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**VIA E-MAIL AND OVERNIGHT COURIER**

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File No. V41353

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Dear Honourable Ministers Polak and Coleman:

**Re: Carrier Sekani Tribal Council's submissions to the Ministers in relation to whether an environmental assessment certificate for the Coastal GasLink Pipeline Project should be issued at this time**

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### **Introduction and summary**

We are writing on behalf of our client, Carrier Sekani Tribal Council (“**CSTC**”), to provide you with its submissions on whether you should issue an environmental assessment (“**EA**”) certificate for the Coastal GasLink Pipeline Project (“**Project**”) at this time.

CSTC and the five CSTC First Nations whose territories will be crossed by the Project are not opposed to the Project provided certain conditions are met and legal deficiencies are remedied.<sup>1</sup> CSTC and the Nations would like to continue to work with the Crown, Environmental Assessment Office (“**EAO**”), and the proponent to address the concerns raised in this letter. Minister Polak recognized the need for BC to work with CSTC and the Nations to address such concerns in her letter today to CSTC Tribal Chief Teegee.

To those ends, CSTC would like to set up a meeting with you and key staff from the EAO, including Doug Caul, to discuss how its concerns can be urgently addressed in a way that minimizes time delays and regulatory uncertainty while simultaneously ensuring appropriate and required assessment of Project effects. We understand from Minister Polak's letter that her staff will contact CSTC to arrange a date and time for that meeting.

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<sup>1</sup> The First Nations are: Nadleh Whut'en, Nak'azdli, Saik'uz, Stelat'en, and Ts'il Kaz Koh (Burns Lake Band) (collectively, the “**Nations**”).

In the meantime, however, you should not issue an EA Certificate. An EA certificate should only be issued *after* the additional assessment work, consultation, and accommodation identified in this letter has been completed to the mutual satisfaction of CSTC, the Nations, and the EAO.

At the moment, the EAO's assessment of the Project is legally deficient, and the Crown has failed to discharge its duty to consult and accommodate the Nations. It would therefore be a legal error for you to issue the EA Certificate at this time, and doing so could jeopardize the regulatory approvals process for the Project.

There are at least 5 independent reasons why it would be a legal error for you to issue an EA Certificate for the Project at this time:

1. The Application is incomplete, and therefore fails to comply with the Section 11 Order and the Application Information Requirements (“**AIR**”) for the Project. The EAO has failed to take steps to address this fundamental legal deficiency;
2. The EAO and the proponent have failed to properly assess the potential adverse effects of the Project on the Nations' Aboriginal rights and interests as required by s. 3.1.2 of the Section 11 Order;
3. The EAO and the proponent have failed to properly assess the potential cumulative environmental effects of the Project in combination with other past, present or reasonably foreseeable projects or activities, and corresponding potential adverse effects of the Project on the Nations' Aboriginal rights and interests as required by ss. 3.1.1 and 3.1.2 of the Section 11 Order;
4. The EAO's assessment of the Project is incomplete. It does not assess the potential adverse effects of the Project on the Nations' Aboriginal title, rights, and interests based on the Use and Occupancy Study and Socio-Economic Reports CSTC, Nak'azdli, and Nadleh commissioned in relation to the Project, which are being submitted directly to you as part of this letter; and
5. The Crown has failed to discharge its duty to consult the Nations in relation to the Project.

Further assessment and consultation by the EAO with the Nations is, therefore, required before you can lawfully issue an EA Certificate for the Project.

Given prescribed timelines for you to make a decision, it will likely be necessary for you to issue an order pursuant to s. 17(3)(c)(iii) of the *Environmental Assessment Act*<sup>2</sup> to address current legal deficiencies with the assessment. That order will need to require the EAO to: (i) carry out further assessment of the potential environmental, economic, social, heritage and health effects, including cumulative effects, of the Project; (ii) carry out further

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<sup>2</sup> *Environmental Assessment Act*, SBC 2002, c 43.

assessment of the potential adverse effects of the Project on the Nations' Aboriginal title, rights and interests; (iii) meaningfully consult with the Nations in relation to such effects; and (iii) accommodate the Nations' title, rights, and interests in that process as well as in relation to those effects, all as set out below.

There is a practical need for the Crown to obtain the Nations' consent, without which the Project may need to be cancelled if one or more of the Nations establish title and the Project is unjustifiably infringing. As the Supreme Court stated in *Tsilhqot'in*:

[92] Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing...<sup>3</sup>

Fulsome environmental assessment of the Project and meaningful consultation are pre-conditions to the Nations being in a position to provide their consent to the Project proceeding. The Crown must therefore take the steps outlined in this letter to address CSTC and the Nations' concerns, at which point CSTC and the Nations will make their own decisions as to whether the Project can proceed in unceded Carrier Sekani title lands.

## **PART I: THE EAO'S ASSESSMENT OF THE PROJECT IS LEGALLY DEFICIENT; FURTHER ASSESSMENT IS REQUIRED**

- 1. The EAO's environmental assessment is legally deficient because it relies almost, if not, exclusively, on information provided in the Application which is: (i) incomplete, (ii) fails to comply with the Section 11 Order and the AIR, and (iii) should not, therefore, have been accepted for review**

On February 19, 2014, Nak'azdli, wrote to the Honourable Minister Polak and Mr. Brian Westgate, Project Assessment Officer, to provide them with its submissions about how the Application fails to comply with the Section 11 Order and the AIR. Briefly, legal deficiencies with the Application identified at that time included that: (1) the assessment is based on incomplete and inadequate data; (2) spatial boundaries of the assessment are insufficiently defined; (3) the alternatives assessment is improper; (4) project contribution model of cumulative effects is unacceptable; (5) consultation on the scope of the assessment of Aboriginal use of land and resources is incomplete; (6) the assessment of the scale of greenhouse gas emissions is unacceptable; (7) the evaluation of the decommissioning and abandonment stages is absent; and (8) the estimates of benefits are not credible.

At that time, Nak'azdli asserted that the Application could not be accepted for review because it did not contain the information required by the Section 11 Order and the AIR.

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<sup>3</sup> *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 ("*Tsilhqot'in*") at para. 92, emphasis added.

On April 22, 2014, Nak'azdli and Nadleh jointly wrote to the Honourable Minister Polak and Mr. Michael Sheppard, Project Assessment Manager, to provide their joint comments on the application review for the Project. In that letter, those Nations reiterated that the Application does not comply with the Section 11 Order or the AIR, asserted that the Executive Director committed a legal error by accepting the Application for review, and requested the Executive Director to suspend the EA pursuant to s. 24(2) of the *Environmental Assessment Act* until the legal deficiencies identified above were addressed.

Those positions were reiterated in a June 6, 2014 letter jointly sent by Nak'azdli, Nadleh, and CSTC to Mr. Brian Westgate, Project Assessment Manager, and in other correspondence with the EAO.

The EAO responded to those letters on February 28, 2014 and August 20, 2014. Other than requiring the proponent to provide additional information in relation to GHG emissions, the EAO failed to require the proponent to address the fundamental legal deficiencies.

Moreover, for the reasons set out on pages 4-6 of Nak'azdli and Nadleh's joint September 26, 2014 letter to Mr. Sheppard, the proponent's responses have not in any way addressed the Nations' concerns or cured the legal deficiencies with the Application.

The information gaps in the Application prevent the EAO from being capable of properly completing the required assessment of Project effects. Given that the EAO's assessment is based almost, if not, exclusively, on information provided in the Application, it too is legally deficient.

*You must therefore order the EAO to require the proponent to provide the missing information and analysis set out in Nak'azdli's February 19 letter and in this letter, and to subsequently re-assess the potential adverse (and cumulative) effects of the Project.*

**2. The EAO and the proponent have failed to properly assess the potential adverse effects of the Project on the Nations' Aboriginal rights and interests as required by s. 3.1.2 of the Section 11 Order**

Historical context and the current baseline status of fish and wildlife populations harvested by the Nations must be considered by the Crown in assessing the seriousness of the impacts of the Project on the Nations' Aboriginal rights.

In *West Moberly*, all three judges of the BC Court of Appeal agreed that "historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt."<sup>4</sup> Chief Justice Finch described how historical context and the current state of the caribou herd at issue in *West Moberly* needed to be taken into consideration in assessing the scope of the Crown's duty:

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<sup>4</sup> *West Moberly First Nation v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247: Finch C.J.B.C. at para 117; Hinkson J.A. at para 181; Garson J.A. at para 237, emphasis added.

[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.

...

[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.

In his February 28, 2014 letter to us, Mr. Westgate confirmed that the EAO would consider a number of factors in assessing the seriousness of potential impacts on Aboriginal Interests, including the “baseline conditions” of key fish and wildlife populations:

...

- “Past, present, and anticipated future Aboriginal uses of the proposed Project area and its surroundings, including the frequency and timing of such uses by a First Nation;
- The baseline conditions of valued components including those associated with the exercise of Aboriginal Interests, incorporating a consideration of other activities or development in the local and regional area that are in proximity to the proposed Project that may contribute to the current condition of the valued components;
- The impact of the proposed Project on the current exercise of Aboriginal Interests...”<sup>5</sup>

As we set out below, the EAO did not assess, or appropriately assess, the baseline conditions of valued components. This is highly problematic given the poor health of fish and wildlife populations in CSTC territory.

CSTC retained the Upper Fraser Fisheries Conservation Alliance (“**UFFCA**”) to: (i) assess baseline conditions of fish and wildlife populations that the Nations rely on to exercise their Aboriginal rights; (ii) assess whether the residual effects identified in the Application would have a negative impact on the Nations’ Aboriginal rights when considered in light of the current baseline condition of those populations; and (iii) make recommendations about whether further assessment is required. UFFCA’s report is attached as **Appendix A**.

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<sup>5</sup> Emphasis added.

Briefly, UFFCA concluded that (i) key fish and wildlife populations that are central to the exercise of traditional cultural and harvesting practices are currently diminished, (ii) the Nations' ability to meaningfully exercise their Aboriginal rights in relation to those resources is currently severely constrained, and (iii) the Application fails to assess how the residual adverse effects of the Project will contribute to the decline of those populations, decrease the Nations' ability to meaningfully use the resources, and, adversely impact their Aboriginal rights:

... we assessed the status and health of key wildlife and fish populations that CSTC First Nations harvest pursuant to their Aboriginal rights. We conclude, based on our assessment, that the ecological integrity of the CSTC territorial land base and resources are currently severely compromised. Many key aquatic and wildlife resources that are central to the exercise of traditional cultural and harvesting practices are currently of diminished status. As such, CSTC First Nations' ability to meaningfully exercise their Aboriginal rights in relation to these resources is currently severely constrained.

We also reviewed the Proponent's Application to determine whether the Proponent assessed potential adverse impacts on CSTC First Nations' Aboriginal rights having regard to the compromised status of these wildlife and fish populations. It did not do so. The Proponent failed to assess how the residual adverse effects of the Coastal GasLink project ("Project") will contribute to the current decline of wildlife and fish populations in CSTC First Nations' territories, decrease CSTC First Nations' ability to meaningfully harvest these resources, and, therefore, adversely impact their Aboriginal rights.

There is therefore no basis for the Proponent's conclusion in its Application that there is no significant threat of impact to species of concern to CSTC First Nations.<sup>6</sup>

UFFCA also concluded that the EA framework used by the proponent in its Application is fundamentally flawed for the following reasons:

... the EA framework that the Proponent uses in its Application is structured to allow impacts within certain thresholds without taking into account the effects of the Project on current baseline conditions measured by spatial, regional, and temporal contexts relevant to CSTC First Nations' Aboriginal rights. Instead, the Proponent considers context generally at a "project area" spatial scale and at the "species level", and therefore does not capture the current diminished conditions of fish and wildlife populations and their habitats within CSTC territory that is relevant to assessing Project impacts on Aboriginal rights.

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<sup>6</sup> Upper Fraser Fisheries Conservation Alliance, 2014, "Assessment of the Proposed Coastal Gaslink Pipeline Project Effects on Select Fish and Wildlife Interests of the Carrier Sekani Tribal Council (CSTC) First Nations" ("UFFCA Report"), Executive Summary, p. 1.



The Application identifies a range of residual adverse effects and claims those residual effects will not exceed any specific threshold used in the Proponent's analysis. This is a reflection of the Proponent's use of thresholds that are beyond a level of diminished state in which CSTC First Nations can meaningfully exercise their rights, and that do not accurately take the reality of the current status of wildlife and fish populations of concern to CSTC First Nations' into consideration. The Proponent's cumulative effects assessment also, therefore, fails to assess the Project's incremental impacts on current baseline wildlife and fish populations, the result of which is that the Proponent has underestimated the total effects loading to date in CSTC territory.

Furthermore, the effects characterization for wildlife and fish in the Application is highly qualitative and subjective. The few quantitative analyses made by the Proponent are established at a point within the spectrum of the decline in health of the species at which the exercise of Aboriginal rights is already severely impaired.<sup>7</sup>

The EAO, in assessing Project effects, relied on the results in the proponent's deficient EA analysis, which, as UFFCA concluded, failed to consider the baseline conditions of fish and wildlife populations. For this reason, the EAO's assessment of Project effects on Aboriginal Interests does not consider baseline conditions of fish and wildlife populations of concern to the Nations, as it was legally required to do and as it committed to do in its February 28, 2014 letter.

On the other hand, when UFFCA considered the "residual effects" of the Project within the context of the baseline of the health of fish and wildlife populations which provide the basis for the Nations to exercise their Aboriginal rights, UFFCA concluded that (i) the Project will likely cause significant adverse environmental effects and corresponding adverse impacts on the Nations' ability to meaningfully exercise their Aboriginal rights, and (ii) further assessment is required:

... we considered "residual effects" within the context of the baseline of the health of fish and wildlife populations that are the basis for CSTC First Nations to exercise their Aboriginal rights. In doing so, we conclude that the current health status of fish and wildlife populations of critical importance to CSTC First Nations' exercise of their Aboriginal rights, when properly considered using an appropriate temporal, spatial and biological baseline, is in serious decline due to current environmental pressures, and that those environmental pressures are likely to be exacerbated by adverse effects caused by the Project.

Given (i) the status of key resources which are central to the exercise of CSTC First Nations Aboriginal rights and interests, (ii) the residual adverse environmental effects CGL has itself identified, and (iii) the failure by the Proponent to consider the current baseline status of these key resources when

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<sup>7</sup> UFFCA Report, Executive Summary, pp. I-II.

assessing the impact of residual effects on Aboriginal rights, we (A) conclude that the effects findings in the Application should not be used as a basis to assess potential Project impacts on CSTC First Nations' Aboriginal rights, (B) conclude that the Project will likely cause significant adverse environmental effects and corresponding adverse impacts on CSTC First Nations' ability to meaningfully exercise their Aboriginal rights, and (C) recommend that the Proponent and/or EAO, working with CSTC and its member First Nations, undertake further territory-specific assessments of the Project's effects, including developing appropriate and adequate baselines of the status of their Aboriginal interests to assess the magnitude of those effects and impacts.<sup>8</sup>

*Given the conclusions reached in the UFFCA Report and the legal requirement for the Crown to consider the "existing state of affairs"<sup>9</sup> in assessing potential Project effects on Aboriginal rights, further assessment is required. CSTC respectfully requests you to require the EAO, or where appropriate the proponent, to work with CSTC and the Nations to conduct a further and required assessment of the Project's effects on the Nations' Aboriginal rights having regard to UFFCA's conclusions that the Nations' ability to meaningfully harvest key fish and wildlife populations is already severely constrained.*

**3. The EAO and the proponent have failed to properly assess the potential cumulative environmental effects of the Project in combination with other past, present or reasonably foreseeable projects or activities, and corresponding potential adverse effects of the Project on the Nations' Aboriginal rights and interests as required by ss. 3.1.1 and 3.1.2 of the Section 11 Order**

Cumulative effects of the Project in combination with other past, present, and reasonably foreseeable future developments are of serious concern to CSTC and the Nations as a result of the current baseline of fish and wildlife populations in CSTC territory.

CSTC retained Alistair MacDonald of The Firelight Group to undertake an expert peer review of the cumulative effects assessment ("CEA") carried out by the Proponent for the Project. Mr. MacDonald's report is attached as **Appendix B**.

Mr. MacDonald identified at least ten major deficiencies with the methods used by the proponent and the EAO to assess the Project's cumulative effects on the Nations' Aboriginal rights. He concluded that the EAO and proponent:

1. failed to consider cumulative effects on (i) Aboriginal people within their territories, and (ii) fish and wildlife populations at regional or conservation unit level (i.e. at the spatial scale and location relevant to the exercise of Aboriginal rights);

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<sup>8</sup> UFFCA Report, Executive Summary, p.II.

<sup>9</sup> *Supra*, note 4 at para 119.



2. failed to characterize CSTC member Nations' values, worldview, history, and exercise of Aboriginal rights, or include them as valued components (“**VCs**”);
3. failed to adequately integrate traditional land and resource use (“**TLRU**”) information from CSTC member Nations to determine baseline, thresholds, or effects;
4. failed to consider pre-industrial baseline data for any VCs, wildlife status, and practice of Aboriginal rights;
5. failed to consider historic impacts to date and failed to describe the primary causal factors of adverse change to “sufficiency resources” in CSTC territory, such as land privatization and industrial forestry practices;
6. merely considered “project contribution”, masking total effect load on VCs (i.e. health or resilience of VCs);
7. failed to assess TLRU or Aboriginal rights as separate, independent VCs. Rather, the Proponent and EAO improperly primarily used wildlife VCs as proxies to assess impacts on Aboriginal rights;
8. failed to define thresholds of acceptable change for most VCs that are relevant to CSTC;
9. failed to consider the possibility – and implications – of there being pre-Project existing significant adverse cumulative effects on VCs (e.g. caribou, certain Aboriginal rights, Nechako White Sturgeon, etc.); and
10. failed to complete any CEA for Aboriginal rights and provide an inadequate, non-CSTC territory-specific CEA on TLRU.<sup>10</sup>

Mr. MacDonald also developed a preliminary alternative assessment of the cumulative effects of the Project in combination with past, present, and reasonably foreseeable future developments on the Nations' Aboriginal rights and interests. He used a “sufficiency of resource approach” to assess cumulative effects:

A “sufficiency of resources approach” is used by the author to assess cumulative effects. This approach identifies that the focus of assessment should be on the minimum quality and quantity of land and resources required for the full practice of Carrier Sekani culture, mode of life, and Aboriginal rights. Adverse effects on these “sufficiency resource” requirements will limit or prevent Carrier Sekani member Nations from meaningfully exercising their Aboriginal rights, for example by not having an adequate land base to pursue seasonal rounds or not having

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<sup>10</sup> The Firelight Group Research Cooperative, 2014, “Cumulative Effects on the Aboriginal Rights and Interests of Carrier Sekani Tribal Council First Nations” (“Firelight Report”), Executive Summary p iii.

adequate preferred harvesting species in one's traditional territory in order to conduct successful harvests.<sup>11</sup>

Mr. MacDonald identified that the Nations' relied on at least 11 resources to meaningfully exercise their Aboriginal rights:

(1) healthy populations of fish and game in preferred harvesting areas; (2) ability to maintain traditional land tenure and governance systems; (3) clean and plentiful water from natural sources on the land; (4) adequate, safe, and well known routes of access and transportation to harvesting areas; (5) an adequate land base within which to pursue seasonal rounds; (6) freedom from competition for access to and harvesting of resources; (7) faith in the quality of country foods and feelings of safety and security on the land; (8) healthy cultural and spiritual relationships with the land; (9) abundant berry, food crops and medicines in preferred harvesting areas; (10) adequacy and access to known and preferred habitation sites on the land; and (11) strong knowledge of land and socio cultural institutions to pass across generations.<sup>12</sup>

Based on his cumulative effects assessment, Mr. MacDonald concluded that (i) the CSTC territory "has been heavily altered from its pre-contact baseline"<sup>13</sup>, which has adversely affected the Nations' ability to exercise their Aboriginal rights, and (ii) the EAO and the proponent "vastly underestimated or ignored those changes, and therefore have failed to adequately assess the total effects loading to date" on resources required for the Nations to exercise their Aboriginal rights.<sup>14</sup>

Ultimately, Mr. MacDonald concluded that cumulative effects caused by the Project in combination with other reasonably foreseeable future developments have the potential to seriously impact key resources relied on by the Nations to meaningfully exercise their Aboriginal rights, which would exacerbate existing cumulative impacts and cause important impacts on their culture and way of life:

In the author's opinion, based on the available evidence, the Project in combination with past, present and reasonably foreseeable projects and activities will seriously impact at least four resources relied upon by CSTC member Nations to meaningfully exercise their Aboriginal rights: (1) healthy populations of fish and game in preferred harvesting areas; (2) ability to maintain traditional land tenure and governance systems; (3) an adequate land base within which to pursue seasonal rounds; and (4) freedom from competition for access to resources. The first three of these "sufficiency resources" are already showing indications of having been subject to serious impacts even in the pre-Project circumstance.

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<sup>11</sup> *Supra* note 10, Executive Summary p.iii.

<sup>12</sup> *Ibid*, at p. iv.

<sup>13</sup> *Ibid*, at p.v.

<sup>14</sup> *Ibid*, at p v.

The Project therefore has potential to exacerbate already serious adverse impacts on CSTC Nations' ability to exercise their Aboriginal rights, which could have important adverse impacts on their culture and mode of life.<sup>15</sup>

Based on his assessment, Mr. MacDonald made the following 6 recommendations:

Recommendation #1: A revised cumulative effects assessment of the proposed CGL Project is highly recommended before Crown decisions on whether and under what conditions the Project should be allowed to proceed are made. Special emphasis is required on total cumulative effects loading on wildlife and fish in CSTC territory, other resources that support the CSTC traditional mode of life, and on Aboriginal rights and title.

Recommendation #2: The Crown should fund a regional cumulative effects assessment within CSTC territory, including territory-wide and First Nations-specific sub-components, prior to any irrevocable government decision on the location and number of acceptable LNG-related pipelines. Any such CEA will need to consider biophysical and human environmental VCs and cumulative effects on Aboriginal rights and title.

Recommendation #3: Revitalize regional land use planning in CSTC territory.

Recommendation #4: The Crown should provide adequate funding to all First Nations with potential title impacted by the Project in order to generate appropriate response materials to the EAO's strength of title claims made during the course of this EA.

Recommendation #5: The Crown should work with CSTC and its member Nations toward the development of co-management programs with the goals of re-establishing woodland caribou and Nechako White Sturgeon in greater numbers and locations in CSTC territory.

Recommendation #6: The Crown should conduct an LNG production system level GHG cumulative effects assessment.<sup>16</sup>

*CSTC submits it is imperative to ensure that a proper assessment of the Project is carried out and to ensure that the Crown's duty to consult the Nations is discharged that you require the EAO and/or the proponent to implement the 6 recommendations, or work with others to do so, before you decide whether an EA Certificate should be issued for the Project.*

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<sup>15</sup> *Supra*, note 10 at p.vi.

<sup>16</sup> *Supra*, note 10 at pp. vi-vii.

#### **4. The EAO's assessment of the Project as set out in the Assessment Report is incomplete**

CSTC, Nak'azdli, and Nadleh commissioned a Use and Occupancy Study and a Socio-Economic Study for the Project. Those studies are specific to Nak'azdli and Nadleh, and are attached as **Appendix C** and **D**, respectively.

The studies were not previously provided to the EAO. The EAO's assessment of the Project's potential effects on Nak'azdli and Nadleh's Aboriginal title, rights, and interests is therefore incomplete because it is not based on the information set out in the studies.

You should therefore require the EAO to further assess the potential for the Project to cause adverse effects on the Nations' Aboriginal title, rights, and interests having regard to the findings, opinions, and conclusions set out in the studies.

##### *Key Findings from the Use and Occupancy Study*

CSTC carried out a preliminary use and occupancy study for Nak'azdli and Nadleh to document and describe some of their current use of lands and resources in proximity to, or which otherwise may be affected by, the Project ("**Use and Occupancy Study**").

The Use and Occupancy Study concludes that Nak'azdli and Nadleh's ancestors have lived in villages in the Fraser River watershed and harvested resources from it since time immemorial, and that members continue to live in the respective territories and use lands and resources throughout them.<sup>17</sup>

Key findings from the Use and Occupancy Study about how Nak'azdli and Nadleh's members use lands and resources, and how such uses could be adversely impacted by the Project, include:

The members of both Nations members continue to use harvesting sites at moderate to high levels of intensity throughout the Study Area...The Nations' members also identified culturally significant sites of fixed location (including birth sites, burial sites, sacred sites, and gathering places) throughout the Study Area. Earthen material sites were also identified at specific locations within the Study Area.

The Project will intersect and disturb the use of several of the Nations' members' overnight sites. This includes important cabin locations located in close proximity to the Project in both Territories. Project construction and operation will also limit access to important overnights sites, which the members of both Nations continue to use in exercising their Aboriginal rights, title and interests.

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<sup>17</sup> The Firelight Group Research Cooperative, 2014, "Nadleh Whut'en First Nation & Nak'azdli Band: Preliminary Use and Occupancy Study for the Coastal GasLink Pipeline Project", Executive Summary, pp vi.

Impacts from past and existing resource activities have already rendered White Sturgeon an endangered species, thereby limiting the Nations' use thereof and presence in their diet as a traditional food. White Sturgeon are still present in the waterways of both Nations' Territories...There are concerns that any disturbances of these, and ancillary waterways, will adversely affect the salmon and White Sturgeon, and undo all efforts towards rehabilitation that the Nations have already undertaken.

It is also likely that the construction and operation of the Project across both of the Nations' Territories will increase adverse impacts on animal habitats, forest cover, and the dispersion of animals. These new impacts will likely further impair the Nations' trapping activities across their Territories, and, in particular, within and in close proximity to the Study Area.

There are also several important and regularly-used berry collecting sites that may be impacted by the construction and operation of the Project...

Further, fixed cultural sites were identified throughout the Study Area for both Nations, several of which sites are in close proximity to the Project. Adverse impacts on several of these sites from the Project are also likely.

Some earthen materials are still collected (such as stones and gravel) by both Nations in, and in close proximity to, the Study Area. Project construction may limit access to these resources, which will eliminate them as a continued materials resource to the Nations.

Finally, significant portions of the Nations' Territories have already been lost to land alienation. Agricultural uses, forestry, mining, fee simple land ownership, and Crown expropriation or use have all removed significant tracts of harvesting lands, especially in the southern portion of the Nations' Territories, in proximity to the Project. This alienation has already caused significant impacts on the Nations' use of their Territories and the exercise their Aboriginal rights in a meaningful manner.<sup>18</sup>

The Use and Occupancy Study concludes that the Project could seriously impair Nak'azdli and Nadleh's ability to meaningfully exercise their harvesting rights and impact their title as follows:

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<sup>18</sup> The Firelight Group Research Cooperative, 2014, "Nadleh Whut'en First Nation & Nak'azdli Band: Preliminary Use and Occupancy Study for the Coastal GasLink Pipeline Project", Executive Summary, pp vi-vii.

The Nations continue to use land and resources at moderate to high levels of intensity throughout the Study Area, including within and in proximity of the Project. In light of that use, the Nations have serious concerns that the Project may cause significant adverse impacts on their use of lands and resources in their Territories. Such effects could seriously impair the Nations' abilities to carry out their constitutionally protected harvesting rights and impact their title.

In particular, the Nations are concerned that gas leaks and other contaminants and activities associated with the Project will pollute lakes and rivers in the Fraser River Watershed. Aquatic and terrestrial resources are already under serious stress from existing resource activity, with new Project-related impacts likely to further harm those resources in ways that may seriously impair the Nations' use of lands and resources in their Territories.

The Nations are also very concerned of compressor stations and other Project-related infrastructure emissions of dust, toxic air contaminants, and noise, which will cause serious adverse impacts on local and regional airsheds. Impacts on aquatic species from vibrations associated with Project operation are also of concern.

Further, the Nations are concerned that the length and width of the Project corridor, in combination with other pipelines being proposed in their Territories, will cause habitat loss, fragmentation, and degradation while simultaneously facilitating increased recreational use by non-aboriginal peoples. The Nations have serious concerns about how cumulative impacts will add to existing regional damage and disruptions, thereby further altering their Territories, traditional and cultural practices, and infringing their constitutionally-protected rights and title.

Finally, the Nations are very concerned that the Project, including accidents and malfunctions during the operational phase, will cause large-scales fires. The forests in the Nations' territories have been seriously impacted by mountain pine beetle infestations, which have rendered the forest highly flammable. Even a small explosion will likely cause a forest fire, which could spread and cause serious adverse impacts over large areas of the Territories.<sup>19</sup>

The Use and Occupancy Study highlights that (i) Nak'azdli and Nadleh's concerns remain outstanding, and (ii) there has been limited engagement by the EAO and the proponent to discuss whether and how the concerns can be addressed.<sup>20</sup> The Study recommends that the EAO and the proponent should take the following steps:

1. support the Nations in completing additional traditional knowledge studies to supplement this preliminary work and to assess potential cumulative effects and impacts;

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<sup>19</sup> *Supra*, note 17, pp vii-viii.

<sup>20</sup> *Supra*, note 17, pp.viii-ix.



2. meaningfully engage with both Nations on all aspects of the Project and ensure their traditional knowledge informs plans and mitigation measures proposed, developed and implemented at all Project stages;
3. use traditional knowledge provided by the Nations to:
  - a. evaluate, monitor, and manage environmental and cumulative impacts; and
  - b. make changes to the proposed Project, including existing plans and regulatory applications;
4. engage with other natural gas pipeline proponents to consider establishing a single pipeline corridor rather than numerous separate corridors that increase fragmentation;
5. immediately work with the Nations to establish native plant nurseries to preserve significant native plants removed during the Project construction and operation phases;
6. work with the Nations to prepare emergency response plans and strategies that are clear, comprehensive, and readily available to the Nations and their members; and
7. offer accessible training and opportunities for long-term employment to members of both Nations.<sup>21</sup>

*CSTC submits that you should require the EAO to (i) take the steps, or where appropriate require the proponent to take the steps, recommended in the Use and Occupancy Study, and (ii) conduct further assessment of the Project based on the findings, opinions, and conclusions set out in the Use and Occupancy Study as well as the further work set out in (i).*

### *Socio-Economic Study*

CSTC, Nak'azdli, and Nadleh retained Firelight to carry out a Socio-Economic Study in relation to the Project.

Part I of the Socio-Economic Study describes the socio-economic baseline for Nak'azdli and Nadleh in relation to the Project as follows:

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<sup>21</sup> *Supra*, note 17, pp.viii-ix

... the baseline indicates that the Nations' members continued to engage heavily, and rely extensively on traditional Aboriginal economies. This level of reliance exceeds the provincial average for other First Nations communities. Both Nations continue to exercise traditional laws and cultural practices of sharing and resource distribution. Their members also exemplify the Carrier Sekani stewardship values and remain committed to long-term sustainable development of their territories.

Although they rank highly on the Aboriginal measure of traditional livelihoods and economies, the Nations do not rank as highly on mainstream economic measures. Both Nations rank below the average for other First Nations on the Canadian Index of Wellbeing, and far below the levels of the non-native population. Although these measures are limited in scope, they nevertheless indicate a relatively high level of vulnerability to potential negative effects from the Project, as well as significant limitations and inequities in the ability to take advantage of any potential opportunities the Project might offer the Nations...<sup>22</sup>

The Socio-Economic Study identified several gaps in the available baseline data, and recommended that the following data gaps need to be filled for a comprehensive socio-economic assessment to be completed that can meaningfully guide efforts to enhance existing socio-economic baseline and minimize future impacts:

- Changes to the long-form census have limited the available statistics on several socio-economic indicators. Monitoring changes in the baseline conditions reported herein, and accurately characterizing Project impacts will therefore depend on primary data collection by the Nations, which imposes a heavy burden on their already strained resources.
- Data on the traditional economy and how it interacts with the market economy, including data on traditional diet is very limited. Given the Nations' heavy reliance on traditional foods, and the close relationship to physical health, mental health, food security and income security, this data is vital for the assessment of vulnerabilities and monitoring of Project impacts.
- There is little data available for members who live off-reserve, particularly for Nadleh Whut'en members. Several Nak'azdli off-reserve members would prefer to live on-reserve or closer to their Territory, but adequate housing and employment remains a barrier.
- The Nations' specific workforce potential is not reflected in Statistics Canada census data. A workforce survey of on- and off-reserve members in terms of education, training levels and aspirations is important for assessing the abilities of the Nations to take advantage of opportunities associated with the Project.

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<sup>22</sup> The Firelight Group Research Cooperative, 2014, "Socio-Economic Study Specific to Nak'azdli Band and Nadleh Whut'en First Nation, in Relation to the Proposed Coastal GasLink Pipeline Project, Part I", p.62.

- There has not been a proper cumulative effects study done for either of the Nations' territories. A cumulative effects study is required to address concerns about changes from developments carried out to date with potential effects of the multiple proposed projects, including the Project.<sup>23</sup>

Firelight concludes in Part I of the Socio-Economic Study that “[f]illing in these data gaps is critical to properly assessing the vulnerabilities of the Nations’ members, their potential ability to take advantage of the Project, and Project impacts”<sup>24</sup>.

*Given this conclusion, you should order the EAO to (i) collect, or where appropriate require the proponent to collect, the data required to fill in existing gaps, and (ii) to further assess Project effects based on Part I of the Socio-Economic Study and the additional data that is collected.*

Part II of the Socio-Economic Study describes key socio-economic aspects of the Project, summarizes lessons learned from other similar projects, provides a scope of what matters most to Nak’azdli and Nadleh from the perspective of quality of life and well-being, and summarizes concerns raised by their members in relation to potential Project effects.

Some of Firelight’s key findings from Part II of the Study include:

Nak’azdli and Nadleh Whut’en continue to exercise their Aboriginal rights throughout their Territories, and rely heavily on the traditional Aboriginal economy. With such a high reliance on traditional foods and harvesting, the Nations are particularly vulnerable to changes on the land that impact their ability to exercise their rights. The Nations are particularly concerned about the cumulative effects from past and existing developments, as well as from the myriad of projects currently being proposed across their Territories. The Nations are also particularly vulnerable to impacts within the communities due to colonial and residential schools legacies.

Key findings from Part 2 of the Study are as follows:

- The Nations have already been adversely impacted by development, including hydro, commercial fishing, mining, forestry, agriculture, major infrastructure and oil and gas. Oil and gas activity is ramping up with a total of five gas pipelines currently proposed in the Nations’ Territories. The Territories are also impacted by the pine beetle infestation. No comprehensive cumulative effects assessments have yet been completed.

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<sup>23</sup> *Ibid* p.63.

<sup>24</sup> *Ibid*, at p.63.

- The Nations and their members have been impacted by discriminatory laws, widespread settlement and residential schools. Associated and adverse legacies on both Nations' socio-economic conditions continue to create barriers to their members' access to education and employment, as well as mental health and addiction problems.
- Both Nations are concerned about observed impacts of contaminants on the health of wildlife throughout their Territories. Some members are harvesting fish outside their preferred locations due to fear of contaminants associated with hydro, forestry and mining activities, including herbicides and fire retardants.
- Members report that wildlife is both less abundant and of poorer quality throughout their Territories. Several wildlife species, including moose and fish, have been reported as being ill. Members also report having to go further to find wildlife and they are harder to find/catch which means it is more expensive to harvest food and the harvest is smaller. Collectively, this reduces the Nations' ability to meaningfully exercise their Aboriginal rights.

Pipelines do not create long-term employment opportunities. Based on employment figures provided by CGPL, and the unreasonable assumption that all such positions would go to First Nations, there will be less than one long-term job per First Nation community along the Project corridor. The bulk of the jobs will be short-term construction-phase jobs...Concurrently, there are barriers (both external and internal) to accessing available jobs and historic inequities in access thereof.

While the benefits are limited, the adverse effects and costs to both Nations could be significant. Both Nations are already impacted by resource development...

...the Nations are also concerned that access to international markets, facilitated by the construction of large LNG facilities in Kitimat and Prince Rupert, and proposed natural gas pipelines that link to the natural gas fields in northeastern BC, will greatly increase demand for, and production of, natural gas in and around their Territories. Further expansion of oil and gas activities in and around the Nations' Territories, facilitated by an expanding LNG export industry, would have very serious, irreversible impacts on the lands, waters and air in CSTC territory, on the practice of CSTC traditional rights and livelihoods, and on the CSTC way of life.<sup>25</sup>

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<sup>25</sup> The Firelight Group Research Cooperative, 2014, "Socio-Economic Study Specific to Nak'azdli Band and Nadleh Whut'en First Nation, in Relation to the Proposed Coastal GasLink Pipeline Project, Part II", p.29.

In Part II of the Socio-Economic Study, Firelight recommends that the following assessment work be carried out to better understand potential socio-economic impacts of the Project on Nak'azdli and Nadleh and their members:

- (1) A comprehensive impact assessment is required to fully understand the cumulative effects of past and existing development, as well as reasonably foreseeable development (including the Project), to fully understand the ability of the Nations to continue to exercise their Aboriginal rights in their territories in a meaningful manner.
- (2) The concerns raised in Study should form the basis for further work with the Nations to identify and verify impact pathways, effects and mitigations. Gaps identified in this Study should be filled in to properly assess the potential Project interactions and effects. This includes a proper cumulative effects assessment completed on a Territory-wide basis.
- (3) This Study does not include any formal impact pathway identifications, impact characterizations, impact significance estimations, or mitigation identification exercises for Project-specific effects. Further engagement with the Nations to identify impact pathways and triggers/mechanisms, characterize and estimate the significance of residual impacts from the Project (alone and in combination with cumulative effects), and identify and implement appropriate mitigation and monitoring, is necessary for the completion of a proper community-led socio-economic impact assessment.<sup>26</sup>

*Given Firelight's conclusions and recommendations in Part II of the Socio-Economic Study, you should order the EAO to (i) carry out, or where appropriate require the proponent to carry out, the additional assessment work identified by Firelight that is required to fully assess the potential socio-economic effects of the Project on Nak'azdli, Nadleh, and their members, and (ii) further assess Project effects based on Part II of the Socio-Economic Study and the additional data that is collected.*

## **PART II: INADEQUATE CONSULTATION**

### **5. The Crown has failed to discharge its duty to consult the Nations in relation to the Project**

The Crown has already acknowledged that the Project has the potential to adversely impact the Nations' Aboriginal title, rights, and interests. Moreover, the EAO states in the Consultation Report that the Crown's duty to consult the Nations is at the middle to the high end of the spectrum.

The high end of the consultative spectrum is described by the Supreme Court of Canada in *Haida* as follows:

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<sup>26</sup> *Ibid*, p.29.

44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case...<sup>27</sup>

Here, the Crown was required to carry out “deep consultation” from the outset of the environmental assessment process with “the intention of substantially addressing [the Nations’] concerns”.<sup>28</sup> At all stages of the process, the Crown was required to carry out meaningful, good faith, consultation, which requires “willingness on the part of the Crown to make changes based on information that emerges during the” consultation process.<sup>29</sup>

Given the goals of reconciliation, meaningful and substantive consultation is more than looking at First Nations as another “stakeholder”: it requires an exchange of views that gives the First Nation meaningful and real input into the decision-making process.<sup>30</sup> In particular, the case law is clear that the Crown’s duty to consult lies “upstream” of the statutory mandate of decision makers,<sup>31</sup> and it is not simply an opportunity to “blow off steam” before the Crown proceeds to do what it intended all along.<sup>32</sup> Consultation that amounts to merely “blowing off steam” excludes from the outset any form of accommodation and is “meaningless”.<sup>33</sup>

Unfortunately, the consultation carried out by the EAO to date in relation to the Project amounts to merely providing the Nations with the opportunity to “blow off steam”. The Crown has excluded any form of accommodation from the outset of the EA process, rendering any consultation meaningless.

As set out above, the Crown has failed to meaningfully take CSTC and the Nations’ submissions into account and require the proponent to provide required but missing information, to suspend the EA process to provide the proponent with time to do so, and to provide extensions of time for the Nations to meet the multiple, and sometimes overlapping, deadlines for the EAs being conducted for the proposed natural gas pipelines.

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<sup>27</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para 44.

<sup>28</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168; affirmed in *Haida* at para 42; see also *Kwikwetlem First Nation v British Columbia (Utilities Commission)*, 2009 BCCA 68 at para 70.

<sup>29</sup> *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550 at para. 29.

<sup>30</sup> *White River First Nation v. Yukon Government*, 2013 YKSC 66

<sup>31</sup> *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)* 2011 BCCA 247 at para 106; *Halfway River First Nation v. British Columbia*, 1999 BCCA 470 at para 177.

<sup>32</sup> *Misikew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 54 (“Misikew”)

<sup>33</sup> *Ibid* at para 54.



Further details about how the EAO has failed to take CSTC and its member Nations' submissions into account are set out on pages 4-6 of the joint Nak'azdli and Nadleh September 26, 2014 letter to Mr. Sheppard.

Other forms of accommodation are also required but have not yet been provided.

In *Tsilhqot'in*, the Supreme Court held that Aboriginal title confers ownership rights such as “the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land.”<sup>34</sup> In doing so, the Court therefore explicitly recognized that decision-making authority and the right to manage the land are part of the bundle of rights that belong to Aboriginal title holders.

Here, the Nations are claiming Aboriginal title to lands that could be adversely impacted by the Project. However, the Crown has failed to accommodate the Nations' decision-making authority and right to manage those lands by making changes to the EA process to accommodate those rights. What is required here is shared decision-making authority rather than Crown consultation about a process that was unilaterally designed by the Crown and which, for the reasons set out above and others, fails to take the Nations' strong claims to Aboriginal title into account.

The duty to consult and accommodate lies “upstream” of all statutory decision-making powers.<sup>35</sup> The Supreme Court has clarified that a decision-maker “who proceeds on the basis of inadequate consultation errs in law.”<sup>36</sup> It would therefore be an error of law for you to issue an EA Certificate for the Project given that the Crown has not yet discharged its duty to consult and accommodate the Nations. Further consultation and accommodation is required, including in relation to the further required assessment of the Project outlined in this letter.

## **Conclusion**

For the reasons set out above, it would be a legal error for you to issue an EA Certificate for the Project at this time.

To summarize, key steps that you need to require the EAO and/or the proponent to take to address CSTC and the Nations' concerns and the existing fundamental legal deficiencies in relation to the EA include:

- (1) the EAO must require the proponent to provide the missing information and analysis set out in Nak'azdli's February 19 letter and in this letter, and to subsequently re-assess the potential adverse (and cumulative) effects of the Project;

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<sup>34</sup> *Tsilhqot'in* at para 73.

<sup>35</sup> *West Moberly*, *supra* note 22.

<sup>36</sup> *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC, at para 48.

- (2) the EAO, and where appropriate the proponent, must work with CSTC and the Nations to conduct a further and required assessment of the Project's effects on the Nations' Aboriginal rights having regard to UFFCA's conclusions that the Nations' ability to meaningfully harvest key fish and wildlife populations is already severely constrained;
- (3) the EAO, the Crown, and/or the proponent must implement the 6 recommendations set out in Mr. MacDonald's expert peer review;
- (4) the EAO must (i) take the steps, or where appropriate require the proponent to take the steps, recommended in the Use and Occupancy Study, and (ii) conduct further assessment of Project effects based on the findings, opinions, and conclusions set out in the Use and Occupancy Study as well as the further work set out in (i);
- (5) the EAO must collect, or where appropriate require the proponent to collect, the data required to fill in existing gaps identified in the Socio-Economic Study, and the EAO must further assess Project effects based on Part I of the Socio-Economic Study and the additional data that is collected; and
- (6) the EAO must (i) carry out, or where appropriate require the proponent to carry out, the additional assessment work identified by Firelight in Part II of the Socio-Economic Study that is required to fully assess the potential socio-economic effects of the Project on Nak'azdli, Nadleh, and their members, and (ii) further assess Project effects based on Part II of the Socio-Economic Study and the additional data that is collected.

Additional consultation and accommodation is required.

CSTC remains committed to working with you, the EAO, and the proponent to ensure that these important issues are addressed in a mutually beneficial way.

We look forward to your response to the issues raised in our letter.

Yours sincerely,

**GOWLING LAFLEUR HENDERSON LLP**

A handwritten signature in blue ink, appearing to read 'M-A', enclosed in a light blue rectangular box.

**Merle Alexander**  
Partner  
Natural Resource and Aboriginal Law

A handwritten signature in blue ink, appearing to read 'Scott A. Smith', enclosed in a light blue rectangular box.

**Scott A. Smith**  
Aboriginal and Environmental Law

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