Federal Court of Appeal | Cour d'appel fédérale

Date: 20160623

Dockets: 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

Citation: 2016 FCA 187

CORAM: **DAWSON J.A.**
STRATAS J.A.
RYER J.A.

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

Heard at Vancouver, British Columbia, on October 1-2 and October 5-8, 2015.

Judgment delivered at Ottawa, Ontario, on June 23, 2016.

REASONS FOR JUDGMENT BY: DAWSON AND STRATAS JJ.A.
DISSENTING REASONS BY: RYER J.A.

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REASONS FOR JUDGMENT

DAWSON and STRATAS JJ.A.

[1] 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 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.e.*, 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 facts of this case.

[10] Thus, for the following reasons, we would quash the Order in Council and the Certificates that were issued under them. We would remit the matter back to the Governor in Council for prompt redetermination.

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

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 combined 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 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 negotiations decades ago

and twenty years ago, Canada entered into a 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 kilometres from the main Gitga'at community at Hartley Bay, British Columbia.

- *Kitasoo Xai'Xais Band Council.* This party is the body that governs the Kitasoo Xai'Xais Nation, a band of Aboriginal peoples comprised of the Tsimshian Kitasoo people and Heiltsuk language speaking Xai'Xais people. Their asserted territory includes a number of coastal islands and surrounding waters and mainland territory next to inlets and fjords. Tankers will cross their territory.

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

- *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 “sGan gwaay” or “nansdins.” Northern Gateway identified nine ecosections and twelve oceanographic areas of significance for the Project and a number of these surround Haida Gwaii.

[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 environment.

- *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 research vessel.

- *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 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 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.

[26] 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 consultation 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 comment period closed in mid-April 2009, submissions and comments from Aboriginal groups continued to be accepted until August 2009. During this time, the Crown offered to meet with Aboriginal groups to discuss the draft Joint Review Panel agreement and how consultation with them would be carried out. In particular, the Gitga'at, the Gitxaala and the Haisla met with the Crown.

[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.

[32] The Canadian Environmental Assessment Agency acted as Canada's "Crown Consultation Coordinator" for the Project.

(3) The process gets underway

[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.

[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.

[36] 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.

[40] 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 interveners 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 Transshipment 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*, S.C. 2012, c. 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 those amendments, the Minister of the Environment and the Chair of the National Energy Board directed that the Joint Review Panel submit its environmental assessment as part of the recommendation report under section 52 of the *National Energy Board Act* no 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 had to provide a report under section 52 of the *National Energy Board Act*. Second, in that report it was 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 process

[48] Overall, the parties had ample opportunity to participate in the Joint Review Panel process and generally availed themselves of it:

- *Gitxaala Nation*. The Gitxaala participated in all parts of the Joint Review Panel process, including making information requests, submitting 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.

- *Kitasoo Xai'Xais Band Council.* The Kitasoo submitted brief written evidence, oral evidence at a community hearing and filed final written argument.

- *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 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 submissions.

- *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 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 ongoing and enduring opportunities for affected Aboriginal 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

- 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 Heiltsuk, 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 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] The Governor 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 [Joint Review] Panel's finding that the Project, if constructed and operated in full compliance with the conditions set out in Appendix 1 of Volume 2 of the [Joint Review Panel's] Report, is and will be required by the present and future public convenience and necessity." It

"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.

[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 as follows:

> The Governor in Council has decided, after considering the [Joint Review Panel's] report together with the conditions proposed in it, that the [Project] is not likely to cause significant adverse environmental effects referred to in subsection 5(1) of [the *Canadian Environmental Assessment Act*], but it is likely to cause significant environmental effects referred to in subsection 5(2) of [the *Canadian Environmental Assessment Act*] to certain populations of woodland caribou and grizzly bear as described in the [Joint Review Panel's] report.
>
> The Governor in Council has also decided that, pursuant to subsection 52(4) of [the *Canadian Environmental Assessment Act*], the significant adverse environmental effects that the [Project] is likely to cause to certain populations of woodland caribou and grizzly bear are justified in the circumstances.
>
> The Governor in Council has established the 209 conditions set out by the [Joint Review Panel] in its report as the conditions in relation to the environmental effects referred to in subsections 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:

- *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 or 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);

- *ForestEthics Advocacy Association et al. v. Attorney General of Canada et al.* (A-56-14);

- *Gitxaała Nation v. Minister of the Environment et al.* (A-64-14);

- *Haisla Nation v. Canada (Minister of Environment) et al.* (A-63-14) (later amended);

- *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.* (A-448-14);

- *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 prosecuting 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 review them in the same way, namely the way we proceed when considering applications for judicial review: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339.

[77] Broadly speaking, in judicial reviews, we deal with any preliminary issues, determine the standard of review, use that standard of review to assess the administrative decisions to see if the court should interfere, and then, if we consider interference to be warranted, decide what remedy,

if any, should be granted. See generally *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 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?

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

[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 B'Nai 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.); *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116, [2010] 2 F.C.R. 488.

[84] On the evidence before us, we are persuaded that the legal or practical interests of these parties are sufficient to maintain proceedings. Above, at paragraph 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 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 Shoes*, [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 environmental assessment is conducted and recommendations are prepared and presented to the 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	**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*) 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	*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*) 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	*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.

provisions of it are to come into force.

[103] Under subsection 52(2), the recommendation of the Board (here the Joint Review Panel) 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:	**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 qui suit :
(*a*) the availability of oil, gas or any other commodity to the pipeline;	*a*) l'approvisionnement du pipeline en pétrole, gaz ou autre produit;
(*b*) the existence of markets, actual or potential;	*b*) l'existence de marchés, réels ou potentiels;
(*c*) the economic feasibility of the pipeline;	*c*) la faisabilité économique du 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	*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*) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.	*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:

(4) The report must be submitted to the Minister within the time limit specified by the Chairperson. The specified time limit must be no longer than 15 months after the day on which the applicant has, in the Board's opinion, provided a complete application. The Board shall make the time limit public.	(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.
(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.	(5) 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 délai.
(6) 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.	(6) L'Office rend publiques, sans délai, la date où commence la période visée au paragraphe (5) et celle où elle se termine.
(7) 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 time.	(7) 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.
(8) 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	(8) Afin que le rapport soit établi et présenté en temps opportun, le ministre peut, par arrêté, donner au président instruction :

(*a*) specify under subsection (4) a time limit that is the same as the one specified by the Minister in the order;	*a*) de fixer, en vertu du paragraphe (4), un délai identique à celui indiqué dans l'arrêté;
(*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	*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*) issue a directive under subsection 6(2.1) that addresses a matter set out in the order.	*c*) de donner, en vertu du paragraphe 6(2.1), des instructions portant sur une question précisée dans l'arrêté.
(9) Orders made under subsection (7) are binding on the Board and those made under subsection (8) are binding on the Chairperson.	(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.
(10) A copy of each order made under subsection (8) must be published in the Canada Gazette within 15 days after it is made.	(10) 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* requirements

[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 use of lands and resources for traditional purposes, and any structures, sites or things that are of historical, archaeological, palaeontological, or architectural significance.

[110] What is submitted to the Governor in Council is not the whole environmental assessment but rather only a report of it. Under section 29 of the *Canadian Environmental Assessment Act, 2012*, the report must offer recommendations concerning the subject matter found in paragraph 31(1)(*a*) of the *Canadian Environmental Assessment Act, 2012—i.e.*, the existence of significant adverse environmental effects and whether or not those effects can be justified.

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

29. (1) If the carrying out of a designated project requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy 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	**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*) its recommendation with respect to the decision that may be made under paragraph 31(1)(*a*) in relation to the designated project, taking into account the implementation of any mitigation measures that it set out in the report; and	*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*) its recommendation with respect to the follow-up program that is to be implemented in respect of the designated project.	*b*) sa recommandation quant au programme de suivi devant être mis en oeuvre relativement au projet.
(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.	(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) Subject to sections 30 and 31, the report with respect to the environmental assessment is final and conclusive.	(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 Gateway.

[113] Overall, the Governor in Council has three options:

(1) It can "direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report": paragraph 54(1)(*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*.

(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 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*	**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*) 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	*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) is not likely to cause significant adverse environmental effects,	(i) n'est pas susceptible d'entraîner des effets environnementaux négatifs et importants,
(ii) is likely to cause significant adverse environmental effects that	(ii) est susceptible d'entraîner des effets environnementaux négatifs

can be justified in the circumstances, or

et importants qui sont justifiables dans les circonstances,

(iii) is likely to cause significant adverse environmental effects that cannot be justified in the circumstances; and

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

(*b*) direct the responsible authority to issue a decision statement to the proponent of the designated project that

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

(i) informs the proponent of the decision made under paragraph (a) with respect to the designated project and,

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

(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.

(ii) 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 mesures 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) The conditions that are included in the decision statement regarding the environmental effects referred to in subsection 5(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.	(2) Les conditions énoncées dans la déclaration qui sont relatives aux effets environnementaux visés au paragraphe 5(2) et qui sont directement liées ou 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.
(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.	(3) 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.
(4) The responsible authority must ensure that the decision statement is posted on the Internet site.	(4) Elle veille à ce que la déclaration soit affichée sur le site Internet.
(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.	(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,	**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*) direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report; or

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

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.

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

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

(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.

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

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

(4) Les décrets pris en vertu des paragraphes (1) ou (3) sont définitifs et sans appel et lient l'Office.

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

(5) L'Office est tenu de se conformer au décret pris en vertu du paragraphe (1) dans les sept jours suivant sa prise.

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

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

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

30. (1) After the responsible authority with respect to a designated project has submitted its report with respect to the environmental assessment under section 29, the Governor in Council may, by order made under section 53 of the *National Energy Board Act*, refer any of the responsible authority's recommendations set out in the report back to the responsible authority for reconsideration.	**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.
(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.	(2) 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.
(3) The responsible authority must, before the expiry of the time limit specified in the order, if one was specified, reconsider any recommendation specified in the order and prepare and submit to the Minister within the meaning of section 2 of the *National Energy Board Act* a report on its reconsideration.	(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 national de l'énergie*.
(4) In the reconsideration report, the responsible authority must	(4) Dans son rapport de réexamen, l'autorité responsable :
(*a*) if the order refers to the recommendation referred to in paragraph 29(1)(*a*)	*a*) si le décret vise la recommandation prévue à l'alinéa 29(1)*a*) :
(i) confirm the recommendation or set out	(i) d'une part, confirme celle-ci ou formule une

a different one with respect to the decision that may be made under paragraph 31(1)(*a*) in relation to the designated project, and

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

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

autre recommandation quant à la décision pouvant être prise au titre de l'alinéa 31(1)*a*) relativement au projet,

(ii) d'autre part, confirme, modifie ou remplace les mesures d'atténuation précisées dans le rapport d'évaluation 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) Subject to section 31, the responsible authority reconsideration report is final and conclusive.

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

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

(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.	**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) 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 which the Board shall complete its reconsideration.	(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.
(3) The order is binding on the Board.	(3) Le décret lie l'Office.
(4) A copy of the order must be published in the Canada Gazette within 15 days after it is made.	(4) Une copie du décret est publiée dans la Gazette du Canada dans les quinze jours de sa prise.
(5) The Board shall, before the expiry of the time limit specified in the order, if one was specified, reconsider its recommendation or any term or condition referred back to it, as the case may be, and prepare and submit to the Minister a report on its reconsideration.	(5) L'Office, dans le délai précisé — le cas échéant — dans le décret, réexamine la recommandation ou toute condition visée par le décret, établit un rapport de réexamen et le présente au ministre.
(6) In the reconsideration report, the Board shall	(6) Dans son rapport de réexamen, l'Office :
(*a*) if its recommendation was referred back, either confirm the recommendation or set out a different recommendation; and	*a*) si le décret vise la recommandation, confirme celle-ci ou en formule une autre;
(*b*) if a term or condition was referred back, confirm the term	*b*) si le décret vise une condition, confirme la

or condition, state that it no longer supports it or replace it with another one.	condition visée par le décret, déclare qu'il ne la propose plus ou la remplace par une autre.
(7) Regardless of what the Board sets out in the reconsideration report, the Board shall also set out in the report all the terms and conditions, that 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.	(7) Peu importe ce qu'il mentionne dans le rapport de réexamen, l'Office y mentionne 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.
(8) Subject to section 54, the Board's reconsideration report is final and conclusive.	(8) Sous réserve de l'article 54, le rapport de réexamen est définitif et sans appel.
(9) After the Board has submitted its report under subsection (5), the Governor in Council may, by order, refer the Board's recommendation, or any of the terms or conditions, set out in the report, back to the Board for reconsideration. If it does so, subsections (2) to (8) apply.	(9) 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 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 be considered only by the Governor in Council, not this Court. It follows that these applications for judicial review should be dismissed.

[126] Under this legislative scheme, the National Energy Board also does not really decide anything, except in a formal sense. After the Governor in Council decides that a proposed project should be approved, it directs the National Energy Board to issue a certificate, with or without a decision statement. The National Energy Board does not have an independent discretion to exercise or an independent 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 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 of review.

[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 Ekuanitshit* must be examined more closely.

[133] In *Innu of Ekuanitshit*, this Court considered a decision made by three federal departments and a later order made by the Governor in Council approving the decision. The order and the decision came after an environmental assessment process had been followed concerning a hydroelectric project.

[134] The Governor in Council's order in council approved the federal government's response to a report of a joint review panel established under the 1992 version of the *Canadian Environmental Assessment Act*. The order in council was made under section 37 of that legislation.

[135] In considering the Governor in Council's order in council, this Court asked itself whether the Governor in Council and the departments "had respected the requirements of the [1992 version of the Canadian Environmental Assessment Act] before making their decisions" (at paragraph 39). It held (at paragraphs 40-41) that it could interfere with the Governor in Council's order only if it found that the legislative process was not properly followed before it made its decision, it made its decision without regard for the purposes of the Act or its decision had no basis in fact.

[136] Of course, we are bound by this Court's decision in *Ekuanitshit*. However, in our view, it does not set out a standard of review that must be applied to the Governor in Council'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.

[139] In the case at bar, however, the Governor in Council's decision—the Order in Council—is the product of its consideration of recommendations made to it in the report. The decision is not simply a consideration of an environmental assessment. And the recommendations made to the Governor in Council cover much more than matters disclosed by the environmental assessment—instead, a number of matters of a polycentric and diffuse kind.

[140] In conducting its assessment, the Governor in Council has to balance a broad variety of matters, most of which are more properly within the realm of the executive, such as economic, social, cultural, environmental and political matters. It will be recalled that under subsection 52(2), matters such as these must be included in the report that is reviewed by the Governor in Council.

[141] The amorphous nature and the breadth of the discretion that the Governor in Council must exercise is 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 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. I-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 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 paragraph 21; *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 30-31.

[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 considerations of policy and public interest under sections 53 and 54 of the *National Energy Board Act*.

[153] We acknowledge that on some occasions, the Governor in Council makes decisions that have 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 Railway 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 satisfy—many concerning technical matters that can be evaluated and weighed only with expertise—alleviate those concerns? And in light of all of these considerations, was there enough high-quality information for the Governor in Council to balance all the considerations and properly assess the matter? These are the sorts of questions this legislative scheme remits to the Governor in Council. Under the authorities set out above that are binding upon us, we must give the Governor in Council the widest margin of appreciation over these questions.

(6) The Governor in Council's decision was reasonable under administrative law principles

[156] In our view, 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, 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 ousts 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: *Eldridge v. British Columbia (Attorney 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 inequitable results should be avoided: *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, 125 D.L.R. (4th) 385, at paragraph 65.

[163] Section 54 of the *National Energy Board Act* and the associated sections constituting the legislative scheme we have described above can be interpreted in such a way as to respect Canada's duty to consult and to remain valid. We interpret these sections in that way.

[164] Under section 52 of the *National Energy Board Act*, the National Energy Board, or here the Joint Review Panel, submits its report to a coordinating Minister who brings the report before the Governor in Council, along with any other 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.	**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 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.

[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: *Haida 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 S.C.R. 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].

[177] In *Taku River*, the Supreme Court also recognized that project approval is "simply one stage in the process by which the development moves forward": at paragraph 45. Thus, outstanding First Nation concerns could be more effectively considered at later stages of the

development process. It was expected that throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown would continue to 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)*, 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 consult.

[189] Canada describes the consultation process to include:

- Direct engagement by Canada with affected Aboriginal groups, both before and after the Joint Review Panel process. This consultation included consideration of the mandate of the Joint Review Panel.

- Participation by Canada in the Joint Review Panel process in order to effectively and meaningfully:

    i. gather, distribute and assess information concerning the Project's potential adverse impacts on Aboriginal rights and interests;

    ii. address adverse impacts to Aboriginal rights and interests by assessing potential environmental effects and identifying mitigation and avoidance measures; and

iii. ensure, to the extent possible, that specific Aboriginal concerns were heard and, where appropriate, accommodated.

- The provision of almost $4,000,000 in participant funding by Canada to 46 Aboriginal 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:

1. Phase I provided for Canada's direct engagement with Aboriginal groups before the Joint Review Panel process, including consultation on the draft Joint Review Panel Agreement and the mandate of the Joint Review Panel.

2. Phase II required Canada to provide information to Aboriginal groups about the pending Joint Review Panel process.

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

4. Phase IV provided for additional, direct consultations between Canada and Aboriginal groups after the Joint Review Panel process, but before the Governor in Council considered the Project.

5. Phase V would provide additional consultation on permits or authorizations that Canada might be requested to issue after the Governor in Council's decision on the Project.

(4) The alleged flaws in the consultation process

[191] Briefly, the most salient concerns about the nature of the consultation asserted by the applicant/appellant First Nations are:

(a) The Governor in Council prejudged the approval of the Project.

(b) Canada's consultation framework was unilaterally imposed on the First Nations; there was no consultation on it.

(c) Canada provided inadequate funding to facilitate the participation of First Nations in the Joint Review Panel process and other consultation processes.

(d) The consultation process was over-delegated: the Joint Review Panel was not a legitimate forum for consultation and it did not allow for discussions between Canada and affected First Nations.

(e) Canada either failed to conduct or failed to share its assessment of the strength of the First Nations' claims to Aboriginal rights or title.

(f) The Crown consultation did not reflect the terms, spirit and intent of certain agreements between Canada and the Haida.

(g) The Report of the Joint Review Panel left too many issues affecting First Nations to be decided after the Project was approved.

(h) The consultation process was too generic. Canada and the Joint Review Panel looked at First Nations as a whole and failed to address adequately the specific concerns of particular First Nations.

(i) After the Report of the Joint Review Panel was finalized, Canada failed to consult adequately with First Nations about their concerns; it also failed to give reasons showing that Canada considered and factored them into the Governor in Council's decision to approve the Project.

(j) Canada did not assess or discuss First Nations' title or governance rights, nor was the impact on those rights factored into the Governor in Council's decision to approve the Project.

We shall examine each of these in turn.

(a) The Governor in Council prejudged the approval of the Project

[192] The 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 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. 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 I) were flawed or unreasonable. 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 A.R. 259, at paragraph 39. What is required is a reasonable process, not perfect consultation: *Haida Nation*, at paragraph 62.

[204] Phase I consultation included the following steps:

- Following receipt of a preliminary information package submitted by Northern Gateway, the National Energy Board, in consultation with other responsible federal authorities, requested that the then Minister of the Environment refer the Project to a review panel. On September 29, 2006, the Minister referred the Project to a review panel and released the draft Joint Review Panel agreement for a 60-day comment period. A number of comments were received from Aboriginal groups. Thereafter, Northern Gateway put the Project on hold.

- Following 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 and subsequent consultation on the Report of 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 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, Canada modified the Joint Review Panel selection

process to ensure that the 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 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.

(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 significant travel expenses because the Joint Review Panel hearings were held in Prince Rupert and Terrace, British Columbia. They point to the fact that even though approximately 35 Aboriginal communities registered as interveners, only 12 First Nations cross-examined witness panels and only two First Nations substantially 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 unreasonable for Canada to integrate the Joint Review Panel process into the Crown consultation process for the following reasons.

[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

assessment, can 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.

[217] 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 rights or title

[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 Gitga'at and the Haisla.

[220] The Haisla make the additional point that by letter dated April 18, 2012, the then Minister of the Environment advised their counsel that:

> 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 consultation analysis and assessment.

[222] However, as set out in the portion of the letter extracted above, the Minister made no commitment to provide the actual legal analysis to the Haisla. He committed to providing only a description of the analysis, which we construe to be an informational component. In Phase IV, the Haisla were advised only in a general sense of the informational component. They were told that the preliminary strength of claim assessment "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;
- the Memoranda of Understanding with Canada for cooperative management and planning of the sGaan Kinghlas (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 Panel looked at First Nations as a whole and failed to address adequately the specific concerns of particular First Nations

(i) After the Report of the Joint Review Panel was finalized, Canada failed to consult adequately with First Nations about their concerns and failed to give adequate reasons

(j) Canada did not assess or discuss title or governance rights and the impact on those rights

[230] To this point we have rejected the arguments advanced by the applicant/appellant First Nations that Canada's execution of the consultation process was 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 maintain the honour of the Crown.

[231] We begin our analysis on this point by briefly setting forth some of the relevant legal principles that speak to what constitutes a meaningful process of consultation.

[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 demonstrably 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 Panel 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 consult 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 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, v. 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 opportunity—and its last opportunity before the Governor in Council's decision—to engage in direct consultation and dialogue with affected First Nations on matters of substance, not procedure, concerning the Project: 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:

> …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.

[244] We turn now to consider Canada's execution of the process of consultation under Phase IV—a process we 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 concerns?

    - 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:

> 107. During the March Meeting, the Haisla Nation asked the Crown representatives to extend the timeline for consultation. Mr. Clarke advised that the timelines were driven by legislation which they themselves were not authorized to extend. We pointed out that the relevant legislation provided the Crown with an ability to extend the timelines. Mr. Clarke conceded that this was correct. The Haisla Nation therefore asked the Crown representatives to ask the Minister to extend the timelines for the Decision to allow meaningful consultation. Mr. Clarke agreed to do so.
>
> 108. During the April Meeting, Mr. Clarke told us that he had communicated the Haisla Nation's request to extend the deadlines to the Minister of Natural Resources, 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 consistent with this evidence.

[249] 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."

[250] 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:

> 15. 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]
>
> 16. 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 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 deadline.

[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.

[254] 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:

> 323. 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?
>
> 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 discussed?
>
> A. I would say, no, it wasn't.
>
> 328. Q. What about trapping?
>
> A. I would say, no, it wasn't.

329. Q. How about marine spills? Was there a discussion about how marine spills may have negative effects on the 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.

332. Q. Was there a discussion of how the negative effects on the environment might impact the marine resources Haisla relies on in a way that might infringe its Aboriginal rights?

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 necessary, correct the information.

[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.

- 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 participation.

- a failure to identify the central issue raised by the Heiltsuk regarding the lack of baseline work and the lack of spill modelling in the Open Water Area.

[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 territory.

[262] As with the Kitasoo and the Heiltsuk, the Nadleh and the Nak'azdli also responded to Canada asserting that the Governor in Council did not have sufficient information to make a decision. The record does not demonstrate that the Governor in Council had this information before making its decision. While Canada did respond acknowledging the errors in the Phase IV discussions, it did not indicate any steps taken to correct the errors or state what effect, if any, this had on the Governor in Council's decision: July 14 letter, Major Book of Documents, page 469.

[263] Also of significant concern is the lack of meaningful dialogue that took place in Phase IV.

[264] During the consultation meetings, Aboriginal groups were repeatedly told that Canada's representatives were:

- working on the assumption that the Governor in Council needed to make the decision by June 17, 2014;

- tasked with information gathering, so that their goal was to get the best information to the decision-makers;

- not authorized to make decisions;

- required to complete the Crown Consultation Report by April 16, 2014.

[265] When the role of Canada's representatives is seen in 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 consultation was:

> 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 can in taking your recommendations forward so that they are properly understood within our respective departments.
>
> Brett Maracle: And considered.
>
> Joseph Whiteside: and considered.
>
> Chief Clark Robinson: Will [you]make a recommendation on consultation?
>
> Joseph Whiteside: Well one of the things we can look at is, based on what your community and others have said – 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 [Cabinet] feels there is ongoing consultation work that needs to be engaged [in regardless] 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-spawn-on-kelp—a resource over which the Heiltsuk have an Aboriginal right to fish on a commercial basis: see the Heiltsuk's closing submissions to the Joint Review Panel, extract book, Tab 19.

[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 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 Heiltsuk 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 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, 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 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 of consultation assessment.

[293] But Canada never provided the Haisla with that description. The evidence of Chief Ross of the Haisla shows that during Phase IV Canada resiled from that commitment and avoided defining exactly what was in play during the consultations:

> 99. There was no genuine discussion of the Haisla Nation's strength of claim at the March and April Meetings. At the March Meeting, the Haisla Nation raised the importance of openly discussing Aboriginal rights and title – a topic [the Joint Review Panel] had avoided entirely – and asked the Crown representatives to share the Crown's views of the strength of 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.

100. 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 waters.

101. Shortly after the March Meeting, the Crown sent a letter to the Haisla Nation with a generic and deliberately vague statement about our Nation's strength of claim that was divorced from the Project area. The letter states as follows at page 2:

> As discussed during our meetings on March 4 and 5, Canada's preliminary strength of claim assessment is based on the information the Haisla Nation 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 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.
>
> 103. At the April Meeting, the issue of strength of claim was again raised, as was the deliberately vague strength of claim language in the March 24 letter. We expressed concern that such language was entirely unhelpful for the consultation process. Mr. Maracle and Mr. Jim Clarke, of the Major 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 seek 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 share."

[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 be shared.

[299] 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 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 assessment, which we cannot share."

[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 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.

[309] While we agree with Canada that the consultation process was not a proper forum for the negotiation of title and governance matters, similar to other asserted rights, affected First Nations were entitled to a meaningful dialogue about the strength of their claim. They were entitled to know Canada's information and views concerning the 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 April18, 2012 (discussed at paragraphs 220 and 292, above), was legally unacceptable. Canada's failure frustrated the sort of genuine dialogue the duty to consult is meant to foster.

[310] We now consider the adequacy of Canada's reasons.

[311] In the present case, Canada was obliged at law to give reasons for its decision directing the National Energy Board to issue the Certificates. The source of this obligation was two-fold. As we develop in more detail below, in the present circumstances where a requirement of deep consultation existed, the Crown was obliged to give reasons. Additionally, subsection 54(2) of the *National Energy Board Act* requires that where the 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 Council's decision.

- "Added to the other aspects of the record and the lengthy consultation process in this case that unfolded over several years, the June and July letters 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 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, it fell 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 Heiltsuk'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-assessed 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 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 unacceptable gap.

[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) Conclusion

[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.

[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 them.

[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 necessary 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 Governor in Council decided to acknowledge only the existence of consultations by others during the process. It did not say more despite the requirement to provide reasons under section 54 of the *National Energy Board Act* and under the duty to consult. The Governor in Council had to provide reasons to show that it fulfilled its legal obligation. It did not do so.

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

G. Remedy

[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.

[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 *National 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.

[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.

[343] 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:

(a) The matter is remitted to the Governor in Council for redetermination;

(b) 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*;

(c) If the Governor in Council does not pursue the option in paragraph (b) or if it pursues that option but does not 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;

(d) 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

(e) The Governor in Council shall then redetermine this matter in accordance 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 no more than five pages.

[346] We thank the parties for the great assistance they have provided to the Court throughout.

"Eleanor R. Dawson"
J.A.

"David Stratas"
J.A.

RYER J.A. (Dissenting Reasons)

[347] 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 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;

(c) 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.

[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 Nations' 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 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.

"C. Michael Ryer"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	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

APPLICATIONS FOR JUDICIAL REVIEW OF A REPORT DATED DECEMBER 19, 2013 OF A JOINT REVIEW PANEL; APPLICATIONS FOR JUDICIAL REVIEW OF ORDER IN COUNCIL P.C. 2014-809 DATED JUNE 17, 2014; APPEALS OF CERTIFICATE OC-060 AND CERTIFICATE OC-061 BOTH DATED JUNE 18, 2014 OF THE NATIONAL ENERGY BOARD

STYLE OF CAUSE:	GITXAALA NATION *ET AL.* v. HER MAJESTY THE QUEEN *ET AL*.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 1-2 AND 5-8, 2015
REASONS FOR JUDGMENT BY:	DAWSON AND STRATAS J.A.
DISSENTING REASONS BY:	RYER J.A.
DATED:	JUNE 23, 2016

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