

FEDERAL COURT OF APPEAL

BETWEEN:

SQUAMISH NATION

Applicant

- and -

ATTORNEY GENERAL OF CANADA and TRANS MOUNTAIN PIPELINE ULC

Respondents

APPLICATION UNDER SECTIONS 18, 18.1 and 28 of the *Federal Courts Act*, R.S.C. 1985, c. f-7, subsection 55(1) of the *National Energy Board Act*, R.S.C. 1985, c. n-7 and Rule 301 of the *Federal Courts Rules*, SOR/98-106.

AMENDED NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at 701 West Georgia, Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicants' solicitor, or where the applicants are self-represented, on the applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date:

Issued by: _____
(Registry Officer)

Address of local office:
Federal Court of Appeal
Pacific Centre - P.O. Box 10065
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**Attention: Maureen Killoran, Q.C.
Sean Sutherland
Olivia Dixon**

APPLICATION

This is an application for judicial review by the Squamish Nation (the “**Nation**” or “**Squamish**”) in respect of the order of the Governor in Council (“**GIC**”) made on June 18, 2019 (Order in Council P.C. 2019-820) and published in the *Canada Gazette*, Part 1, Vol. 153, No. 25 on June 22, 2019 (the “**Decision**”) with respect to the Trans Mountain Expansion Project (the “**Project**”).

The Decision:

- a) accepts the recommendation of the National Energy Board (the “**NEB**” or the “**Board**”) that the Project is required by the present and future public convenience and necessity and is in the Canadian public interest under s. 52 of the *National Energy Board Act*, R.S.C., 1985, c. N-7 (the “**NEB Act**”);
- b) accepts the recommendation of the NEB that the significant adverse effects the Project is likely to cause can be justified in the circumstances under the *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 19 (“**CEAA**”);
- c) pursuant to subsection 31(1) of CEAA, decides that, taking into account the terms and conditions referred to in paragraph (d), the Project is likely to cause significant adverse environmental effects that can be justified in the circumstances, and directs the NEB to issue a decision statement concerning the Project (the “**Decision Statement**”);
- d) pursuant to subsection 54(1) of the NEB Act, directs the NEB to issue Certificate of Public Convenience and Necessity OC-65 (the “**Certificate**”) to Trans Mountain Pipeline ULC (“**Trans Mountain**”), in respect of the proposed construction and operation of the Project, subject to the terms and conditions set out in Appendix 3 of the National Energy Board Report of February 22, 2019 entitled National Energy Board Reconsideration Report - Trans Mountain Pipeline ULC - MH-052-2018 (the “**Reconsideration Report**”) with conditions 6, 91, 98, 100, 124 and 151 superseded by the conditions as amended and annexed to the Decision; and
- e) pursuant to subsection 21(2) of the NEB Act,

- (i) approves the issuance by the NEB to Trans Mountain Pipeline ULC of Amending Orders AO-004-OC-49 and AO-005-OC-2, substantially in the annexed form to the Decision, and
- (ii) approves the December 1, 2016 issuance by the NEB to Trans Mountain of Amending Orders AO-002-OC-49 and, AO-003-OC-2 (collectively, the **"Amending Orders"**).

THE APPLICANTS MAKE APPLICATION FOR:

- 1. An order quashing or setting aside the Decision;
- 2. An order quashing or setting aside the Certificate and Amending Orders issued by the NEB in respect of the Project;
- 3. An order quashing or setting aside the Decision Statement for the Project issued by the Board pursuant to the Decision;
- 4. A declaration that the Decision constitutes a breach by the Crown in right of Canada, as represented in these proceedings by the Attorney General ("**Canada**"), of its legal and constitutional duty to consult with and accommodate Squamish in respect of the subject matter of the Decision;
- 5. ~~A declaration that the Decision constitutes a breach by Canada of its fiduciary obligations to Squamish to protect Squamish's interests in respect of their reserves, particularly Seymour Creek Reserve No. 2, Mission Reserve No. 1, Capilano Reserve No. 5, and Kiteilano Reserve No. 6 (the "**Reserves**");~~
- 6. A declaration that it was an error in law or unreasonable for the GIC to issue an order under s. 54 of the NEB Act in respect of the Project before such time as Canada had fulfilled its constitutional duty to consult and accommodate in respect of Squamish's asserted Aboriginal rights and title, and its fiduciary obligation in respect of the Reserves;
- 7. ~~A declaration that it was an error in law or jurisdiction for the GIC to issue an order under s. 54 of the NEB Act in respect of the Project before such time as the NEB had prepared~~

*Quashed
by Order
dated Oct 2,
2019*

~~and submitted a report in accordance with the constitutional requirements and the statutory requirements of the NEB Act and CEAA;~~

8. ~~A declaration that the GIC erred in law in issuing the Decision because it does not comply with the constitutional requirements and the statutory requirements of the NEB Act and CEAA;~~
9. A declaration requiring Canada to meaningfully consult and accommodate Squamish and that only after meaningful consultation and accommodation has been completed can the Project be put before the GIC for approval;
10. An order prohibiting or staying any agents, servants and officials of Canada, and/or the relevant regulatory authority from issuing any permits, certificates or authorizations that would allow the Project to be carried out in whole or in part until such time as Canada has fulfilled its duty to meaningfully consult and accommodate Squamish in relation to the Decision on the Project;
11. An order prohibiting or staying Trans Mountain from taking any steps in reliance on the Certificate, Amending Orders, Decision Statement or subsequent orders made pursuant to the Certificate, Amending Orders and Decision Statement with respect to the Project;
12. Costs; and
13. Such further and other relief as this honourable Court may deem appropriate and just.

THE GROUNDS for the Application are:

A. FACTUAL BACKGROUND

1. Overview

1. Burrard Inlet, is, and always has been, home to the Squamish and its people. Burrard Inlet is also the chosen marine terminus for the Project and the narrow transit route for the at least seven-fold increase in tanker traffic for the Project that will pass three of Squamish's Reserves before even reaching the entrance to the Inlet at First Narrows.

2. The Nation's people, and the lands, waters and resources upon which they depend will be directly and significantly adversely impacted by the Project. The approval of the Project puts Squamish territory and its Reserves at risk with potentially devastating consequences.

3. Despite having the benefit of the Court's guidance in *Tsleil-Waututh Nation v. Canada*, 2018 FCA 153, Canada has again failed to uphold the honour of the Crown in its second effort to consult with Squamish regarding the Project. Canada again steadfastly relied on the NEB's conclusions despite Squamish identifying shortcomings in that analysis, including some acknowledged by Canada's scientists, and failed to engage substantively on outstanding issues of concern to Squamish. Canada has not offered any meaningful explanation for why these information gaps need not be filled to assess impacts on Squamish rights. Nor has Canada provided any certainty as to how impacts will be assessed and addressed through any future collection of information.

4. In addition, Canada withheld highly relevant information from Squamish until the very end of the consultation process, even though it had been in Canada's possession for some time, in breach of Canada's obligation to provide information in a timely way. This is not honourable and it precluded any opportunity for meaningful, two-way dialogue about the subject matter of this information, which was core to the reinitiated Squamish consultation in 2019.

5. Canada approached consultation with a predetermined outcome and failed to accommodate the Nation. Canada's self-imposed deadline for a decision on the Project rushed the process and dictated its content. From an early stage in the consultation process, Canada precluded any form of accommodation beyond the generic measures unilaterally developed by Canada that were unresponsive to Squamish's concerns, and closed its mind to the possibility that Squamish's perspective may have to prevail, supported as it was by expert evidence and in some instances by Canada's own scientists, and that alterations to the Project may need to take place to avoid, mitigate and accommodate impacts to Squamish's rights, title and reserve interests.

6. Overall, the conduct of Canada fell well below the standard required to uphold the honour of the Crown, especially as articulated in *Tsleil-Waututh*. Thus, the approval of the

Project must again be quashed to ensure Canada fulfills the duty to consult and accommodate, which is a constitutional imperative.

2. **Squamish Nation**

7. Squamish is a Coast Salish Nation and a band as defined in the *Indian Act*, R.S.C. 1985, c. I-5. They are an Aboriginal people within the meaning of s. 35(1) of the *Constitution Act, 1982*, with approximately just over 4,000 registered members.

8. Since a time before contact with Europeans, Squamish has used and occupied lands and waters on the southwest coast of what is now British Columbia extending from the Lower Mainland of British Columbia, and including Burrard Inlet, English Bay, Howe Sound, the Squamish Valley and north to Whistler (the “**Territory**” or “**Squamish Territory**”).

9. The boundaries of Squamish Territory encompass all of Burrard Inlet, English Bay and Howe Sound, as well as the rivers and creeks that flow into these bodies of water.

10. Squamish has occupied, governed and sustained themselves physically, culturally and spiritually since time immemorial from the areas of their Territory that would be impacted by the Project. Squamish asserts a strong claim to Aboriginal rights, including title and self-governance rights, within these areas pursuant to s. 35(1) of the *Constitution Act, 1982*.

11. Further, since a time before contact with Europeans, Squamish regularly travelled to and fished in the Fraser River and they assert Aboriginal rights to fish in the Fraser River, including at its mouth and on its tributaries.

12. Squamish continue to occupy, and be stewards of, their Territory, and harvest resources throughout their Territory, among other places, the Capilano River at the entrance of Burrard Inlet, Seymour River, the Fraser River, and Howe Sound for food, social and ceremonial purposes. These lands, waters, resources and activities are central to their way of life, culture and identity.

13. Squamish are protectors of the Salish Sea and rely heavily on the marine and freshwater resources within their Territory to practice their Aboriginal rights.

3. Squamish Nation Reserves and Village Sites

14. Squamish has three reserves located in and at the entrance to Burrard Inlet: Seymour Creek Reserve No. 2 (*Ch'ich'elxwi7kw*) on the north shore close to the Westridge Marine Terminal, Mission Reserve No. 1 (*Eslhá7an*), and Capilano Reserve No. 5 (*Xwmech'stn*). These reserves stand to be directly impacted by the Project, and any accidents or malfunctions associated with the Project. Also affected are Kitsilano Reserve No. 6 (*Sehákw*) near the entrance to False Creek, and at least three other waterfront reserves in Howe Sound.

15. However, not all Squamish villages in the Project area were designated as reserves. For example, Squamish has village sites adjacent to the Project, including at *Temtemixwtn* (Belcarra), *Titemtsen* (Port Moody), *Stitsma* (mouth of Seymour River), *Kikáyt* (Fraser River) and along the tanker route.

4. Respondents

16. At the time that the Project was proposed, Kinder Morgan Canada Limited (“**Kinder Morgan**”) owned Trans Mountain. On May 29, 2018, the Government of Canada and Kinder Morgan announced that they had entered into an agreement for the purchase of the existing Trans Mountain pipeline system and the rights, at that time, to build the Project. As of August 31, 2018, the Trans Mountain pipeline system and the Project are part of Trans Mountain Corporation (“**TMC**”), a federal Crown corporation.

17. Canada, as represented in these proceedings by the Attorney General, is responsible for discharging the federal Crown’s duty to consult Squamish with respect to the Project. Canada has consistently acknowledged that it owes Squamish a duty to consult at the “deep” or “high” end of the spectrum for the Project.

5. Trans Mountain Expansion Project

18. On December 16, 2013, Trans Mountain applied to the Board for a certificate of public convenience and necessity (“**CPCN**”) and related regulatory approvals in relation to the Project.

19. The Project is a proposal by Trans Mountain to expand the Trans Mountain pipeline system from 300,000 bbl/d to 890,000 bbl/d for the transport of heavy oil, including diluted

bitumen, between Edmonton, Alberta and Burnaby, British Columbia. The Project will include a substantial expansion of the current infrastructure in Squamish Territory, and a substantial increase in shipping in Squamish Territory, including:

- (a) a new pipeline along a new route to the Burnaby Terminal;
- (b) 13 new tanks and one replacement tank at the Burnaby Terminal;
- (c) two new delivery lines connecting the Burnaby Terminal to the Westridge Marine Terminal;
- (d) a new dock complex with three new berths at the Westridge Marine Terminal in Burrard Inlet; and
- (e) at least a seven-fold increase in tanker traffic per month.

20. While the Project was proposed as an expansion, it will mostly cut new routes through Squamish Territory and result in the dismantling of the current Westridge Marine Terminal and the building of an entirely new, much larger marine terminal.

6. Significance of the Project to Squamish

21. The Project poses a serious threat to Squamish's home, to their continued reliance on the marine and aquatic environment for the practice of their rights, and to the survival of the Southern resident killer whale ("SRKW") – a species of cultural and spiritual significance to the Nation that is recognized to be in a critical state.

22. A significant part of the Project, the marine terminal and associated tanker traffic, is to be situated in the heart of Squamish Territory. Burrard Inlet and the Salish Sea are central to Squamish identity and culture. They are also key to the modern economic success of the Nation.

23. The majority of Squamish members live in or near what is now North Vancouver and West Vancouver both on and off reserve within close proximity to the terminals and tanker routes for the Project. The majority of those members who live on reserve, live on one of the reserves on the north shore of Burrard Inlet. The Squamish Council and main administrative

office is at *Ch'ich'elxwi7kw* – Seymour Creek Reserve across the Inlet from the Westridge Marine Terminal.

24. In addition to this being their home, Squamish rely on their territorial and reserve lands, and the waters and resources adjacent to them, to support their people, culture and way of life, and to practice their Aboriginal rights, including harvesting, cultural, social, ceremonial and governance rights. These areas are culturally and ecologically significant, are vital to Squamish's livelihood and economy, and are critical to the survival of Squamish people and culture.

25. Due to the density and significance of the cultural and spiritual values in the Project area, the lands and waters in this area are very sensitive to further industrial development. The loss of access to, or availability of, the land, waters and resources within this part of Squamish Territory would be devastating to Squamish identity and culture.

26. Squamish is uniquely vulnerable to the impacts of the Project and will bear the burden of risks arising from the expansion of the terminals and the increase in the transport of diluted bitumen, including risks of terrestrial and marine spills or other accidents in very sensitive areas – events that could be catastrophic for Squamish people, Territory, economy and culture.

7. Initial Phase III Consultation Process

27. Squamish participated extensively in the original OH-001-2014 NEB hearing for the Project and the initial 2016 Phase III consultation process.

28. The original NEB hearing did not provide Squamish with the information that they needed to understand and assess the extent of the impacts of the Project to Squamish's rights and title, and to facilitate meaningful consultation.

29. On May 19, 2016, the NEB issued the initial report for the Project, which recommended that (i) the Project is in the public interest, (ii) the Project is not likely to cause significant adverse environmental effects under CEAA, and (iii) the GIC approve the Project.

30. Squamish engaged in good faith in the initial Phase III consultation process in the hope that Canada would act to fill gaps in the Board's process, but Canada closed consultation without

taking any steps to fill the information deficiencies in the NEB process or to engage meaningfully with Squamish on their outstanding concerns.

31. Canada's focus remained throughout the initial Phase III on obtaining comments on the conditions for the Project, and completing the Crown Consultation and Accommodation Report (the "CCAR"). Throughout the consultation process, despite Squamish's efforts, there was no real dialogue with Canada about the substance of their concerns, engagement with their concerns or effort to address their concerns. As a result, on November 17, 2016, Squamish provided a submission to the GIC setting out that the duty to consult and accommodate Squamish had not been discharged and requesting that the GIC either reject the Project or refer the Project back to the NEB for further assessment and to Canada for meaningful consultation.

32. Despite Squamish's submission, on November 29, 2016, the GIC proceeded to approve the Project, subject to the terms and conditions set out in the initial NEB report, and accepted the recommendations of the NEB that the Project is in the public interest and is not likely to cause significant adverse environmental effects.

33. Squamish was one of the applicants that were granted leave to challenge the original approval of the Project in the Federal Court of Appeal on the basis of Canada failing to fulfill the duty to consult and accommodate the Nation.

34. Squamish's application for judicial review was successful. On August 30, 2018, the Federal Court of Appeal found that Canada's conduct "fell well short" of the standard required to discharge the duty to consult. Accordingly, the Court quashed the approval of the Project (*Tsleil-Waututh Nation v. Canada*, 2018 FCA 153).

8. Canada's Approach to the Reinitiated Phase III Consultation Process

35. On August 30, 2018, following the decision of the Court in *Tsleil-Waututh*, Canada immediately affirmed its commitment to build the Project, publically announcing that "building the Trans Mountain Expansion Project is in the national interest".

36. On September 20, 2018, through Order in Council P.C. 2018-1177, the GIC referred the NEB report, including the recommendations and terms and conditions, back to the Board for

reconsideration with reference to paragraph 770 of the Court's reasons in *Tsleil-Waututh* (the "**Reconsideration**"). Order in Council P.C. 2018-1177 set a timeline of 155 days for the NEB's Reconsideration.

37. Prior to issuing Order in Council P.C. 2018-1177, Canada did not consult with Squamish about the scope of the Reconsideration or the matters that in Squamish's view remained outstanding from the previous 2016 consultation process, and that needed to be assessed and addressed by the NEB.

38. On October 5, 2018, Canada sent a form letter to Squamish advising the Nation that it had decided not to appeal *Tsleil-Waututh* and would rely on the NEB Reconsideration to the extent possible to fulfill the legal duty to consult. Canada did not provide any details at this time on how the reinitiated Phase III consultation process (the "**2019 Consultation**") would be carried out. Those details would not be provided until a subsequent form letter on February 19, 2019.

39. Canada has acknowledged that Squamish is owed consultation at the "high end of the consultation spectrum" with respect to the Project. The Nation participated extensively in the 2019 Consultation, but Canada has not meaningfully engaged with the intention of addressing their outstanding concerns.

(a) National Energy Board Reconsideration

40. Squamish was granted intervenor status in the NEB Reconsideration and participated in all stages of the process to the extent it was able in the tight timeline set by cabinet.

41. Squamish raised early on in the Reconsideration that the timeline set by cabinet for the Reconsideration would not allow Squamish to meaningfully participate in the review process and put forward their case to the Board. Squamish also objected to the constrained scope of the NEB review. Squamish asked the Minister to extend the timeline and scope of the review in a meeting on October 31, 2018 and letters on November 5, November 20 and December 12, 2018, but Squamish did not get a response until February 8, 2019 after the NEB hearing record was closed.

42. Squamish's participation in the NEB Reconsideration included: providing oral traditional evidence; filing direct evidence of Squamish's traditional use and occupancy of the Project area;

filing expert evidence; filing written information requests of Trans Mountain and Natural Resources Canada (**NRCan**); filing motions with the Board for extensions of time and adequate answers to information requests; and filing written argument.

43. Squamish requested the opportunity to provide the Board with evidence in the form of a sacred ceremony that could only be performed and discussed in the Squamish longhouse. Squamish's request was denied by the Board.

44. The oral traditional evidence of Squamish described the importance of the yew yews (orcas) to Squamish culture and included stories of how the yew yews would teach their young to feed in Burrard Inlet and would calve at the elbow of Indian Arm and Burrard Inlet. Squamish also described the reliance of Squamish on the marine and aquatic environment for the practice of their rights, and the importance of salmon to their way of life and teachings.

45. Together with Tsleil-Waututh Nation and others, Squamish jointly filed expert reports with the Board that highlighted gaps in the available information with respect to the impacts of the Project in Squamish Territory and the underrepresentation of the specific risks from the Project to Squamish (collectively, the "**Joint Reports**"). The Joint Reports were as follows:

- (a) A report by Dr. Jeffrey W. Short entitled "Further Report on the Fate and Effect of Oil Spills from the Trans Mountain Expansion Project in Burrard Inlet and the Fraser River Estuary" that highlights an information gap in the existing studies on spilled bitumen in a marine environment (the "**Short Report**"). He states that those studies do not mimic the environmental conditions in Burrard Inlet and Fraser River or the product to be shipped on the Project and that, contrary to the NEB's conclusions, diluted bitumen could submerge in large quantities over widespread areas if a spill occurred during the conditions leading to freshened surface waters in Burrard Inlet and/or the Fraser River Estuary. Dr. Short also highlights the limitations of the representative spill modelling undertaken by Trans Mountain and the failure to consider the ecological effects to sensitive shorelines and species in Burrard Inlet, the Fraser River Estuary and English Bay.

- (b) A report by Ms. Elise G. DeCola of Nuka Research and Planning Group entitled “Further Technical Analysis of Oil Spill Response Capabilities and Limitations of the Trans Mountain Expansion Project” that identifies spill response gaps, including environmental conditions in Squamish Territory that would limit spill response or render it ineffective for significant portions of the year, and the lack of capability and capacity to respond to diluted bitumen spills in the fast-moving waters of the Fraser River (the “**Nuka Report**”).
- (c) A report by Dr. Thomas Gunton and Dr. Chris Joseph entitled “Trans Mountain Expansion Project Reconsideration Hearing: Assessment of Oil Spill Risks” that concludes, contrary to the NEB, that oils spills from the Project are likely.
- (d) A report by David Hughes entitled “Report on the Need For, and Economics Of the Trans Mountain Expansion Project” that sets out how the economic circumstances have changed since the original NEB hearing warranting a reconsideration of the need for the Project.

46. The gaps highlighted by the Joint Reports became the focus for Squamish in the 2019 Consultation with Canada. Squamish sought to use the NEB hearing process to address these and other information gaps it considered necessary to fill to understand the potential impacts of the Project on its rights and whether those impacts could be mitigated. However, the Nation was unable to obtain the information it considered necessary.

47. In its argument-in-chief, Squamish asked the NEB to recommend that the Project would cause significant adverse environmental effects that cannot be justified and that the Project was not in the public interest due to, among other reasons, the lack of information on the ability to mitigate Project impacts to Squamish’s rights, title and reserve interests, particularly in the event of a spill, and the failure of Canada to remedy the defects in consultation and accommodation as found in *Tsleil-Waututh*.

(b) National Energy Board Report

48. On February 22, 2019, the NEB released the Reconsideration Report. The NEB recommended that the GIC approve the Project by directing the issuance of a CPCN to Trans Mountain, subject to 156 conditions and 16 recommendations. The NEB found that:

- (a) The Project is and will be required by the present and future public convenience and necessity, and is in the Canadian public interest.
- (b) The Project is likely to cause significant adverse environmental effects that can be justified in the circumstances in light of the considerable benefits of the Project and measures to mitigate the effects. Specifically, Project-related marine shipping is likely to cause significant adverse environmental effects: on the SRKW, and on Indigenous cultural use associated with the SRKW; through greenhouse gas emissions from Project-related vessels; and by a credible worst-case spill from the Project or a Project-related vessel.

49. As with the NEB's 2016 report, the Board once again undertook a generic assessment of impacts to all Aboriginal groups. The Reconsideration Report does not include any Squamish-specific findings about impacts on their rights, title and other interests, and whether those impacts can be mitigated or accommodated. Based on its generic assessment, the Board found that any potential impacts from marine shipping on the interests, including rights of affected Indigenous peoples, are not likely to be significant and can be effectively addressed, with the exception of the impacts on the traditional use of SRKW by Indigenous peoples.

50. While many of the Board's conclusions on impacts turned on its view that spills are unlikely (contrary to the conclusion in Squamish's Joint Reports), the Board acknowledged that "depending on the extent and location of the spill, response time and the effectiveness of response measure, there could be significant adverse environmental effects to the use of lands, waters and resources for traditional purposes" and that the "fate and behavior of any spilled oil ultimately depends on the specific physical and chemical properties of the spilled oil and environmental conditions at the time of the spill event". With respect to Trans Mountain's representative spill modelling, the Board "used them as examples that provide an idea of the

potential effects pathways that could occur” and “generalized such pathways to predict the type of effects that could result from a spill.”

51. Problematically, the Board did not address the specific impacts of spills to Squamish’s rights, title and reserve interests in Burrard Inlet, and disregarded Squamish’s submission that the interruption of their practices would be devastating to Squamish culture.

52. The Board acknowledged that Indigenous communities raised a number of concerns that were beyond the scope of the Reconsideration hearing.

(c) Phase III

53. The 2019 Consultation between Squamish and Canada consisted of an exchange of correspondence and seven meetings. As set out above, Squamish raised at an early stage of the 2019 Consultation Squamish’s concerns with the limited scope of Canada’s mandate and the constrained timeline for consultation under s. 54(3) of the NEB Act (three months from the time the Board’s report is submitted). Squamish reiterated these concerns in a meeting with Canada on January 31, 2019, along with its concerns about Canada’s unreasonably low strength of claim assessment for Squamish (from the 2016 process) and Canada’s commitment that the Project will be built. Since the NEB did not reconsider all aspects of the Project relevant to impacts on Squamish, Squamish wanted to ensure that Canada planned to address those issues, to fill information gaps, and to collaboratively develop mitigation measures in the 2019 Consultation.

54. On February 8, 2019, Squamish finally received a response from the Minister to their letters of November 5, November 20 and December 12, 2018. The Minister noted that he “heard” their concerns about the process and timeline for the Reconsideration, but he provided no explanation for why he did not respond to these concerns during the NEB Reconsideration process. With respect to Squamish’s concerns that fell outside the NEB Reconsideration, the Minister assured Squamish that the 2019 Consultation will “provide the opportunity to find ways to address and respond to those concerns.” With respect to extending the time for consultation, contrary to the Minister’s prior assurances of no time limit in a meeting with the Nation on October 31, 2018, the Minister noted that a “decision on whether to recommend an extension has

not been made” and that “the NEB reconsideration report, as well as the Phase III consultations, will inform timing.”

55. On February 12, 2019, Canada sent an email to Squamish providing a status update on the concerns Squamish raised in the meeting on January 31, 2019. Canada assured Squamish that revising their strength of claim assessment was a “priority” and that they would share something more substantive soon (that assessment would not be provided to Squamish until May 15, 2019).

56. On February 19, 2019, Canada provided its approach to the 2019 Consultation, including that it will aim to secure Squamish’s free, prior and informed consent. Of particular concern to Squamish was that the mandate did not appear to contemplate gathering information outside the NEB process to understand the impacts to the Nation prior to a decision on the Project. The consultation team’s limited mandate remained a concern of Squamish throughout the process.

57. On March 1, 2019, Squamish wrote to Canada to reassert their objection to Canada’s strength of claim assessment for the Nation, and to provide material for Canada’s consideration. Squamish noted that strength of claim is a threshold issue for consultation, and asserted their strong claim to rights and title to the areas to be impacted by the Project, particularly to harvest fisheries resources. Squamish asked that Canada provide Canada’s information and views concerning the content and strength of the Nation’s claims and enter into a dialogue about the rights, title and reserve interests to be impacted by the Project, noting that this type of genuine dialogue had not yet occurred.

58. On March 7, 2019, Squamish wrote an email to Canada’s consultation team informing them that they would be preparing a detailed list of issues for consultation arising from the NEB Reconsideration Report, including matters and issues that they consider to remain outstanding and/or unaddressed in the Reconsideration Report. Squamish again followed up on Canada’s strength of claim assessment and offered to provide additional input on the assessment if needed.

59. On March 14 and 21, 2019, Squamish wrote to Canada setting out the issues relevant to understanding and mitigating the impacts of the Project on Squamish that Squamish considered to be outstanding after the NEB Reconsideration, including: an assessment of Project impacts specific to Squamish’s rights; the cumulative impacts to Burrard Inlet, the Salish Sea and

Squamish's rights; the fate and behaviour of diluted bitumen in the environmental conditions present in Squamish Territory; the spill response gaps in Squamish Territory; alternatives to reduce tanker traffic in the Nation's Territory and lessen impacts to SRKW; the feasibility of mitigating the significant adverse impacts to the SRKW; the need for the Project in light of changed economic circumstances; and conditions to reduce the number of tankers and mitigate tanker risk.

60. Squamish provided these lists of issues as a foundation to start the 2019 Consultation process with Canada. Squamish had hoped to hear back from Canada on their views with respect to the key issues for discussion arising from the reasons of the Court in *Tsleil-Waututh* and the NEB Reconsideration as committed to by Canada at the January 31, 2019 meeting, but Squamish never received a response from Canada to this request, despite Canada acknowledging this as an action item.

61. On April 1, 2019, without meeting with Squamish to discuss the issues in their March 14 and March 21 letters, Canada provided a form letter to Squamish that set out the broad initiatives that Canada unilaterally developed as "accommodation measures" for all Aboriginal groups.

62. On April 5, 2019, Squamish met with Canada to discuss the matters that it considered outstanding or unaddressed with respect to the Project. At this meeting, the representatives of Canada were not prepared to provide responses to the specific issues raised in Squamish's March 14 and 21 letters. The result of the meeting was a long list of action items for Canada to follow-up on. The Nation requested that Canada respond in writing to their letters.

63. At this early meeting, Squamish raised its initial concerns with the "accommodation measures" proposed in Canada's letter of April 1, including that they defer gathering of essential information to understanding impacts to Squamish's rights from the Project until post-approval without any certainty with respect to whether that information will be gathered and how it will be assessed.

64. On April 15, 2019, Squamish wrote to Canada's consultation representatives to follow-up on the April 5 meeting, and to outline their initial concern with the mandate of the consultation team with respect to the 2019 Consultation. Squamish asked that Canada confirm whether the

mandate of the consultation team includes collaboratively working towards information gathering on key aspects of the Project in the Nation's Territory in order to fill gaps in the NEB process and assess the impacts of the Project to the Nation prior to Project approval.

65. Further, Squamish noted that the list of action items provided by Canada after the meeting for the most part misunderstands or misstates the nature of the requests that the Nation has made. Squamish's requests were focused and specific. Squamish asked that Canada respond in a similarly focused manner. Squamish provided a detailed list of the requests and action items of the Nation arising out of the April 5 meeting. Squamish closed the letter by asking Canada to provide a copy of the NEB document that set out the issues beyond the scope of the Reconsideration that the NEB noted in the report it would provide to NRCan to assist in the 2019 Consultation. Squamish never received a copy of that document.

66. On April 17, 2019, Squamish again followed-up on the revised strength of claim assessment and asked Canada to provide specific pinpoint references to the material that it relies upon for the conclusions in its assessment so that Squamish are able to have a meaningful and informed dialogue about the assessment when it is delivered.

67. Without providing any response to Squamish's March 14 and 21 letters, on April 24, 2019, Canada provided Squamish with a draft of the revised CCAR. This was the only draft of the CCAR shared with Squamish in the 2019 Consultation process.

68. By email on April 26, 2019, Squamish's legal counsel followed-up with Canada's consultation team about the outstanding response to their March 14 and March 21 letters, noting that Canada's timely substantive response on these issues is critical and that without this, the Nation's ability to secure necessary technical support, and otherwise prepare for meetings, is significantly hindered.

69. On April 29, 2019, Canada provided Squamish with their response to Squamish's March 14 and March 21 letters. For the most part, Canada relied on the analysis of the NEB and Trans Mountain to dismiss Squamish's concerns, despite the Nation raising the deficiencies in that analysis that make it unsuitable to assess impacts to Squamish's rights.

70. Squamish and Canada's consultation team then proceeded to schedule a series of five technical meetings with respect to the Nation's outstanding issues in May 2019. In each meeting, Squamish: (i) raised specific concerns about the mandate of Canada; (ii) requested that Canada take steps to address the specific gaps and flaws in the NEB process and put forward proposals for Canada to do so; (iii) requested that Canada take steps to understand the Squamish-specific impacts of the Project and mitigate those impacts prior to a Project decision; and (iv) explained that Canada's initiatives do not address Squamish's concerns or mitigate impacts of the Project on Squamish.

71. In these meetings, Canada focused on defending the analysis of the NEB and did not depart from the Board's findings. The dialogue that ensued was not interactive or responsive. Squamish would raise very specific, focused concerns about gaps in the Board's assessment, and Canada would provide general information on research being undertaken by the government, which did not relate to Squamish's specific concerns. Canada also fell back on the broad initiatives it had put forward as generic accommodation measures. Squamish was unable to convince Canada that it was necessary to take any steps to mitigate or accommodate impacts to Squamish's rights prior to a decision and did not receive a response from Canada as to why they were not obligated to take these steps.

72. The meeting on May 2, 2019 primarily concerned the fate and behaviour of diluted bitumen. Dr. Short attended to assist Squamish. Squamish noted that the NEB recognized that the fate and behavior of any diluted bitumen spill ultimately depends on the specific physical and chemical properties of the spilled diluted bitumen and environmental conditions at the time of the spill. Squamish further noted that timing of submergence is extremely important in these situations to understand whether a diluted bitumen spill could be cleaned-up and to understand the impacts to the Nation and the resources upon which the Nation depends. Dr. Short raised a gap that was highlighted in the Short Report in the scientific literature in that the currently available studies do not mimic the environmental conditions in Burrard Inlet and the Fraser River Estuary or the product to be shipped on the Project and that, contrary to the NEB's conclusions, diluted bitumen could submerge quickly in large quantities over widespread areas if a spill occurred during the conditions leading to freshened surface waters in Burrard Inlet and/or the Fraser River Estuary.

73. Dr. Short was of the view that simple experiments could be done to establish the minimum time of dilbit submergence. Dr. Short noted that these experiments would only take in the order of months. Squamish requested that these experiments be done prior to Project approval.

74. Canada agreed with Squamish's request to have Government of Canada scientists collaborate with Dr. Short, Squamish and Tsleil-Waututh Nation to design and implement an experiment to attempt to fill the significant information gap the Nation highlighted with respect to the fate and behaviour of diluted bitumen in their Territory, particularly the time that it will take for diluted bitumen to sink or submerge in the environmental conditions in their Territory. However, while recognizing this is an information gap, Canada went on in the meeting to explain that it did not view this study as relevant to the GIC's decision, and reverted to relying on the NEB assessment, without a specific response for why this information was unnecessary to assess potential impacts on Squamish.

75. Squamish disagreed and emphasized the need to fill this information gap prior to Project approval in order to ensure that this material risk and impact of the Project is understood before a decision is made on the Project.

76. At the meeting, Canada was not able to provide a response to health impacts of consuming traditional foods that had been contaminated by a diluted bitumen spill. After the meeting on May 6, 2019, Canada emailed Squamish with a list of action items from the May 2 meeting, including documents entitled "Guidance for the Environmental Public Health Management of Crude Oil Incidents" (initially provided May 2) and the "Kalamazoo River Spill – State of Emissions Report". These documents did not provide answers to Squamish's specific concerns about the health impacts to their people if they continue to consume the traditional foods from their Territory after a spill.

77. On May 7, 2019, Squamish's legal counsel emailed the Crown consultation team to, among other things, inquire about the status of Canada's renewed strength of claim assessment for Squamish.

78. On May 9, 2019, Squamish met with Canada for the second technical meeting. The focus of this meeting was on spill modelling and spill response. The Nation had Ms. Elise DeCola of Nuka Research and Dr. Short attend the meeting to assist the Nation. As set out in the Short Report, Dr. Short explained that Trans Mountain did not consider the serious ecological damage that could result from oil spills that originate from locations other than the Swartz Bay-Tsawwassen ferry route intersection with the marine shipping route, and used that location as a “representative” location for the damage from a spill. Dr. Short stated that he was retained with respect to the Northern Gateway Project to do spill modelling based on values rather than location, and could undertake similar modelling for this Project to understand the impacts to Squamish. Squamish asked Canada to collaborate on spill modelling that would consider the damage from a spill to the valued components in their Territory prior to Project approval.

79. Canada did not commit to undertaking the spill modeling necessary to understand the impacts of the Project to Squamish’s rights prior to Project approval, or otherwise meaningfully respond to Squamish’s concerns.

80. Also, at the May 9 meeting, Squamish raised its concerns about the spill response gaps in their Territory as set out in the Nuka Report, including that existing river response resources are inadequate and would not be effective in fast-moving waters, particularly in the event that diluted bitumen submerged (as expected) in the Lower Fraser. This was recognized by the NEB as a material gap and, through Recommendation 7, it suggested that the GIC consider the spill response gaps raised in the Nuka Report as part of any work undertaken to review and update federal marine shipping oil spill response requirements.

81. Squamish followed-up on a previous request to Canada at the April 5 meeting for an update on the work being undertaken to fill the gaps in spill response (Recommendation 7), which Canada had noted it was undertaking, but that may be subject to cabinet privilege.

82. Canada did not provide their analysis relevant to Recommendation 7 to Squamish in the 2019 Consultation process. Canada provided presentations by Transport Canada, the Canadian Coast Guard and Western Canada Marine Response Corporation of spill response capacities within their individual jurisdictions. The presentations did not provide an answer to the specific response gaps highlighted by the Nation based on the Nuka Report, which relate to the

environmental conditions present in their Territory, and offered no assurance that these gaps would be able to be filled.

83. On May 9, 2019, Squamish wrote to Canada setting out their concerns with Canada's broad initiatives, including that they are at the early stages of planning, would take years to develop, defer information gathering until post-approval, and do not accommodate or mitigate impacts to Squamish's unique interests.

84. On May 15, 2019, one day prior to the meeting scheduled to address this topic, Canada provided the revised strength of claim assessment for Squamish. The assessment did not provide Squamish with either a meaningful assessment or the essential information on Canada's views of the rights at stake. The new assessment described Squamish's claim as "weak to moderate to strong".

85. At the meeting on May 16, 2019, Squamish raised their concerns with Canada's strength of claim assessment that it was provided too late (only one day prior to the meeting), and that it is too high-level. Squamish sought to understand the basis for Canada's assessment of "weak to moderate to strong", and what it meant to list all three at once, but Canada failed to provide Squamish with a meaningful response. Squamish also followed-up with respect to a response to their letter of May 9, 2019 with respect to Canada's proposed accommodations.

86. Squamish further raised their concerns about the need for the Project in light of recent developments. Squamish stated from their perspective that this remains a fundamental gap in the NEB's analysis and asked Canada's representatives to address this gap prior to a Project decision. Squamish had Mr. David Hughes attend to assist the Nation.

87. Mr. Hughes noted that Trans Mountain's assumption of the benefit of the Project to Canadian producers as set out in the evidence to the NEB is stale-dated and inaccurate. Mr. Hughes raised changes in the economic climate, including the current market conditions for diluted bitumen, the costs of exporting it overseas to Asia, and the pipeline capacity that is coming online with other projects (namely Keystone XL and Enbridge Line 3), and the need to meet Canada's climate commitments. Canada steadfastly relied on the conclusions of the NEB, and did not meaningfully respond to Squamish's concern that those conclusions are outdated.

88. On May 16, 2019, the Crown consultation team emailed Squamish with a list of action items arising from the May 9 meeting and attaching, among other things, a discussion paper entitled “Discussion Paper: Review of Oil Spill Response Organizations”. Canada noted that this paper was provided with respect to Squamish’s request for an update on how Canada is going to fulfill Recommendation 7 of the NEB. As noted in Squamish’s independent submission to the GIC, the discussion paper only provides a high level review of the current regulatory regime and asks for feedback. It did not answer the specific deficiencies in the spill response regime in Squamish’s Territory raised in the Nuka Report.

89. On May 17, 2019, Squamish wrote to Canada with respect to the initial draft of the CCAR. Squamish highlighted a number of errors in the CCAR, and objected to the argumentative and positional approach that Canada’s representatives took to setting out the consultation with the Nation. Squamish stated their disagreement with Canada’s assessment of impacts to the Nation of up to minor (that had not been updated at that stage), and asked Canada to prioritize a discussion of this assessment in the consultation process.

90. On May 23, 2019, Squamish and Tsleil-Waututh Nation sent a joint proposal to Canada with respect to the study on the fate and behaviour of diluted bitumen.

91. On May 23, 2019, prior to the meeting, Canada emailed Squamish reference material for the meeting on the SRKW measures that was to take place that same day. In that meeting, Squamish raised their concerns about the SRKW and chinook. Canada’s main SRKW experts were not available to attend this meeting because they were testifying at the Roberts Bank Terminal 2 hearing. Squamish raised their main concern that more needs to be known about the ability to effectively offset the significant adverse effects to the SRKW from Project-related marine shipping prior to any Project approval. Canada’s scientists acknowledged that they currently do not have an understanding of the level of underwater noise in the SRKW habitat that has brought the SRKW to such a critical state and they do not have an understanding of the thresholds for underwater noise that would promote recovery of the SRKW, or how those thresholds will be achieved.

92. Canada’s scientists stated that what they do know is that we need quieter and cleaner oceans, and we need more chinook produced. Squamish stated that the Project is not moving in

the direction of cleaner, quieter oceans and more chinook, and questioned how the Project can be approved at this time when it is accepted that the SRKW is in a critical state and the Project would only add to those effects, without measures in place to more than mitigate those effects.

93. Notably, Squamish asked at the consultation meeting on May 23, 2019 about the legislative mechanisms that Canada would have to revoke approval of the Project if after studying the current level of cumulative impacts Canada discovered that it had gone too far, and could not mitigate the Project-related effects to Squamish's rights (including to the SRKW). Canada was not able to respond.

94. At the May 23 meeting, Squamish also reiterated their concerns with Canada's strength of claim assessment, including the failure to take into account ethnographic material that establishes Squamish's intensive use of the Fraser River – an area that Canada only acknowledges Squamish has a weak to moderate claim to. For most of Squamish's specific questions about the rights at stake and where in Canada's view the claims are the strongest and the weakest, Canada's representatives could not respond and said they would have to get back to Squamish in writing.

95. Squamish further raised the potential of re-routing some of the capacity for the Project to Washington State on Trans Mountain's existing line to reduce the number of tankers calling at the Westridge Marine Terminal. In response, Canada's representatives indicated that they were "there to consult on the project in its current form, and to suggest alternative routes would mean consideration of a different project." Canada's refusal to consider Project alternatives that would not jeopardize Squamish's asserted and established interests ruled out a potentially important form of accommodation.

96. On May 24, 2019, Canada emailed Squamish to inform them that the next meeting would be their last meeting as Canada's representatives would need time to inform the GIC on the Project. Canada attached to this email a memorandum on strength of claim. In this memorandum, with respect to Squamish's request for where in Canada's view the claims are strong, Canada notes that it is "unable to accede to [the] request" as "these are high-level assessments that do not provide detailed analysis of every site throughout each Nation's territory."

97. On May 28, 2019, Squamish's legal counsel emailed Canada's consultation team asking for an extension for the final submission to the GIC (that Canada had unilaterally determined was due May 29, 2019), given the meeting scheduled with Canada on May 30, 2019.

98. By letter dated May 28, 2019 (emailed on May 29), Canada set out its final views on the consultation process and reiterated its refusal to depart from the Reconsideration Report in order to assess and address impacts to Squamish. In the cover email on May 29, Canada noted that it had reassessed impacts to Squamish as "up to moderate" (from "up to minor" in 2016). This was only one week before the close of consultation. The one remaining meeting with Canada on May 30, 2019 was dedicated to SRKW so it did not provide a forum to discuss the reassessment.

99. Further, unlike the 2016 consultation, Canada only communicated its conclusion for the assessment and did not provide Squamish with the basis for the assessment in a revised draft of the CCAR. Squamish did not have an opportunity to see or discuss the basis for the impact assessment with Canada, as there was not time to do so before Canada's self-imposed deadline for a Project decision and Canada had refused Squamish's request for an extension to discuss this (and other) important outstanding matters.

100. On May 30, 2019, Squamish had their final meeting with Canada via telephone conference. The focus of the meeting was again on SRKW. Canada's scientists were candid about the unknowns with respect to the ability to mitigate the effects to the SRKW, and the level of uncertainty that currently exists about bringing underwater noise to an acceptable level. As set out in Squamish's final submission to the GIC, the meeting did not alleviate Squamish's concern that none of the measures proposed by Canada at this time would effectively avoid or lessen the significant adverse effects to the SRKW and promote recovery. Squamish also followed-up at this meeting about setting a time to discuss their proposal on the study with respect to the fate and behavior of diluted bitumen. As Squamish were not able to get to all their outstanding concerns in the time set for consultation, Squamish told Canada they would follow-up in writing. Squamish again reiterated their request for an extension of the time for consultation.

101. On May 31, 2019, Squamish wrote to Canada to provide further comments on the initial draft of the CCAR provided on April 24, 2019 (this draft had not been updated by Canada despite the meetings that occurred in May). Squamish objected to the fact that Canada had not

provided a revised version of the CCAR or the basis for Squamish's impact assessment for comment. As the CCAR would be a key document for the GIC's consideration, Squamish stated that it seems highly unfair that they are not given an opportunity to comment on it or respond to it before the cabinet-imposed deadline. Squamish asked Canada's representatives to make it clear when the final CCAR is submitted that it should not be taken as a reflection in any way of Squamish's view of the consultation process.

102. On June 3, 2019, after Canada's self-imposed deadline for Squamish's final submission on the CCAR, Canada wrote to Squamish to provide a response to the errors Squamish highlighted in the initial draft of the CCAR in their May 17 letter. At this time, Canada did not provide a revised version of the CCAR for comment, so Squamish still did not know how Canada's representatives would represent consultation with the Nation in the CCAR. Canada stated that it would only incorporate Squamish's comments on the CCAR "where appropriate".

103. On June 4, 2019, Squamish's legal counsel emailed Canada's consultation team with Squamish's comments on Canada's meeting summaries and noted that Squamish has not received the remainder of Canada's meeting summaries for the meetings in May.

104. On June 4, 2019, Canada's consultation team emailed Squamish with a list of action items from the May 30 meeting. The email attached the meeting summary for the May 16, 2019 meeting summary as "final" (even though Squamish had not yet had an opportunity to comment on it) and noted that the summaries for the May 23 and 30 meetings would follow soon. Squamish did not have the opportunity to comment on the remainder of Canada's meeting summaries prior to the close of consultation.

105. On June 5, 2019, Squamish wrote to Canada setting out the outstanding issues in the 2019 Consultation. Squamish's concerns that remained outstanding at the close of consultation are significant and have significant implications for the impacts of the Project on their rights, title and reserve interests and to the development of mitigation and accommodation measures. The matters include those that relate to understanding: the current cumulative impact loads in their Territory to know whether it can sustain the exponential increase in tanker traffic; the risks posed by the increase in tanker traffic; the current level of underwater noise in their Territory and the threshold that would need to be reached to promote recovery of the SRKW; the impacts of a spill

of diluted bitumen on the valued components in their Territory relied upon to practice their rights; the feasibility of measures to reduce the tanker traffic for the Project; whether there is the capability to clean-up a diluted bitumen spill that submerges or sinks in the environmental conditions present in their Territory; and whether there are measures that can feasibly and effectively mitigate the impacts to the SRKW and chinook to prevent the loss of those valued species.

106. Dissatisfied with how the CCAR reflected Canada's engagement, on June 6, 2019, Squamish provided a submission to the GIC setting out the reasons why they say the Crown's duty to consult had not been discharged.

107. Squamish asked Canada to extend the time for consultation to address their outstanding concerns prior to a Project decision, but Canada proceeded to approve the Project despite Squamish's view that a decision on the Project was premature and Canada's consultation obligations remained outstanding.

(d) Correspondence from Canada after the Close of Consultation

108. After the close of consultation, and all opportunity to meet had passed, Canada produced for the first time (i) written peer reviews of Squamish's expert reports prepared (at least initially) by Canada's scientists though apparently edited by others; and (ii) Canada's impact assessment (along with other responses to Squamish's letters in the consultation process). These documents were highly relevant to the 2019 Consultation, but Squamish was deprived of the opportunity to engage with Canada on them.

109. On June 10, 2019, Canada disclosed, for the first time, written peer-reviews of the Joint Reports done by Canada's scientists. Even though the Joint Reports were the frequent and focused subject of several consultation meetings in the 2019 Consultation process, at no time during those meetings or otherwise during the process (until June 10) did Canada disclose the existence of these written reviews.

110. Squamish first learned of these reviews when they were disclosed on June 10. Inexplicably, they had been produced to Tsleil-Waututh Nation ten days earlier on May 31 but not to Squamish. (Tsleil-Waututh Nation and Squamish had jointly commissioned the expert

reports that were the subject of the reviews.) Subsequently, on June 24, Squamish learned through Tsleil-Waututh that, in fact, there were several different versions of these reviews which Tsleil-Waututh had received from Canada the two days prior. Tsleil-Waututh's legal counsel provided Squamish's legal counsel with these different versions, together with a document comparing the original version with the final version. That compare document showed that Canada had made significant changes to the scientists' original reviews.

111. On June 10, 2019, Canada's consultation lead also wrote to Squamish to correct perceived "errors" in Squamish's June 5, 2019 letter.

112. On June 11, 2019, Squamish's legal counsel wrote to Canada's consultation lead with respect to the correspondence that was sent after Canada's self-imposed deadline for Squamish's final submission to the GIC, and after all opportunity to have a meaningful dialogue on these issues had passed. With respect to the letter on the perceived "errors" in Squamish's June 5 letter, the letter notes that given that Squamish have been deprived of the opportunity to respond, that it should not form part of the consultation record before the GIC. With respect to the peer reviews of the Joint Reports, the letter notes that these reports were central to the 2019 Consultation and it is inexplicable why Canada would withhold these reviews from Squamish. The letter asks that NRCan inform the GIC that these reviews were withheld from Squamish until after the consultation process closed.

113. On June 11, 2019, Squamish's legal counsel wrote to Canada with respect to Canada's meeting summaries. The letter notes that it is inappropriate for Canada to finalize the meeting summaries without Squamish having had an opportunity to comment on those summaries.

114. On June 14, 2019, at 8:29 am, the Deputy Minister emailed Squamish with a letter and Squamish's annex to the CCAR. On June 14, 2019, at 7:30 pm, the Deputy Minister again emailed Squamish with a letter and Squamish's annex to the CCAR. In the letter, the Deputy Minister explained that the earlier version was a draft and that there had been several revisions to Squamish's annex, including the inclusion of the correspondence up to June 11, 2019. The Deputy Minister noted Squamish's request that the correspondence not form part of the record as it was provided after the close of consultation, but then goes on to state that the Crown included

it in the information before the GIC so that the GIC has the opportunity to “understand and take into account these concerns”.

115. Canada provided only one draft CCAR for review and that was on April 24, 2019, which was relatively early in the post-NEB phase of the consultation process. Despite the issue-specific meetings that followed in May, Canada did not provide an updated version of the CCAR for Squamish’s review and comment. The final version, which grew from 34 pages in the April 24 draft to 100 pages in the final, was delivered on June 14 without a chance to comment on this much-enlarged report, which included the impact assessment for Squamish.

(e) GIC Decision on the Project

116. On June 18, 2019, the GIC approved the Project and, on June 22, 2019, Order in Council P.C. 2019-820 (the “OIC”) was published in the Canada Gazette, along with an Explanatory Note.

117. The OIC states the GIC is satisfied “the consultation process undertaken is consistent with the honour of the Crown and meets the guidance set forth in the *Tsleil-Waututh Nation* decision for meaningful two-way dialogue focused on rights and the potential impacts on rights, and that the concerns, and potential impacts to interests including established and asserted Aboriginal and treaty rights identified in the consultation process have been appropriately accommodated.” The Explanatory Note confirms that the Government relied on the CCAR and Canada’s broad initiatives in making its decision on the Project. Neither the OIC nor the Explanatory Note make any specific reference to impacts to Squamish’s rights, title and reserve interests, or to Squamish’s independent submission to the GIC.

118. The CCAR merely summarized the concerns of Squamish, and did not provide any additional evidence, or address the deficiencies identified by Squamish that prevented Canada from understanding the impacts to Squamish and mitigating those impacts.

(f) Correspondence from Canada after the GIC Decision

119. On June 24, 2019, Canada’s consultation lead wrote to Squamish’s legal counsel providing the outstanding meeting summaries for the meetings on May 23 and May 30, noting

that to “ensure Squamish's perspective is “reflected on the record”, Canada will file Squamish's comments alongside Canada's meeting summaries to form part of the record.

120. On June 24, 2019, Canada’s consultation lead sent a second letter to Squamish’s legal counsel with respect to the withheld peer reviews of the Joint Reports noting the reviews were shared in the “interests of transparency”.

121. On June 26, 2019, Squamish’s legal counsel replied to Canada’s initial letter of June 24 noting that it is too late to “ensure Squamish’s perspective is reflected on the record” because the GIC has already made the decision on the Project, and it would be highly irregular and improper to alter the consultation record after the GIC has made a decision. The letter notes that due to Canada’s late disclosure of these summaries, Squamish was denied the opportunity to put forward its perspective on these meetings, and the only perspective that was reflected in the meeting summaries (and ultimately the CCAR) was that of NRCan. Squamish’s concerns and the discussions that took place were not accurately reflected in the meeting notes.

122. On June 26, 2019, Squamish’s legal counsel replied to Canada’s second letter of June 24 with respect to the withheld peer reviews of the Joint Reports. The letter notes that the conclusions in the peer reviews were not discussed in the consultation meetings with Squamish, Squamish was denied any opportunity to respond to the peer reviews in the consultation process for the Project, and there are material and unexplained changes between the original version of the peer reviews and the version that was sent to Squamish.

123. On June 28, 2019, Canada’s consultation lead emailed Squamish in response to the letters of June 26, 2019. The email does not explain why the reviews of the Joint Reports were withheld from Squamish, incorrectly states that the content of these reviews was discussed in the consultation meeting, and dismisses the material changes to the reviews as “clarification”. The email further does not explain why Canada did not provide Canada’s meeting summaries for comment in the consultation process so that they could inform the CCAR and the independent submission.

B. GROUNDINGS FOR REVIEW

124. The Crown has an obligation to consult and accommodate an Aboriginal group when the Crown (1) has knowledge, real or constructive, of asserted Aboriginal rights or title, and (2) contemplates conduct that (3) might adversely affect the Aboriginal rights or title.

125. The content of the duty to consult varies with the circumstances, depending on the strength of the claim by the Aboriginal group and the seriousness of the potential impact. Good faith consultation may reveal a duty to accommodate and to take steps to avoid or minimize impacts to the claimed rights or title.

126. The duty to consult is grounded in the honour of the Crown and is a constitutional obligation that acts as a constraint on the Crown's decision-making power. The duties of consultation and accommodation form part of the process of reconciliation and fair dealing.

127. Canada was aware that Squamish claims Aboriginal rights and title in an area where significant elements of the Project are located and where Project vessels will transit to and from the Project's marine terminal past Squamish's Reserves. Canada acknowledged that it owed Squamish a duty to consult in respect of the subject matter of the Decision at the deep end of the spectrum.

128. The Crown's duty in this case is particularly onerous and includes a fiduciary obligation given the proximity of the Project's marine terminal to Squamish reserves (particularly Seymour Creek I.R. No. 1), and the fact that diluted bitumen-laden tankers will pass through Burrard Inlet in front of three of the Reserves, each of which stands to be catastrophically affected by a spill.

129. In making the decision to approve the Project, the Crown is exercising discretionary control that affects Squamish's interest in its Reserves. As a fiduciary, it is bound to act with reference to Squamish's best interest in relation to their Reserves.

~~130. As part of its purported consultation, Canada relied on, or said that it was relying on, to the extent possible the NEB Reconsideration process and the NEB Reconsideration Report. The NEB process was substantively and procedurally flawed and could not be relied upon to~~

discharge the duty to consult and accommodate, or as a basis for the GIC's decision on the Project, including for the following reasons:

- (a) — failing to recommend against Project approval until Canada had fulfilled its obligations to consult and accommodate Squamish;
- (b) — failing to apply the correct legal test, or misapplying the correct legal test, under CEAA with respect to justification of the significant adverse environmental effects of the Project; and
- (c) — determining that the significant adverse environmental effects of the Project can be justified in the circumstances under CEAA without mitigation measures in place to avoid or lessen the significant adverse environmental effects of the Project, particularly with respect to the SRKW, contrary to the objectives of the *Species at Risk Act*, S.C. 2002, c. 29 (“SARA”).

131. While Canada acknowledged its duty to consult and accommodate, including at a “deep” level, it failed to fulfill that duty in the 2019 Consultation process and correct the defects in consultation as found by the Court in *Tsleil-Waututh* in the following respects:

- (a) Canada unreasonably and incorrectly assessed the merits of Squamish's *prima facie* claim for Aboriginal rights and title at an unduly low level, particularly with respect to Squamish's claim to harvest fisheries resources on the Fraser River;
- (b) Canada unreasonably and incorrectly assessed impacts to Squamish's Aboriginal rights, title and reserve interests at an unduly low level, including by:
 - (i) unreasonably relying on the NEB's Reconsideration Report, Canada's broad initiatives and the conditions for the Project that were not Squamish-specific;
 - (ii) failing to consider baseline conditions when it assessed the Project's impacts on Squamish's Aboriginal rights, title and reserve interests;

- (iii) unreasonably concluding that impacts to Squamish were up to moderate, despite the high cultural value of the SRKW to Squamish and the NEB's conclusion that Project-related marine shipping activities are likely to cause significant adverse environmental effects to the SRKW and to Aboriginal cultural uses associated with the SRKW, and despite the NEB's conclusion that the effects from a credible worst-case spill would be significant.
- (c) Canada unreasonably relied on the NEB Reconsideration Report in the 2019 Consultation in that:
 - (i) the NEB only undertook a generic assessment of impacts to all Aboriginal groups and did not consider Squamish-specific impacts to Squamish's rights, title and reserve interests;
 - (ii) the NEB findings, or lack thereof, in respect of Squamish's rights, title and reserve interests, and the impacts to those interests, are unreasonable, incorrect, incomplete, and fail to reasonably, correctly or adequately consider those interests;
 - (iii) the NEB's conclusion that its recommendation and decisions with respect to the Project are consistent with s. 35(1) of the *Constitution Act, 1982* is unreasonable and incorrect;
 - (iv) the NEB only assessed the impacts of spills at representative locations and to indicator species, and did not consider impacts to the valued components within Squamish Territory relied upon for the practice of rights;
 - (v) the NEB did not consider the cumulative impacts to Squamish's rights;
 - (vi) the NEB did not consider the fate and behaviour of diluted bitumen in the environmental conditions present in Squamish Territory;

- (vii) the NEB did not require evidence on critical matters, such as Project alternatives, or other measures to reduce Project-related tanker traffic;
 - (viii) the NEB did not develop measures that would avoid or lessen the significant adverse impacts of the Project on Squamish's rights, title and reserve interests;
 - (ix) the timeline for the NEB Reconsideration that largely dictated the timeline for consultation and the limited opportunities for participation did not allow for a meaningful opportunity for Squamish to put forward its concerns ~~in the process~~; and
 - (x) the scope of the NEB Reconsideration was constrained and did not consider all aspects of the Project that would impact Squamish's rights, title and reserve interests;
- (d) Canada withheld or delayed production of highly relevant information from Squamish until late into the consultation process (and in some cases until after the consultation process had closed) in breach of its obligation to disclose information in a timely way, thus negating any possibility of a meaningful dialogue on that information, including:
- (i) peer-reviews of Squamish's expert reports done by Canada;
 - (ii) an updated version of the CCAR;
 - (iii) Canada's impact assessment for Squamish; and
 - (iv) Canada's revised strength of claim assessment for Squamish;
- (e) Canada failed to engage substantively on issues of concern, including by:
- (i) unreasonably refusing to take steps to fill the gaps in the NEB Reconsideration Report to assess impacts on Squamish, despite the NEB Reconsideration Report being a generic assessment for all Aboriginal

- groups that did not specifically consider Squamish and despite Canada's own scientists agreeing with Squamish's experts on some of these gaps;
- (ii) unreasonably refusing to gather information or deferring the collection of essential information, including on matters relevant to impacts on Squamish's rights, title and reserve interests, and on matters relevant to avoiding or minimizing impacts to Squamish's rights, title and reserve interests, without the certainty of a process or criteria that would ensure proper assessment of impacts and protections for Squamish; and
 - (iii) unreasonably failing to engage in a meaningful two-way dialogue and grapple with Squamish's specific and focused outstanding concerns raised in the 2019 Consultation process, prior to the close of consultation and re-approval of the Project;
- (f) Canada approached consultation with a predetermined outcome and failed to accommodate Squamish, including by:
- (i) unreasonably constraining the mandate of the Crown officials to Project accommodation, with Crown officials having no mandate to engage substantively to address gaps in the NEB process and NEB Reconsideration Report in the manner required by law;
 - (ii) unilaterally rushing to the end point of consultation and developing accommodation measures prior to taking steps to understand the nature and extent of Squamish's rights and the impacts of the Project on those rights, inconsistent with the principle of fair dealing and reconciliation;
 - (iii) unilaterally determining and relying on "accommodation" measures that were generic, undeveloped, unresponsive to Squamish's concerns and that do not lessen or avoid impacts to Squamish's rights, title and reserve interests, while being unresponsive to accommodation measures proposed by Squamish;

- (iv) unreasonably failing to meaningfully respond and grapple with Squamish's concerns with Canada's proposed "accommodation" measures;
 - (v) closing its mind to the possibility that Squamish's perspective may have to prevail, supported at it was by expert evidence and in some instances by Canada's own scientists (as Squamish discovered after the close of consultation), and that alterations to the Project may need to take place to avoid, mitigate and accommodate impacts to Squamish's rights, title and reserve interests;
 - (vi) unreasonably refusing to consider alternatives to the Project, or make any alterations to the Project, as a means to avoid, mitigate and accommodate impacts to Squamish's rights, title and reserve interests; and
 - (vii) precluding any form of accommodation beyond the conditions and broad measures developed by the NEB and Canada, which did not even satisfy the precautionary principle and statutory objectives of CEAA and SARA, let alone the constitutional obligations to Squamish;
- (g) Canada unreasonably relied upon the CCAR which;
- (i) unreasonably and incorrectly excluded the Squamish perspective;
 - (ii) unreasonably, incorrectly and incompletely assessed Squamish's asserted rights, title and reserve interests and the risks and impacts to those interests posed by the Project;
 - (iii) unreasonably and incorrectly concluded that the NEB Reconsideration Report, the conditions for the Project and Canada's broad initiatives accommodated impacts to Squamish; and
 - (iv) unreasonably and incorrectly concluded or inferred that the Crown's duty to consult and accommodate Squamish had been fulfilled at the time the CCAR was completed;

- (h) Canada unreasonably refused to extend to the time for consultation at the request of Squamish to allow for meaningful engagement on issues of key concern in the 2019 Consultation process, leaving those issues unaddressed.

132. The GIC approved the Project without Canada having fulfilled its duty to consult and accommodate Squamish and, therefore, the Decision must be quashed as unlawful and in breach of a constitutional imperative.

133. Further and in the alternative Canada failed to uphold its fiduciary obligation to Squamish to protect the Squamish's interest in and use and enjoyment of its Reserves for the same reasons as set out in paragraph 131 prior to approving the Project and, therefore, the Decision must be quashed.

134. Such further and other grounds as counsel may advise and this Court may permit.

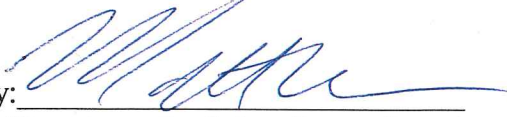
This application will be supported by the following material:

1. Affidavits of Syetáxtn, Christopher Lewis;
2. NEB Reconsideration Report;
3. The record before the GIC with respect to the Decision; and
4. Such further and other material as counsel for the applicant may advise.

The applicant requests, pursuant to Rule 317(2), that the GIC send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the GIC to the applicant and to the Registry:

1. Any material relied upon or that was considered by the GIC in making the Decision.

Date: September 26, 2019

Issued by: 

(Signature of solicitor for applicant)

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