2015 01:13 October 15, 2016 09:30 Cotober 15, 2016 09:30 Cotober 15, 2016 09:30 Cotober 15, 2016 09:30 Seaforth Channel, approximately 11nm west of Bella Bella Tug Nathan E. Stewart and Barge DBL 55 ran hard aground on the rocks at 10/13/15 (0:113 PDT) vesterday morning. The unit was located in Canadian Waters at 52.14.648, 128.23.160W at the entrance to Sea Forth Channel. The tug remains aground on Athlone Island, approximately 11.5 miles from Bella Bella by water. The barge was empty of cargo and has since been moved to a safe anchorage, at the mouth of Dundavan Inite. Water ingress has been detected in the number 2,3, and 5 wold tanks, all other barge voids and all cargo compartments have been inspected and there is no sign of water ingress. The tug is aground in shallow water and is partially submerged (only the mast is showing) in 9 meters of water. After the incident it was reported that the 1Center, and 1Starboard fuel tanks were breached. The tug was loaded with 59.924 gallons of diesel fuel, Kirbt was able to confirm that 5554 gallons of diesel fuel were pumped from the tug into tank 6 on the barge before the pumps failed due to water in the engine room. A positive manifest of October 13, 2016 01:13 pumped from the tug into tank 6 on the barge before the pumps failed due to water in the engine room. A positive manifest of additional liquids aboard is being prepared. Tug is considered in a stable position; it is sitting on the bottom with a roughly 12* list to port, and is not currently moving in the swell. Ensure the safety of citizens and response personnel Control the source Secure the vessel and refloat/remove from the marine environment environmentally-sensitive areas, prioritizing of sample collection Contain and recover spilled material Remove of from impacted areas Priorities/Objectives Remove oil from impacted areas Recover and rehabilitate injured wildlife Recover and relabilistate injured wildlife Manage coordinated response effort Keep the public & stakeholders informed of response activities Clear and consistent communication to the community Minimize economic impacts from the spill to the community and the environment Minimize local business interruption Minimize local business interruption Jim Guidry (Responsible Party Incident Commander) William Housty (Heiltsuk On Scene Commander) Unified Command Jeff Brady (Canadian Coast Guard Federal Incident Commander) John Kervel (BC Provincial On Scene Commander)

Unified Command Situation Report 09:30am | Page 01

UNIFIED COMMAND SITUATION REPORT No incidents/near misses reported relating to accident or WCMRC vessels are fitted with air monitoring resources and will WCMRC vessels are fitted with air monitoring resources and will report any safety concerns Site Specific Safety Plan is being continuously developed and is to be followed by all responders Personal Protective Equipment stocks will be located on the MAR-ELL-MIST and the BARTLETT to ensure continued availability on INCIDENT COMMAND POST • ICP is operating out of the Heiltsuk Nation Tribal Council chambers ICP staff reconvened and conducted Operations Briefing at 0800 ICP staff are transitioning the response to the Planning Phase. and Operations will be implementing the first incident Action Plan today STAGING AREA Staging Area has been established at Shearwater Operations Briefing held at 0800, daily Operations are to be directed according to the Incident Action Plan Communications are to be coordinated to the ICP through MAR-ELL-MIST Priorities for on-water responders today are to install secondary containment booming around casualty, install protection booming at locations in Gale Channel, and continue to recover product as possible with sorbents · Currentbuster system is to be deployed, and will be attempting Currentbuster system is to be deployed, and will be attempting recovery in the areas of thickest concentration Initial overflight this morning shows containment around the casualty oppears effective in the current conditions Skimming considered ineffective thus far due to limited thickness of product Additional WCMRC equipment and contractor personnel have been mobilized from Prince Rupert, Vancouver Island and South Coast and will be arriving at various times today and tomorrow Schedule for overflights has been developed for the day. Schedule for overflights has been developed for the day: available assets include CCG helicopter and Kirby helicopte

Unified Command Situation Report 09:30am | Page 02

UNIFIED COMMAND SITUATION REPORT

NASP aircraft has been requisitioned and will be arriving on scene with ETA of 1300

- Overflight taskings will be coordinated through the ICP,
- Overflight taskings will be coordinated through the ICP, and will be focusing on tast tical operations support, and will be focusing on tast tical operations support, go and barge are considered stable; Resolve Marine Group divers have been down to the tup to conduct salvage assessments and have been able to plug all vents on the tug; lightering plan is being developed to remove fuel from the tug with hot taps, and a salvage plan is in development to follow once lightering is complete; plan is to remove the trug from the water with a crane and place it on a barge for transit; no repairs are to be attempted in the water. Assessments are also be made of the damaged barge to ensure it is safe for transit out of the area; Transport Canado will be assisting in salvage assessments of the tug and barge and will be approving any plans developed

SHORELINE CLEANUP ASSESSMENT TECHNIQUES

- SCAT crews will be conducting an initial overflight today, and will be starting assessments at identified locations thereafter Polaris Applied Sciences has been hired to lead SCAT
- SCAT Teams will be comprised of at least:

 - 1 RP Representative
 1 Heiltsuk Representative
 1 Provincial Representative
- 1 Provincial Representative
 SCAT teams survey the area to collect geo-referenced data on shoreline oiling conditions in a systematic process, using standardized methods and terminology.
 The shoreline oiling surveys will be used to create shoreline treatment recommendations (STRs). These will direct how the cleanup operations will take place.

- Wildlife Hotline has been activated: 877-323-3985
- Wildlife Hatline has been activated: 877-323-3965
 Operations crews have been instructed to report any wildlife sightings through the MAR-ELL-MIST for relay to the ICP

 A part of the seasonments.
- Wildlife has arrived on scene and has started assessments Wildlife assessment teams will include representatives from
- Heiltsuk Nation
- Perison Wildlife has been contracted to lead Wildlife
 Public and responders are urged not to attempt to handle any
 oiled wildlife

UNIFIED COMMAND SITUATION REPORT

ENVIRONMENT UNIT

- VIROMMENT UNIT

 B C Ministry of Environment is cooperating with Helitsuk Nation
 and being supported remotely by Environment Canada

 BC Ministry of Environment is leading development of a
 Sampling Plan, has been collaborating with Helitsuk and Kirby to
 take samples

 BC Ministry of Environment is developing a Waste Plan to
 support Operations

Marine Weather Statement Issued 3:47 AM PDT 15 October 2016

A deepening low pressure system will cross the Southern BC waters today. Gale force easterly or southeasterly winds will develop over the southern waters this afternoon with whide rising intuitive to gale to storm force this evening as the low passes Southern Vancouver Island. In the wake of the low gale to storm force southwesterlies are expected off Southern Vancouver Island.

Forecast (Environment Canada)

Issued 04:00 AM PDT 15 Ortober 2016
Today Tonight and Sunday Wind southeast 15 to 25 knots increasing to southeast 25 to 30 kins moring the diminishing to northeast 10 to 15 early this evening. Wind diminishing to light late overnight then increasing to southeast 15 to 25 binday marinish.

Issued 04:00 AM PDT 15 October 2016
Today Tonight and Sunday Seas 3 to 4 metres subsiding to 3 this morning.

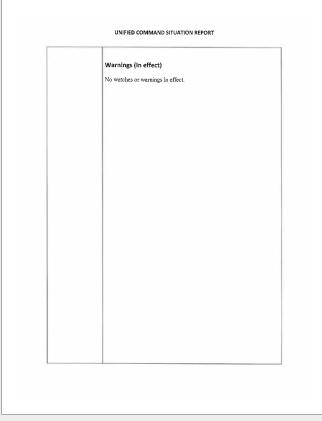
Weather & Visibility

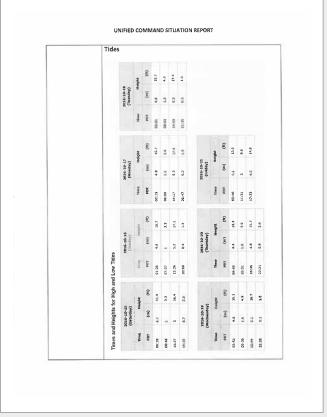
Extended Forecast

Issued 04:00 AM PDT 15 October 2016 I SUCCOSE TABLE MAINTEN 1.3 OCCOSET FAULD
Monday Wind light becoming southeast 10 to 15 knots in the afternoon.
Tuesday Wind south 10 to 15 knots.
Wednesday Wind southeast 15 to 25 knots increasing to southeast 45 to 55
late in the day.

Unified Command Situation Report 09:30am | Page 03

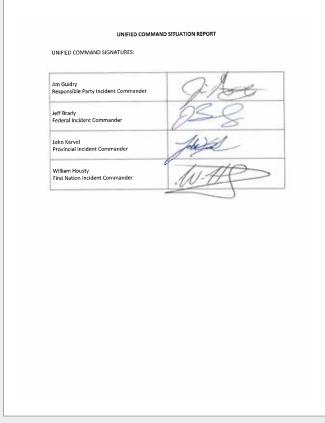
Unified Command Situation Report 09:30am | Page 04



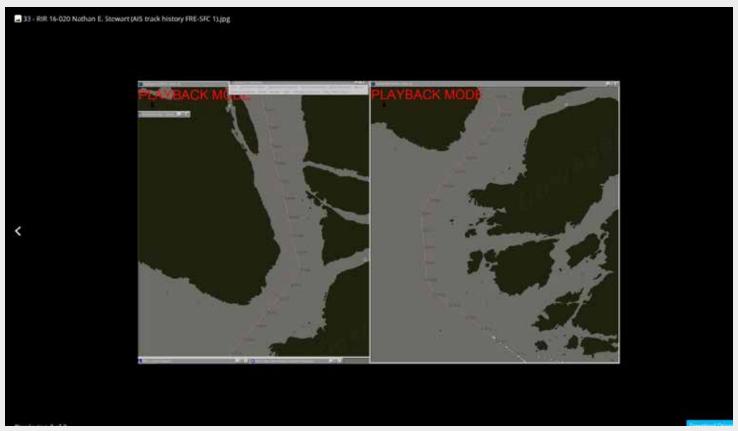


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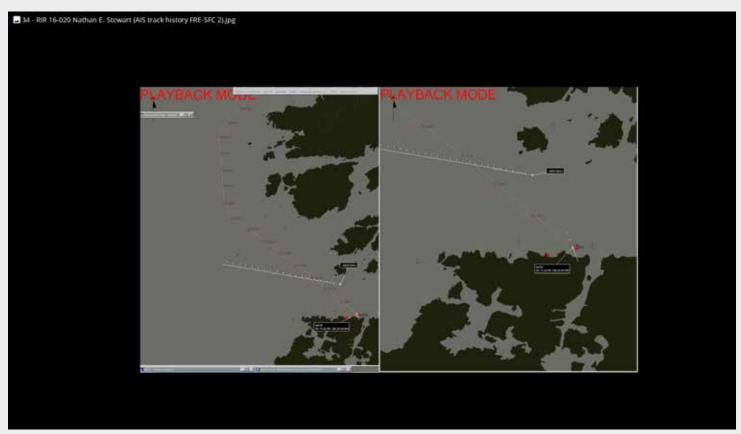


Unified Command Situation Report 09:30am | Page 07



RIR 16-020 NES (AIS track history FRE-SFC 1)

SCHEDULE 34



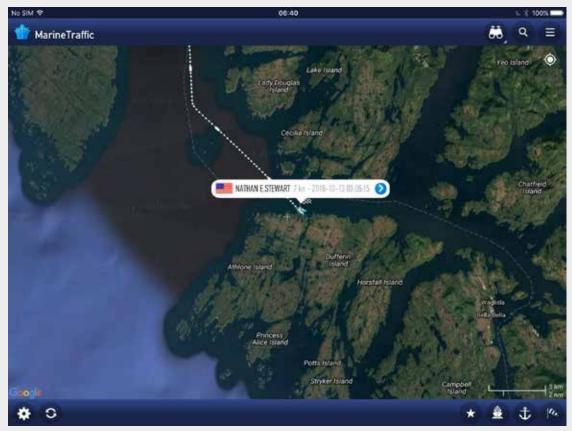
RIR 16-020 NES (AIS track history FRE-SFC 2)

ICS 201-2 - Sun	mary of Current Actions	Version Name: Initial Respon	
Incident Name: Sea	forth Channel Incident	Period: Initial Re [10/13/2016 01:06 - 10/14/2016 01:	
	Initial Resp	onse Objectives	
Ensure the Safety o	Citizens and Response Personnel		
Secure the Vessel			
Control the Source			
Maximize Protection	of Environmentally-Sensitive Areas		
Contain and Recove	er Spilled Material		
Remove Oil from Im	pacted Areas		
	ilitate Injured Wildlife		
Manage Coordinate			
Keep the Public & S	takeholders Informed of Response Activiti	es	
Minimize Economic			
Minimize Business I	nterruption		
	Current and	Planned Actions	
Date/Time	Action/Event/Notes		
10/13/2016 01:05	Incident occurred		
10/13/2016 04:10	Diesel fuel detected in the water.		
10/13/2016 09:40	All 7 crew members have abandoned ship. All recovered and accounted for. 7 crew members are now aboard the Canadian Coast Guard Ship Bartlett. Tug Nathan E Stewart reported to be sliding off current point of grounding.		
10/13/2016 10:15	Request made by Kirby via Canadian C CG will relay to on-scene commander.	G to deploy the barge anchor so that unit will not shift. Canadian	
10/13/2016 11:08	Tug Nathan E Stewart has partially sunk. Tug is being held in place to the barge by the JAK pin system. Canadian CG Ship Bartlett is attaching spectra line to the unit to secure in place. Additional diesel fuel ha been detected in the water. Barge has shifted slightly but it still aground.		
10/13/2016 11:17	Tank Barge DBL 55 #3 double bottom is believed to be compromised. The tide is coming up. The barge now floating free. On-scene vessels have turned the barge into the wind in the channel. Barge is current being anchored by the Tug Nathara E Stewart hanging from the notch. The barge anchor has not been dropped at this time. Canadian CG will transfer management of authority from JRCC to Regional Ops Environmental Response Center.		
10/13/2016 13:45	Kirby personnel arrived on scene and conducted overflight. Observed oil in the water. Tug was down at t stern all the way up the the aft side of the stacks.		
10/13/2016 15:00	Kirby personnel arrived on scene at the incident location via vessel. Conducted assessment of on scene resources. Began booming off tug and barge (encapsulated it)		
10/13/2016 15:15	Local personnel began booming off Gal	e Creek with two 50' sections of boom.	
10/13/2016 15:30	Deployed three skiffs with 8 sections of 50' sections of boom. 9 personnel. Headed to boom off Gale Creek. 90% boomed (most of it sorbent). Returned to Shearwater to get more personnel.		
10/13/2016 16:50	Ordered more personnel to complete bo	oming of Gale Creek.	
10/13/2016 17:30	Arrived on scene at Gale creek. Assess		
10/13/2016 17:50	added sorbent.	in Gale Creek (same location as before). Double boomed and	
10/13/2016 18:40	Tug separated from the barge. Barge flo		
10/13/2016 18:50	Instructed tug HIGH SEAS GUARDIAN to gently pull on the barge to see if it would pull free - which it did.		
10/13/2016 18:57	Barge is floating free off the beach. HIGH SEAS GUARDIAN took barge in tow. Tug DILLIGENCE also or scene conducted survey of barge. Barge drafts reported; 6.5' forward and 8.0 feet aft with no noticable lis		
10/13/2016 19:10	and will await anchoring instructions.	nd down for the evening. HAISEES GUARDIAN has barge in tow	
10/13/2016 19:55	IC advised that a naval architect and on stability. Developing anchoring plan.	e Kirby representative will go out to do assessment of the barge	
ICS 201-2 - Summa	ry of Current Actions	Prepared By Brown, Ayla, Updated 01/16/2017 16:26 GMT -8:00	
INCIDENT ACTION PLAN	SOFTWARE ¹⁰ Printed 01/16/2017 16:26 GMT -8:00		

ICS 201-2 - Summary	of Current Actions – Initial	Response for Oct. 14, 2016	Page 01
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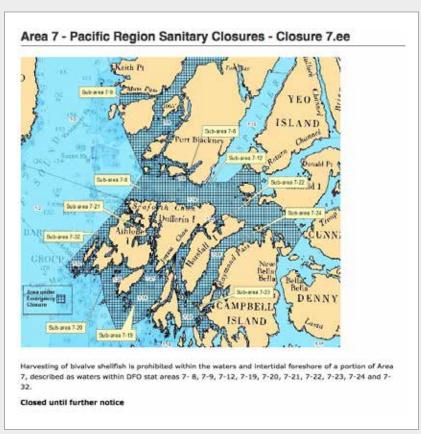
ICS 201-2 - Summary of Current Actions				
Incident Name: Seaforth Channel Incident		Period: Initial Re [10/13/2016 01:06 - 10/14/2016 01:06]		
0/13/2016 22:41	Unified Command has established a sit rep protocal for field operations. ALI operations to radio the CCG Vessel Bartlett on Channel 83A at 1000, 1300, and 1600 with a situation status report.			
0/14/2016 09:45	Commenced UC brief			
0/14/2016 11:05	Kirby personnel onboard workboat enroute to Tug Nathan E Stewart to conduct salvage assessment			
10/14/2016 11:50	On scene w/tug. Boom is around tug. Tug is lying on it's port side with 15-20 list. Upper house is visable above the waterline.			
10/14/2016 11:57	Diver in the water to assess tug. Diver observed product coming from starboard day tank vent. Diver sealed it with garbage bags and duct tape. #1 starboard vent also leaking (approx 1 quart every 10 min). Unable to secure - will return with more equipment.			
0/14/2016 12:10	Diver out of the water. Returning to town to	o pick up more gear.		
0/14/2016 14:40	Dive boat with divers returned to tug to co	nduct dive and repair remaining leaks		
0/14/2016 14:48	Diver in water. Found aft water tight door of aft water tight door and commenced to rep	open. Observed leak coming from day tank and 1 stbd. Closed pairing remaining leaks.		
10/14/2016 15:36	Fuel tank #2 and 2 Center vents sealed wi sounding tube.	ith "splash zone". Also sealed leaks on day tank valve, stbd #1		
0/14/2016 16:25	Gear oil, lube oil, and hydraulic oil sealed			
10/14/2016 17:05	Commenced underwater survey of barge I hull. Hull compromised. Hull survey compl	DBL 55. Oberserved dents and 20 to 30 gashes on bottom of lete.		
	Appro	ved By		
Incident Commar	uer.	Date:		
IIIJOONI COMMAR		Date:		

ICS 201-2 - Summary of Current Actions – Initial Response for Oct. 14, 2016 | Page 02

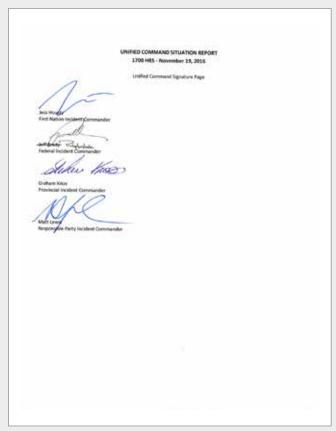


AIS picture of the Nathan E. Stewart wreck location and track (Ingmar Lee)

SCHEDULE 37



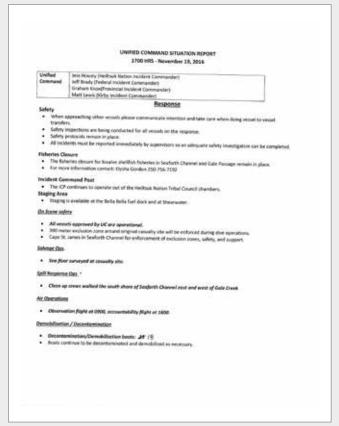
Area 7 - Pacific Region Sanitary Closures and Emergency Closure Areas



UNIFIED COMMAND SITUATION REPORT Incident Incident Start Date: Current STREP Outs/Time NEXT Seaforth Channel Incolune October 13, 2016 01 11 November 19, 2016, 1700 hours November 20 2016-0900 hours Seaforth Channel, approximately 11 cm sent of balls table.
The tigs Norther E. Sonwart and Eagle DIE, 55 net hard aground on the roots at 10/13/20 in DIE 128/01. The only are Socied in Canadian Waters at 52.24.600, 128.23.109 at the orbitance to Seaforth Channel, And of 14 November at 1000 PT, the tigs Norther 6 Sentence on the other of the orbitance orbit 6. Sersent.
The trig was located with 297,962 flows of disself leaf. 24,870 flows of disself leaf was transferred flows the frag lett to the same 3 port cargo task on the being before the pennis field if the to was transferred flows the frag lett to the same 3 port cargo task on the being before the pennis field if the to waster to register come. As if if I I leve 2016, after water respection 94,000 flows that the same service flows to have been penning and of the face, install controlled in the same service flows been revised and as 900,553 flows from the controlled flows to the same service flows to the revision shaded on violations of district and 2,000 flows flows from 1,466 filtered in flows of district and 2,000 flows flows from 1,466 filtered in flows of district and 2,000 flows flows from 1,466 filtered in flows of district and 2,000 flows flows from 1,466 filtered in flows flows from 1,466 filtered in flows flows from 1,466 filtered in flows flows flows from 1,466 filtered in flows flows flows from 1,466 filtered flows flows flows from 1,466 filtered flows Ensure the safety of public and response personnel
 Provide proper RM is all Personnel
 Provide proper RM is all Personnel
 Mainting any office of extraordisal procedure areas, providing of sample
codection
 Certain, Recover and Despise of Spiller Material
 Browler of Your Impacted areas;
 Recover and rehabilitate impacted wildlife
 Manage coordinated exports either
 Manage coordinated exports either
 Manage coordinated exports either
 Manage coordinated communication to the community
 Manage coordinate communication to the community
 Manage control to the communication to the community
 Manage control impacts from the said to the Hestback community and the
 minimizer control public control impacts to the Hestback community and the
 Management for four Business Interruption Maintain focial on mitigating and assessing environmental damage.
 After removal of the Nathan E Siewari, assess damage to the habitet and develop a restoration plan purposes to SARII Carolicate.

Unified Command Situation Report 1700 HRS | Page 01

Unified Command Situation Report 1700 HRS | Page 02



UNIFIED COMMAND SITUATION REPORT 1700 HRS - November 19, 2016 **Environmental Services** Environmental Unit (EU) Sampling completed as planned.

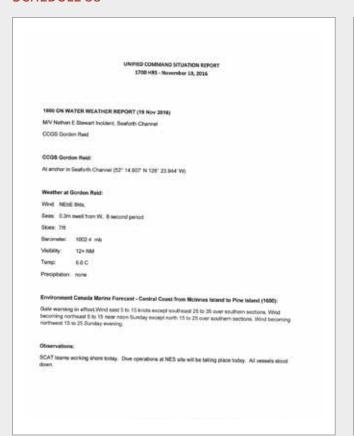
Sampling will continue to folker plan.

Owned sampling includes towar, sentence, water, and vegetation sampling.

Financement Canada continues to outpoort planning and also specific weather forecasting. 3CAT surveyed cost and west of Gale Creek entrance. Middly manitoring has now shifted to the Corcan Resourcy plan, and surveying will take place on days when sampling does not occur. Archaeology . Anthorology surveyed at Gale Druck Media/VIP Visits Cultural briefings continue to be available for all incoming personnel. Split information website has been activated - incoming personnels; ca

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UNIFIED COMMAND SITUATION REPORT 1700 HRS - November 19, 2016 Marine Weather Statement Technical Marine Synopsis tround 4.00 PM PST 15 Revenitor 2016 Tenight and Senday At 4.00 p.m. PST today line 965 risk located courtbeers of By 4:00 a.m. PST Sunday low 18th mb located west of Yangoyeer bland. At 4.00 p.m. PS7 today frontal system located over southern Englowe. By 4:00 are, POS harder frontal system located ever Vancouver Ideal Weds. Inseed 04:00 PM PST 19 Necessite 2016. Tassight and Seadoly Gale warning in effect. Wind east 5 to 15 knots except southeast 25 to 35 over numbers sections. Wind becoming nertheast 5 to 15 near more Seadoly except earth 15 to 25 over numbers sections. Wind becoming nertheast 5 to 25 Seadoly evening. Waves Issued 04:00 PM PST 19 November 2016 Today Tunight and Sanday Seas 1 to 2 autics. Extended Forecast bound 04-00 PM PST 19 November 2016.

Monday Wind variable 5 to 15 knots increasing to exalinent 15 to 25 in the afternoon and to nontheast 25 to 35. Twenday Wind southeast 25 to 35 knots decision to receive 15 to 25.

Wednesday Wind southeast 25 to 25 knots decision to receive 15 to 25.

Wednesday Wind southeast 15 to 25 knots backing to reacheast 30 late in the day.

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UNHTED COMMAND SITUATION REPORT 3700 HRS - November 19, 2018 1:111 1:111 11111 11111 1 * 1 5 1 1

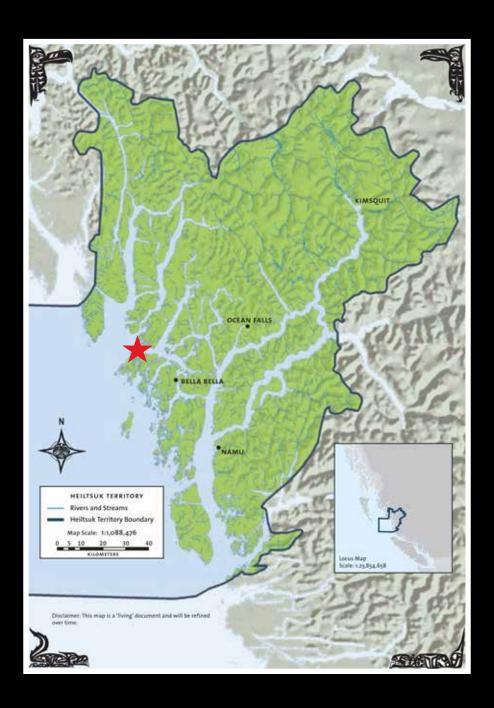
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SCHEDULE OF PHOTOGRAPHS

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 <i>Nathan E. Stewart</i> floating in sheen of diesel oil, at p. 2.
Photo 2:	April Bencze, October 22, 2016; The <i>Nathan E. Stewart</i> 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 <i>Nathan E. Stewart</i> 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 <i>Nathan E. Stewart</i> '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 <i>Nathan E. Stewart</i> bridge with boom in the foreground, at p. 24
Photo 7:	Jordan Wilson, October 13, 2016; Crew members moving from the sinking <i>Nathan E. Stewart</i> onto barge <i>DBL-55</i> , October 13, 2016, at p. 26.
Photo 8:	Kyle Artelle, November 14, 2016; A crane raising the sunken <i>Nathan E. Stewart</i> from Seaforth Channel, at p. 30.
Photo 9:	Tavish Campbell & April Bencze, October 23, 2016; Aerial view of the sunken <i>Nathan E. Stewart</i> , 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 <i>Nathan E. Stewart</i> , 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 <i>Nathan E. Stewart</i> , at p. 35 (middle photo).
Photo 14:	April Bencze, October 23, 2016; Sinking of the <i>Nathan E. Stewart</i> , 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, 2014; Other vessels at the scene of the Incident on October 14, 2016, at p. 47.
- Photo 20: Jordan Wilson, October 14, 2014; View of flying bridge of sunken Nathan E. Stewart with booms, and shore in background, at p. 54.
- Robert Johnson, October 13, 2016; Photograph of the diesel oil from the Nathan E. Stewart on the beach, Photo 21: 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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