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Ginette Lischenski
VAN 18

Court File No. T-4012-25

# FEDERAL COURT

B E T W E E N:

METLAKATLA FIRST NATION

APPLICANT

– and –

THE ATTORNEY GENERAL OF CANADA~~MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and~~
KSI LISIMS LNG TOLLING GP ULC and
NISGA'A NATION, AS REPRESENTED BY
NISGA'A LISIMS GOVERNMENT

RESPONDENTS

## AMENDED NOTICE OF APPLICATION

(Pursuant to sections 18 and 18.1 of the *Federal Courts Act*)

Pursuant to the Order of Justice Kathleen Ring dated December 22, 2025, leave is granted to the applicants to file their Amended Notice of Application

**TO THE RESPONDENTS:**

**A PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the Applicant. The relief claimed by the Applicant appears below.

**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 Applicant. The Applicant requests that this application be heard in Vancouver.

**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 file a notice of appearance in Form 305

prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitors, **WITHIN 10 DAYS** after being served with this notice of application.

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

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

Date ____________________ Issued by ______________________________
(Registry Officer)

Address of
local office: Pacific Centre
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**TO:** **THE ATTORNEY GENERAL OF CANADA**~~**MINISTER OF ENVIRONMENT AND CLIMATE CHANGE**~~

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## APPLICATION

This is an application for judicial review of the decisions by the Minister of Environment and Climate Change, pursuant to ss. 60 and 64 of the *Impact Assessment Act*, SC 2019 (“**IAA**”) (“**Decisions**”), and the decision statement issued on September 15, 2025 ~~by the Minister of Environment and Climate Change~~ pursuant to s. 65 communicating those decisions~~of the federal *Impact Assessment Act*, SC 2019 (“**IAA**”)~~ (“**Decision Statement**”), in respect of the Ksi Lisims LNG Natural Gas Liquefaction and Marine Terminal Project (“**Project**”).

## PART I – RELIEF SOUGHT

**THE APPLICANT MAKES APPLICATION FOR:**

1. An order quashing each of the Decisions and the Decision Statement and remitting them~~it~~ for redetermination in accordance with the Court’s directions;

2. A declaration that the honour of the Crown was breached;

3. An order for costs in favour of the Applicant; and

4. Such further relief as counsel may advise and the Court may permit.

## PART II – GROUNDS FOR APPLICATION

### THE GROUNDS FOR THE APPLICATION ARE:

### A. Parties

#### (a) Applicant

5. The Applicant, Metlakatla First Nation (“**Metlakatla**”), is a “band” within the meaning of the *Indian Act*, RSC 1985, c I-5 and an “Aboriginal people of Canada” within the meaning of s. 35(1) of the *Constitution Act, 1982*.

6. Metlakatla is derived from the word Maxłaxaała which means “saltwater pass” in Sm’algyax, the Coast Tsimshian language. Metlakatla’s home reserve is located at Metlakatla Pass, about 5 km from Prince Rupert. Metlakatla’s home reserve is also the location of a Coast Tsimshian traditional winter village.

7. Metlakatla members are Coast Tsimshian, an Indigenous people. The Coast Tsimshian exclusively used, occupied, owned, and controlled the coastal region between Grenville Channel, the Skeena and Nass Rivers, Portland Canal, and the lands and waters within Prince Rupert Harbour before and at contact, and at 1846. This territory includes lands and waters where the proponents intend to construct the Project, including a transmission line, and conduct intense Project-related marine shipping activity.

8. Metlakatla was a “participating Indigenous nation” pursuant to the *Environmental Assessment Act*, SBC 2018, c 51 (“**EA Act**”), with respect to the BC Environmental Assessment Office’s assessment of the Project.

### (b) Respondents

9. The ~~Respondent~~decision-maker who made the Decisions and issued the Decision Statement is the federal Minister of Environment and Climate Change ("**Federal Minister**"), as represented in this proceeding by the Respondent Attorney General of Canada. The Federal Minister is appointed under the *Department of the Environment Act*, RSC 1985, c E-1.

10. Canada asserts jurisdiction over "Navigation and Shipping", "Sea Coast and Inland Fisheries" and "Indians and Lands reserved for the Indians" pursuant to ss. 91(10), 91(12) and 91(24) of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3.

11. The Respondent Ksi Lisims LNG Tolling GP ULC is the designated holder of the Environmental Assessment Certificate ~~granted pursuant to the Decision Statement in connection~~ with respect to the Project, on behalf of Ksi Lisims LNG Tolling LP ("**Ksi Lisims LNG**").

## B. Factual Background

### (a) Substitution notice

12. On July 21, 2021, the proponents of the Project, the Nisga'a Lisims Government ("**Nisga'a Nation**") with Rockies LNG and Western LNG, submitted an initial project description, under the EA Act and the IAA. Detailed project descriptions followed on April 25 and July 8, 2022.

13. On August 6, 2021, the BC Environmental Assessment Office ("**EAO**") requested substitution from the Impact Assessment Agency of Canada ("**IAAC**") under the IAA and the *Canada-BC Impact Assessment Cooperation Agreement* with respect to the Project.

14. On October 4, 2021, Metlakatla wrote to EAO to confirm that it intended to be a "participating Indigenous nation" pursuant to the EA Act in the regulatory review and environmental assessment process for the Project.

15. On April 6, 2023, IAAC responded to EAO confirming approval of a substituted assessment process. IAAC defined the Project's scope as including: (i) marine shipping within Canada's 12-nautical-mile territorial sea limit; (ii) supporting marine traffic to/from the Project site and Gingolx or Prince Rupert; and (iii) a submarine electrical transmission line to the Project site across Portland Canal.

16. The Minister's Notice of Substitution Approval ("**Substitution Notice**") confirmed substitution approval because, among other things, BC committed to meeting the requirements of the IAA, including assessing factors under s. 22(1) and conditions under ss. 33(1) and (2), taking into account the definition of "effects within federal jurisdiction".

17. The Substitution Notice also confirmed the Federal Minister's requirement that EAO meet the following conditions: (i) the "designated project to be assessed is the construction, operation, and decommissioning of a floating natural gas liquefaction facility and marine terminal and any incidental physical activities"; (ii) assessing impacts of Project marine shipping and a proposed transmission line, including any potential cumulative effects; (iii) considering federal policies and commitments in the Strengthened

Climate Plan; and (iv) addressing commitments in Canada's 2030 Emissions Reduction Plan, including oil and gas sector emissions caps and best-in-class guidance.

18. By letter accompanying the Substitution Notice, the Federal Minister also recognized and relied on BC's requirement for proposed LNG facilities "to include a credible plan to be net zero by 2030".

**(b) EAO application and draft materials**

19. On October 16, 2023, Ksi Lisims LNG submitted a project application to EAO by on behalf of the proponents. A revised application was submitted on September 4, 2024. In November 2024, EAO issued a draft assessment report, EA certificate, and federal and provincial conditions.

20. Among other things, these materials confirmed the following:

(a) The Project is proposed by, but would not be owned by, the Nisga'a Nation;

(b) The Project requires an enormous 4,700 GWh of electricity annually;

(c) There is currently no available grid electrification, and without a transmission line, the Project will rely on "temporary" power generation barges to burn natural gas for electrification, and emit 1,867,992 tonnes of $CO_2$ annually;

(d) That level of annual emissions represents 12.29% and 0.86% of provincial and federal emissions from the oil and gas sectors in 2022, and 2.91% and 0.26% of total provincial and federal emissions in 2022;

(e) Electrifying the Project would require a transmission line to be built across the Mylor Peninsula, an area where Coast Tsimshian (Metlakatla and Lax Kw'alaams) have a claim for a declaration of Aboriginal title which is active before the B.C. Supreme Court;

(f) The Project contemplates about 468-520 new marine transits annually during the construction phase, and 208 new marine transits annually during the operations phase, by vessels providing materials and supplies to the Project between Prince Rupert and the Project site, transiting Chatham Sound;

(g) The Project also contemplates between 140-160 new marine transits to and from the Project site and the open ocean by large marine tanker vessels shipping LNG, again transiting Chatham Sound; and

(h) The selected marine shipping route ("**Route A**") overlaps many "fisheries important areas", designated critical habitat for northern resident killer whales, six ecologically and biologically significant areas, and other areas important to Metlakatla members, including fishers and harvesters.

## (c) Assessment process

### (i) Dispute resolution

21. On January 31, 2025, Metlakatla provided notice to EAO that it did not consent to the Project and initiated dispute resolution with respect to the effects assessment under s. 28 of the EA Act.

22. On June 30, 2025, the facilitator issued a report on the s. 28 dispute resolution process, documenting that EAO (i) had attempted to simultaneously initiate dispute resolution in advance of a sustainability recommendation later required pursuant to s. 29 of the EA Act, while (ii) also refusing to discuss the issue of the Project's economic feasibility with Metlakatla, on the stated basis that "the financial viability of a project is not a requirement of environmental assessment and the proponent is not required to complete this analysis through Application Information Requirements."

23. The facilitator also issued a report on EAO's premature attempt to refer the s. 29 sustainability recommendation to dispute resolution. That report documented EAO's agreement, at the time, that "Metlakatla First Nation will be able to initiate a dispute resolution process under section 29(1) of the Act in the future." Inexplicably, EAO attempted unsuccessfully to persuade the facilitator to remove that reference, after the report had already been issued.

**(ii) Minister's March 21, 2025 letter**

24. As noted above, from February to June 2025, Metlakatla engaged in dispute resolution on various issues. On March 21, 2025, while that process was ongoing, the provincial Minister of Energy and Climate Solutions abruptly issued a policy letter stating

that LNG projects like the Project do not require any plan for net-zero emissions by 2030, if grid electricity is “unavailable” due to circumstances beyond a proponent’s control.

25. The March 21 letter reversed the requirement under prior policy for a net-zero plan, which the Federal Minister relied upon in approving the substitution process. It also responded nearly exactly to a negative finding based on the prior policy letter in the EAO’s November 2024 draft assessment report.

#### (iii) Rights Impact Assessment

26. On July 11, 2025, Metlakatla submitted its Rights Impact Assessment. It assessed the impacts of the Project on Metlakatla’s rights as “severe” and concluded that the impacts “are expected to be deep, widespread, and interconnected, with high intensity across key areas such as harvesting and cultural continuity.”

#### (iv) Outstanding concerns, including economic feasibility

27. On July 11, 2025, in advance of EAO referring the matter to the ministers for decision, Metlakatla referred the matter of EAO’s s. 29 sustainability recommendation to dispute resolution under the EA Act. Metlakatla also provided notice under the EA Act that it did not consent to the Project and detailed several outstanding concerns regarding the Project’s assessment.

28. On July 18, 2025, Metlakatla set out further concerns in writing to EAO as to the Project’s economic feasibility. Metlakatla referenced a new, publicly available June 2025

report specific to the Project's economic challenges, prepared by an independent body, the Institute for Energy Economics and Financial Analysis ("**IEEFA Report**").

29. Briefly, the IEEFA Report raised several doubts as to the Project's economic feasibility. Metlakatla's position was that EAO's sustainability recommendation had to be updated, and again requested consultation on economic feasibility.

30. Metlakatla outlined the following concerns respecting economic feasibility: (i) the Nisga'a Nation would not own the Project; (ii) capital expenditures in the 2022 project description materials were outdated, and now conservatively estimated at <u>triple or higher</u>; (iii) 70% of the Project's LNG production had no dedicated buyer, risking reliance on the volatile spot market; (iv) the global LNG market faces an impending supply glut due to a surge in production capacity coming online in 2025; and (v) the floating LNG barge technology selected is unproven and untested in Canadian waters, is fabricated overseas, and is therefore a poor choice to create any local jobs.

31. EAO offered to meet with Metlakatla in connection with these concerns on August 1, 2025 for half an hour. Nothing was resolved, and EAO responded to Metlakatla's economic feasibility concerns by letter on August 7, 2025.

32. EAO did not respond to the first three concerns, and ignored the final two entirely, on the basis that "the IEEFA Report references its own publication, Global LNG Outlook 2024–2028, to support the claim of an impending LNG glut" and the idea that the floating barges would limit job creation was already known. EAO concluded it was "[not] new information" and there was no need to update the sustainability recommendation.

33. On July 22, 2025, EAO responded to some of the concerns set out in Metlakatla's July 11 letter and stated that "[s]eparate responses will be provided to address the remaining parts of Metlakatla's July 11 letter, including the 'Indigenous Legal System' section of Appendix A and potentially other matters."

34. EAO's July 22 letter concluded by stating that "EAO has considered all of the concerns raised by Metlakatla in relation to the Project and is of the view that the substantive responses provided in this letter, along with the proposed conditions, recommendations and other measures intended to mitigate the potential effects of the Project on Metlakatla and its rights and title, have appropriately addressed the remaining concerns identified during consultation."

35. On July 30, 2025, Metlakatla received a further letter from EAO on the concerns it had raised regarding the applicable Indigenous legal system as it related to the Project. EAO set out why it believed that the Project assessment process took the legal system and the Articles of UNDRIP into account. Among the factors listed by EAO was Metlakatla's ability to submit a Rights Impact Assessment.

36. EAO did not make any substantive changes to the Project, nor were any new conditions or mitigation measures proposed in response to Metlakatla's submissions.

37. In separate correspondence, on August 7, 2025, EAO also refused to appoint a facilitator in respect of Metlakatla's referral of the matter of EAO's pending s. 29 sustainability recommendation to dispute resolution, because to allow the referral "would allow Indigenous nations to repeatedly refer the same disputed matter to [dispute resolution] and thus to delay indefinitely an assessment under the Act."

### (v) Ministers' meeting

38. Owing to Metlakatla's non-consent, ss. 29(5) and 29(6)(b) of the EA Act required both responsible provincial ministers to offer to meet with Metlakatla, and if that offer was accepted, to "attend the meeting in an attempt to achieve consensus with the participating Indigenous nation on the decision to be made by the ministers."

39. That meeting occurred on August 20, 2025 and lasted one hour. Metlakatla set out various outstanding concerns. The PowerPoint presentation used by Metlakatla during the August 20 meeting documenting these concerns was also transmitted to the Federal Minister. Given the limited time, Metlakatla principally focused on outstanding concerns relating to: (i) GHGs and electrification, (ii) marine shipping, and (iii) economic feasibility.

40. In addition to reiterating existing concerns, Metlakatla also stated to the provincial ministers that another publicly available report questioning the Project's economic feasibility had been released by the Yellowhead Institute ("**Yellowhead Report**").

41. The Yellowhead Report further substantiated the relevant conclusions of the IEEFA Report, based on independent data, that: (i) a global LNG glut is pending, (ii) the Project's cost baseline is entirely stale-dated, and (iii) the lack of long-term shipping contracts undermines the Project's overall economic feasibility.

42. Metlakatla stated that the Project "would severely and disproportionately impact the environment and Metlakatla's title and rights; [and asked] regarding the economic rationale: will the Project provide economic benefits to outweigh these detrimental risks and effects?" Metlakatla stated that further consultation was required on this issue.

43. Metlakatla also observed that EAO's assessment report and sustainability recommendation made repeated references to "economic reconciliation" or "economic self-determination" for the Nisga'a Nation or "direct or indirect benefits to other First Nations" and "creating access to new export markets" and similar economic-related matters but "[did not] define these concepts, set out how economic benefits will accrue, or address the [issue of outdated economic information from 2022]."

44. The provincial minister asked one question to EAO staff: "why an assessment of economic sustainability is not included in the EA process." EAO answered: "economics are not normally part of the assessment process as it is outside of EA scope [due to] changing economic variables throughout project lifecycle … assessing economic sustainability is the sole responsibility of the Proponent."

45. On August 27, 2025, EAO asked Metlakatla to comment on draft meeting minutes. On August 29, 2025, in its letter commenting on the draft meeting minutes, Metlakatla recorded the above exchange between the minister and EAO.

46. EAO later deleted this section of the draft meeting minutes and altered it to instead record that "EAO responded that, as previously outlined, that the financial viability of a project is not assessed in an EA. The assessment included the potential effects on employment and the economy and supported the development of conditions that were considered as part of the sustainability recommendation."

### (vi) LiDAR evidence and strength of claim

47. In the same August 29, 2025 letter, Metlakatla also provided new evidence to EAO arising from LiDAR drone work done on Mylor Peninsula in support of the active Coast Tsimshian Aboriginal title claim. The LiDAR data demonstrated areas of physical use and occupation which Metlakatla stated aligned with the Tsimshian *adaawx* or Indigenous legal system applicable to the area and, given its proximity to the range of the Project's proposed transmission line rights of way, was likely to require further investigation and the involvement of technical experts and archaeological work.

48. Metlakatla also raised concerns it had previously raised to the effect that the strength of the Coast Tsimshian claim to Mylor Peninsula had been inappropriately minimized through reliance on the flawed analysis of a provincial employee whose stated qualifications are limited to a Bachelor's degree in "Art History, History, and Visual Arts."

49. On September 4, 2025, EAO responded stating that they would meet to discuss the LiDAR data on September 5, but were "hoping for just a casual conversation" on the topic. Metlakatla met with EAO for an hour on September 5.

50. EAO staff had no substantive response at that meeting, other than to state that the matter was with other ministries and EAO could not respond to it.

51. On September 11, 2025, EAO responded to Metlakatla's August 29 letter. The letter confirmed the Province's position that: (i) it is reasonable for provincial employees who lack any formal qualifications to assess the strength of claims, and (ii) the LiDAR data did not change the Province's position respecting strength of claim.

### (vii) Minister's meeting follow-up, proposed extension to decision-making timeline, request for consultation, and decision

52. On September 5, 2025, both provincial ministers wrote to Metlakatla to follow up on the August 20 meeting. The letter set out the ministers' view that simply meeting with Metlakatla, discussing the matter, and following up via the letter itself met the statutory requirement under s. 29(6)(b) of the EA Act to "attend the meeting in an attempt to achieve consensus with [Metlakatla] on the decision to be made by the ministers."

53. Respecting GHGs, the ministers' September 5 letter referred to another project, the North Coast Transmission Line ("**NCTL**"), and stated that in view of that proposed development "the risk of long-term use of natural gas power barges may be low".

54. On September 5, 2025, EAO also e-mailed Metlakatla to advise that "the ministers are considering extending their decision-making timeline beyond the legislated 30 days." The legislated timeline otherwise would expire on September 8, 2025.

55. On September 12, 2025, Metlakatla responded to the ministers' September 5 letter and EAO's September 5 e-mail and September 11 letter. Metlakatla set out a number of concerns which remained outstanding. Given the breadth of the outstanding concerns, Metlakatla requested consultation on the length of time the ministers were considering extending their statutory decision-making timeline, and the reasons for doing so.

56. On September 15, 2025, the provincial ministers issued a decision approving the Project, contemporaneously extending the statutory decision-making timeline to the date of that decision. The same day, the Federal Minister also issued the Decision Statement at issue in this Application, communicating the Decisions contained therein.

57. Although EAO has suggested that Metlakatla would receive a response to Metlakatla's September 12 letter, as of the date of filing this Notice of Application, no substantive response has been received.

## C. Grounds for Judicial Review and Breach of Honour of the Crown

### (a) Overview

58. Under s. 60 of the IAA, the Federal Minister determined that the Project is likely to cause adverse effects within federal jurisdiction that are "to some extent, significant." However, with reference to the public interest factors under s. 63, the Federal Minister determined that any such adverse effects were justified in the public interest due to economic considerations. In reaching these conclusions, the Federal Minister relied on a deficient EAO report arising from the Project's substituted assessment.

59. Each of the Decisions and the ~~The~~ Decision Statement ought to be set aside on the following grounds:

(a) The Federal Minister relied on a substituted assessment process that failed to properly assess alternative means in connection with marine shipping, contrary to the requirements of s. 25(2)(i) of the EA Act and s. 22(1)(e) of the IAA, the Substitution Notice and the honour of the Crown;

(b) The Federal Minister failed to adhere to the applicable requirements of the *Species at Risk Act*, SC 2002, c 29 ("**SARA**"), or alternatively relied on EAO's failure to do so, when assessing risks to northern resident killer whales and

their critical habitat, and further failed to adopt a precautionary approach to the issue; and

(c) Respecting GHGs, the Federal Minister relied on a substituted assessment process that did not meet the relevant conditions of substitution, contained unaddressed gaps, and creates a "no-win" situation for Metlakatla that breaches the requirements of the honour of the Crown.

60. As a result of the above, the Federal Minister's determinations as to likelihood and significance of adverse effects within federal jurisdiction under s. 60(1), and whether those effects could be justified in the public interest under s. 63, are unreasonable.

61. The Decision Statement, and the Decisions communicated therein, also ultimately looks to justify the Project's adverse effects on the basis of various speculative economic concepts, without any substantive examination of the Project's actual economic feasibility and a lack of adequate consultation on that topic, all in the face of mounting evidence that the Project is entirely uneconomic.

62. Compounding the above errors, the Project assessment process and Decision Statement, and the Decisions communicated therein, failed to apply the relevant Indigenous legal system and the requirements of UNDRIP, in breach of the honour of the Crown and the Articles of UNDRIP itself.

63. These errors, individually or cumulatively, are fatal to each of the Decisions and the Decision Statement.

**(b) Breach of s. 22(1)(e) of IAA respecting marine shipping**

64. The EA Act and IAA each require a thorough assessment of technically and economically feasible alternative means for the Project. In the context of marine shipping, this required assessment of alternative shipping routes. This exercise was important because Project-related marine shipping will impact Indigenous rights in Chatham Sound and Brown Passage, sensitive fisheries, and marine mammal critical habitat.

65. Throughout the Project assessment, Metlakatla consistently advocated for a thorough examination of alternative marine shipping routes, including a northern route which, if feasible, could have avoided a considerable amount of these impacts. This alternative route is referred to as "Route C".

66. However, after only examining the availability of marine navigation aids and pilotage services, the Project materials abruptly concluded no other marine route other than an existing and heavily transited southern one ("Route A") could be used.

67. In response to concerns expressed by Metlakatla and others, EAO simply removed the marine shipping route from the certified project description, apparently with a view to allowing the proponents to potentially change marine routes later, at their option.

68. These steps do not meet the requirements in ss. 25(2)(i) of the EA Act and 22(1)(e) of the IAA, and those of the honour of the Crown, to assess alternative means and look to mitigate or accommodate impacts to Metlakatla's rights, <u>before the Project is approved</u>.

69. Further, and despite the specious change to the certified project description and related commentary in the Decision Statement, the proponents would not be required to

assess other marine shipping routes. There is also no reason to think that the proponents would ever do so when the evidence is that the marine pilots strongly prefer and would simply choose the marine route they are used to: the southern route that was the only route assessed (Route A).

70. The Decision Statement, and the Decisions communicated therein, is also at odds with, and does not grapple with, Metlakatla's Rights Impact Assessment, which assessed the Project's impact to Metlakatla's rights as 'severe', including in relation to Metlakatla's ability to exercise their harvesting and fishing rights, at a moderate to high level of intensity. The impacts include adverse effects to Metlakatla's traditional economies and resource sufficiency.

71. In addition, the Decision Statement, and the Decisions communicated therein, fails to address the cumulative effects of increased marine shipping caused by the Project, instead relying on generalized statements about non-Project related federal initiatives.

72. In effect, the Federal Minister shirked responsibility to address such cumulative effects by relying on the *status quo* of ongoing or future initiatives. The Decision Statement itself admits these regional initiatives "do not constitute mitigation and accommodations for adverse impacts associated with the Designated Project."

73. The failure to require a proper alternative means assessment also eliminated any examination of whether serious impacts to the environment and Metlakatla's rights might be avoided altogether. Ultimately, in breach of the honour of the Crown, Metlakatla was deprived of potential accommodation and potentially providing informed consent.

74. It was unreasonable for the Federal Minister to issue the Decision Statement, and reach the Decisions contained therein, in the absence of a proper alternative means assessment.

**(c) Breaches of *Species at Risk Act***

75. As noted above, the only assessed marine route (Route A) transits several areas designated as important to sensitive fisheries and marine mammals.

76. Noise from marine shipping will exceed levels associated with that known to cause harm to marine mammals, especially the northern resident killer whales (a keystone species for Metlakatla and a threatened species under SARA) and their protected critical habitat, which lies a mere 5 to 10km south of the approved Route A.

77. The Project application materials readily admit that the harm to northern resident killer whales and their critical habitat from noise from Project-related marine shipping would go on for decades and be cumulative in nature, because the ambient soundscape in the Marine Shipping Regional Assessment Area is already at or in exceedance of the relevant marine mammal behavioural disturbance threshold of 120 dB re 1 μPa.

78. The Project application materials also readily admit that "[t]here is a high likelihood that underwater noise levels from marine shipping will exceed the 120 dB re 6 1 μPa threshold for marine mammal disturbance".

79. Northern resident killer whale critical habitat will be harmed by noise from marine shipping, because the critical habitat will "[overlap] the area of exceedance of the 120 dB re 1 μPa rms [sound pressure level] behavioural threshold … This critical habitat extends

approximately 90 kilometres east to west along the north end of Haida Gwaii and begins approximately 5 to 10 km away from the shipping route."

80. Problematically, the projected acoustic disturbance from Project-related marine shipping extends well into the critical habitat at a radius of 20.8 km from Route A for marine tankers when transiting at 16 knots, and a radius of 28.2km transiting at 14 knots.

81. Section 58(1) of SARA specifically prohibits destruction of critical habitat of a threatened species. Project marine shipping therefore engages the process set out under ss. 73 and 79 of SARA, which includes a requirement for a permit.

82. The *Recovery Strategy for the Northern and Southern Resident Killer Whales* incorporated under law by SARA states that principal among threats from human activity "are environmental contamination, reductions in the availability or quality of prey, and both physical and acoustic disturbance." It also states that critical habitat requires an "[a]nthropogenic noise level that does not interfere with life functions and is sufficient for effective acoustic social signaling and echolocation to locate prey; anthropogenic noise level that does not result in loss of habitat availability or function."

83. Despite the above, the Decision Statement, based on the Decisions communicated therein, concludes that effects of Project-related marine shipping on the northern resident killer whales are "significant to a low to moderate extent" because of a stated "uncertainty related to the assessment of effluent and underwater noise, and the fact that the proposed mitigation measures may not fully eliminate or reduce these effects." This conclusion is inconsistent with SARA, the Recovery Strategy, and the Project application materials themselves.

84. Further, in these circumstances the Federal Minister was in any event bound to apply a precautionary approach, the absence of which further led to an unreasonable response to the already-unreasonable conclusion that the adverse effects were only "low to moderate" and no further action was necessary.

85. In addition, s. 79(1) of SARA requires the person assessing a project, here EAO, to notify the responsible federal minister "without delay" if a project is likely to affect a listed wildlife species or its critical habitat. EAO was to identify adverse effects on listed species and their critical habitat and ensure measures are taken to avoid or lessen those effects and monitor them, consistent with applicable recovery strategies and action plans.

86. Section 73(1) allows the responsible federal minister to authorize activities affecting a listed species, critical habitat, or individual residences, by issuing a permit or entering into an agreement, but only if preconditions in s. 73(3) are met: (i) all reasonable alternatives to the activity that would reduce impacts have been considered and the best solution adopted; (ii) all feasible measures will be taken to minimize the impacts of the activity on the species, habitat, or residences; and (iii) the activity does not jeopardize species survival or recovery. In this case, the preconditions have not been met.

87. The requirements of SARA are therefore engaged but were left unaddressed. While the Decision Statement states the Minister was of the view that relevant obligations under SARA were met, and that effects can be addressed "to the extent practical" through conditions, the reality is nothing whatsoever has been proposed to mitigate effects on the northern resident killer whales and their critical habitat, save for federal condition 3.15.

88. Condition 3.15 is not a mitigation measure. It merely requires an underwater noise impact study to be conducted for LNG marine vessels. This specious measure is therefore of absolutely no utility given that, as set out above, the baseline noise level and certainty of harm to northern resident killer whales and their critical habitat is already known.

89. It was therefore unreasonable for the Federal Minister to issue the Decision Statement, and reach the Decisions communicated therein, in the face of these breaches of SARA and the requirement for a permit. The Federal Minister's cursory reference to SARA does not address these issues, nor does it provide a sufficient explanation capable of justifying the Minister's approach to the issue.

90. The relevant breaches of SARA also serve to re-emphasize the abject failure, as noted above, to require a proper alternative means assessment respecting marine shipping routes, with a view to providing potential accommodation and obtaining Metlakatla's informed consent. The Federal Minister's decision to issue the Decision Statement, reaching the Decisions contained therein, was unreasonable in view of the flawed approach to SARA.

**(d) Failure to meet substitution requirements regarding GHGs and electrification**

91. As set out above, the Project has an enormous annual electricity requirement of 4,700 GWh. Without grid electrification, the Project will emit 1,867,992 tonnes of $CO_2$ per year by burning gas to generate the required electricity. Provincial and federal emissions goals would clearly be at risk if grid electrification is not achieved in a timely manner. Ongoing emissions of this magnitude would also mean ongoing impacts to Metlakatla.

92. As noted above, ss. 25(1)(h) of the EA Act and 22(1)(i) of the IAA require assessments to consider effects on the Province and Canada's respective ability to meet emissions and climate change commitments.

93. Under the *Climate Change Accountability Act*, the Province has committed to reducing total provincial GHG emissions to 40% below 2007 levels by 2030, 60% by 2040, and 80% by 2050. Under the federal 2030 Emissions Reduction Plan, Canada is required to reduce its emissions by 40% to 45% from 2005 levels by 2030.

94. Briefly, the Substitution Notice underscored the importance of these requirements. The sufficiency of the substituted process was predicated on the Province having a proper net-zero LNG policy in place and approaching the Project assessment with a view to meeting GHG obligations and commitments. These preconditions for the substituted assessment process were ultimately not met.

95. Additionally, achieving the Project's "base case" scenario of grid electrification relies on a stated "assumption" that BC Hydro can supply sufficient power to electrify the Project. Problematic to this assumption is the fact that it in turn relies on a further assumption, that an essential segment of the transmission line needed to connect the Project to the grid will be placed on the Mylor Peninsula, which is subject to a claim for a declaration of Aboriginal title which is active before the B.C. Supreme Court.

**(e) Federal Minister's erroneous approach to determinations under ss. 60(1) and 63(1) of the IAA**

96. To issue the Decision Statement, and make the Decisions communicated therein, the Federal Minister had to make determinations (i) under s. 60(1) of the IAA as to the

likelihood and significance of adverse effects within federal jurisdiction, and (ii) whether any effect found likely and significant could be justified in the public interest under s. 63(1).

### i. Approach to likelihood and significance of effects under s. 60(1)

97. First, as to effects respecting climate change and GHG emissions, as set out above, the Project currently cannot be connected to the electrical grid, there is no transmission line capable of doing so for hundreds of kilometers in any direction, and no timeline or commitment for one to be constructed.

98. Emitting 1,867,992 tonnes of $CO_2$ annually represents 12.29% and 0.86% of provincial and federal emissions from the oil and gas sectors in 2022, respectively, and 2.91% and 0.26% of total provincial and federal emissions in 2022, respectively.

99. As set out above, the “clarificatory” GHG letter dated March 21, 2025 stated an LNG project proponent does not need a credible plan to achieve net-zero if the proponent finds it cannot connect their project to the electrical grid. This therefore appears to suggest that it is permissible to authorize the Project based on the scenario above.

100. While the legality of the March 21 letter is not the direct subject-matter of this Application, it cannot act as a “back door” to belatedly modify or override the applicable statutory requirements and the relevant conditions of the Substitution Notice.

101. Together, the erroneous approach to marine shipping, SARA, the Rights Impact Assessment, and revised approach to GHGs, caused the Federal Minister to rely on a report that breached the conditions of substitution and was insufficient to properly make

the determinations necessary as to the likelihood and significance of adverse effects from GHGs within federal jurisdiction, and whether they can be justified in the public interest.

### ii. Approach to justification of likely and significant effects under s. 63

102. As noted above, the Decision Statement, and the Decisions communicated therein, accepts that, pursuant to s. 60(1), carrying out the Project, in whole or in part, is likely to cause adverse effects within federal jurisdiction that “are to some extent, significant” but concludes, under s. 63, that these effects are justified in the public interest.

103. Justification of effects under s. 63 requires examination of three public interest factors: (a) impact of effects on any Indigenous group and their rights under s. 35 of the *Constitution Act, 1982*, (b) the extent to which effects contribute to Canada’s ability “to meet its environmental obligations and its commitments in respect of climate change”, and (c) the extent to which effects “contribute to sustainability.” The report relied on by the Federal Minister ill-equipped her to make the required determinations.

104. First, respecting effects on Indigenous peoples and their s. 35 rights under s. 63(a), as set out above, the Project’s “base case” scenario of grid electrification relies on a stated “assumption” that BC Hydro can supply sufficient power to electrify the Project. The approach appears to *ipso facto* further assume that a segment of the transmission line will be placed on the Mylor Peninsula as part of the supposed “base case” scenario.

105. The Mylor Peninsula is subject to an Aboriginal title claim currently being actively advanced by the Coast Tsimshian through the BC Supreme Court.

106. The Nisga'a Nation has been trying to purchase these disputed lands and add them to its treaty lands for some time. This latter circumstance is also relevant to the failure to integrate the Indigenous legal system into the Project assessment process, as set out in section (e) below.

107. This transmission line was also omitted from the detailed project description (listed instead as a "third-party project"), then included in the process order as part of the Project but not assessed to the same standard as other Project components; only as a broad area within which a transmission line may be developed, as opposed to a specific location.

108. This lesser approach is inconsistent with the Project application materials themselves, which characterize the transmission line as "one of the key features of the Project for its investors and customers" and Canada's inclusion of the submarine component of the transmission line within the scope of assessment.

109. Respecting consultation on this aspect of the Project, the Province has shifted position as to where and how concerns relating to it should be raised, alternating between (a) stating they should be raised in the context of consultation regarding the Project, and (b) in the context of consultations with both the Province and Canada on the proposed sale of the lands to the Nisga'a Nation and their addition to Nisga'a Lands.

110. As set out above, in all consultations and dealings relating to the Mylor Peninsula, the Province has grossly understated the strength of the Coast Tsimshian claim to the Mylor Peninsula, grounded on the erroneous analysis and conclusions of provincial employees who lack relevant qualifications. The Decision Statement, and the Decisions communicated therein, also relies on these erroneous analyses and conclusions.

111. The segment of the transmission line planned for the Mylor Peninsula represents a significant gap in the Project assessment process and consultations with Metlakatla. The honour of the Crown does not allow the Federal Minister to proceed, or rely on the substituted process, in the face of gaps of this nature.

112. The gap surrounding certainty on GHG emissions on one hand, and the transmission line on the other, combine to create a “no-win situation” in which Metlakatla either: (i) endures an infringement of its Aboriginal title by way of an inadequately assessed transmission line which it has not consented to; or (ii) if the transmission line is not constructed, endures severe impacts from unsustainable emissions indefinitely.

113. Further, as the Coast Tsimshian Aboriginal title claim over Mylor Peninsula advances, the Crown is required to take special care to preserve the Coast Tsimshian Aboriginal title interest pending final resolution of the claim. It has not done so.

114. Second, respecting the requirement under s. 63(b) to consider effects on Canada’s ability to meet environmental and climate change commitments, the Federal Minister did not consider this factor at all despite the uncertainty around the “base case” scenario and the “no-win situation” created around the Mylor Peninsula outlined above.

115. Instead, apparently owing to the modified “back door” approach to GHGs arising from the Provincial Minister’s March 21 letter, the Federal Minister found she “was not able to consider [s. 63(b)] when [considering] whether the Designated Project’s adverse effects within federal jurisdiction are justified in the public interest.”

116. Third, respecting the Project's contributions to sustainability under s. 63(c), the Decision Statement, and the Decisions communicated therein, primarily justifies effects found significant and likely pursuant to s. 60 on the basis of "economic reconciliation", "positive economic benefits" and "creating export opportunities for Canadian natural gas".

117. These elastic, undefined concepts are entirely unsupported by the evidence as to the Project's economic feasibility. The Decision Statement, and the Decisions communicated therein, makes no effort to define these concepts or justify the Federal Minister's conclusions with reference to the evidence provided by Metlakatla to the Crown as to the Project's true economic circumstances.

118. Even if s. 63(c) did authorize the Federal Minister to severely impact one Indigenous people's rights with a view to providing another Indigenous people a potential economic benefit, which is contrary to reconciliation, the economic benefits are dubious at best.

119. Further, as set out above, the issue of the Project's economic feasibility was not subject to adequate consultation, and represents an unaddressed gap in the substituted process which the Federal Minister then erroneously relied on.

120. The Minister did not address or fill this gap, and her conclusions with respect to the justification of effects in the public interest under s. 63 therefore also cannot stand.

**(f) Failure to meet requirements of UNDRIP and the Indigenous legal system**

121. As noted above, the Project is being proposed by a nation that has been Metlakatla's neighbour for millennia, the Nisga'a Nation. That gives rise to obligations to

Metlakatla on the part of the Nisga'a Nation under the Indigenous legal system applicable to both nations. The Nisga'a Nation has not complied with those obligations, and the Decision Statement, and the Decisions communicated therein, does not take that into account.

122. The Crown knows of the existence and requirements of the common legal system between the two nations, the existence of an active dispute regarding the Mylor Peninsula, and the fact that the nations have addressed territorial boundary issues before, for example in a 1996 MOU when the Nisga'a Nation concluded its treaty.

123. In view of the adoption of UNDRIP into federal law, the honour of the Crown required that the Indigenous legal system be incorporated into the consultation and decision-making process, including in the context of seeking Metlakatla's consent.

124. EAO's September 11 and July 30, 2025 letters reference the Indigenous legal system in the context of the Project. The September 11 letter references the 1996 MOU and suggests that EAO took it and the Indigenous legal system into account in the Project assessment and consultations with Metlakatla.

125. The letters do not explain how, and instead simply suggest that the Coast Tsimshian and the Nisga'a Nation in fact have different legal systems, an entirely new position contrary to all available evidence, including that published by the Nisga'a Nation.

126. The July 30 letter also states that "[w]here there are disagreements between Indigenous nations about the application and content of Indigenous laws, EAO is of the view that these issues are best resolved by the Nations together" yet the Project

assessment has provided no opportunity to do just that. Ultimately, EAO's position on the Indigenous legal system is irreconcilable and not transparent, justified or intelligible.

127. Reconciliation is a required consideration under s. 29(4) of the EA Act and appears in the preambles of the IAA and the *Impact Assessment Cooperation Agreement Between Canada and British Columbia*. The EA Act and IAA both reference and emphasize a commitment to meeting the requirements of UNDRIP.

128. Notwithstanding this, the assessment of the Project and the Decision Statement, and the Decisions communicated therein, disregard the Indigenous legal system while looking to grant a highly speculative potential economic benefit in favour of the Nisga'a Nation, setting up the "no-win" situation for Metlakatla described above. The Project would cause extensive and severe impacts on Metlakatla's rights for decades. This approach circumvents the requirements of the Indigenous legal system and the requirements of UNDRIP. It is unreasonable and contrary to reconciliation and the honour of the Crown.

## PART III – MATERIALS IN SUPPORT OF THE APPLICATION

**THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:**

The Applicant requests, pursuant to Rule 317(2) of the *Federal Court Rules*, that the Minister of Environment and Climate Change transmit a certified copy of the following material to the Applicant and to the Federal Court Registry:

> All materials considered in coming to and issuing the Decision Statement, including but not limited to all records containing information relating directly or indirectly to the Decision Statement, notice of any information considered in coming to the Decision Statement that was not reduced to

writing, and any other materials that are factually or legally relevant to the Decision Statement.

1. Affidavits to be sworn and filed in accordance with the *Federal Court Rules*; and

2. Such further and other material as counsel may advise and the Court may permit.

Dated: ~~October 14, 2025~~

December 23, 2025

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