

Federal Court



Cour fédérale

Date: 20251217

Docket: T-1080-23

Citation: 2025 FC 1986

Ottawa, Ontario, December 17, 2025

PRESENT: Madam Justice Pallotta

BETWEEN:

LUMMI NATION

Applicant

and

THE ATTORNEY GENERAL OF CANADA
AND VANCOUVER FRASER PORT
AUTHORITY

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This case relates to the Crown's duty to consult and accommodate when government conduct may impact Aboriginal rights in Canada and the group asserting rights is outside of Canada. The central issues are whether the Crown owed a duty to consult with the applicant Lummi Nation (*Xwlemi* in *Xwlemi Ch'osen* (Lummi language)), and if so, whether the Crown fulfilled its duty.

[2] Lummi Nation is a Coast Salish Indigenous Nation in Washington state with treaty rights in the United States of America and asserted but unproven Aboriginal rights in Canada. Lummi claims it is an Aboriginal society that, at the time of European contact and before there was an international border, used and occupied traditional territory that is now in Canada. As such, Lummi claims to be an “aboriginal people of Canada” with rights that are recognized and affirmed under section 35 of the *Constitution Act, 1982*.¹

[3] The government conduct in this case relates to Vancouver Fraser Port Authority’s (VFPA)² proposed project to build and operate a new shipping terminal at Roberts Bank, Delta, British Columbia (Project). Lummi opposes the Project and brings this application for judicial review to challenge a decision made by the Governor in Council (Cabinet)³ in the Project’s environmental assessment. By its Order in Council 2023-0330 dated April 19, 2023, Cabinet decided that the significant adverse environmental effects the Project is likely to cause are justified in the circumstances. The Order in Council states that in reaching its decision, Cabinet considered the interests of Indigenous Nations and was satisfied that the consultation process undertaken was consistent with the honour of the Crown and that potential impacts to interests, including established and asserted Aboriginal and treaty rights identified in the consultation process, had been appropriately accommodated. The effect of Cabinet’s decision was to allow the Project to proceed, subject to conditions and the requirements of future regulatory processes.

¹ For simplicity, sometimes I refer to the rights that section 35 protects as section 35 rights.

² VFPA is a port authority under the *Canada Marine Act*, SC 1998, c 10 and it is responsible for managing the lands and navigable waters that make up the Port of Vancouver.

³ The Governor in Council acts on the advice of the Prime Minister and Cabinet. For simplicity, I refer to the Governor in Council as Cabinet.

[4] Lummi’s challenge relates solely to the duty to consult and accommodate, which is grounded in the honour of the Crown and can arise when contemplated government conduct might adversely affect asserted but unproven claims to Aboriginal rights or title that are guaranteed under section 35 of the *Constitution Act, 1982: Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*]. Lummi contends that Cabinet could not issue the Order in Council because Canada did not fulfill its duty to consult with Lummi on the Project’s impacts. Lummi asks the Court to set aside the Order in Council.

[5] A key consideration in this proceeding is the effect of the Supreme Court of Canada’s decision in *R v Desautel*, 2021 SCC 17 [*Desautel*], which was released in April 2021, after many steps in the Project’s environmental assessment had been completed and two years before Cabinet made its decision. In *Desautel*, the SCC addressed the scope of section 35, interpreting the term “aboriginal peoples of Canada” to mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact: *Desautel* at paras 21-23. As a result, groups whose members are neither citizens nor residents of Canada can be Aboriginal peoples of Canada: *ibid*. The SCC noted that one consequence of its decision is that a duty to consult may arise when such groups assert or hold section 35 rights: *Desautel* at paras 71-76.

[6] Lummi describes *Desautel* as a game changer. Lummi states that prior to *Desautel*, Canada’s position and the generally accepted view were that Indigenous groups outside Canada could not have section 35 rights giving rise to a duty to consult. Canada allowed Lummi and other US Indigenous groups to participate in the Project’s environmental assessment, but Lummi

says that prior to *Desautel*, the scope of its participation was limited to the Project's transboundary impacts on its US rights and on the environment, and this was not consultation. After *Desautel*, in October 2021, Lummi requested formal consultation in respect of the Project's effects on its asserted section 35 rights. Lummi alleges that Canada owed a duty to consult by October 2021 at the latest, but Canada never acknowledged its duty and refused to consult despite now alleging that what occurred was consultation. Lummi further alleges that, if what took place was consultation, the process was inadequate to meet Canada's consultation duty. According to Lummi, Canada ignored the guidance in *Desautel*, refused to engage in meaningful consultation, and failed to fulfill the duty to consult before Cabinet made its April 2023 decision.

[7] The respondents state that Canada presumed it owed a duty to consult with Lummi, this is not a "no consultation" case, and the only question for review is whether consultation was adequate. They contend that *Desautel* did not mandate any specific consultation process or step, and Canada meaningfully engaged with Lummi to understand and address its Project-related concerns, beginning with potential transboundary effects and expanding the scope of engagement after *Desautel* in an effort to preserve asserted section 35 rights from adverse Project impacts pending a resolution of Lummi's claim. The respondents further state that Canada identified specific measures to address the Project's impacts, including impacts on Lummi's asserted section 35 rights, but Lummi declined invitations to comment. They contend that the process should not be parsed into pre- and post-*Desautel* efforts, and when viewed as a whole, consultation was reasonable, meaningful, and honourable.

[8] I agree with Lummi that Canada owed a duty to consult on the Project's impacts by October 2021, but I do not agree that Canada refused to consult or failed to fulfill its duty. Canada was not required to follow a formulaic approach to consultation, and I agree with the respondents that *Desautel* did not mandate a specific process or step. There were imperfections in the consultation process (attributable to both parties), but in my view the imperfections did not render consultation inadequate, particularly when considered in the context of the legal change following *Desautel*. Viewed as a whole, consultation was reasonable, meaningful, and honourable. For the reasons below, I am dismissing this application.

II. **Background**

A. *Lummi Nation*

[9] Lummi Nation's reservation lands are located on what is now the Point Roberts Peninsula (*Chelh-ten-en*), about 30 kilometres south of the Canada-USA border. Lummi is a signatory to the 1855 Treaty of Point Elliott with the US government and its US treaty rights, including commercial fishing rights, extend to the border. It also manages several thousand acres of tidelands on reservation lands and co-manages state fisheries with the Washington Department of Fish and Wildlife.

[10] Lummi claims broader rights connected to its traditional territory (*Xwlemi T'enexw-s*), which centers around the Salish Sea (*Xwullemy*) and includes village sites, harvesting sites, and cultural/spiritual sites on both sides of the border on and around the San Juan and Gulf Islands, southern Vancouver Island and mainland British Columbia, and Washington. In 1846, Great Britain and the USA signed a boundary treaty formalizing what is now the Canada-USA border

from the Rocky Mountains through to the islands of the Salish Sea. Lummi states that the border, established without regard for the rights of Indigenous inhabitants, severed its access and ties to land, resources, and relatives. Lummi asserts unextinguished Aboriginal rights in Canada as a result of its historic use and occupation of what are now lands and waters within Canadian territory, including lands and waters adjacent to the Project, at the area of the Point Roberts Peninsula, Boundary Bay, and the Fraser River.

[11] Lummi states the Project will double the Port of Vancouver's footprint in the Fraser River estuary, impacting Lummi's established treaty rights in the US and its asserted Aboriginal rights in Canada. Lummi's concerns include the Project's impact on salmon populations, southern resident killer whales (whales), and fishing boats. Of particular importance to Lummi is the revitalization of rights and restoration of fisheries around Point Roberts Peninsula, which were Lummi's largest and most productive fisheries prior to European contact.

B. *The environmental assessment*

[12] The Project was subject to federal and provincial environmental impact assessments under the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [*CEAA 2012*] and British Columbia's *Environmental Assessment Act*, SBC 2018, c 51 (formerly SBC 2002, c 43). Although *CEAA 2012* was repealed in 2019 and replaced by the *Impact Assessment Act*, SC 2019, c 28, s 1, the Project's assessment was completed under *CEAA 2012* as if it had not been repealed: *Impact Assessment Act*, s 183.

[13] Canada and British Columbia worked together to meet the requirements of their respective environmental assessment laws and the Crown's duty to consult. While the federal and provincial processes were conducted in parallel, the Project will be on federal lands and its impacts are primarily matters of federal jurisdiction.

[14] The following timeline gives an overview of the Project's environmental assessment. *CEAA 2012* imposes time limits for completing the steps of an environmental assessment. The time limits for the Panel and decision phases described below were paused while VFPA responded to information requests (IRs).

- Start, November 2013: The Canadian Environmental Assessment Agency (Agency) and the Minister of Environment (Minister)⁴ commenced the Project's environmental assessment.
- Initial steps and scoping, November 2013-May 2016: The Agency determined the scope of the assessment and VFPA submitted its environmental impact statement, as well as a marine shipping addendum after the scope was expanded. The Minister decided to refer the Project's environmental assessment to an independent review panel (Panel) and established the Panel's terms of reference.

⁴ The Agency later became the Impact Assessment Agency. The Minister's title later changed to the Minister of Environment and Climate Change. Two women and two men served as Minister over the course of the Project's assessment.

- Panel phase, May 2016-March 2020: The Panel issued IRs to VFPA on topics that included fish and mammal habitat, underwater noise, habitat offsetting, air and water quality, and Indigenous groups' current use of lands and resources for traditional purposes. The Panel gathered information from interested groups and government agencies and held public hearings. On March 27, 2020, the Panel submitted a report of its conclusions and recommendations to the Minister. It found that the Project would have some “residual” adverse effects after accounting for mitigation. Some of these effects were significant, while others were not significant or their significance was unknown.
- Post-panel phase, March 2020-April 2023: The Minister needed additional information for the decision-making process (the three decisions are outlined below) and issued an IR to VFPA, which paused the time limit for the decisions. *Desautel* was released during this pause, in April 2021. VFPA's IR response and the Agency's proposed Project conditions were posted for public comment in the fourth quarter of 2021. The time limit resumed (with 89 days remaining) on January 23, 2023, when the Minister determined that VFPA's response was sufficient.
- CEAA 2012 decisions, April 2023:
 - The Minister decided that the Project is likely to cause significant adverse environmental effects within the meaning of sections 5(1) and 5(2) of *CEAA 2012*. Consequently, the Minister had to refer

the matter to Cabinet to decide whether the effects are justified in the circumstances.

- Cabinet decided that the Project's significant adverse environmental effects are justified in the circumstances and issued the Order in Council on April 19, 2023.
- As a result, the Minister had to issue a decision statement setting the conditions for the Project. The Minister's April 20, 2023 decision statement sets the conditions with which VFPA must comply during all phases of the Project.

[15] Lummi challenges the second *CEAA 2012* decision, namely, Cabinet's Order in Council.

C. *Background on the consultation process generally, and on Canada's engagement with Lummi*

[16] Consultation with Indigenous groups was part of the environmental assessment. The Agency was the federal Crown consultation lead and coordinated a "whole of government" approach to consultation. The Agency corresponded and/or met with Indigenous group representatives and coordinated meetings with other government officials.

[17] The Crown's approach to consultation relied, in part, on engagement efforts by VFPA and on the Panel's assessment. The Agency guided VFPA and the Panel in their roles.

[18] The Panel's terms of reference stated that Aboriginal consultation was to be integrated with the regulatory process to the extent possible. The Panel was mandated to collect information on rights and propose measures to mitigate the Project's adverse impacts but not to make conclusions or recommendations on rights or the Crown's duty to consult. The Panel's March 2020 report has sections assessing impacts on current use of land and resources for traditional purposes, physical and cultural heritage resources, potential or established Aboriginal and treaty rights, and potential effects on Indigenous groups in the US.

[19] The Agency maintained a record of federal consultation and engagement with Indigenous groups throughout the environmental assessment process. It documented the consultation and engagement undertaken with Indigenous groups in the Crown's Consultation and Accommodation Report (CAR), which was part of the briefing package sent to the Minister for the *CEAA 2012* decision-making process.

[20] The CAR describes the consultation process and the methodology that was used, which involved assessing potential impacts on rights. The CAR states that the Crown applied the methodology and guiding principles set out in two Agency guidance documents for assessing potential impacts on the rights of Indigenous peoples. While these guidance documents do not appear to be part of the record in this proceeding, the methodology is described in other documents in the record. The CAR describes the methodology as a collaborative approach of assessing the Project's impact on rights and it contains two pictorial diagrams of the method—one is an overview of the method for assessing potential adverse impacts on rights and the other is about understanding cumulative impacts. The CAR states that after the Panel issued its report,

Indigenous groups were invited to draft or to collaborate with the Crown in drafting an impact on rights assessment, and key outcomes are summarized in the groups' respective CAR chapters.

[21] The CAR summarizes the Panel's findings and states that those findings and the responses to the Minister's post-Panel IR were considered (i) in assessing the impacts on Indigenous rights, and (ii) in developing the Project conditions that would bind VFPA as well as the Crown's response to the Panel's recommendations for additional government measures. The CAR notes that some of the concerns identified by Indigenous groups were shared concerns. The main body of the CAR provides the Crown's responses to shared concerns and describes the ways they would be addressed. These ways included VFPA's commitments, potential Project conditions, the "whole of government" response to Panel recommendations that were directed to the Crown, and additional Crown initiatives that are not specific to the Project (such as marine shipping initiatives to address Indigenous concerns regardless of Project approval and to address the cumulative effects of marine shipping extending beyond the Project's effects). The dedicated CAR chapters focus on issues and potential solutions that are specific to an Indigenous group.

[22] As background, I make some general points about Lummi's involvement in the Project's assessment and Canada's engagement with Lummi before and after *Desautel*. Further details are in the sections summarizing the parties' arguments and explaining my findings.

- Lummi did not participate in the initial steps of the assessment: The Washington State Department of Ecology gave the Agency outdated Lummi contact information, and the Agency's emails to Lummi were returned as undelivered until this was corrected in 2017. While the

Agency's website provided public notice of the Project's assessment and invited comments on the early foundational documents for the assessment, Lummi did not see the notices.

- Lummi participated in the Panel phase between 2018 and 2020; the Panel phase ended a year before *Desautel*: Lummi exchanged letters with the Panel explaining its concerns and asking to be consulted about Project impacts, including impacts on fishing and fish populations in US waters, cultural practices related to the whales, and the cultural significance and management of the Salish Sea. Lummi also filed written submissions and participated in the Panel's public hearing. The Panel's report sets out its analysis and findings on the Project's potential effects on Lummi and the other US groups.
- Prior to *Desautel*, Lummi communicated with government representatives outside of the Panel's process: Lummi wrote to the Minister expressing its opposition to the Project and asking to meet. The Minister was unable to meet. Instead, Lummi met with Agency representatives—the Director General of the Crown Consultation Division and the Crown Consultation Lead. The Minister also asked Canada's Consul General in Seattle (Consulate) to meet with Lummi on her behalf. The Consulate tried to schedule a meeting and followed up with Lummi, but the meeting did not happen. VFPA was not asked to meet with US Indigenous groups and did not meet with Lummi.

- The post-Panel phase is the most contentious part of the process: There were a number of written communications and meetings during this phase, mostly between the Agency and Lummi, and the parties characterize what happened differently. For background, it is sufficient to note the following:
 - After *Desautel*, Lummi prepared a strength of claim (SOC) submission and sent it to the Agency, asking for a preliminary assessment of the strength of its claim and stating it was owed deep consultation commensurate with the highest level of consultation afforded to impacted Nations. Canada did not assess the strength of Lummi's asserted claim or opine on the level of consultation owed to Lummi, stating that the Project's environmental assessment is not a rights determination process.
 - Lummi asked for capacity funding but did not receive any funding.
 - Lummi was encouraged to comment on VFPA's responses to the Minister's IR and on the proposed measures to mitigate Project effects, including proposed Project conditions. Lummi did not provide comments.
 - As part of its work on the CAR, the Agency drafted a CAR chapter for Lummi that described Lummi's concerns and the measures Canada believed would address the concerns. Lummi had

opportunities to comment on the CAR chapter and the Agency revised the chapter in response to the comments Lummi provided.

D. *Cabinet's decision*

[23] Among other things, the Order in Council states that: (i) the Government of Canada consulted with Indigenous Nations potentially impacted by the Project to fully understand their concerns and the nature and seriousness of potential impacts on Aboriginal and treaty rights, and where appropriate, work collaboratively to identify accommodations and respond to concerns in a flexible manner taking into account the potential impacts and needs of each Indigenous Nation; (ii) the Panel's report to the Minister concluded that the Project is likely to result in residual adverse effects, including effects on current use of land and resources for traditional purposes as well as cultural heritage of Indigenous Nations, and effects on a number of Indigenous Nations whose territories overlap with the Project area or the Project-related marine shipping area; (iii) the Minister considered the Panel's report, additional information provided by VFPA, the subsequent public comments received, and the implementation of mitigation measures he considered appropriate, and decided that the Project is likely to cause significant adverse effects; and (iv) having made that decision, the Minister referred the matter to Cabinet to decide whether those effects are justified in the circumstances.

[24] The Order in Council states that Cabinet considered the interests of Indigenous Nations, including the positions of consent or non-objection with respect to the Project taken by certain Indigenous Nations and the concerns of other Indigenous Nations, and was satisfied that the consultation process undertaken was consistent with the honour of the Crown and that potential

impacts to interests, including established and asserted Aboriginal and treaty rights identified in the consultation process, had been appropriately accommodated. The Order in Council also states that Cabinet considered the environmental effects of the Project and the adverse effects on wildlife species that are at risk, the economic need for the Project including its contribution to improving supply chain resilience and other economic benefits it would create, the interests of Indigenous Nations, other social, economic, and policy interests, and the broader public interest. The Order in Council concludes with Cabinet's decision that the significant adverse environmental effects the Project is likely to cause are justified in the circumstances.

III. Overview of the Parties' Positions

[25] Lummi submits that Canada did not consult with it, despite now alleging that what occurred was consultation. Canada's engagement prior to *Desautel* was not consultation, and after *Desautel*, Canada showed no genuine efforts to pursue meaningful consultation. According to Lummi, Canada delayed, denied, and deferred any meaningful consultation, treating it as an afterthought rather than a constitutional imperative. Canada did not respond to Lummi's SOC submission and never acknowledged that it owed Lummi a duty to consult. To the contrary, the CAR differentiates between *consultation* with Indigenous groups in Canada and *engagement* with Indigenous groups in the US, and states that communications with Lummi and other Washington state groups "focused on an openness to hearing concerns, as opposed to formally consulting with them." Lummi submits Canada's decision not to consult is inconsistent with the principles in *Haida*, which set a low threshold for triggering the duty. It is also inconsistent with the honour of the Crown for Canada to now say it adequately consulted when the CAR indicates it was not consulting with Lummi.

[26] If the dialogue that took place was consultation, Lummi submits the process was neither meaningful nor adequate and the Crown failed to meet its legal duty to consult and accommodate. Canada did not assess the strength of Lummi's claim on the basis that an environmental assessment is not a rights-determining process, but it was required to assess the strength of Lummi's claim and the impact on asserted rights in order to determine the scope and content of the duty to consult. Lummi contends that Canada did not accept its asserted section 35 rights for the purpose of addressing potential Project-related impacts, and if it had, Canada would have acknowledged a duty of deep consultation and followed a process of deep consultation, which did not happen. Lummi submits there was no meaningful dialogue with an intention and willingness to understand the full scope of Lummi's rights, grapple with Lummi's concerns, and substantially address them. Instead, Canada provided brief and generic responses and relied on work with other Indigenous groups to develop mitigation and accommodation strategies that it assumed were broad enough to address Lummi's concerns.

[27] Lummi states that the Canada-USA border had a drastic impact on seasonal customs of use and occupation throughout its traditional territory and its members now reside in Washington year-round. *Desautel* sought to correct the injustice that the border imposed. Lummi contends that Canada's failure to consult constitutes a missed opportunity to advance the twin purposes of section 35—recognition and reconciliation.

[28] Lummi contends Cabinet erred by approving the Project when the Crown had not discharged its duty to consult on the Project's potential impacts to its asserted section 35 rights. Consequently, Lummi asks the Court to set aside the Order in Council, declare that Canada

failed to discharge its duty and owes Lummi a duty of deep consultation on the Project's potential adverse impacts to its section 35 rights, and order that Canada must discharge its duty to consult meaningfully before Cabinet redecides whether the Project's adverse environmental effects are justified and before any subsequent regulatory authorizations for the Project are issued. Lummi contends anything less would not uphold the honour of the Crown or further the ongoing process of reconciliation with Indigenous peoples, including those on whom international borders were imposed.

[29] The respondents submit there was no breach of the duty to consult. They ask the Court to dismiss this application.

[30] The Attorney General of Canada (AGC) submits that Canada presumed there was a duty to consult. AGC states Canada was not required to follow a formulaic *Haida* process and judicial review should focus on what was done. Canada took Lummi's asserted section 35 rights at face value for the purpose of addressing Project-related impacts, and since Canada did not make a legal determination of whether the duty to consult was triggered, assess the strength of Lummi's claim, or analyze the depth of consultation, the Court does not need to do so. The sole question for the Court is whether consultation was constitutionally adequate.

[31] In this regard, AGC submits that Lummi's process was more than adequate to discharge the Crown's consultation duty. The Crown was committed to meaningful discussions with Lummi from the moment its members expressed Project-related concerns, years before *Desautel*. Canada engaged directly with Lummi on the Project's potential transboundary effects and

expanded the scope of engagement after *Desautel* in an effort to preserve Lummi's asserted section 35 rights pending a resolution of the claim. Throughout the process, Canada reasonably and meaningfully engaged with Lummi on the Project's potential impacts and identified specific ways to address the impacts, including on asserted section 35 rights. However, Lummi did not meet its reciprocal obligations. Lummi declined invitations to comment on proposed Project conditions and government measures to address its concerns, and instead insisted that Canada pause the Project and recognize Lummi as a governing body with jurisdiction and decision-making authority.

[32] AGC and VFPA both dispute Lummi's position that it was owed a duty of deep consultation at the highest end of the *Haida* spectrum, arguing that the duty fell at the lower end.

[33] Regarding remedy, if the Court finds that Canada failed to meet the duty owed to Lummi, AGC submits that quashing the Order in Council would be wholly disproportionate. The remedy should focus on addressing any specific deficiencies that the Court identifies.

[34] VFPA submits that Canada consulted with Lummi for four years in a good faith effort to understand and address its concerns, and viewed as a whole, consultation was reasonable, meaningful, and honourable. VFPA states that Lummi's concerns about Project impacts overlapped with the concerns of other Indigenous groups, and the CAR explained how the concerns were being addressed. The Project is subject to 370 conditions that are binding on VFPA, including conditions to mitigate effects on salmon, whales, and fishing boats, and the federal and British Columbia governments have committed to additional mitigation initiatives.

[35] VFPA adds that Cabinet made its decision after a thorough environmental assessment with wide participation. Over 50 Indigenous groups in British Columbia and Washington took part and only Lummi challenges the Order in Council. Even if the Court concludes that Canada did not fulfill its duty to consult with Lummi, VFPA states it would not be appropriate to set aside the Order in Council in the circumstances of this case—particularly when Lummi participated in the environmental assessment and was afforded meaningful opportunities to provide feedback on Project mitigation but elected not to do so.

IV. Issues and Standard of Review

[36] Lummi frames the issues as: (i) whether the duty to consult was triggered; and (ii) whether the Crown met its duty.

[37] Whether the duty to consult was triggered is judged on the correctness standard. The duty to consult flows from the honour of the Crown and is constitutionalized by section 35 of the *Constitution Act, 1982*; it accordingly follows that the existence, extent, and content of the duty to consult is reviewable according to the correctness standard: *Mikisew Cree First Nation v Canadian Environmental Assessment Agency*, 2023 FCA 191 at para 16 [*Mikisew FCA 2023*], citing *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 78 [*Ktunaxa*], *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at para 27, leave to appeal to SCC refused, 39111 (2 July 2020) [*Coldwater*], and other cases. Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness: *Haida* at para 63.

[38] Whether or not the duty to consult was fulfilled is reviewable according to the reasonableness standard: *Mikisew FCA 2023* at para 17, citing *Haida* at para 62, *Ktunaxa* at para 82, and *Coldwater* at para 27. Where the government is correct on the seriousness of the claim or impact of the infringement and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable; perfection is not required: *Haida* at paras 62-63.

V. **Summary of Conclusions**

A. *Was the duty to consult triggered?*

[39] I disagree with AGC that the Court does not need to decide if the duty was triggered. Whether Canada owed a duty to consult with Lummi is an overriding issue that the Court must decide.

[40] To my knowledge, this is the first post-*Desautel* case to decide whether the Crown owed a duty to consult with a group outside Canada. Therefore, I have considered the test that should be applied to determine when a duty to consult is triggered in circumstances where an Indigenous group asserting unproven section 35 rights claims to be, but has not proven, that it is an Aboriginal people of Canada. In my opinion, the duty to consult is triggered when the group has provided sufficient information to meet the *Haida* threshold for triggering the duty for all aspects of its claim—the claim that it is an Aboriginal people of Canada (the precondition for constitutional protection), and the claim that it holds specific Aboriginal rights or title protected under section 35. Applying this test to the facts of this case, Lummi met the *Haida* threshold and triggered the duty to consult by October 2021. It was by this date that Canada had real or

constructive knowledge of a credible unproven claim and knew it was contemplating government conduct or a decision that might adversely impact claimed rights.

B. *Did the Crown meet its consultation duty?*

[41] In my opinion, Lummi has not shown that Canada failed to fulfill its duty to consult on Project-related impacts. The Crown discharged its consultation duty before Cabinet made its decision.

(1) *The Crown did not refuse to consult*

[42] Canada did not refuse to consult or decide not to consult.

- While Canada did not acknowledge that it owed Lummi a legal duty to consult, it assumed that there was a duty.
- Lummi is correct that the CAR differentiates between consultation with Indigenous groups in Canada and engagement with Indigenous groups in the US. However,
 - the Agency's characterization of the process as engagement rather than formal consultation was not a refusal to consult, nor an admission that Canada did not fulfill its consultation duty or that the process with Lummi was not intended to be a good faith effort to address its concerns; furthermore, even if the Agency mischaracterized the process, the Crown could satisfy its obligation to consult through its conduct;

- Canada did not lack the requisite intention to fulfill its consultation duty; contrary to Lummi's position, the record demonstrates that Canada engaged in meaningful dialogue with an intention and willingness to understand the full scope of Lummi's rights, grapple with its concerns, and substantially address them, throughout the process;
- there were differences between Lummi's process and the process followed with Indigenous groups within Canada, but the differences do not demonstrate that Lummi's process was not consultation.

(2) *The duty owed to Lummi was no higher than the middle of the Haida spectrum*

[43] AGC contends the Court does not need to decide where the duty fell along the *Haida* spectrum. At the same time, AGC disputes Lummi's position that it was owed deep consultation at the highest end of the spectrum and agrees with VFPA that the duty was at the low end. In my view, the Court should decide where the duty fell along the *Haida* spectrum.

[44] While both sides advanced arguments about whether Lummi has a strong or weak claim, I have not assessed the strength of Lummi's claim (including its claim to be an Aboriginal people of Canada) for two reasons. First, it was not necessary for me to assess the strength of the claim in order to decide whether Lummi met the threshold for triggering the consultation duty. Second, it seems to me that the depth of consultation owed to Lummi should reflect Canada's acceptance

of Lummi's asserted section 35 rights for the purpose of addressing potential Project-related impacts. To assess the adequacy of consultation, I have assumed that Lummi has a strong claim.

[45] That said, strength of claim alone does not dictate the depth of consultation. Each case must be approached individually and the point where the duty falls along the *Haida* spectrum depends on multiple factors. I do not agree with Lummi that Canada owed a duty of deep consultation falling at the highest end of the *Haida* spectrum.

[46] I find that the duty fell no higher than the middle of the *Haida* spectrum. Generally speaking, this required a process that entailed giving notice, providing information, affording opportunities to present concerns, understanding and responding to concerns, and affording opportunities for discussion and comment, all with a view to preserving asserted section 35 rights from adverse Project impacts pending a resolution of Lummi's claim.

(3) *The Crown discharged its duty—consultation was adequate*

[47] I find that the Crown met its consultation duty before Cabinet made its decision. In my view, Lummi was afforded a process that exceeded what the middle of the *Haida* spectrum required, but Lummi did not meet its reciprocal obligation.

[48] I do not agree with Lummi that Canada ignored *Desautel*'s guidance or failed to carry out mandatory steps for fulfilling its consultation duty.

- *Desautel* did not establish a consultation framework that Canada was required to follow.

- Canada was not required to conduct and communicate a preliminary assessment of the strength of Lummi's claim and provide an opportunity to comment on the assessment in order to meet its consultation duty. It was reasonable for Canada to take Lummi's asserted section 35 rights at face value.
- Canada was not required to determine the depth of consultation owed or where the duty fell along the *Haida* spectrum in order to meet its consultation duty.

[49] Lummi's process was not inadequate because it differed from other Nations' processes. *Desautel* recognized that the consultation process may differ for groups outside of Canada, and Lummi has not shown that its process differed in a way that rendered consultation inadequate.

[50] Viewed as a whole, consultation was reasonable, meaningful, and honourable.

- While I have found that the legal duty to consult arose as of October 2021, steps taken before this date are relevant to whether the Crown discharged its consultation duty. I agree with the respondents that the Court should review the process as a whole.
- It was reasonable for the Crown to build on pre-*Desautel* processes. The Panel phase addressed Project impacts on rights that Lummi exercises in the US and provided a solid foundation for consultation on Lummi's asserted section 35 rights, which are an extension of its US rights and

practices. Prior to *Desautel*, Lummi also had opportunities to raise its concerns about the Project through direct engagement with representatives of the federal Crown.

- After *Desautel*, I agree with the respondents that the Crown meaningfully responded to the change in the legal landscape. Canada expanded the scope of engagement to understand and address Lummi's concerns about Project impacts to its asserted section 35 rights in order to preserve the rights pending a resolution of Lummi's claim.
 - While Canada did not assess the strength of Lummi's claim, I do not agree with Lummi that Canada failed to assess the Project's impact on asserted section 35 rights. The CAR explained how the impacts on rights were assessed and addressed.
 - Canada did not rely improperly on mitigation and accommodation measures developed with other Indigenous groups to address Lummi's concerns. Canada reasonably relied on the ways that common concerns about Project impacts are being addressed; those ways are directly relevant to protecting the section 35 rights that Lummi wishes to exercise.
 - Canada did not provide brief and generic responses to Lummi's concerns about the Project. The measures to address Project impacts are detailed, specific, and comprehensive.

- Lummi states that Canada failed to address all of its asserted rights and ignored some of Lummi’s concerns and requests. In my view, the Crown accurately characterized Lummi’s main concerns, made good faith efforts to address them, and invited Lummi to identify deficiencies or outstanding concerns. Lummi did not take advantage of important opportunities for feedback—it declined invitations to comment on proposed Project conditions and other government measures that were identified as addressing its asserted rights and concerns, and it did not provide specific comments and feedback on its CAR chapter. Lummi did not meet its reciprocal obligations.
- There were imperfections in the process, but they did not render consultation inadequate. Lummi has not established that there were material shortcomings attributable to the Crown that went beyond imperfections.

[51] Lummi has not shown that Cabinet’s conclusion on consultation—that the consultation process undertaken during the Project’s environmental assessment was consistent with the honour of the Crown and that Indigenous Nations’ interests had been appropriately accommodated—was untrue for Lummi’s process.

VI. Analysis

A. *Was the duty to consult triggered?*

(1) *The parties' arguments*

[52] Lummi states that the Crown refused to consult with it and this decision is reviewable on a correctness standard.

[53] Lummi submits the duty to consult was triggered under the test in *Haida*, as restated in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 [*Carrier Sekani*]. The Crown had real or constructive knowledge of the potential claim or right, it was contemplating conduct or a decision that may impact the claim or right, and the impact would be adverse or prejudicial to the claim or right. Lummi says the test was met, with the only possible question being whether the evidence it provided was sufficient to meet the low threshold for establishing a credible but unproven claim: *Haida* at para 37; *Carrier Sekani* at para 40.

[54] According to Lummi, the duty to consult was triggered as early as 2014 and by no later than October 2021. Beginning in 2014, during the National Energy Board's assessment of a proposed expansion of the Trans Mountain pipeline (TMX), Lummi provided information about its interests in British Columbia. Lummi also made arguments about its section 35 rights when it intervened in *Desautel* (Canada was also an intervener). In the context of the Project's environmental assessment, Lummi states it gave notice of its interests before and after the SCC's decision in *Desautel*. Lummi wrote to the Panel in October 2018, claiming transboundary rights, requesting consultation, and providing Lummi's declaration on the cultural significance of the Salish Sea. After *Desautel*, in October 2021, Lummi sent letters to the federal and British

Columbia governments requesting consultation on the Project and on all Crown decisions and actions with the potential to affect Lummi's rights, including Aboriginal rights protected by section 35 of the *Constitution Act, 1982*.

[55] Lummi submits the Crown's refusal to consult must be considered in light of the evidence that was provided. In this regard, Lummi states it provided strong evidence of established US treaty rights extending to the international border and unextinguished section 35 rights in Canada arising from historic use and occupation of lands and waters, including near the Project. At a March 2022 meeting with the Agency, Lummi presented information about its section 35 claim and life prior to contact, such as a large reef net fishing operation and village sites for processing fish and harvesting resources from surrounding lands. Following that meeting, Lummi provided a preliminary SOC submission with additional information about its traditional territory, asserted rights, and pre-contact activities. Later, in November 2022, Lummi provided US court decisions, archaeological evidence of village sites, and historical journals of European explorers in support of its SOC submission. Lummi argues that the information and evidence it provided was more than sufficient to trigger the duty to consult and in fact established a very strong claim. Given Lummi's connection to the Project area, the proximity of US treaty rights extending to the border, and the potential for the Project to adversely impact its asserted section 35 rights, Lummi states it was owed a duty of deep consultation at the highest end of the *Haida* spectrum.

[56] AGC submits the Court does not need to decide whether the duty to consult was triggered because Canada did not make this legal assessment and instead presumed it owed a duty. When

assessing the adequacy of consultation, what matters is what occurred. AGC contends that Canada accepted Lummi's assertion of rights at face value and engaged in a meaningful process that was more than adequate to discharge any legal duty that may have been owed.

[57] VFPA acknowledges that the *Haida* threshold for triggering the duty is low and does not contest that Lummi provided sufficient information to meet the threshold, thus establishing that the Crown owed a duty to consult with respect to the contemplated Cabinet decision.

(2) *Consideration of the arguments*

[58] While I agree that the Court's task is to review what actually occurred, I do not agree with AGC that this means I do not have to decide whether the Crown owed a duty to consult with Lummi. Canada did not concede that it owed a duty and all the allegations on judicial review relate to the duty to consult—Lummi advances no other ground for challenging Cabinet's decision. If the duty to consult did not arise, there would be no reason for the Court to determine whether the Crown met its consultation duty and no basis to grant any of the relief Lummi seeks. In my view, whether the Crown owed a legal duty to consult on Lummi's asserted section 35 rights is an overriding issue that must be decided. I would add that, to my knowledge, this is the first case where the Court has considered when a legal duty to consult is triggered for an Indigenous group outside of Canada and my decision may be appealed. My reasoning on this point is therefore also necessary in case of an appeal.

[59] I agree with Lummi that the duty to consult was triggered. The Crown owed a duty to consult with Lummi prior to Cabinet's *CEAA 2012* decision. I find the duty to consult was

triggered by October 2021 because it was at this date that the Crown had knowledge of a credible but unproven claim that Lummi is an Aboriginal people of Canada, and knowledge of a credible but unproven claim to the existence of Aboriginal rights protected under section 35 of the *Constitution Act, 1982* that may be adversely affected by contemplated government conduct.

[60] The reasons for my findings are set out in the next sections. I will explain the test I believe should be applied to determine when a duty to consult arises in circumstances where an Indigenous group claims to be, but has not proven, that it is an Aboriginal people of Canada, and asserts an unproven claim to rights protected under section 35. I will then turn to the application of the test, and my finding that a duty to consult with Lummi arose by October 2021.

[61] As part of my reasons, I will explain why it is not necessary to decide that Lummi is an Aboriginal people of Canada or pronounce on the strength of Lummi's claim. My finding that a legal duty to consult was triggered is not based on an implied finding that Lummi is an Aboriginal people of Canada or that it has a strong claim.

- (a) *The duty to consult can be triggered based on an asserted but unproven claim that a group meets the Desautel threshold question*

[62] In the context of rights determination, *Desautel* identifies a threshold question that is likely to arise where, to use the SCC's words, "there is some ground for doubt" about whether an Indigenous group is an Aboriginal people of Canada, such as where the group is located outside of Canada: *Desautel* at para 20. Whether a group is an Aboriginal people of Canada and whether the group has an Aboriginal right according to the test in *R v Van der Peet*, [1996] 2 SCR 507

[*Van der Peet*] are analytically distinct questions; a positive answer to the first is a precondition to the second: *Desautel* at paras 19-20.

[63] The *Desautel* threshold question did not arise in *Haida*. Haida Nation’s unproven claim only related to the second question—whether it had an Aboriginal right according to the *Van der Peet* test. It was in that context that the SCC held that knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate, because the potential rights embedded in unresolved claims to Aboriginal rights are themselves protected by section 35 of the *Constitution Act, 1982* (*Haida* at paragraph 25):

25. Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[64] What happens, then, when the premise in the above paragraph is asserted but not proven? When does a legal duty to consult arise in circumstances where there is some ground for doubt about whether the group asserting rights is one of “Canada’s Aboriginal peoples [who] were here when Europeans came,” with potential section 35 rights flowing from an unproven status?

[65] *Desautel* did not decide these questions. The SCC discussed the duty to consult in a section of its reasons responding to government concerns about the possible consequences of groups outside Canada being held to be Aboriginal peoples of Canada: *Desautel* at para 71. The

impact it would have on the duty to consult was one of the concerns. The SCC explained why this concern did not justify a different interpretation of section 35 and said little more. The SCC did not explain when the legal duty is triggered in circumstances where an asserted but unproven claim to Aboriginal rights or title depends on an asserted but unproven *Desautel* threshold question, nor did it address how the *Desautel* threshold question affects the *Haida* test for triggering a legal duty to consult and accommodate or the scope of the duty that is owed.

[66] In my opinion, the potential rights embedded in a claim are constitutionally protected even where there is ground for doubt about whether the group asserting them is an Aboriginal people of Canada and this precondition for constitutional protection has not been proven. The *Desautel* threshold question adds a layer to the analysis but it does not need to be decided before the potential rights embedded in the claim to Aboriginal right or title will give rise to a legal consultation duty—in other words, the *Desautel* threshold question is not a threshold question for triggering a duty to consult.

[67] This aligns with established duty to consult principles. As noted above, the *Desautel* threshold question is a rights determination question. While administrative decision makers may be called upon to assess the *prima facie* strength of unproven Aboriginal claims and the impact of proposed government actions in order to determine the depth of consultation required, they should not pronounce on the existence or scope of Aboriginal rights outside of a proper process that allows for full evidence on the specific legal tests: *Ktunaxa* at paras 84-85. Similarly, it is inappropriate for a court to pronounce on the validity of a claim to Aboriginal rights as an

incident of administrative law proceedings that centre on the adequacy of consultation and accommodation: *Ktunaxa* at para 84.

[68] While *Haida* did not involve a *Desautel* threshold question, in my view it stands to reason that the principles at *Haida* paragraphs 26 to 38 for determining when a duty to consult arises should extend to circumstances where a group’s as-yet unproven claim involves an as-yet unproven *Desautel* threshold question.

[69] Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate: *Haida* at para 37. For a group outside of Canada asserting rights, this means the group has an onus to provide sufficient information to meet the *Haida* threshold for triggering the duty for all aspects of its claim, including the “*Desautel* aspect” of its claim. The *Haida* threshold has been described as low—even a weak claim can trigger the duty—but the threshold must be met. The nature and extent of the evidence required to meet the *Haida* threshold for triggering a duty should be assessed on a case-by-case basis in light of all relevant circumstances. When there is a *Desautel* aspect to an asserted claim, this principle applies equally to the evidence that would be required to establish a credible unproven claim that a group is an Aboriginal people of Canada.

(b) *Desautel did not impose a new notice requirement*

[70] Lummi alleges that *Desautel* provides a roadmap for consultation with groups outside Canada. According to Lummi, *Desautel* changed the law to require Indigenous groups outside Canada to put the Crown on notice, and once the group discharges that onus the Crown must

decide whether a duty to consult arises and what the scope of the duty is: *Desautel* at paras 75-76. Lummi states it met its onus by putting Canada on notice that it is an Aboriginal people of Canada and wants to be consulted, and by presenting sufficient evidence to establish a credible claim. Lummi states the onus then shifted to the Crown to decide whether the duty was triggered and to assess the strength of Lummi's claim in order to determine the content of the duty, which did not happen. Canada did not address the *Desautel* threshold question of whether or not Lummi is an Aboriginal people of Canada, never acknowledged that it owed a duty to consult, and did not consult (despite now alleging that what occurred was consultation).

[71] In this section I will address Lummi's notice argument. I will address whether the Crown had to decide if the duty was triggered and assess the strength of Lummi's claim as part of the second issue, that is, whether the Crown met its consultation duty.

[72] I do not agree with Lummi that *Desautel* changed the law by requiring Indigenous groups outside of Canada to put the Crown on notice of a claim to rights protected under section 35. In my view, the statement at paragraph 75 of *Desautel* that “[i]t is for the groups involved to put the Crown on notice of their claims” was simply recognizing an established principle of general application—that the Crown does not have a freestanding duty to seek out Aboriginal groups for consultation in the absence of actual or constructive knowledge of a potential impact to their rights. Indeed, the SCC supported its statement by referring to old cases that involved Indigenous groups within Canada. While it may be more likely, as a factual matter, that a group outside Canada will need to provide notice with more details and/or evidence about the nature and scope of its claim to section 35 rights for the Crown to have sufficient knowledge and information to

trigger a consultation duty, I do not read *Desautel* paragraph 75 as imposing a distinct or higher legal obligation that applies uniquely to groups outside of Canada.

(c) *The duty to consult with Lummi was triggered by October 2021*

[73] Turning to when the duty was triggered in this case, Lummi states that the Crown had actual or constructive knowledge of its claim to section 35 rights as early as 2014. Applying the test described above, I am not persuaded that the Crown had actual or constructive knowledge sufficient to trigger a legal duty to consult on the Project based on the information Lummi provided in the context of the TMX project assessment, in its October 2018 letter to the Panel, or in its arguments as an intervener in *Desautel*.

[74] In my view, the change to the legal landscape is an important contextual factor. Lummi describes *Desautel* as a game changer and stated in oral argument that the generally accepted view prior to *Desautel* was that Indigenous groups outside Canada could not have section 35 rights giving rise to a duty to consult. The pre-2021 information from Lummi must be understood in this context. Furthermore, the pre-2021 information did not focus on Lummi's section 35 rights or the Project's impact on them. I am not satisfied that the pre-2021 information sufficiently outlined Lummi's claim to be an Aboriginal people of Canada, its asserted section 35 rights, and how the Project would negatively impact those rights as opposed to rights that Lummi exercises in the US. Consequently, Lummi has not established that Canada had sufficient information before 2021 to satisfy the *Haida/Carrier Sekani* conditions of Crown knowledge and contemplated conduct that may impact claimed section 35 rights in an adverse or prejudicial way.

[75] The context changed after *Desautel*, and so did the information from Lummi. It was after *Desautel* that Lummi turned its mind to explaining in more detail its claim to be an Aboriginal people of Canada with section 35 rights that would be impacted by the Project.

[76] In October 2021, Lummi wrote to the then Minister of Crown-Indigenous Relations (Minister Miller) stating that, as the modern-day successor of an Aboriginal society that occupied Canadian territory at the time of contact, Lummi is an Aboriginal people of Canada to whom Canada owes a duty to consult and accommodate. Lummi asked the government of Canada to consult with it on all matters with the potential to affect its inherent rights, including Aboriginal rights protected by section 35 of the *Constitution Act, 1982*. The letter to Minister Miller described Lummi's section 35 claim in general terms, stating that Lummi has both US treaty rights and unextinguished Aboriginal rights to hunt, fish, and gather throughout its traditional territory, including areas that are now part of Canada. However, this letter was not specific to the Project.

[77] Also in October 2021, Lummi wrote to the Minister responsible for the Project's environmental assessment (at the time, Minister Guilbeault) requesting formal consultation on the Project specifically. Lummi alleged that the Project's adverse impacts would not be limited to transboundary effects and would affect what it asserted to be unextinguished, constitutionally protected section 35 Aboriginal rights as well. Lummi asked Canada to review its concerns with a view to its Aboriginal rights throughout the Salish Sea.

[78] In my view, the October 2021 letters (particularly the second one) provided enough information about Lummi's asserted claim to unextinguished, constitutionally protected section 35 Aboriginal rights, and stated that its concerns about the Project's adverse impacts on rights were not limited to the US but also extended into Canada. I find Lummi has established that, by October 2021, the Crown had real or constructive knowledge of a sufficiently credible unproven claim that Lummi is an Aboriginal people of Canada and a sufficiently credible unproven claim of Aboriginal rights or title protected under section 35 of the *Constitution Act, 1982*, and the Crown knew that it was contemplating conduct with the potential to adversely affect the claim or rights: *Haida* at para 35; *Carrier Sekani* at paras 31, 40-50.

[79] As noted above, in my view *Desautel* did not require Lummi, as an Indigenous group outside of Canada, to meet a distinct and more onerous legal obligation for providing notice and evidence of its asserted section 35 rights before a duty to consult was triggered. The second October 2021 letter explained that Lummi was asserting "unextinguished Aboriginal rights, to *inter alia*, hunt, fish and gather throughout our traditional territory, which includes areas that are now part of Canada," and that Lummi had "taken several significant steps towards recognition and reconciliation of our Indigenous rights within the Canadian legal system," including by intervening in *Desautel*. Lummi's October 2021 letters did not provide much detail on the scope and nature of its asserted section 35 rights or its concerns about the Project's effects on those rights. However, when considered in light of Canada's information from the environmental assessment process (Lummi's asserted section 35 rights were an extension of rights Lummi exercised in the US, and Lummi had provided detailed information about the Project's impacts on the exercise of those rights), it is my opinion that Canada had sufficient information, as a

factual matter, to satisfy the *Haida/Carrier Sekani* conditions and trigger a legal duty to consult with Lummi by October 2021.

[80] While I find that the duty to consult was triggered as of October 2021, I agree with the respondents that the Court should not parse the process into the periods before and after *Desautel* for the purposes of judicial review. Particularly in the context of this case, where Lummi claims that the international border severed rights that had once been exercised without regard to it, the environmental assessment process and the Crown's pre-*Desautel* engagement with Lummi are relevant to whether the Crown discharged its consultation duty. The fact that the legal duty was triggered as of October 2021 provides context, but the Court should assess whether the process as a whole was reasonable.

(d) *It is not necessary for the Court to assess the strength of Lummi's claim*

[81] While both sides advanced arguments about whether Lummi's claim is strong or weak, I have not assessed the strength of Lummi's claim—including its claim to be an Aboriginal people of Canada. In my view, doing so is neither necessary nor advisable in this case.

[82] First, it was not necessary for me to assess the strength of Lummi's claim in order to decide whether Lummi met the low *Haida* threshold for triggering the consultation duty. I repeat that whether Lummi is an Aboriginal people of Canada is a threshold question for rights determination, but it is not a threshold question for deciding whether the legal duty to consult is triggered; the Crown owed a duty to consult based on the potential rights embedded in Lummi's as-yet unproven claim to be an Aboriginal people of Canada with rights protected under

section 35. My finding that a duty to consult was triggered does not imply that Lummi would meet the *Desautel* threshold question or the legal tests for establishing Aboriginal rights or title that are recognized and affirmed by section 35 of the *Constitution Act, 1982*.

[83] Second, the Court does not need to assess the strength of Lummi's claim in order to review the adequacy of consultation. It seems to me that in this case, the depth of consultation owed to Lummi should reflect Canada's acceptance of Lummi's asserted section 35 rights for the purpose of addressing potential Project-related impacts. To assess the adequacy of consultation, I have assumed, without deciding, that Lummi has a strong claim.

[84] Consequently, I make no pronouncement on the strength of Lummi's claim, including its claim to be an Aboriginal people of Canada. Whether Lummi should be recognized as an Aboriginal people of Canada, and if so, the nature and scope of any legally recognized section 35 rights and/or title, will be questions for another day.

B. *Did the Crown meet its consultation duty?*

(1) *Legal principles*

[85] It is helpful to begin with a summary of applicable legal principles.

- The duty to consult preserves asserted Aboriginal interests pending claims resolution and fosters a relationship for negotiations, the preferred process for achieving ultimate reconciliation: *Haida* at para 38.

- The content of the duty is fact specific and there is no specific process that must be followed: *Haida* at para 39. In general terms, the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title and the seriousness of the potentially adverse effect upon the right or title claimed: *ibid.*
- Consultation must be approached flexibly, and the level required may change as new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake: *Haida* at para 45.
- The duty to consult is not triggered by historical impacts and it is not the vehicle to address historical grievances; consultation is limited to addressing the adverse impacts flowing from the specific Crown proposal at issue: *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 41 [*Chippewas of the Thames*]. Consultation inquires into impacts on rights, not environmental effects *per se*: *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 45 [*Clyde River*].
- Consultation must be meaningful and requires good faith on both sides; the Crown must intend to substantially address and be responsive to an Indigenous group's concerns as they are raised: *Haida* at paras 10, 42.

- Where Crown conduct may adversely affect the Aboriginal right or title of more than one Indigenous group, each is entitled to consultation based upon the unique facts and circumstances pertinent to it: *Gitxaala Nation v Canada*, 2016 FCA 187 at para 236 [*Gitxaala*].
- Consultation is more than exchanging information and the Crown must do more than receive and understand a group's concerns—it must be prepared to make changes to its proposed action: *Haida* at para 46; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at para 558 [*Tsleil-Waututh*]. Consultation is more than an opportunity to blow off steam before the government does what it intended to do all along: *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 54 [*Mikisew 2005*].
- Good faith consultation may lead to a duty to accommodate: *Haida* at para 47; *Mikisew 2005* at para 54.
- The Crown may rely on steps taken by a regulatory agency to fulfill the duty to consult, and if necessary, accommodate, but the Crown is responsible for ensuring the process is adequate. If the regulatory process falls short, the Crown must take further action to meet its duty: *Clyde River* at para 22.

- The duty to consult does not require agreement and Indigenous groups do not have a veto power; instead, there must be a process of balancing interests: *Haida* at paras 45, 48.

(2) *The parties' arguments*

(a) *Lummi Nation*

[86] Lummi argues that the Crown did not consult with it, despite now alleging that what occurred was consultation. The Crown refused and/or decided not to consult and cannot now say that what occurred was consultation. Furthermore, the Crown did not intend to consult, and inadvertent consultation cannot be meaningful because consultation must represent a good faith effort to reconcile Crown sovereignty with claims to pre-existing Aboriginal rights or title.

[87] Lummi submits that Canada's engagement prior to *Desautel* was not consultation, and the Agency's submissions to the Panel and the Panel's report confirm that Canada was not consulting. Lummi states that its limited participation in the Panel's process did not satisfy the duty to consult:

- Lummi learned about the Project five years into the assessment and missed opportunities for funding and opportunities for consultation on foundational documents for the Panel phase;
- Lummi's preparation for the Panel phase was rushed, it was treated as a public participant, and its participation was limited to potential

transboundary impacts on the environment and its US treaty rights with no engagement on section 35 rights;

- unlike Indigenous groups within Canada, the Panel did not assess the Project's potential impacts on Lummi's asserted Aboriginal rights, nor did it properly assess the impacts on Lummi's established US rights;
- the duty to consult inquires into the impact on rights, not environmental effects *per se*, and section 35 rights cannot be an afterthought to an assessment of environmental concerns (*Clyde River* at paras 45, 51-52); the concerns of US Indigenous groups informed the Panel's assessment of the Project's potential environmental effects, but the Panel did not consider the Project's broader effects on US Indigenous groups under section 5(1)(c) of *CEAA 2012*.

[88] Even after *Desautel*, when Lummi formally requested consultation on its section 35 rights, Lummi states Canada showed no genuine effort to pursue meaningful consultation and never acknowledged that it owed a duty to consult. The Agency's statement in the CAR, that communications with Lummi and other Washington state groups "focused on an openness to hearing concerns, as opposed to formally consulting with them," confirms that Canada decided not to consult. In addition, Canada never communicated its decision not to consult—Lummi was left to learn of the decision when it reviewed the draft CAR. Lummi states it is inconsistent with the honour of the Crown for Canada to now say that it adequately consulted with Lummi when the CAR indicates that the Agency was not consulting; consultation without the intent to consult

is not consultation: *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354 at para 113 [*Dene Tha'*]; *Enge v Mandeville*, 2013 NWTSC 33 at para 172 [*Enge*], citing *Dene Tha'* at para 113.

[89] In the alternative, if the dialogue that took place was consultation, Lummi submits Canada did not meet its legal duty because the process was neither meaningful nor adequate.

[90] Lummi states that its participation in the Panel phase and the pre-*Desautel* communications with government officials focused on transboundary impacts, and did not satisfy the duty to consult. The post-Panel consultation phase, culminating in the CAR, was also unacceptably flawed. Lummi states that the Agency failed to assess the scope of the Crown's duty to consult and accommodate based on a misconceived view that an environmental assessment is not a rights-determining process nor the appropriate forum to implement *Desautel*. Lummi submits Canada was obligated to conduct a preliminary assessment of its SOC submission and provide an opportunity to comment on the assessment—this was needed to determine the scope and content of the duty to consult and accommodate and it was required as part of the consultation roadmap in *Desautel*. Furthermore, the Agency developed a methodology for considering and assessing potential impacts to asserted rights, but it did not assess the Project's potential adverse effects on Lummi's asserted section 35 rights in accordance with the methodology.

[91] Lummi states that if Canada had taken Lummi's claim at face value, as AGC asserts, the process would not have played out as it did. After putting Canada on notice in October 2021,

Lummi presented evidence of a strong claim that triggered a duty falling at the highest end of the *Haida* spectrum—the same level of deep consultation and accommodation afforded to Tsawwassen First Nation and Musqueam Indian Band—and Canada did not grapple with this. Instead, Lummi states there were two video meetings where the Agency did not ask questions or take the time to understand the full scope of Lummi’s Aboriginal rights, and a CAR that repeats what Lummi told the Agency and points to draft conditions that Lummi had no role in reviewing. There was no two-way dialogue about Lummi’s expressed concerns with someone who was able to respond meaningfully or do more than take notes: *Gitxaala* at para 279. The process amounted to exchanging information, receiving and understanding concerns, and an opportunity to blow off steam: *Tsleil-Waututh* at para 558; *Haida* at para 46; *Enge* at para 149; *Mikisew 2005* at para 54.

[92] Lummi states that the Agency dismissed any form of accommodation from the outset and the Project conditions do not address its specific concerns. Canada provided brief and generic responses to Lummi’s concerns and relied on work with other Indigenous groups to develop mitigation and accommodation strategies that it assumed were broad enough to address the concerns. Where government conduct may affect the rights or title of more than one First Nation, each is entitled to consultation based on the unique facts and circumstances pertinent to it:

Gitxaala at para 236.

[93] Lummi states Canada had at least 18 months after October 2021 to consult meaningfully but chose not to. Lummi contrasts its experience to that of the Snuneymuxw First Nation, a British Columbia Indigenous group that was first identified as a potentially impacted group after the Panel phase was complete. When Snuneymuxw requested formal consultation in

November 2021, the Agency provided funding and directed VFPA to work with it. Lummi was denied funding and VFPA did not engage with it.

[94] Lummi also states it was not given the same opportunities as Indigenous groups within Canada for post-approval engagement and consultation on issues of concern that Lummi had identified as early as 2018. There are Project conditions requiring VFPA to consult with named Indigenous groups, but Lummi and the other US Indigenous groups are not among them. Lummi states it has also been excluded from opportunities to review and comment on future regulatory processes, such as VFPA's permit applications under the *Fisheries Act*, RSC 1985, c F-14 and the *Species at Risk Act*, SC 2002, c 29.

[95] Lummi argues that Canada delayed, denied, and deferred any engagement in meaningful consultation, treating it as an afterthought rather than a constitutional imperative. After *Desautel*, the Minister *delayed* responding to Lummi's request for consultation while the clock ran down, and the Agency never responded to Lummi's SOC submission. Having waited over 175 years to exercise rights in Canada, Lummi was told to wait while Canada figured out how to "operationalize" *Desautel*. The Agency *denied* that the environmental assessment was an appropriate forum to implement the outcomes of *Desautel* on the basis that it is not a rights determination process. The Agency's focus was on making sure Lummi's concerns were "adequately considered and reflected" in the CAR, but Lummi says its CAR chapter merely repeats information Lummi provided in its submissions with no consideration of how its asserted rights and title might be accommodated. That consideration was *deferred* on the basis that it would be best dealt with by Crown-Indigenous Relations and Northern Affairs Canada

(CIRNAC), the federal department tasked with operationalizing *Desautel*, and British Columbia's Ministry of Indigenous Relations and Reconciliation. Years later, Lummi states Canada still has not figured out how to operationalize *Desautel*.

[96] To consult meaningfully, Lummi submits the Crown, acting honourably, must participate in processes of negotiation. The Crown must engage in meaningful dialogue with an intention and willingness to grapple with Indigenous concerns and substantially address them: *Haida* at para 42; *Mikisew 2005* at para 55; *Dene Tha'* at para 113; *Tsleil-Waututh* at paras 6, 557-59, 754. With Lummi, Canada cut consultation short and rushed to a Cabinet decision under legislated timelines. Cabinet failed to evaluate the adequacy of consultation in light of *Desautel* and erred in law by finding that the consultation process had been adequate when no meaningful consultation with Lummi had taken place.

(b) *Attorney General of Canada*

[97] As noted above, AGC submits this is not a “no consultation” case. The Agency took Lummi's assertions of rights at face value and was not required to assess whether a duty was owed or the depth of consultation: *Chippewas of the Thames* at paras 47-48. AGC submits the Crown provided a meaningful process to substantially address potential Project impacts to Lummi's asserted section 35 rights.

[98] Even though Canada did not formally assess the strength of Lummi's asserted rights, AGC states the process afforded all the hallmarks of meaningful consultation—including opportunities to participate and engage, multiple invitations to comment, direct dialogue, and the

opportunity to provide submissions to decision makers. From the moment Lummi expressed Project-related concerns, long before *Desautel*, the Crown was committed to meaningful discussions. Lummi had opportunities to correspond with ministers and meet with the Agency, and these opportunities continued throughout the consultation process. Lummi provided information on its governance, community, management of commercial fishing vessels, and Project-related concerns. The Agency maintained a meaningful dialogue with Lummi and provided information on several government measures and initiatives related to the predicted Project effects.

[99] AGC states that Canada reasonably relied on information obtained through the environmental assessment process. The Panel had considered the Project's potential transboundary effects on Indigenous groups in Washington, given their proximity to the international border and the designated marine shipping lanes that Canada and the US jointly manage. The Panel's report also provided a detailed summary of Lummi's views and an explanation of how the Panel analyzed Lummi's concerns on commercial fishing and seafood harvesting, use of lands and resources, and the effects of marine shipping.

[100] After *Desautel*, AGC submits the Crown acted in a manner that was meaningfully responsive to the change in the legal landscape. Discussions with Lummi expanded beyond transboundary issues and the Minister asked the Agency to meet with Lummi to discuss concerns about potential impacts to section 35 rights and potential solutions to mitigate them.

[101] AGC states that Lummi provided general information to the Agency about the nature of its asserted section 35 rights to hunt, fish, and gather, without detailing the nature and location of asserted rights in Canada. Lummi's preliminary SOC submission cited historical documents to support a claim to section 35 rights but did not explain how the Project might impact the ability to exercise the rights. Nonetheless, the Agency continued to seek information from Lummi and met with Lummi representatives to discuss Project-related concerns. The Agency encouraged Lummi to comment on the draft Project conditions, agreed to receive comments after the deadlines had passed, and continued to make efforts to engage with Lummi in the months leading up to Cabinet's decision, but Lummi did not avail itself of these opportunities.

[102] AGC submits that the CAR provided an opportunity for Lummi to make submissions to the decision makers directly. It included a chapter with the Crown's conclusions on the Project's potential impacts on Lummi's asserted section 35 rights and how they may be addressed. The Agency sent Lummi a draft of its CAR chapter for comment and a draft of the main body. Lummi's response to the draft focused on how the Crown should implement *Desautel* and stated that its rights had not been addressed because Canada refused to consult, without providing comments on the proposed measures for addressing the Project's impacts.

[103] AGC submits there is no evidence that a lack of funding impacted Lummi's ability to participate. The Crown is not obliged to provide capacity funding, and this is only one of the factors considered in determining whether consultation was meaningful: *Bigstone Cree Nation v Nova Gas Transmission Ltd*, 2018 FCA 89 at para 45 [*Bigstone Cree*].

[104] AGC argues that Lummi did not meet its reciprocal obligation to fully participate in the environmental assessment and consultation process. Despite encouragement from the Minister and others, Lummi declined meetings and important opportunities to comment on the sufficiency of the information filed by VFPA and on whether the proposed Project conditions would address Lummi's concerns and preserve its asserted rights.

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[105] VFPA argues the Court should assess whether the process as a whole was reasonable, and not seize on imperfections. VFPA submits it is appropriate that the Crown's consultation with Lummi differed from consultation with Indigenous nations in Canada, as requirements vary with the circumstances and identical treatment is not required at law: *Desautel* at paras 71, 76; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 25 [*Taku River Tlingit*].

[106] VFPA argues that the duty owed to Lummi was at the lower end of the *Haida* spectrum because Lummi does not have a strong claim to rights or title in the area impacted by the Project, and the potential adverse effects of Cabinet's decision on the claim are not expected to be serious: (i) Lummi is not currently exercising rights in Canada and has not exercised rights in Canada since the international border was established, so there is no Crown conduct relating to the Project that would adversely affect Lummi's current exercise of rights in Canada; (ii) any title claims are weak given the overlapping claims of other Indigenous groups; (iii) the fishing sites Lummi used before the border was established were shared with other Indigenous groups, are at the very edge of Canadian territory, and are not expected to be impacted by the Project;

(iv) while Lummi self-identifies as an independent sovereign nation, others claim that descendants of Canadian Indigenous groups moved to the US and joined Lummi after the border was established; others also claim that the historical materials Lummi relies on to support claims of pre-contact fishing and village sites describe those sites as being the territories of other Canadian Indigenous groups; (v) the Project's significant adverse effects on the salmon population are addressed through Project conditions; (vi) the number of vessels calling at the Port of Vancouver is not expected to increase; and (vii) the Project's adverse effects on the whales are addressed through Project conditions and government initiatives.

[107] VFPA submits the Crown fulfilled the duty to consult and Cabinet's decision was supported by a record of meaningful consultation that was proportionate to the strength of Lummi's asserted rights and the potential impact on those rights. It argues that the historical documents do not support the assertions that Lummi provided "detailed information" and has a strong claim. Where a claim to Aboriginal title is weak, an Aboriginal right is limited, or the potential for infringement is minor, the duty to consult may only require the Crown to give notice, disclose information, and discuss any issues raised in response: *Haida* at para 43.

[108] VFPA submits the Crown gave Lummi notice and information about the Project, as well as an opportunity to provide information in writing and in person at key points in the environmental assessment process. The Panel and the Agency incorporated the information received from Lummi into the Panel's report and the CAR, and Lummi elected not to make submissions on Project conditions and mitigation despite opportunities to do so. At the end of the

process, the CAR articulated Lummi’s asserted rights and its concerns, and described how the concerns would be addressed.

(3) *Consideration of the arguments*

(a) *The Crown did not refuse to consult*

[109] I disagree with Lummi that Canada did not consult with it. I agree with the respondents that this is not a “no consultation” case.

[110] Lummi is correct that the Agency did not acknowledge that the Crown owed a duty to consult; however, the failure to acknowledge the duty was not a refusal to consult. The Agency was concerned that acknowledging a legal duty would determine rights, and even though I have found otherwise, there was uncertainty following *Desautel*. The Agency explained to Lummi that it is not always clear there is a duty to consult so Canada proceeds as though there is a duty.

[111] Lummi states the Crown did not have the requisite intention. The CAR differentiates between consultation with Indigenous groups in Canada and engagement with Indigenous groups in the US and describes communications with Lummi and other Washington state groups as “focused on an openness to hearing concerns, as opposed to formally consulting with them.” Lummi states the Crown cannot now argue that what took place was consultation—consultation is not consultation absent the intent to consult: *Dene Tha'* at para 113.

[112] VFPA argues that Lummi’s reliance on *Dene Tha'* is misplaced because the Federal Court of Appeal cast doubt on the lower court’s findings: *Canada (Environment) v Imperial Oil*

Resources Ventures Ltd, 2008 FCA 20 at para 11 [*Dene Tha' Appeal*]. VFPA also argues that the principle in *Dene Tha'* no longer applies in light of the SCC's decisions in *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Beckman*] and *Ktunaxa*, where the government had mischaracterized what took place but still provided the appropriate level of consultation: *Ktunaxa* at para 104, citing *Beckman* at paras 38-39.

[113] In my view, Canada had the requisite intention and acted in a way that was meant to fulfill a duty. Lummi's reliance on *Dene Tha'* is misplaced, but not for the reasons argued by VFPA.

[114] In *Dene Tha'*, the Court relied on the holding in *Mikisew 2005* that consultation must be undertaken with a genuine intention to address a First Nation's concerns: *Dene Tha'* at paras 102-03. The Court found it relevant that the Crown's consultation coordinator had stated that Canada was not engaged in consultation, but this was not determinative; the question was whether the Crown fulfilled the duty to consult in its behaviour toward the Dene Tha': *Dene Tha'* at paras 111, 113. In this regard, the Court concluded that there was no consultation whatsoever—the most minimal threshold of consultation was not met and the Crown's conduct did not even meet the procedural fairness standard under administrative law of providing notice and an opportunity to be heard: *Dene Tha'* at paras 115-17.

[115] That is not what happened in Lummi's case. The Crown's behaviour toward Lummi demonstrated a genuine intention to address its concerns.

[116] In *Dene Tha' Appeal*, the FCA did not cast doubt on the principle that the Crown must undertake consultation with a genuine intention to address an Indigenous group's concerns, which derives from *Mikisew 2005*. In upholding the lower court's decision, the FCA stated that *Dene Tha'* turned entirely on its own facts and did not impose a different or more onerous obligation on the Crown than was justified by *Haida*, *Taku River Tlingit*, and *Mikisew 2005*: *Dene Tha' Appeal* at paras 8-9.

[117] In my view, *Beckman* and *Ktunaxa* did not overtake the principle that consultation requires a genuine intention to address concerns. Rather, *Beckman* and *Ktunaxa* recognized that even if the Crown mischaracterizes the process as a courtesy rather than consultation, or mischaracterizes an asserted right, it is still possible for the Crown to fulfill the duty to consult if appropriate consultation did take place. *Beckman* and *Ktunaxa* did not involve a situation where the Crown lacked the intent to consult in the sense described in *Mikisew 2005*, that is, of being indifferent to legitimate concerns or acting without regard to those concerns.

[118] In Lummi's case, the Crown had the requisite intention. Consultation was not meaningless, and this was not a case where Lummi was justified in not fulfilling its reciprocal obligations because consultation never got off the ground: *Mikisew 2005* at para 65.

[119] Lummi is correct that the CAR differentiates between consultation with Indigenous groups in Canada and engagement with Indigenous groups in the US. While this was a deliberate distinction, I do not agree with Lummi that the statement in the CAR shows that Canada decided not to consult or lacked the intent to consult.

[120] The statement in question was in the main body of the CAR, in a section that addressed certain Nation-specific considerations for Lummi and other US Indigenous groups:

Lummi Nation (Lummi) and three other Indigenous groups from the United States identified interests and asserted rights in Canada as being potentially affected by the RBT2 Project during the Review Panel process: the Suquamish Tribe, the Swinomish Indian Tribal Community, and the Tulalip Tribes (U.S. Tribes). Communications to date with these Nations have focused on an openness to hearing concerns, as opposed to formally consulting with them.

[121] AGC argues that this only meant that Canada did not adopt a formulaic *Haida* approach to consultation, but I do not find this persuasive. The CAR distinguishes the process for the US groups from the process for groups within Canada, and a non-formulaic approach was not a distinction (the Crown did not follow a formulaic *Haida* approach for any Indigenous group).

[122] That said, the fact that Lummi's process differed from the process followed for Indigenous groups within Canada did not, in itself, render the process incapable of satisfying the Crown's duty to consult with Lummi. Even among "consulted" Nations, there were differences in the scope and content of consultation—for example, fewer than half of them were consulted on the Project's impacts from both the terminal and marine shipping. Furthermore, *Desautel* recognized that the scope of the Crown's duty and the manner in which it is given effect may differ for groups outside of Canada: *Desautel* at para 76. I will return to the differences between Lummi's process and the processes for other Nations in section VI.B.(3)(c)(ii). For the reasons given in that section, it is my opinion that the differences did not render consultation inadequate.

[123] I note that Lummi raised concerns with the Agency about the language in the CAR. Apart from telling Lummi that Canada proceeds on the assumption that it owes a duty, the Agency did not clarify what it meant or explain the distinction between the Crown's engagement with US Indigenous groups and consultation with groups within Canada. It is regrettable that the Agency did not do more to explain the distinction or clarify the language in the CAR, which was confusing and concerning to Lummi. This was a serious imperfection in the process.

[124] However, in my view, the CAR does not show that the Crown refused to consult, decided not to consult, or did not intend to consult with Lummi. In my view, the CAR shows that the Crown worked to understand Lummi's concerns about Project impacts and to address those concerns, and it shows that the Crown had the requisite intention for meaningful consultation with Lummi.

[125] A number of Lummi's concerns were shared by other Indigenous groups, and shared concerns were addressed in the main body of the CAR. The main body explains the measures intended to address the shared issues, which included: VFPA's commitments (the initial commitments are summarized in the Panel's report, and additional commitments were made in response to the Minister's IR); potential Project conditions (the CAR states that in updating the conditions, particular attention was given to Indigenous responses, and the CAR also explains how the conditions respond to Indigenous rights and interests); and the Crown's response to Panel recommendations that were directed at the Crown, as well as additional Crown initiatives (including programs, studies, legislative changes, and initiatives under a Canada-USA joint

statement of cooperation) to address the effects of marine shipping associated with the Project, the cumulative effects of marine shipping on the area, and the effects of rail traffic.

[126] The Agency also prepared a dedicated CAR chapter for Lummi, the purpose of which was to describe Lummi's interests related to the Project and to "communicate Lummi's views on the Project and process" to the decision makers. The chapter summarizes the engagement between the Crown and Lummi, describing both the engagement during the Panel phase (Lummi's participation in the Panel's process and the meetings with the Agency to discuss Lummi's interests and concerns) and during the post-Panel phase. The chapter describes Lummi's interests and concerns in the US as well as those extending into Canada. After summarizing the Panel's process and findings about Lummi's concerns, the Agency addressed potential impacts of the Project on Lummi's interests within Canada, specifically noting that these were not the impacts from the Project's transboundary effects. The section explains the measures that are intended to address the impacts.

[127] Again, consultation must be in good faith and with the intention of substantially addressing the Indigenous group's concerns: *Mikisew 2005* at paras 55, 61, citing *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168. The CAR includes a general recognition of the Crown's duty to consult and states that the Agency believed the consultation activities that were undertaken were adequate to support the required decisions under *CEAA 2012* and BC's *Environmental Assessment Act*. With respect to Lummi specifically, the CAR chapter for Lummi concludes:

The Crown believes that the approach to engagement with the Lummi has been in good faith, and it has worked to be responsive to the concerns as understood by the Crown.

The Crown is of the view that the concerns shared by the Lummi as understood to date and identified in this chapter may be adequately responded to and addressed in a Project context given the new information provided by [VFPA], the draft Project Conditions, and measures identified above in response to the concerns of the Lummi.

[128] In my view, while the Agency's statements in the CAR distinguished engagement from consultation, the distinction was not indicative of the kind of shortcoming identified in *Dene Tha'* and *Mikisew 2005*. I see no indication in the CAR (or elsewhere in the record) that Canada acted in bad faith, proceeded unilaterally without engaging with Lummi about its concerns, or was otherwise closed to consultation with Lummi. Unlike the circumstances in *Dene Tha'*, the Agency's behaviour was consistent with the statement it made to Lummi that Canada was proceeding on the assumption that it owed Lummi a duty to consult. In this proceeding, Canada is not taking a position that is contrary to the position it took with Lummi during the Project's assessment, and I see no basis for concluding that the approach of assuming without deciding that Canada owed a duty to Lummi was inconsistent with the honour of the Crown.

[129] If I am mistaken and the Agency was denying that it consulted with Lummi (and I do not believe it was), then it was a mischaracterization error as described in *Beckman* and *Ktunaxa*. In this regard, I agree with VFPA that Crown conduct can satisfy the obligation to consult even if the government mischaracterizes a right or the duty: *Beckman* at para 39; *Ktunaxa* at para 104. In such a circumstance, there is only one question in the end—whether in fact the consultation that took place was adequate: *Ktunaxa* at para 81. In the face of a mischaracterization, the Crown can satisfy its obligation to consult through its conduct.

[130] For these reasons, it is my view that the Agency’s statement characterizing the process with Lummi as something different from “formal consultation” was not an admission that the engagement with Lummi during the course of the Project’s environmental assessment was not, or was not intended to be, a good faith effort to engage with Lummi and address its concerns about Project-related impacts to asserted section 35 rights in a way that was sufficient to discharge the Crown’s legal consultation duty for the purpose of advancing to the *CEAA 2012* decision phase.

(b) *The duty owed to Lummi was no higher than the middle of the Haida spectrum*

[131] At the hearing, AGC argued that the Court does not need to decide where the duty fell along the *Haida* spectrum—all that is required of the Court is an assessment of whether Lummi’s process was constitutionally adequate: *Haida* at para 42; *Chippewas of the Thames* at para 61 among others; *Beckman* at para 39; *Taku River Tlingit* at paras 23, 28, 47; *Manitoba Metis Federation Inc v Brian Pallister et al*, 2019 MBQB 118 at para 141. At the same time, AGC disputes Lummi’s position that it was owed deep consultation at the highest end of the spectrum and agrees with VFPA that the duty was at the low end.

[132] In my view, the authorities above do not clearly support AGC’s argument. At least in this case, where the parties disagree on the depth of process that should have been afforded to Lummi, I believe the Court should decide where the duty fell along the *Haida* spectrum.

[133] Lummi states that, given its connection to the Project area, the proximity of established treaty rights extending to the Canada-USA border, and the potential for the Project to adversely impact section 35 rights, it presented a strong claim that triggered a duty falling at the highest

end of the *Haida* spectrum, and it was owed at least the same level of consultation as Tsawwassen First Nation and Musqueam Indian Band. Lummi contends that if Canada had taken its rights at face value, as AGC asserts, the process would have played out very differently—Canada would have acknowledged a duty of deep consultation and followed a process like the one it followed with Tsawwassen and Musqueam, which did not happen. Lummi argues that Canada did not engage in a process of deep consultation commensurate with the high end of the *Haida* spectrum.

[134] AGC submits that any duty owed to Lummi in the context of the Project’s assessment would fall at the low end of the *Haida* spectrum, and the Crown’s process more than adequately discharged the duty. VFPA contends that the duty owed to Lummi was at the low end of the *Haida* spectrum for the reasons listed in paragraph 106, including that Lummi does not have a strong claim to rights or title in the area impacted by the Project and the potential adverse effects of Cabinet’s decision on the claim are not expected to be serious. It argues that the consultation provided to Lummi was commensurate with the strength of Lummi’s claimed rights and the seriousness of the potential impacts on those rights.

[135] If the Crown takes asserted section 35 rights at face value, it seems to me that the depth of consultation should reflect this. I therefore disagree with VFPA that any “weakness” in Lummi’s asserted claim to rights or title in the area impacted by the Project should be taken into account to justify a lower level of consultation. In this regard, I have assumed, without deciding, that Lummi has a strong *prima facie* claim to section 35 rights in Canada.

[136] That said, strength of claim alone does not dictate the depth of consultation. The point along the *Haida* spectrum where the duty falls depends on multiple factors—in addition to the strength of the *prima facie* case for the claim, these can include the nature of the right, its significance to the Nation, the significance of the potential infringement, and the risk of non-compensable damage: *Haida* at paras 43-45. A strong *prima facie* case for a claim will favour a higher level of consultation, but a lower level may be justified for other reasons, such as where the Aboriginal right is limited or the potential for infringement is minor: *Haida* at para 43. Every case must be approached individually, and with flexibility if information comes to light that may change the level of consultation that is required: *Haida* at para 45.

[137] The duty owed to Lummi did not fall at the high end of the *Haida* spectrum, including because: (i) Lummi has no established rights or title in Canada; its claim rests entirely on asserted section 35 rights; (ii) Lummi does not claim exclusive rights, apart from the asserted title claim; (iii) the Project's potential adverse impacts on Lummi's section 35 rights are not expected to be serious after mitigation, and Lummi has not shown that the Project would adversely impact the asserted title claim; (iv) Lummi does not currently exercise rights in Canada and has not done so for many years; it does not depend on the exercise of section 35 rights in Canada, and it has not established a risk of non-compensable damage.

[138] I find that the duty owed to Lummi fell no higher than the middle of the *Haida* spectrum. Generally speaking, this required a process that entailed giving notice, providing information, affording opportunities to present concerns, understanding and responding to concerns, and

affording opportunities for discussion and comment, all with a view preserving asserted section 35 rights from adverse Project impacts pending a resolution of Lummi's claim.

(c) *Consultation was adequate in this case*

[139] I find that the Crown met its consultation duty before Cabinet made its decision. In my view, Lummi was afforded a process that exceeded what the middle of the *Haida* spectrum required, but Lummi did not meet its reciprocal obligation.

(i) *Canada did not ignore Desautel's guidance or fail to carry out mandatory consultation steps*

[140] Lummi submits that *Desautel* provides a roadmap or framework for consultation, which Canada ignored. Canada did not address the *Desautel* threshold question and ignored *Desautel's* teaching that, while consultation involving groups outside Canada may be more challenging, the difficulties cannot defeat constitutional rights. Lummi states that AGC's arguments mischaracterize the paragraphs where the SCC addressed the duty to consult (by describing them as *obiter*) and gloss over *Desautel's* guidance.

[141] Lummi further submits that *Desautel* required Canada to assess its SOC submission in order to fulfill the consultation duty. Lummi states that, having met its onus by putting the Crown on notice that it is an Aboriginal people of Canada and wants to be consulted, and presenting evidence establishing a credible claim, the onus then shifted to the Crown to grapple with the issue. Once put on notice, the Crown had to determine whether a duty to consult arose and what the scope of the duty was: *Desautel* at para 76. Relying on *Adams Lake Indian Band v British Columbia*, 2011 BCSC 266 at paras 131-38 [*Adams Lake*], *Gitxaala* at paras 287-309,

and other cases, Lummi contends that the Crown was required to conduct a preliminary assessment of the strength of its claim and the potential impact of the government conduct or decision on its asserted rights, and to provide an opportunity to comment on the preliminary assessment. A preliminary assessment determines the scope and content of the duty to consult and accommodate, and this did not occur.

[142] I disagree with Lummi that *Desautel* provides a roadmap or framework for Crown consultation with Indigenous groups outside of Canada or that the Crown ignored steps that *Desautel* required it to take. As noted above, the SCC discussed the duty to consult in response to arguments about the consequences of interpreting “aboriginal peoples of Canada” to include groups outside of Canada: *Desautel* at paras 72-76. While the SCC stated that the scope of the Crown’s duty to consult and the manner in which the duty is given effect may differ for groups outside of Canada, *Desautel* does not explain the differences or provide a consultation framework for such groups. I agree with AGC that the SCC did not provide guidance on what is required for reasonable consultation when Indigenous groups outside Canada are involved.

[143] In the present case, Canada was not required to conduct and communicate a preliminary assessment of the strength of Lummi’s claim and provide an opportunity to comment on the assessment in order to meet its consultation duty. It was reasonable for Canada to take Lummi’s asserted section 35 rights at face value for the purpose of addressing Project-related impacts and preserving those rights pending a resolution of Lummi’s claim. Also, Canada did not have to determine the depth of consultation owed or where the duty fell along the *Haida* spectrum in order to meet its consultation duty.

[144] I explained above that *Desautel* did not change the law to impose a distinct notice obligation that applies uniquely to groups outside of Canada. For similar reasons, I disagree with Lummi that the SCC’s statement at paragraph 76 that “[o]nce the Crown is put on notice, however, it has to determine whether a duty to consult arises and, if so, what the scope of the duty is” means the Crown must assess the strength of a US group’s claim in order to fulfill the consultation duty. *Desautel* was not a duty to consult case, and if the SCC meant to impose new Crown obligations that apply uniquely to Indigenous groups outside Canada, in my view it would have said so expressly—particularly when the SCC warned that it was exercising restraint and intentionally saying little beyond the central interpretive issue: *Desautel* at para 2. Moreover, imposing mandatory steps for consulting with groups outside of Canada seems incongruous with the rationale the SCC offered for why the duty may operate differently, which was that groups outside of Canada are not implicated in the process of fair dealing and reconciliation arising from the Crown’s assertion of sovereignty to the same degree as groups within Canada: *Desautel* at para 76.

[145] In summary, there is no *Desautel* roadmap for consultation with groups outside Canada and the Crown did not ignore a framework that it was required to follow. *Desautel* did not impose a mandatory consultation step that required the Crown to assess the strength of Lummi’s claim, for either aspect of the claim: the *Desautel* threshold question, or the asserted section 35 rights.

[146] Turning to whether established duty to consult principles required the Crown to assess the strength of Lummi’s claim to discharge its duty, Lummi states that a preliminary SOC

assessment dictates the depth of consultation. The context behind *Chippewas of the Thames* is that the Crown does not have to assess the strength of an Indigenous group's claim if the Crown concedes that it owes a duty to consult at the highest end of the *Haida* spectrum. In such a case, an assessment would serve no purpose. Lummi states that *Chippewas of the Thames* is distinguishable because the Crown did not concede that it owed Lummi a duty of deep consultation.

[147] Duty to consult jurisprudence confirms that the content of the duty is variable and flexible; there is no rigid test or formula for what must happen: *Haida* at paras 43-45; *Ktunaxa* at para 81; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 24 [*Mikisew 2018*]. In *Ktunaxa*, the SCC summarized four steps of a consultation process, with step two being a determination of the level of consultation required by reference to the strength of the *prima facie* claim and the significance of the potential adverse impact on the Aboriginal interest: *Ktunaxa* at para 81. However, the SCC was clear that its summary of steps was offered as guidance to ensure that adequate consultation takes place, not as a rigid test or perfunctory formula: *ibid*. In the end, there is only one question—whether in fact the consultation that took place was adequate: *ibid*.

[148] I agree with the respondents that a preliminary SOC assessment is not necessarily required to discharge the Crown's consultation duty: *Chippewas of the Thames* at para 47; *Ktunaxa* at para 81; see also *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379 at para 88, *Halalt First Nation v British Columbia*, 2012 BCCA 472 at para 124, and *Beckman* at para 39. Whether a strength of claim assessment is helpful or required will depend on the

circumstances and whether it is reasonable: Thomas Isaac, *Aboriginal Law*, 6th ed (Toronto: Thomson Reuters, 2024) at 590-91.

[149] As I read *Chippewas of the Thames* and other cases, there is no rule that the Crown must perform a preliminary SOC assessment if it does not concede deep consultation—just as there is no rule that the Crown need not perform an SOC assessment if it concedes that consultation must be deep. Indeed, in *Gitxaala*, Canada had acknowledged that the affected First Nations were owed deep consultation (*Gitxaala* at paras 188, 207); yet, in the circumstances of that case, the Court found that consultation was inadequate because (among other inadequacies) Canada did not share sufficient information about its SOC assessment: *Gitxaala* at paras 288-90.

[150] Similarly, there is no rule that the Crown must assess the level of consultation on the *Haida* spectrum. The Crown can meet its consultation duty without this step: *Chippewas of the Thames* at paras 47, 66.

[151] The fundamental principle is that what constitutes honourable dealing, and what specific obligations are imposed by the honour of the Crown, depend heavily on the circumstances: *Mikisew 2018* at para 24, citing *Haida* at para 38, *Taku River Tlingit* at para 25, and *Carrier Sekani* at paras 36-37. Accordingly, whether an SOC assessment is helpful or necessary to the consultation process will depend on the circumstances.

[152] *Adams Lake* and *Gitxaala* do not establish that an SOC assessment was necessary in Lummi's circumstances.

[153] While *Adams Lake* does state that the Crown is obliged to make a preliminary assessment of the strength of the claim and the potential impact of the proposed decision on the asserted rights, VFPA correctly points out that the British Columbia Court of Appeal overturned *Adams Lake* and reached a different conclusion on this point specifically: *Adams Lake Indian Band v Lieutenant Governor in Council*, 2012 BCCA 333 at para 74, leave to appeal to SCC refused, 35023 (11 April 2013) [*Adams Lake Appeal*]. I note that the BCCA's finding that it was not necessary for the government (or the court) to assess the strength of Adams Lake Indian Band's claim was not tied to a concession of deep consultation. The government did not concede deep consultation and the BCCA found that the duty owed fell at the low end of the *Haida* spectrum: *Adams Lake Appeal* at para 84. The BCCA concluded that the impact on the Aboriginal claim was minimal, the offered accommodation was reasonable, and the process was "as thorough and as comprehensive as the circumstances required": *Adams Lake Appeal* at paras 74-79, 84.

[154] In my view, the FCA's holding in *Gitxaala* that strength of claims was an important matter that had to be considered for meaningful consultation (*Gitxaala* at para 288) turned on the circumstances of that case. Notably, there was considerable uncertainty about the nature and extent of the rights that would potentially be impacted by the pipeline project in question. Consultation was not meaningful because the affected First Nations were entitled to know Canada's information and views concerning the content and strength of their claims in order to know what was in play, the subjects on which Canada might have to accommodate, and the extent of accommodation: *Gitxaala* at paras 308-09. The consultation process in that case had ignored entire subjects that were of central interest to the affected First Nations: *Gitxaala* at para 325.

[155] The circumstances of *Gitxaala* are distinguishable from Lummi's case. The Crown took Lummi's asserted rights at face value, did not withhold information or ignore entire subjects of central interest, and invited Lummi to identify deficiencies and raise outstanding concerns. An SOC assessment was not necessary to resolve uncertainty about the scope of Lummi's asserted rights that were "in play" for consultation, and I am not persuaded that an assessment was necessary for meaningful consultation.

[156] Lummi contends that Canada did not, in fact, take its asserted rights at face value. For the reasons at paragraphs 196 to 203, I disagree. In my view, the Crown accurately characterized Lummi's main concerns, made good faith efforts to address them, and invited Lummi to identify deficiencies or outstanding concerns. Lummi expressed dissatisfaction with the process and asserted that the Crown had not addressed its concerns, but Lummi did not take full advantage of important opportunities for feedback, and it did not identify specific deficiencies that called for a material change to the scope of consultation.

[157] Lummi states there is another reason why the Crown was required to assess the strength of its claim. Relying on *Gitxaala* (at paragraph 309), Lummi states it was entitled to a meaningful dialogue about the strength of its claim. At the hearing, Lummi explained the Crown was required to conduct a preliminary SOC assessment because the duty to consult has informational and response components (*Mikisew 2005* at para 64) and once the Crown had notice that Lummi wanted to be consulted as an Aboriginal people of Canada it had to grapple with the issue by assessing the SOC submission and addressing the *Desautel* threshold question.

[158] I am not persuaded by these arguments, which assume that Lummi was entitled to have the Crown's assessment of the strength of its claim. Unlike the circumstances in *Gitxaala*, an SOC assessment was not necessary for meaningful consultation about the Project's impacts on Lummi's asserted section 35 rights.

[159] In summary, Lummi has not shown that consultation was inadequate because Canada failed to carry out steps that were required to fulfill the Crown's consultation duty.

(ii) *Lummi's process was not inadequate because it differed from other Nations' processes*

[160] Lummi states that, starting in 2013, the Agency consulted 26 Indigenous groups (comprised of 48 individual Nations) about the Project's potential impacts on asserted and established section 35 rights. The CAR differentiates between consultation with these Nations and engagement with US Indigenous groups, and Lummi contends there were significant differences in the processes afforded to each. The Agency provided \$2.8 million in capacity funding to consulted Nations but denied Lummi's requests for funding. The Crown delegated aspects of consultation to VFPA but there was no engagement between VFPA and Lummi. Consulted Nations had opportunities to participate in workshops, working groups, and committees, and they were offered revenue-sharing, employment, training, and contracting opportunities as well as opportunities for ongoing consultation. VFPA did not offer the same to Lummi.

[161] Lummi's April 2022 letter to the Agency stated that it was aware of significant accommodation measures proposed to address the Project's impacts on Tsawwassen's treaty

rights and Musqueam's right to fish, and Lummi should be afforded the same level of consultation and accommodation. Lummi contends its experience was also radically different from that of Snuneymuxw First Nation. Snuneymuxw requested formal consultation in November 2021, a few weeks after Lummi's request. However, in contrast to Lummi's experience, the Agency provided funding and directed VFPA to work with Snuneymuxw. Lummi alleges it was deprived of an opportunity to fully participate, and consequently, its specific concerns were not incorporated into the environmental assessment and regulatory processes.

[162] In my view, Lummi's process was not inadequate because it differed from other Nations' processes. Each Nation is entitled to consultation based on its unique circumstances and concerns: *Gitxaala* at para 236. Lummi was not in the same position as Indigenous groups in Canada, and it was not entitled to the same process or accommodation as Tsawwassen and Musqueam with established rights, and whose members are currently exercising section 35 rights that are impacted by the Project.

[163] I am not persuaded that Lummi was entitled to funding or a process that included engagement with VFPA.

[164] As AGC notes, the Crown is not obliged to provide funding; it is but one factor to determine if consultation was meaningful: *Bigstone Cree* at para 45. Ultimately, funding decisions are the Crown's, as part of its design and implementation of a consultation process, and

decisions on funding will be reviewed on a standard of reasonableness: *Saugeen First Nation v Ontario (MNR)*, 2017 ONSC 3456 at para 27.

[165] I question whether funding decisions for groups outside and within Canada should be judged on the same standards, but even assuming that they should, Lummi has not shown that a lack of funding compromised its process. Lummi states it requested capacity funding to facilitate meaningful participation and to pay for a traditional use study. However, Lummi has not shown financial need, and it has not shown that a lack of funding impaired its ability to participate in the process. Lummi asked Canada to fund a traditional use study in November 2022, stating that the purpose of the study was to expand on Lummi's SOC submission and provide more information about Lummi's connection to its traditional territory in Canada. By this time, however, Lummi had the draft CAR that explained Canada's views on how the Project's impacts would be addressed by Project conditions and other measures, and the next step was for Lummi to provide comments and feedback on its chapter. I am not persuaded that a traditional use study was required in Lummi's circumstances.

[166] I am also not persuaded that VFPA engagement was required for meaningful consultation. The Crown is responsible for the consultation process. Lummi has not shown that it was entitled to a process that VFPA alone could provide, particularly when Lummi had opportunities to comment on VFPA's IR responses and on the Project conditions that would bind VFPA, but did not take advantage of these opportunities.

[167] *Desautel* recognized that the consultation process may differ for groups outside of Canada. In my view, Lummi has not shown that its process differed from the processes for other Nations in a way that rendered consultation inadequate.

(iii) *Consultation was reasonable, meaningful, and honourable*

[168] I agree with the respondents that the Court should not review the pre- and post-*Desautel* processes separately. All phases of the environmental assessment were meant to assess and mitigate Project impacts, and while I have found that the legal duty to consult with Lummi arose in October 2021, steps that were taken before then are relevant to whether the Crown discharged its consultation duty. To decide whether consultation was adequate, the Court should consider the process as a whole.

[169] The Panel phase provided a solid foundation for consultation. It was reasonable for the Crown to build on pre-*Desautel* processes that included the Panel's process and additional opportunities for Lummi to engage directly with government officials.

[170] Beginning with the Panel's process, the Panel gathered and considered extensive information about Project impacts, which was shared with participants. Lummi participated in the Panel's process by giving evidence and by providing written and oral submissions. The Panel's report addressed Lummi's concerns about the Project's impacts on its members' way of life.

[171] Lummi's participation in the Panel phase was not rushed. Lummi states it first learned about the Project in September 2018. Lummi requested and received additional time to prepare materials for the Panel, which it filed in April 2019, and I found no other requests for more time. Lummi appeared before the Panel in May 2019 and filed closing submissions in August 2019. In this proceeding, Lummi has not shown it was prejudiced by this timeline or explained what more it would have done. Lummi had enough time to participate in the Panel's process.

[172] The record does not support Lummi's position that it was treated as a public participant in the Panel's process. As explained below, the process was responsive to Lummi's concerns as an Indigenous group.

[173] When Lummi first expressed its concerns to the Panel in October 2018, the Panel explained the process and provided information about the Project, directing Lummi to information that would help it to participate. The Panel explained that it was mandated to gather information from Indigenous groups about potential environmental effects of the Project and that the Crown would rely on the Panel's process to fulfill the duty to consult. The Panel also informed Lummi that it had issued IRs to VFPA and to government departments on topics of concern to Lummi, including impacts on fishing and fish populations in US waters, cultural practices related to the whales, and the cultural significance and management of the Salish Sea. The Panel invited Lummi to communicate its views and provide information about the Project's potential adverse effects on its current use of lands and resources and on ways to mitigate those effects.

[174] As VFPA correctly notes (and Lummi accepts), the Panel did not constrain Lummi's participation to transboundary effects. However, the Panel phase pre-dated *Desautel*, and Lummi's concerns focused on the Project's potential impacts to its US rights and practices. Lummi's main concerns related to the Project's impacts on its usual and accustomed fishing sites and on salmon (from habitat degradation), and the impacts of vessel traffic on fishing, cultural sites, resources in and around the marine shipping area, and on the whales. The Panel asked whether Lummi's members fished in Canadian waters and their evidence was that they fished in American waters.

[175] In its report, the Panel analyzed and made findings on the Project's effects on Lummi and the other US Indigenous groups, including the transboundary effects of the Project and associated marine shipping on commercial fishing and seafood harvesting, use of lands and resources, air quality, physical and cultural heritage, and accidents and malfunctions.

[176] I do not agree with Lummi that the Panel failed to consider the Project's effects on current use of lands and resources for traditional purposes under section 5(1)(c) of *CEAA 2012*. The Panel considered these effects and how Project-related marine shipping would affect Lummi's use of lands and resources in the marine shipping area, noting that this use was tied to Lummi's culture, traditions, and identity. The Panel did not limit its assessment to effects on the environment—it considered the concerns that Lummi and other US groups raised about the Project's effect on their rights. It is true that the Panel phase focused on the Project's transboundary effects on rights that Lummi exercises in the US and in international shipping lanes, but this was because Lummi was not exercising rights in Canada.

[177] The Panel's main findings were:

- Marine commercial fishing and seafood harvesting: Project-related marine shipping is unlikely to affect marine resources; a significant adverse effect on juvenile Chinook salmon in the Project area could affect the availability of this resource for Lummi and other US groups but the degree of the effect is unknown;
- Use of lands and resources: there would be no residual adverse transboundary effect from Project-related marine shipping activities, due to the small number of ship movements associated with the Project; however, total ship movements in the international shipping lanes could affect Lummi's and other US groups' use of marine resources, given their reliance on fishing, the number of members who harvest for subsistence, economic, and ceremonial purposes, and the potential for economic damage;
- Air quality: Project-related marine shipping is unlikely to materially affect air quality; emissions during the construction and operation of the Project could affect air quality out to Point Roberts;
- Physical and cultural heritage: there would be no transboundary effects on archaeological sites; Project- and shipping-related risks to the whales could affect cultural practices related to the whales, but the Panel was unable to determine the significance of the effect;

- Accidents and malfunctions: two accident scenarios in the marine shipping area have the potential for transboundary effects—a container ship colliding with a small vessel and a container ship running aground and spilling fuel; both scenarios are unlikely, but if they occur, they would adversely affect human health and current use of lands and resources.

[178] The Agency reasonably relied on the Panel’s findings to assess impacts on Indigenous rights, develop Project conditions, and respond to the Panel’s recommendations for additional government measures. Lummi’s asserted section 35 rights are an extension of its US rights and practices, and its concerns about the Project’s impacts to its section 35 rights overlap with its concerns about the Project’s transboundary impacts. Also, in assessing transboundary effects, the Panel noted that the Project would have similar effects in the US and Canada. It was reasonable for Canada to build on the Panel’s process and findings to fulfill its consultation duty with Lummi.

[179] Before *Desautel*, Lummi also had opportunities to engage with representatives of the federal Crown about its Project-related concerns. Lummi corresponded with ministers and met with representatives of the Agency’s Crown Consultation Division to discuss its concerns about the Salish Sea. The Agency provided information about the environmental assessment process and directed Lummi to information about the predicted effects of the Project. Government officials encouraged Lummi to participate in the assessment process and invited Lummi to share its comments and concerns. Lummi was also offered a meeting with the Consulate in Seattle. Lummi says the meeting did not take place because of the COVID-19 pandemic, but the record

shows that the Consulate tried to schedule a meeting a few times and then asked Lummi to reach out when it was ready to meet. Lummi did not reach out.

[180] After *Desautel*, I agree with the respondents that the Crown's engagement efforts were meaningfully responsive to the change in the legal landscape.

[181] In response to Lummi's October 2021 letter requesting consultation, the Minister directed the Agency to meet with Lummi to discuss its concerns about the Project's potential impacts on asserted section 35 rights and potential solutions to mitigate those impacts. The Minister stated that the concerns Lummi presented to the Panel were largely taken into account in the Panel's report, and the dialogue between Lummi and the Agency would build on Lummi's engagement in the process to date. The Minister also informed Lummi that the Agency was holding a public comment period and that he would welcome Lummi's input on VFPA's IR response and the draft Project conditions.

[182] The Agency met with Lummi in March 2022 to discuss its concerns and its participation in the environmental assessment process going forward. Lummi presented on its asserted section 35 rights in Canada and explained that its members intend to exercise rights. The Agency told Lummi it wanted to capture Lummi's concerns about the Project and find ways to address them, notably through Project conditions. Lummi wanted to submit comments as a government and took the position that the public comment period was not binding on it. The Agency stated it respects the relationship with Lummi as a government and would receive Lummi's comments and materials even though the comment period had ended. The Agency explained it would draft

a dedicated CAR chapter for Lummi. Following the meeting, Lummi was to provide additional information, the Agency was to begin drafting Lummi's CAR chapter, and a meeting to continue discussions was to be scheduled after the CAR chapter was prepared.

[183] Lummi sent its SOC submission to the Agency the next month, providing additional information on the strength of Lummi's *prima facie* claim. Lummi believed that Canada was required to assess the strength of its claim to section 35 rights as a first step for consultation, but I have found that the Crown was not required to do so. Lummi did not comment on VFPA's IR response or on the draft Project conditions.

[184] The Agency prepared a draft CAR chapter and scheduled a meeting with Lummi on November 8, 2022. The draft CAR chapter described Lummi's concerns and the measures Canada believed would address the concerns. In the accompanying email, the Agency explained that, as the next step in the environmental assessment, it was reviewing comments and revising the Project conditions as needed. The Agency explained that the Minister would consider the Panel's report, the information from VFPA, the responses received during the comment period, and the updated Project conditions in deciding whether the Project would likely cause significant adverse environmental effects. The Agency also explained that if the matter were referred to Cabinet for a final decision, Cabinet would consider the outcomes of consultation and the potential impacts on rights and/or interests in the CAR, and Lummi had the opportunity to provide comments for Cabinet's consideration through its CAR chapter.

[185] At the meeting, the Agency asked Lummi for comments to feed into the CAR process and offered to receive them at this meeting, in writing, or at a later meeting. Lummi's position was that Canada had a year to consult but chose not to, and the Agency had not considered the Project's impacts on its way of life and what it means to be Lummi. The Agency stated it is not always clear there is a duty to consult so Canada proceeds on the assumption that there is a duty, and asked Lummi to be specific about how it had disappointed Lummi or failed to meet its responsibility. The Agency explained the *CEAA 2012* decision timeline and asked for Lummi's comments by November 16, 2022. The Agency told Lummi that the CAR was an opportunity to provide its perspectives to decision makers and a clear response was important, particularly if there were concerns on how topics had been expressed.

[186] Lummi sent its response on November 16, 2022. The letter discussed *Desautel*, stating that the decision provided a path forward for recognition and reconciliation of Lummi's rights in Canada. Lummi alleged that the Agency had not offered a substantive response to its SOC submission and was pressing forward with a decision without having engaged in consultation on the basis that the environmental review cannot take *Desautel* into account. Lummi stated that the Project's transboundary effects had been scoped out of the Agency's updated assessment and the impacts on Lummi's inherent rights and treaty rights in the US had not been assessed. Also, Lummi stated that the impacts on its Aboriginal rights and title in Canada had not been addressed "given Canada's refusal to even consider consulting with us."

[187] The only specific comment on the content of the CAR chapter was about kinship—Lummi stated it is an independent sovereign Nation, and its claim does not depend on kinship

ties to an Indigenous group in Canada. Lummi did not propose any revisions to the measures the Agency had identified or explain why the measures did not address its concerns.

[188] Lummi's letter concluded:

We again request that the [Agency] formally consult Lummi before moving ahead with a decision. Otherwise, the [Agency] is accepting as adequate a process that both (1) has not addressed impacts to Lummi's treaty rights in the U.S., and (2) ignores the Crown's duty to consult Lummi on our Aboriginal rights and title in Canada. The duty to consult cannot be satisfied simply by summarizing Lummi's concerns in the CAR and pointing to generic conditions as potentially satisfying those concerns. It is time for the [Agency] to take a step back and fulfill its constitutional obligations to Lummi prior to moving forward with the next stage of the review process.

[189] The Agency proposed adding Lummi's letter to the CAR chapter, so the decision makers would have its views, and sent Lummi an updated chapter for consideration.

[190] In a December 15, 2022 letter, the Agency responded to Lummi's concerns that Canada had not assessed the Project's impacts on Lummi and that the assessment process had not taken *Desautel* into account. The Agency reiterated that environmental assessments are not rights determination processes, but Canada acknowledged Lummi's concerns about the Project's impacts on asserted section 35 rights. The Agency stated that Canada's approach had been to engage with Lummi to ensure that Project-specific concerns are adequately considered and reflected in the CAR, and the CAR chapter explains how Lummi's Project-specific concerns about asserted Aboriginal rights were considered and/or addressed. The letter then outlined the key concerns the Agency heard from Lummi and Canada's responses (which I summarize below). Even though the deadline had passed, the Agency invited Lummi to meet and provide

comments on their draft CAR chapter, including any outstanding concerns that were not adequately addressed or reflected, by January 10, 2023.

[191] Lummi expressed reservations that a further meeting would serve a purpose, given what it saw as the Crown's refusal to accommodate or consult about Lummi's unextinguished Aboriginal rights and title interests in Canada. Lummi stated that the Agency was acting contrary to *Haida*, "taking notes" rather than consulting, and had not shown a willingness to accommodate, amend or supplement proposed conditions, or provide a meaningful response to Lummi's expressed concerns. Optimistic that the Agency would re-evaluate its position that formal consultation is not required, Lummi offered dates to meet. The Agency agreed to meet with Lummi on January 31, 2023.

[192] On January 23, 2023, the Agency sent an email announcement to Indigenous groups, stating that the Minister was satisfied with VFPA's IR response and the *CEAA 2012* timeline had resumed. The email explained that the Minister would now decide whether the Project is likely to cause significant adverse environment effects, and if so, Cabinet would have to decide if they are justified. The email also explained what the Minister and Cabinet would consider, including the comments received on VFPA's responses, proposed Project conditions, and potential impacts on rights and interests as outlined in the CAR. The email noted that the Agency would follow up with each Nation on its chapter prior to a federal decision.

[193] A few days later the Agency reached out to Lummi about the January 31 meeting. Lummi responded that it was no longer able to meet that day and would follow up, but Lummi did not follow up. The meeting did not happen.

[194] On February 6, 2023, the Agency sent Lummi the final CAR and Lummi's chapter as sent to the Minister, confirming that Lummi's comments had been included.

[195] In my view, Lummi was afforded a process that gave adequate notice and information, and a meaningful opportunity to present concerns about the Project's adverse impacts to its asserted section 35 rights. The Agency did not simply document Lummi's concerns and proceed unilaterally. The Agency tried to understand and respond to Lummi's concerns, and afforded opportunities for discussion and comment. It remained responsive to feedback and willing to make changes. I believe Lummi was afforded a process that exceeded what the middle of the *Haida* spectrum required, in that Lummi had multiple opportunities to participate and engage, multiple invitations to comment (beyond the timelines and outside the established processes for doing so), direct dialogue with government representatives, and the opportunity to make submissions directly to decision makers, with assistance from the Agency.

[196] Lummi alleges that Canada never assessed the Project's impacts on its asserted section 35 rights. Lummi states the Agency did not respond to its SOC submission or conduct a post-Panel assessment of potential impacts to Lummi's asserted rights using the Agency's methodology that involved looking at the level of impact through different pathways and applying criteria to determine the potential severity of the adverse impact.

[197] While the Agency did not assess the strength of Lummi's claim, I disagree with Lummi that Canada did not assess the Project's impacts on its asserted section 35 rights. The Agency's methodology to assess impacts on rights was a collaborative and iterative process. The Agency engaged with Lummi to understand its concerns about Project impacts and the CAR explained how the impacts on asserted section 35 rights were assessed and addressed.

[198] The Agency's December 15, 2022 letter also explained how the impacts were addressed:

- concerns about harvesting fish species near the terminal may be addressed by Project conditions in the sections on fish and fish habitat and accidents and malfunctions, as well as through the permit requirements of the *Fisheries Act*;
- marine shipping incidental to the Project would be unlikely to impact harvesting, cultural practices, or stewardship in the marine shipping lanes beyond the impact that would exist if the Project is not built; however, any cumulative impacts on Lummi's asserted section 35 rights in the marine shipping lanes may be addressed through federal programs supporting marine environmental protection, such as the Oceans Protection Plan;
- the Project's impact on cultural practices related to the whales may be addressed by Project conditions in the section on marine mammals and the permit requirements of the *Species at Risk Act* and *Fisheries Act*; further, Canada is working to protect and support the recovery of endangered

whales and address the cumulative effects threatening them through a suite of measures, including the Whales Initiative;

- no additional measures are required to address concerns with the Project's impact on archeological sites in the Salish Sea in view of the Panel's conclusion that Project-related marine shipping would not cause shoreline erosion or affect archeological resources.

[199] Lummi states that Canada did not address the full scope of its claims to Aboriginal rights and title in Canada and/or its established treaty rights in the US or adequately address Lummi's concerns. Lummi states its CAR chapter simply repeats information Lummi provided, with no consideration of how the Project's adverse effects on its asserted rights and title might be accommodated. Lummi criticizes the Agency's December 15, 2022 letter, stating that it attempts to fit Lummi's concerns under three headings—marine shipping, fish harvesting, and the whales—when its concerns were broader, and the letter points to generic conditions to address (and in the Crown's view, accommodate) Lummi's concerns without addressing broader impacts to the Aboriginal rights and title at issue, as articulated in Lummi's SOC submission. Lummi compares its position to that of the Upper Nicola Band in *Tsleil-Waututh* (at paragraphs 728-36), stating that Canada did not explain why the impacts to its asserted rights and title required no accommodation beyond generic mitigation measures that were not specific to Lummi.

[200] I do not agree with Lummi that the Crown misconceived Lummi's asserted rights or the Project's impacts on those rights. In my view, the CAR captured Lummi's main concerns and described the specific ways those concerns would be addressed. Lummi was afforded

opportunities to identify any deficiencies and to provide feedback on proposed measures for addressing Project impacts and on the process. The Agency encouraged comments, offered to meet, and asked Lummi to raise any outstanding concerns. Lummi did not do so.

[201] While Canada's engagement during the environmental assessment encompassed transboundary effects on US rights, the duty to consult only applied to the Project's impacts on Lummi's asserted section 35 rights in Canada. In this regard, the Agency explained in the CAR how it had characterized the Project's potential impacts on Lummi's interests within Canada and it described how those impacts would be addressed. Lummi did not comment on the measures proposed in the draft CAR or explain how they failed to address Project-related impacts to Lummi's asserted section 35 rights. I agree with AGC that Lummi's comments focused on *Desautel* and its position that it was owed a duty of deep consultation.

[202] Contrary to Lummi's submissions, Canada's responses to Lummi's concerns were not brief and generic. The Project conditions with which VFPA must comply are detailed, specific, and comprehensive, covering 21 categories and spanning approximately 50 pages. They include requirements to monitor, follow-up, and provide reports on the Project's effects over time. In addition to the Project conditions, there are detailed and specific government initiatives.

[203] In my view, Lummi's circumstances are not like those of the Upper Nicola Band in *Tsleil-Waututh*. Upper Nicola pointed to concerns that had not been addressed and it proposed numerous potential mitigation measures, but Canada did not respond or explain why these measures were rejected: *Tsleil-Waututh* at paras 728-36. Lummi did not: comment on VFPA's IR

responses or commitments, the draft Project conditions, or proposed government measures and initiatives; propose changes to the measures for addressing Project impacts or ask for anything to be revised; explain how the measures were inadequate or how its concerns were or were not addressed; or propose any additional measures to preserve its rights or address its concerns.

[204] In oral argument, Lummi gave examples of accommodation, such as compensation or changes to the Project, and stated it was not offered any accommodation. I disagree. Project conditions and other government measures are important commitments that require significant investment and resources. They are accommodation measures. Lummi may not have been offered the kind of accommodation it wanted, but I agree with AGC that Lummi had the opportunity to influence the development of Project conditions and to ask for additional accommodations. In this proceeding, Lummi has not identified material gaps in the conditions and other measures for addressing its Project-related concerns or explained how they are inadequate for preserving its section 35 rights pending a resolution of its claim. Consultation with Lummi did not suffer from the flaw in *Gitxaala*, where the Crown showed no willingness to amend or supplement the proposed conditions for the project at issue. Rather, Lummi did not take advantage of opportunities to explain how the proposed measures failed to address its concerns.

[205] At all stages of the consultation process, good faith on both sides is required: *Haida* at para 42. The Crown must intend to substantially address concerns as they are raised and Indigenous groups must not frustrate the Crown's reasonable good faith attempts: *ibid*. Indigenous groups must make their concerns known, respond to attempts to meet their concerns,

and to try to reach a mutually satisfactory solution: *Mikisew 2005* at para 65. During the assessment, Lummi asserted that Canada failed to meet its consultation duty, but it did not provide specifics or explain how the Crown could adequately preserve asserted section 35 rights pending a resolution of its claim. Nonetheless, the Crown remained responsive and continued to ask for comments and feedback.

[206] There were imperfections in the process, but in my view they did not render consultation inadequate. Lummi has not established any material shortcomings attributable to the Crown that went beyond imperfections.

[207] As noted above, the Agency should have done more to respond to Lummi's concerns about the CAR statement that communications with Lummi were focused on an openness to hearing concerns, as opposed to formally consulting with them, and this was a serious imperfection.

[208] While there was some delay by both sides, I disagree with Lummi that Canada ran down the clock, cut consultation short, or rushed to a Cabinet decision.

[209] I also disagree that the Agency deferred any consideration of how to accommodate impacts to Lummi's rights to a different government department, CIRNAC. The Agency's proposed Project conditions were accommodation measures, and I agree with AGC that a larger conversation about Lummi's rights exceeded the scope of the environmental assessment. In this

regard, CIRNAC would be better placed to “work through and implement the outcomes of *Desautel*” than a Project-specific forum.

[210] Lummi believed the parties were at an impasse—that despite *Desautel*, the Agency was not going to engage in consultation—but the record shows that Canada engaged with Lummi on the Project’s potential impacts with an intention and willingness to understand the full scope of Lummi’s section 35 rights, grapple with its concerns, and substantially address them. Lummi did not meet its obligation to fully participate in the environmental assessment and consultation process, and in my view, this had the biggest impact on the process.

[211] While the issue of remedy does not arise, Lummi’s arguments on remedy reinforce the adequacy of consultation. Lummi argued that the Order in Council should be set aside, and the process rolled back to October 2021, so the Crown can consult with Lummi on VFPA’s IR response and the Project conditions and have a two-way dialogue on how to address Lummi’s concerns—including, for example, by adding to or revising Project conditions. I agree with VFPA that Lummi seeks to be afforded opportunities that it already had.

[212] In its argument, Lummi pointed out that it had asked to be consulted in accordance with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). However, Lummi does not allege that Canada failed to meet its consultation duty because it breached an UNDRIP obligation. In my view, Lummi has not properly raised an issue for review relating to UNDRIP.

[213] In conclusion, based on my review of the record, Lummi was afforded a process that exceeded what the middle of the *Haida* spectrum required, and Canada executed the process in a way that was reasonable, meaningful, and honourable. Lummi has not shown that Cabinet's conclusion on consultation—that the consultation process undertaken during the Project's environmental assessment was consistent with the honour of the Crown and that Indigenous Nations' interests had been appropriately accommodated—was untrue for Lummi's process.

VII. Conclusion

[214] Lummi's application is dismissed. Canada owed a duty to consult with Lummi on the Project's impacts to its asserted section 35 rights, but Canada did not refuse to consult or fail to fulfill its consultation duty. Lummi has not established that Cabinet made its justification decision before adequate consultation had taken place.

[215] With respect to costs, the parties submit that as between Canada and Lummi, costs should be payable to the successful party, and that \$15,000 represents a reasonable award. Lummi and VFPA do not seek costs from one another.

[216] I find the parties' cost proposal to be reasonable. Lummi shall pay \$15,000 in costs to Canada.

[217] At the conclusion of the hearing, the parties were asked to inform the Court of any urgency in receiving the Court's decision or circumstances that would justify an exemption from the requirement to issue precedential decisions in both official languages: *Official Languages*

Act, RSC 1985 c 31 (4th Supp), s 20(1)(a.1). The parties submit that the decision does not fall within an exemption under the *Official Languages Act*, and that the precedential value of this decision outweighs its urgency. I agree with these submissions. This decision will be issued in both official languages.

JUDGMENT IN T-1080-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. Lummi shall pay costs to Canada, fixed at \$15,000.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1080-23

STYLE OF CAUSE: LUMMI NATION v THE ATTORNEY GENERAL OF CANADA AND VANCOUVER FRASER PORT AUTHORITY

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JUNE 26-27, 2024

JUDGMENT AND REASONS: PALLOTTA J.

DATED: DECEMBER 17, 2025

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