



November 25, 2024

Hon. Tamara Davidson
Minister of Environment and Parks
Via Email Only: ENV.Minister@gov.bc.ca

Dear Minister Davidson,

RE: Prince Rupert Gas Transmission Project Substantial Start Determination

Congratulations on your recent appointment.

The provincial Environmental Assessment Certificate (“EAC”) expiry date for the Prince Rupert Gas Transmission Project (“PRGT”) is today, November 25, 2024. The Minister of Environment and Climate Change Strategy is required to reasonably determine whether PRGT has been “substantially started” as of that date, for the purposes of determining whether the project’s EAC has expired.¹

The Gitanyow Hereditary Chiefs write to provide our review of PRGT’s *Substantially Started Determination Application* (“SSD Application”), as well as to seek clarity regarding the Province’s proposed process for consultation with Gitanyow on the substantial start determination (“SSD”) for PRGT.

Gitanyow’s review of the SSD Application indicates that PRGT has not been substantially started, and consequently the project’s EAC has expired as of today’s date. As a result, the agreement between the Province and Gitanyow regarding PRGT is also no longer in effect.

The PRGT project has not been “substantially started”

The proponent has provided Gitanyow with the SSD Application it submitted to the Environmental Assessment Office (“EAO”), in which PRGT seeks a positive SSD. Gitanyow

¹ *Environmental Assessment Act*, S.B.C. 2018, c. 51, s. 31 [“EAA”].

has carefully reviewed the SSD Application and concluded that the proponent has not substantially started the PRGT project.

Attached to this letter as an Appendix is Gitanyow's detailed review of the SSD Application. In summary, PRGT has not been substantially started because:

- A. the PRGT project described in its EAC cannot be operated and will not be completed due, *inter alia*, to the cancellation of its terminus;
- B. PRGT's proposed new pipeline routes and related major design modifications have not been approved, and its proposed new terminus does not have an EAC;
- C. PRGT is legally barred from undertaking construction activities throughout the vast majority of the pipeline route;
- D. PRGT's completed physical activities are minor in relation to the scope of the project;
- E. PRGT heavily and unduly relies upon non-physical activities such as permitting and investment that have only minimal, secondary relevance to the SSD;
- F. PRGT mischaracterizes Indigenous engagement and support as it relates to Gitanyow;
- G. neither PRGT nor its proposed new terminus has a Final Investment Decision;
- H. PRGT seeks to raise various justifications for lack of construction progress, yet the jurisprudence states such justifications cannot be considered in the SSD;
- I. PRGT's "strategic" attempt to preserve its EAC and avoid fresh environmental assessment – through undertaking limited, last-minute physical activities on a project that lacks the necessary legal, financial and practical basis to proceed – is inconsistent with the purposes of the substantial start requirement; and
- J. PRGT raises irrelevant matters to downplay the need for fresh assessment of the project.

PRGT Agreement between the Province and Gitanyow is no longer in effect

With the expiry of the PRGT EAC, the *Prince Rupert Gas Transmission Project Natural Gas Pipeline Benefits Agreement* executed in counterpart between Gitanyow and the Province in December 2014 and January 2015, respectively (the "PRGT Agreement"), is no longer in effect.

The PRGT Agreement relates to the PRGT project approved by, and described in, the EAC. The "Natural Gas Pipeline Project" that is the subject of the PRGT Agreement is defined in clause

1.1 as: “the Prince Rupert Gas Transmission Project identified in the Environmental Assessment Office Project Approval Certificate issued on November 25, 2014 under the *Environmental Assessment Act...*”, which includes various listed components. PRGT’s EAC expires as of today’s date, and the related EAC Certified Project Description is consequently invalid. The “Natural Gas Pipeline Project”, within the meaning of the PRGT Agreement, ceases to exist and thus the PRGT Agreement is no longer in effect.

For similar reasons, the agreement between the proponent and Gitanyow regarding PRGT is not in effect, which Gitanyow has communicated to the proponent.

Gitanyow requests clarity on SSD engagement

Gitanyow expects fulsome and meaningful engagement from the Province regarding the PRGT SSD, carried out in a manner that upholds Gitanyow’s rights under the *United Nations Declaration on the Rights of Indigenous Peoples*.

Jurisprudence and policy acknowledge that the Province has a constitutional duty to consult Gitanyow regarding the SSD. The BC Supreme Court has stated that such consultation should address the “question of whether the project can still proceed in the face of so many years of delay, when measured against the time-sensitive provisions of [the SSD requirement]”.² Former Minister George Heyman affirmed the Province’s obligation to consult Gitanyow regarding the PRGT SSD.³

Gitanyow has received the EAO’s November 22, 2024 letter regarding the PRGT SSD, and Gitanyow is aware of the fact sheet posted online by the EAO regarding the PRGT SSD.⁴ However, a number of question remain regarding the consultation process for the SSD. Gitanyow seeks a response to the following process requests about the Province’s approach to the PRGT SSD.

1. In the circumstances of this SSD, in Gitanyow’s view the Minister should make the PRGT SSD rather than an EAO employee. Will the Minister make the PRGT SSD?
2. Please confirm that Gitanyow will be provided an opportunity to review and respond to both (a) the EAO’s draft preliminary assessment of project status, and (b) the EAO’s

² *Taku River Tlingit First Nation v. British Columbia (Minister of Environment)*, 2014 BCSC 1278, para 70 [“*Taku River Tlingit*”].

³ Minister George Heyman letter to Gitanyow dated March 22, 2024.

⁴ Environmental Assessment Office, “[Factsheet: Determination of substantial start for Prince Rupert Gas Transmission project](#)” (November 22, 2024) [“EAO Factsheet”].

draft decision document, within the meaning of the *Substantial Start Determination Policy* ("SSD Policy"),⁵ prior to finalization of those documents.

3. Please confirm that the EAO will ensure Gitanyow has access to any additional information, beyond the proponent's SSD Application, that the EAO considers or requests as part of the PRGT SSD process.
4. The EAO indicates that it will conduct further on-site inspections to inform the SSD.⁶ Will the EAO invite a Gitanyow representative to attend such inspections as an observer?
5. Please confirm that any further engagement on the Substantial Start Determination Policy between the BCEAO and Gitanyow will inform the application of the Policy to review of the PRGT Application for a Substantial Start.

Gitanyow is aware of the EAO's proposed January 15, 2025 date for providing written input regarding the PRGT SSD. Please consider this letter and the enclosed Appendix as part of Gitanyow's submission. Gitanyow may make additional submissions based on any further information or developments that arise. However, Gitanyow seeks more in-depth engagement on this matter than mere consideration of a written submission, including engagement based on the process requests above, given the potentially significant impacts of the PRGT SSD on Gitanyow.

Thank you for your attention to this important matter. We look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read 'Glen Williams', with a large, sweeping flourish above the name.

Glen Williams/Malii
President & Chief Negotiator

⁵ Environmental Assessment Office, *Substantial Start Determination Policy* (June 15, 2021), page 10, Steps 2 and 4 ["SSD Policy"].

⁶ EAO Factsheet, *supra*, page 1.

SIMGIGYET'M GITANYOW

WATAKNA4ETXW Delorah Jod
SINDIHI - Sukam Moya
HAITSIMSXW - Verna Howard
Cunee Lan GPC

D Russell sr

Cc:

Hon. Christine Boyle, Minister of Indigenous Relations and Reconciliation
Alex MacLennan, Chief Executive Assessment Officer
Ryan Stark, Manager – Decision Support, British Columbia Energy Regulator

APPENDIX

Gitanyow review of PRGT Substantial Start Determination Application⁷

Upon review of the PRGT SSD Application, Gitanyow has concluded that PRGT has not achieved a substantial start of its project for the reasons below.

A. The PRGT project described in the EAC cannot be operated and will not be completed

Only those components of a project described in the Certified Project Description (“CPD”) of a project’s EAC are considered for the purposes of a SSD, because other works or activities are not part of the authorized project.⁸ It is common ground that the PRGT project described in PRGT’s CPD will not be completed or operated.

Pacific Northwest LNG, the LNG facility intended to serve as PRGT’s terminus, was cancelled and its respective EAC expired in 2019. The PRGT project, as described in its CPD, has no terminus. Instead, PRGT proposes a new western route to serve a different proposed terminus for the pipeline: the Ksi Lisims LNG facility. PRGT also proposes a new eastern route for the pipeline to address, *inter alia*: “the current changing context for industrial development within Treaty 8 territory in light of the 2021 decision in *Yahey v. British Columbia* that determined that the Government of British Columbia had infringed on the rights of Blueberry River First Nations under Treaty 8 through cumulative effects from provincially authorized developments.”⁹

These significant project changes lack the required approvals, as addressed below, thus they are not part of the project that is considered for the purposes of whether a substantial start has been achieved. Rather, the question of whether PRGT has substantially started its project is evaluated against the project’s approved CPD. It is plainly apparent that PRGT will not build the project described in its CPD.

While PRGT inserted the words “alternative route” into its EAC amendment applications for new western and eastern routes, PRGT offers no legal or practical basis upon which it could complete and operate the *current* route described in the CPD. Indeed, PRGT acknowledges that it does not plant to build the project described in its CPD. For instance, PRGT states in

⁷ Prince Rupert Gas Transmission Ltd., *Substantially Started Determination Application: Prince Rupert Gas Transmission Project*, November 19, 2024 [“SSD Application”].

⁸ SSD Policy, *supra*, page 6.

⁹ [Prince Rupert Gas Transmission Project: Application for Eastern Route Alternative Amendment to EAC #14-06](#) (August 2024), page 3.2

its SSD Application that its current proposal is to build a pipeline to the Ksi Lisims LNG facility, rather than the defunct Pacific Northwest LNG facility.¹⁰

The proponent's lack of legal or practical ability to complete and operate the PRGT project described in its CPD, as well as the proponent's related acknowledgement that it instead plans to pursue a different pipeline route and terminus, strongly indicates that PRGT is not in a position to substantially start the project approved in its EAC.

B. PRGT's proposed new pipeline routes and major design modifications have not been approved, and its proposed new terminus does not have an EAC

PRGT's proposed new terminus facility cannot be constructed or operated, as of PRGT's EAC expiry date. The Ksi Lisims LNG facility has not completed the provincial environmental assessment process and thus lacks an EAC. Moreover, PRGT's proposed new routes for the pipeline, at both the western and eastern ends, have not been approved due to belated submission of EAC amendment applications by PRGT.

On June 21, 2024, PRGT submitted an application to amend its EAC for a proposed new western pipeline route to a new terminus and related project changes. On August 23, 2024, PRGT submitted an application to amend its EAC for a proposed new eastern pipeline route and related project changes. These are both highly complex proposed changes to the PRGT project proposal. PRGT's SSD Application acknowledges that each of the two EAC amendment requests are "major design modifications" to the project.¹¹ The EAO policy for EAC amendments states that the EAO's review timeline, from submission of an amendment application to referral, is one to four years for "complex" amendments.¹² Even "typical" EAC amendments, which PRGT's proposed route changes are not, have a review timeline of six months to one year under the EAO policy.

PRGT submitted its western route EAC amendment application roughly five months before its EAC expiry date, and its eastern route EAC amendment roughly three months before the EAC expiry date. This did not leave enough time for consideration and decision on the amendment applications prior to the EAC expiry date of November 25, 2024.

Unsurprisingly, the EAO will not have completed review of PRGT's EAC amendment requests by the EAC expiry date. Furthermore, it has not been demonstrated that all impacted Indigenous Nations have provided their free, prior and informed consent for the proposed new PRGT pipeline routes and major design modifications.

¹⁰ SSD Application, *supra*, page 6.

¹¹ SSD Application, *ibid*, page 8.

¹² Environmental Assessment Office, [Amendments to Environmental Assessment Certificates and Exemption Orders – Guidance for Holders](#) (January 2024), page 8.

Consequently, PRGT does not have approval to build its proposed new pipeline route and related major design modifications as of the EAC expiry date, nor does it have an approved terminus facility. This further indicates PRGT is not in a position to substantially start its project.

C. PRGT is legally barred from undertaking construction activities throughout 92.8% of the pipeline route described in the CPD

The British Columbia Energy Regulator (“BCER”) has confirmed with Gitanyow the BCER’s view that pre-construction conditions have not been satisfied for any of PRGT’s BCER permits outside of Section 5B. PRGT’s SSD Application recognizes that “construction activities in other spreads are constrained by permit conditions.”¹³ While PRGT acknowledges its present inability to satisfy BCER permit conditions requiring a final investment decision in a downstream LNG facility, PRGT also has not met other pre-construction permit conditions such as mitigation plan reporting and related engagement with impacted First Nations, and providing notice for the purposes of cumulative effects assessment of the project.

The BCER’s approval of construction activities for section 5B of the PRGT pipeline is currently subject to legal challenge,¹⁴ raising uncertainty as to whether PRGT has the necessary approvals to conduct construction at all. Gitanyow has expressed deep concerns to the BCER about failure to conduct cumulative effects assessment of the project as a whole prior to approving construction activities, as well as BCER’s related inadequate consultation with Gitanyow on the segmentation of the PRGT Section 5 permit into Sections 5A and 5B. Regardless, even putting aside these matters, Section 5B accounts for only approximately 7.2 percent of the pipeline length described in PRGT’s CPD.¹⁵ PRGT is legally barred from undertaking construction activities, within the meaning of the BCER permits, throughout the remaining 92.8 percent of the pipeline length.

PRGT asserts that it has focused on Section 5B because “construction on Nisga’a Lands is the most complex and long-lead construction on the entire Project route, due to the work required to construct and achieve safe access routes to critical Project areas. Therefore, it was essential to commence construction in this section, as it requires a longer overall

¹³ SSD Application, *supra*, page 16.

¹⁴ BC Supreme Court No. VLC-S-S-245853.

¹⁵ The project described in PRGT’s CPD includes a total length of up to 900 kilometres, depending on the chosen marine route (SSD Application, *supra*, page 12). PRGT states that it has cleared trees in approximately 42 kilometres of the pipeline corridor, accounting for 65 percent of Section 5B (SSD Application, page 63). This indicates that section 5B spans a length of roughly 64.6 kilometres total, which accounts for approximately 7.2 percent of the total pipeline length under the CPD.

construction duration to complete.”¹⁶ However, PRGT does not provide any evidence to explain why construction within the specific areas it undertook physical works is more complex than all other pipeline sections, nor why it was “essential” that those physical works be completed first. The alternative explanation is that PRGT is legally barred from commencing construction anywhere else.

D. Completed physical activities are minor in relation to the scope of the project

The physical activities PRGT has carried out do not constitute a substantial start of the project, for the reasons below.

- i. *Physical activities are considered in relation to the scope of a project, not distances set out in the Reviewable Projects Regulation*

PRGT states in its SSD Application that it deliberately planned and carried out physical works across a distance of roughly 42 kilometres because a similar-diameter pipeline of at least 40 kilometres would require an environmental assessment under the provincial *Reviewable Projects Regulation* (“RPR”).¹⁷ PRGT asserts it has achieved a substantial start on this basis, because its physical works span a distance that exceeds the 40-kilometre RPR threshold. There are several difficulties with this assertion.

First, nothing in the SSD jurisprudence or policy refers to the RPR thresholds as a determinant for whether substantial start has been achieved. The Minister in *Glacier Resorts Ltd. v. British Columbia (Minister of Environment)* considered, as one factor in deciding that a substantial start had *not* been achieved, the fact that the construction at issue was limited to a small day-skiing area that “would not have required an environmental assessment certificate and was not what the massive project report was directed to.”¹⁸ This does not support the contention that, to achieve a substantial start, a proponent need only carry out physical activities in an area that surpasses an RPR threshold. Rather, *Glacier Resorts* affirms that, for an SSD, completed physical works are considered against the scope of the project described in the EAC.

Thus, a second difficulty with PRGT’s reliance on the 40-kilometre RPR threshold is that an SSD must consider the scope of physical works completed *in relation to the scope of the project*. PRGT’s CPD does not describe a 40-kilometre pipeline; it describes a pipeline of up to 900 kilometres with various compressor stations, a meter station and ancillary facilities. PRGT asserts in its SSD Application that: “To be substantially started the project does not

¹⁶ SSD Application, *ibid*, page 30.

¹⁷ SSD Application, *ibid*, pages 9, 31, 68.

¹⁸ *Glacier Resorts Ltd. v. British Columbia (Minister of Environment)* 2019 BCCA 289, para 56 [“*Glacier Resorts*”].

need to have completed a particular proportion of construction.”¹⁹ While it is true there is no ‘magic number’ of physical activities to be undertaken, the BC Court of Appeal states in *Glacier Resorts* that: “whether a start is to be considered “substantial” will depend, at least in part, on the scope of the project.”²⁰ In this context, the EAO’s SSD Policy indicates that an SSD Application should include: “[a] description of what construction still remains to be completed before the project can become operational”; and “[f]or individual elements of the project, a description of what percentage of construction is complete.”²¹ PRGT’s SSD Application provides very little information on these important factors.

Third, and relatedly, *it matters what the physical activities are*, and how significantly they advance completion and operation of the project. This is evident from the SSD Policy, including the information requirements excerpted immediately above. The fact that physical works cover a distance that exceeds an *RPR* threshold is immaterial if the works themselves are minor. As addressed below, PRGT’s physical works are very limited in relation to the scope of the project described in the CPD, both in terms of their geographic scope and the nature of the works themselves.

- ii. *Construction activities were carried out over roughly two and a half months during the ten-year EAC period*

After receiving EAC approval on November 25, 2014, PRGT did not undertake construction activities on the project for roughly nine years and nine months, beginning “strategic” physical works only three months before the EAC expiry in an effort to prevent the EAC from expiring. PRGT’s SSD Application relies upon physical works undertaken between August 24, 2024 and November 12, 2024.²² While PRGT also identifies some activities carried out prior to the abandonment of the Pacific Northwest LNG facility (e.g. geotechnical investigations), PRGT acknowledges that it did not commence construction at that time.²³

This is a very limited construction schedule that does not support a substantial start of the project.

- iii. *Most activities relate to ancillary components of the project and/or are temporary in nature*

¹⁹ SSD Application, *supra*, page 29.

²⁰ *Glacier Resorts*, *supra*, para 28.

²¹ SSD Policy, *supra*, page 9.

²² SSD Application, *supra*, page 38.

²³ SSD Application, *ibid*, pages 12, 52.

The majority of physical works relied upon in PRGT’s SSD Application are identified in the CPD as ancillary to the project, and/or are identified in the SSD Application as temporary in nature, including:

- developing borrow pits (ancillary);
- constructing workforce accommodation (ancillary and temporary);
- preparing equipment storage sites (ancillary and temporary);
- installing bridges (ancillary); and
- upgrading and maintaining access roads (ancillary, and it is not clear whether some access roads are also temporary – certain access roads are identified as permanent, e.g. Ginulak Road,²⁴ but there is no comprehensive indication of the permanent or temporary nature of access roads addressed in the SSD Application).

The BC Supreme Court states in *Taku River Tlingit First Nation v. British Columbia (Minister of Environment)*, that, in making an SSD: “temporary structures at the site, if they will be soon removed, followed by remediation, are less important to consider than structures which will be in place for the duration of the project.”²⁵ The Court further directs: “the decision maker needs to focus primarily on physical activities... having a long-term impact on the site.”²⁶ The temporary works described above, such as workforce accommodation and equipment storage, are thus given less weight in SSD decision-making.

Similarly, the SSD Policy asks: “are the activities in relation to a significant or important step, or are they ancillary, secondary, or temporary?”²⁷ It follows that, like temporary physical works, ancillary works are given less weight in SSD decision-making, in contrast with physical activities that accomplish “a significant or important step” in the project. All PRGT activities listed above are identified as “ancillary” in PRGT’s CPD, and thus they are given less weight in SSD decision-making in comparison with the main project elements, identified in the CPD as the pipeline, compressor stations and meter station.

iv. Clearing activities undertaken are limited in nature

²⁴ SSD Application, *ibid*, page 46.

²⁵ *Taku River Tlingit*, *supra*, para 35.

²⁶ *Taku River Tlingit*, *ibid*, para 39.

²⁷ SSD Policy, *supra*, page 9.

The only physical activity identified in PRGT’s SSD Application that is not ancillary in nature is clearing within the pipeline right of way to remove trees and vegetation. PRGT’s clearing is insufficient to support a substantial start for reasons including the following.

- a. The clearing is minimal in relation to the scope of the project, consisting of removal of trees and vegetation within approximately 4.7 percent of the total pipeline right of way described in the CPD.²⁸
- b. Further necessary steps to prepare the land for pipeline construction have not been taken, beyond clearing. In particular, PRGT has not completed final grade planning nor conducted any grading in areas of tree and vegetation removal.²⁹ The SSD Application identifies that grading is “...crucial as it ensures a stable foundation for construction equipment and eventually, the pipeline”, while stating that “PRGT’s Year-1 (2024) Construction Program does not include grading within the ROW”.³⁰
- c. PRGT’s clearing is fragmented, reducing its usefulness for any planned pipeline construction. PRGT has not conducted clearing in the Nisga’a Memorial Lava Bed Corridor Protected Area, resulting in a disconnected “eastern front” and “western front” of clearing in the right of way.³¹ Within the eastern front and western front, PRGT also states that: “Where possible, the Year-1 Construction Program was designed to include discontinuous clearing to avoid watershed disruption and clearing through the riparian zones of watercourses and wetlands.”³²
- d. PRGT has apparently not fully cleared the width of right of way necessary for pipeline construction, in areas where it has conducted clearing. In its application for an EAC, PRGT indicated that the typical width of cleared pipeline right of way it would require for construction is 50 metres, although the necessary width could extend up to 300 metres.³³ 42 kilometres of clearing at a width of 50 metres would account for 210 hectares. Yet PRGT stated to Gitanyow that it has cleared approximately 100 hectares along the

²⁸ The SSD Application describes clearing along 42 km of right of way. The CPD describes a pipeline with a total length of up to 900 km. SSD Application, *supra*, pages 12, 38.

²⁹ SSD Application, *ibid*, pages 38, 42,

³⁰ SSD Application, *ibid*, page 62.

³¹ SSD Application, *ibid*, pages 38, 42, 60.

³² SSD Application, *ibid*, page 51.

³³ Environmental Assessment Office, [Prince Rupert Gas Transmission Assessment Report](#) (November 12, 2014), pages 22-23.

42 kilometres of right of way, which appears to be consistent with Tables 4.2 and 4.4 of the SSD Application.³⁴

- v. *PRGT has not achieved any of the indicators of a “material commencement of construction” for the project*

Multiple agreements executed in 2014/2015 between the provincial government and First Nations regarding PRGT set out that PRGT would have achieved “Material Commencement of Construction” when all three of the following thresholds were met:

1. the Province receives written confirmation from the proponent that orders have been placed for substantially all of the pipe required for the Natural Gas Pipeline Project;
2. a contract has been entered into with at least one large diameter pipeline general contractor for completion of the work associated with installation of the pipe for one spread having a linear length of more than 25 kilometres of the Natural Gas Pipeline Project; and
3. the completion of production welding along a portion of at least 10 kilometres of a spread of the Natural Gas Pipeline Project.³⁵

None of those three thresholds have been achieved. While prior government-to-government agreements do not fetter the Minister’s SSD, they establish a relevant set of thresholds for the Minister to consider as part of determining whether a substantial start of PRGT has occurred. It would be absurd and contradictory for the Minister to find that PRGT has achieved a “substantial start” of the project although it has not achieved even a single agreed-upon indicator of a “material commencement of construction” of the project.

- vi. *PRGT’s physical activities are significantly less than the most comparable “substantially started” pipeline (which itself was never constructed)*

While the SSD for each project is approached on a case-by-case basis, comparable projects may help illustrate whether a substantial start has or has not been achieved. One appropriate comparator to PRGT is the Pacific Trail Pipelines project (“PTP”), because it represents a provincial natural gas pipeline for which some clearing and other preliminary physical activities had been undertaken, but which had not completed construction as of

³⁴ SSD Application, *supra*, pages 39-40, 43.

³⁵ See e.g. [Prince Rupert Gas Transmission Project Natural Gas Pipeline Benefits Agreement](#) between British Columbia and Gitanyow Nation (December 2014-January 2015), clause 3.2(a); [Natural Gas Pipeline Benefits Agreement Prince Rupert Gas Transmission Project](#) between British Columbia and Nisga’a Nation (November 2014), clause 4.2(a).

the SSD. PTP is relevant to demonstrating PRGT has not achieved a substantial start in two respects.

First, PTP undertook substantially more physical activities than PRGT to achieve a positive SSD, both in aggregate and in relation to the scope of the project. PTP received a positive SSD in December 2016 based on the physical activities below.

- PTP carried out physical activities over approximately four years (August 2012 to August 2016),³⁶ in comparison to the two and a half months of physical activities carried out by PRGT.
- PTP cleared 479 hectares along approximately 94 kilometres of pipeline right of way, accounting for approximately 19.9 percent of the total length of the 472 kilometre pipeline.³⁷ In contrast, PRGT has cleared slightly over 100 hectares along 42 kilometres of right of way, which is only 4.7 percent of the 900 kilometre maximum pipeline right of way described in its CPD.
- PTP completed 313 hectares of access development including constructing and upgrading access roads and completing 36 bridges and 93 culverts.³⁸ PRGT constructed 9 bridges, and undertook upgrades and maintenance along 47 kilometres of access roads³⁹ (the latter figure is difficult to directly compare to PTP because the unit of measurement differs).
- PTP cleared 61 hectares of land for various staging areas, stockpiling sites and camp locations.⁴⁰ PRGT cleared 15 hectares of land for storage areas and a worker camp.⁴¹ PRGT also built a camp within that area.
- PTP also installed four communication repeater sites, and purchased and was ready to install a cable crane system in areas of mountainous terrain.⁴²

Second, in considering comparable SSD examples, it is relevant to consider not only the prior SSD thresholds used by the EAO, but also what became of the project post-SSD, to evaluate the accuracy of the conclusion that the project had been “started in its essentials,

³⁶ Environmental Assessment Office, *Substantially Started Determination: Pacific Trail Pipelines Project* (December 11, 2016), pages 2-3 [“PTP SSD”].

³⁷ PTP cleared 79 percent of the “western portion” of the pipeline route that traversed 119 kilometres between kilometre 353 and kilometre 472 of the pipeline, accounting for approximately 94 kilometres or 19.9 percent of the total 472 kilometre pipeline. PTP SSD, *ibid*, page 3.

³⁸ PTP SSD, *ibid*, page 3.

³⁹ SSD Application, *supra*, page 63.

⁴⁰ PTP SSD, *supra*, page 3.

⁴¹ SSD Application, *supra*, page 50.

⁴² PTP SSD, *supra*, page 3.

in a real and tangible way”.⁴³ The fate of the PTP indicates that the SSD threshold used by the EAO in 2016 *was not robust enough*, because it resulted in the indefinite preservation of an EAC for a project that the proponent was not prepared to build.

PTP has not been constructed or operated in the eight years after it was found by the EAO to be “substantially started”. In its most recent quarterly report to the EAO, PTP describes “reduced Project activity since the 2017/2018 construction season” and notes there is not presently a clear construction schedule for PTP.⁴⁴ In 2022, the proponent of PTP’s proposed terminus, the Kitimat LNG Terminal (which had received a positive SSD in 2015), submitted decommissioning plans to the EAO.⁴⁵

Gitanyow submits that these outcomes indicate the factors used by the EAO to determine PTP had been substantially started were not reliable indicators that the project had in fact been started in its essentials, in a real and tangible way. The EAO should take this into account with respect to PRGT, and consequently adopt more robust SSD indicators. For example, the indicators for a “material commencement of construction”, addressed above, are helpful and instructive in this regard.

E. PRGT’s SSD application heavily relies upon non-physical considerations such as permitting, investment and engagement, yet these have only minimal, secondary relevance to the SSD in comparison to physical works

The BC Supreme Court sets out that:

The object of the *Environmental Assessment Act* is the protection of the environment. The definition of a project, therefore, is intended to address primarily physical activities affecting the land environmentally, as contrasted with bureaucratic activities, for example, which do not. Thus, in deciding whether a project has been substantially started, the decision maker should focus less on the permits which have been granted, and the money expended, as two examples, and more on what has taken place physically at the site, on the ground, as it were.⁴⁶

The EAO’s SSD Policy repeats that physical activities must be the primary focus of the SSD. While the SSD Policy notes “there is some latitude to consider other factors, along with physical work”, the SSD Policy indicates the relevance of non-physical factors is tied to how they corroborate or illustrate the scope of physical works:

⁴³ *Taku River Tlingit, supra*, para 37.

⁴⁴ PTP letter to EAO, “[Quarterly Report for 2024 Q2, Pacific Trail Pipelines Project, EAC 08-01](#)” (July 16, 2024), page 1.

⁴⁵ See e.g. Chevron letter to EAO, “[Kitimat LNG Decommissioning Plans](#)” (March 25, 2022).

⁴⁶ *Taku River Tlingit, supra*, para 34 (emphasis added).

Financial information can be provided in order to give an indication of scope of the construction and to assist in corroborating the significance of physical works... Similarly, although the focus is on what has physically taken place on the site, Holders may wish to include information on licenses, permits and studies that were prerequisites to physical construction.⁴⁷

While PRGT acknowledges these requirements,⁴⁸ elsewhere in its SSD Application PRGT attempts to place non-physical considerations such as investment, permitting and Indigenous engagement on equal footing with physical work in terms supporting an SSD. For example, PRGT asserts: “a positive determination is justified by the physical construction completed, substantial investment, economic benefits, permits in place, and Indigenous engagement by the EAC expiry date.”⁴⁹ This statement is not consistent with the jurisprudence and policy above, which set out that the key consideration is the physical work carried out in relation to the CPD.

More generally, PRGT devotes a large proportion of its SSD Application to bureaucratic and non-physical considerations such as permitting, investment, engagement, and asserted project benefits.⁵⁰ These non-physical considerations have only minimal, secondary relevance to the SSD, to the extent they relate to physical work. The SSD Application’s heavy focus on such non-physical factors underlines that relatively little physical work has been undertaken in relation to the scope of the project.

F. PRGT mischaracterizes Indigenous engagement and support as it relates to Gitanyow

The SSD Application inaccurately portrays Indigenous engagement in an attempt to inflate the perception of Indigenous support for the project to bolster the SSD request.

As a general matter, recent correspondence between the proponent and the provincial Crown acknowledges Indigenous opposition to PRGT. Gitanyow has recently learned that the BCER’s April 2024 segmentation of PRGT’s Section 5 permit into Sections 5A and 5B, which formed the basis upon which the Province has allowed limited construction activities to proceed on the project, was explicitly carried out in order to avoid physical activities in the territories of Indigenous Nations other than the Nisga’a Nation. BCER

⁴⁷ SSD Policy, *supra*, pages 7 and 9.

⁴⁸ E.g. SSD Application, *supra*, page 29.

⁴⁹ SSD Application, *ibid*, page 11.

⁵⁰ For example, SSD Application sections 2.2.2, 2.2.3, 2.3.1, 2.3.2, 2.3.3, 2.5.1, 2.5.2, 4.1.2, 4.1.3, and all of Part 5 relate to non-physical considerations like permitting, Indigenous engagement, investment and asserted economic or other project benefits.

decision-maker Shannon Weatherill stated the following to TC Energy in an April 2, 2024 email, shortly before she segmented the Section 5 permit into Sections 5A and 5B:

I know that this new permit is setback within the Nisga'a Lands boundary to avoid area where other nations lands may overlap, from the old construction plans I can't be 100% sure exactly where section 5B starts and since this project has opposition I don't want to guess...⁵¹

As it relates to Gitanyow, specifically, the SSD Application does not properly characterize recent proponent engagement. After PRGT provided a draft version of the SSD Application to Gitanyow on October 30, 2024, Gitanyow requested that the proponent make several edits to its portrayals of Indigenous engagement in the SSD Application, as it relates to Gitanyow. The proponent did not make any revisions in response to Gitanyow's request. Below are the three inaccuracies that Gitanyow raised with PRGT.

i. *Inaccurate reference to notification of SSD efforts*

The draft SSD Application states: "PRGT provided a notification to Indigenous Nations relating to the Project's substantially started determination efforts in February 2024."⁵² This is untrue; Gitanyow received no notification of PRGT's SSD efforts in February 2024. In fact, Gitanyow explicitly asked PRGT on multiple occasions, beginning in August 2023, whether PRGT intended to pursue a determination that the project had been substantially started (versus commencing a new assessment, or seeking variation or exemption from the prohibition on multiple EAC extensions), yet PRGT declined to answer that question as recently as April 2024.

ii. *Inaccurate reference to collaboration on Indigenous Leader's Summit*

The draft SSD Application states: "PRGT has organized the Indigenous Leader's Summit collaboratively with all Indigenous Nations, so that all voices and perspectives continue to be considered while making informed Project decisions."⁵³ PRGT and Gitanyow did not collaborate to organize the Indigenous Leader's Summit. It is inaccurate to state that the Summit was organized with all Indigenous Nations. Gitanyow responded to the invitation and requested a more inclusive community meeting in Terrace or similar location within the project region, and this was not responded to by PRGT.

⁵¹ Shannon Weatherill email to TC Energy representative Adair Rigney, "Section 5A and 5B Construction Plans", (April 2, 2024). This email was obtained through an access to information request from local community members and recently shared with Gitanyow.

⁵² SSD Application, page 27.

⁵³ SSD Application, pages 66-67.

iii. *Incomplete context regarding Project Agreement*

The draft SSD Application states that PRGT has Project Agreements with 15 of 20 Indigenous Nations along the pipeline route, that PRGT intends to complete Project Agreement updates by early spring 2025, and that the Project Agreements “provide the basis of Indigenous support for PRGT and serve as an important foundation for ongoing dialogue and preparation for current and upcoming construction activities.”⁵⁴

These statements lack three important pieces of context with respect to Gitanyow. First, not all Gitanyow Wilp whose Lax’yip would be traversed by the pipeline signed a Project Agreement with the proponent in 2015. Second, since the proponent revived its project proposal in 2023, all relevant Gitanyow Wilp have clearly communicated that a new assessment of the project is appropriate, including under the Wilp Sustainability Assessment Process, and that the prior Project Agreement should be dissolved to accommodate this. Third, after careful review of PRGT’s draft SSD Application, Gitanyow has communicated to the proponent its view is that substantial start has not been achieved and thus the Project Agreement is no longer in effect in any event as of expiry of PRGT’s EAC.

In this context, attempting to portray past project agreements as unqualified support for the project is an incomplete and inaccurate representation of relevant interactions between PRGT and Gitanyow.

Moreover, it is worth emphasizing the lack of PRGT responsiveness to Gitanyow requests for changes in the draft SSD Application, as well as the overall misrepresentation of Gitanyow support for the project to provincial decision-makers.

G. Neither PRGT nor its proposed terminus has a Final Investment Decision

The SSD Application acknowledges that PRGT’s intended customer, the Ksi Lisims LNG facility, does not have a Final Investment Decision (“FID”). The SSD Application does not mention the fact that PRGT itself does not have a FID either.⁵⁵ The lack of a FID in PRGT after 10 years, as well as the lack of a terminus/customer with a FID, indicates a lack of financial and practical readiness to proceed with the project. Moreover, as a result of the BCER permit conditions noted above, the lack of a downstream facility FID bars construction throughout most of the PRGT route.

⁵⁴ SSD Application, pages 7, 26, 67.

⁵⁵ TC Energy, “TC Energy enters agreement to sell Prince Rupert Gas Transmission entities to Nisga’a Nation and Western LNG” (March 14, 2024), online: <https://www.tcenergy.com/announcements/2024/2024-03-14-tc-energy-enters-agreement-to-sell-prince-rupert-gas-transmission-entities-to-nisgaa-nation-and-western-lng/>.

The SSD Application notes that: “The purpose of this [FID] condition was to reduce the likelihood of long-term or permanent impacts occurring without the Project being fully developed”.⁵⁶ Gitanyow agrees with the rationale behind the BCER’s permit conditions requiring pre-construction proof of FID. A lack of FID indicates that PRGT’s project is not sufficiently advanced to warrant environmental and other impacts caused by construction, since the lack of FID significantly increases the likelihood those impacts will ultimately be caused for nothing if the project does not proceed. Put simply, substantial PRGT project construction is unlikely to be undertaken without a FID in PRGT and its proposed terminus. The lack of a FID in both PRGT and its proposed terminus supports the conclusion that PRGT has not been substantially started.

PRGT and the Nisga’a Nation were only able to secure BCER’s removal of the FID condition from the Section 5B permit because, in PRGT’s words: “the Nisga’a Nation has agreed to accept any impacts or risks associated with pipeline construction advancing without the Project being fully developed or the LNG facility customer having made an FID”.⁵⁷ It is significant that PRGT acknowledges its project is not “fully developed”. This admission underlines that PRGT’s “strategic” approach to commencing physical works in Section 5B is directed towards claiming a substantial start *even though* the project is not fully developed due, *inter alia*, to a lack of key financial and legal approvals, as well as failure to meet relevant pre-construction permit conditions.

H. PRGT seeks to raise mitigating factors that cannot be taken into account as part of the SSD

In its SSD Application, PRGT attempts to rely on a number of justifications for delays in its construction progress such as: significant market changes since 2014, including a substantial decline in the number of companies seeking to advance LNG export projects; the COVID-19 pandemic; delays in PRGT reaching a partnership with Ksi Lisims LNG; alleged regulatory delays for Ksi Lisims LNG; and the BCER conditions requiring pre-construction proof of a FID in a downstream LNG facility.⁵⁸

The substance of these justifications is not well explained. For instance, PRGT does not explain how COVID-19 specifically impacted its efforts to advance construction, beyond causing general global market and regulatory uncertainty. As another example, it is unclear how an allegedly slow regulatory process for Ksi Lisims delayed PRGT’s construction, given

⁵⁶ SSD Application, *supra*, page 9.

⁵⁷ SSD Application, *ibid*, page 9.

⁵⁸ SSD Application, *ibid*, pages 10, 15-16, 23.

that PRGT did not enter into a partnership with Ksi Lisims until a year ago and had not satisfied its own BCER pre-construction permit conditions during that time.

More importantly, however, these types of justifications are excluded from consideration in SSD decision-making. This issue was dealt with by the Court in *Glacier Resorts*. There, the proponent similarly raised a number of regulatory, legal and other difficulties it encountered, asserting that as a result of these difficulties it was practically prevented from beginning construction until the year its EAC was due to expire, leaving it “a very narrow construction window in that year”.⁵⁹ The Minister found that the project had not been substantially started and concluded: “I do not think the [SSD] threshold can be adjusted based on these mitigating factors.”⁶⁰ The BC Court of Appeal upheld the Minister’s decision, finding that:

...proponents may fail to commence a project through no fault of their own: they may fail to secure financing; encounter landowners who are unexpectedly reluctant to sell their land or yield necessary rights; face municipalities that are not cooperative in allowing rezoning; or simply face public hostility. While we might sympathize with a proponent that has tried its best but failed to make a substantial start on a project, it does not change the fact that the statutory test has not been met.⁶¹

The various justifications PRGT raises in its SSD Application for delay in construction progress are not properly considered as part of SSD decision-making.

I. PRGT’s “strategic” approach to preserve its EAC is inconsistent with the purposes of the substantial start requirement

According to the BC Court of Appeal, the purpose of the substantial start requirement is twofold. On the one hand, it recognizes that “[i]t would be unwise to allow long-delayed projects to proceed based on reports and conditions that have become outdated” due to progress in environmental science, changing public attitudes, increasing knowledge of impacts from development, changes in environmental or site conditions, and advances in technology⁶² (to which Gitanyow would add, advances in legal requirements, such as legislative affirmation of UNDRIP and a new *Environmental Assessment Act* that *inter alia* provides recognition for Indigenous-led assessment).

⁵⁹ *Glacier Resorts, supra*, para 40.

⁶⁰ *Glacier Resorts, ibid*, para 41.

⁶¹ *Glacier Resorts, ibid*, para 55.

⁶² *Glacier Resorts, ibid*, para 52.

At the same time, the substantial start requirement is intended to “protect proponents by allowing them to proceed with projects that have been “substantially started” within the deadline”.⁶³ This is fundamentally an inquiry into whether the project described in the EAC has been started “in its essentials, in a real and tangible way”, with an eye primarily to “what has taken place physically at the site, on the ground.”⁶⁴ The SSD does not entitle proponents that are not legally, financially, or practically ready to proceed with a project on the ground to ‘preserve’ outdated approvals and avoid new environmental assessments by carrying out minimal activities.

In autumn 2023, PRGT and Ksi Lisims LNG announced they had entered into an agreement that calls on PRGT to “preserve the regulatory permits” for its project.⁶⁵ In a February 7, 2024 letter from PRGT to the BCER (which was never provided to Gitanyow),⁶⁶ PRGT stated that it was providing the notifications required prior to commencing construction under its Section 5 permit “in order to maintain regulatory options for the Project”.⁶⁷ The SSD Application states that PRGT has taken a “careful and strategic approach” to planning and executing works that are explicitly aimed at seeking a positive SSD (and thus at preserving the EAC),⁶⁸ even though PRGT cannot complete or operate the project described in its EAC.

PRGT’s “strategic” effort to preserve its EAC is an attempt to avoid fresh environmental assessment of a long-delayed pipeline by tailoring limited, last-minute physical activities to create an illusion of starting a project that lacks the necessary legal, financial and practical basis to proceed. This approach is inconsistent with the purposes of the substantial start requirement, because a positive SSD in this context would allow further impacts to occur based on outdated assessment information and conditions even though the proponent has undertaken little work and is not ready to start its proposed project.

J. PRGT raises irrelevant matters to downplay the need for fresh assessment of the project

The SSD process is a factual inquiry into whether PRGT’s activities have met the requirement in provincial law for a “substantial start”. However, in its SSD Application PRGT

⁶³ *Glacier Resorts, ibid*, para 51.

⁶⁴ *Taku River Tlingit, supra*, paras 34-37.

⁶⁵ Brent Jang, “[TC Energy’s B.C. pipeline route bolstered by deal with Ksi Lisims LNG](#)” (October 19, 2023), *The Globe and Mail*.

⁶⁶ Local community members recently shared the February 7, 2024 PRGT letter with Gitanyow, after they obtained it through an access to information request. Neither PRGT nor the BCER provided the letter to Gitanyow.

⁶⁷ Letter from TC Energy to Shannon Weatherill, February 7, 2024, page 1.

⁶⁸ SSD application, *supra*, pages 9, 68.

raises issues that are irrelevant to the SSD in an apparent attempt to advance PRGT's underlying goal of avoiding environmental assessment.

In particular, PRGT states:

...under the 2018 *Environmental Assessment Act*, BC extended the overall duration of EACs for projects, from a total of 10 years to 15 years. By allowing for this longer total duration for an EAC, BC recognizes that the science used to complete an EA, and the EA conclusions, are sufficiently robust to allow for the authorization to remain valid for up to 15 years.⁶⁹

This assertion is seriously flawed for several reasons.

- i. Both the 2018 and 2002 *Environmental Assessment Act* prohibit more than one EAC extension, regardless of the original term.⁷⁰ PRGT has already extended its EAC once.
- ii. The 2018 *Environmental Assessment Act* also added various strengthened assessment provisions in comparison to the 2002 statute, which did not apply to PRGT's environmental assessment when it was carried out over a decade ago, including: provisions for Indigenous-led assessment;⁷¹ more stringent mandatory assessment matters including in relation to cumulative effects and impacts on current and future generations;⁷² and the ability of the Chief Executive Assessment Officer to unilaterally amend an EAC at its fifth anniversary.⁷³ PRGT is not entitled to selectively rely upon elements of the new *Environmental Assessment Act* that it views as favourable without having satisfied other more stringent aspects of that *Act*.
- iii. The term limits for EAC duration and extension in the 2018 *Environmental Assessment Act* (and the prior statute) are legislated *maximums*, setting out that the substantial start deadline and any extension must be "not more than" ten years and five years, respectively.⁷⁴ A proponent is not *entitled* to the maximum terms.

⁶⁹ SSD Application, *ibid*, pages 8 and 18.

⁷⁰ *EAA*, *supra*, s. 31(4)

⁷¹ *EAA*, *ibid*, ss. 19(4) and 41. Furthermore, *EAA* s. 7 is an enabling provision that may be used to recognize Indigenous consent-based decision-making in assessments, although it has been used only once. Gitanyow does not submit that implementation of these provisions has been adequate from the perspective of respecting Gitanyow ayookxw and upholding the *United Nations Declaration on the Rights of Indigenous Peoples*; Gitanyow simply notes that the provisions are strengthened in relation to the 2002 *Environmental Assessment Act*, under which PRGT's assessment was conducted.

⁷² *EAA*, *ibid*, s. 25.

⁷³ *EAA*, *ibid*, s. 32(5).

⁷⁴ *EAA*, *ibid*, s. 31(1) and 31(4).

- iv. The legislated maximums on EAC duration and extension under the 2018 *Environmental Assessment Act* were not intended to be and in no way represent an endorsement of the currency or appropriateness of assessment science, conclusions and conditions for specific projects. This is doubly true for assessments conducted before the 2018 *Environmental Assessment Act* existed, such as the PRGT assessment.

Importantly, in addition to being flawed, PRGT's interpretation of the meaning of maximum EAC terms under the 2018 *Environmental Assessment Act* is also irrelevant to the question of whether PRGT has substantially started its project. It is therefore unclear why PRGT has made this assertion multiple times in its SSD Application. The most plausible explanation Gitanyow can discern is that PRGT is laying groundwork to request an emergency variation or regulatory exemption from the prohibition on more than one EAC extension, on the assumption that its SSD Application will be rejected. Indeed the SSD Application states that:

PRGT also recognizes there are other options available to extend EAC durations that have previously been exercised, including the emergency variation powers under Section 46(1) and the regulatory exemption authority under Section 77(2)(h).⁷⁵

Again, this point is irrelevant to the question of whether PRGT has substantially started its project.

The question of an emergency variation or regulatory exemption from the *Environmental Assessment Act*, to excuse PRGT from the prohibition on multiple EAC extensions, would be a serious and entirely separate matter from the SSD Application. Gitanyow would expect to be immediately notified by the Province if it receives a request for such a variance or exemption, which would require significant government-to-government engagement with Gitanyow.

To be clear, Gitanyow's view is that there is no valid basis for such a variation or exemption,⁷⁶ which would seriously prejudice Gitanyow's rights by prolonging outdated provincial approvals in an attempt to circumvent necessary assessment of project impacts. Fresh and fulsome assessment of PRGT is necessary to ensure respect for

⁷⁵ SSD Application, page 30.

⁷⁶ In addition to the lack of an emergency that warrants variation of the *Act* for PRGT, and the lack of any principled or evidentiary basis for exempting PRGT from EAC expiry provisions that apply to all other reviewable projects, PRGT has not demonstrated that the powers to vary or exempt under *Environmental Assessment Act* ss. 46 or 77(2)(h) could be requested and/or used retroactively to revive PRGT's already-expired EAC.

Indigenous rights and high standards for environmental, social and cultural protection in light of changes over the past decade, including:

- implementation of Gitanyow’s Wilp Sustainability Assessment Process, which requires Gitanyow-led assessment of projects in Gitanyow Lax’yip, according to the ayookxw (Gitanyow law);
- changes in cumulative effects, both in terms of altered site and environmental conditions (e.g. increased extreme weather events and wildfires), and a different context of industrial activities proposed, completed and under construction;
- a significantly different PRGT project proposal, including an entirely different proposed terminus and different pipeline routes at both ends of the project;
- a new provincial *Environmental Assessment Act* with updated assessment factors and processes, including on relevant matters such as Indigenous-led assessment, cumulative effects, and impacts on current and future generations; and
- legislative recognition by both provincial and federal governments of the *United Nations Declaration on the Rights of Indigenous Peoples*, including its requirements for free, prior and informed consent.