

FINAL REPLY ARGUMENT

In response to the Final Response Written Argument of Northern Gateway Pipelines Inc.

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Kil Tlaatsгаа, *Peter Lantin*
President of the Haida Nation

&

Legal Counsel for the Haida Nation
Gid7ahl-gudsllaay lalaxaaygans, *Terri-Lynn Williams-Davidson*

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[June 18, 2013]



Haida Nation

Concluding 18 months of public hearings, Final Reply Arguments were made by the *Council of the Haida Nation* to the Enbridge Joint Review Panel in Terrace, June 18, 2013.

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Submissions were made on behalf of the *Council of the Haida Nation* by:

Kil Tlaats'gaa, *Peter Lantin* President of the Haida Nation
&
Legal Counsel for Council of the Haida Nation
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The Joint Review Panel will make their recommendation on the project to the government of Canada at the end of the year – 2013.

**KIL TLAATS'GAA, PETER LANTIN
PRESIDENT OF THE HAIDA NATION**

My name is Kil Tlaats'gaa, *Peter Lantin* and I am the President of the Haida Nation. As President, I am the official spokesperson for the Haida Nation. I want to begin our concluding remarks opposing the Enbridge Northern Gateway project by bringing us back to the people of Haida Gwaii, to humanize this process – in direct response to the overall approach Northern Gateway has taken in their written argument.

My submission will address four areas:

- Failure of Northern Gateway to understand the responsibilities of the Haida Nation;
- Our assessment of risk;
- Cost Benefit-Analysis; and
- Lack of Support for the Project.

**THE PEOPLES' SUBMISSIONS:
RESPONSIBILITIES OF THE HAIDA NATION**

Northern Gateway purports to have heard and responded to some of the concerns expressed by Aboriginal Nations. Yet, Northern Gateway does not appear to understand the responsibilities that flow from being “inextricably linked with the natural environment”.

Let me briefly explain what I mean. The Haida Nation has an ancient culture, borne from one of the richest land and marine areas on the planet. Because of this origin and because of our long-standing relationship with Haida Gwaii, we inherit responsibilities to take care of the land, the surrounding waters and the people who call it home. The Panel heard eloquent submissions from Haida elders Margaret Edgars and Diane Brown and others about the inseparable connections between our culture and Haida Gwaii, and stewardship responsibilities. This is a lesson that my Nonnie (grandmother), Ethel Jones demonstrated when she inspired people from all over the world during the stand at Lyell

Island, to take care of, and protect Haida Gwaii, for future generations of all peoples.

This connection is recognized by our neighbours in Haida Gwaii, as represented by Mayor Merilees of New Massett and Mayor Kulesha of Queen Charlotte Village:

“There is a very clear linkage between our natural environment, our ecosystem and the Haida Nation, the Haida, particularly the oceans.”

“The Village of Queen Charlotte respects the hereditary responsibilities and the relationships of the Haida people to Haida Gwaii and we recognize the co-existence of Crown and Aboriginal title.”

Yet, Northern Gateway's response to Haida oral submissions does not incorporate this same appreciation of Haida hereditary responsibility into the assessment of whether the project proceeds or not, but instead responds and proposes to address these concerns with oil spill response plans and offering economic benefits.

The elders have been clear that our responsibilities are greater because we have not ceded or surrendered our Aboriginal Title and Rights, and because our Title and Rights are at continued risk of infringement. We have taken every step and have not shied away from conflict to fulfill this responsibility. We have also been to Canada's highest court to confirm that we have a strong case of Aboriginal Title.

We have also shown that we are more than willing to work hand-in-hand with the Crown to begin reconciling our interests, and to tackle the larger, strategic level decisions to avoid conflict at the operational level. As reconciliation proceeds, our strong case cannot be ignored.

Northern Gateway has advised the Panel to view “with some degree of caution” “assertions of an Aboriginal right to make land or marine use decisions”. Further, Northern Gateway has argued that lands – and by implication marine waters – subject to Aboriginal title can be used for development and that Aboriginal nations do not have “an unfettered right to decide land use”.

In response, we say that we have approached the right to choose how Aboriginal Title lands and waters are used through reconciliation; by building alliances and negotiating shared decision-making with the Crown. It is in the mutual interests of the Crown and the Haida Nation to pursue reconciliation rather than conflict.

We laid the groundwork for reconciliation by fostering relationships with the local communities of Haida Gwaii through the formation of the Gwaii Trust, and later formalizing our cooperative relationships through protocol agreements with the local municipalities, as described by Mayor Kulesha of the Village of Queen Charlotte.

“... The protocol agreement sets out the basis for all of us to work together in a spirit of respectful co-operation, to design a future that supports a healthy environment and a sustainable islands’ economy.”

We further say that Northern Gateway fails to realize the importance of and implementation of strategic level consultation and accommodation through co-management agreements before proof of Aboriginal Title.

We have successfully [challenged] the inadequacy of consultation at the operational level. We established that consultation requires involvement in decision-making at the strategic level to ensure that development does not unjustifiably infringe Aboriginal Title nor jeopardize the inherent limit of Aboriginal title. Northern Gateway’s model of consultation and engagement is consultation at the operational level – to little, too late to protect Aboriginal title and interests from adverse impacts.

To conclude this point, we have made great progress in implementing reconciliation. We have

established co-management arrangements with both the Province of British Columbia and Canada. We have jointly negotiated processes for management and stewardship of the lands and marine areas, and developed strategies to move towards and develop a more sustainable island economy. The proposed project throws a wrench into these initiatives and jeopardizes not only the people of Haida Gwaii, but reconciliation in this country as a whole.

THE PEOPLES’ ASSESSMENT OF RISK

As Ms. Williams-Davidson spoke to earlier, Northern Gateway made a decision at the outset that it could essentially ignore Haida concerns because Haida Gwaii is in the Open Water Area. Yesterday, in his oral argument, Mr. Neufeld called the Haida a “remote community”, again, indicating a dismissive approach to the concerns our people have raised about the proposed project.

Northern Gateway’s interaction with our people was superficial and nominal with an inability to hear and appreciate that our values, land, waters, culture and future sustainability are at stake. If a spill occurs in the open waters surrounding Haida Gwaii, any oil response plan – even an innovative one – will be ineffective at cleaning up or preventing oil from reaching the coastline. The impacts could be permanent, and long-lasting beyond our lifetimes.

Contrary to what Northern Gateway would have this Panel believe, our people are neither naive nor ill-informed. We have fully assessed Northern Gateway’s application, working with our elders, our traditional knowledge holders, our political and hereditary leaders, our technical staff and our legal advisors to assess the environmental, cultural, social and economic impact of the proposed project.

After expending significant time and resources to review and test the application, compile and submit our evidence, and make oral history submissions and legal argument, we have concluded that the Application is grossly inadequate and incomplete. Northern Gateway has manifestly failed on all counts.

Our conclusion is contrary to Northern Gateway’s Cost Benefit Analysis, which I will turn to next.

COST BENEFIT ANALYSIS

Northern Gateway submits that the purpose of the Cost-Benefit Analysis for the proposed project is to give an idea of the overall costs and benefits of the project instead of reflecting the cost and benefit attributable to any particular group, including the Haida Nation.

Northern Gateway’s approach is wrong. Northern Gateway is required to assess the potential impact of the project on the Haida Nation, which requires, at a minimum, a Cost-Benefit Analysis with respect to the Haida Nation.

If such an analysis were done, it would show that the Haida Nation would be burdened with catastrophic costs, including long-lasting and potentially irreversible impacts on Haida sustenance, cultural, political and spiritual rights, in the event of both an oil spill and the introduction of aquatic invasive species from ship hulls or ballast water.

Northern Gateway acknowledges that impacts on cultural and spiritual values associated with harvesting cannot be “monetized” but nevertheless argues that there is an onus on the Haida Nation to provide the values at risk. We say that the burden is actually on Northern Gateway, and second, we say we have provided this evidence.

Our conclusion is correct, as evidence from the lack of support for the proposed project.

NO SUPPORT FOR THIS PROJECT

Northern Gateway boasts that 60 percent of Aboriginal communities support the project as they have signed up for equity participation in the project. Let’s examine this assertion.

Northern Gateway admits that, of the 18 equity packages offered in Alberta, 15 were allegedly signed in Alberta and, of the 22 packages offered in the interior of British Columbia, 11 were allegedly signed.

Northern Gateway also admits that five Aboriginal groups on the coast of British Columbia received an initial equity offer but no offer has been finalized.

This means 0 percent support from coastal Aboriginal Nations.

This also means that of the 27 packages offered in British Columbia, only 11 were allegedly signed. If you

do the math, 60% of the Aboriginal groups in British Columbia do not support the project. This does not include those who do not appear on the list, who have not yet been offered an equity package, and who do not support the project.

The Haida Nation is not in favour of the project because the potential costs outweigh the potential benefits touted by Northern Gateway. We are not alone in this conviction. This view is held by the majority of people living in Haida Gwaii, as expressed by Mayor Merilees of (New) Massett and Mayor Kulesha of the Village of Queen Charlotte, respectively:

“There are really no mitigation efforts that would be acceptable to slow or to stop any sort of damage from the introduction of oil to our environment. I really fear that this project cannot just affect our local communities, our local food. It affects our local economy and it affects our nation. We should be showing the world what we really value in our country.”

“The issues with the pipeline and tanker traffic brought to you by the representatives of the CHN and the hearings in Old Massett and here in Skidegate again yesterday, are issues that we share. We are very much united in front of you in our opposition to the proposal to build a pipeline that requires bringing large tankers into the waters of Hecate Strait, Dixon Entrance, and Queen Charlotte Sound.”

The risks to Northern Gateway, the oil companies and shippers are low: they are manageable and acceptable business risks. However, for all the people who rely upon the oceans, the proposed project would put at risk our life source, our communities, our families and our future. This view is shared by the majority of the people living in Haida Gwaii, as represented in these comments by Mayor Merilees who owns and operates a tourism business on Haida Gwaii:

“Allowing tanker traffic on our coast will result in an oil spill at some point. It may not be in my life-

time, but it will occur, and that's really a risk that we, as an island community, cannot afford to take. I fear the damage that would be done to the culture of the Haida and, in turn, the culture of the west coast of Canada, my business, my livelihood.”

The assessment process for the Open Water Area should not be reduced to fine-tuning with a risk analysis, rather it requires a complete environmental assessment. We cannot permit this process to masquerade as consultation: it is engagement about oil spill clean-up. For instance, Mr. Carruthers envisioned aligning with First Nations through training and job opportunities. With respect, you do not build Aboriginal self-respect by training and job opportunities in oil spill clean up in the very waters that will sustain our culture millennia into the future, long after oil is depleted from this planet.

This process must focus on the consequences: the consequences to the sea, the Haida people, the people of Haida Gwaii, and our collective future. We, the Haida Nation on behalf of Haida Gwaii, strongly recommend that the Panel advise the federal government not to approve this project.

I stand before you to remind that the Haida Nation's responsibility to focus the Joint Review Panel and the Crown on the consequences is the proper, and only, path forward – much like it was when my Nonnie Ethel Jones and other elders stood on the line at Lyell Island. •

**LEGAL COUNSEL FOR COUNCIL OF THE HAIDA NATION,
GID7AHL-GUDSLLAAY LALAXAAYGANS, TERRI-LYNN WILLIAMS-DAVIDSON**

Good morning, Madam Chair and Members of the Panel. I am Gid7ahl-gudsllaay lalaxaaygans, *Terri-Lynn Williams-Davidson*, from White Raven Law Corporation representing the Council of the Haida Nation.

I'd like to take a moment to introduce the Haida leadership in attendance today. Seated next to me is Kil Tlaatsgaa, Peter Lantin, the President of the Haida Nation. There are two Hereditary Chiefs in attendance. First, next to Kil Tlaatsgaa, is sGaan 7yuu7yaans, Allan Wilson, and then Gaahlaay, Lonnie Young, and Guu-jaaw, a member of the Council of Haida Nation as well.

I will begin the submissions for the Haida Nation and Kil Tlaatsgaa, Peter Lantin, will provide our concluding reply submissions.

To ensure we proceed efficiently, we have provided copies of our speaking notes which contain the references that we'll refer to.

The Council of the Haida Nation submits that Northern Gateway's Application is fundamentally flawed. Northern Gateway has concluded that the risk of an oil spill from a tanker accident or malfunction in the territorial waters of Haida Gwaii is minimal. As a result, Northern Gateway did not do a proper environmental assessment for Haida Gwaii.

Our oral argument will reply -- respond to Northern Gateway's attempts to justify this flawed approach in its written argument. I will also respond to Northern Gateway's arguments related to Aboriginal engagement and consultation.

Now, beginning with the risk assessment related to tanker accident and malfunctions, Northern Gateway incorrectly asserts that it is “simply not the case” that an accident involving a tanker transiting to or from the proposed Kitimat terminal is likely, if not inevitable.

Its assurances are not convincing, nor should they be relied upon by the Joint Review Panel.

Northern Gateway has mistakenly dismissed and underestimated the possibility of an oil spill from a tanker accident or a malfunction in the Open Water Area.

Northern Gateway's analysis fails to consider worst-case scenarios. The inclusion of worst-case scenarios is common in environmental assessment methods but it was not used for the TERMPOL report or for the quantitative risk analysis.

Northern Gateway claims that the return period is about 12,000 years for a major oil spill in the Open Water Area, and that's ludicrous. Northern Gateway has mistakenly extrapolated from a very short record of 16 years from 1990 to 2006 to make a prediction of 12,000 years.

Predictions can vary widely based on assumptions. Uncontested evidence submitted by the Coastal First Nations based on the United States Government Oil Spill Risk Analysis Model shows that the likelihood of a tanker oil spill for the Project is very high, ranging from 81.75 percent and 99.9 percent. Northern Gateway's prediction is simply unbelievable.

Northern Gateway has also failed to provide an adequate sensitivity analysis, as it did not account for increases in vessel traffic to the proposed Kitimat Terminal or combined factors assessed for sensitivity.

As part of its sensitivity analysis, Northern Gateway considered the return period of an oil spill for the areas between the 12 nautical miles -- 12 nautical mile territorial boundary of segments 5, which is Dixon Entrance, and 8 (Queen Charlotte Sound) and the 200 nautical mile limit of the economic exclusive zone.

Northern Gateway discounted the risk factor associated with the tanker traffic along these areas even though, by its own estimate, the spill return periods were significantly lower for these areas than that for segments 5 and 8.

According to the Government of Canada, the 75 nautical mile tanker exclusive zone off the west coast of Haida Gwaii would not apply to the Project's tankers

This is particularly troubling since spills along these open water areas could find their way to the shoreline of Haida Gwaii.

Northern Gateway's lack of a vigorous analysis for the Open Water Area and the waters to the west of Haida Gwaii, calls into question the reliability and relevance of the QRA with respect to the tanker routes in Haida territorial waters. Northern Gateway failed to independently analyze the specific risk to Haida Gwaii associated with the Project's tanker traffic in Haida territorial waters.

The Council of the Haida Nation submits that it is more likely than not that there will be a tanker accident in the tanker route surrounding Haida Gwaii for a number of reasons, as set out in our written argument. We add that the QRA dismissed spills such as the Exxon Valdez oil spill as outliers in the calculation of frequency of oil spills. The underlying cause of the accident was a master who was drunk and left the bridge of his ship.

Future mistakes such as this are not beyond the realm of possibility; one only has to look at the number of car accidents that occur due to driving under the influence of alcohol.

Northern Gateway refers to what it calls "facts" related to the dangerous nature of the proposed tanker routes, which supposedly render groundless any concerns relating to the safety of the routes. Even if these facts were true, they relate to the CCAA and do not address concerns relating to the safety of tanker routes in Haida territorial waters, including collisions, grounding or accidents due to equipment malfunction, human error or other factors. Safety issues relating to the Open Water Area has not been adequately considered.

Northern Gateway incredulously argues that it has reduced the spill -- the risk of an oil spill from a tanker accident to as close to zero as practicable through its commitments relating to prevention and mitigation.

Mitigation measures do not ensure that a spill will not occur due to human error, equipment failure or weather and sea conditions. As well, many of the

measures proposed such as double-hulled tankers and escort tugs are already industry practice in many parts of the world.

They should not be considered to be mitigative measures whether or not they are required by Transport Canada. Mitigation is the reduction of adverse impacts, not the elimination or complete avoidance of adverse impacts.

Both the deployment and effectiveness of oil spill response measures is dependent upon the prevailing weather and sea conditions at the time of the spill and a 24-hour timeframe therefore which is "critical for spill response".

Clean-up is next to impossible if equipment cannot be deployed. Weather conditions in the Open Water Area, especially in the winter and especially around Haida Gwaii would make it impossible to employ equipment. Northern Gateway's expert Dr. Owens admitted that for most open water spills, no oil from a spill is recovered. His evidence is supported by Haisla's expert Ms. DeCola.

Northern Gateway also boasts about taking an innovative approach to marine assessment. We say that the extent of innovation is to involve First Nations in the clean-up of an oil spill.

Although Northern Gateway has had little if any discussions with First Nations about involvement with oil spill clean-up.

Northern Gateway has not substantially addressed Haida Gwaii's vulnerability to significant adverse impacts should there be an oil spill in the tanker routes in Haida territorial waters. Northern Gateway's risk assessment gives little comfort to the Haida Nation. Most fatal to its application is the fact that Northern Gateway has not met its obligations to demonstrate to the Joint Review Panel that there will be no significant adverse impacts resulting from the operations with respect to Haida Gwaii and the Haida Nation.

Instead, Northern Gateway proposes to conduct a survey of select locations on the east coast of Haida Gwaii after project approval to establish baseline data in the event of an oil spill, and to assess the effectiveness of proposed mitigation and environmental protection measures.

In response to this plan, we say that a proper environmental assessment, including baseline surveys, should have been done in the Open Water Area as part of the Joint Review Panel process. Baseline surveys have been developing in Kitimat for six years but none in the Open Water Area. This is a wasted opportunity; if an oil spill occurs in the first five years of operation there will be zero baseline data against which to assess damages.

Further, we say conducting baseline surveys after project approval cannot adequately compensate for the lack of a proper environmental assessment. The environmental assessment should have considered both the potential effects of an oil spill on the coastal and marine ecosystems of Haida Gwaii and the potential effect of aquatic invasive species resulting from tanker traffic.

Northern Gateway's approach does not permit the Council of the Haida Nation or the Crown to properly assess the impacts upon Haida Aboriginal rights and title as required by law. It is not acceptable to defer this important inquiry to the post-approval phase of the Project that deals with oil spill response planning.

An assessment of the nature and scope of the potential consequences of an oil spill from a tanker accident or malfunction is crucial to the JRP's deliberations regarding whether the Project will result in significant adverse impacts for Haida Gwaii and the Haida Nation. Without this important information base, the Joint Review Panel cannot make a reasoned decision and fulfill its mandate to review the Project in a careful and precautionary manner.

Northern Gateway has committed to incorporating Haida oral traditional evidence but only after the Project is approved for purposes of follow-up monitoring and oil spill response planning.

This turns Northern Gateway's obligation on its head, and in turn, frustrates the Crown's obligations to the Haida Nation. Northern Gateway must incorporate the information now, as we maintain that it was not incorporated. This must be done before the application is approved and it must fully integrate the body -- the incredible body of knowledge that the Haida have provided in a fulsome environmental assessment for Haida Gwaii. This is necessary to assess the potential impacts

on Haida Aboriginal rights and title.

Northern Gateway admits in its argument that it did not conduct spill modelling for the Open Water Area near Haida Gwaii. This omission is troubling in view of the navigational hazard posed by Learmonth Bank near Langara Island -- near East Gwaii. An oil spill in that location would have a devastating impact on the fragile ecosystems of Langara Island and Lepas Bay.

In further response, we direct the Panel to our argument regarding the failure of Northern Gateway to commission any study relating to the unique vulnerabilities on Haida Gwaii, including the susceptibility of North Beach and McIntyre Bay to oiling. As well, we say that Northern Gateway did not commission any study relating to depressed herring stocks in Gwaii Haanas and unique herring stocks in Skidegate Inlet that might be impacted from an oil spill on the southern route.

Northern Gateway in its argument acknowledges that marine invasive species from ballast water and hull fouling is a global marine industry issue.

Introductions in other parts of the world have caused irreversible changes to marine ecosystems. Despite this, Northern Gateway failed to assess the consequences of the introduction of aquatic invasive species to Haida Gwaii and upon the Haida people.

Northern Gateway's submission that activities related to the exercise of asserted Aboriginal rights would not be affected by routine project-related shipping is based on a fundamental misunderstanding of the nature of Aboriginal title.

Aboriginal title includes the right to make decisions, including those that impact the economic component of Aboriginal title, about the use of marine and -- about the use of waters and marine resources subject to Aboriginal title, including restricting uses that risk long-term impacts and that are incompatible with Haida values and the intrinsic importance of the waters, resources and abutting lands to the Haida Nation.

Northern Gateway submits that there is no credible nexus between the Project and the effects on the Haida Nation's rights.

This statement is highly objectionable, both for its inaccuracy and its utter lack of understanding of Haida

Aboriginal Rights and Title. Northern Gateway has inaccurately assessed the impacts upon the Haida Nation.

Northern Gateway optimistically submits that, even if an oil spill were to occur, the impacts to the biophysical and human environment would not be permanent and that recovery times are measured in months, rather than years.

This is not so straightforward, as is evident from the Exxon Valdez oil spill example.

The lesson to be learned from EVOS is that there is considerable uncertainty regarding the nature, scope and speed of recovery from an oil spill. Some marine species are believed to have recovered within two to four years, while other species, such as killer whales, sea otters, harlequin ducks and herring, have yet to recover. There is disagreement among EVOS experts about the extent of recovery from an oil spill event.

Part of the problem with EVOS studies was that there was totally inadequate baseline inventories. The lack of baseline information on the fate and behaviour of diluted bitumen casts further doubt on Northern Gateway's assertion that there will be no permanent impacts from an oil spill.

Without this information, it is not possible to determine whether diluted bitumen will sink or float if spilled into the marine environment and whether adverse effects can be mitigated. According to the Haisla Nation's expert, Ms. DeCola, there is no standard cleanup procedures for dealing with sunken or submerged oil.

This information gap is a fatal defect in the Project's environmental assessment. Without the necessary information, the Joint Review Panel cannot assess the full impacts of spilled diluted bitumen on the coastal and marine areas of Haida Gwaii in the event of a tanker incident in Dixon Entrance, Hecate Strait, Queen Charlotte Sound or in the waters to the west of Haida Gwaii.

It logically follows that, since Haida Gwaii is surrounded by the Project's tanker routes in Haida territorial waters, including Dixon Entrance, which has the acknowledged navigational hazard of Learmonth Bank, situated near the centre of the channel, that the entire coastline and marine ecosystems of Haida Gwaii is

vulnerable to an oil spill in the Open Water Area and in the waters to the west of Haida Gwaii.

Northern Gateway describes its engagement program as involving "consultation with Aboriginal groups" and states that the Joint Review Panel process has involved multiple stages of "consultation" with Aboriginal groups.

Beginning with the first statement about Northern Gateway's engagement program, Northern Gateway mistakenly confuses "engagement" with "consultation". Northern Gateway's engagement activities with the Haida involved little more than providing information about the Project and attempting to solicit information that Northern Gateway could use to propose measures to mitigate the admittedly adverse impacts on the Haida Nation's rights and interests in the event of an oil spill in Haida territorial waters.

The Joint Review Panel's consultation activities can best be described as registering oil and written evidence about Haida Aboriginal Rights and Title and Haida concerns about potential impacts on those rights from the Project.

While we agree that the federal Crown needs this information to assist with fulfilling its obligations to consult and accommodate the Haida Nation with respect to potential infringements, we say that consultation requires much more than engagement for the purpose of collecting information on behalf of the Crown.

Neither Northern Gateway nor the Joint Review Panel has the authority to discharge the federal Crown's consultation obligations to the Haida Nation. Yet, Northern Gateway's submissions attempts to leapfrog over those obligations directly to justification and compensation.

In the Haida case, the Supreme Court of Canada directed that consultation requires putting forward for Haida consideration a proposal that is not yet finalized, seeks Haida opinion on the proposal, does not promote but listens with an open mind to what the Haida have to say and, finally, consultation requires being prepared to alter the original proposal to accommodate Haida concerns. [Haida Nation v. Canada (Minister of Forests), 2004 SCC 73 at para. 46, [2004] 3 SCR 511]

In the companion case to our case, the Taku case,

[Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550, 2004 SCC 74 ("Taku")] the Chief Justice stated:

"As discussed in Haida, what the honour of the Crown requires varies with the circumstances. It may require the Crown to consult with and accommodate Aboriginal peoples prior [to making --] to taking decisions. [R. v. Sparrow, [1990] 1 S.C.R. 1075, at p. 1119; R. v. Nikal, [1996] 1 S.C.R. 1013; R. v. Gladstone, [1996] 2 S.C.R. 723; Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, at para. 168] The obligation to consult does not arise only upon proof of an Aboriginal [right], in order to justify infringement. That understanding of consultation would deny the significance of the historical roots of the honour of the Crown, and deprive it of its role in the reconciliation process. Although determining the required extent of consultation and accommodation before a final settlement is challenging, it is essential to the process mandated by s. 35(1). The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation."

Accordingly, the Haida Nation is entitled to receive, and expects to receive, a deep level of consultation before any decision is made by the Crown about whether to approve this Project. The Haida Nation is entitled to receive, and expects to receive, a sufficient level of responsiveness, including a willingness to alter or reject the proposal to accommodate Haida concerns.

Post-approval consultation will be too late to satisfy the Crown's consultation and accommodation obligations to the Haida Nation. In Taku, the post-approval permitting stage required the proponent in that case to develop a more detailed baseline information and analysis which could result in adjustments to the road route at issue.

There is no similar post-approval permitting process for Northern Gateway's Project that could result in adjustments to the proposed tanker route through territorial waters -- Haida Territorial waters. Northern Gateway has determined that the only feasible open water routes to and from the proposed Kitimat terminal are in Haida territorial waters.

Northern Gateway has tried to distinguish the Taku case, saying that this environmental assessment process discharges the Crown's duty to consult. Northern Gateway relies upon the court's statement that Aboriginal concerns:

"...could be more effectively considered at the permit stage or at the broader stage of treaty negotiations or land use strategy planning."

In response, we remind the Panel that the Haida and the Crown are very far along in reconciliation negotiations. In fact, we're at the cutting edge of reconciliation in Canada. We agree that the best stage to engage in consultation and accommodation is at the strategic level. The outcomes from strategic marine use planning must properly constrain future projects and developments, such as Northern Gateway's proposed project.

The Haida litigation history, the Crown's knowledge of Haida Title and Rights and the progress with reconciliation means that deep consultation is required with the Haida Nation, and accommodation of Haida concerns. That must precede any decision by the Crown regarding whether to approve the Project.

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