

FEDERAL COURT

BETWEEN:

Luutkudziwwus, also known as Charlie Wright and Gwininitxw, also known as Yvonne Lattie, on behalf of themselves and in their capacity as Gitxsan Hereditary Chiefs as Representatives of their Wilps

APPLICANTS

AND:

Her Majesty the Queen in Right of Canada
Attorney General of Canada
Minister of Environment and Climate Change
Canadian Environmental Assessment Agency
Pacific NorthWest LNG Limited

RESPONDENTS

NOTICE OF APPLICATION

TO THE RESPONDENTS:

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

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

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

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

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

(Date)

Issued by:

TO: ATTORNEY GENERAL OF CANADA
c/o Department of Justice Canada
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MINISTER OF ENVIRONMENT AND CLIMATE CHANGE
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CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY
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PACIFIC NORTHWEST LNG LIMITED PARTNERSHIP
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APPLICATION

1. This is an application for judicial review in respect of:
 - a. the decision of the Minister of Environment and Climate Change (the “Minister”) dated September 27, 2016 pursuant to s.52 of the *Canadian Environmental Assessment Act, 2012* SC 2012, c 19 s 52 (“CEAA 2012”) and issued in a decision statement pursuant to s.54 of CEAA 2012, that the Pacific NorthWest LNG Project (the “Project”) is likely to cause significant adverse environmental effects and must therefore be referred to the Governor in Council as to whether those effects are justified in the circumstances (the “Minister’s Decision”); and
 - b. Order in Council P.C. 2016-0838, dated September 27, 2016, issued by the Governor in Council in which the Governor in Council decided that the significant adverse environmental effects that the Project is likely to cause are justified in the circumstances pursuant to s.52(4) of CEAA 2012 (the “OIC”).

2. The Applicants make this application for:
 - a. an order quashing or setting aside the Minister’s Decision;
 - b. an order quashing or setting aside the OIC;
 - c. a declaration that the Project will result in a *prima facie* infringement of the Applicants’ Aboriginal right to fish for food, social and ceremonial purposes (the “Fishing Rights”);
 - d. a declaration that the Canadian Environmental Assessment Agency (the “Agency”), the Minister and the Governor in Council, acting on

behalf of the Crown, breached the Crown's constitutional obligations to justify the infringement of the Applicants' Fishing Rights prior to issuing the Minister's Decision and the OIC (collectively, the "Decisions");

- e. a declaration that the Agency, the Minister and the Governor in Council, acting on behalf of the Crown, breached the Crown's constitutional obligations to consult and accommodate the Applicants in respect of potential impacts of the Project on the Fishing Rights prior to issuing the Decisions;
 - f. an order requiring the Respondents to pay the Applicants' costs of this application in any event of the cause; and
 - g. an order that the Applicants shall not be required to pay costs to the Respondents pursuant to Rule 400 of the Federal Court Rules in the event that this application is dismissed.
2. Such further and other relief as this Honourable Court may deem appropriate.

The grounds for the application are:

A. THE PARTIES

The Applicants

1. The Gitksan are an Aboriginal people as defined in s. 35 of the *Constitution Act 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982 c. 11 (the "*Constitution Act 1982*") and "Indians" within the meaning of s. 91(24) of the *Constitution Act 1867*, 30 & 31 Vict, c.3.

2. Gwininitxw is a Gitxsan Hereditary Chief, Simogyet of the Lax Gibuu Clan and acting in her capacity as Simogyet represents herself and the members of the Wilp Gwininitxw.
3. Luutkudziiwus is a Gitxsan Hereditary Chief, Simogyet of the Lax Seel Clan and acting in his capacity as Simogyet represents himself and the members of the Wilp Luutkudziiwus.

The Respondents

4. The Agency is responsible for carrying out an environmental assessment of the Project pursuant to CEAA 2012.
5. The Minister has statutory responsibilities pursuant to CEAA 2012 in respect of the Project.
6. The Attorney General is the representative of Her Majesty the Queen in Right of Canada, pursuant to s. 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C50, as amended.
7. Pacific NorthWest LNG Limited Partnership (the "Proponent"), is majority-owned by Petroliam Nasional Berhad, which is an integrated oil and gas business owned by the Government of Malaysia and minority shareholders Sinopec, Japan Petroleum Exploration Company, India Oil Corporation Ltd., and Petroleum BRUNEI.

B. THE FACTS

The Gitxsan People

1. The Gitxsan live in communities along the Skeena, Bulkley and Kispiox rivers approximately 150 to 180 miles from the coast.
2. The Gitxsan are divided into four clans: the Lax Seel or Ganeda (Frog Clan), Lax Gibuu (Wolf Clan), Giskaast (Fireweed Clan) and Lax Skiik (Eagle Clan).

Each clan is further divided into huwilp (houses). The wilp (house) is the central social unit in Gitxsan society. Wilp members are closely related family members through matrilineal descent.

3. Each wilp owns a series of Simogyet (Hereditary Chief) names, including the head chief and wing chiefs, which are passed down from generation to generation. Simogyet names carry the daxgyet (the Simogyet's power and authority) of the wilp. When a name is passed to a successor Simogyet, the crest, territory and authority and spiritual connection to the territory is also passed to the successor.
4. Each wilp controls its own territories, including fishing sites, for use by their members for food, livelihood, and ceremonial purposes according with the Gitxsan land tenure system.
5. The Simogyet for each wilp has authority and is responsible for making decisions, protecting the wilp members' interests and rights and managing the wilp's lands and resources pursuant to Gitxsan ayookw (law). No Simogyet has authority to make decisions or speak to another wilp's interests or rights.

The Applicants' Territories

6. The Gitxsan hold and exercise Aboriginal title and rights to approximately 33,000 square kilometres of territory known as the Lax Yip in northwestern British Columbia.
7. Wilp Luutkudziiwus holds two territories in the Lax Yip: Madii Lii, which is located on the north bank of the Suskwa River, and Xsi Gwin Hauums, which is located on the north bank of the Skeena River across from Hazelton, B.C.
8. Wilp Gwininitxw holds two territories in the Lax Yip: Galaanhl Gist and Maxhla Didaat. Galaanhl Gist and Maxhla Didaat are located adjacent to and are bisected by the upper Skeena River. The two territories combine to cover

approximately 170,000 hectares of the central Skeena Mountains, including portions of the Atna, Sicintine and Slamgeesh Ranges.

The Applicants' Fishing Rights

9. Prior to and since contact with Europeans, Gitksan people have continuously exercised Fishing Rights in the Lax Yip, including harvesting salmon for sustenance, social, cultural and ceremonial purposes.

10. The Gitksan, including the Applicants, continue to exercise Fishing Rights in the Lax Yip today. The salmon fishery is a mainstay of Gitksan culture and economy.

11. Wilp Luutkudziiwus holds and exercises Fishing Rights on the Xsan (Skeena) River at sites upstream and downstream of Hazelton, including the Four Mile Canyon area. Luutkudziiwus also uses ancestral fishing sites on the Suskwa River and several of its tributaries.

12. Luutkudziiwus manages the wilp's fisheries under a fisheries management plan which incorporates Gitksan traditional knowledge and current science. The goal of the fisheries management plan is to rebuild and maintain a sustainable fishery.

13. Wilp Gwininitxw's territories centre on the Slamgeesh and Sicintine river systems. Both river systems support populations of chinook, pink, sockeye and coho salmon and steelhead trout. Gwininitxw also uses ancestral fishing sites on the Babine and Skeena River systems.

14. Gwininitxw manages the wilp's fisheries based on Gitksan traditional knowledge and contemporary science. Gwininitxw fisheries management activities are supported by Canada DFO, Pacific Salmon Commission and the Gitksan Watershed Authorities.

15. The salmon populations on which the Applicants rely for their fisheries have declined in the past six decades. Since 2004 there have been at least two years when fisheries were completely closed to the Gitksan in order to ensure that sufficient numbers of spawners reached the spawning grounds.
16. The decline in salmon populations has had a significant negative impact on the Applicants' ability to exercise their Fishing Rights.

Impacts of the Project on the Applicants' Fishing Rights

17. The Project is a new facility for the liquefaction, storage, and export of liquefied natural gas. The Project will be located approximately 15 kilometres south of Prince Rupert, British Columbia in the Skeena River Estuary (the "Estuary").
18. The Estuary is critical migration and rearing habitat for juvenile salmon populations originating in Gitksan territory which the Applicants rely on to exercise their Fishing Rights and to sustain their culture and connection to their territories.
19. The protection and conservation of the Estuary habitat for migrating juvenile salmon populations is particularly important to the Applicants in light of the declining salmon returns in their territories.
20. If allowed to proceed, the Project will cause significant harm to the critical Estuary habitat and migrating juvenile salmon originating in upper Skeena waters, and will result in a *prima facie* infringement of the Applicants' Fishing Rights.

Crown Consultation with the Applicants

21. In April 2013, the Agency commenced an environmental assessment of the Project pursuant to CEAA 2012.

22. During the environmental assessment the Applicants and other Gitxsan Simgigyet (Hereditary Chiefs) repeatedly expressed concern about the Project and requested consultation about potential impacts of the Project on their Fishing Rights.
23. By email dated June 25, 2015 Gwininitxw notified the Agency that Wilp Gwininitxw holds Fishing Rights which would be infringed by the Project. Gwininitxw objected to the Agency's failure to consult and requested that the Agency and the federal government engage in consultation with Gwininitxw and other Gitxsan Simgigyet.
24. By letter dated July 9, 2015 Luutkudziiwus and other Gitxsan Simgigyet, as well as elected Gitxsan chiefs, wrote to the Agency to formally request that the Crown engage in consultation with them about the impacts of the Project on their fisheries.
25. By letter dated August 6, 2015 the Agency advised the Applicants that it did not consider Gitxsan rights to be affected by the Project because mitigation measures proposed by the Proponent would prevent upstream impacts. The Agency further advised that the next opportunity for public comment would be when its draft environmental assessment report (the "EA Report") and potential conditions for the Project were announced.
26. By email on August 26, 2016 Gwininitxw again requested that the Agency consult about the impacts of the Project.
27. By letter dated February 10, 2016 the Agency invited the Applicants to participate in the public comment period on the draft EA Report and potential conditions.
28. By letter dated February 16, 2016 Luutkudziiwus advised that Wilp Luutkudziiwus had serious concerns about the Project and the environmental assessment and that the Agency had not consulted them about impacts on their Fishing Rights. Luutkudziiwus requested that the federal government initiate consultation and

explain how it had considered Luutkudziiwus' Fishing Rights and how the Crown could justify the infringement of those rights.

29. By letter dated March 10, 2016 the Applicants and other Gitxsan Simgigyet provided comments on the draft EA Report. The Applicants and other Simgigyet appended a letter to their comments from scientists to the Minister regarding critical flaws in the studies relied on by the Agency in its environmental assessment of the Project. The Applicants and other Simgigyet advised that based on the scientists' concerns, the Proponent's proposed mitigation measures would be insufficient to protect the Skeena River fisheries from being significantly impacted by the Project.
30. On March 31, 2016 Richard Wright, consultation representative for Wilp Luutkudziiwus, met with representatives of the Agency to discuss the need for the Agency and the federal government to consult with the Gitxsan about the Project.
31. On April 18, 2016 Richard Wright, on behalf of the Applicants and other Simgigyet, met with staff of the Prime Minister's Office to present the Gitxsan's concerns that the Project would infringe their Fishing Rights and that the Agency had declined to consult with the Gitxsan.
32. By letter dated April 26, 2016 the Applicants and other Simgigyet again wrote to the Agency to request consultation beyond information-sharing about the Project and to express their concern about the Crown's failure to conduct a strength of claim analysis for the Gitxsan. In the letter the Applicants and other Simgigyet again raised concerns about impacts of the Project on migrating salmon and stressed that it was not too late for the Crown to consult.
33. By letter dated August 24, 2016 the Agency advised that it considered the comments submitted by the Applicants during the public comment period as part of its Aboriginal consultation process.

The Environmental Assessment Report

34. In September 2016 the Agency delivered its EA Report to the Minister pursuant to CEAA 2012.
35. The Agency concluded in the EA Report that the likelihood for the Project to result in adverse effects to salmon in the upper Skeena watershed was low as a result of mitigation measures proposed by the Proponent.
36. In the EA Report the Agency defines the Gitksan as one of the “upriver Aboriginal groups” which expressed concerns how the Project’s effects on migrating salmon through the Skeena watershed would affect their Fishing Rights.
37. The Agency acknowledged that many of the traditional fisheries relied on by the upriver Aboriginal groups for the exercise of their Fishing Rights were “already at a depressed level,” and that as such, unanticipated adverse effects to salmon populations in the upper Skeena watershed could contribute to a “moderate cumulative impact” on their Fishing Rights as a result of “prolonged inability to fish preferred species or in preferred locations.”

The Decisions

38. On review of the EA Report, the Minister decided pursuant to s.52 of CEAA 2012 that the Project is likely to cause significant adverse effects and must therefore be referred to the Governor in Council as to whether those effects are justified in the circumstances.
39. On September 27, 2016 the Governor in Council issued the OIC in which the Governor in Council decided that the significant adverse environmental effects that the Project is likely to cause are justified in the circumstances pursuant to s.52(4) of CEAA 2012.
40. On September 27, 2016 the Minister issued its decision statement confirming the Governor in Council’s decision that the adverse environmental effects that

the Project is likely to cause are justified in the circumstances pursuant to s.54 of CEEA 2012.

C. LEGAL BASIS

1. The Applicants hold and exercise constitutionally-protected Aboriginal rights, including Fishing Rights, in their respective territories within the Lax Yip.
2. The Crown holds constitutional obligations in respect of the Applicants pursuant to s.35 of the *Constitution Act 1982*, including the duty to consult and accommodate the Applicants in respect of any decision which has the potential to impact the Applicants' Aboriginal rights and to attempt to justify any infringement of those rights.
3. The Project will result in a *prima facie* infringement of the Applicants' Fishing Rights.
4. The Agency, the Minister and the Governor in Council, acting on behalf of the Crown, breached the Crown's constitutional obligations by failing to consult and accommodate the Applicants in respect of potential impacts of the Project on the Applicants' Fishing Rights prior to issuing the Decisions.
5. The Agency, the Minister and the Governor in Council, acting on behalf of the Crown, breached the Crown's constitutional obligations by failing to justify the infringement of the Applicants' Fishing Rights prior to issuing the Decisions.

D. CONCLUSION

1. Based on the foregoing the Applicants respectfully request that the Court quash the Decisions on the basis that the Crown breached its constitutional obligations to consult and accommodate the Applicants and justify the infringements of their Fishing Rights in respect of the Project.

2. This application will be supported by the following material:
 - a. EA Report of the Agency dated September 2016;
 - b. Decision Statement of the Minister dated September 27, 2016;
 - c. OIC issued by the Governor in Council dated September 27, 2016;
 - d. the record before the Minister as requested under Rule 317;
 - e. the record before the Governor in Council as requested under Rule 317;
 - f. Affidavit of Luutkudziwus, Charlie Wright, to be filed;
 - g. Affidavit of Gwininitxw, Yvonne Lattie, to be filed;
 - h. Affidavit of Richard Wright, to be filed;
 - i. Affidavit of Kenny Rabnett, to be filed; and
 - j. Such further and additional affidavits and materials as counsel may advise.

Rule 317 Requests:

1. The Applicants request that the Agency send a certified copy of the following material that is not in the possession of the Applicants but is in the possession of the Agency to the Applicants and to the Registry:

The record of all materials placed before and considered by the Agency in preparing the EA Report.

2. The Applicants request the Minister to send a certified copy of the following material that is not in the possession of the Applicants but is in the possession of the Minister to the Applicants and to the Registry:

The record of all materials placed before and considered by the Minister in making the Minister's Decision.

3. The Applicants request the Governor in Council to send a certified copy of the following material that is not in the possession of the Applicants but is in the possession of the Governor in Council to the Applicants and to the Registry:

The record of all materials placed before and considered by the Governor in Council in making the Governor in Council's decision and in preparing the OIC.

Dated this _ 10th _ day of January, 2017.



Bruce McIvor



FOR Bertha Joseph



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