From:	Chris Gall
To:	Leung,Quincy [CEAA]
Cc:	Bailey, Scott EAO:EX; Bailie, Anna (NRCan/RNCan); dblack@kitimatclean.ca; dblack@blackpress.ca; Winfield-Lesk, Mellissa; Kim, Dennis; Dale Drown; Leona Shaw
Subject:	Re: Request to Comments on draft EIS Guidelines for the Kitimat Clean Refinery Project
Date:	August 12, 2016 9:49:45 AM
Attachments:	Kitimat Comments MNBC Draft EIS Guidelines.docx ATT00001.htm

---

Quincy,

Please find comments from MNBC attached.

Kind regards,

Chris

Christopher Gall B.A., M.A., J.D.
Director of Natural Resources
Métis Nation BC
<email address removed>
Office: 604.557.5851
Mobile: [redacted]

Unit# 103–5668, 192nd Street
Surrey, BC, V3S 2V7
Tel: 604.557.5851
Fax: 604.557.2024
TF: 1.800.940.1150

www mnbc.ca

12 August 2016

Subject: Métis Nation British Columbia's comment on the Draft EIS Guidelines

MNBC currently represents over 14,000 Powley compliant Citizens (1000+ more/year) in British Columbia who still use the land and resources for traditional purposes, many of whom reside in the region in Terrace and Smithers. Métis people have been active in the area for roughly 200 years.

MNBC is satisfied with the commitments made in the draft guidelines document.

Regarding the project description document and general comments:
MNBC is Métis Nation British Columbia there is no "of". Further, Métis have significant current use in the area and we believe should be consulted above notification as a result.

Section 35 of the *Constitution Act, 1982* asserts "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada."[1] In *Sparrow,*[2] the Supreme Court of Canada stated that the inclusion of s. 35(1) in the *Constitution Act, 1982*[3] "represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights."[4] All Aboriginal people hold inherent, constitutionally protected rights. Further, there is no hierarchy of Aboriginal rights within Section 35. Métis are a distinct Aboriginal peoples with equal but unique Aboriginal rights as other Section 35 Aboriginal peoples. This was highlighted recently in Ministerial Special Representative Thomas Isaac's Report on Métis Rights.

MNBC would here like to highlight the duty to consult as it relates to the provincial Crown. Independent of a proven Aboriginal right, the Duty to Consult with Aboriginal people has been affirmed and recognized repeatedly. In the *Haida* and *Taku River* decisions in 2004, and the *Mikisew Cree* decision in 2005, the Supreme Court of Canada held that the Crown has a duty to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights.[5] The Court explained that the duty stems from the Honour of the Crown and the Crown's unique relationship with Aboriginal peoples. In *Haida* the Court articulates this:

[1] Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[2] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1990 CanLII 104 (S.C.C.) [*Sparrow* cited to CanLII].
[3] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 35(1).
[4] *Sparrow*, *supra* note 4 at 32.
[5] *Haida Nation v. British Columbia (Minister of Forests)* | 2004 SCC 73, 2004, *Taku River Tlingit First Nation v. British Columbia* (Project Assessment Director), [2004] 3 S.C.R. 550, 2004 SCC 74,

the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in control of that people.[6]

To be clear, the Court asserted that the Crown must act in good faith when providing consultation and must consult where it has knowledge of the potential existence of Aboriginal rights or title; proven rights are not required to trigger the Crown's duty and the Crown's duty to act honourably is enshrined in the Constitution of Canada, 1982. The duty to consult is a pre proof remedy. As such, the position of the provincial crown and the EAO regarding Métis consultation is frankly, absurd.

The Supreme Court of Canada held in *Haida* that the duty to consult and accommodate arises when the Crown has knowledge, real or constructive of the potential existence of Aboriginal rights covered by Section 35, and contemplates conduct that might adversely affect those rights.[7] Given there is no hierarchy of rights under the constitution, the Crown's obligation to consult applies equally to the Métis.[8] The implication of collectively embodied rights extends to the Crown's Duty to Consult, which it must oblige when it "contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights".[9]

Numerous international environmental agreements call on the inclusion of indigenous knowledge in planning and decision-making and stipulate that the prior informed consent of indigenous peoples should be sought regarding proposed developments on the lands and in the waters traditionally used and occupied by indigenous peoples. The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity* is a 2010 agreement that supplements the 1992 *Convention on Biological Diversity*. It provides a legal framework for the fair and equitable sharing of benefits arising out of the use of genetic resources. As the title suggests, its objective is "the fair and equitable sharing of benefits arising from the utilization of genetic resources, thereby contributing to the conservation and sustainable use of biodiversity."[10] Further, "The Nagoya Protocol addresses traditional knowledge associated with genetic resources with provisions on access, benefit-sharing and compliance. It also addresses genetic resources where

---

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69.

[6] *Haida* para 32.

[7] *Haida* paras. 34-35

[8] *R. v. Beer*, 2011 MBPC 82 at para. 31

[9] Canada. Department of Aboriginal Affairs and Northern Development Canada. Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the *Duty to Consult.* Aboriginal Affairs and Northern Development, 2011. Web. 29 July, 2013. <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/textetext/intgui_ 1100100014665_eng.pdf> at 6.

[10] https://www.cbd.int/abs/about/

MÉTISBC
NATION

Unit# 103–5668, 192nd Street
Surrey, BC, V3S 2V7
Tel: 604.557.5851
Fax: 604.557.2024
TF: 1.800.940.1150

www mnbc.ca

indigenous and local communities have the established right to grant access to them. Contracting Parties are to take measures to ensure these communities' prior informed consent, and fair and equitable benefit-sharing, keeping in mind community laws and procedures as well as customary use and exchange."[11]

The *Nagoya Protocol* entered into force on October 12, 2014 and creates legal certainty, clarity and transparency for contracting parties. Further, it lays out fair rules and procedures for prior informed consent which is a critical component of international law dealing with indigenous peoples. Article 7: Access to Traditional Knowledge Associated with Genetic Resources, states:

In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.[12]

Traditionally, natural resources were managed solely through our indigenous governance system by captain's of the hunt. Our people have long standing legal traditions that constitute a deep and extensive connection to land as well as to our broad territorial use throughout Canada. Our law is a product of our relationship to our land. As such, our legal traditions can help conserve and sustainably manage the resources our people continue to rely on.[13] Our system of rules and punishments evolved into our system of government that survives today. These legal traditions were necessary to govern the people and was a system of incentive based laws with a positivistic legal base. Our laws are based on our experience, senses and connection to our territory. They are closely tied to all facets of life including education, health, safety, trade, and the harvesting of resources off of the land.

Indigenous laws and legal traditions are deeply rooted in conditioned attitudes about "the nature of law, role of law in society, organization of the legal system and how law should be made, applied and taught."[14] The historic violation of Indigenous law and legal principles threatens their continued legitimacy. To rebuild a relationship with Canada, we need our voices heard, our governance structures respected, and our laws upheld.

[11] https://www.cbd.int/abs/about/
[12] https://www.cbd.int/abs/text/articles/default.shtml?sec=abs-07
[13] Kent McNeil, "Judicial Approaches to Self-Government since Calder", in Hamar Foster, Heather Raven & Jeremy Webber, eds Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights (Vancouver: UBC Press, 2007) 129 at 151.
[14] Val Napolean, "Thinking About Indigenous Legal Orders" *National Centre for First Nations Governance* (18 June 2007), online: <http://fngovernance.org/ncfng_research/val_napoleon.pdf> [*Napoleon*] at 2.

International law today includes a body of conventional and customary norms concerning indigenous peoples, grounded in the principle of self-determination. Self-determination is an extraordinary regulatory vehicle in the contemporary international system, broadly establishing rights for the benefit of all peoples, including indigenous peoples. It enjoins the incidents and legacies of human encounter and interaction to conform with the essential idea that all are equally entitled to control their own destinies. Self-determination especially opposes, both prospectively and retroactively, patterns of empire and conquest. To the extent indigenous peoples have been denied self-determination by virtue of historical and continuing wrongs, they are entitled to remedial measures. These measures must, at a minimum, implement contemporary norms as they have developed with particular regard to indigenous peoples, including prescriptions of non-discrimination, cultural integrity, control of lands and resources, social welfare and development, and self-government.[15]

Métis as a collective people have consistently exercised their right to self determination by fighting for our rights, lands, and ongoing existence. Further,"[b]y virtue of that right [we] freely determine [our] political status and freely pursue [our] economic, social and cultural development."[16] This right is set out in a number of binding treaties. This includes the International Covenant on Economic Social and Cultural Rights (ICESCR), as well as in Article 1 of the International Covenant on Civil and Political Rights (ICCPR), collectively referred to as the Decolonization Treaties. Canada, as a signatory, is required to implement the resulting international human rights obligations.[17] The international community has collectively agreed that the right to self-determination applies to Indigenous Peoples, as set out in Article 3 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP),[18] which contains the same wording specific to Indigenous Peoples.

The right to self-determination of all peoples is a foundational right under international law and has the status of *jus cogens*.[19] Under the Vienna Convention on the Law of Treaties, which is binding on Canada, *jus cogens* is, "a peremptory norm of general international law [which] is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is

---

[15] James Anaya Indigenous Peoples In International Law pp. 183-184

[16] The International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967); Can TS 1976 No 47, (entered into force 23 March 1976, accession by Canada 19 May 1976), [ICCPR]; and the International Covenant on Economic Social and Cultural Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967); Can TS 1976 No 47, (entered into force 23 March 1976, accession by Canada 19 May 1976), [ICESCR]. Article 1, para 1, of both covenants set out that: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

[17] *Ibid.*

[18] U. N. Declaration on the Rights of Indigenous Peoples, GA Res 61/295 (Annex), UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (2008). [UNDRIP].

[19] James Crawford, Brownlie's Principles of Public International Law, 8th edition, (UK: Oxford University Press, 2012); Kindred Hugh M., Phillip M. Saunders et al., eds., International Law, Chiefly as Interpreted and Applied in Canada 7th ed. (Toronto: Emond Montgomery, 2006) 70-78; John H. Currie, Public International Law, Second edition, (Toronto: Irwin Law, 2008) at 56-66.

MÉTISBC
NATION

Unit# 103–5668, 192nd Street
Surrey, BC, V3S 2V7
Tel: 604.557.5851
Fax: 604.557.2024
TF: 1.800.940.1150

www mnbc.ca

permitted and which can be modified only by a subsequent norm of general international law having the same character."[20] There is no universal agreement regarding precisely which norms are *jus cogens* nor how a norm reaches that status, but it is generally accepted that *jus cogens* includes the prohibition of genocide, maritime piracy, slaving in general (to include slavery as well as the slave trade), torture, refoulement and wars of aggression and territorial aggrandizement.[21]

In the Secession Reference, the Supreme Court of Canada found that the right to self-determination, "is so widely recognized in international conventions that the principle has acquired a status beyond convention and is considered a general principle of international law"[22] and is hence a free-standing source of international law. Furthermore, Canadian jurisprudence has clearly established that, "Canada's international obligations and relevant principles of international law are … instructive in defining [constitutional rights]," and that they, "should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."[23]

UNDRIP clearly states in Article 10 that, "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."[24] This speaks strongly against this historic injustices faced by our people over the two centuries. FPIC is also contained in articles 11, 19, 28, and 29. Canada is clearly falling behind when Peru, Australia, and the Philippines that have recognized it in their laws.[25]

The Court has also offered an interpretation as to how the right to self-determination arises in Canada:

> In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination

[20] Vienna Convention on the Law of Treaties, GA res. 2166 (XXI); 1155 UNTS 331; 8 ILM 679; Can TS 1980 No 37 (entered into force 27 January 1980, accession by Canada , 14 October 1970) Articles 53 and 64.
[21] M. Cherif Bassiouni. (Autumn 1996) "International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes'." *Law and Contemporary Problems*. Vol. 59, No. 4, at 68
[22] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para. 114, [*Secession Reference*].
[23] *Divito v Canada* (Public Safety and Emergency Preparedness), 2013 SCC 47 at paras 22-28; and, Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27 at para 70.
[24] U. N. Declaration on the Rights of Indigenous Peoples, GA Res 61/295 (Annex), UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (2008). [UNDRIP].
[25] Abbi Buxton and Emma Wilson, "FPIC and the Extractive Industries: A guide to applying the spirit of free, prior and informed consent in industrial projects" (2013), online: <http://pubs.iied.org/pdfs/16530IIED.pdf>.

because they have been denied the ability to exert internally their right to self-determination.[26]

As the Courts[27] and Royal Commissions[28] have repeatedly established, all Indigenous Peoples in Canada have been subject to colonization and remain oppressed and marginalized peoples as a direct result of government regulation and the failure to implement our rights pursuant to Section 35 of the Constitution Act, 1982.[29] Indigenous peoples have struggled against colonization, oppression and marginalization throughout our interactions with Canada's colonial legal system and bureaucracy. We insist on the implementation of our right to self-determination so we can continue to maintain our way of life and maintain our effective control over the lands and resources on which our community members depend.

Canada has been urged by the *Special Rapporteur on the Rights of Indigenous Peoples to "*put in place a policy framework for implementing the duty to consult that allows for indigenous peoples' genuine input and involvement at the earliest stages of project development."[30] Currently this is not happening for Métis in British Columbia.

The World Bank has recognized "that the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend. These distinct circumstances expose Indigenous Peoples to different types of risks and levels of impacts from development projects, including loss of identity, culture, and customary livelihoods, as well as exposure to disease."[31] Further, the UN Development Group Guidelines on Indigenous Peoples most clearly point out the importance of indigenous sovereignty over natural resources and the role Indigenous peoples have been playing in their management and conservation:

> Indigenous peoples' natural resources are vital and integral components of their lands and territories. The concept includes the entire environment: surface and sub-surface, waters, forests, ice and air. Indigenous peoples have been guardians of these natural environments and play a key role, through their traditions, in respectfully maintaining them for future generations. They have managed these resources sustainably for millennia and in many places have created

---

[26] Divito v Canada (Public Safety and Emergency Preparedness), 2013 SCC 47 at paras 22-28; and, Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27 at para 70 (emphasis added).

[27] *R v Ipeelee*, 2012 SCC 13 at para 60; R v Gladue, [1999] 1 SCR 688 at para 61; R v Williams, [1998] 1 SCR 1128 at para 58.

[28] Report of the Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back, (Ottawa: Supply and Services, 1996). [RRCAP]; Canadian Human Rights Commission, Report on Equality Rights of Aboriginal People (Ottawa: CHRC, 2013) online: <http://www.chrcccdp.gc.ca/sites/default/files/equality_aboriginal_report.pdf>.

[29] The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 s 35.

[30] Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples, UNHRC, 24th Sess, Annex, Agenda Item 3, UN Doc A/HRC/24/41 (2013) at 22.

[31] World Bank OP 4.10 – Indigenous Peoples of 20 May 2005, online: <http://web.world-bank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~pagePK:64141683~piPK:64141620~theSitePK:502184,00.html> at para 2.

MÉTISBC NATION

Unit# 103–5668, 192nd Street
Surrey, BC, V3S 2V7
Tel: 604.557.5851
Fax: 604.557.2024
TF: 1.800.940.1150

www mnbc.ca

> unique bio- cultural landscapes. Many of these indigenous management systems, even though altered or perturbed by recent processes of change, continue to contribute to the conservation of natural resources to this day.[32]

The UN Declaration recognizes this special perception of land and resources. The Preamble recognizes that control over developments affecting their lands, territories and resources will enable indigenous peoples to maintain and strengthen their cultures, traditions, and institution. Article 25 refers to our distinctive spiritual relationship to our lands, territories, waters and coastal seas, and the responsibility to future generations in this regard. This understanding forms the basis of aboriginal rights to lands and resources as enshrined in the declaration. Additionally, as Doyle contends:

> A cogent argument can be made asserting that the requirement for consent had long been operationalised among and between indigenous cultures prior to their engagement with European colonial powers... It is of particular relevance for contemporary assertions of indigenous peoples of their right to give or withhold FPIC through the formulation of their own self-determined processes, policies and protocols governing how their consent should be sought.[33]

Domestically, the Supreme Court of Canada (SCC) continues to rule on issues around consultation and accommodation, and recently on the question of title. The SCC's *Tsilhqot'in* decision underscored that without obtaining consent prior to Aboriginal title being established, it might become necessary to cancel an approved project upon establishment of title if continuation of the project would unjustifiably infringe these rights. It follows that consent from us as Indigenous peoples is critical to move forward on development projects in indigenous territories. This is critically important to us in British Columbia in order to see us recognized as decision makers, enable us to generate and support effective consultation, and ensure the active and engaged participation of our community members at the community level where the impacts will be realized.

For a right to self-determination to be meaningful, it has to include sovereignty over lands and natural resources. Even though a duty to obtain free, prior and informed consent grants certain rights to aboriginal peoples to resist decisions of the state and thereby the democratically elected government, this is inherent and necessary for any form of self-determination and autonomy. Self-determination would be deprived of all meaning if the group that is granted such a right had no means of opposing decisions of the majority elected government. As Susan Doyle articulates: "free prior and informed

[32] *UN Development Group Guidelines on Indigenous Peoples Issues,* February 2008, online: <http://www.ohchr.org/Documents/Issues/IPeoples/UNDGGuidelines.pdf> at 17.
[33] Cathal Doyle, *Indigenous peoples, title to territory, rights and resources: the transforma*tive *role of free prior & informed consent* (United Kingdom: Routledge, 2014) at 17

consent reconstructs the foundations of self-determination which were brutally ruptured in the initial colonial encounters."

MNBC will work cooperatively to ensure that its Citizen's Aboriginal rights are respected and appropriately addressed. MNBC will work diligently and in good faith to protect all the natural resources that Métis people have, and continue to rely on, as a way of life and cultural connection.

Respectfully,

[redacted]

Christopher Gall B.A.. M.A., J.D.
Director of Natural Resources
Métis Nation British Columbia