ALLIED TSIMSHIAN TRIBES OF LAX KW'ALAAMS
March 11, 2016

To: Honourable Catherine McKenna, Minister of the Environment and Climate Change

CC: Honourable Justin Trudeau, Prime Minister of Canada
Honourable Jody Wilson-Reybould, Minister of Justice and Attorney General
Honourable Hunter Tootoo, Minister of Fisheries and Oceans Canada
Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs
Honourable Jim Carr, Minister of Natural Resources Canada

RE: Canadian Environmental Assessment Agency Draft Environmental Assessment Report on the Pacific Northwest LNG Project and Crown's Legal Duty to Consult

This submission is made on behalf of the Allied Tsimshian Tribes of Lax Kw'alaams (ATTL), and more specifically on behalf of the Gitwilgyots Tribe and Waaps (House of) Gwis Hawaal, a constituent Waap of the Gitwilgyots Tribe. Lelu Island (Lax Uula) and adjacent waters are part of the traditional territory of Gwis Hawaal while the surrounding area, including Flora and Agnew Banks, is owned, occupied and used by the Gitwilgyots Tribe in common. These areas have been owned, occupied and used by the Gitwilgyots Tribe and Waaps Gwis Hawaal for untold millennia before Europeans landed on our shores and claimed our lands.

WHO WE ARE

The nine tribes that comprise the Allied Tsimshian Tribes of Lax Kw'alaams are as follows:

- *Gitandoh*, "People of the Otherside"
- *Gitwilgyots*, "People of the Kelp"
- *Gitzaxlaal*, "People from the side of"
- *Gitsiis*, "People of the Sealtraps"
- *Ginaxdoiks*, "People of the Swift Current"
- *Gitanaaxangiik*, "People of the Hemlock"
- *Gispaxlo'ots*, "People of the Elderberry"
- *Gilutzau*, "People of the Inside", and
- *Gitlan*, "Canoe Stern People"

These Tribes and their constituent Wuwap are not extinct; they exist today as they have for

millennia and are headquartered in Lax Kw'alaams. The Houses are a critical component of Tsimshian Tribes and society, and, as was found in the BC Supreme Court's decision on *Wii'litswx*[1], are protected under the s. 35.1 of the *Constitution Act*. While Tribal members may belong to various *Indian Act* Bands, these historic Tribes, Houses and their Territories do not, nor do they owe their existence to any government or agency.

The Territory of each Tribe is comprised of the Lax Yuup (Territories) of its constituent Wuwap[2] and Territories that are held and used in common by the whole Tribe[3]. These Territories are located in the Skeena Watershed and on the coast as described below. Each Tribe is an independent body and is governed by a head Chief (S'mooygyet) and Council consisting of the head Lik'agyet from each p'deex (clan) within the Tribe. Each Waap is an independent unit that owns and manages its Waap Territory and is passed on to succeeding generations according to Tsimshian Ayaawx (Laws). The nine Tribes work together to address common concerns and interests through the Allied Tsimshian Tribes of Lax Kw'alaams.

ABORIGINAL TITLE TERRITORIES of the ALLIED TSIMSHIAN TRIBES

The following description of the ATTL Tribal Territories (Lax Yuup) is an excerpt from the *Interim Land and Resources Plan of the Allied Tsimshian Tribes of Lax Kw'alaams*[4]:

"The Allied Tsimshian Tribes of Lax Kw'alaams are the nine tribes, or ts'ap, that have territories both on the Skeena River and on the ocean, outer islands and coastal areas of the north coast of British Columbia. The traditional territory of Allied Tsimshian Tribes of Lax Kw'alaams is an area of approximately 1.2 million hectares centered around the lower *Ksyeen* or Skeena River. The Territory includes major watersheds that flow into the Skeena-including the Ecstall, Khyex,

[1] Wii'litswx v. British Columbia (Minister of Forests), 2008 BCSC 1139, the Honourable Madam Justice Neilson stated [at para 222], " I am satisfied on the material before me that the Wilp are an integral and defining feature of Gitanyow's society. As such, the Wilp system and the related aboriginal rights attract the protection of s. 35 of the *Constitution Act*, and the honour of the Crown required that they be reconciled with Crown sovereignty by being reasonably accommodated.

[2] Plural of Waap – House; Houses

[3] The Tsimshian Waap (House) is the basic unit of organization in Tsimshian society and owns territories, adaawk (*oral records of historical events of collective political, social and economic significance such as migration, territorial acquisition, natural disaster, epidemic, war and significant shifts in political and economic power* – See page 1, Interim Land & Marine Resources Plan of the ATTL) crests, names

[4] Lut'ak dil Loomsk Txanii Laxyuup Ksi'aamks dil Laxsuulda; "Treasure and respect all of our lands, fresh water and oceans" June 3, 2004, Allied Tsimshian Tribes of Lax Kw'alaams

Exchamsiks, Khtada, Extew, Gitnadoix, Shames, Lakelse and Zymagotitiz watersheds[5]. It also includes Kxeen, or present-day Prince Rupert, the Tsimshian Peninsula, and portions of Grenville Channel, Portland Inlet and the lower Nass River, including Kwinimaas, the Khutzeymateen watersheds. The Territory also included extensive marine areas and islands, including Zayas, Dundas, Melville, Stephens, Digby, Kaien, Finlayson, Somerville and portions of Porcher Island."

We would add to this description that these areas are independently and exclusively owned by the Tribes and Wuwap (Houses) of the ATTL and it is these Tribes and Wuwap who hold constitutionally protected Aboriginal title to the respective territories. Each Tribe consists of a hereditary chiefly House and a number of constituent Houses each with a hereditary leader who is responsible for the safe keeping the House's inheritance (Territories, Adaawk, names, crests and songs). The lawful decision-makers in each Tribe are the S'mooygyet and the lead Lik'agyet (Head Men) of each p'deex[6] (clans) and it is only these jointly-made decisions that that are legitimate under Tsimshian Ayaawx (law). Decision-making in a Waap is the responsibility of the Lik'agyet and leading family members.

IDENTIFICATION OF CORRECT ABORIGNAL TITLE HOLDERS

We have reviewed the Pacific NorthWest LNG Draft Environmental Assessment Report and in particular, Chapter 8, *Impacts on Potential or Established Aboriginal Rights or Title*. Section 8.1 of that chapter states that the Agency identified six Aboriginal groups that assert potential or established Aboriginal rights or title on Lelu Island and on the marine environment surrounding Lelu Island, in the Prince Rupert area. The identified groups are the Lax Kw'alaams Band, Metlakatla First Nation, Gitxaala Nation, Kitsumkalum First Nation, Kitsumkalum First Nation, Kitselas First Nation, and Gitga'at First Nation. Therein lies the problem; all of the CEAA identified Aboriginal groups are *Indian Act Bands* and as such do not, and cannot, satisfy the criteria established in a number of Supreme Court of Canada (SCC) decisions on Aboriginal title including the *Delgamuukw*[7] and *Tsihlqot'in*[8] cases. In the Tsihlqot'in case (at para 26) the SCC confirmed the test for Aboriginal title as was set out in Delgamuukw as para 143:

> In order to make out a claim for [A]boriginal title, the [A]boriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of

[5] These watersheds are individually owned by an ATTL Tribe with specific areas within the Watershed individually owned by the constituent Wuwap (plural of Waap) of that Tribe.
[6] There are four clans, Laxskiik (Eagle), Ganhada (Raven), Laxgibou (Wolf) and Gispaxwutwada (Black Fish)
[7] Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010
[8] Tsihlqot'in Nation v. British Columbia [2014] SCC 44

> occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

A recent decision of the BC Court of Appeal in *Louie v. Louie*[9] succinctly describes the source of a Band Council's authority and is set out in full below:

> [12] This brought the trial judge to the matter of governance of the Band. The parties are agreed that the Lower Kootenay Indian band is a creation of the *Indian Act,* and that the authority of the Band Council derives from that statute. The words of the Alberta Court of Appeal in *Paul Band v. The Queen* [1984] 2 W.W.R. 540 are therefore apposite:
>
> > Band councils are created under the *Indian Act* and derive their authority to operate *qua* Band councils exclusively from that Act. In the exercise of their powers they are concerned with the administration of Band affairs on their respective reserves whether under direct authority of Parliament or as administrative arms of the Minister. They have no other source of power. [At para. 20.]

In the seminal decision of the Supreme Court of Canada in Delgamuukw[10], the Honourable Chief Justice Lamer stated [at para. 141] that, as laid down in *Van de Peet* "Aboriginal rights arise from prior occupation of the land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on the land" (Emphasis in the original). He went on to explain that since the purpose of s.35 (1) is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty, it is clear that it must recognize and affirm both aspects of that prior presence – first, the occupation of land and second, the prior social organization and distinctive cultures of aboriginal peoples on the land. At para 142, he stated that "… [t]he time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land[11].

A plain reading of these paragraphs makes it clear that *Indian Act* Bands do not and cannot establish Aboriginal title. They did not exist in 1846 and they do not arise from Tsimshian social organization, cultures or laws. While we may work together, they cannot replace the Tribes and

[9] Louie v. Louie [2015] BCCA 247

[10] ibid

11 Considered to be the 1846 signing of the Oregon Treaty by the United States and Britain)

their authority over Tribal and House Territories and resources, not under Tsimshian law or Canadian law.

ATTL STRENGTH OF CLAIM TO THEIR TERRITORIES INCLUDING PRINCE RUPERT HARBOUR AREA

If CEAA had carried out its due diligence it would have found that on December 10, 2002 the B.C. Supreme Court[12] recognized that the nine Tribes of the Lax Kw'alaams have established a "good *prima facie* claim of Aboriginal title and a strong *prima facie* claim of aboriginal rights with respect to at least part of the territory claimed by them…" [At para. 72.] At para 75, the Honourable Justice Tysoe provided the following assessment on the relationship of a strength of claim to the likelihood of an Aboriginal group's ability to establish Aboriginal title, stating that, roughly speaking, he would equate the term a) reasonable possibility to a *prima facie* case; b) reasonable probability to a **good** *prima facie* case; and c) substantial probability to a **strong** *prima facie* case. [Emphasis added]

The Court's recognition that we have established a good to strong prima facie claim of aboriginal title is compatible with the findings of the Indians Claims Commission in its report on the inquiry of Tsimshian IR 2[13] of June 1994 which found that the Allied Tsimshian Tribes had established a **strong** *prima facie* case for Aboriginal title in the Prince Rupert Harbour area.

THE CROWN LEGAL DUTY TO CONSULT AND ACCOMMODATE

There is no indication in the Draft Assessment Report of the Agency's determination of the scope of its duty to consult the six identified Indian Bands; however it appears that all claims to Aboriginal title and rights in the Project area were treated equally and that all consultation was conducted under CEAA's regulatory review of the Project.

The SCC in Tsihlqot'in speaks of an s35 framework for assessing an Aboriginal group's strength of claim, stating [at para. 93] that:

> Prior to the declaration of Aboriginal title, the Province had a duty to consult and accommodate the claimed Tsihlqot'in interest in the land. As the Tsihlqot'in had a **strong** prima facie claim to the land at the time of the impugned government action and the intrusion was significant, the duty to

[12] *Gitxsan and other First Nations v. British Columbia (Ministry of Forests)*, *2002 BCSC 1701*
[13] Report of the Indian Claims Commission on the Inquiry into Claims of the Lax Kw'alaams Indian Band on Tsimshian IR 2, June 1994

> consult owed by the Crown fell at the **high end** of the spectrum described in Haida and required significant consultation and accommodation in order to preserve the Tsihlqot'in interest. [Emphasis added]

The Allied Tsimshian Tribes **strong** *prima facie* case for Aboriginal title in the Prince Rupert Harbour coupled with the proposed destruction of Lelu Island, which Waaps Gwis Hawaal cannot simply go out and replace, the potential destruction of our fisheries both on the coast and our Skeena River Territories, and the potential for the permanent devastation of the delicate ecosystem at Flora Banks, should have resulted in a deep level of consultation with Gwis Hawaal, the Gitwilgiots Tribe and the Allied Tsimshian Tribes. It did not.

Ken Lawson, head of the House of Gwis Hawaal and the correct title holder for Lelu Island, attended the January 14th CEAA meeting in Prince Rupert regarding the Project having learned of it by word of mouth two days before. Mr. Lawson asked a number of questions at that meeting regarding the effect the Project would have on the marine environment and fish. Government representatives were unable to answer these questions at that time, but assured Mr. Lawson he would get answers. That meeting was followed up with the letter restating Mr. Lawson's questions and again he was assured by email from CEAA and the Ministry of Environment that he would be provided with responses to his questions.

There's been no response to Mr. Lawson's questions from CEAA or any of the participating Federal Departments despite having informed its representatives that Lelu Island was part of the traditional territory of his House nor was there any offer of further consultation regarding this information. This, despite the fact that the Crown knows that this island will be totally destroyed and never again will the House of Gwis Hawaal be able to occupy or use this land. The Proponent cannot grow another island for Gwis Hawaal, never mind another island with the unique attributes that Lelu Island holds, not just for Gwis Hawaal to enjoy, but for all people who love and hold sacred this beautiful place.

The SCC in Tsihlqot'in stated [at para. 74] that Aboriginal title is a collective title held not just for the present generation but for all succeeding generations. It cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using or enjoying it. The land cannot be developed or misused in a way that would substantially deprive future generations of the benefit of land. Lelu Island and the surrounding marine areas have not been surrendered to the Crown, yet the Crown purports to have the authority to allow the destruction of Lelu Island, Flora and Agnew Banks and other areas that will be impacted by this Project. We say this is unlawful.

The Gitwilgiots Tribe and the House of Gwis Hawaal were never consulted by the Proponent, despite its having contracted a high level ethno history report[14] on the use and occupation of Lelu Island and the surrounding marine environment. The report included many of the usual sources for this information, including William Beynon, Wilson Duff, George McDonald, Gary Coupland, and David Archer, who all have extensive expertise in this area and who identified the Gitwilgyots Tribe as the probable owners of the territories at the mouth of the Skeena River. However, the Proponent did not act on this information, and did not consult the Gitwilgyots Tribe who only recently were provided a copy of that report. This same information should have also been available to the Crown in carrying out 'strength of claims' analysis on the identified aboriginal groups, the neighbouring Indian Act Bands, and in the process, ignored the Tribes and Houses who are the correct title holders.

8.5 CEAA Views about Impacts on Potential or Established Aboriginal Rights or Title

The PNW LNG project was assessed under the *Canadian Environmental Assessment Act, 2012.* Section 5.1(c) of that Act states that the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are:

(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on

> *(i) health and socio-economic conditions,*
>
> *(ii) physical and cultural heritage,*
>
> *(iii) the current use of lands and resources for traditional purposes, or*
>
> *(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.*

Yet the Agency concludes that "**the extent of the potential adverse impacts on potential or established Aboriginal rights or title cannot yet be fully determined**". This is a shocking statement to find at the conclusion of a process that is supposed to examine "the seriousness of the potential adverse effect upon the interest claimed[15]" in order to determine the accommodation required. And it is a troubling admission from a Crown Agency that is responsible for discharging Canada's lawful obligation to Aboriginal people and contradicts its stated belief[16] that the mitigation measures outlined in its Report will serve as accommodation measures for the potential effects on

[14] Aboriginal Use and Occupancy of Lelu Island, 1793 to 1846
[15] Tsihlqot'in at para 79
[16] Draft Environmental Assessment Report – Pacific NorthWest LNG, page v.

potential or established Aboriginal rights or title. No accommodation measures have been identified for Gwis Hawaal, the Gitwilgyots Tribe or the Allied Tsimshian Tribes as there was no consultation.

We are aware that CEAA has ignored the scientific work carried out by the Lax Kw'alaams Band on the threats this Project poses to the marine environment and fish. We are also aware of the recent letter[17] to Federal government regarding the failure of the agency to properly assess the potential impacts of the proposed Project on Flora Banks. We are in full support of the Lax Kw'alaams technical reports and the letter from some of Canada's most eminent scientists.

CONCLUSION

We find that the Crown as represented by CEAA did not meet its legal duty to consult and accommodate the constitutionally protected Aboriginal title rights of the **correct** Aboriginal title holders that will be impacted by the significant adverse effects from Project, that is the Gitwilgiots Tribe, Waaps Gwis Hawaal, and the Allied Tsimshian Tribes.

The only way to rectify this situation is for CEAA to stop the clock on the EA of the proposed Project and meaningfully consult and accommodate the Aboriginal rights and title of the House of Gwis Hawaal, the Gitwilgyots Tribe and the Allied Tsimshian Tribes of Lax Kw'alaams.

The recently elected Liberal government promised to build a new relationship with Aboriginal peoples and to implement the United Nations Declaration on the Rights of Indigenous Peoples. We are waiting for this new era of respect for our rights to begin, and we must say it is not off to an auspicious start.

We look forward to the Crown's response.

Sincerely,

The Allied Tsimshian Tribes of Lax Kw'alaams

S'mooygyet Yehan, Donald Wesley, Sr., Gitwilgyots Tribe

Gwis Hawaal, Ken Lawson, Waaps Gwis Hawaal, Gitwilgyots Tribe, Laxgibou

[17] Scientists urge Catherine McKenna to reject Pacific NorthWest LNG report, Brent Jang and Shawn McCarthy, Globe & Mail, March 9, 2016