



## GITXAALA NATION

PO Box 149 11 Ocean Drive Kitkatla, BC V0V 1C0 Phone 250.848.2214 Fax 250.848.2238

October 7, 2014

**DELIVERED VIA E-MAIL**  
**(Edwin.Hubert@gov.bc.ca)**

Environmental Assessment Office  
P.O. Box 9426, Stn. Prov. Govt.  
Victoria, BC V8W 9V1

Attention: Edwin Hubert, Project Assessment Officer

Dear Sir:

**Re: Gitxaala Nation Comments on Application Screening for Proposed LNG Canada Project**

On behalf of the Gitxaala Nation we write to provide screening comments on the LNG Canada Development Inc.'s ("LNG Canada") Application for an Environmental Assessment Certificate (the "Application") for the proposed LNG Canada Export Terminal Project (the "Project").

From our initial review, we submit that the Application does not meet the requirements of the Application Information Requirements ("AIR") and is deficient for the purposes of assessing the potential adverse effects of the Project on Gitxaala's Aboriginal rights. Along with the specific comments set out in the attached tracking table, we have the following general comments about the Application as proposed.

- Gitxaala submits that the Application is deficient in terms of assessing the potential effects of the Project on the selected Valued Components (including the four additional Valued Components submitted by Gitxaala). Specifically, the Application lacks a clear description of LNG Canada's methodology for assessing potential effects of the Project on the Valued Components and includes no indication of what thresholds, criteria or standards will be used to determine the significance of potential impacts to Gitxaala.
- While screening time periods do not permit for a detailed review of how the Project may cause changes to the selected Valued Components, one serious deficiency identified in Gitxaala's review is that while LNG Canada has included locations within the proposed shipping lanes in its assessment of acoustics, to date it has not collected any baseline data in these locations.

- While mitigations are proposed, their expected effects are frequently not described and mitigations are proposed that do not appear related to the effect identified, e.g. visual quality and use of a communications system. Gitxaala's concerns about a lack of specificity in relation to proposed future mitigations were brought to the attention of LNG Canada and remain unaddressed (see for example comment 12 in "LNG Canada Part C: Initial Comments" regarding reliance on mitigations to be designed post-approval).
- Residual effects include LNG Canada vessel transits during critical harvest seasons and tides. It is unacceptable to Gitxaala that such transits would take place during critical harvest times.
- Section 17 contains a table outlining Gitxaala concerns and steps that LNG Canada says they have taken to address these concerns. Where LNG Canada has included additional text or revised wording in its Application to address concerns, the text or revised wording should be indicated in the table for ease of reference and evaluation. Simply stating that text has been added does not allow either Gitxaala or the EAO to evaluate the adequacy of the response.
- The Application does not consider cumulative effects on Current Use of Land and Resources for Traditional purposes. This failure arguably renders the Application deficient with respect to the requirement in 19(1) of *CEAA, 2012* to consider cumulative environmental effects.

Gitxaala asks the EAO to take steps to ensure these deficiencies as well as those identified in the attached tracking table are addressed prior to accepting the Application for review.

In addition to these concerns, Gitxaala is also concerned with unrealistic timelines that the EAO has placed on working group members to comment during the screening process. While we recognize that the EAO requires time in the 30 day screening process to review and process incoming comments from all stakeholders, 13 working days for working group members to review the relevant sections of an entire EA is unrealistic. At this time Gitxaala, and I'm sure most nations, are engaged in the EA process of multiple proposed projects and require time to complete reviews for deadlines and free up resources for new reviews. We expect that moving forward this concern will be recognized and respected.

Yours truly,



James Witzke  
Gitxaala Environmental Monitoring

cc: Shell Canada Limited, Attn: Steven Francis, Sr. (via email [Steven.Francis@shell.com](mailto:Steven.Francis@shell.com))

Enclosure

**From:** Robert Janes  
**To:** Waters, Cory EAO:EX  
**Cc:** Worsley, Kristin E; Lofthouse, Mark ABR:EX; Virginia Mathers  
**Subject:** Gitxaala First Nation -- Strength of Claim Assessment  
**Date:** Thursday, February 27, 2014 8:45:20 AM

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Dear Mr. Waters,

We have been provided with a copy of the strength of claim assessment that was sent to Gitxaala by your letter of January 31, 2014. We are troubled that we were not copied on this letter as the EAO and Mr. Lofthouse are aware that we are counsel for Gitxaala with respect to the LNG matters. Could you verify if in fact this was sent to our office as we have no record of receiving this document. This has caused delay in in dealing with this matter.

Gitxaala will be providing a comprehensive reply to this strength of claim assessment. While we are still in the process of reviewing your letter and will need to consult with our client and others to prepare a comprehensive reply there are a few initial observations which cause us deep concern:

1. While the annex refers to reviewing various materials provided or made available in the last year there seems to be no incorporation of that material into your analysis. For example, while extensive evidence was provided with respect to use in the Prince Rupert Harbour area your analysis uses a traditional territory boundary based upon an boundary used in a 2004 Forestry Agreement for purposes related to forestry consultation;
2. The analysis of the aboriginal rights claimed by the Gitxaala First Nation does not appear to include any reference to the Gitxaala system of hereditary governance over land, water and resources in Gitxaala's territory and the s. 35 right to govern these resources. As should have been apparent from Gitxaala's correspondence as well as the transcripts of the evidence before the Northern Gateway Joint Review Panel (which the annex indicates you reviewed) this is a key right which Gitxaala expects to be respected.
3. The analysis of the aboriginal title claim does not disclose the legal principles brought to bear on the analysis. While this might be acceptable in a situation where the test for aboriginal title and its application is well-established and settled, your legal counsel and likely you are well aware that the decision of the Court of Appeal in ***William v. British Columbia (Minister of Forests)*** is under appeal to the Supreme Court of Canada and the court has reserved following argument of that case. The analysis you have conducted appears on its face to have adopted the mistaken view that establishing aboriginal title requires proof of intensive localized used of small tracts of land. This approach is simply not merited on the case law seen as a whole and therefore improperly discounts the overall evidence of usage.
4. There also appears to be no significant analysis of the impact of the projects and associated facilities and shipping activity on spiritual and cultural sites.

This list should in no way be taken to be comprehensive in nature and should merely been seen as illustrative of the apparent deficiencies in your analysis.

We would therefore ask that this analysis **not** be distributed to proponents at this time **nor** be used as a basis for any government decision making.

We would appreciate it if you could provide us with electronic copies of all of the supporting documents referenced in your letter, including the 2011 Ministry of the Attorney General report.

Robert JM Janes

Janes Freedman Kyle Law Corporation

816-1175 Douglas Street

Victoria, BC V8W 2E1

250-405-3466 (d)

250-888-5269(c)

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**From:** James Witzke <jamesw@gitxaalanation.com>  
**Sent:** Monday, November 3, 2014 2:39 PM  
**To:** Howes, Kenneth EAO:EX  
**Cc:** Waters, Cory EAO:EX; Mayall, Jane EAO:EX  
**Subject:** 30050-20/PNLNG-04 RE: revised Part C

Hi Ken,

We are working as fast as we can to get our submission to you.

Last Wednesday you suggested that you would have a revised Part C to us and we have still not received it. It is difficult for us to finish our submission until we have the full revised document to comment on. When can we expect to get a copy of it?

Thanks



James Witzke  
Environmental Assessment Coordinator  
Gitxaala Environmental Monitoring

280-110 1<sup>st</sup> Ave W  
Prince Rupert BC  
V8J 1A8  
W: 250-624-3339  
C: 250-600-3622

---

**From:** Howes, Kenneth EAO:EX [<mailto:Kenneth.Howes@gov.bc.ca>]  
**Sent:** October 30, 2014 3:23 PM  
**To:** [jamesw@gitxaalanation.com](mailto:jamesw@gitxaalanation.com)  
**Cc:** Waters, Cory EAO:EX; Mayall, Jane EAO:EX  
**Subject:** revised Part C

Hi James,

I acknowledge that I did say I would do my best to provide you with revisions to section 7.3 of EAO's draft Part C of the Assessment Report by end of day yesterday (Wednesday). I apologize, but I was not able to meet that timeline. I am hoping to get a revised draft to you by tomorrow.

Please feel free to call me directly if you wish to discuss.

Regards,  
Ken

***Kenneth Howes***

Project Assessment Manager – LNG Facilities

Environmental Assessment Office

Ph: 250-387-2445

Mobile: S.17

**Mayall, Jane EAO:EX**

**From:** Robert Janes <RJanes@jfkllaw.ca>  
**Sent:** Tuesday, October 28, 2014 9:26 PM  
**To:** Waters, Cory EAO:EX; 'clarence.innis@gitxaalanation.com'; 'jamesw@gitxaalanation.com'; Virginia Mathers  
**Cc:** 'drobbins@woodwardandcompany.com'; Robertson, Linda G ABR:EX; Lofthouse, Mark ABR:EX; Steynen, Marc; 'Jillian.smith@ceaa-acee.gc.ca'; 'katherine.beavis@tc.gc.ca'; 'Catherine.Ponsford@ceaa-acee.gc.ca'; 'candace.anderson@ceaa-acee.gc.ca'; Howes, Kenneth EAO:EX; Bailey, Scott EAO:EX; Braun, Nathan EAO:EX; Mayall, Jane EAO:EX; Spiteri, Bailey EAO:EX; Chan, Debbie JAG:EX; Balcaen, Trish L EAO:EX; Dusseault, Kecia JAG:EX; XT:Ignas, Mark FOR:IN  
**Subject:** 30050-20/PNLNG-04 RE: Letter dated October 24, 2014 from EAO

Dear Mr. Waters,

I think you can appreciate receiving two highly technical memorandums dealing with a range of ethno-historical materials provided to the Crown on March 8, 2013 at 5:28 pm on October 28, 2014 for a meeting scheduled for October 30, 2014 is actually not incredibly helpful or constructive. This leaves us with little time to review this material ourselves much less have our consultants and relevant chiefs review and comment on it.

Robert

Robert JM Janes  
 JFK Law Corporation  
 816-1175 Douglas Street  
 Victoria, BC V8W 2E1

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**From:** Waters, Cory EAO:EX [<mailto:Cory.Waters@gov.bc.ca>]  
**Sent:** Tuesday, October 28, 2014 5:28 PM  
**To:** 'clarence.innis@gitxaalanation.com'; 'jamesw@gitxaalanation.com'; Virginia Mathers; Robert Janes  
**Cc:** 'drobbins@woodwardandcompany.com'; Robertson, Linda G ABR:EX; Lofthouse, Mark ABR:EX; Steynen, Marc; 'Jillian.smith@ceaa-acee.gc.ca'; 'katherine.beavis@tc.gc.ca'; 'Catherine.Ponsford@ceaa-acee.gc.ca';

'candace.anderson@ceaa-acee.gc.ca'; Howes, Kenneth EAO:EX; Bailey, Scott EAO:EX; Braun, Nathan EAO:EX; Mayall, Jane EAO:EX; Spiteri, Bailey EAO:EX; Chan, Debbie JAG:EX; Balcaen, Trish L EAO:EX; Dusseault, Kecia JAG:EX  
**Subject:** RE: Letter dated October 24, 2014 from EAO

Good afternoon,

Further to the letter provided to you on October 24, 2014, I am attaching two follow-up memoranda as follows:

1. Ministry of Justice, October 28, 2014. Memo from Kecia Dusseault, Senior Research Officer, Aboriginal Research Division to Cory Waters, First Nations Lead, LNG Projects, Environmental Assessment Office. "Gitxaala at the Nass River Eulachon Fishery."
2. Ministry of Justice, October 28, 2014. Memo from Kecia Dusseault, Senior Research Officer, Aboriginal Research Division to Ken Howes, Project Assessment Manager, Environmental Assessment Office. "Detailed Review of the Gitxaala Submission – Prince Rupert Harbour Area (March 2013)"

I trust that this information will assist in our discussions on October 30 in Vancouver.

Sincerely,

Cory Waters  
First Nations Lead for LNG Projects  
BC Environmental Assessment Office  
phone: (250) 387-0236  
cell: s.17

---

**From:** Spiteri, Bailey EAO:EX  
**Sent:** Friday, October 24, 2014 5:23 PM  
**To:** 'clarence.innis@gitxaalanation.com'; 'jamesw@gitxaalanation.com'  
**Cc:** 'rjanes@jfkclaw.ca'; 'vmathers@jfkclaw.ca'; 'drobbins@woodwardandcompany.com'; Robertson, Linda G ABR:EX; Lofthouse, Mark ABR:EX; Steynen, Marc; 'Jillian.smith@ceaa-acee.gc.ca'; 'katherine.beavis@tc.gc.ca'; 'Catherine.Ponsford@ceaa-acee.gc.ca'; 'candace.anderson@ceaa-acee.gc.ca'; Waters, Cory EAO:EX; Howes, Kenneth EAO:EX; Spiteri, Bailey EAO:EX; Bailey, Scott EAO:EX; Braun, Nathan EAO:EX; Mayall, Jane EAO:EX  
**Subject:** Letter dated October 24, 2014 from EAO

Good afternoon,

Please see attached letter dated October 24, 2014, signed by Cory Waters, EAO.

Cheers,

*Bailey Spiteri*

Administrative Assistant | Environmental Assessment Office  
4<sup>th</sup> floor – 836 Yates St, Victoria, BC V8W 1L8  
Ph: (250) 387-7983 | Fax: (250) 356-6448 | Email: [Bailey.Spiteri@gov.bc.ca](mailto:Bailey.Spiteri@gov.bc.ca)  
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**Mayall, Jane EAO:EX**

**From:** Virginia Mathers <VMathers@jfkclaw.ca>  
**Sent:** Monday, November 3, 2014 7:28 PM  
**To:** Howes, Kenneth EAO:EX  
**Cc:** drobbins@woodwardandcompany.com; Robertson, Linda G ABR:EX; Lofthouse, Mark ABR:EX; Steynen, Marc; Jillian.smith@ceaa-acee.gc.ca; katherine.beavis@tc.gc.ca; Catherine.Ponsford@ceaa-acee.gc.ca; candace.anderson@ceaa-acee.gc.ca; Howes, Kenneth EAO:EX; Bailey, Scott EAO:EX; Mayall, Jane EAO:EX; Ferbey, Stasia EAO:EX; Chan, Debbie JAG:EX; Balcaen, Trish L EAO:EX; Dusseault, Kecia JAG:EX; clarence.innis@gitxaalanation.com; XT:Ignas, Mark FOR:IN; Robert Janes; James Witzke; Waters, Cory EAO:EX; Charles Menzies  
**Subject:** 30050-20/PNLNG-04 Gitxaala Nation Submission Package for Ministers for Pacific NorthWest LNG project  
**Attachments:** Gitxaala Nation Submissions to the Ministers Regarding Pacific NorthWest LNG.PDF

Dear Mr. Howes,

On behalf of the Gitxaala Nation, please find attached a submission package for the Ministers for the proposed Pacific NorthWest LNG Project.

Please confirm that you have received the package and that it will be accompanying your referral package to the Ministers on November 5, 2014.

Thank you

**Virginia C. Mathers**

JFK Law Corporation  
340 - 1122 Mainland Street  
Vancouver, BC V6B 5L1

604 687-0549 x 104 (office)  
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604 687-2696 (fax)

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Page 010 to/à Page 012

Withheld pursuant to/removed as

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## GITXAALA ENVIRONMENTAL MONITORING

280-110 1<sup>st</sup> Ave West - Prince Rupert, BC Phone (250)-624-3339 Fax (250)624-3338

June 7, 2013

Scott Bailey, Executive Project Director  
BC Environmental Assessment Office  
PO Box 9426 Stn Prov Govt  
Victoria, BC V8W 9V1

FILE COPY

30050-20/LN GC - 04

Via Email: [scott.bailey@gov.bc.ca](mailto:scott.bailey@gov.bc.ca)

Dear Scott Bailey;

**Re: Section 11 Order for LNG Canada (Ref # 103064)**

We were surprised and dismayed to see on the BC EAO website today that the BC EAO issued a final Section 11 Order for LNG Canada's Export Terminal Project yesterday, June 6, 2013.

As you know, in my May 31, 2013 letter and the May 31, 2013 letter from our legal counsel, Gitxaala raised a number of serious concerns with the content of the draft Section 11 order and requested consultation on these issues by the BC EAO before the order was finalized. It was our understanding, based on Kenneth Howes's acceptance of our request to meet on June 4, 2013, that the BC EAO had committed to discuss the issues raised by and on behalf of Gitxaala regarding the need to modify and discuss significant aspects of draft order before it was issued. With your issuance of the order on June 6, 2013, it now appears that the BC EAO has declined to engage Gitxaala on those critical issues.

In our preliminary review of the final order, it appears that the BC EAO has responded to only a single comment made by Gitxaala; that we have an opportunity to review LNG Canada's consultation reports when they are submitted to the BC EAO. None of our other concerns are acknowledged or addressed in any way.

Your decision to issue the order before meaningfully engaging with Gitxaala regarding our concerns and without responding to our concerns is deeply troubling. The actions of the BC EAO respecting the section 11 order undermine not only our confidence in the BC EAO environmental assessment process for the Project, but also create serious doubts about the transparency and fairness of the consultation process for the Project. Unfortunately, this latter concern is made all the more troubling by your decision to remove all reference to accommodation respecting impacts from the Project on the section 35 rights, culture and socio-economic conditions of aboriginal groups from Part G of the Order.

Yours truly,

Dillon Buerk  
Environmental Assessment Coordinator



## **GITXAALA ENVIRONMENTAL MONITORING**

280-110 1<sup>st</sup> Ave West - Prince Rupert, BC    Phone (250)-624-3339    Fax (250)624-3338

Cc. Chief Conrad Lewis – Gitxaala Nation

Cc. Deputy Chief Clarence Innis – Gitxaala Nation

Cc. Mark Ignas, Business Manager – Gitxaala Nation



## GITXAALA ENVIRONMENTAL MONITORING

280-110 1<sup>st</sup> Ave West - Prince Rupert, BC Phone (250)-624-3339 Fax (250)624-3338

September 23, 2013

Edwin Hubert, Project Assessment Officer  
BC Environmental Assessment Office  
PO Box 9426 Stn Prov Gov  
Victoria, BC, V8W 9V1

Via Email: [edwin.hubert@gov.bc.ca](mailto:edwin.hubert@gov.bc.ca)

Dear Edwin Hubert;

**Re: EAO grant funding for Prince Rupert LNG, Pacific NW LNG, and LNG Canada**

The BC EAO has offered Gitxaala Nation three funding grants in order to facilitate participation in the pre-application EA processes for three proposed LNG projects. \$5,000 was offered each with respect to Prince Rupert LNG and Pacific NorthWest LNG in July 24 2013 letters, and \$10,000 was offered for LNG Canada in a July 31 2013 email.

As it is Gitxaala's responsibility to engage with proponents and government to participate in the EA process, Gitxaala will accept all three grants that have been offered. However, these amounts are far below the costs incurred by Gitxaala in order to fully participate, and account for less than 5% of what this entire process will actually cost. These grants may reimburse the Band for travel costs associated with the consultative process, but will not allow for salary of even one staff member to help keep up with the fast-moving regulatory process. In order to ensure that all the Nation's concerns are addressed and Aboriginal rights are protected, third party consultants and legal advice will be needed, on top of GEM administrative and staff costs.

We look forward to discussing a work plan and budget with EAO that will allow for a more meaningful participation by Gitxaala in the EA process.

Yours truly,

Dillon Buerk  
Environmental Assessment Coordinator

Cc. Deputy Chief Clarence Innis – Gitxaala Nation

Cc. Mark Ignas, Business Manager – Gitxaala Nation

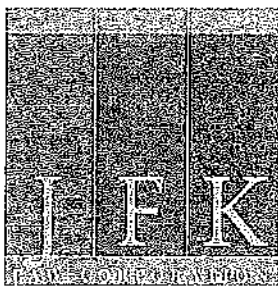


## **GITXAAŁA ENVIRONMENTAL MONITORING**

280-110 1<sup>st</sup> Ave West - Prince Rupert, BC    Phone (250)-624-3339    Fax (250)624-3338

Cc. Virginia Mathers – JFK Law Corporation

Cc. Ken Howes - EAO



# JANES FREEDMAN KYLE LAW CORPORATION

Suite 816 – 1175 Douglas Street  
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November 13, 2013

Robert J.M. James  
Direct Line: 250.405.3466  
E-mail: rjanes@jfkllaw.ca

**Delivered by E-mail (Kenneth.Howes@gov.bc.ca)**

File No. 1023-019

Environmental Assessment Office  
P.O. Box 9426, Stn. Prov. Govt.  
Victoria, BC V8W 9V1

Attention: Ken Howes, Project Assessment Manager

Dear Sirs/Mesdames:

**Re: EAO Response to Gitxaala Nation Comments on BC EAO Draft Section 11 Order  
Pacific Northwest LNG Export Facility ("the Project")  
BCEAO Reference 103529**

We are writing on behalf of the Gitxaala Nation ("Gitxaala") in response to your letter dated October 8, 2013.

As noted in Gitxaala's letter to the Environmental Assessment Office ("EAO") dated August 29, 2013 ("the August 29 Letter"), Gitxaala had a number of comments on the draft section 11 order ("the Order") for the Project. Gitxaala was concerned to see that despite requesting a meeting to discuss these comments, the Order was finalized on September 17, 2013 without a meeting having taken place. As there are no regulatory timeframes associated with pre-Application stage activities, the speed at which these processes are occurring is deeply concerning to Gitxaala. The effect of these rapid timeframes is being exacerbated by the fact that Gitxaala is currently engaged in the review of multiple projects within their traditional territory.

We note Gitxaala's concern that information from different reviews is being applied to the review of this Project. While currently engaged in multiple review processes, Gitxaala is not in a position to assume that information from one review process is being applied to other processes. In order to reduce confusion and to ensure that a thorough review is conducted for each project,

it is important to keep these processes separate. In Gitxaala's opinion, information from one review should not be applied to another review without Gitxaala being specifically notified.

Gitxaala continues to have concerns with the Order as drafted. Gitxaala's concerns relate primarily to how impacts to Gitxaala will be assessed, including the selection of Valued Components ("VCs"). As you know, Gitxaala has submitted comments on the draft Application Information Requirements ("dAIR") for the Project. These comments include Gitxaala's input on the proposed VCs and include four additional VCs which Gitxaala has recommended for inclusion in the dAIR. In Gitxaala's opinion, the inclusion of the additional VCs is necessary in order to ensure the EA adequately assesses potential adverse impacts from the Project to Gitxaala. Gitxaala's comments clearly indicate that there are still significant gaps in the dAIR in relation to assessment methodology, particularly related to Aboriginal interests. We would ask the EAO to consider Gitxaala's section 11 order comments alongside their dAIR comments in order to reduce repetition. Gitxaala looks forward to the EAO's response to these comments.

Gitxaala also has the following comments by way of response.

#### **Coordination of EA**

In general, Gitxaala requires more clarity about how exactly the review will be carried out by the EAO and CEAA in relation to alignment and coordination of activities, particularly with regards to fulfilling the Crown's duty to consult. Gitxaala would like to meet with representatives of EAO and CEAA to discuss this coordination.

#### **Scope of the Assessment**

Gitxaala is concerned that, following finalization of the Order, the definition of Aboriginal Interests in the Scope of the Assessment remains unclear. As explained in the August 29 Letter, Gitxaala is seeking to have the Scope of the Assessment clarified in terms of what is encompassed in the definition of Aboriginal Interests. For example, are governance rights, culture, and spiritual beliefs included in the definition? This concern does not appear to have been addressed in the revised Order and Gitxaala looks forward to discussing this issue with the EAO.

In the August 29 Letter, Gitxaala included a list of additional issues for inclusion in the Scope of the Assessment. These issues of concern to Gitxaala are not reflected in the finalized Order, which is a matter of great concern to Gitxaala. Please explain why these issues have not been included in the Scope of the Assessment for the Project.

#### **Working Group**

We note that the Working Group model provides the structure for consultation with Gitxaala for this Project. As you know, Gitxaala has reservations with utilizing the Working Group model for review and examination of information collected for this Project. Gitxaala is concerned that the Working Group is being relied upon as a forum for identifying and addressing potential adverse effects to Gitxaala rights, including title. Your letter specifies that Gitxaala can make comments at the Working Group, during the public comment period and directly to the EAO on the dAIR. These issues are not related. Gitxaala comments in a Working Group meeting do not



constitute an identification of potential adverse effects from the Project. Gitxaala comments also do not constitute the process of addressing these effects. While the Working Group may be a way for Gitxaala to raise comments and concerns during the consultation process, it cannot be the only vehicle for identification of these effects. We wish to ensure that Gitxaala's participation in the Working Group is not being taken by the EAO as constituting adequate consultation in respect of the Project.

Similarly, the public comment period, direct communication with the EAO or comments on the dAIR cannot be the vehicle for the identification of potential adverse effects to Gitxaala's Aboriginal rights. Rather, the EAO must direct the Proponent to include specific VCs to reflect Gitxaala Aboriginal rights and ensure this is included in the guidance documents and, ultimately, in the final assessment. This issue is of extreme importance to Gitxaala. Should you require further discussions to clarify, please let us know and we will ensure Gitxaala representatives are available to discuss.

Your letter also notes that Gitxaala participated in a number of sub-working groups related to marine vessel routes, operating conditions, navigation and spill response. While participation in these technical meetings is an important part of the consultation process, Gitxaala participation alone does not equate to satisfaction of the issues raised in relation to the section 11 order, the dAIR or other subsequent pre-Application documents. Instead, to consider an issue satisfied in these forums it must be explicitly stated at the meeting, and captured in mutually agreed-to meeting minutes. Until such time, Gitxaala considers the issues raised in the August 29 Letter to be outstanding and requires additional discussion with the EAO, CEAA, and the Proponent in relation to these issues.

### **Public Hearing**

As noted in the August 29 Letter, Gitxaala believes that a public hearing is required for the review of the Project. A request was made that the Order be revised to require a public hearing. Please confirm how this concern has been addressed in the final Order.

### **Marine Shipping**

Gitxaala continues to seek clarification about the status of marine shipping as a project component. In your response you advise that the EAO will discuss this issue with CEAA. Please advise as to the status of these discussions. Gitxaala would like to discuss this issue with the EAO and CEAA at an in person meeting.

Your response notes that the EAO continues to seek information from Gitxaala in relation to shipping between Triple Island pilotage station and the facility marine berth. This issue is critical to Gitxaala, as evidenced by ongoing concerns articulated by Gitxaala for all LNG projects within Gitxaala territory. We would appreciate specific clarification on what information the EAO requires so Gitxaala can ensure this issue is properly scoped as part of the ongoing work completed for this Project. We would also refer you to materials sent to the EAO in relation to the Project on October 31, 2013 enclosing Gitxaala use information for the Prince Rupert area.

### **Baseline Fieldwork and Biophysical Studies**

With regard to Gitxaala's involvement in baseline fieldwork and biophysical studies already undertaken by the Proponent, it is Gitxaala's belief that any fieldwork and biophysical studies initiated by the Proponent prior the finalization of the dAIR, including the selection of VCs, is premature. In Gitxaala's opinion, this work should not be undertaken until it is clear what studies and fieldwork needs to be completed in order to satisfy the Application Information Requirements.

Gitxaala is currently in the preliminary stage of capacity discussions with the Proponent in terms of how Gitxaala will be involved in the execution of the environmental assessment. We note that any attempts by the proponent to include Gitxaala in fieldwork and studies prior to sufficient capacity funding being provided will result in a process that is not meaningful. During our meeting of September 6, 2013 Gitxaala requested that BC EAO ensure sufficient capacity was provided by the proponent. Further, your letter indicates that the EAO "may assist in facilitating further discussions with the proponent". Gitxaala would like to request the EAO's assistance in engaging the proponent in capacity discussions in order to ensure that Gitxaala can meaningfully participate in the review of the Project.

### **Effects on Aboriginal Interests**

Gitxaala appreciates the clarification that cumulative effects on Aboriginal Interests will be considered as part of the Application. However, until the EAO and Proponent fully define what Aboriginal Interests will be assessed through the selection of VCs, the overall sufficiency of the assessment will remain unclear.

Further, when discussing the assessment procedures and application review stage, we note the use of the term "seriousness" in relation to effects to Gitxaala Aboriginal rights rather than "significance", which is an accepted term in environmental assessment methodology. We further note that the EAO has previously explained that this term is used because of the linkage to case law related to Aboriginal consultation. However, Gitxaala would like to stress that any selected VCs related to Gitxaala Aboriginal rights, including title, must be assessed using accepted environmental assessment methodology, while still considering case law. By changing the terminology, Gitxaala is concerned that the EAO will not complete a proper assessment using accepted standards; rather it will be a matter of interpretation.

Your letter also touches upon the ongoing discussions Gitxaala has been party to in relation to methodology for Part B versus Part C. Gitxaala notes that the specific details related to this methodology are still outstanding. The follow-up correspondence sent on September 18, 2013 does not sufficiently address the outstanding concerns Gitxaala has with this separation and lack of clarity.

### **Concluding Remarks**

Gitxaala's overarching goal in providing these comments is to obtain clarity regarding how the Project's impacts on Gitxaala's Aboriginal rights and culture will be assessed. Part of achieving this clarity is to ensure that the proponent is expressly required, through the EIS Guidelines and the Application Information Requirements, to assess the potential direct, indirect, and cumulative

impacts on Gitxaala's Aboriginal rights, heritage and culture in order to ensure Gitxaala's ability to meaningfully exercise their constitutionally-protected rights now and in the future.

Gitxaala remains concerned that as written, the Order does not provide for a full and proper assessment of potential adverse impacts to Gitxaala's section 35 rights. We look forward to these issues being addressed by the EAO.

Yours truly,

Janes Freedman Kyle Law Corporation

Per:



Robert J.M. Janes

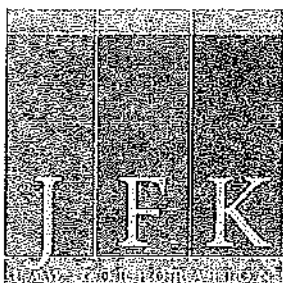
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cc: Jack Smith, Canadian Environmental Assessment Agency (via email [Jack.Smith@ceaa-acee.gc.ca](mailto:Jack.Smith@ceaa-acee.gc.ca))  
Michael Lambert, Progress Energy Canada Ltd. (via email [mlambert@progressenergy.com](mailto:mlambert@progressenergy.com))  
Andrea Pomeroy, Stantec Consulting Ltd. (via email [andrea.pomeroy@stantec.com](mailto:andrea.pomeroy@stantec.com))

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December 13, 2013

**Delivered by E-mail (Kenneth.Howes@gov.bc.ca)**

File No. 1023-019

Environmental Assessment Office  
P.O. Box 9426, Stn. Prov. Govt.  
Victoria, BC V8W 9V1

Attention: Ken Howes, Project Assessment Manager

Dear Sirs/Mesdames:

**Re: Gitxaala Nation Comments on draft Application Information Requirements for  
Pacific Northwest LNG Export Facility ("the Project")**

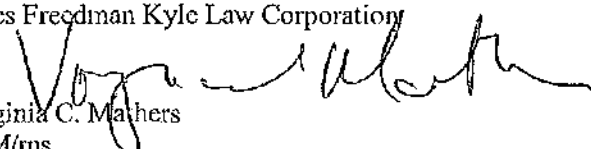

On behalf of the Gitxaala Nation ("Gitxaala") we write to provide comments on the revised draft Application Information Requirements (dAIR) for the Project. This letter should be read in conjunction with the following comments provided by Gitxaala's environmental and traditional land use study consultants:

- Partially Completed Tracking Table

We look forward to discussing these outstanding issues with the Environmental Assessment Office and ask that no decision be made in relation to finalizing the dAIR until there has been meaningful engagement with Gitxaala on its issues and concerns.

It should also be noted that due to time constraint there were certain matters which could not be indicated as either resolved or unresolved. We will endeavor to provide further information to the BCEAO in this regard as soon as reasonably possible. This should not affect the answers and comments which we have provided.

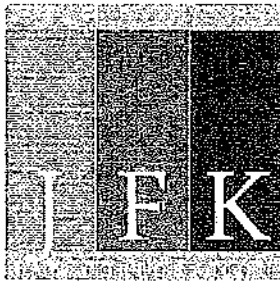
Yours truly,  
Janes Freedman Kyle Law Corporation

Per:   
Virginia C. Mathers  
VCM/rps  
Encl. 

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February 25, 2014

**Delivered by E-mail (Kenneth.Howes@gov.bc.ca)**

Virginia C. Mathers  
Direct Line: 604.687.0549, ext. 104  
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File No. 1023-017

BC Environmental Assessment Office  
4<sup>th</sup> Floor, 836 Yates Street  
Victoria, BC V8W 1L8

Attention: Ken Howes, Project Assessment Manager

Dear Sirs/Mesdames:

**Re: Proposed LNG Canada Project**

On behalf of the Gitxaala Nation ("Gitxaala"), we write with respect to the Environmental Assessment Office's ("EAO") review of the proposed LNG Canada Project (the "Project").

Gitxaala was recently asked to provide comments on LNG Canada's draft Aboriginal consultation summary report. The EAO will be aware of the concerns raised by Gitxaala in these comments as a copy was provided to the EAO.

Along with these comments, Gitxaala also raises a larger concern regarding the EAO's consultation to date in relation to the Project. Specifically, Gitxaala is concerned that the approach to consultation outlined by the EAO in the Section 11 Order for the Project and carried forward in the Draft Application Information Requirements ("DAIR") will not lead to effective consultation with Gitxaala about the Project's potential to adversely affect or infringe their section 35 rights.

The approach taken by the EAO to date has been limited to consultation related to the environmental assessment ("EA") of the Project. The EAO's consultation to date has largely been confined to consultation about the process of conducting the EA and in gathering EA information for the process as defined by the Section 11 Order. There does not appear to have been any effort to assess the strength of the claimed rights or to seriously engage with Gitxaala's rights and title. In particular, Gitxaala is concerned that the restrictions placed on the scope of consultation by the EAO in its DAIR requirements will lead to either the exclusion or very

limited consultation with respect to important aspects of Gitxaala's Aboriginal title and Aboriginal rights.

Gitxaala has serious concerns about the ability of EA processes to properly understand and assess the potential adverse impacts of development on the exercise of section 35 rights. However, the Crown's assessment of the severity of potential adverse impacts to Gitxaala from the Project must consider more than just standard environmental assessment factors. Similarly, consultation (whether carried out by Shell Canada, the Crown, or both) must focus on more than the legislated EA process.

For example, in considering whether the Project has the potential to directly and adversely affect the rights of Gitxaala, the following legal principles are relevant:

- a. Section 35(1) of the *Constitution Act, 1982* is to be construed in a purposive way. A generous, liberal interpretation is demanded given that the provision is to affirm Aboriginal rights: *R. v. Sparrow*, [1990] 1 S.C.R. 1075;
- b. The determination of whether a decision or action may impact an Aboriginal right or title (and, hence, trigger a duty to consult) must similarly be guided by a generous purposive approach because "actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown"; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para 43;
- c. The assessment of whether a decision or action may impact an Aboriginal right must be approached in a manner which maintains the integrity of the Crown because the honour of the Crown is always at stake in its dealing with Aboriginal peoples: *R. v. Badger*, [1996] 1 S.C.R. 771, at par. 41;
- d. When considering the environmental impacts of a project on Aboriginal rights, the term "environment" must be construed broadly and includes the cumulative impacts of a project and other facilities to be developed in the future on those rights: *Dene Tha' First Nation v. MOE et al.*, 2006 FC 1354, at par. 34;
- e. When considering impacts to Aboriginal rights, the historical context of impacts to the environment and other impacts to Aboriginal rights must be taken into consideration: *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at para 83 and 117, leave to appeal denied 2012 CanLII 8361 (SCC);
- f. The assessment of whether a decision or action may impact an Aboriginal right must take into account the injurious affection that a project causes on the exercise of Aboriginal rights in the vicinity of that project: *MCFN*, supra, at par. 15, 44, and 47;
- g. The assessment of whether a decision or action may impact an Aboriginal right must take into consideration the potential negative derivative impacts of a project:



*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at par. 32;

- h. The assessment of whether a decision or action may adversely impact an Aboriginal right must take into account that adverse impacts to those rights may not be only physical in nature: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at par. 72-73; and
- i. Courts have rejected the argument that the rights of a First Nation are not directly and adversely affected if they can "go elsewhere" to harvest: *Mikisew* at para 47-48.

Courts have noted the difficulties of assessing Aboriginal rights within the context of environmental assessments. For example, in *Dene Tha' First Nation v. Minister of Environment*, 2006 FC 1354, *aff'd* 2008 FCA 20 the court stated at paras. 62 and 82:

....the JRP is engaged in environmental assessment, not Aboriginal consultation. Although it will assess the effects the MGP and NGTL pipelines will have on Aboriginal communities, it does so through the lens of environmental assessment, focusing on activities, not rights.

...

In assessing whether the Crown has fulfilled its duty of consultation, the goal of consultation -- which is reconciliation -- must be firmly kept in mind. The goal of consultation is not to be narrowly interpreted as the mitigation of adverse effects on Aboriginal rights and/or title. Rather, it is to receive a broad interpretation in light of the context of Aboriginal-Crown relationships: the facilitation of reconciliation of the pre-existence of Aboriginal peoples with the present and future sovereignty of the Crown. [emphasis added]

Other problems with using an environmental assessment process to assess impacts on rights include:

- EAs do not consider effects to Aboriginal rights such as:
  - Interference with Aboriginal title rights (in particular, the right of exclusive possession);
  - Interference with governance rights (in particular, the right to control access to areas within a House territory);
  - Interference with spiritual rights including rights associated with avoiding disturbing *naxnox*;
  - Impacts to Gitxaala culture; and
  - Impacts associated with non-biophysical impacts such as avoidance of preferred harvest areas.

- Social and cultural indicators are not linked and applied to the assessment of impacts to the exercise of Aboriginal rights and title. For example, potential changes to plants or animals may be identified and the proponent may set out mitigation measures; however, consideration also needs to be given to what that change means to Aboriginal rights and title-holders (the cultural and social impact to their livelihood, their ability to teach the next generation how to exercise the right, and the ability to have places to exercise the right that are not heavily impacted by development) – without consideration of these issues, the true ability of the harvesters to exercise their Aboriginal rights and title is not assessed. The quantitative orientation of an environmental assessment makes it difficult to evaluate the social issues that Project-related impacts have for Aboriginal people.
- EAs do not seek to understand or consider the impacts on First Nation cultural ecosystems.
- The methodologies in project-specific assessments are largely inadequate for elucidating the key relationships among socio-cultural and ecological aspects that support the meaningful practice of rights.
- EAs do not consider how the addition of disturbance (both project specific and other foreseeable projects) affects already diminished Aboriginal rights. EAs start with the "existing environment" - a baseline - but no one has yet actually assessed how much of a First Nation's ability to exercise Aboriginal rights is already affected and hence, we do not know the effect of the addition to something unknown.
- EAs do not properly consider the fact that the fragmentation of the landscape and travel routes also affects Aboriginal rights.
- Most small projects, including exploration, camps, roads and even pilot projects do not trigger an EA or require a cumulative effects assessment. These projects are, in turn, not usually shown on the disturbance maps shown in EAs with the result that the predicted cumulative effects (on Aboriginal rights and anything else) are underestimated.
- In EAs, mitigation measures are usually project specific – it is assumed (without doing the more broad kind of analysis set out below) that project-specific mitigation will be sufficient.
- EAs do not assess the disruption of travel/ability to access parts of the Traditional Territory.

We are concerned that some of the constitutional issues on which Gitxaala seeks consultation will be ignored or downplayed through the "lens of environmental assessment". As you know, Gitxaala has serious concerns about the EAO's direction to relegate the consideration of certain Valued Components ("VCs") to a less intensive analysis which excludes consideration of the significance of the adverse impacts upon those VCs. While the EAO has indicated that it expects

there to be follow-up consultation with respect to these issues, Gitxaala has yet to receive a satisfactory explanation as to how that consultation is to occur.

It is also clear that the EA does not include an assessment of the proprietary and governance rights of Gitxaala in the relevant areas. For example, one of Gitxaala's concerns with the Project is that the waters through which the associated tanker traffic must pass are subject to Gitxaala's Aboriginal title. As a result, passage through these waters without Gitxaala's consent constitutes an infringement of Gitxaala's Aboriginal title irrespective of the issue of physical adverse impacts. Similarly, Gitxaala asserts Aboriginal governance rights in these waters based upon the rights of the hereditary chiefs over their resources and territories. To pass through these waters without permission constitutes a breach of these rights, and represents an additional cultural impact in terms of adverse effect to Gitxaala's system of governance and the status of the affected hereditary chiefs.

Gitxaala would like to meet with the EAO to discuss these and other issues relating to the EAO's review of the Project. Could you please identify some dates in March when the EAO would be available to meet with Gitxaala?

Gitxaala looks forward to working cooperatively with the EAO on these issues and we look forward to receiving your responses.

Yours truly,

Janes Freedman Kyle Law Corporation

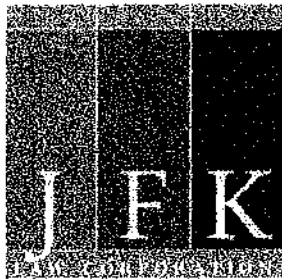
Per:



Virginia C. Mathers  
VCM/ejr

cc. Shell Canada, Attn.: Steve Francis (via e-mail [Steven.Francis@shell.com](mailto:Steven.Francis@shell.com))  
CEAA, Attn.: Vivian Au (via e-mail [vivian.au@ceaa-acee.gc.ca](mailto:vivian.au@ceaa-acee.gc.ca))  
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May 31, 2013

Delivered by Email ([Scott.Bailey@gov.bc.ca](mailto:Scott.Bailey@gov.bc.ca))

B.C. Environmental Assessment Office  
 PO Box 9426 Stn Prov Govt  
 Victoria BC V8W 9V1

File No. 1023-017

Attention: Scott Bailey

Dear Mr. Bailey:

**Re: *Draft Section 11 Order for the Proposed LNG Canada Export Terminal Project (the "Project")***

We are legal counsel for Gitxaala Nation and write on their behalf regarding the draft section 11 order (the "Order") and the proposed consultation process (the "Draft Consultation Process") for the Project.

**I. More engagement on the Order and Draft Consultation Process is Required – Request to Meet**

As a preliminary matter, Gitxaala notes that the British Columbia Environmental Assessment Office (the "BC EAO") has scheduled the 21 day window for Gitxaala to comment on the Order and the Draft Consultation Process for the Project for the precise period during which Gitxaala's resources are focused on preparing final submissions on the proposed Northern Gateway Project. This short window for engagement has also been scheduled for a period that directly follows Gitxaala's recent band council election, meaning that the 21 day window is taking place at a time when Gitxaala is in the midst of a leadership and administrative transition. Together, these factors have made it unfeasible for Gitxaala to prepare a comprehensive response to the Order and the Draft Consultation Process or meet with Canada and the BC EAO within the 21 day window set by the BC EAO.

Gitxaala submits that it is premature for the BC EAO to conclude its engagement with Gitxaala on the section 11 Order and the Draft Consultation Process on May 31, 2013 for two further reasons.

First, Gitxaala notes that the recent agreement between Canada and British Columbia respecting substitutions of environmental assessments and the delegation of various procedural aspects of consultation create a novel and uncertain situation that neither the BC EAO, Canada, nor Gitxaala have ever experienced. Specifically, as a result of the agreement, there are now critical questions about what informs the environmental assessment process and how Crown consultation will be coordinated. These questions are not sufficiently answered by the Order or Draft Consultation Process. These questions should be discussed in a collaborative, in-person meeting between the BC EAO, the Canadian Environmental Assessment Agency, Transport Canada, the Department of Fisheries and Oceans and Gitxaala before any further steps are taken regarding the Order or the Draft Consultation Process.

Second, as Gitxaala explained during the export licence hearing for the Project, Gitxaala is concerned that the Project will have significant adverse impacts to and will infringe Gitxaala's aboriginal rights and title. In its decision granting the export licence and declining to hear Gitxaala's concerns, the National Energy Board took the position that it is only through the environmental assessment now contemplated in the Order that Gitxaala's fundamental concerns with the direct, indirect and cumulative effects of the Project on Gitxaala's rights and interests can be considered and potentially addressed.

While Gitxaala strongly disagrees with how the National Energy Board and Governor in Council excluded Gitxaala's concerns about impacts from the export licence process and has taken steps to challenge those decisions, the fact remains that this environmental assessment and the Draft Consultation Process are the only currently available process for raising Gitxaala's serious concerns. The NEB's decision underscores the need to "get it right" for the Order and the Draft Consultation Process, by which we mean ensure that both are developed through a collaborative and transparent process that is responsive to the needs and concerns of Gitxaala and other First Nations. This requires more than a 21 day comment period.

Accordingly, while Gitxaala has endeavored to provide preliminary comments on both the Order and the Draft Consultation Approach below in order to guide the further discussions that must take place in respect of both, Gitxaala hereby requests that no decision on the Order or Draft Consultation Process be made without an in-person meeting with both levels of government and meaningful consultation on the Order and the Draft Consultation Plan. In this regard, Gitxaala appreciates the BC EAO's understanding of the importance to Gitxaala of ensuring the responsible transition of its administration and leadership following the election, of participating fully in the Northern Gateway JRP process and of working collaboratively to develop an appropriate, clear and transparent process for the Project.

## **II. Gitxaala's Constitutionally-Protected Rights**

Before providing comments on the Order and Draft Consultation Process, Gitxaala wishes to provide a brief introduction to its way of life and highlight its strong – and well documented – claim to the following Section 35 rights:

- a. Aboriginal title;
- b. Aboriginal harvesting rights, including:
  - i. The right to fish for various fin fish;
  - ii. The right to harvest shell fish from the waters and foreshores;
  - iii. The right to harvest marine plants from the waters and foreshores;
  - iv. The right to harvest herring roe from the waters;
  - v. The right to harvest marine mammals, including seals and sea lions;
  - vi. The right to harvest sea birds;
- c. The aboriginal right to navigate through and use the waters in this area both for the purpose of travel and for the purpose of exercising the rights set out above;
- d. Aboriginal governance rights in respect of the lands, waters and foreshores in this area, including the right to determine who may pass through these waters; and
- e. The aboriginal right to teach and pass on these traditional activities and to maintain their way of life.

We note that Gitxaala has provided a considerable volume of materials to British Columbia over the years to support the assertion of these rights. Most recently, Gitxaala provided extensive written and oral evidence in the Joint Review Panel Process for the Northern Gateway Project. These materials are publicly available (and many of them have been available for a considerable length of time) and the Province of British Columbia is participating in that process.

Gitxaala is a distinct aboriginal group located on British Columbia's Northwest Coast. Gitxaala people have continuously and extensively occupied their Traditional Territory, and have exercised their distinct culture and governance system within it, for centuries. Today, Gitxaala's

main village is located on Dolphin Island, in the community of Kitkatla. There are many more traditional villages, camps, spiritual sites, harvesting sites and places associated with historical and legendary events throughout Gitxaala's traditional territory. Extensive sections of the proposed tanker routes for the project, if approved, would be located within Gitxaala's Traditional Territory.

Gitxaala people refer to themselves in Smal'gax as Git Lax Moon, which means "People of the Saltwater". This name reflects the fact that Gitxaala's way of life finds its origin and enduring strength in the waters and marine resources within the Gitxaala Traditional Territory. Just as prior to contact with Europeans, Gitxaala's distinct culture, spiritual practices and belief system, social and political institutions, and legal system continue to be interwoven with and inseparable from Gitxaala's Traditional Territory and the resources within it. This is true not only for the approximately 396 Gitxaala members who live on reserve, but for all approximately 1800 registered members, regardless of where they are living.

Respectful use and stewardship of the lands, waters and resources in Gitxaala's Traditional Territory continues to sustain and nourish present generations of Gitxaala. As a result, the ability of the waters to provide resources, and the ability of the People of the Saltwater to safely access those resources during the appropriate seasons, is essential for the continued existence of Gitxaala as a people and their customs, practices and traditions.

### **III. Preliminary Comments on the Section 11 Order**

Gitxaala wishes to ensure that the environmental assessment for the Project fully assesses the potential direct, indirect and cumulative impacts of the Project on Gitxaala's Section 35 rights and interests. The scope of the assessment must be broad enough to determine potential impacts and effects on First Nations' rights and interests. This means, among other things, that the assessment needs to include consideration of environmental, social, cultural, and economic impacts not just from the Project, but also all existing, planned, and reasonably foreseeable development that will result in cumulative impacts. This is particularly critical for Gitxaala, which has witnessed a significant increase in approved and proposed tanker traffic through its traditional territory, including areas over which Gitxaala asserts aboriginal title and governance rights, in recent years. Gitxaala requests the BC EAO and representatives of Canada meet with Gitxaala prior to finalizing the Order to ensure that these goals are met.

With respect to the proposed Scope of the Project, Gitxaala notes that all phases of the Project need to be expressly included in the scope of the Project – construction, operations, modification, dismantling and abandonment. Additionally, the definition of shipping activities should include anchorages, all infrastructure and any other marine facilities/activity related to the Project within the waters in Gitxaala's Traditional Territory.

Gitxaala is concerned with how the Scope of the Assessment is addressed in the Order. First, although the Order defines "Aboriginal interests" to include aboriginal rights and title, the Order

lacks sufficient clarity for the parties to know what is encompassed therein with respect to the Scope of the Assessment. For example, cumulative effects are explicitly included with respect to environmental, social, economic, health and heritage effects, but the Order is silent on whether the scope of the assessment includes cumulative effects with respect to aboriginal interests. The Order also does not provide sufficient clarity about whether governance rights, culture and spiritual beliefs are included in the definition of "Aboriginal interests" and therefore within the scope of the Assessment. These issues must be clarified.

Second, Gitxaala is concerned that the Scope of the Assessment is too narrowly defined, and too dependent on the exercise of ministerial discretion, to ensure that the matters that are of the most concern to Gitxaala are included in the assessment. Gitxaala submits that the following issues should be included in the Scope of the Assessment:

- The existence and scope of First Nation rights and title which may potentially be adversely impacted by the Project,
- Whether the Project will result in an unjustifiable infringement of Aboriginal rights and title.
- Assessment of the adequacy of Crown consultation in relation to the Project.
- Potential direct, indirect and cumulative impacts and effects of the Project and other industrial development on the Aboriginal rights and title of First Nations, including but not limited to consideration of:
  - potential impacts from a tanker accident, considering the likelihood and consequences of such an event, with a full understanding of the ecological, social, economic and cultural sensitivities of the area;
  - potential impacts to harvesting activities from increased marine traffic;
  - potential impacts to archaeological and sacred sites from increased wave action from marine traffic;
  - potential impacts from ballast water releases, including contamination of waters and marine species and introduction of invasive species;
  - potential impacts from increased noise and air pollution from marine traffic; and
  - potential impacts from the foregoing to spiritual and cultural values and practices that underpin Aboriginal rights (such as aboriginal title, governance systems, teaching, and harvesting).



- Baseline information relating to the environment and the exercise of Aboriginal rights based on a period prior to tanker traffic through Gitxaala's Traditional Territory.
- Feasibility and efficacy of the full emergency response plans for a spill in marine areas, including how the likelihood of a spill differs between locations along the proposed tanker routes, how this has been considered in the design of the response plans, and whether the resources required to achieve the goals will be reasonably available.
- Ability of the proponent, regulators or the Crown to impose operating conditions on tanker owners and operators.
- Capacity and resources of the proponent to manage risk and financial liabilities relating to the Project, including responding to, managing and cleaning up relating to spills.
- Capacity of liability insurance to cover the costs of oil and/or condensate tanker spills.
- Risk of a tanker accident with full consideration of the likelihood and the consequence of all possible types of accidents, taking into account all the navigational hazards existing along the proposed tanker routes and Gitxaala's harvesting activities and governance system.
- Direct, indirect and cumulative impacts of tankers anchoring in refuge locations along the proposed tanker routes.
- Direct, indirect and cumulative impacts of proposed tanker navigation in addition to existing and other reasonably foreseeable tanker navigation in the Project area.
- Direct, indirect and cumulative impacts on fish, wildlife and vegetation from increased noise, air and other pollution and disturbances from marine traffic.
- Clearly defined market need for the Project, including signed contracts and commitments from shippers and refiners.
- Community knowledge and Aboriginal traditional knowledge.

To support Gitxaala's position that these points must be clearly included in the Scope of the Assessment, we refer you to the public registry for the Northern Gateway Project, where you can find Gitxaala's submissions on the scope of the issues for the marine component of that project, Gitxaala's written evidence (including the historical reports of Susan Marsden and Charles

Menzies and Gitxaala's traditional use study), transcripts from Gitxaala's oral evidence and, as of today, Gitxaala's final argument which describes many of these reports and materials. Together, these materials describe how Gitxaala has and continues to use its Traditional Territory and why the issues listed above are so critical to Gitxaala and why they must be included in the scope of the assessment.

Next, it is essential for Gitxaala and other First Nations to be involved in the selection of Valued Components. This is not something that should be left to the Proponent to select, particularly since there is an opportunity now, prior to the finalization of the Order, to work collaboratively to identify valued components that are relevant to Gitxaala's rights and include them in the Order. Without the involvement of First Nations in the selection of Valued Components, and without explicitly including those Valued Components in the Order, there is a very real risk that the information requirements and assessment report will not include information that is essential to understanding and assessing potential adverse impacts to and infringements of the Aboriginal Rights of Gitxaala and other First Nations. In this regard, Gitxaala notes that the definition of Valued Components must be revised so that Aboriginal Rights and Interests are included as a stand alone valued components.

With respect to the Working Group proposal, the Order simply provides too little information for Gitxaala to understand the role and limitations of this Group. As currently drafted, Gitxaala is concerned that the large number of Aboriginal and potentially non-Aboriginal government agencies and local governments with divergent interests and goals participating in the group will diminish Gitxaala's voice and undermine its ability to raise concerns. Gitxaala is also concerned that, due to the number of participants, the Working Group is not a proper forum for identifying and addressing impacts to Gitxaala's section 35 rights. As noted below, Gitxaala is also concerned that the Project Assessment Lead appears to have absolute, discretionary control over what the Working Group can look at, comment on, or even raise.

Gitxaala looks forward to obtaining more information about the Working Group before any decision is made on the Order so that Gitxaala, BC EAO and Canada can work together to identify alternative structures if the Working Group is unable to play a meaningful role.

As a final preliminary point, Gitxaala requests that the Order require that a public hearing be held regarding the Project. Without a hearing, Gitxaala is concerned that the Order does not establish a sufficiently robust process for engaging with the proponent and testing its information and conclusions.

#### **IV. Comments on the Draft Consultation Process**

Gitxaala wishes to raise a few preliminary points relating to the Draft Consultation Process prior to meeting with Canada and the BC EAO. In this regard, it is critical that the BC EAO be cognizant that courts in British Columbia have been clear that the first step in consultation is to discuss the consultation process itself and mutually develop a consultation process:

The first step in the process is to discuss the process itself (Gwasslam at para. 8). The Crown is then obligated to design a process for consultation that meets the needs for discharge of this duty before operational decisions are made.<sup>1</sup>

Gitxaala has an overarching concern that the Draft Consultation Process falls far short of the clear and transparent consultation process that Gitxaala is entitled to as a matter of law. We highlight a number of these problems here so that they can form part of the discussion during the in-person meeting with BC CEA and CEAA:

- 1) Without further discussions regarding how the new BC-Canada agreement regarding environmental assessments and Crown consultation will affect consultation, there are too many uncertainties regarding such key issues as: how provincial and federal consultation and accommodation obligations will be coordinated; the mandates of Crown representatives in consultation; what roles each government and the technical staff and expertise that they have at their disposal will play in discharging consultation and accommodation obligations; and the scope of consultation.
- 2) It is unclear what steps the BC EAO and Canada are taking, directly, to analyze the potential direct, indirect and cumulative impacts of the Project on Gitxaala's section 35 rights and with respect to the social, economic, environmental and cultural impacts of the Project on Gitxaala's community.
- 3) It is not clear from the Draft Consultation Process who will assess the potential infringements to Gitxaala's rights; how potential impacts or infringements will be addressed or accommodated or when they will be addressed/accommodated; or who will assess the adequacy of consultation.
- 4) There is no agency or decision-maker identified in the Draft Consultation Plan with any mandate or authority to accommodate potential impacts to or infringements of Gitxaala's rights or to require such accommodation measures.
- 5) It is unclear what steps have been taken by the BC EAO or Canada to make a preliminary assessment of the strength of Gitxaala's claims in the vicinity of the Project.
- 6) It is not apparent from the Draft Consultation Process whether Gitxaala will be provided with meaningful feedback in relation to comments that it makes throughout the EA and consultation processes.
- 7) The mandate of the Working Groups is unclear as the working group appears unable to make recommendations, identify gaps, independently gather information or take any

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<sup>1</sup> *Hut-Ay-Aht First Nation et al. v. The Minister of Forests et al.*, 2005 BCSC 697 at para 113

action without having been directed to do so by the Project Assessment Lead and individual First Nations within the group are unable to independently engage with the Proponent without being requested to do so by the Project Assessment Lead.

- 8) There is a distinct lack of clarity and transparency about whether the Proponent and the BC EA will use standard environmental assessment methodologies (such as a focus on a significance standard for assessing effects and a reliance on biophysical indicators to determine effects) during consultation. If the Draft Consultation Process is premised on a decision to utilize such approaches in consultation, then Gitxaala strongly objects and requests that the Draft Consultation Process be substantially revised so that it is clear that consultation and environmental assessments are very different exercises that require different methodologies, approach and assessments. Gitxaala would be happy to explain this further with the BC EAO and Canada should you have questions.
- 9) It is not clear if there will be sufficient time or funding available for each step of the Draft Consultation Plan. It is Gitxaala's experiences that unless these issues are discussed as early as possible, and unless there is a clear process for obtaining extensions and identifying capacity funding needs at various stages of the consultation process, the proposed process is likely to undermine Gitxaala's ability to participate meaningfully in the environmental assessment and consultation processes rather than facilitate it.

Next, Gitxaala is concerned that the Draft Consultation Process lacks clarity respecting whether the Crown (including the Crown in right of British Columbia and the Crown in right of Canada) will consult Gitxaala regarding not only direct effects, but also regarding indirect and cumulative effects to Aboriginal Rights. Since *Haida Nation* set out the basic framework for the duty to consult, courts have been commenting on the role cumulative impacts are to play in consultation. In *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, the Supreme Court of Canada made it clear that the effect of a decision could not be looked at in isolation but had to be looked at in the context of other developments that may have a detrimental impact on the ability of the First Nation in question to enjoy and exercise their rights:

[21] Trapline #143 was registered to Johnny Sam, a member of the LSCFN. His trapline is in a category administered by the Yukon government, not the First Nation. It helps him to earn a livelihood as well as to provide a training ground for his grandchildren and other First Nation youth in the ways of trapping and living off the land. The trapline covers an area of approximately 21,435 hectares. As noted by the Court of Appeal, the 65 hectares applied for by Mr. Paulsen is approximately one-third of one percent of the trapline. A portion of the trapline had already been damaged by forest fire, which, in the LSCFN view, added to the significance of the loss of a further 65 hectares. The severity of the impact of land grants, whether taken individually or cumulatively, properly constituted an important element of the consultation with LARC and, ultimately, a relevant consideration to be taken into account by the Director in reaching his decision.

Similarly, in *West Moberly*, 2011 BCCA 247, the Court of Appeal responded to an argument that cumulative effects of existing and past projects are outside of the scope of project-specific consultation by noting that it is simply not possible to understand potential impacts of a proposed project without considering past, present and future developments:

[117] I do not understand *Rio Tinto* to be authority for saying that when the “current decision under consideration” will have an adverse impact on a First Nations right, as in this case, that what has gone before is irrelevant. Here, the exploration and sampling projects will have an adverse impact on the petitioners’ treaty right, and the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners’ treaty right to hunt.

[118] The amended permits authorized activity in an area of fragile caribou habitat. Caribou have been an important part of the petitioners’ ancestors’ way of life and cultural identity, and the petitioners’ people would like to preserve them. There remain only 11 animals in the Burnt Pine herd, but experts consider there to be at least the possibility of the herd’s restoration and rehabilitation. The petitioners’ people have done what they could on their own to preserve the herd, by banning their people from hunting caribou for the last 40 years.

[119] To take those matters into consideration as within the scope of the duty to consult, is not to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from pursuit of the exploration programs.

...

[125] I am therefore respectfully of the view that to the extent the chambers judge considered future impacts, beyond the immediate consequences of the exploration permits, as coming within the scope of the duty to consult, he committed no error. And, to the extent that MEMPR failed to consider the impact of a full mining operation in the area of concern, it failed to provide meaningful consultation. [Emphasis added]

Respectfully, the requirement that the Crown consult about direct, indirect and cumulative effects to each of the Section 35 rights asserted by Gitxaala above, as well as direct, indirect and cumulative effects to Gitxaala’s culture and socio-economic conditions should be made crystal clear in the Draft Consultation Plan.

Gitxaala is also greatly concerned that the Draft Consultation Plan excludes First Nations such as Gitxaala from the development of the proponent’s consultation plan, particularly in light of the Crown’s over-reliance on the Proponent to discharge significant aspects of Crown consultation. Similarly, the Draft Consultation plan should require that Gitxaala have opportunities to comment on the veracity and completeness of the proponent’s consultation report – it has been Gitxaala’s experiences that proponents routinely misuse consultation report and mischaracterize

the concerns and comments raised by Gitxaala in those reports. Gitxaala asks that an express provision be included in the Order requiring consultation plans and reports to be prepared, both by the proponent and the Crown, with input from the First Nations, including Gitxaala.

#### Conclusion

Gitxaala looks forward to meeting with BC EAO to develop a properly scoped and procedurally fair and effective environmental assessment process and a meaningful consultation process for the Project. Please contact my office to arrange a meeting to discuss these matters prior to any decision on the Order and Draft Consultation Process.

By copy of this letter, Gitxaala is also requesting that representatives of Canada meet with Gitxaala and putting the Crown on notice that Gitxaala has serious concerns with Canada's efforts to delegate its environmental assessment and Crown consultation obligations, as well as other obligations under s.91(24) of the Constitution Act, 1867.

Yours truly,

Janes Freedman Kyle Law Corporation

Per:



For Robert J.M. Janes  
RJMJ/mag/nf

cc: Kenneth Howes, BC EAO ([Kenneth.Howes@gov.bc.ca](mailto:Kenneth.Howes@gov.bc.ca))  
Adrienne Butler, BC EAO ([Adrienne.Butler@gov.bc.ca](mailto:Adrienne.Butler@gov.bc.ca))  
Canadian Environmental Assessment Agency ([LNGCanada@ceaa-acee.gc.ca](mailto:LNGCanada@ceaa-acee.gc.ca) &  
[Celine.Legault@ceaa-acee.gc.ca](mailto:Celine.Legault@ceaa-acee.gc.ca))  
The Honourable Denis Lebel, Minister of Transport Infrastructure and Communities  
[denis.lebel@parl.gc.ca](mailto:denis.lebel@parl.gc.ca)  
The Honourable Keith Ashfield, Minister of the Department of Fisheries and Oceans  
[keith.ashfield@parl.gc.ca](mailto:keith.ashfield@parl.gc.ca)  
The Honourable Joe Oliver, Minister of Natural Resources Canada [Minister.Ministre@NRCan-RNCan.gc.ca](mailto:Minister.Ministre@NRCan-RNCan.gc.ca); [joe.oliver@parl.gc.ca](mailto:joe.oliver@parl.gc.ca)



## GITXAALA ENVIRONMENTAL MONITORING

280-110 1<sup>st</sup> Ave West - Prince Rupert, BC Phone (250)-624-3339 Fax (250)624-3338

May 31, 2013

30050-20/LNGC-04

Scott Bailey, Executive Project Director  
BC Environmental Assessment Office  
PO Box 9426 Stn Prov Govt  
Victoria, BC V8W 9V1

FILE COPY

Via Email: [scott.bailey@gov.bc.ca](mailto:scott.bailey@gov.bc.ca)

Dear Scott Bailey;

**Re: Section 11 Order for LNG Canada (Ref # 103064)**

Please be advised that the Gitxaala Nation via the Gitxaala Environmental Monitoring (GEM) office has completed its review of the section 11 Order included in the April 3, 2013 letter to Chief and Council.

The foremost concern that Gitxaala has, regarding this project, is surrounding the Aboriginal Consultation Plan. For approximately the last six months, Gitxaala has been attempting to negotiate terms of this environmental assessment with the proponent. Despite a detailed Engagement Protocol being drafted and signed by both parties, there has not been any progress with funds being allocated to Gitxaala in order to allow us to meaningfully participate in this process. Gitxaala and the GEM office have been forced to divert resources from other important departments in order to engage with the proponent, but will not be able to continue participating in the environmental assessment until capacity funding is secured. Additionally, baseline studies have been carried out by the proponent within Gitxaala territory without prior approval or consultation, which expressly contradicts terms set out in the Protocol Agreement. Gitxaala has therefore lost confidence in this consultation process, and disagree that these regulatory approvals processes should be able to continue while our concerns are being dismissed.

Because of this record of poor consultation on behalf of the proponent, Gitxaala will need to see a strong Aboriginal Consultation Plan in place, with strict consequences included if the proponent continues to ignore their consultation responsibilities. Section 15 of the Order should include regular reporting directly to First Nations as well as the Project Assessment Lead, at any time they request a consultation report. We also expect to be fully involved in selection of the Valued Components for this project.

Also, if the substitution of the provincial EA process is granted for that of the federal, the section 11 Order should include consideration of alternate means of carrying out the project, pursuant to section 19 (1)(g) of CEAA 2012. Natural gas-fired refrigeration systems may release more environmental contaminants than alternative systems, and other shipping routes than that included in the Project



## GITXAALA ENVIRONMENTAL MONITORING

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Description should be considered, since this is could be a way to avoid many of the areas of Gitxaala concern.

Thank you for your interest in the views of the Gitxaala Nation. Please contact me with any questions or further information.

Yours truly,

Dillon Buerk  
Environmental Assessment Coordinator

Cc. Chief Conrad Lewis – Gitxaala Nation

Cc. Deputy Chief Clarence Innis – Gitxaala Nation

Cc. Mark Ignas, Business Manager – Gitxaala Nation



Mayall, Jane EAO:EX

FILE COPY

**From:** Bailey, Scott EAO:EX  
**Sent:** Tuesday, June 18, 2013 3:28 PM  
**To:** Howes, Kenneth EAO:EX  
**Cc:** Mayall, Jane EAO:EX; Hubert, Edwin EAO:EX  
**Subject:** 30050-20/LNGC-04 Fw: Gitxaala Nation - Shipping Activities Working Group (LNG Canada)

---

**From:** Robert Veitch [<mailto:rveitch@farris.com>]  
**Sent:** Tuesday, June 18, 2013 01:12 PM Pacific Standard Time  
**To:** Bailey, Scott EAO:EX; Butler, Adrienne L EAO:EX  
**Subject:** Gitxaala Nation - Shipping Activities Working Group (LNG Canada)

Dear Scott and Adrienne,

We represent the Gitxaala Nation ("Gitxaala"). Pursuant to the order under section 11 issued on June 6, 2013, Gitxaala is to be part of the Shipping Activities Working Group for the LNG Canada Export Terminal Project.

Gitxaala is seeking clarification as to

1. Who is running the Shipping Activities Working Group (i.e. who is the Project Assessment Lead)?
2. When and where the first Shipping Activities Working Group meeting will take place.

Please advise.

Best Regards,

Robert Veitch  
*Associate*

**FARRIS**

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Thank you.

Mayall, Jane EAO:EX

FILE COPY

**From:** Robert Veitch [rveitch@farris.com]  
**Sent:** Tuesday, June 18, 2013 3:48 PM  
**To:** Butler, Adrienne L EAO:EX  
**Cc:** Bailey, Scott EAO:EX; Hubert, Edwin EAO:EX; Mayall, Jane EAO:EX  
**Subject:** 30050-20/LNGC-04 RE: Gitxaala Nation - Shipping Activities Working Group (LNG Canada)

Hi Adrienne,

Thank you for your reply. That information is helpful.

Robert Janes is lead counsel for Gitxaala Nation with respect to environmental assessment matters. We represent Gitxaala Nation in certain other matters and coordinate, at times, with Mr. Janes.

This was merely a request for information. Sorry for any confusion this may have created with respect to Gitxaala Nation's legal representation for the environmental assessment process.

Best Regards,

Robert Veitch  
Associate

**FARRIS**

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25th Floor, 700 W Georgia St  
Vancouver, BC V7Y 1B3

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Thank you.

---

**From:** Butler, Adrienne L EAO:EX [mailto:Adrienne.Butler@gov.bc.ca]  
**Sent:** June 18, 2013 3:35 PM  
**To:** Robert Veitch; Bailey, Scott EAO:EX  
**Cc:** Bailey, Scott EAO:EX; Hubert, Edwin EAO:EX; Mayall, Jane EAO:EX  
**Subject:** RE: Gitxaala Nation - Shipping Activities Working Group (LNG Canada)

Hello, Robert:

Thank you for your email. The project assessment lead for the proposed LNG Canada Project, as specified on the section 11 order, is Scott Bailey. Ken Howes is the lead on First Nations for EAO for the proposed project. Emails for both Scott and Ken are included in the cc line above.

The first Working Group meeting is being held today and tomorrow (June 18 & 19) in Kitimat. One of the objectives at the meeting is for the Working Group to delineate which activities fall under Shipping vs. Facility Working Groups. Dillon Beurk of Gitxaala Nation has confirmed attendance at tomorrow's meeting.

The EAO understands, further to a letter dated May 31, 2013 from Robert Janes, that the firm Janes, Friedman and Kyle is representing the Gitxaala Nation. We request clarification on this point as we are preparing a response to Mr. Janes' letter which addresses comments raised by Gitxaala regarding the section 11 Order, including comments on working group composition that reflect questions similar to yours. The EAO has also agreed to a request to meet with Gitxaala to discuss directly, and we are still awaiting confirmation on a date and location.

Sincerely,

**Adrienne Butler**

Environmental Assessment Officer  
B.C. Environmental Assessment Office  
Phone: (250) 387-0215 | fax: (250) 356-7477

---

**From:** Robert Veitch [mailto:rveitch@farris.com]  
**Sent:** Tuesday, June 18, 2013 1:12 PM  
**To:** Bailey, Scott EAO:EX; Butler, Adrienne L EAO:EX  
**Subject:** Gitxaala Nation - Shipping Activities Working Group (LNG Canada)

Dear Scott and Adrienne,

We represent the Gitxaala Nation ("Gitxaala"). Pursuant to the order under section 11 issued on June 6, 2013, Gitxaala is to be part of the Shipping Activities Working Group for the LNG Canada Export Terminal Project.

Gitxaala is seeking clarification as to

1. Who is running the Shipping Activities Working Group (i.e. who is the Project Assessment Lead)?
2. When and where the first Shipping Activities Working Group meeting will take place.

Please advise.

Best Regards,

Robert Veitch  
Associate



Farris, Vaughan, Wills & Murphy LLP  
25th Floor, 700 W Georgia St  
Vancouver, BC V7Y 1B3

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Thank you.



## GITXAALA ENVIRONMENTAL MONITORING

280-110 1<sup>st</sup> Ave West - Prince Rupert, BC Phone (250)-624-3339 Fax (250)624-3338

June 24, 2013

Scott Bailey, Executive Project Director  
BC Environmental Assessment Office  
PO Box 9426 Stn Prov Govt  
Victoria, BC V8W 9V1

*Via Email: [scott.bailey@gov.bc.ca](mailto:scott.bailey@gov.bc.ca)*

Dear Scott Bailey;

**Re: Valued Components selection for LNG Canada's proposed export facility.**

This letter is to follow up on questions and concerns raised in the June 18 and 19<sup>th</sup> Working Group meeting in Kitimat. To start off with comments on the Environmental Valued Components (VCs) selected by the proponent:

- Potential future climatic conditions should be reflected in the environmental assessment. Climate change is already affecting precipitation and storm patterns, and the EA should take into account changes in water supply, as well as extreme storm and wind events.
- The noise and wake assessments should include tugboats as well as the tankers, as the tugs may in some cases cause larger wakes and acoustic disturbance than the tankers. These wake studies should not only be based on mathematical models, but be confirmed through field studies. There should also be noise monitors along the highway between Kitimat and Terrace to measure the noise levels due to large volume and size of traffic, especially during the construction phase.
- Water quality and wetlands are important enough to be their own VC categories. Even though water quality can be measured by other terminal VCs such as fish populations, there is also the question of eutrophication and enrichment from nitrogen deposition in lakes, streams, and oceans, as well as pH, dissolved organic carbon, and other attributes that may be missed if only studying fish mortality. Wetlands are essential habitats for many species, and cannot be left out of the assessment with the aim of assessing indirectly via other VCs. Lakes are currently not part of the assessment's scope, despite having potential effects from acidification.
- Intertidal surveys are currently only being planned for the area of the project footprint. This project is large enough to affect intertidal areas far outside of the immediate footprint, and the scope of the assessment should capture these non-local effects. There is also the question of how and where to dispose of sediments from any dredging associated with this project, and toxicity tests should be carried out to find out what specific toxins are present.
- The visual aesthetic of pristine areas should also be somehow measured. There is little to no commercial tanker traffic in much of the proposed tanker routes at the present moment, and there will be a large visual impact from hundreds of tankers per year passing through this pristine area. There is currently no visual quality assessment planned for the shipping lane.



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Regardless of the safety standards involved with this project, the *perception* of safety/danger is often as much of a barrier to access as actual danger.

- Different green house gases (GHGs) have different properties and behaviours in the environment, and should be split up and looked at separately to properly assess the effects of each. The deposition patterns in Kitimat Valley will likely require a larger scope than what is currently proposed. Certain vegetation and fungi can hyper-accumulate toxins, which could affect populations up the valley as far as Terrace or beyond. Acidification due to NOx compounds will also impact vegetation and water resources in the area.

For the Social and Economic VCs:

- There should be a study of the change in availability of goods and services, in addition to the change in labour availability, regional economy, and cost of living. The scope of all socioeconomic VCs will need to look beyond Kitimat and Terrace.
- The traffic study should include air and rail travel, not only road and marine. There will be changes to public access to Douglas Channel, and emergency planning for natural disasters should be reflected in the EA.
- There will be a significant "bottleneck" effect when it comes to finding enough pilots for this and other projects. Currently, there are only 108 registered pilots in BC. This is not enough for the 350 tankers/year currently planned for this project, let alone the multitude of other proposed projects that will require pilots. The pilotage training and apprenticeship program takes several years, which could impact supply of available pilots by the time they are needed.

For Health and Heritage VCs:

- The baseline country food contaminants study is based on background information only. There should be some field work planned to ground-truth these studies, especially with knowledge of how some vegetation and fungi can accumulate toxins far higher than background soil and air levels.
- The aboriginal view of wellness is different than the "community health and wellness" currently being scoped for. Aboriginal groups should be consulted to align the health and wellness studies with their values, and incorporate traditional ecological knowledge. The current studies planned are limited to Kitimat and Terrace, but should also involve effects on Gitxaala, using input from community members.
- The health and wellness studies should also look at cohesion of, resilience to, and recovery from effects of the proposed project.

On a more general note, Stantec's presentation of their material at this meeting left something to be desired. For future presentations, they should provide the most recent and up-to-date information. It is difficult to identify gaps in the selection and rationale of Valued Components and Key Indicators when the material presented to the group is not current. For example, the information sheets that were



## GITXAALA ENVIRONMENTAL MONITORING

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handed out contained proposed VCs, rationale for inclusion, and potential adverse effects, but lacked the measurable parameters that we were discussing, making for a confusing and difficult identification of what was missing.

Further, Fisheries and Oceans were not present at the meeting. I understand that there have been many budget cuts, but much of the discussion hinged on fish and fish habitat, including permanent or harmful disruption of this habitat due to project effects. As a federal body mandated to manage and help mitigate the disruption of fish and fish habitat, they would be a valuable resource to have at these Working Group meetings.

Gitxaala would like to see the points above addressed within the draft Information Application Requirements being submitted by the proponent. If there are any concerns that will not be attended for any reason, please feel free to contact me.

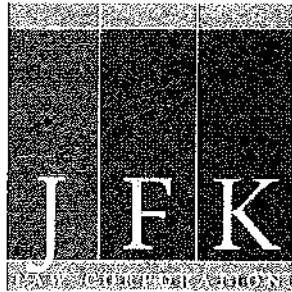
Yours truly,

Dillon Buerk  
Environmental Assessment Coordinator

Cc. Chief Conrad Lewis – Gitxaala Nation

Cc. Deputy Chief Clarence Innis – Gitxaala Nation





P22 COPY  
30050-20/LNGC-04

# JANES FREEDMAN KYLE

## LAW CORPORATION

Suite 816 1175 Douglas Street  
Victoria, BC V8W 2E1  
Phone: 250.405.3460 Fax: 250.381.8567  
www.jfklaw.ca

July 18, 2013

**Delivered by Courier**

Robert J.M. Janes  
Direct Line: 250.405.3466  
E-mail: rjanes@jfklaw.ca

File No. 1023-017

BC Environmental Assessment Office  
4<sup>th</sup> Floor, 836 Yates Street  
Victoria, BC V8W 1L8

Attention: Ken Howes, Project Assessment Manager

Dear Sirs/Mesdames:

**Re: Environmental Assessment for Proposed LNG Canada Export Terminal Project**

We write in response to your letter dated June 21, 2013. Gitxaala looks forward to meeting with the Environmental Assessment Office ("EAO") to discuss the environmental assessment ("EA") process for the proposed LNG Canada Export Terminal Project (the "Project"). We will be in touch shortly regarding possible dates for a meeting.

Gitxaala remains concerned that the proposed EA process for the Project must fully assess the potential direct, indirect, and cumulative impacts of the Project on Gitxaala's Section 35 rights. As set out in previous correspondence, Gitxaala's view is that the Scope of the Assessment as set out in the Section 11 Order does not allow for an adequate assessment of impacts from the Project to Gitxaala's Aboriginal rights and title. By way of letter dated May 31, 2013, Gitxaala provided EAO with a list of issues that need to be included in the Scope of the Assessment in order to adequately assess potential impacts from the Project. Gitxaala wishes to discuss the inclusion of these issues in the EA process when they meet with EAO.

To support Gitxaala's position that these issues must be included in the Scope of the Assessment, we refer you to information Gitxaala has provided to the Province in relation to Gitxaala's rights and title. As you are aware, over the years Gitxaala has provided the Province with a considerable amount of information about the nature of their rights and interests. Most recently, Gitxaala participated in the Joint Review Process for the Northern Gateway Project, a process in

relation to the EA process for the Project? What assurances has the Province given CEAA in relation to its ability to meet the *CEAA 2012* time limits?

By copy of this letter, Gitxaala also requests that CEAA advise Gitxaala of any assurances received from the Province concerning EAO's ability to meet the time limits set out in s. 52 of *CEAA 2012* in relation to the review of the Project.

Gitxaala looks forward to meeting with EAO to discuss these issues as well and the development of a thorough, properly scoped and procedurally fair environmental assessment process and meaningful consultation process for the Project.

Yours truly,

Janes Freedman Kyle Law Corporation

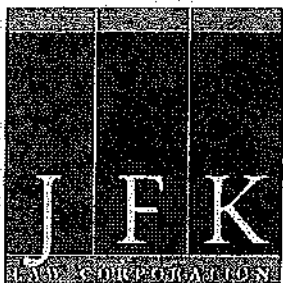
Per:

  
Robert J.M. Janes

RJMJ/vcm/ejr

Enclosure

cc: Scott Bailey, BC EAO (via e-mail Scott.Bailey@gov.bc.ca - w/o enclosure)  
Vivian Au, CEAA (via e-mail vivian.au@ceaa-acee.gc.ca - w/o enclosure)  
Honourable Lisa Raitt, Minister of Transport (via e-mail lisa.raitt@parl.gc.ca - w/o enclosure)  
Honourable Gail Shea, Minister of DFO (via e-mail gail.shea@parl.gc.ca - w/o enclosures)  
Honourable Joe Oliver, Minister of Natural Resources Canada (via fax 613.996.4516 -- w/o enclosures)



# JANES FREEDMAN KYLE LAW CORPORATION

Suite 816 - 1175 Douglas Street  
Victoria, BC V8W 2E1  
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www.jfklaw.ca

September 13, 2013

**Delivered by E-mail (Kenneth.Howes@gov.bc.ca)**

Robert J.M. Janes  
Direct Line: 250.405.3466  
E-mail: rjanes@jfkaw.ca

File No. 1023-017

BC Environmental Assessment Office  
4<sup>th</sup> Floor, 836 Yates Street  
Victoria, BC V8W 1L8

Attention: Ken Howes, Project Assessment Manager

Dear Mr. Howes:

**Re: Environmental Assessment for Proposed LNG Canada Export Terminal Project  
(the "Project")**

We write further to our meeting of September 6, 2013 in Vancouver to discuss issues arising out of the Section 11 Order and the manner in which the Order is being implemented by LNG Canada Development Inc. (the "Proponent"). This letter should be read in conjunction with our letter of May 31, 2013 and should be taken as supplementing that letter and not narrowing or replacing it.

We also write to provide some overarching comments on the Draft Application Information Requirements ("DAIR") that are being considered by the Working Group, the Proponent and the Environmental Assessment Office ("EAO"). These comments should be read in conjunction with further comments coming from our environmental and traditional land use study consultants, which will be forthcoming by September 26, 2013.

The overarching issue which we believe needs immediate attention is the manner in which Aboriginal Interests, as well as Aboriginal title and Aboriginal rights, are being treated in this process. This issue has a number of aspects.

### **Failure to Explicitly Address Section 35 Rights**

We remain concerned that the Section 11 Order and the DAIR in its current form fails to expressly articulate any explicit requirement that the environmental assessment include a specific assessment of effects associated with the Project on Aboriginal title and Aboriginal rights. While the Section 11 Order defines Aboriginal interests to include 'asserted Aboriginal rights, including title, or such determined Aboriginal or treaty rights', the DAIR itself relies exclusively on the collection of 'traditional use and traditional knowledge' that the Proponent 'will use to inform our understanding of potential effects on Aboriginal interests.' The DAIR currently lacks any identification of valued components specific to Aboriginal rights and title.

Due to the lack of specificity in the DAIR with respect to Section 35 rights, we fear that the EAO and the Proponent both assume that the question of adverse effects on rights can be meaningfully assessed by using the effect on a biophysical component as a proxy for effects on rights. That is, if a study is undertaken on a biophysical component of the environment (such as fish or fish habitat for example) the significance of such effects can be used to assess the significance of the effect on the exercise of an Aboriginal right. If an adverse effect is noted on fish or fish habitat used for the purpose of exercising a Section 35 right, then it can be inferred that there is a corresponding adverse effect on the exercise of the Section 35 right. Conversely, if no adverse effect is noted on a biophysical component there would be no adverse effect on the exercise of the corresponding Section 35 right. This logic is faulty for a number of reasons.

First, it ignores the fact that an effect to a biophysical component may be seemingly acceptable in size and scope to a non-Aboriginal user, but may be unacceptable depending upon the nature and location of the Aboriginal usage. For example, an adverse effect to fish which does not affect the overall viability of that population of fish species may be considered acceptable; however, the same effect may render fish unsuitable for the purposes of personal consumption in the context of the exercise of a Section 35 right in a particular area. Similarly, a situation could result where harvesters cannot exercise their rights in their preferred locations, using their preferred means. This is particularly so given the fact there may be issues of whether the resource is still perceived to be suitable or even safe for Section 35 purposes as a result of Project effects, or perceived Project effects associated with contamination risks. A properly designed and implemented environmental assessment should reflect this. It is our concern that the DAIR as drafted is over-narrowly focused on biophysical effects and therefore neglects the cultural and social aspects of these effects.

Second, this approach ignores the fact that effects on the exercise of Section 35 rights flowing from the Project (including malfunctions) may be indirect. For example, if ordinary operations in the form of shipping lead Gitxaala fishermen to abandon net-based fishing in Principe Channel due to safety concerns (perceived or real), this will have been not only as a result of a direct obstruction, but also as a result of an indirect pathway. The DAIR, as currently written, will not require the EA application to fully describe or assess the significance of effects to the exercise of Gitxaala rights. Furthermore, effects on the status of the hereditary chiefs and their ability to exercise their governance rights will be completely overlooked if the focus is only on biophysical and socioeconomic Valued Components ("VCs").

This issue is largely centred on the question of whether VCs should be limited to standard biophysical and socioeconomic components, or if VCs should be identified in a manner that encompasses the exercise of Aboriginal rights and Aboriginal title. The Proponent has refused to identify VCs that relate to activities carried out by Gitxaala. This position largely flows from its interpretation of the Section 11 Order. In our view, this fails to appreciate the distinction made in the *Canadian Environmental Assessment Act, 2012* between effects on biophysical components and effects on "current use of lands and resources for traditional purposes." The latter is clearly focused on assessing the effects on an activity - "use ... for traditional purposes" - and not just the effects on biophysical components of the environment.

In our view, the EAO should direct the Proponent to develop an appropriate set of VCs to address this issue. Absent this, there will be a significant information gap in the Proponent's application which will make it impossible for the EAO to assess the environmental effects covered by ss. 5(1)(c)(ii) and (iii).

#### **The Failure to Explicitly Require Examination of Cumulative Effects in Relation to Aboriginal Interests**

We are also concerned that the Section 11 Order on its face distinguishes Aboriginal Interests from other valued components in describing the scope of the assessment to be carried out. As discussed, on its face Section 3.1.2 does not include an express requirement that cumulative effects be considered in relation to effects on Aboriginal Interests. This is in contrast to Section 3.1.1 which does explicitly require consideration of cumulative effects in respect of non-Aboriginal interests. While the Section 11 order has been issued the Executive Director has the statutory power to correct this shortcoming under s. 13. The Executive Director can also ensure, to the extent possible that these issues are addressed in the DAIR in the context of factors that are subject to cumulative effects assessment.

Our concerns about this are two-fold. First, we believe that this leads to a potential conflict with the jurisprudence concerning the duty to consult. In *West Moberly First Nations v. British Columbia*, 2011 BCCA 247, the Court of Appeal agreed that the consideration of cumulative effects is pertinent to the proper assessment of the significance of the impact of a government decision on Section 35 right for the purpose of determining the depth of consultation needed in a particular case and to assess whether accommodation is necessary. Thus to the extent that the Crown is attempting to use the environmental assessment process as the core mechanism to discharge the information gathering aspects of the duty to consult (a position with which Gitxaala does not agree), the approach contemplated for this EA would mark a very serious departure from what the case law requires.

Second, we are also concerned that this approach to assessing effects on Aboriginal Interests is inconsistent with the EAO's statutory requirements, given that there has been an agreement that this matter will proceed as a substituted environmental assessment under the *Canadian Environmental Assessment Act*, as well as an assessment under the *Environmental Assessment Act, 2002*. Under the *Canadian Environmental Assessment Act, 2012* the assessment must assess the effects of the Project on "the current use of lands and resources for traditional

purposes" (s. 5(1)(c)(iii)) as well as on "physical and cultural heritage" (s. 5(1)(c)(ii)). Given that Gitxaala continues to extensively exercise and rely upon its harvesting rights (current land, water and resource use) and its governance rights (cultural heritage) in this area, these sections mandate an assessment of impacts on Aboriginal rights and culture, including title. Under s. 19 of the federal legislation the environmental assessment must also consider "the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project **and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out**" (2. 19(1)(a)). The EAO also requires consideration of the "likely impacts from a reviewable project, combined with the impacts from prior development, existing activities; and, reasonably foreseeable future development that is sufficiently certain to proceed." In combination it appears a proper construction of the *Canadian Environmental Assessment Act, 2012* and direction from the EAO both mandate consideration of exercised Aboriginal rights and Aboriginal title, as well the assessment of cumulative effects on rights and title.

Given that the Minister requested and agreed to substitution of the provincial EA for the federal EA pursuant to s. 32 of the *Canadian Environmental Assessment Act, 2012* it is necessary that the Executive Director ensure that the Section 11 Order and DAIR captures all of the considerations set out in s. 19(1) of the *Canadian Environmental Assessment Act, 2012* (see s. 34(1)). As such it is essential that the Section 11 Order and DAIR ensure that the consideration of effects on Aboriginal Interests also includes the assessment of cumulative effects on those Interests. In this case, we are concerned that the separation of effects on "Aboriginal Interests" from other effects and the exclusion of those interests from the assessment of cumulative effects are inconsistent with statutory requirements of both the *Canadian Environmental Assessment Act, 2012* and the British Columbia *Environmental Assessment Act, 2002*. In our view, the Executive Director should exercise his power under s. 13 of the *Environmental Assessment Act, 2002* to amend the Section 11 Order to rectify this flaw.

We note that at our September meeting, counsel for the EAO suggested that the separate treatment of Aboriginal Interests in the Section 11 Order and DAIR flowed from the idea that the assessment of effects on these interests would be guided by the jurisprudence regarding consultation and the treatment of cumulative effects in that regard. There are two problems with this suggestion. First, we believe (as outlined above) that the standard adopted in the Section 11 Order and the DAIR is inconsistent with the relevant case law as it does not include an explicit obligation to deal with cumulative effects on Aboriginal Interests. Second, even if this jurisprudence did not mandate dealing with cumulative effects as a part of consultation, cumulative effects would have to be dealt with as part of the statutory requirements under the governing legislation. That is, the statutory framework sets a floor for the consideration of cumulative effects even if the consultation jurisprudence did not.

We note that the approach taken to the assessment of biophysical effects and cumulative effects creates a very problematic situation in respect of the assessment of adverse effects on Aboriginal Interests and Section 35 rights in particular. The approach that has been taken to assessing the size and scope of an adverse effect on a VC will tend to under-estimate or effectively ignore adverse effects on these resources that have an adverse impact relevant to the exercise of Section 35 rights and the current use of lands and resources for traditional purposes. For example, there

are assumptions made with respect to the significance of local effects (assumed to be low) which may in fact be very significant in respect of the actual exercise of Section 35 rights (that is, current land use activities which are exercised locally). These assumptions permeate the DAIR and tend to understate, or underestimate, or simply fail to measure effects on Aboriginal Interests. The reality is that an assessment of effects on a regional or landscape level will often simply ignore or overlook the fact that Section 35 rights are commonly practised in very specific locations or are dependent upon very specific populations of fauna or flora. Similarly, the significance of an effect on the intergenerational transmission of a practice may be very great even if the affected resource is restored to pre-disturbance levels over an extended period of time. That is, if a resource is restored to pre-disturbance levels in 100 years, this may reduce the significance of the effect at a biophysical level, but may have devastating effects in terms of the ability of the First Nation to transmit its culture, way of life, and continued use of lands and resources to future generations.

This has a consequential result in respect of the assessment of cumulative effects. Under existing environmental assessment methodologies used by the EAO, cumulative effects assessment depends upon the identification of residual effects. While we expressed our concerns about the approach adopted by the EAO in respect of the assessment of cumulative effects, the EAO's focus on the identification of significant residual effects makes it critical that effects and their significance are properly assessed with a view to Aboriginal Interests, the current use of land and resources for traditional purposes, culture and Aboriginal title and Aboriginal rights. Given that the proposed approach to the assessment of the significance of these effects on these factors would underestimate and understate the significance of these effects, it is likely that significant residual effects will not be identified. Of course, since the proposed approach in the DAIR does not propose to directly assess the significance of impacts on Aboriginal Interests at all by the Proponent, there will be no clear and direct effort made to assess the potential for significant residual impacts (including cumulative effects) on Aboriginal Interests. This reinforces the importance of ensuring that the environmental assessment ensures that there is an appropriate assessment of impacts on Aboriginal Interests (including aboriginal title and aboriginal rights) carried out.

#### **Development of Application Information Requirements – Identification of Appropriate VCs**

A series of related problems have arisen with respect to the development of Application Information Requirements for the Proponent.

The current DAIR proposes that the EA Application will separate the scope of Aboriginal interests in Part C from the main effects assessments of valued components in Part B. The proposed requirements for Part B exclude matters of importance to Aboriginal peoples in the identification of potential adverse project effects and measurable parameters for each Valued Component. This current DAIR appears to have deferred Gitxaala and Aboriginal interests to a "catch-all" section in Part C that lacks sufficient detail for the AIR to serve its intended purpose. A complete assessment of biophysical and human components, including cultural components, should be integrated into a comprehensive effects assessment following EAO guidance and

international best practice. There is obvious confusion among the EAO, the Proponent and their consultants, and the Working Group members as to how these different sections relate to each other. Until these issues are resolved it would be inappropriate to release the DAIR for comment. Instead the Proponent should be required to rework the DAIR to deal with these issues and return it to the Working Group for further, pre-comment review.

As an example, the confusion and mixed messages at the Working Group meeting were apparent in how the socioeconomic components were presented. At times during the Working Group meeting, Stantec/LNG Canada expressed their intention that Aboriginal interests would in large part be addressed in the Part B effects assessment. However, the spatial parameters proposed for socioeconomic components deliberately excluded coastal Aboriginal villages and surrounding areas (Figure 4.1-13). Gitxaala wonders where and how certain concerns will be addressed and leaves a major gap in the DAIR.

In addition to the above Part B/C issue, there are issues and input to EA scoping that have not been addressed yet in the DAIR. Examples include:

1. There are additional locations for acoustic monitoring in areas of concern to Gitxaala; The DAIR requirements thus far only require acoustic monitoring for "communities" along the shipping route, and not preferred harvesting locations. This outstanding issue was recognized by Stantec at the Working Group meeting. Also, the selected measurable parameters for acoustic quality assessment do not reflect potential effects from shipping.
2. The marine resources assessment has an unnecessarily narrow focus on underwater acoustic interaction from shipping.
3. There is no provision for Gitxaala confirmation of existing shoreline datasets identified by the Proponent as a primary source of information for baseline conditions.
4. The DAIR does not reflect a full description of mitigation measures already incorporated into the site selection and project design to prevent repetition of similar mitigation measures reiterated in the VC assessments.
5. Characterization of residual project effects criteria do not reflect consideration of criteria for identification of adverse effects on Section 35 rights (generational transmission; local effect assumed to be low; definition of substantial; ability of cultural effects to be reversible; pristine or undisturbed areas or regions assumed to be more resilient).
6. Concern about adverse effects (direct, indirect and cumulative) to shoreline resources and harvesting activities from tanker wake, which has not been recognized as a source of potential effect in the DAIR. Stantec has promised to provide background studies used to inform their opinions about wake, but these have not been delivered. If technical rationales for scoping decisions regarding serious concerns are not shared with Gitxaala (and other concerned Working Group members), then these issues should be included in the scope of the AIR until such time that there is strong technical reason to exclude them from the EA scope.



7. Indicator species selected for terrestrial and marine resources assessment do not reflect Aboriginal input, specifically Gitxaala input.
8. The scope of potential adverse Project effects is unnecessarily narrow for freshwater and estuarine fish and fish habitat.
9. The scope and locations of visual quality impact studies, sufficient to inform discussion about Gitxaala's concerns are absent; DAIR rationale for inclusion focuses solely on the LNG facility and marine terminal and not on shipping.
10. Marine shipping activities overall are minimized, focusing incorrectly on the LNG facility
11. There is no information about the assessment methodology proposed to identify effects resulting from accidents and malfunctions, other than that one will be carried out.
12. The Local Study Areas for the majority of valued components are improperly scoped in Principe Channel.
13. The Regional Study Areas for the majority of valued components are improperly scoped; some focus incorrectly on Indian Reserves only, some do not allow for consideration of current or future Gitxaala harvesting patterns.
14. Valued components specific to Gitxaala (including additional human and cultural components) are not reflected in the DAIR. Gitxaala anticipates an additional four (4) components will require study. The need to define which Gitxaala-specific components are going to be studied and how LNG Canada/Stantec intends to collect baseline data for these additional components are outstanding. It is unclear how the Proponent and its consultants intend to undertake these assessments given the timelines proposed.
15. The scope and methods of cumulative effects assessments may be VC dependent. At the Working Group meeting, the EAO recognized the need to discuss the approach with each First Nation.
16. Stantec committed to providing both the updated VC scoping report and project interactions matrix at the Working Group meeting last week and the EAO recognized it as important for the Working Group to complete their review of the scope of the DAIR. **This item is outstanding.**

#### **Development of Application Information Requirements -- Significance Determination**

An additional problem with the DAIR is that the Proponent, under the direction of the EAO, has developed an approach to assessing adverse effects on Aboriginal Interests, including Aboriginal rights and Aboriginal title, that excludes a determination of the acceptability of the effect of the Project on Aboriginal Interests, whether in terms of "significance" or some other threshold, from the Application. This not only has manifested itself in development of a "Part C" of the VCs

table to which VCs related to Aboriginal Interests will be relegated, but a declaration by the Proponent that they **will not** undertake the determination of significance specifically for components related to Aboriginal interests. The position taken by the Proponent is that while effects on these VCs will be assessed, the acceptability of these effects will not be determined. It is not at all clear where or by what methodology the assessment of these effects will be dealt with.

This approach is inconsistent with the statutory framework. The *Canadian Environmental Assessment Act, 2012* requires under s. 19(1)(b) that the **significance** of the effects dealt with in s. 19(1)(a) be considered. This explicitly requires consideration of significance of impacts on Aboriginal Interests and therefore requires assessment of the acceptability of those impacts. The failure to assess the acceptability of impacts to Aboriginal Interests is a failure to consider a statutorily mandated factor.

In addition, in the context of the duty to consult, a threshold of "significance" is not appropriate for assessing potential impacts to Aboriginal rights. "Significance" is neither the trigger for consultation, nor the test for an infringement of Aboriginal rights. More appropriate thresholds, and criteria for characterizing the acceptability of Project effects, need to be delineated for assessing impacts to rights, and should reflect the need to consider things like preferred means and places for exercising rights. Appropriate sources of information need to be used when establishing the criteria and thresholds for assessing potential impacts to rights, such as traditional ecological knowledge, traditional use data, anthropological and ethno-historical resources and other relevant literature.

Given this significant flaw in the methodology that is being adopted, the EAO should direct the Proponent to revisit its development of the VCs and eliminate the concept of a Part C assessment that does not include an assessment of the acceptability of the effect of the Project on Aboriginal Interests.

As an overarching matter, Gitxaala notes that the relegation of Aboriginal Interests to "Part C" and the decision to exclude the consideration of the significance of the effects on those interests is contrary to the principles of reconciliation. This sends a clear message to Gitxaala that not only are Aboriginal rights and Aboriginal title not being taken seriously (being not named and merely encompassed under the vague heading of "Aboriginal Interests") but that even their Aboriginal Interests are being relegated to a separate category that is subject to lower levels of assessment and scrutiny. As noted by the EAO in the meeting on September 6, 2013, clear methodologies and approaches to assessing the effects and the significant effects on Aboriginal Interests have not been developed. The solution to this deficiency is not to avoid undertaking the assessment, but instead to commence the process of developing the necessary methodologies, in consultation with the potentially affected First Nations. The message that is being sent at this point is that Aboriginal people, including Gitxaala, are being relegated to a second class process with no clear means of properly assessing effects and the significance of effects on their Aboriginal Interests, including their Section 35 rights. Given the number of LNG projects being proposed in Gitxaala's Territory, this is particularly disconcerting. Project effects, including cumulative effects, to Gitxaala's Aboriginal rights and title need to be properly assessed in the EA for this proposed Project. As currently drafted, the DAIR does not set the foundation for this to happen.

### **Fiscal Support for First Nations Costs of Participation and Information Gathering**

As noted in the meeting on September 6, 2013, Gitxaala is being required to incur very substantial costs to engage with the various proponents of LNG projects. These proponents are required to obtain information from Gitxaala to fulfill the statutory and regulatory requirements of the federal and provincial environmental assessment processes. This information is to be used to further the proponents' goals of satisfying the statutory requirements and advance their projects toward approval. The process of gathering and analyzing this information so that it can be provided to the proponents for use in their applications is expensive and time consuming. It requires the dedication of administrative time at Gitxaala, as well as the costs associated with retaining consultants and legal advisors to participate in the process. Gitxaala does not have the option of declining to participate since the result would be that its interests were neglected in the assessment.

The Proponent has exacerbated this situation by describing in Section 15 of the DAIR, that information from Aboriginal groups will only be utilized by the Proponent to understand the potential effects on Aboriginal interests if it is "available at the time of writing." In other words, the Proponent intends to submit its application to the BCEAO if, and only if, Aboriginal groups, including Gitxaala, can provide it with relevant information in time. As Gitxaala is currently without a concluded capacity agreement with the Proponent outlining the necessary funding to collect that information, Gitxaala is mystified as to how Gitxaala will accomplish these tasks.

It is our view that the Executive Director should make it clear in the Section 11 Order (and amend it if need be) that proponents are required to provide reasonable capacity to cover the costs of First Nations participating in the EA process. This includes capacity for the investment of internal time by band officials and employees, compensation for TUS/TEK/TLU consultants and for legal advice as well as associated disbursements and costs. This is clearly within the mandate of the EAO as Section 11 provides that the Executive Director has broad powers to determine the process by which the assessment is to be conducted, including what third parties are to be consulted and the means by which such consultation is to be carried out. This is generally consistent with the principle that the costs of the assessment should be carried by the Proponent and not by members of the public. It is also consistent with the honour of the Crown as it would be rendered inconsistent with the honour of the Crown to establish a process for participation which is essentially inaccessible to First Nations because of costs, or which imposes significant costs on First Nations which essentially accrue to the benefit of the Proponent.

We look forward to hearing from you shortly on these important matters. We ask that no decision be made in relation to finalizing the DAIR until there has been meaningful engagement with Gitxaala on its issues and concerns.

Yours truly,

Janes Freedman Kyle Law Corporation

Per:



Robert J.M. Janes  
RJM/VCM/ejr

cc: Steven Francis, LNG Canada/Shell (via e-mail [steven.francis@shell.com](mailto:steven.francis@shell.com))  
Dan Kolenick, LNG Canada/Shell (via email [Dan.Kolenick@shell.com](mailto:Dan.Kolenick@shell.com))  
Vivian Au, CEAA (via e-mail [vivian.au@ceaa-acee.gc.ca](mailto:vivian.au@ceaa-acee.gc.ca))  
Debbie Chan, Ministry of Justice and Attorney General (via email [Debbie.Chan@gov.bc.ca](mailto:Debbie.Chan@gov.bc.ca))

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**Mayall, Jane EAO:EX**

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**Subject:** 30050-20/LNGC-04 FW: Interaction Table for LNG Canada Project  
**Attachments:** LNG Canada\_WG2 minutes\_11Sept13.docx

**From:** Virginia Mathers [mailto:VMathers@jfklaw.ca]  
**Sent:** Tuesday, September 24, 2013 05:45 PM Pacific Standard Time  
**To:** Howes, Kenneth EAO:EX  
**Cc:** tracy.campbell@calliougroupp.com <tracy.campbell@calliougroupp.com>; Leslie Beckmann <LBeckmann@pggroupp.com>; Robert Janes <RJanes@jfklaw.ca>  
**Subject:** Interaction Table for LNG Canada Project

Dear Kenneth,

On behalf of the Gitxaala First Nation, I am writing to follow up on an action item from the LNG Canada Working Group meetings on September 4/5, 2013.

At these meetings, the EAO committed to circulating an "interaction table" to Working Group members. (Action Item 10 from the attached Working Group Meeting minutes).

Please advise as to the status of this Action Item. This information is required by Gitxaala in order to adequately prepare their comments on the draft AIR due this Thursday.

Regards,  
Virginia

**Virginia C. Mathers**

Janes Freedman Kyle Law Corporation  
340 - 1122 Mainland Street  
Vancouver, BC V6B 5L1

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Page 070 to/à Page 084

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**Mayall, Jane EAO:EX**

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**From:** Virginia Mathers <VMathers@jfkllaw.ca>  
**Sent:** Wednesday, September 25, 2013 5:55 PM  
**To:** Howes, Kenneth EAO:EX  
**Cc:** 'tracy.campbell@calliougroupp.com'; 'Leslie Beckmann'; Robert Janes; Bailey, Scott EAO:EX; Hubert, Edwin EAO:EX; Mayall, Jane EAO:EX; 'Russell.Morrison@shell.com'  
**Subject:** 30050-20/LNGC-04 RE: Interaction Table for LNG Canada Project

Hi Ken,

Gitxaala requires the interaction table in order to ensure that all interactions have been considered and that the appropriate VCs have been selected.

Gitxaala is still able to provide its comments on the dAIR, but may need to submit additional comments following the circulation of the interaction table as they may be incomplete without this information.

Many thanks,

**Virginia C. Mathers**

Janes Freedman Kyle Law Corporation  
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**From:** Howes, Kenneth EAO:EX [mailto:Kenneth.Howes@gov.bc.ca]  
**Sent:** Wednesday, September 25, 2013 12:39 PM  
**To:** Virginia Mathers  
**Cc:** 'tracy.campbell@calliougroupp.com'; 'Leslie Beckmann'; Robert Janes; Bailey, Scott EAO:EX; Hubert, Edwin EAO:EX; Mayall, Jane EAO:EX; 'Russell.Morrison@shell.com'  
**Subject:** RE: Interaction Table for LNG Canada Project

Hi Virginia,

As stated in the minutes under action item #10 (copied below), the interaction table will be circulated prior to the end of the public comment period; that is the current status. An interaction table is not usually incorporated in dAIR

documents. Please elaborate on how this represents a challenge for Gitxaala Nation to provide comments on the dAIR, and how EAO may be able to assist through further discussion.

- Matt Hammond asked if an interaction table has been circulated. LNGC indicated that it has not, but it could be developed and circulated to the working group with time for review before the end of the public comment period. (ACTION ITEM #10)

Regards,  
Ken

---

**From:** Virginia Mathers [<mailto:VMathers@jfkllaw.ca>]  
**Sent:** Tuesday, September 24, 2013 5:45 PM  
**To:** Howes, Kenneth EAO:EX  
**Cc:** [tracy.campbell@calliougroupp.com](mailto:tracy.campbell@calliougroupp.com); Leslie Beckmann; Robert Janes  
**Subject:** Interaction Table for LNG Canada Project

Dear Kenneth,

On behalf of the Gitxaala First Nation, I am writing to follow up on an action item from the LNG Canada Working Group meetings on September 4/5, 2013.

At these meetings, the EAO committed to circulating an "interaction table" to Working Group members. (Action Item 10 from the attached Working Group Meeting minutes).

Please advise as to the status of this Action Item. This information is required by Gitxaala in order to adequately prepare their comments on the draft AIR due this Thursday.

Regards,  
Virginia

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September 26, 2013

**Delivered by E-mail (Kenneth.Howes@gov.bc.ca)**

Robert J.M. Janes  
Direct Line: 250.405.3466  
E-mail: rjanes@jfklaw.ca

File No. 1023-017

BC Environmental Assessment Office  
4<sup>th</sup> Floor, 836 Yates Street  
Victoria, BC V8W 1L8

Attention: Ken Howes, Project Assessment Manager

Dear Mr. Howes:

**Re: Gitxaala Nation Working Group Comments on Draft Application Information Requirements for the Proposed LNG Canada Export Terminal Project (the "Project")**

As you know, we act for the Gitxaala Nation ("Gitxaala") with respect to the regulatory aspects of the above captioned Project.

We write to provide comments on the draft Application Information Requirements (dAIR) that are being considered by the Working Groups, the Proponent and the EAO. This letter should be read in conjunction with our previous correspondence, including our letter dated September 13, 2013, and with the following comments provided by Gitxaala's environmental and traditional land use study consultants:

- Comments on Draft Application Information Requirements (Table)
- Valued Components - Part C
- Gitxaala comments on Working Group Meeting Minutes, September 4/5, 2013
- Gitxaala comments on Working Group Meeting Minutes, September 12, 2013

The changes suggested by Gitxaala's consultants are necessary in order to bring the dAIR in line with both statutory and constitutional requirements. Gitxaala remains extremely concerned that

the EAO is adopting an approach to the environmental assessment for the Project that is not in accordance with either the statutory requirements of both the *Canadian Environmental Assessment Act, 2012* and the *British Columbia Environmental Assessment Act, 2002*, or the duty to consult.

As explained in our previous correspondence, the overarching issue which we believe needs immediate attention is the manner in which Aboriginal Interests, as well as Aboriginal title and Aboriginal rights, are being treated in this process. Gitxaala needs to be consulted about the methodology to be used to assess effects to Aboriginal Interests, including the thresholds and criteria to be used to do so.

We look forward to hearing from you shortly on these important matters. We ask that no decision be made in relation to finalizing the dAIR until there has been meaningful engagement with Gitxaala on its issues and concerns.

Yours truly,

Janes Freedman Kyle Law Corporation

Per:

for 

Robert J.M. Janes  
RJM/VCM/ejr

cc: Steven Francis, LNG Canada/Shell (via e-mail [steven.francis@shell.com](mailto:steven.francis@shell.com))  
Dan Kolenick, LNG Canada/Shell (via email [Dan.Kolenick@shell.com](mailto:Dan.Kolenick@shell.com))  
Vivian Au, CEAA (via e-mail [vivian.au@ceaa-acee.gc.ca](mailto:vivian.au@ceaa-acee.gc.ca))  
Debbie Chan, Ministry of Justice and Attorney General (via email [Debbie.Chan@gov.bc.ca](mailto:Debbie.Chan@gov.bc.ca))

Enclosures:

- Comments on Draft Application Information Requirements (Table)
- Valued Components - Part C
- Gitxaala comments on Working Group Meeting Minutes, September 4/5, 2013
- Gitxaala comments on Working Group Meeting Minutes, September 12, 2013

Page 089 to/à Page 099

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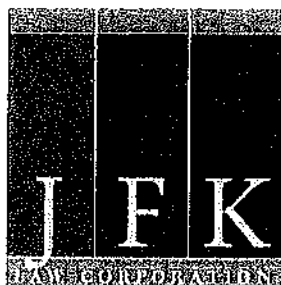
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# JANES FREEDMAN KYLE LAW CORPORATION

Suite 816 – 1175 Douglas Street  
Victoria, BC V8W 2E1  
Phone: 250.405.3460 Fax: 250.381.8567  
www.jfkclaw.ca

October 31, 2013

Robert J.M. Janes  
Direct Line: 250.405.3466  
E-mail: rjanes@jfkclaw.ca

**Delivered by Courier**

File No. 1023-021

BC Environmental Assessment Office  
4<sup>th</sup> Floor, 836 Yates Street  
Victoria, BC V8W 1L8

Canadian Environmental Assessment Agency  
Suite 410 – 701 West Georgia Street  
Vancouver, BC V7Y 1C6

Attention: Ken Howes  
Project Assessment Manager

Attention: Vivian Au

Dear Sirs/Mesdames:

**Re: Gitxaala's Concerns Regarding the Proposed Prince Rupert LNG Project (the "Project")**

We are legal counsel to the Gitxaala Nation ("Gitxaala") and write with respect to the BC Environmental Assessment Office ("EAO") and Canadian Environmental Assessment Agency ("CEAA") review of the above noted Project.

As you are likely aware, Gitxaala has been participating in the EAO and CEAA's review of the Project. Gitxaala continues to have serious concerns about the potential for the Project to adversely impact and infringe Gitxaala's section 35 rights. We write at this time to provide the EAO and CEAA with information about the nature of Gitxaala's rights in the Project area and to notify both agencies of Gitxaala's ongoing concerns with the review of the Project.

**Overview of Gitxaala's Rights, Title and Interests**

The proposed Project is located in Gitxaala's traditional territory, in areas where Gitxaala members have historically exercised, and continue to exercise, their rights protected by section 35 of the *Constitution Act, 1982*.

Gitxaala is one of the oldest Aboriginal groups located along the coast of British Columbia and currently has approximately 1,800 members. Its main reserve community is located at *Lach Klan*, also known as Kitkatla, on Dolphin Island. In addition to the community at Dolphin

Island, important and sizable Gitxaala communities are located in and around Prince Rupert and Port Edward.

Gitxaala asserts its constitutionally-protected Aboriginal rights, including title, in its traditional territory and waters, which stretch from Prince Rupert to Aristazabal Island and include Banks Island, McCauley Island, Pitt Island, the western side of Campania Island, portions of the mainland adjacent to Grenville Channel, and the surrounding waterways.

Gitxaala members have historically used and occupied, and continue to extensively use and occupy, Gitxaala's traditional territory for harvesting activities, including fishing, hunting, trapping and gathering, including in marine areas. Within their traditional territory, Gitxaala claims the following section 35 rights:

- a. Aboriginal title;
- b. Aboriginal harvesting rights, including:
  - i. The right to fish for various fin fish;
  - ii. The right to harvest shell fish from the waters and foreshores;
  - iii. The right to harvest marine plants from the waters and foreshores;
  - iv. The right to harvest herring roe from the waters;
  - v. The right to harvest marine mammals, including seals and sea lions;
  - vi. The right to harvest sea birds;
- c. The right to navigate through and use the waters in this area both for the purpose of travel and for the purpose of exercising the rights set out above;
- d. Governance rights in respect of lands, waters and foreshores in this area, including the right to determine who may pass through these waters; and
- e. The right to teach and pass on these traditional activities to maintain Gitxaala's way of life.

Gitxaala's ancestors developed a marine resource based economy that was guided by adherence to Gitxaala's traditional laws and by active resource management. Gitxaala travelled extensively throughout the territory for resource harvesting, including through the particular house territories over which they held exclusive ownership and other areas in which they held various rights. The practice of harvesting marine resources within Gitxaala traditional territory supports the physical, spiritual and economic well-being of Gitxaala.

In order for Gitxaala to be able to exercise their right to harvest resources within their traditional territory, the following conditions need to be in place:

- a. Gitxaala must be able to safely access harvesting areas and safely participate in harvesting practices;
- b. The environment must remain clear and uncontaminated;

- c. *Naxnox* (a supernatural being which teaches Gitxaala values, beliefs and rules about harvesting and cultural practices) must be respected;
- d. Traditional resources must be properly managed;
- e. Gitxaala's traditional knowledge must be transferred to younger generations; and
- f. There must be a minimal amount of sensory disturbances to resources and to Gitxaala people themselves.

The consequences of any interference with Gitxaala's harvesting rights are severe. Due to the reliance on traditional resources, and marine resources in particular, any loss of the quantity or quality of resources or interference with harvesting activities within Gitxaala's traditional territory threatens the physical survival of Gitxaala.

#### **Gitxaala Exercise of Rights in the Vicinity of the Project - Potential Infringement of Rights**

The Project, on its own, and together with other existing and planned development around the Prince Rupert area, has the potential to adversely affect and/or infringe Gitxaala's Aboriginal rights. The Project and other development in this area can reasonably be expected to have an adverse impact on Gitxaala's ability to exercise their Aboriginal rights as the shipping activity associated with the Project is likely to interfere with harvesting activities and other aspects of Gitxaala's use of their traditional territory.

As explained above, the area in question has been used historically and is currently being used by Gitxaala members for fishing, marine harvesting, hunting, trapping, and gathering activities. A CD containing information about Gitxaala's use of the Prince Rupert area is enclosed for your reference. In addition, Gitxaala has provided evidence of their Aboriginal rights, including title, within their traditional territory on numerous other occasions. Most recently, Gitxaala provided written and oral evidence in the Joint Review Panel process for the proposed Northern Gateway Project. Gitxaala provided the federal government with a considerable amount of information relating to Gitxaala's traditional territory, Aboriginal rights and title, traditional land use, culture and other information relating to Gitxaala. This information is publicly available on the Joint Review Panel's public registry.

#### **Gitxaala's Interests Related to the Project**

With respect to the review of the Project, Gitxaala has at least the following interests:

1. Ensuring that the EAO and CEAA fully assess the potential direct, indirect, and cumulative impacts (including environmental, social, cultural, and economic) of the Project on Gitxaala's section 35 rights;
2. Ensuring that there is a full and proper consideration of TUS and TEK information from Gitxaala in the EA;
3. Ensuring that the scope of the environmental assessment is sufficient to determine potential impacts and effects on Gitxaala's rights and interests, including parameters and execution of studies the proponent is required to carry out in respect of the EA;

4. Ensuring that there is a clear articulation of how meaningful consultation in respect of the Project will be carried out by the proponent and by the Crown and how the results of any such consultation will be fully incorporated within the review of the Project; and
5. Ensuring there is adequate capacity funding provided to Gitxaala to permit Gitxaala to meaningfully participate in the EA.

### **Questions Raised by Gitxaala**

Gitxaala has been and continues to be engaged in a thorough and rigorous review of the Project. Along with Gitxaala's specific concerns about the Project, which have been provided to the EAO and CEAA through Gitxaala's correspondence to date, Gitxaala also has the following questions relating to the review of the Project:

1. By what process will Gitxaala input within the consultation process for the Project be managed and accommodated?
2. What steps have the EAO and CEAA taken to make a preliminary assessment of the strength of Gitxaala's claims in the Project area and corresponding cultural impact of the Project? In doing so, how has the governance structure of Gitxaala been considered?
3. How will any Crown consultation in relation to the Project be integrated into the EA process for the Application? In particular, what are the legislative or regulatory measures by which the results of any such consultation would be integrated into the EA process such that Gitxaala's rights and interests are properly addressed?
4. What steps will the Crown take to analyze the potential direct, indirect and cumulative impacts of the Project on Gitxaala's section 35 rights and what specific criteria will be used to assess such impacts?
5. What is the specific consultation process that the Crown will undertake with Gitxaala to assess and accommodate the potential direct, indirect and cumulative impacts of the Project on Gitxaala's section 35 rights prior to any approval of the Project?
6. What steps will be taken to set appropriate criteria to assess the cumulative impacts of all existing and reasonably foreseeable development in the vicinity of the Project specifically as they affect the section 35 rights of Gitxaala?
7. Are the EAO and CEAA prepared to consult with Gitxaala, prior to any approval of the Project, on potential impacts from the Project on Gitxaala culture, governance structures and jurisdiction?
8. Are the EAO and CEAA prepared to consult with Gitxaala to implement rigorous monitoring and assessment programs, on a local and regional basis, to ensure that the key resources and lands relied on by Gitxaala to exercise their section 35 rights do not fall below the levels required to sustain those rights?
9. Are the EAO and CEAA prepared to work with Gitxaala on the development and funding of a Traditional Resource Use Plan to determine the resources on which Gitxaala rely and will rely in the future to exercise their rights, prior to any approval of the Project?

10. Are the EAO and CEAA prepared to consult with Gitxaala, prior to any approval of the Project, on the development of appropriate baseline data, benchmarks/thresholds or related measures for wildlife, fish and other marine resources, associated habitat, air, water and other resources on which Gitxaala members rely to carry out their rights, prior to any approval of the Project, to ensure that potential direct, indirect and cumulative impacts on their rights are properly and fully assessed and accommodated and to ensure that there are sufficient quantities/conditions for same to ensure that Gitxaala can meaningfully exercise their rights now and into the future?
11. Are the EAO and CEAA prepared to consult with Gitxaala prior to any approval of the Project, to implement regional targets for Gitxaala's key resources/resources on which they rely to preserve their rights in the face of ongoing development within Gitxaala's traditional territory?
12. Are the EAO and CEAA prepared to consult with Gitxaala, prior to any approval of the Project, to identify critical lands, waters, and marine areas that should be protected from further development, including areas within the vicinity of the Project, to ensure that Gitxaala retain a meaningful opportunity to exercise their rights?
13. By what process, and upon what criteria, will the Crown determine the adequacy (or lack thereof) of the proponent's consultation with Gitxaala on the Project? On this point in particular, can you please provide us with copies of all consultation records exchanged between the EAO and CEAA and the proponent so that we can verify the accuracy of same. Please also provide copies of same to us on an ongoing basis.
14. What permits have been issued to the proponent to date in relation to the Project? If permits have been issued, what consultation has occurred to date with Gitxaala in relation to these permits? How will the EAO and CEAA consult with Gitxaala for permits that are needed in the future in relation to the Project?

We look forward to working cooperatively with the EAO and CEAA on these issues and look forward to receiving your responses.

Yours truly,

Janes Freedman Kyle Law Corporation

Per:

*for* 

Robert J.M. Janes  
RJMI/VCM/ejr

Enclosure CD - Gitxaala Nation, Aboriginal Title To and Right At the "Fairview Port Lands" About *Sulga Kxeen, Ksba Ganaaw and Wil Yaga Loo*, d. March 8, 2013

cc: Jack Smith, CEAA (via email Jack.Smith@ceaa-acee.gc.ca) - without enclosures  
Nathan Braun, EAO (via email Nathan.Braun@gov.bc.ca) - without enclosures  
Stephen Swaffield, BG Canada, Suite 1330 - 1075 West Georgia Street, Vancouver, BC V6E 3C9

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## GITXAALA ENVIRONMENTAL MONITORING

280-110 1<sup>st</sup> Ave West - Prince Rupert, BC Phone (250)-624-3339 Fax (250)624-3338

September 23, 2013

Edwin Hubert, Project Assessment Officer  
BC Environmental Assessment Office  
PO Box 9426 Stn Prov Gov  
Victoria, BC, V8W 9V1

*Via Email: [edwin.hubert@gov.bc.ca](mailto:edwin.hubert@gov.bc.ca)*

Dear Edwin Hubert;

**Re: EAO grant funding for Prince Rupert LNG, Pacific NW LNG, and LNG Canada**

The BC EAO has offered Gitxaala Nation three funding grants in order to facilitate participation in the pre-application EA processes for three proposed LNG projects. \$5,000 was offered each with respect to Prince Rupert LNG and Pacific NorthWest LNG in July 24 2013 letters, and \$10,000 was offered for LNG Canada in a July 31 2013 email.

As it is Gitxaala's responsibility to engage with proponents and government to participate in the EA process, Gitxaala will accept all three grants that have been offered. However, these amounts are far below the costs incurred by Gitxaala in order to fully participate, and account for less than 5% of what this entire process will actually cost. These grants may reimburse the Band for travel costs associated with the consultative process, but will not allow for salary of even one staff member to help keep up with the fast-moving regulatory process. In order to ensure that all the Nation's concerns are addressed and Aboriginal rights are protected, third party consultants and legal advice will be needed, on top of GEM administrative and staff costs.

We look forward to discussing a work plan and budget with EAO that will allow for a more meaningful participation by Gitxaala in the EA process.

Yours truly,

Dillon Buerk  
Environmental Assessment Coordinator

Cc. Deputy Chief Clarence Innis – Gitxaala Nation

Cc. Mark Ignas, Business Manager – Gitxaala Nation



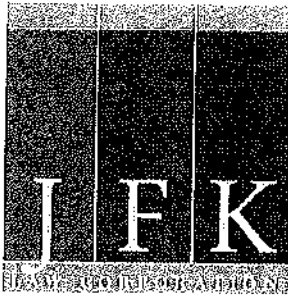
## **GITXAALA ENVIRONMENTAL MONITORING**

280-110 1<sup>st</sup> Ave West -- Prince Rupert, BC    Phone (250)-624-3339    Fax (250)624-3338

Cc. Virginia Mathers -- JFK Law Corporation

Cc. Ken Howes - EAO





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JANES FREEDMAN KYLE  
LAW CORPORATION

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Suite 816 - 1175 Douglas Street  
Victoria, BC V8W 2E1  
Phone: 250.405.3460 Fax: 250.381.8567  
www.jfklaw.ca

October 31, 2013

\* large attachment on  
I drive.

**Delivered by Courier**

Robert J.M. Janes  
Direct Line: 250.405.3466  
E-mail: rjanes@jfklaw.ca

File No. 1023-021

BC Environmental Assessment Office  
4<sup>th</sup> Floor, 836 Yates Street  
Victoria, BC V8W 1L8

Canadian Environmental Assessment Agency  
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We look forward to working cooperatively with the EAO and CEAA on these issues and look forward to receiving your responses.

Yours truly,

Janes Freedman Kyle Law Corporation

Per:



Robert J.M. Janes  
RJM/VCM/ejr

Enclosure CD - Gitxaala Nation, Aboriginal Title To and Right At the "Fairview Port Lands" About *Sulga Kxeen, Ksha Ganaaw and Wil 'Yaga Loo*, d. March 8, 2013

cc: Jack Smith, CEAA (via email Jack.Smith@ceaa-acee.gc.ca) - without enclosures  
Nathan Braun, EAO (via email Nathan.Braun@gov.bc.ca) - without enclosures  
Stephen Swaffield, BG Canada, Suite 1330 - 1075 West Georgia Street, Vancouver, BC V6E 3C9



## GITXAALA NATION

PO Box 149 11 Ocean Drive Kitkatla, BC V0V 1C0 Phone 250.848.2214 Fax 250.848.2238

April 10, 2014

**DELIVERED VIA E-MAIL**  
**(cory.waters@gov.bc.ca)**

Environmental Assessment Office  
P.O. Box 9426, Stn. Prov. Govt.  
Victoria, BC V8W 9V1

Attention: Cory Waters, First Nations Lead, LNG Projects

Dear Sir:

**Re: Potential Impacts of LNG Projects on Rights and Title of Gitxaala Nation**

We write in partial response to your letters of January 31, 2014 and March 12, 2014 on behalf of the EAO, which provide a preliminary strength of claim assessment with respect to five liquefied natural gas ("LNG") projects currently proposed for British Columbia (the "Preliminary Assessments").

The LNG projects considered in the Preliminary Assessments include (collectively "the Projects"):

- Westcoast Connector Gas Transmission Project ("WCGT Project")
- Prince Rupert Gas Transmission Project ("PRGT Project")
- Prince Rupert LNG Project ("PR LNG Project")
- Pacific Northwest LNG Project ("PNW LNG Project")
- LNG Canada Export Terminal Project ("LNG Canada Project")

### **Gitxaala's Response**

We are gravely concerned about the strength of claim analysis, and the materials produced and relied upon in forming its analysis. Gitxaala is of the view that the Preliminary Assessments are based on an incomplete review of Gitxaala's Aboriginal rights and title in the areas of the Projects, and are therefore inadequate and incorrect. Gitxaala also takes the view that it is premature for the EAO to have conducted the Preliminary Assessments since Gitxaala is in the process of gathering Project-specific Traditional Use Study information in relation to the Projects.

Gitxaala's response proceeds in three parts. First, Gitxaala provides the relevant context for situating its concerns that follow.<sup>1</sup> Second Gitxaala sets out some its concerns with the Preliminary Assessment as they relate to (1) the Projects located in the Prince Rupert Harbour area (the "Prince Rupert Projects") and (2) the LNG Canada Project. We intend to provide you with further detailed comments in response to the EAO's materials as soon as possible; however, given the detail warranted, we require more time to properly reply to the EAO's materials.

### **Gitxaala's Aboriginal Rights**

It is critical that the Preliminary Assessment consider and assess who Gitxaala are as a people, what their constitutionally-protected rights are, and how they could be adversely affected by the proposed Project.

Gitxaala is a distinct Aboriginal group located on British Columbia's Northwest Coast who has continuously and extensively occupied their Traditional Territory, and have exercised their distinct culture and governance system within it, for centuries. Gitxaala people refer to themselves in *Smal'gax* as *Git Lax Moon*, which means "People of the Salt water." This name reflects the fact that Gitxaala's way of life – from the traditional marine foods that are provided with pride to guests when visiting the Gitxaala community, to the complex inheritance and legal system that form the basis of Gitxaala society – finds its origin and enduring strength in the waters and marine resources within the Gitxaala Traditional Territory.

Gitxaala is not a signatory to a historic treaty and is currently not in the modern-day British Columbia comprehensive treaty process. Accordingly, they have not ceded or relinquished any aspects of their Aboriginal rights and title. Gitxaala asserts Aboriginal rights and title throughout its traditional lands and waters which stretch from Prince Rupert to Aristazabal Island and include Banks Island, McCauley Island, Pitt Island, the western side of Campania Island, portions of the mainland adjacent to Grenville Channel, and the surrounding waterways. A map showing the extent of Gitxaala's Traditional Territory is attached.

Just as prior to contact with Europeans, Gitxaala's distinct culture, spiritual practices and belief system, social and political institutions, and legal system continue to be interwoven with and inseparable from Gitxaala's Traditional Territory and the resources within it. This is true not only for the approximately 396 Gitxaala members who live on reserve, but for all approximately 1800 registered members, regardless of where they are living.

The following information is provided in relation to the following aspects of Gitxaala's Aboriginal rights: (1) Key cultural principles; (2) System of governance; (3) Title; and (4) Harvesting Rights.

---

<sup>1</sup> Much of the information contained in this letter in relation to Gitxaala's Aboriginal rights and title has been collected in relation to the Northern Gateway Pipeline Project. A summary of this information along with references can be found in Gitxaala's final written submissions for the Northern Gateway Joint Review Panel process which can be access at the Joint Review Panel's public registry, filing D72-92-2.

## Key Cultural Principles

Gitxaala is internally organized and governed through a complex system of clans, House territories, hereditary leaders and traditional laws that existed prior to contact with Europeans. A *sm'oogyet*'s (House leader's) jurisdiction over their House territory includes ownership over the unique histories and legends that relate to that territory and House. These histories and stories are called *adawx* and they are an oral record of the unique origins and subsequent history of a hereditary lineage and a territory. *Adawx* reference places, events, people, privileges (crests, songs, stories) and things that are inextricably linked with a specific House and its territory. *Adawx* is what teaches Gitxaala values and beliefs. A component of *adawx* is *malisk*, which are more recent factual stories, such as stories relating to resource use, and are complementary to *adawx*.

Each House holds *adawx* relating to their territories and there are no Houses without distinct *adawx*. For example, during the Joint Review Panel hearings for the Northern Gateway Project (the "JRP Process"), hereditary leader and Acting Chief Councillor Clarence Innis described how the crest that he wears is possessed and worn only by his House, *Git'gyiyaaks*. During these proceedings, Chief Innis also told an *adawx* regarding the dwelling of a supernatural being in the House territory he has ownership and jurisdiction over, Keecha on the west side of Banks Island along Principe Channel. In telling that story, Chief Innis explained why he had the right to share that story.

The authority of a *sm'oogyet* over a particular territory and its resources is encoded in the name of the *sm'oogyet*, and the authority is transferred to subsequent generations through a process of transferring hereditary names. The highly prescriptive system through which hereditary names and the territories associated with these names are transferred to future generations is called *gugwilx'ya'ansk*, which means "to pass down through generations" or inheritance.

*Gugwilx'ya'ansk* is a key structural principle of Gitxaala social and political relations as well as Gitxaala's relationship with its ecology. It provides the authority on which the Gitxaala governance system is based. *Gugwilx'ya'ansk* passes from uncles on the mother's side to nephews, but can only transfer after a *sm'oogyet* selects an appropriate nephew and after prescribed feasting protocols have been followed by the individual assuming the name within necessary time periods.

The laws governing *gugwilx'ya'ansk* are called *ayaawx*. But *ayaawx* govern much more than the inheritance process. As Gitxaala community members explained throughout the JRP Process community hearings held in Lach Klan on March 12, 13, 14 and 15, 2013 and in Prince Rupert on April 16 and 17, 2013 (the "Community Hearings"), *ayaawx* governs all aspects of Gitxaala life from birth to death. The *ayaawx* is Gitxaala's traditional laws that have governed the relationship between Gitxaala and their territories since time immemorial. It is enforced and taught by *sm'gigyet* (plural of *sm'oogyet*) and other traditional leaders, such as *sigydm hana'a*, Gitxaala's leading women. *Ayaawx* were entrusted to Gitxaala by their ancestors well before contact.



Gitxaala's evidence in the JRP Process was replete with examples of *ayaawx* specific to Gitxaala that guide their way of life and relationship with each other, outsiders and the resources and supernatural beings in Gitxaala's territory. For example:

- a. Gitxaala laws forbid other Houses from telling the *adaawx* of another House without obtaining permission through strict protocols.<sup>2</sup>
- b. Members of one House cannot reach into another House's territory and use their resources without permission. This *ayaawx* also applies to anyone who is not a member of the House that owns the territory and the resources;<sup>3</sup>
- c. *Sm'gigyet* cannot "dirty the blanket", by which they mean weakening the authority that is connected to their hereditary position by failing to care for their territory or by allowing its creeks and resources to be damaged;<sup>4</sup>
- d. One can only pick marine resources above the low tide mark;<sup>5</sup>
- e. Proper protocols and feasts must be followed to transfer a hereditary name;<sup>6</sup>
- f. Salt water must be looked after and kept clean;<sup>7</sup>
- g. Boys must share their first catch or kill with their aunts;<sup>8</sup>
- h. Girls cannot eat fresh seafood for a year after their first menstruation;<sup>9</sup>
- i. All land and marine resources must be treated with respect;<sup>10</sup>
- j. One cannot ask questions when one is on a boat;<sup>11</sup>
- k. Resources can only be harvested at specific times of year;<sup>12</sup> and
- l. Hereditary leaders must care for and manage the resources in their territory.<sup>13</sup>

Unlike European laws which can be modified or repealed, *ayaawx* cannot be bent or broken. This is because Gitxaala's *ayaawx* are derived from the supernatural beings within Gitxaala

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<sup>2</sup> Transcript Volume 27, Lines 16586-16596; Transcript Volume 42, Line 31276; Transcript Volume 43, Lines 31814-31827

<sup>3</sup> Transcript Volume 28, Lines 17636 and 17647

<sup>4</sup> Transcript Volume 26, Lines 16385-16390

<sup>5</sup> Transcript Volume 29, Line 19825

<sup>6</sup> Transcript Volume 42, Lines 30781

<sup>7</sup> Transcript Volume 26, Lines 16180; Transcript Volume 27, Line 17064; Transcript Volume 27, Lines 16844

<sup>8</sup> Transcript Volume 27, Lines 17139-17142

<sup>9</sup> Transcript Volume 43, Lines 31483-31508

<sup>10</sup> Transcript Volume 28, Line 17502

<sup>11</sup> Transcript Volume 27, Line 17016

<sup>12</sup> Transcript Volume 28, Line 18318

<sup>13</sup> Transcript Volume 27, Line 16823

Traditional Territory, from Gitxaala's spiritual values, and from Gitxaala's interdependent relationship with the lands and resources in Gitxaala Traditional Territory.

The Gitxaala term for violating an *ayaawx* is *hawalk*, or forbidden. Punishment, whether from *sm'gigyel* or nature itself, is swift if someone acts in a way that is *hawalk*. Certain *hawalk* actions can put the survival of a family and a House in jeopardy.

In addition to *awaayx* and *adawx*, the practices, customs and traditions of Gitxaala continue to be guided by *naxnox* and *spanoxnox*, supernatural beings and their dens, respectively. Gitxaala believe that all living things in their territory have their own *naxnox*. It is through experiences with *naxnox* that Gitxaala learned the values and beliefs that define Gitxaala culture and *ayaawx*. *Naxnox* also provide the rules and knowledge that taught Gitxaala ancestors the harvesting practices and principles that have allowed successive generations of Gitxaala to survive in their Traditional Territory.

Fear of angering *naxnox* remains strong for Gitxaala. Gitxaala's evidence documents numerous protocols and *ayaawx* that require that *naxnox* be treated with the greatest respect, including in some cases a requirement to give offerings to *naxnox*. If *naxnox* and their dens are not respected in accordance with Gitxaala *ayaawx*, they can withdraw resources from the territory.

The experiences of Gitxaala ancestors with *naxnox* in specific locations are the source of hereditary names, hereditary crests and hereditary titles. The hierarchy of Gitxaala governance mirrors and finds its root in the hierarchy of the *naxnox*. Gitxaala holds numerous stories of ancestor's experiences with *naxnox* that not only provide the history of hereditary names but which also serve as the basis for a *sm'oogyel*'s authority. This is also true for the names of high ranking women. Gitxaala's evidence in the JRP Process also describes site-specific experiences with *naxnox* throughout Gitxaala's territory, including in Principe Channel, around Aristizabal Island, around Dolphin Island, at the point of McCauley Island, and elsewhere.

The *adawx*, *ayaawx* and *gugwilx'ya'amsk* of the Gitxaala form a distinct cultural, political, social and spiritual system that structures the ownership, use, care and protection of the lands, waters and resources. Because *adawx*, *ayaawx* and *gugwilx'ya'amsk* are inextricably tied to specific locations within Gitxaala's Traditional Territory, specific historical and mythical events unique to Gitxaala's ancestors and tied to Gitxaala's particular spiritual beliefs, they make Gitxaala's culture and society distinct.

When the *awaayx*, *adawx*, *gugwilx'ya'asn* and *naxnox* are followed and respected, Gitxaala people are *syt guulm goot*, of one heart, mind and spirit.

#### Gitxaala's System of Self-Governance and Territorial Governance

Gitxaala's governance system, which has been developed over centuries and passed down from pre-contact times through a structured set of rules and practices, is the foundation that has allowed Gitxaala to survive and thrive as the People of the Salt Water.

Within Gitxaala, there is a clan system, which consists of four clans: the *Gisputwada* (Blackfish), *Lax Gyibu* (wolf), *Ganhada* (Raven) and *Lax Sgyiik* (Eagle). Each Gitxaala person is born into a clan. As Gitxaala is a matrilineal society, clan affiliation is determined by the mother's side.

Clans are further subdivided into *walp* or Houses. Houses are connected with particular territories within the larger Gitxaala Traditional Territory, where the House, through its hereditary leader, own and have the right to govern, use and manage their House territories.

Each House is lead by a *sm'oogyet* (hereditary House leader). As described in more detail below, the *sm'gigyet* (plural of *sm'oogyet*) form the hereditary system of Gitxaala governance. Each *sm'oogyet* has authority and jurisdiction over their territory, including the ability to control access to the lands, waters and resources in that territory. The authority and wealth of a *sm'gigyet* and his House flow from his territory, including the resources and any *naxnox*, or supernatural beings, in that territory.

Gitxaala has never relinquished or ceded any of the governance powers and jurisdiction that are carried by *sm'gigyet*. The hereditary system of governance is one of the main structures of Gitxaala society for cultural, economic and political purposes. Whereas the band council's authority has its source in the *Indian Act*, the authority of *sm'gigyet* is rooted in *adawx*, *ayaawx* *gugwilx'ya'ansk* and the spiritual order of the *naxnox*. *Sm'gigyet*'s authority also arises from the fact that the authority and governance system has been passed on for centuries to successive *sm'gigyet*.

While the governance powers of a *sm'oogyet* are transferred through *gugwilx'ya'ansk*, there are specific protocol and *ayaawx* which a nephew must strictly follow to validly "wear the name" of the *sm'oogyet*, meaning to obtain the authority to exercise the governance powers associated with that name, House and territory.

First, a nephew must demonstrate that he follows all Gitxaala *ayaawx* and can harvest traditional resources to sustain his family and House. Second, the nephew must undergo a process of teaching and tutelage under his uncle, such as walking the House territory, caring for the territory and learning the *adawx* and *ayaawx* of that House. Third, when the *sm'oogyet* passes away, the nephew must put up a funeral feast, in which resources and gifts are provided. While this feast is sufficient to transfer the name to the nephew, the authority and jurisdiction that goes with the name cannot be exercised until the nephew holds a second feast a year later to move the headstone of the uncle. This feast is called the *luulgit*.

There is a highly public aspect to these feasts so that everyone is aware of and acknowledges the transferring of authority. As explained by *sm'oogyet* Clarence Innis during the JRP Process, there are strict timelines in which feasts must be held if the blanket and authority are to transfer to the next generation. If these timelines are not adhered to, even for reasons out of the nephew's control, the name and House start to lose status and recognition.

The Gitxaala feasting system remains a meaningful part of Gitxaala community life, maintaining the transmission of names and political jurisdiction. House Leaders Sam Lewis, Clarence Innis and Larry Bolton, three of the highest ranking Gitxaala *sm'gigyet*, provided evidence at the Community Hearings of the feasting protocols and *ayaawx* that they studiously followed in order to obtain the governance powers over their House and House territories. These *sm'gigyet* provided evidence that all of the steps that must be followed to obtain their authority are dependent on being able to grow up on the Traditional Territory and following *ayaawx*.

The authority of *sm'gigyet* also has its source in the wealth of their territory because *sm'gigyet* have a responsibility to distribute resources among his House and to trade resources that are above the needs of the House. Much of this wealth comes from the waters and creeks within the House territory. There is no inheritance, and by extension no authority, if there are no resources in a House territory.

The foundation of Gitxaala governance is the connection between the requirement of the passing of a name and the territory tied to that name. When a name and blanket are transferred to a nephew through *gugwilx'ya'ansk* and adherence to *ayaawx*, authority and jurisdiction (i.e. governance rights) over House territories and the resources associated with it are transferred as well. This authority and jurisdiction extends far beyond that of the Gitxaala band council. The role of the elected band council is the management of physical transfer payments from Canada. The governance powers of *Sm'gigyet* of Gitxaala extend over the Traditional Territory, including the jurisdiction and authority to pass on those lands, and Gitxaala members of a House.

These governance powers give *sm'gigyet* power to manage their House territory and the resources associated with it, including creeks, harvestable resources, blankets, crests, songs, *adaawx*. *Sm'gigyet* also have authority over the members of their House, who are obligated by *ayaawx* to follow their House leader. The governance powers of *sm'gigyet* also include the power to exclude others from their House territories as well as the power to invite people in: only *sm'gigyet* can give permission for people to enter and use a House territory. On a Nation level, *sm'gigyet* work together to ensure that *ayaawx* are being applied and respected and to protect Gitxaala from threats to the broader territory or Gitxaala's culture.

Gitxaala's governance system also places heavy responsibilities on *sm'gigyet* with respect to their territories and their House members. Foremost among these responsibilities, the system of clan and House group ownership provides a structure for resource management based on hereditary rights. This includes obligations to provide for the members of the House.

Each *Sm'oogyet* is responsible for management of the territory holdings of their House to ensure that the territory and the natural resources within it are managed in a manner that will provide for future generations. This includes obligations to care for and maintain the territory. *Sm'gigyet* also have an obligation not to bring shame to their House by "dirtying the blanket" by which they mean weakening the authority that is connected to their hereditary position by failing to care for their territory or by allowing its creeks and resources to be damaged.

As was demonstrated at the Community Hearings, all generations of Gitxaala from youth to Elders continue to acknowledge the authority of their House leaders and identify as belonging to a particular clan and House.

Gitxaala's participation in the review of the Projects, like its participation in JRP Process and previous hearings regarding proposed offshore oil drilling, is an example of the *Sm'gigyet* of Gitxaala exercising their governance authority over Gitxaala territory.

### Title

Based on the governance system and practices, customs and traditions flowing from the way of life they have maintained for centuries, Gitxaala asserts Aboriginal rights and title throughout its

traditional lands and waters. Gitxaala has exercised jurisdiction over its lands and waters for centuries, and its ability to do so was a key part of the practices, customs and traditions that were integral to its distinctive culture at the time of assertion of Crown sovereignty, and continues to be so. Gitxaala held Aboriginal title to the lands and waters in their Traditional Territory prior to the assertion of Crown sovereignty, physically occupied those lands and waters, and has done so continuously and exclusively since prior to the assertion of Crown sovereignty.

Throughout the period that Gitxaala has occupied its Territory, it has managed resources and controlled a complex system of House territories, including villages and camps, stretching back for centuries. Gitxaala's evidence in the context of the JRP Process described dozens of village sites throughout Gitxaala's Traditional Territory. At many of these village sites, there remain permanent structures placed there by Gitxaala. Several village sites are now Indian Reserves, many of which are along the proposed tanker transit route for the LNG Canada Project.

Gitxaala's Territory over which it asserts title encompasses both lands and waters. As noted previously, it is the waters in the Territory that provide wealth to Gitxaala people, as well as transportation routes and harvesting locations. Gitxaala people use two words to describe their territory: *laxuulp* and *lax aks*. The former refers to land, while the latter indicates territory that is water. While the land in Gitxaala territory provides wood and locations for structures such as dwellings and smokehouses, it is the waters that provide regularly used transportation routes, harvesting locations and the wealth of the territory. As such, Gitxaala's Traditional Territory also includes waterways, such as Principe Channel, Petrel Channel, Calamity Bay and Kitkatla Inlet. The salmon bearing creeks along Principe Channel and elsewhere in the Traditional Territory are particularly prized and valuable aspects of Gitxaala territory due to the role that they play in sustaining Gitxaala people.

*Sm'gigyat*, of Gitxaala refer to their territories as a "treasure box". As *sm'gigyat* explained during the Community Hearings, the wealth and value of a House territory is measured primarily by the productivity of its waters. It is frequently how well the waters in a hereditary leader's territory have been maintained, and the productivity of the creeks and foreshore, that determine rank within Gitxaala society and among hereditary leaders.

Gitxaala patterns of continuous ownership, use and occupation of its Traditional Territory provide a record of intensive presence, resource management and control of a complex system of House territories, including villages and camps, stretching back for centuries. Examples of this in Gitxaala's evidence in the JRP Process include the archeological evidence and oral histories about village sites. Historically, Gitxaala established village sites next to productive salmon creeks, in areas where the foreshore provided access to abundant marine resources, such as seaweed, abalone, clams, chitons, urchins, among others and in areas with productive fisheries. For example, Lach Klan in the northern area of Gitxaala's Traditional Territory has been identified as one of the oldest continually inhabited sites in the region. Looking south, evidence of occupation at two Gitxaala village sites at the south end of Pitt Island date to 4000 and 6000 years before present day.

Another example of the spread of village sites throughout Gitxaala territory is the reserves that have been set aside for Gitxaala under the *Indian Act*. The reserves were established in continuously owned and used village sites of some of Gitxaala's *sm'gigyat*. These include village

sites along the south end of Pitt Island, along the west coast of Banks Island (such as Keecha), Mink Trap and other village sites near the proposed anchorage on the west coast of Pitt Island, on the both sides of northern end of Principe Channel (on Banks Island and McCauley Island), on Dolphin Island and on the West coast of Banks Island.

The evidence presented by Gitxaala during the JRP process including Gitxaala's traditional use study, the reports of Susan Marsden and Charles Menzies, and Gitxaala's oral evidence described dozens of village sites throughout Gitxaala's Traditional Territory, including at:

- a. Lach Klan, on Dolphin Island;
- b. Ks'waan, at the south end of Banks Island;
- c. Will u sgket, a cluster of 5 villages at the south of Pitt Island;
- d. Citeyats, at the south of Pitt Island at the entrance to Principe Channel;
- e. Arizitabal and Campania islands;
- f. Knackown, in Bonilla arm;
- g. Bear Bay;
- h. Kts'ml'aa'wen, in Curtis Inlet; and
- i. Keecha, on Banks Island.

At many of these village sites, there remain permanent structures placed there by Gitxaala. During the Community Hearings, Gitxaala witnesses described such structures in Mink Trap, Keeja, Arizitabal Island, the south end of Pitt Island, Knackown and elsewhere. Gitxaala were still staying at many of these village sites for months at a time well into the 20<sup>th</sup> century.

Although many historical village sites are not permanently occupied today, no non-Gitxaala people have assumed control over these sites and they remain part of Gitxaala House territories and are used for harvesting in accordance with Gitxaala's seasonal round.

In addition to village sites, Gitxaala's system of use and occupation includes a variety of camps, which were used as part of Gitxaala's seasonal round of harvesting and resource utilization. Each tribe has a number of camps, which are located in the territory based on the season. Even where Gitxaala maintained harvesting camps rather than village sites, these sites were intensively used for harvesting and *sm'gigyet* would regularly maintain the health of the resources at these camps in addition to controlling access to them.

These patterns of extensive use of Gitxaala's lands and waters continue today throughout the Traditional Territory as part of Gitxaala's seasonal round. The patterns of Gitxaala's seasonal round have been followed for generations.

Gitxaala's evidence presented in the JRP Process establishes the existence and extensive use of marine travel corridors to access House territories, village sites, camps and other harvesting areas. Particularly vital and frequently used transportation routes include Principe Channel, Petrel Channel, Otter Passage and Channel, and routes between Dolphin Island and Knackown (Bonilla arm), between Dolphin Island and Edye Passage on the west coast of Porcher Island, between Dolphin Island and Kitkatla Inlet and through Ogden Channel.

Gitxaala have engaged and continue to engage in the active management of the lands and resources within their Traditional Territory. Historical evidence of this takes the form of stone fish weirs and other landscape modifications relating to salmon harvesting throughout the Traditional Territory.

Gitxaala's extensive use of the Traditional Territory is further underscored by the connection between Gitxaala place names that cover the territory and Gitxaala hereditary names, *adawx*, songs and traditional activities that occur at that location. *Adawx*, songs and hereditary leadership positions are anchored to specific geographic features and locations in Gitxaala's territory.

Gitxaala's place names are full of specific examples which are still widely used and understood today, including:

- a. the south end of McCauley island is named after a sea otter *naxnox*;
- b. the hereditary name associated with Keeja on the east side of Banks island relates to a *spanoxnox* there;
- c. a place name near Odgen channel describes how the mountain there looks like herring roe when covered with snow;
- d. Baird Point on the west side of McCauley Island at the northern entrance to Principe Channel is named after the bountiful chitons that are harvested there.

Other Aboriginal groups recognize and use Gitxaala place names within Gitxaala's Traditional Territory.

Gitxaala territory is divided into House territories, and each House, through its *sm'oogyet*, owns and has the right to govern, use and manage their House territories. As described at the Community Hearings, provincial trapline boundaries within Gitxaala's territory are frequently a proxy for traditional boundaries of House territories, as both were bounded by natural boundaries. There is no area in Gitxaala territory that is not associated with a hereditary name and House.

Gitxaala's understanding of territory is informed by the Gitxaala concepts of *ayaawx* and *gugwilx'ya'ansk*, which together establish a system of exclusive ownership within Gitxaala's Traditional Territory. It is through the system of *gugwilx'ya'ansk* in particular that Gitxaala have maintained continuous ownership and control of the lands and resources within House territories. It is also the system that provides governance rights. The Gitxaala inheritance system, *gugwilx'ya'ansk*, includes waters when passing ownership rights and stewardship responsibilities across generations.

*Adawx* documents the history of ownership over specific territories within Gitxaala's greater territory. Many of the names of the hereditary leaders who led these clans to originally occupy different portions of the Traditional Territory still exist among Gitxaala because they have been passed down through successive generations to today's hereditary leaders of Gitxaala.

Gitxaala's *ayawx* establish the exclusivity of ownership of House territories. The *ayawx* prohibiting one clan or House from using the territory or resources owned by another clan or House is the most basic and fundamental law within Gitxaala society. This *ayawx* also applies to anyone who is not a member of the House that owns the territory and the resources.

*Sm'gigyel* actively have controlled and still control access to and use of House territories, both by other Houses and by outsiders. Prior to contact, Gitxaala controlled access to House territories through the *ayawx* forbidding other Houses from using territories that did not belong to them and by expelling invaders. These practices continue today. In the 1950's Gitxaala *sm'gigyel* stood up against allowing oil rigs in Gitxaala territory as an exercise of their jurisdiction over their territories. During the Community Hearings, House Leader Larry Bolton provided numerous examples of patrolling Gitxaala territory, particularly around Kitkatla Inlet and along the travel route to *Knackown* on the west side of Banks Island, and taking steps to have outsiders removed from Gitxaala House territories and the harvesting areas within them.

For Gitxaala people, it is not possible to separate their spirituality, their customs, their laws or their governance system from their understanding of and relationship with their Traditional Territory.

The very landscape of Gitxaala's Traditional Territory resonates for Gitxaala people with deep meaning: it is the physical home of the spiritual beings that help Gitxaala structure their society (*naxnox*), the source of the histories that are unique to individual Houses and clans (*adawx*), the basis for stories that provide teachings about resource utilization (*melsk*), and the core of the governance system (*gugwilx'ya'ansk*) that sustains Gitxaala people and determines the relationships between them. The territory and the resources within it also physically sustain and nourish the Gitxaala people, whether they live in Lach Klan or elsewhere in Canada.

Gitxaala's Traditional Territory is where culture, harvesting practices and the Gitxaala governance structure are learned. It also provides the resources that are used in traditional feasts, which are an essential mechanism for transferring ownership of territories, upholding Gitxaala laws, addressing violations of those laws, and maintaining relationships between clans.

### Harvesting Rights

Gitxaala's Traditional Territory contains a vast array of marine and terrestrial resources that Gitxaala have harvested for centuries and the sophisticated processing techniques that ensure that the resources can last throughout the year. All of these species are harvested and are necessary to support Gitxaala's way of life and physical, social and economic well-being. Many of these resources within Gitxaala's territory, such as the herring roe, salmon stocks and seaweed, have many unique qualities that cannot be found elsewhere.

Resource use is critically important to Gitxaala's culture, economy, social structure and well-being. Gitxaala's marine harvesting activities have their origins in pre-contact practices,



traditions and customs and are integral to Gitxaala's culture, as People of the Saltwater. Gitxaala's resource use today is directly linked to Gitxaala's ancestors because it remains guided by *ayaawx* and Gitxaala's governance system, which have been handed down and maintained for centuries.

Gitxaala have relied and continue to rely on the sea for much of their food, income and exercise of their culture, customs, practices and traditions, pre and post contact with Europeans. Gitxaala's unbroken pattern of using the resources within its Territory lies at the core of Gitxaala's identity, culture, economy and well-being. Gitxaala would be fundamentally altered as a people without use of the terrestrial and marine resources in Gitxaala territory.

Gitxaala members often refer to the waters in their Territory as their "deep freeze" because it is the place that holds all of their foods. Intertidal zones are referred to as Gitxaala's "dinner table" because of the bountiful resources that can be picked at low tide.

Traditional foods are not only important for the diets of those who actively harvest resources. Through an extensive system of sharing, harvesters provide food for much of the Gitxaala community. This sharing system itself is instilled in Gitxaala through an *ayaawx* that requires young men to share their first catch. As part of their governance obligations, hereditary leaders still harvest and provide traditional foods for the members of their House. Other members in the community trade services in exchange for traditional foods. Gitxaala resource harvesting also sustains and nourishes Gitxaala people who, for various reasons, live outside of Lach Klan.

In addition to the strong preference for traditional foods, the cost of purchasing food in grocery stores alone and the added cost of having those foods transported to Lach Klan makes non-traditional foods cost-prohibitive for many Gitxaala members. Even today, Gitxaala's Traditional Territory can be characterized as remote. The main community at Lach Klan is only accessible by floatplane or by boat. There is no grocery store in the community and there are more boats than vehicles in Lach Klan. Travelling by boat to traditional harvesting sites is the only means for Gitxaala to fish and harvest the marine resources that feed the community.

Traditional resources are also an important component of Gitxaala's physical health. Gitxaala have and continue to gather seawater and various herbs and medicines to address physical ailments and diseases.

Gitxaala's harvesting of resources has had and continues to have a strong economic component, both within Gitxaala society and in relation to Gitxaala's neighbours. Within Gitxaala society, traditional resources continue to be a signifier of wealth and authority for *sm'gigyel*. Although changes to the management of the commercial fishing industry have negatively impacted the ability of Gitxaala members to participate in commercial fishing opportunities, many Gitxaala members still fish and harvest resources commercially.

For centuries, Gitxaala's harvesting of resources has also served as the basis for Gitxaala's extensive trading networks with other Aboriginal groups. These networks exist today and remain vital to Gitxaala's economy and status among other Aboriginal groups in the Pacific Northwest. Without trading, there is no relationship with other nations. Gitxaala youth are continuing to maintain and rely on these trading networks.

Gitxaala's trade is not limited to a singular resource. Gitxaala have always traded an extensive array of traditional resources harvested from their territory due to the high quality and unique nature of many of their resources, such as herring roe, seaweed, chitons, cockles, clams, which are highly valued by other Aboriginal groups. Gitxaala members attribute the high quality of their resources and the unique taste that creates trading advantages to the quality of the salt water in Gitxaala territory.

In addition to providing economic value and access to resources that are unavailable in Gitxaala territory, these trade networks reinforce the status of Gitxaala as a people and the recognition of their governance system.

The ability of Gitxaala to uphold their *ayaawx* is dependent on traditional resources. For example, one of Gitxaala's *ayaawx* is to welcome visitors with respect and traditional foods. Traditional resources – such as clams, cockles, herring roe, seaweed, octopus, seal, cod, salmon, halibut, geese, deer and others – support the continued practice of holding Gitxaala feasting events, such as those where the status and authority of *sm'gigyel* are transferred and validated by the broader community. At feasts, hereditary leaders also provide resources that are unavailable in Gitxaala territory, but which have been obtained through trade with other Aboriginal nations, such as eulachon grease.

Resource harvesting is also the means for Gitxaala to learn their culture, including the *ayaawx*, *adawx* and governance system that are the foundation of Gitxaala society. From Gitxaala elders, to hereditary leaders and Gitxaala's youth, being out in Gitxaala territory harvesting resources is where Gitxaala have and continue to learn lessons about their culture and how to be part of it, the identification of House territories and how to follow the *ayaawx* that guide Gitxaala society.

Gitxaala's reliance upon and connection to the marine environment has resulted in a unique, mutually constituting relationship. Gitxaala rely on marine resources not only for subsistence and trade, but also for the continuity of the traditional and cultural aspects of Gitxaala society and governance, including *ayaawx*, *adawx* and *gugwilx'ya'ansk*. At the same time, Gitxaala *ayaawx* and *gugwilx'ya'ansk* require Gitxaala to care for and enhance their territories and resources within them.

Respectful use and stewardship of the lands, waters and resources in Gitxaala's Traditional Territory continue to sustain and nourish present generations of Gitxaala. As a result, the ability of the waters to provide resources, and the ability of the People of the Salt water to safely access those resources during the appropriate seasons, is essential for the continued existence of Gitxaala as a people and their customs, practices and traditions.

### **1. Prince Rupert Projects**

In responding to the strength of claim analysis for the Prince Rupert Harbour Projects and the materials which the EAO produced and relied upon in forming its analysis, we first identify three general problems with the Province's letters and materials. Second, we provide a sample of Gitxaala's reply to the substantive issue, that the Province denies Gitxaala has any evidence to support its claims of Aboriginal title and rights to the areas of the Tsimpsean Peninsula, Digby Island, and Kaien Island to Port Edward.

### Failure to Respond Substantively to Mr. Robbins' Letter of December 20, 2013

Neither the January 31, 2014, nor the March 12, 2014 letters, consider Mr. Robbins' letter to Mr. Lofthouse of December 20, 2013 regarding Gitxaala's Aboriginal interests in the areas of the Tsimpsean Peninsula, Digby Island, and Kaien Island to Port Edward. While the material of March 8, 2013 enclosed with Mr. Robbins' letter may have been considered by British Columbia's Aboriginal Research Division in a memorandum of December 19, 2013, contrary to your comment that, "the Province has reviewed all information provided by Gitxaala to date, and has provided substantive responses to how that information relates to the assessments made of Gitxaala's claims to Aboriginal rights and title," Mr. Robbins' letter and the submissions therein have not been acknowledged or substantively addressed by the Province. When can we expect a substantive reply to Mr. Robbins' letter of December 20, 2014?

### EAO Complete Disregard of Gitxaala's Submission & Evidence of March 8, 2013

The EAO itself completely ignores the Gitxaala submission of March 8, 2013, and all evidence, regardless of the source of evidence, that supports Gitxaala's position that it used and occupied relevant areas. Instead, the EAO simply falls back on the broad, uncritical position that,

[w]ith respect to the northern portion of Gitxaala's asserted traditional territory, north of Porcher Island, including Prince Rupert Harbour and the east side of Chatham Sound to Lax Kw'alaams, this area is located outside of what was considered by ethnographers as within pre-contact traditional territory of the Gitxaala. ... EAO is not aware of any evidence to indicate that Gitxaala occupied or made any use of any sites in the areas north of Porcher Island, including the lower Skeena River, Prince Rupert Harbour and the east side of Chatham Sound to Lax Kw'alaams, at 1846 that would support a claim to Aboriginal title.<sup>14</sup>

### Insertion of Unsupported Assumptions and Hypotheses

The materials provided and relied upon by the Province in the Preliminary Assessment are rife with assumptions and hypotheses that have no supporting evidence and are detrimental to Gitxaala. For example, in your letter of January 31, 2014 you state that, "While it is possible that Gitxaala may have utilized camp sites and harvested resources along the coast en route to or from the oolichan fishery on the Nass each year, use of this area at the time of contact (1787) likely required the permission of a Coast Tsimshian Tribe." Firstly, the evidentiary record, including sources the Province utilizes, is plain and clear that Gitxaala used campsites on route to the Nass each year – this is a fact, not simply "possible".<sup>15</sup> Moreover, the evidentiary record does not support the hypothesis that Gitxaala required permission to use the campsites. This statement is unsupported by any evidence.

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<sup>14</sup> Letter of January 31, 2013, pp. 4, 7.

<sup>15</sup> This is supported by the Province's own materials. See "Gitxaala First Nation: Review of Ethnographic and Historical Sources Relating to the Traditional Territories of the Gitxaala and Neighbouring First Nations," dated November 15, 2011("Review of Ethnographic Sources – November 15, 2011"), at 45.

Another example of misleading statements is found in Ms. Dusseault's December 19, 2013 memorandum. Ms. Dusseault incorrectly inserts the "Coast Tsimshian" into an excerpt from a Barbeau informant where no such implication exists, which makes the evidence presented remarkably misleading to the disadvantage of the Gitxaala. Ms. Dusseault's excerpt reads, "Barbeau's informant Herbert Wallace (Gitsiis) said.... [The] adjacent coast up to Nass and down to Skeena was used in common by all the [Coast Tsimshian] tribes; with the exception of Japan Point..."<sup>16</sup> However, the original source never states "Coast Tsimshian". Barbeau's informant makes this statement after naming numerous tribes and their territories, including the Gitxaala, and later the informant acknowledges that the Gitxaala went to the Nass and "had territory (fishing there)."<sup>17</sup> There is no basis to read "Coast Tsimshian" into this informant's statement, which insertion seems to be for the sole purpose of demonstrating that Gitxaala was meant to be excluded when no such implication exists in the original source.

### **Substantive Reply to Province's Strength of Claim**

The Gitxaala has presented much evidence of its use and occupation in the areas of the Tsimpsean Peninsula, Digby Island, and Kaien Island to Port Edward. However, the EAO has not considered Gitxaala's submissions in an honest and thorough manner. Below we provide just a few samples of evidence of Gitxaala's use and evidence in the areas of the Tsimpsean Peninsula, Digby Island, and Kaien Island to Port Edward, which samples are taken from the Province's own materials and sources.

#### Red Bluff, Nass River Estuary

In your letter of January 31, 2014, you indicate that Gitxaala has a, "moderate to strong *prima facie* claim to the Aboriginal right to fish in the area around Red Bluff" and that the "EAO is not aware of any evidence to indicate that Gitxaala occupied or made any use of any sites in the areas north of Porcher Island... at 1846 that would support a claim to Aboriginal title." Gitxaala has a strong *prima facie* claim to Aboriginal title in the area north of Porcher Island, on the Nass. The Province's own materials support the conclusion that Gitxaala had a village on the Nass: "According to Mitchell, Sturgis reported a Gitxaala village called *Chebbaskah* several miles up the Nass, and Beynon (Barbeau, File A, Vol. VII 29e,ii) located a Gitxaala village near the confluence of the Tseax and Nass Rivers."<sup>18</sup>

#### Prince Rupert Area

The Province's own materials support Gitxaala's claims that it used and occupied areas in and around Prince Rupert:

In 1916, Metlakatla-Gitxaala informant Dan Haldane told Beynon that during the migration from *Temlaxham*, *Ts'ibasaa* and another *Gispwudwada* chief "all settled at the Gitxaala village (at near where Prince Rupert is now) and that is why the present

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<sup>16</sup> See Gitxaala submission – Prince Rupert Area (March 2013), December 19, 2013, at p. 31.

<sup>17</sup> BF 418.2:5.

<sup>18</sup> See Review of Ethnographic Sources – November 15, 2011, at 44.

Metlakatla gets its name which comes from *maxlegitxala-maxla*-through to; to-go-over-through-on-water . . ." (Beynon, 'The Gitrhatla Tribe of the Seacoast,' BF 12.1).<sup>19</sup>

However, as discussed above, the Province ignores this evidence and instead continues to state that the Gitxaala merely camped in the area and required explicit permission from the Coast Tsimshian in order to do so.

### Other Places in the General Area

Both British Columbia's Review of Ethnographic Sources – November 15, 2011, and Ms. Dusseault's memorandum of December 19, 2013 describe camps in the vicinity of Prince Rupert, to which no tribes were specifically named by ethnographers and which could plausibly be Gitxaala territory:

In the vicinity of Prince Rupert, Beynon also reported camps on the north and south ends of Tugwell Island, at Ryan Point or Duncan Bay, on Fern Passage between Pethick Point and Butze Point [northeast of Kaien Island], and at McNichol Creek [north of Kaien Island]. These were not attributed to a particular tribe by his informants; it is possible that any one of them might have been used by Gitxaala as they travelled between the Nass River and their home territories, or by other visitors to the area, such as when they came to trade.<sup>20</sup>

### **Conclusion with regard to Prince Rupert Harbour Projects**

Gitxaala will continue to work towards a more detailed response to the EAO's letters and materials and will endeavor to provide that to you as soon as possible. However, given that the EAO's own materials support Gitxaala's submissions, we request that the EAO provide an objective and thorough response to Gitxaala's submission contained in Mr. Robbins' letter of December 20, 2013.

## **II. LNG Canada Project**

LNG carriers from the LNG Canada Project would travel through approximately 230km of Gitxaala's Traditional Territory. This includes passage through the House territories of numerous *sm'gigyat* as well as areas of key cultural significance and key harvesting areas. Fifteen of Gitxaala's reserves are along the proposed tanker route for the LNG Canada Project.<sup>21</sup>

Gitxaala has expressed a number of concerns about potential effects from the LNG Canada Project and the impact those effects would have on its Aboriginal rights, including title, its authority and jurisdiction and its culture. Gitxaala remains concerned that the risks imposed by the LNG Canada Project is not acceptable, as the potential adverse effects to their lands, waters, resources, Aboriginal rights and culture could be significant.

<sup>19</sup> Kecia Dusseault's memorandum, "Gitxaala Submission – Prince Rupert Area (March 2013)," dated 19 December 2013, at footnote 8.

<sup>20</sup> *Ibid.* at p. 8.

<sup>21</sup> Tsimtack 7, Toowartz 8, Citeyats 9, Kitlawaoo 10, Keech 11, Kooryet 12, Clowel 13, Shegamy 14, Tsimlairen 15, Kitsemenlagan 19A, Kitsemenlagan 19, Keyarka 17, Keswar 16, Dolphin Island 1 and Kul 18

In the Preliminary Assessments, the EAO states that the duty to consult Gitxaala in relation to the LNG Canada Project as it relates to shipping lies in the middle of the *Haida* spectrum and that to date, British Columbia has met or exceeded this level of consultation.

Gitxaala disagrees that mid-level consultation is sufficient to satisfy the Crown's duty to consult with Gitxaala in relation to the LNG Canada Project. Given the very strong claims that Gitxaala has to Aboriginal title, self-government rights and harvesting rights, and given the potential for serious effects to occur to its rights, the depth of consultation that the Crown is required to undertake with Gitxaala is at the high end of the spectrum.

The Preliminary Assessments prepared by the EAO do not capture the full extent of potential impacts to Gitxaala's Aboriginal rights from the LNG Canada Project. For example, the Preliminary Assessments have completely failed to address Gitxaala's governance rights, potential impacts to Gitxaala's culture and practices from the Projects, as well as potential impacts to Gitxaala's title to the area.

Gitxaala's response to the Preliminary Assessments in relation to potential impacts from the LNG Canada Project is set out below.

#### The Failure to Properly Consider Impacts to Gitxaala's Self-Governance Rights

The LNG Canada Project is likely to have a negative impact on Gitxaala's governance system and self-government rights. In the Preliminary Assessments, the EAO states that it is unclear how Gitxaala's governance system could be adversely affected by the proposed Projects and requests additional information about these impacts.

Four additional Valued Components ("VCs") have been suggested by Gitxaala for incorporation into the Application Information Requirements for the LNG Canada Project. Information on these four VCs (Governance, Harvesting Rights, Cultural Identity, and Sacred Places) is currently being collected by Gitxaala and will be shared with LNG Canada and the EAO once it is complete. This material will assist the EAO in understanding the potential impacts from the LNG Canada Project on Gitxaala's governance rights. In Gitxaala's view, the EAO's assessment should not be shared with the Project proponents until such time as this information has been received and assessed by the Province.

While this information is in the process of being collected, Gitxaala is able to offer the following information to the EAO in relation to its concerns surrounding impacts to governance rights from the LNG Canada Project.

First, fundamental to any governance system is the peaceful and orderly transfer of authority and jurisdiction. As described above, the transfer of authority first requires a nephew to learn the *ayawx* and *adawx* of a territory and take part in the management of that territory. By making it more difficult and less safe to access territories, the tanker traffic associated with the LNG Canada Project will interfere with this important transfer of knowledge and resource management practices.

Gitxaala's *ayawx* requires that two feasts be held at prescribed periods for names and authority to be properly transferred through *gugwilx'ya'ansk* and requires that traditional resources be

provided at these feasts. Any degradation in the quantity or quality of resources or the inability to harvest resources would interfere with, and possibly prevent, a nephew from holding the feasts at the proper time. As a result, authority and jurisdiction would not properly transfer.

Second, a pre-condition of the transfer of authority is the existence of authority and jurisdiction. For Gitxaala's governance system, authority is directly linked to the status of a House Leader, which is based, in turn, on the wealth of traditional resources within a territory and the House Leader's demonstrated ability to follow Gitxaala *ayaawx* and provide for his members. Without productive resources – whether because they have been destroyed or otherwise impacted, because areas can no longer be safely accessed because of tanker traffic, because resources have been scared away or because resources have become contaminated – a House Leader will have lost the basis of his authority. As a result, there is nothing for a House Leader to pass down. There is no process of *gugwilx 'ya'ansk* if there is nothing to transfer.

Third, the LNG Canada Project puts House Leaders at severe risk of violating the central *ayaawx* that prescribes the authority of a House Leader – the *ayaawx* to never dirty the blanket, with the blanket being the symbol of a House Leader's power to govern. The blanket is dirtied when a House Leader has not taken sufficient steps to protect the resources in his territory or has not ensured that his people are provided for. It is a requirement of a House Leader that he keep the name he inherited at the same level of respect as when it was given to him. Any spill, contamination or interference with harvesting would dirty the blankets of House leaders and bring shame on them.

While dirtying the blanket has consequences to the House Leader, such as loss of status and authority, it has very real consequences for the members of his House as well, because they are not able to harvest in another House territory should their territory be damaged or made inaccessible. Even if impacts are isolated to one area, the House Leader and his House cannot simply "go elsewhere".

Fourth, a principle power within the Gitxaala governance system is the power to exclude others from territories. The *Sm'gigyet* of Gitxaala have unanimously stated that they do not authorize tanker traffic associated with the LNG Canada Project to transit Gitxaala's traditional territory. Authorizing tankers to transit Gitxaala's traditional territory would itself be a violation of Gitxaala's self-governance.

Finally, respect for Gitxaala's governance system is learned on the water. This is where Gitxaala learn to whom territories belong, the stories that form part of the governing authority of a House Leader, and the *ayaawx* that House Leaders have the authority to enforce. Accordingly, any impacts to the ability of Gitxaala to travel through their territory and harvest would undermine the recognition of traditional governance system.

#### Impacts to Gitxaala's Aboriginal Title

In the Preliminary Assessments, the EAO recognizes Gitxaala's strong *prima facie* claim to Aboriginal title in the following areas:

- *Çitçiyéks* at the south end of Pitt Island

- *Kw'we.n* at the south end of Banks Island
- Kitkatla
- Port Canaveral
- *Laxtə'dzap* at Sand Island IR4
- *Tétsəp* on MacCauley Island
- *Wəłhatyaél mədik* at Alpha Bay

Gitxaala does not agree that its Aboriginal title is limited to these specific sites. Gitxaala asserts Aboriginal title to all of the areas within its Traditional Territory that would be affected by marine traffic components of the LNG Canada Project. This includes the fifteen reserves along the proposed tanker route as well as additional village sites.

The analysis conducted in the Preliminary Assessments in relation to impacts to title appears on its face to have adopted the mistaken view that establishing Aboriginal title requires proof of intensive localized uses of small tracts of land. Gitxaala strongly disagrees with this approach as it is simply not merited in the case law and improperly discounts the overall evidence of usage. As was made clear in *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, physical occupancy for the purposes of establishing Aboriginal title may be something other than the classic village sites, enclosed fields or hunting grounds. Instead, a wider range of activities, dictated by the character of the land and how that land was used, may be considered. In doing so, the Court confirmed that Aboriginal title is a flexible and adaptive concept:

[Aboriginal title] is established by Aboriginal practices that indicate possession similar to that associated with title at common law. In matching common law property rules to Aboriginal practice we must be sensitive to the context-specific nature of common law title, as well as the Aboriginal perspective. The common law recognizes that possession sufficient to ground title is a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which the land is commonly enjoyed: *Powell v. McFarlane* (1977), 38 P.&C.R. 452 (Ch. D.), at p.471. For example, where marshy land is virtually useless except for shooting, shooting over it may amount to adverse possession: *Red House Farms (Thorndon) Ltd. v. Catchpole*, [1977] E.G.D. 798 (Eng. C.A.). The common law also recognizes that a person with adequate possession for title may choose to use it intermittently or sporadically: *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680 (C.A.), per Wilson J.A. Finally, the common law recognizes that exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of land: *Delgamuukw*, at para 158.<sup>22</sup>

Gitxaala submits that the wide range of uses to which the areas along the proposed LNG Canada Project tanker routes have been put by Gitxaala, including the exercise of governance rights, harvesting activities, and cultural activities, establish a strong *prima facie* claim to Aboriginal title. Gitxaala acknowledges the EAO's commitment to revisiting the Preliminary Assessments once the Supreme Court of Canada has issued its decision in the appeal of *William v. British Columbia*, 2012 BCCA 285 and in the meantime requests that the EAO work with Gitxaala to develop a methodology for assessing impacts to Gitxaala's Aboriginal title from the LNG Canada Project.

<sup>22</sup> *Marshall and Bernard*, *supra* note 12, at para 54.



In the meantime, Gitxaala is able to offer the following information in terms of concerns about impacts to its Aboriginal title from the LNG Canada Project.

At the core of Aboriginal title is the ability to make decisions respecting how lands and water are to be used. Gitxaala's House Leaders, on the basis of Gitxaala's *ayacwix* relating to the preservation of resources and their obligation to ensure that the community has sufficient food and other resources, have unanimously decided that their lands and waters are to be used for resource harvesting and other habitation and cultural practices that nourish and sustain Gitxaala physically, culturally and economically. They have not decided that LNG tankers associated with the LNG Canada Project are to be allowed within the lands and waters owned by Gitxaala through their House Leaders. Accordingly, the Project is inconsistent with Gitxaala's right to decide the exclusive uses to which its land and water will be put.

Aboriginal title also includes a right to benefit economically from the land and its resources. Gitxaala has developed a sophisticated system of resource management and harvesting that provides Gitxaala with economic benefits. Gitxaala still benefits economically from its lands and waters in this way. Aboriginal title necessarily includes the right to access the lands and waters that are subject to Aboriginal title. The LNG Canada Project will adversely affect Gitxaala's ability to benefit from its lands and waters by making it more difficult to access territories and to engage in resource management and harvesting practices on those territories, and by reducing the value of the resources that Gitxaala uses through potential contamination and impacts to the shoreline.

The value of Aboriginal title, and the loss of any such value, must also be understood in its cultural context. The status of House Leaders depends on the resources within a territory. During the Community Hearings, House Leader and Acting Chief Councillor Clarence Innis described how the value of a House Leader's land would be lost if any of the resources within the territory were to become damaged:

17433. The question is what would it mean if the status of our territory became unavailable, damaged or lost? To me, it would become worthless; the territory would have no wealth. It would have no value, and it would affect our *gugwix'ya'ansk*, our inheritance.<sup>23</sup>

Additionally, the value that Gitxaala gets from its territory cannot be separated from the spiritual connection and cultural practices that occur on the lands and waters over which Gitxaala has title. As described below, the LNG Canada Project will adversely impact the *naxnox* in Gitxaala's territory as well as teaching and feasting practices, further undermining key components of Gitxaala's title.

As described above, Gitxaala's Aboriginal title extends to the waters within their Traditional Territory. While there has been very little judicial consideration of Aboriginal title to water in Canada, the Courts have acknowledged that Aboriginal title could extent to water bodies. As the Supreme Court of Canada stated in *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313, Aboriginal title includes the right to "enjoy the fruits of the soil, of the forest and of the rivers and streams within the boundaries of said lands" [p. 422, emphasis added].

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<sup>23</sup> Transcript Volume 28, Line 17433

Gitxaala's use of the waters within their Traditional Territory constitutes "physical occupation" for the purposes of the test for Aboriginal title. While water is not "occupied" in the same way as land, Gitxaala's physical occupation can be shown through Gitxaala's regular use of the rivers, creeks, channels, and sounds within their Traditional Territory for the exercise of rights including governance rights and harvesting rights such as hunting, fishing, gathering, or otherwise exploiting marine resources in the water column or sea bed, as well as through their *ayaanwax* which exclude others from using or occupying certain water bodies.

Courts in other jurisdictions have taken steps to recognize Aboriginal title to water bodies. In *Winters v. United States*, 207 US 564 (1908), the United States Supreme Court recognized that prior to the establishment of reservations, "Indians had a command of the lands and waters".<sup>24</sup> The Court's acknowledgment of Aboriginal control over both land and water illustrates the possibility of a claim to Aboriginal title to water.

Similarly, the decision of the Australian High Court in *The Commonwealth v. Yarmirr* (2001), 75 ALJR 582, 184 ALR 113, supports the principle that waterways can form part of the areas over which First Nations have title or other interests. In *Yarmirr*, the Aboriginal group claimed Aboriginal title to areas of the sea and the seabed in the Croker Island region near Darwin, in the Northern Territory of Australia. The areas claimed included sea waters, islands, a portion of the mainland, the seabed and lands and reefs within the area. The majority of the Court agreed with the trial judge's decision that the Aboriginal group had Aboriginal title to the sea and seabed, but not the right to exclusive possession, occupation, use or enjoyment of the sea. In making this finding, the Court rejected the argument that sovereign rights and interests asserted over the territorial sea are necessarily inconsistent with the continued existence of native title rights and interests.

In Gitxaala's view, based on the guidance provided by Canadian courts as well as the American and Australian courts and Gitxaala's strong evidence of the regular use and "occupancy" of the waterways in their Traditional Territory, it would be open to a Canadian court to make a finding of Aboriginal title to water in favour of Gitxaala. Gitxaala's strong claim to Aboriginal title to the waters in its Traditional Territory must be reflected in the Preliminary Assessment.

#### Impacts to Gitxaala's Harvesting Rights

As described above, Gitxaala's harvesting rights have been, and continue to be, practiced throughout the entirety of Gitxaala's Traditional Territory. The evidence provided by Gitxaala at the Community Hearings is illustrative of the extent of current use by Gitxaala of their Traditional Territory for the harvest of a wide variety of species. This resource use is based on practices and locations that have traditionally been used by Gitxaala for many generations.

In the Preliminary Assessments, the EAO recognizes Gitxaala's strong *prima facie* claim to Aboriginal rights to fish, hunt, trap and gather marine and terrestrial resources in the following areas:

- Wright Sound to Nepean Sound

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<sup>24</sup> *Winters v. United States*, 207 US 564 (1908), at page 576.

- Nepean Sound to Dolphin Island
- Brown Passage (near Porcher Island)

Gitxaala agrees with this finding but does not agree that its Aboriginal harvesting rights are limited to these locations. For example, the Preliminary Assessments do not assess impacts to Gitxaala's rights in an around Porcher Island. As described in detail by Gitxaala during the JRP Process, Kitkatla Inlet is an extremely important harvesting area for Gitxaala, especially for the herring roe harvest. Gitxaala presented evidence during the JRP Process that herring are extremely susceptible to acoustic disturbances, and that the likelihood of a successful herring roe harvest is dependent on there being little to no noise, including engine noise, in the waters when the herring arrive and are spawning. Gitxaala's herring roe harvest in Kitkatla Inlet and the potential impacts to this harvest are not reflected in the Preliminary Assessments, which only references use as far north as Dolphin Island, and then again at Brown Passage.

As described above, one of the VCs for which Gitxaala is currently gathering information is impacts to their harvesting rights from the Project. Gitxaala suggests that it is premature for British Columbia to have performed the Preliminary Assessments without this information. However, while this information is being collected Gitxaala is able to offer the following commentary on the Preliminary Assessments.

In terms of approach, Gitxaala is concerned that the EAO assessment of impacts to Gitxaala's harvesting rights appears to be limited to an assessment of effects to biophysical elements. Essentially, this approach inappropriately uses biophysical valued components as proxies for impacts to rights and interests. The danger associated with this approach lies in making a determination that there will be no adverse effects to the exercise of Aboriginal rights if no significant adverse effects are identified to the biophysical environment. This approach is not consistent with good environmental cultural impact assessment practice and Gitxaala submits that as a result the Preliminary Assessments need to be revised to address this concern.

As well as the additional information that will be provided by Gitxaala on the harvesting right VC and in the Traditional Use Study being prepared in relation to the Project, Gitxaala is able to offer the following information to assist the EAO in conducting its assessment.

Currently, the Preliminary Assessments fail to account for the connection between Gitxaala's harvesting rights and Gitxaala's governance system, culture, economy, social structure, and well being. The practices of harvesting marine resources within Gitxaala's traditional territory support the physical, spiritual and economic well-being of Gitxaala. For Gitxaala to be able to exercise their right to harvest these resources:

- the environment must remain clear and uncontaminated;
- Gitxaala must be able to safely access harvesting areas and safely participate in harvesting practices;
- *naxnox* must be respected;
- traditional resources must be properly managed;

- Gitxaala's traditional knowledge must be transferred to younger generations; and
- there must be a minimal amount of sensory disturbances to resources and to Gitxaala people themselves.

Many of the species harvested by Gitxaala in the exercise of their Aboriginal rights show an extreme sensitivity to noise and other disturbances. For example, Gitxaala's herring roe fishery, which is used extensively for food and commercial purposes, is highly sensitive to sound and the kelp on which this fishery depends is susceptible to environment change. Abalone and puffins are two species that are highly sensitive due to their diminished population size.

Gitxaala is deeply concerned that the LNG Canada Project will interfere with Gitxaala's right to harvest marine resources in the following ways:

- The steady presence of LNG tanker traffic will create safety concerns for Gitxaala members when they are traveling by boat to reach harvesting areas and when they are harvesting by boat and along shore lines;
- Any delay in the ability of Gitxaala members to access harvesting sites because of tanker traffic could mean that Gitxaala will miss low tide, which is the only time when Gitxaala members are allowed to harvest clams, chitons, cockles, abalone and other key resources;
- Tanker noise will scare away marine resources;
- Tanker traffic will make navigation by boat more difficult;
- The wakes of the LNG vessels will damage intertidal and shoreline habitat, which is where many preferred species are harvested;
- Tanker traffic may destroy fishing gear, such as the nets that Gitxaala members set across portions and in the middle of Principe Channel for halibut and other fish for twelve hours at a time;
- Tanker traffic will disturb *naxnox* and undermine the spiritual connection that supports harvesting activities;
- Tanker traffic will undermine the sense of quiet that is required for harvesting; and
- Concerns about collisions and habitat destruction will drastically increase stress when harvesting, resulting in avoidance and fear of exercising harvesting rights.

The consequences of any interference with Gitxaala's harvesting rights are severe. Due to the reliance on traditional resources, and marine resources in particular, any loss of the quantity or quality of resources within Gitxaala's community threatens the physical survival of Gitxaala. Due to Gitxaala's extensive network for sharing resources with other members not residing on

reserve, Gitxaala members around the Province would be impacted by a loss or drop in the quantity and quality of resources.

The full impact to Gitxaala's harvesting rights from any of the concerns described above cannot be properly appreciated without understanding that it is fundamentally inconsistent with the way that Gitxaala undertake harvesting practices (and fundamentally inconsistent with the *ayaawx* that guide those practices) for Gitxaala members to "go elsewhere" if an area is disturbed or damaged. Gitxaala *ayaawx* prevents Gitxaala from harvesting in other House territories. Additionally, certain resources, such as seaweed and the kelp used to harvest herring roe, vary within the territory and cannot be replaced by accessing the same species of resources in any other location. Gitxaala notes that the importance of a First Nation being able to maintain their way of life by protecting their preferred place to carry out their traditional activities was underscored in *Mikisew Cree First Nation v. Canada*, 2005 SCC 69, where the Court rejected the Crown's argument that Treaty rights could not be infringed as long as they could be exercised "somewhere".<sup>25</sup>

Gitxaala's right to harvest medicines and traditional plants is also threatened by the LNG Canada Project. Gitxaala members still rely on traditional medicines to treat illnesses and to treat injuries during harvesting. Traditional medicines like devil's club are also connected to spiritual practices that are part of marine resource harvesting. Many of the plants and medicines that Gitxaala members harvest, such as devil's club, yew wood, hemlock, wild rice and rhubarb, exist along the shoreline and are susceptible to damage from large waves and any contamination washing on shore.

Gitxaala's right to hunt and harvest terrestrial wildlife, such as deer and bear would be impacted by the LNG Canada Project if shorelines or creeks were impacted in any way, if water quality was impacted, and if Gitxaala's right to travel by boat was affected due to safety or navigational concerns.

Currently, Gitxaala is able to trade and sell a wide variety of resources because they are viewed to be clean and of the highest quality by other Aboriginal groups and other purchasers. Should Gitxaala's ability to harvest be impacted or should the quality of Gitxaala's resources be affected by the Project, Gitxaala's right to trade and sell its resources will be severely compromised. As noted throughout Gitxaala's evidence at the Community Hearings, this would undermine Gitxaala's relationship with its neighbors.

If Gitxaala people cannot trade, or if their trade is diminished, it will be more difficult to access eulachon grease, which is obtained through ancient trade networks. Any loss or difficulty in accessing grease through trade would undermine Gitxaala's food preservation practices because grease remains a critical element in how Gitxaala people consume the traditional foods they harvest in their territory. It would also impact Gitxaala's ceremonial and governance practices, such as feasting, because grease is often provided at feasts as a display of wealth and status.

### Impacts to cultural practices

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<sup>25</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, at paras. 47-48

The Preliminary Assessments are completely silent on potential impacts to Gitxaala's cultural practices. As described above, there are many examples of customs, practices and traditions that are integral to Gitxaala's distinctive culture, in addition to the practices relating to harvesting resources and governing their territory.

An example is the practices relating to *naxnox*. *Naxnox* form the centre of Gitxaala's spiritual worldview and there are specific practices, customs and traditions requiring that *naxnox* be cared for and respected. Gitxaala's practices and traditions relating to *naxnox* involve offering seafoods to *naxnox*, passing down *adawx* relating to *naxnox* through *gugwilx'ya'ansk* and feasting ceremonies and ensuring that *ayacwax* relating to the preservation of the environment and respect for traditional resources are followed by those within Gitxaala's territory. These practices also involve prohibitions on having boats or anchoring in certain areas where there are *naxnox*.

Gitxaala is concerned that the LNG Canada Project will impact the *naxnox* and the practices, customs and traditions relating to them, through noise disturbance, the failure of the Project to follow Gitxaala's *ayacwax* relating to resources, and LNG tanker traffic through *spanoxnox* areas.

Another example of customs that are integral to Gitxaala is related to the concept of *hawalk*. *Hawalk* are the set of activities and actions that are forbidden as violating Gitxaala's *ayacwax*. Within Gitxaala's territory, any action that shows disrespect to a marine resources, including the salt water, or places that resource at risk, is *hawalk*. The LNG Canada Project would fall within the concept of *hawalk* because of the impacts it will have on the environment, the disrespect it shows to the *naxnox* and Gitxaala's resources and because of the potential adverse impacts it poses to the People of the Salt water.

Additional information will be provided to the EAO about impacts to Gitxaala's cultural practices in the project specific Traditional Use Study for the LNG Canada Project and the information provided in relation to the four Gitxaala-specific VCs.

### **Critique of Charles Menzies' Report**

The Preliminary Assessments include a critique of the some of the findings of Dr. Charles Menzies. Gitxaala will be providing the EAO with a response by to this critique shortly.

### **Conclusion**

A strength of claim analysis and preliminary assessment of impacts is the first step in a meaningful consultation process. These assessments are crucial to understanding the rights at issue so as to situate the consultation process. This was emphasized by the Supreme Court of Canada in *Haida* and the importance of assessing strength of claim was affirmed in *Rio Tinto*.<sup>26</sup> The strength of claim analysis is an important preliminary step in determining the scope of the duty. Furthermore, the strength of claim analysis is a concrete practice that engages the honour of the Crown.<sup>27</sup>

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<sup>26</sup> *Haida*, para. 36; *Rio Tinto Alcan v. Carrier Sekani Tribal Council*, 2010 SCC 43, para. 36

<sup>27</sup> *Haida*, para 16

British Columbia has been made aware of Gitxaala's claims to Aboriginal rights and title within the area of the Projects. The Province was a party to the Enbridge Northern Gateway Project Joint Review Panel process where Gitxaala filed a considerable amount of evidence in relation to its rights and title within its traditional territory. Gitxaala has also sent correspondence to British Columbia enclosing traditional land use data in relation to its rights and interests in the areas of the proposed Projects. It is difficult to understand how the information provided by Gitxaala in relation to its rights and title in the Project areas has been considered in the Preliminary Assessments.

Gitxaala expected that the Preliminary Assessments would include determining, among other things, Gitxaala's governance, cultural, harvesting, social, and ceremonial rights; the extent to which the lands and waters within Gitxaala's territory are integral to the exercise of these rights; and how Gitxaala's ability to exercise these rights may be negatively impacted by the Projects. As described above, there is no evidence that the Province has conducted assessments of Gitxaala's governance, cultural, harvesting, social, and ceremonial rights and the conditions necessary for the exercise of these rights.

As explained above, Gitxaala is currently in the process of collecting project-specific information in relation to each of the Projects. Gitxaala submits that the EAO should wait until this information has been provided to conduct its strength of claim assessment and preliminary assessment of impacts in relation to the Projects.

In addition, a considerable amount of information has been provided to the Province about the nature of and extent of Gitxaala's Aboriginal rights, including title, which is not referenced in your letter. This includes information filed by Gitxaala in the JRP Process, such as:

- Report by Dr. Douglas C. Harris entitled *Gitxaala Indian Reserves and Marine Harvesting*<sup>28</sup>
- Report by Susan Marsden entitled *The Gitkxala, their History, and their Territories (Porcher Island, Banks Island, Pitt Island, and Adjacent Islands)*<sup>29</sup>
- Gitxaala reserve creation documents and other historical documents relating to Gitxaala's reserves filed in the Northern Gateway Joint Review Panel process<sup>30</sup>
- Historical documents and records filed by Gitxaala in the Northern Gateway Joint Review Panel process<sup>31</sup>

Given the duty to act honourably in relation to claims of Aboriginal rights, it is the Province's responsibility to ensure it has all the relevant information it needs to make a properly informed decision. Gitxaala therefore asks the Province to engage in further information gathering and analysis to produce an appropriate strength of claim assessment prior to continuing with the

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<sup>28</sup> Northern Gateway Joint Review Panel Public Registry, Exhibit D72-24-10

<sup>29</sup> Northern Gateway Joint Review Panel Public Registry, Exhibit D72-33-02

<sup>30</sup> Northern Gateway Joint Review Panel Public Registry, Exhibit D72-79-02

<sup>31</sup> Northern Gateway Joint Review Panel Public Registry, Exhibit D72-19-02 to D72-19-50

review process for the Projects. Doing so is required in order to maintain the honour of the Crown.

Gitxaala asks that the EAO engage in a meaningful review of more complete and relevant information to assess Gitxaala's strength of claim prior to any further decisions being made.

In responding to this letter, please copy Karey Brooks ([kbrooks@jfkllaw.ca](mailto:kbrooks@jfkllaw.ca)) at Janes Freedman Kyle Law Corporation and David Robbins ([drobbins@woodwardandcompany.com](mailto:d Robbins@woodwardandcompany.com)) and Alana DeGrave ([alana@woodwardandcompany.com](mailto:alana@woodwardandcompany.com)) at Woodward and Company.

Yours truly,



Acting Chief Clarence Innis

Enclosure

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Enclosures      Map of Gitxaala Traditional Territory