

A-321-19
COURT NO. ~~19-A-36~~

FEDERAL COURT OF APPEAL

BETWEEN

CHIEF RON IGNACE and CHIEF ROSANNE CASIMIR, on
their own behalf and on behalf of all other members of the
STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC
NATION

APPLICANTS

AND

THE ATTORNEY GENERAL OF CANADA, TRANS
MOUNTAIN PIPELINE ULC AND TRANS MOUNTAIN
CORPORATION

RESPONDENTS

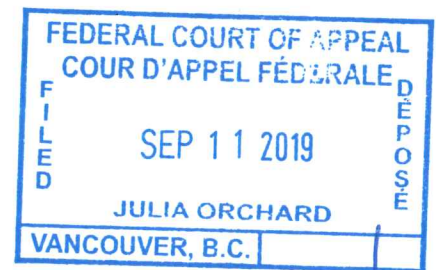
APPLICATION UNDER SECTION 28 OF THE *FEDERAL COURTS ACT*,

RSC 1985, c F-7

NOTICE OF APPLICATION

TO: THE RESPONDENTS

AND TO: THE NATIONAL ENERGY BOARD



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

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the
Judicial Administrator. Unless the Court orders otherwise, the place of the hearing will

be as requested by the Applicants. The Applicants request that this application be heard at the Federal Court of Appeal in Vancouver, British Columbia.

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

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

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

Dated: September 11, 2019

Issued by: JULIA ORCHARD
REGISTRY OFFICER
AGENT DU GREFFE
 (Registry Officer)

Address of local office: Federal Court of Appeal
 Courts Administration Service
 PO Box 10065, 3rd Floor
 701 West Georgia Street
 Vancouver, BC V7Y 1B6

TO: National Energy Board
 517 Tenth Avenue SW
 Calgary, Alberta T2R 0A8

Attorney General of Canada
 284 Wellington Street
 Ottawa, ON K1A 0H8

I HEREBY CERTIFY that the above document is a true copy of
 the original issued out of / filed in the Court on the SEP 11 2019
 day of _____ A.D. 20 _____

Dated this SEP 11 2019 day of _____ 20 _____

J. Orchard
 JULIA ORCHARD
 REGISTRY OFFICER
 AGENT DU GREFFE

Trans Mountain Pipeline ULC
 Trans Mountain Corporation
 c/o Maureen Killoran, Q.C.
 Suite 2500, TransCanada Tower
 450 - 1st St. S.W.
 Calgary AB T2P 5H1

APPLICATION

THIS IS AN APPLICATION FOR JUDICIAL REVIEW IN RESPECT OF the Governor in Council's ("**GIC**") decision to issue Order in Council No. P.C. 2019-820 dated June 18, 2019 (the "**OIC**") and published in the *Canada Gazette* on June 22, 2019, directing the National Energy Board ("**NEB**") to issue Certificate of Public Convenience and Necessity OC-65 ("**Certificate OC-65**") dated June 20, 2019 at Calgary, Alberta authorizing the construction and operation of the Trans Mountain Pipeline Expansion Project (the "**Project**") subject to the terms and conditions set out in Appendix 3 of the National Energy Board NEB Report of February 22, 2019 entitled National Energy Board Reconsideration NEB Report - Trans Mountain Pipeline ULC - MH-052-2018, reconsidering aspects of the OH-001-2014 NEB Report (the "**NEB Report**") with conditions 6, 91, 98, 100, 124, and 151 superseded by the conditions as amended in the annexed form; and approving the issuance by the NEB of Amending Order AO-004-OC-49 and Amending Order AO-005-OC-2, substantially in the annexed form, and the December 1, 2016 issuance by the NEB of Amending Order AO-002-OC-49 and, AO-003-OC-02 (the "**Decision**").

THE APPLICANTS make application for:

An order or orders:

1. Declaring that Canada, including the Minister of Natural Resources and the Minister of Environment and Climate Change (collectively, the "**Crown**") had constitutional and common law duties to consult and seek accommodations in good faith with the Stk'emlupsemc te Secwepemc ("**SSN**") regarding the potential

adverse effects of Trans Mountain Pipeline ULC's ("**TMP**") proposed Project on SSN's Aboriginal rights and title before the GIC issued the OIC directing the NEB to issue Certificate OC-65 authorizing the construction and operation of the Project, subject to the terms and conditions including those contained in the NEB Report;

2. Declaring that the Crown breached its constitutional and common law consultation and its fiduciary duty to SSN prior to making the Decision, and it further failed to uphold the Honour of the Crown, by denying SSN substantive and meaningful consultation and accommodation in relation to potential impacts and/or infringements specific to SSN's Aboriginal rights and title related to, arising from, or caused by the Decision;
3. Declaring that the Crown improperly delegated its duties to consider and assess adverse effects on Aboriginal rights and title from the Project to TMP, the NEB, future regulatory decision-makers and other bodies;
4. Declaring that the Crown breached its constitutional and common law consultation and its fiduciary duty to SSN prior to making the Decision, and it further failed to uphold the Honour of the Crown, by denying by failing to consult with SSN to provide adequate or any reasonable accommodation measures for potential impacts and infringements specific to adverse impacts on SSN's Aboriginal rights and title related to, arising from, or caused by the Decision;
5. Declaring that the Crown has an ongoing duty to consult and accommodate SSN and to meet its fiduciary obligations and uphold the Honour of the Crown with respect to the adverse effects of the Project on SSN's Aboriginal rights and title;
6. Declaring that the GIC Decision is wrong at law and that the GIC had constitutional and/or legal and common law duties to reasonably assess the adequacy of Crown consultation and accommodation, determine whether further

Crown consultation is required, and provide adequate reasons under section 54 of the *National Energy Board Act* ("**NEBA**") and under the duty to consult;

7. Declaring that the GIC erred in granting the OIC, as the Crown and/or the GIC breached its constitutional and/or legal and common law duties to SSN prior to granting the OIC;
8. Declaring that the Decision does not comply with the *Constitution Act*, 1982 and s. 54 of the NEBA, due to the GIC's failure to consider the adverse impacts and/or infringements to specific to SSN's rights and title related to, arising from or caused by the Decision;
9. Declaring that the Decision is unenforceable, invalid and unlawful and/or without legal effect and prohibiting or restraining the Decision, pursuant to section 18.1 of the *Federal Courts Act*;
10. Quashing the Decision and Certificate OC-65 issued by the NEB;
11. An interim order directing that the Decision and Certificate OC-65 be suspended and be of no force or effect until such time as the Crown and/or GIC has fulfilled its duty to meaningfully consult and accommodate SSN about Project impacts;
12. Prohibiting or staying the agents, servants and officials of the Crown including the NEB from issuing any licenses, permits, certificates or statutory authorizations that would allow the Project to be carried out in whole or in part until such time as the Crown and/or GIC has fulfilled its duty to meaningfully consult and accommodate SSN;
13. An interlocutory injunction prohibiting or staying the Respondents from taking any steps in reliance on Decision, the OIC, or Certificate OC-65;

14. An order declaring that the Crown is under a duty to consult with and reasonably accommodate SSN with respect to the adverse impact of the Project on SSN's Aboriginal rights and title and the Crown has breached its duty to consult and accommodate;
15. An order for costs of and incidental to this application;
16. An order that the Applicants shall not be required to pay costs to the Respondents of this application, pursuant to Rule 400 of the Federal Court Rules, in the event that this application is dismissed; and
17. Such further and other relief as this Honourable Court may deem appropriate and just.

THE GROUNDS FOR THE APPLICATION ARE:

18. The Xwexweyul'ecwem Secwepemc otherwise known as Secwepemc Nation is an Aboriginal group that occupies and has occupied the lands comprising the Secwepemc's Traditional Territory at and since the time of contact with Europeans, and at the date British Sovereignty was asserted over British Columbia.
19. Stsmel7qen also known as Kukpi7 (Chief) Ron Ignace is a member of the Secwepemc Nation. He is the elected Chief of the Skeetchestn Indian Band (one of the Indian bands which is part of the Secwepemc Nation). He is an Aboriginal person within the meaning of section 35 of the *Constitution Act*, 1982 and an Indian within the meaning of section 91(24) of the *Constitution Act*, 1867.
20. Kukpi7 (Chief) Rosanne Casimir is a member of the Secwepemc Nation. She is the elected Chief of the Tk'emlúps Indian Band, also known as the Kamloops Indian Band, (one of the Indian bands which is part of the Secwepemc Nation). She is an Aboriginal person within the meaning of section 35 of the *Constitution*

Act, 1982 and an Indian within the meaning of section 91(24) of the *Constitution Act*, 1867.

21. The Stk'emlupsemc te Secwepemc (SSN) or "Kamloops Division" are an Aboriginal people living in and around the confluence of the Fraser and Thompson Rivers. SSN includes and is principally comprised of Secwepemc persons who are members of the Skeetchestn Indian Band and the Tk'emlúps Indian Band and are referred to as "Stk'emlupsemc te Secwepemc" or "SSN". In accordance with Secwepemc laws, customs, and traditions, members of the Stk'emlupsemc te Secwepemc own, care for, and are responsible for the protection and management of that part of Secwepemc Traditional Territory known as Stk'emlupsemc te Secwepemcuc'l'ecw and whose approximate boundaries are identified as SSN's traditional territory as Exhibit "B" to Affidavit #1 of R. Ignace sworn July 3, 2019 (the "Stk'emlupsemc te Secwepemc Territory" or "SSN Territory").
22. Skeetchestn Indian Band and the Tk'emlúps Indian Band are bands under the *Indian Act*, and SSN's members are Aboriginal peoples within the meaning of s. 35(1) of the *Constitution Act*, 1982.
23. SSN's rights and title are recognized, affirmed and protected by s. 35(1) of the *Constitution Act*, 1982, and as such, are constitutionally protected from interference or infringement by the Crown.
24. Canada and the NEB has knowledge of SSN's Aboriginal rights and title and the Decision adversely affects SSN's Aboriginal rights and title.
25. In these circumstances, the Crown's duty to consult and accommodate, and the fiduciary obligations and the Honour of the Crown required the Crown and/or GIC to, *inter alia*, required the Crown to:

- (a) inquire into, identify, evaluate, and assess the implications of the proposed Project on SSN's Aboriginal rights and title including the potential adverse impacts of Project-related marine shipping on SSN's fish within SSN Territory and the sustainability of its Aboriginal fisheries;
- (b) inquire into, identify, evaluate, and assess the implications of the Project on SSN's Aboriginal rights and title including the potential adverse impacts of the Project on SSN's cultural heritage and sacred site known as Pípsell which contains burial sites throughout, the sensitive grasslands of the Lac du Bois Grasslands Protected Area, the Thompson River crossing, and the several facilities associated with the proposed Project on SSN's Territory;
- (c) consult with SSN to determine, recognize and respect the nature and extent of SSN's Aboriginal rights and title potentially adversely affected by the proposed Project and to inquire as to the potential impairment, impact, and/or interference with SSN's Aboriginal rights and title arising from the Project;
- (d) provide SSN with the information and resources necessary to evaluate and assess the potential impacts and/or infringements of the Project on SSN's Aboriginal rights and title and acquire information about the adverse impacts on sacred sites, including Pípsell, and the Lac du Bois Grasslands Protected Area, where there are new or expanded rights of way are to be taken in previously undisturbed land;
- (e) engage and consider, or reasonably consider, reasonable accommodations to the SSN including, without limitation, enabling SSN to undertake its own indigenous-led assessment to review and assess the proposed pipeline corridor and facilities within the approximate 80 km to

103 km of new pipeline and additional footprint of several facilities to be constructed within SSN Territory;

- (f) engage and consider, or reasonably consider, potential accommodations to the SSN to alter, modify or vary the routing of the Project to protect and preserve a Secwépemc cultural heritage and sacred site at Pípsell, including without limitation, recommending terms and conditions specific to address the potential impact of the Project on SSN's Aboriginal rights and title;
- (g) engage and consider, or reasonably consider, potential accommodations to the SSN to address SSN's concerns about burial sites along the pipeline corridor and other culturally significant features, the nature and extent of which have not been sufficiently identified and studied by TMP or the Crown prior to approving the proposed Project despite information being provided by the SSN since the inception of the proposed Project; and
- (h) generally propose potential accommodates to the SSN for potential adverse impacts and/or infringements to SSN's Aboriginal rights and title related to, arising from, or caused by the Project.

26. By failing to do so, the Crown and/or GIC failed to fulfill its duty to consult SSN in accordance with SSN's Aboriginal rights and title prior to and at the date of issuing the OIC. In particular, the ways in which the Crown and/or GIC failed to meet its consultation obligations, but are not limited to, the following.

The Re-initialized Crown Consultation Approach

- (a) The re-initialized Crown consultation from August 30, 2018 after the Federal Court of Appeal's decision in *Tsleil-Waututh et al, v. AG et al.*, Action No. A-78-17 (the "***Tsleil-Waututh Decision***") to June 18, 2019 (the

date of the Decision) failed to meet the Crown's duty to consult and accommodate SSN and/or did not adequately address the shortcomings in the earlier consultation process that were summarized at paras. 557-563 of the *Tsleil-Waututh Decision* in its dealing with SSN, including, without limitation:

- (i) The Crown's consultation process was a process applied to Aboriginal groups generically, but a process which failed to tailor consultation and possible accommodation in a specific or targeted way to respond to SSN's specific issues and concerns about adverse impacts of the Projects on its Aboriginal rights and title including issues carried over from the original Phase III consultation process;
- (ii) The Crown and its Crown Consultation Team ("CCT") failed to adequately implement or execute the Crown Consultation Approach as designed by the Crown so as to satisfy the duty to consult and accommodate the SSN and continued to be reluctant to depart from the NEB Report and the finding in the original *OH-001-2014* Report, in particular, the Crown and the CCT failed to consider, or reasonably consider, any accommodation that would alter, modify, or vary the routing of the pipeline corridor approved in the NEB Report;
- (iii) The Crown failed to substantively and meaningfully engage with SSN and consider, or seriously consider, and/or engage in a timely way to, on issues of concerns to the SSN and possible accommodation measures proposed by SSN to identify, minimize and address adverse impacts of the proposed Project where it was reasonably possible to accommodate SSN on issues of importance specific to the SSN, including without limitation:

- (A) The Crown failed to allow sufficient time to implement and execute the Crown Consultation Approach in consulting with the SSN, rather it consulted with the SSN on a rushed basis only finalizing its draft Crown Consultation Approach on February 19, 2019 and concluding its consultation with SSN prior to the GIC Decision on May 29, 2019 when it required final submissions from SSN to the GIC;
- (B) The CCT delayed meeting directly with the SSN until January 30, 2019, leaving insufficient time to adequately and meaningfully engage on the issues raised by SSN, and despite repeated requests by SSN to meet prior to the conclusion of the NEB Reconsideration hearing;
- (C) The Crown did not respond to concerns outlined by the FCA or by SSN in the *Tsleil-Waututh Decision* proceedings, rather it delayed providing its draft CCAR to the SSN until April 25, 2019 ("2019 CCAR"), and where the 2019 CCAR contained the same substantive errors and factual inaccuracies as the SSN original 2016 CCAR, and further provided analysis for other nations in error (i.e., Coldwater and Upper Nicola), neglecting to provide SSN's analysis;
- (D) The CCT failed to adequately inform itself of SSN's evidence and argument raised in *Tsleil-Waututh Decision* proceedings and re-initiated consultations by re-issuing the original 2016 CCAR with the same errors identified by the SSN in the *Tsleil-Waututh Decision* proceedings;
- (E) The 2019 CCAR is argumentative, bias in favour of the Crown, and fails to fairly summarize the rights and title at

issue and the consultation process that was implemented for the GIC to make an informed decision;

- (F) The Crown failed to respond to correspondence, or to respond to correspondence in a timely way, and failed to engage with SSN regarding SSN's issues and concerns about the adverse impacts of the proposed Project, where it finally responded to SSN's proposed accommodations at end of the consultation process on May 28, 2019, leaving insufficient time for substantive and meaningful engagement on accommodations prior to the Decision;
 - (G) The Crown failed to review and incorporate the evidence provided by the SSN to the Crown from the Detailed Route Hearing MH-014-2018 on May 3, 2019 before the NEB Panel (the "**Detailed Route Hearing**"), choosing instead to ignore SSN's indigenous knowledge and evidence on the adverse impacts of the routing of the proposed Project through SSN Territory on SSN's Aboriginal rights and title; and
 - (H) The Crown failed to respond to the question asked by SSN as to reason for the presence of TMP's representatives in SSN's consultation meetings with SSN until June 1, 2019 where TMP representatives actively discouraged any meaningful dialogue about routing issues;
- (iv) The Crown was singularly focused on Project-related marine shipping impacts to the exclusion of all other potential adverse impacts of the Project on SSN's Aboriginal rights and title from the 2014 NEB Hearing, and where it was to re-do Phase III consultation with SSN on other potential impacts on SSN's Aboriginal rights and

title following this Honourable Court's decision in the *Tsleil-Waututh Decision*, it failed to do so;

- (v) The Crown wrongfully interpreted the Court's reasoning in the *Tsleil-Waututh* decision to restrict the scope and substance of its consultation and possible accommodations with SSN to consultation about impacts to Aboriginal rights, but not Aboriginal title; and failed to provide possible accommodations to the SSN with respect to specific adverse impacts on SSN's Aboriginal title, and where the GIC expressly considers that established and asserted Aboriginal and treaty rights identified in the consultation process have been appropriately accommodated, but where Aboriginal title is not addressed;
- (vi) The Crown wrongfully deferred consultation about Aboriginal title issues including revenue and/or benefits sharing until after the Decision to approve the Project in advising the SSN that consultation about impacts on Aboriginal title would be dealt with in "other processes" where no such other processes have addressed impacts of the proposed Project on SSN's Aboriginal title and where the duty to consult must be fulfilled before the GIC gives its approval for the issuance of the CPCN by the NEB;
- (vii) The Crown failed to inform itself of potential impacts on SSN's asserted Aboriginal rights and title and failed to acknowledge, respect, review and incorporate SSN's indigenous-led assessment and panel review process at Pípsell and the land use objectives set by the SSN for Pípsell, including to revitalize it as a Secwépemc Cultural Heritage Site to be protected from further destruction and disturbance;

- (b) The Crown failed to consider, or reasonably consider, altering, modifying or varying the routing of the Project through SSN Territory through a sacred site at Pípsell where other reasonable alternatives that would minimally impair the sacred site were available as a potential accommodation of SSN's Aboriginal rights and title at Pípsell and where the Crown's fiduciary obligation requires the Crown to protect SSN's Aboriginal rights and title at Pípsell and Aboriginal interest in SSN Territory with reference to SSN's best interests in accordance with the standard of a person of ordinary prudence managing his or her own affairs:
 - (i) The Crown failed to inform itself of the significance of the area by walking the route of the proposed pipeline corridor through SSN Territory at Pípsell and the Lac du Bois Grasslands Protected Area despite requests to do so;
 - (ii) The Crown failed to balance the public interest in justifying the Project, with SSN's Aboriginal title interest in protecting and preserving Pípsell for future generations, in that;
 - (A) The Crown failed to consider other reasonable alternative routing for the Project to avoid traversing Pípsell and/or the Lac du Bois Grasslands Protected Area;
 - (B) The Crown failed to respond, or to respond in a timely way, to SSN's requests for support to have Pípsell declared a world heritage site to be afforded protection under the United Nations Educational, Scientific and Cultural Organization (UNESCO);
 - (iii) The Crown failed to meet its constitutional duties to adequately and meaningfully consult with the SSN and accommodate the impacts on SSN's right and title at Pípsell and breached its fiduciary duties

to the SSN and failed to uphold the Honour of the Crown, including without limitation:

- (A) Failing to satisfy itself of the nature and extent of SSN's Aboriginal rights and title at Pípsell, a cultural heritage and sacred site with burial sites throughout, and through which the proposed pipeline corridor traverses in previously undisturbed land;
- (B) The Crown failed to consider, or reasonably consider in a timely way, possible accommodations of the adverse impacts of the Project to SSN's sacred site at Pípsell, where the Crown proposed to buy-back part of Pípsell and co-manage it with the SSN, but failed to provide the requisite detail on its proposal to the SSN prior to the GIC's decision to approve the proposed Project;
- (C) The Crown generally failed to consider, or reasonably consider, alternatives to the original route selection chosen by Trans Mountain in 2013, despite repeated requests to engage on the issue of alternative reasonable accommodations outside of the proposed pipeline corridor to reasonably accommodation SSN's Aboriginal interests;
- (D) The Crown failed to direct Trans Mountain to review, evaluate and report on alternative routes for the Project that would avoid traversing Pípsell, where such routes would result in an increase to the cost of the Project to be borne by Canada and the Trans Mountain Corporation in breach of its fiduciary obligations to SSN and as a possible accommodation;

- (E) The Crown failed to require Trans Mountain to provide an explanation and review of alternative routes for the pipeline corridor even where alternative routes to avoid Pípsell were clearly delineated by SSN before the re-initialized consultation process commenced, and where Trans Mountain had readily studied and proposed a change outside of the original pipeline corridor at Pípsell to avoid the Ajax Mine Project (Technical Update #2, Routing Update);
- (F) Condition 100, which requires TMP to do file a report on how it intends on mitigating impacts on sacred sites prior to construction, is insufficient to meet the Crown's obligation to consult and accommodate SSN, and to minimally impair SSN's Aboriginal interests in continuing to route the pipeline corridor through a cultural heritage and burial site;
- (iv) The Crown has not acted in accordance with the Honour of the Crown and/or its fiduciary duties to the SSN and indeed, has acted no differently than the proponent who constructed the existing pipeline in the 1950's, despite the increased size of the footprint of TMP's proposed facilities, and twinning of the pipeline in previously undisturbed land, and where SSN has asserted Aboriginal rights and title currently in litigation before the British Columbia Supreme Court.

The Detailed Route Hearing Process

- (c) SSN's Detailed Route Hearing does not discharge the Crown's duty to consult with and accommodate SSN's Aboriginal rights and title, in particular, regarding an alternative route for the pipeline to accommodate the adverse impacts on SSN's Aboriginal rights and title, in that:

- (i) the Detailed Route Hearing unfairly placed an onerous burden on the SSN to prove its asserted Aboriginal rights and title, and demonstrate a better route outside of the approved pipeline corridor to avoid traversing a cultural heritage and burial sites;
- (ii) the Detailed Route Hearing and process is not sufficient to correct the Crown's failed consultation process regarding routing of the pipeline corridor or to discharge the Crown's duty to consult and accommodate the impacts of the routing of the proposed Project on SSN's Aboriginal rights and title;
- (iii) The SSN is not a sophisticated pipeline company and lacks the requisite capacity to satisfy the NEB Panel of a better route for the pipeline corridor, both from a scientific and technical perspective, and where TMP argued at the Detailed Route Hearing and in its written materials that the SSN had failed to provide sufficient evidence of a better route outside of the approved pipeline corridor to the NEB Panel;
- (iv) The Crown did not participate in the Detailed Route Hearing, did not challenge the evidence of Trans Mountain's panel of experts on its failure to consider alternative routes, and was entirely absent from the process where it should have engaged in consultations with SSN substantively and meaningfully prior to a Detailed Route Hearing decision being made, and to ensure that SSN's Aboriginal interests were protected;
- (v) At the Detailed Route Hearing, and during the consultation process throughout, the Crown wrongfully accepted Trans Mountain's deficient explanations as to the original routing selection through SSN Territory even when it became clear that Trans Mountain had failed to considered, or reasonably consider, other possible

alternatives proposed by the SSN including, a diversion around Pípsell along the Coquihalla Highway, or a diversion from Merritt to Kamloops alongside, or in parallel with, the highway corridor;

- (vi) The Detailed Route Hearing is not a reasonable or justifiable means by which the Crown can meet its duty to consult and accommodate the SSN's concerns about routing within SSN Territory.

Further Breaches of Consultation and Accommodation Duties

- (d) The Crown further breached its duty to consult and reasonably accommodate SSN, failed to meet its fiduciary obligations, and failed to uphold the Honour of the Crown, in that:
 - (i) The Crown announced early on, and publically, its prejudgement that the Project would be built, taking a stand in favour of the proposed Project with a closed mind in fact regarding its approval of the proposed Project and leaving SSN to reasonably and practically conclude that the Crown's position was incapable of change;
 - (ii) The Crown communicated to the SSN that its position on approving the proposed routing of the Project was incapable of change, relying on the NEB Report approving the routing, and providing no meaningful response to, or dialogue about, the concerns raised by the SSN about the routing of the proposed Project through the Secwépemc sacred site at Pípsell and the Lac Du Bois Protected Grasslands Area;
 - (iii) The Crown failed to uphold the honour of the Crown when it failed to meaningfully considered a re-route of the pipeline corridor to avoid traversing Pípsell which would require paying additional

monies and possibly delaying the Project to re-route to accommodate SSN's Aboriginal rights and title at Pípsell;

- (iv) The Crown's offer to buy-back part of the Pípsell lands to co-manage the lands with Canada fails to address the adverse impacts to SSN's Aboriginal rights and title endemic in the destruction and disturbance of a cultural and spiritual area with burial sites throughout, and fails to remedy the adverse impacts on SSN's Aboriginal rights and title where Canada failed to consider, or reasonably consider, re-routing the pipeline to avoid Pípsell;
- (e) The Crown breached its fiduciary and constitutional duties to SSN in failing to direct Trans Mountain to prepare a review and assessment of alternatives to avoid, or minimally impair, SSN's rights and title at Pípsell, and in the Lac du Bois Grassland Protected Area, where the Crown knew Trans Mountain had not considered, or reasonably considered, other possible alternatives;
- (f) The Reconsideration Hearing and the NEB processes did not meet Canada's consultation obligations and cannot be relied on as such;
- (g) Canada failed to consult with SSN in a manner that identified and implemented steps to avoid, mitigate, and accommodate SSN's Aboriginal rights and title;
- (h) Alternatively, where measures were identified to avoid, mitigate, and accommodate SSN's Aboriginal rights and title, such measures lacked a nexus between the nature and extent of the impact and the means by which such impacts were to be accommodated;
- (i) The Crown failed to consult with SSN in a manner consistent with the principles of UNDRIP (defined below);

- (j) The Crown approved the Project in the absence of proper consultation and accommodation with SSN in breach of SSN's Aboriginal rights and title;
- (k) The Decision was made without the required consultation and accommodation in respect of the adverse impacts of the proposed Project, proportionate to the strength of SSN's Aboriginal rights and title and therefore is not in keeping with the Honour of the Crown; and

27. Such further and other grounds as counsel will advise and this Honourable Court may permit.

BACKGROUND

The Applicant

- 28. The members of SSN and their ancestors have and continue to rely upon SSN Territory, including the area impacted by the Project, for the exercise of activities, practices, customs, and traditions of their distinctive way of life and culture, including for hunting, fishing, and harvesting on their own behalf and on behalf of their families and communities. These traditional land use activities are relied upon for survival and are vital to the distinct way of life and culture of SSN.
- 29. The SSN have an on-going claim to Aboriginal title and rights in SSN Territory in proceedings currently before the British Columbia Supreme Court as Action No. 051952 since 2015 and as such, appropriate care must be taken to preserve their Aboriginal interests pending final resolution of the claim.

The Respondents

- 30. Pursuant to the NEBA and the *Canadian Environmental Assessment Act, 2012* ("CEAA") the NEB is the federal board responsible for carrying out the regulatory review and assessment of the Project. In adherence to its enabling statutes, for the Project, the NEB is tasked with multiple responsibilities, including conducting

a hearing, providing the NEB Report to the federal cabinet as to the significance of Project effects and whether the Project should be approved, and if so, under what conditions. When the GIC approved the Project, the NEB issued Certificate OC-65 to TMP.

31. The Minister of Justice and Attorney General of Canada is the representative of Her Majesty the Queen in the Right of Canada pursuant to s. 23(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c c-50, as amended, and is the successor to the obligations, duties and liability which the Crown has or owes to SSN.
32. At all material times, Amarjeet Sohi was the Minister of Natural Resources of the Crown in Right of the Canada responsible for Natural Resources Canada, exercising statutory authority under, *inter alia*, NEBA as amended. At all material times, Catherine McKenna was the Minister of Environment and Climate Change of the Crown in Right of the Canada responsible for Environment and Climate Change Canada, exercising statutory authority under, *inter alia*, CEAA as amended. Collectively, both Ministers will be referred to hereinafter as the “Minister”.
33. The Trans Mountain Corporation purchased shares of Kinder Morgan and the company now is set underneath a Crown Corporation reporting to the Minister of Finance and the Crown owns the shares. The TMP holds Certificate OC-65 in relation to lands and natural resources subject to SSN's Aboriginal rights and title.

The Project

34. In December 2013, TMP filed an application with the NEB proposing to expand the existing Trans Mountain Pipeline System by a nominal capacity of 93,800 m³/d (590,000 bbl/d) from its current nominal capacity of 47,690 m³/d (300,000 bbl/d) to a nominal capacity of 141,500 m³/d (890,000 bbl/d), comprised of

pipeline facilities that complete a twinning of the pipeline in Alberta and British Columbia with about 981 km of new buried pipeline, new and modified facilities, such as pump stations and tanks, and additional tanker loading facilities at the Westridge Marine Terminal in BC.

35. The Project is a “designated” project pursuant to section 2(b) of CEAA, for which the NEB is the responsible authority.
36. The Project Application requested, *inter alia*, that the NEB issue a CPCN, pursuant to section 52 of the NEBA, authorizing the construction and operation of the Project.
37. On April 2, 2014, the NEB issued Hearing Order OH-001-2014 (the “**Hearing Order**”). Further to the Hearing Order, the NEB conducted its public hearing from April 2, 2014 to February 17, 2016 (the “**Hearing**”).
38. On April 2, 2014, the SSN were granted intervener status before the NEB and participated throughout the review process for the Project including making final submissions opposing the Project through the SSN Territory, particularly that part of the pipeline that will require a new right of way and pipe at or near Jacko Lake in an area known as Pípsell, a cultural keystone place and sacred site for the SSN.
39. On August 22, 2014, Trans Mountain filed a Technical Update No. 2, Part 1: Routing Update (“Technical Update”), which update report advised the NEB of one change to the pipeline corridor in the Black Pines to Hope Segment being considered by Trans Mountain since its December 2013 application, and Technical Update No. 1. The Technical Update included an alternative pipeline corridor at Pípsell some distance from the existing pipeline corridor in previously undisturbed land to accommodate the Ajax Mine Project.

Original 2016 GIC Decision and Federal Court of Appeal (“FCA”) Decision

40. On May 19, 2016, the Board issued its report on the Project entitled *Trans Mountain Expansion Project OH-001-2014* (the “**NEB Report**”) and its recommendation that the Governor in Council (the “**GIC**”) approve the Project.
41. On November 29, 2016, the GIC accepted the Board’s recommendation and issued Order in Council P.C. 2016-1069 (“**OIC 2016**”) and directed the Board to issue a certificate of public convenience and necessity for the Project, subject to the conditions recommended by the Board in the NEB Report (the “**NEB Conditions**”).
42. On December 1, 2016, the Board issued Certificate of Public Convenience and Necessity OC-064 to Trans Mountain approving the Project, subject to the terms and conditions set out by the Board in the NEB Report.
43. On February 27, 2017, SSN filed a Notice of Application challenging the GIC’s decision to issue OIC 2016 due to the Crown’s failure to adequately and meaningfully consult and accommodate SSN regarding the potential adverse impacts of the Project.
44. In the *Tsleil-Waututh Decision* proceedings, SSN argued that the Crown failed to meaningfully engage with SSN during the Crown’s Phase I-IV consultation process, particularly with respect to the adverse impacts of the Project at Pípsell.
45. On August 30, 2018, the FCA issued its decision in *Tsleil-Waututh Decision* and quashed OIC 2016 and remitted the issue of Project approval back to the GIC for redetermination.

Detailed Route Hearing

46. After the hearing before the Federal Court of Appeal (“FCA”) in *Tsleil-Waututh Decision*, but before the commencement of the NEB Reconsideration process began, SSN participated in a Detailed Route Hearing before a National Energy

Board Panel (the “**NEB Panel**”) concerning the routing of the pipeline corridor through SSN Territory.

47. Trans Mountain’s Proposed Route Map filed in the detailed route hearings depicts the existing Trans Mountain pipeline to be approximately 103.9 km through SSN Territory (including a portion that will be re-activated from Black Pines Pump Station that was previously constructed) and approximately 80 km of the new pipeline being the proposed Trans Mountain Project which route runs through the heart of SSN Territory, together with facilities including the Black Pines Station and the Kamloops Terminal and the Thompson River crossing, described more fully below.
48. On January 23, 2018, the Board issued a Letter of Decision with respect to the Statements of Opposition filed for Segment 5 of the Proposed Route. In its Letter of Decision, the Board granted SSN an individual detailed route hearing, MH-014-2018 (defined above as the “Detailed Route Hearing”).
49. SSN’s Detailed Route Hearing which took place on May 3, 2018. Canada was not present at the detailed route hearing. In SSN’s written evidence, SSN specifically asked for the Crown’s record of consultation on the decision to be made regarding the detailed route and no such record was provided.
50. Despite repeated demand by SSN by letters dated October 3, 2018 and November 15, 2018, the NEB Panel did not release its decision in the Detailed Route Hearing after this Honorable Court released the *Tsleil-Waututh Decision* in August, 2018.

Pipeline Routing

51. According to TMP, the existing and proposed right-of-way cross through Secwépemc Nation’s traditional territory for approximately 350 km. As stated above, approximately 80 km to 103 km of the pipeline is proposed within the

SSN's traditional territory, and including associated setbacks in entirely new rights of way through a cultural heritage site known as Pípsell and the Lac du Bois Grasslands Protected Area, and a major water crossing across the Thompson River.

52. The proposed Project also sees the expansion of significant facilities adding to the footprint and taking additional land without any benefit to the SSN including the existing Black Pines Pump Station and two pump stations at Black Pines which require a new land base of approximately 150 m x 150 m (approximately 2.3 ha) and additional equipment and infrastructure, including a new 138 kV power line approximately 2.2 km long in a 50 m wide right-of-way and new access road.
53. The Darfield Station (an existing station) being 600 m west of the North Thompson River also poses a threat to the SSN evidenced by the spill from the Darfield Pump Station in May 2018 where approximately 4.8 m³ (100 litres) of oil was released and 3 m³ was recovered.
54. The proposed Project also included the Kamloops Terminal and a Kamloops Pump Station within SSN territory. The Kamloops Terminal, containing two storage tanks with a shell capacity of approximately 160,000 bbl, serves as both a hub for local distribution of product shipped from Edmonton and also a receiving point for products from northeastern BC. While there may be no tank changes planned for the Kamloops Terminal yet, three 5,000 HP pump units and one spare 5,000 HP pump unit will be installed at the Kamloops Pump Station (located within the Kamloops Terminal).
55. While much of the Project pipeline route parallels existing disturbance, including the right of way for Trans Mountain's existing pipeline, there are exceptions where new rights of way in pristine land is proposed to be taken through SSN Territory including in at Pípsell and the Lac du Bois Grasslands where there is no

current disturbance along the proposed route and no existing right-of-way, or in the case of Lac du Bois, the existing right of way is too narrow.

2016 Crown Consultation Process

56. On July 21, 2014, the Minister advised SSN that the Crown consultation process for the Project was to rely on the NEB Hearing to the extent possible to fulfil the legal duty to consult. Following the Hearing and release of the Board's draft conditions, federal officials intended to consult Aboriginal groups to discuss outstanding concerns not addressed by the NEB's draft conditions or commitments put forward by TMP, as well as proposed accommodation measures.
57. On February 6, 2015, the Minister advised SSN that Natural Resource Canada's Major Projects Management Office ("**MPMO**") was serving as Crown Consultation Coordinator ("**CCC**") for the Project and would coordinate the consultation requirement of federal departments and agencies in four (4) phases, Phase III to commence from the close of the hearing record to the Decision (with a mandate to be provided) and Phase IV from the Decision to the issuance of any required departmental regulatory authorizations. The Minister also advised that MPMO was currently conducting a strength of claim assessment for all Aboriginal groups close to the proposed pipeline right-of-way.
58. On November 1, 2016, the Crown filed the Joint Federal/Provincial Consultation and Accommodation NEB Report, wherein the Crown details its consultation with SSN in Appendix B-24 and where the Crown appears to rely on the literature used for the Province's strength of claim assessment for the Ajax Mine Project (expressly excluding other parts of SSN's Territory), namely an assessment dated November 7, 2012 prepared by the BC Environmental Assessment Office ("**November 2012 Assessment**").

59. The Province updated its November 2012 Assessment on May 12, 2015, to conclude that SSN had a strong *prima facie* Aboriginal right to title in the proposed Ajax Mine Project area. However, the Federal Crown did not update its November 2012 Assessment for the Project following the Province's revised strength of claim assessment on May 12, 2015.
60. The Crown's failure to properly assess SSN's Aboriginal rights and title claims in the Project area meant that the Crown undertook the original 2016 consultation without being adequately informed of SSN's claims and engaging in a consultation process that reflected the strength of SSN's claims including without limitation, providing SSN with an adequate opportunity to make submissions for consideration, providing for formal SSN participation in the decision-making process, and meaningfully engaging with SSN about their concerns; and providing for a mandate for accommodation of SSN's interests both within and outside of the NEB process.
61. On December 1, 2016, the NEB issued a letter and Certificate OC-064 and Amending Orders AO-003-OC-2 and AO-002-OC-49 to TMP providing approval of the Project. On November 29, 2016, the GIC granted its OIC under the CEAA and the NEBA authorizing the construction and operation of the Project. The OIC was published in the Canada Gazette on December 10, 2016.
62. SSN judicially reviewed the GIC decision and on August 30, 2018, the Federal Court of Appeal ("FCA") decision in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 ("*Tsleil-Waututh Decision*") the Court ordered the NEB reconsideration of aspects of its OH-001-2014 NEB Report as directed by Order in Council P.C. 2018-1177 (the "**Reconsideration**") and that the Crown adequately and meaningfully consult and accommodate SSN.

Reconsideration Proceedings

63. On September 20, 2018, the Privy Council issued Order in Council P.C. 2018-1177 directing the Board to reconsider the recommendations, terms and conditions in the Board's OH-001-2014 Report relevant to the issues identified by the FCA in the *Tsleil-Waututh Decision* and conduct the reconsideration taking into account the environmental effects of Project-related marine shipping and the adverse impacts of Project-related marine shipping on species protected under the *Species at Risk Act*.
64. SSN actively participated in the Reconsideration Hearing as an intervenor. SSN filed affidavit evidence and written argument, largely concerning the adverse impacts of Project-related marine shipping on SSN's inland fish and fisheries. SSN present oral traditional evidence and filed written submissions in the Reconsideration.
65. On February 22, 2019, the NEB released its decision on reconsideration of aspect of its OH-001-2014 Report as directed by OIC P.C. 2018-1177 in its report entitled *National Energy Board Reconsideration Report - Trans Mountain Pipeline ULC - MH-052-2018* (the "**Reconsideration Report**") and its recommendation that the GIC approve the Project.

The Decision at Issue on Judicial Review

66. Certificate OC-65 is the primary authorization required for the Project to proceed. The OIC is legally the decision SSN is seeking to review.
67. The OIC permits the Project to proceed despite impacts and/or infringements to SSN's Aboriginal rights and title.
68. At no time during the Decision making process for the Project was SSN adequately and meaningfully consulted or accommodated by the Crown and/or

GIC in respect of the impact that the Project would have on SSN's Aboriginal rights and title.

Constitutional Rights of the SSN

Historical Use

69. Prior to and at the time of assertion of Crown sovereignty, SSN's ancestors exclusively used and occupied their Territory.
70. SSN holds Aboriginal rights and title over SSN Territory. These rights have been continuously held by SSN and have never been extinguished.
71. SSN's Aboriginal rights and title over SSN Territory gives SSN the right to the exclusive use, priority, and occupation of the land, waters, and resources, including the right to decide how the land, waters, and resources will be used; the right of enjoyment of the land, waters, and resources; the right to possess the land, waters, and resources; the right to the economic benefits of the land, waters, and resources; the right to proactively use and manage the land, waters, and resources; and the right to hunt, fish and harvest.
72. The SSN as yucminme7 (steward) of Pípsell on behalf of the Secwépemc, confirmed the overarching land use objective for Pípsell and the surrounding area is a cultural keystone area which must be preserved in a state consistent with the traditional importance of the site to the Secwepemc people. Pípsell must only be used in ways which preserve and sustain the area, and which allows for the cultural heritage of the Secwepemc people to be exercised and maintained.
73. Pípsell is a significant landmark, a unique geographically and historically identifiable place having special cultural or physical significance (an ancient ruin of spiritual and cultural significance, a source of indigenous law, historical structures (including the hunting blind), lake, monument, grasslands, hunting grounds, fishing and wilderness area) and burial mounds. It signifies a

remarkable accomplishment of humanity, and serves as evidence of our intellectual history on the planet through the Trout Children Stsptékwll. The Trout Children Stsptékwll is inseparable from Pípsell.

74. The traditional knowledge that is specific to Pípsell can only be transmitted at Pípsell, it cannot be further disturbed or destroyed. SSN's strong objection to the destruction and disturbance of the spiritual integrity of Pípsell and SSN's ancestral connection to Pípsell as a cultural heritage site not to be destroyed or further derogated. Pípsell, and the ecosystem that supports it, is unique in that the spring seasonal rounds starts at that elevation. The intimate knowledge of managing micro-ecosystems is and was integral to SSN's life cycle.
75. SSN members are instructed to leave something for the next generation. Pípsell is and was a place for the long-term planning for protecting the territory, healing, trade, spiritual ceremonies and burial. SSN has identified burial sites along the proposed right of way corridor, and throughout Pípsell.
76. The members of SSN and their ancestors, have continuously occupied SSN Territory prior to the time of contact and up to the present day, including the area impacted or potentially impacted by the Project, for the exercise of activities, practices, customs, and traditions of their distinctive way of life and culture, including for hunting, fishing, and harvesting on their own behalf and on behalf of their families and communities. These traditional activities are relied upon for survival and are vital to the distinct way of life and culture of the SSN.
77. The Crown has knowledge of SSN's Aboriginal rights and title.
78. SSN's unextinguished Aboriginal rights and title are constitutional rights, recognized, affirmed and protected by s. 35(1) of the *Constitution Act, 1982*.

79. SSN's Aboriginal rights and title are constitutionally protected from interference or infringement by the Crown.

History of Crown Authorized Activities on SSN Territory

80. SSN Territory has been and continues to be heavily affected by Crown authorized activity which has had significant adverse impacts on the ability of the Secwepemc to exercise their Aboriginal title and Aboriginal rights. These activities include:
- (a) The dedication of lands within SSN Territory to settlement by non-Aboriginal communities, including the development of major cities and towns, including the City of Kamloops;
 - (b) The construction of highways and associated infrastructure;
 - (c) The dedication of lands to major farming operations, including the development of orchards and cattle farms;
 - (d) The opening of lands to grazing and other range uses;
 - (e) The construction of mines and associated infrastructure;
 - (f) The development of recreational properties, including golf courses; and
 - (g) The carrying out of large scale timber harvesting activities.
81. Crown authorized activities have interfered with the ability of the Secwepemc Nation to exercise their Aboriginal title and Aboriginal rights in a wide variety of ways, including:
- (a) They have limited the ability of the Secwepemc to determine the uses to which their lands will be put both now and into the future;

- (b) They have limited the ability of the Secwepemc to protect lands for the purpose of maintaining traditional practices and their way of life;
- (c) They have appropriated resources, including, without limitation, land, timber and minerals, that are controlled by third parties and are supposed to benefit the Secwepemc, but have been used to benefit either the Crown or third parties and not the Secwepemc;
- (d) They have deprived the Secwepemc of access to areas in which they traditionally exercised their Aboriginal rights;
- (e) They have destroyed, damaged or degraded habitat necessary for supporting plant and wildlife populations that are necessary for the purpose of exercising Aboriginal rights or enjoying the benefits of Aboriginal title; and
- (f) They have deprived the Secwepemc of the economic benefits of their lands and resources.

82. Crown authorized interferences with Secwepemc Aboriginal title and Aboriginal rights cumulatively have resulted in an unjustifiable infringement of Secwepemc Aboriginal title and Aboriginal rights in SSN Territory in that:

- (a) Many of the activities were authorized without consideration of and without compelling purposes that would justify infringement of Aboriginal rights or Aboriginal title;
- (b) The level of interference has been occasioned without a compelling public purpose;

- (c) These activities have been authorized without adequate or any accommodation;
- (d) These activities have largely been authorized without any consultation or, in more recent years, with limited consultation; and
- (e) These activities have been authorized without compensation or any benefit to the Secwepemc.

Re-initialized Consultation 2018/2019

83. SSN responded to the Crown's November 7, 2018 letter re-initiating Phase III consultation and identified several issues it wished to be consulted with, which issues were previously identified by SSN in the original 2016 Phase III consultation and identified by this Honourable Court in the *Tsleil-Waututh* decision. Those issues include, without limitation:

- (a) Formalization of a Nation-to-Nation consultation protocol for the Project;
- (b) Project conditions must be more specific with respect to safety and emergency preparedness response; warning notifications to communities and opportunities for training; and provision made for a per-barrel spillage fee charged on product flowing through the pipeline;
- (c) A Stk'emlupsemc te Secwépemc Nation Tmicw Resource Protection Centre established in SSN traditional territory;
- (d) A Resource Development Revenue Tax established for that portion of the Project located in SSN's traditional territory for SSN's benefit;
- (e) An SSN Indigenous-led review and assessment of the Project; and
- (f) Re-routing of the pipeline corridor to go around Pípsell and to avoid taking up of new land within the Lac du Bois Grasslands Protected Area.

84. SSN had its first meeting with the CCT on January 30, 2019. A Trans Mountain representative, Max Nock, was invited by the CCT to attend this meeting and all of the meetings with the CCT and SSN.
85. On February 13, 2019, at the outset of the consultation process with the CCT, Kimberly Lavoie advised SSN during our meeting with them that Canada had no mandate to consult with SSN about Aboriginal title.
86. On February 19, 2019, Christyne Tremblay for NRCan provided SSN with a finalized copy of the Crown's Consultation Approach.
87. SSN submits that the Crown failed to satisfy its duty to consult and accommodate the adverse impact of the proposed Project, breached its fiduciary duty to the SSN, and/or failed to uphold the Honour of the Crown in making the Decision to approve the proposed Project.

Pípsell and the Lac du Bois Grassland Protected Area

88. Pípsell is a unique historical site in North America and testify to the spiritual, cultural, economic, social, environmental and cultural traditions of the Secwepemc. The area represents an Aboriginal cultural site of historical significance. The Secwepemc identify the area as a cultural and socio-economic keystone site, valued for its natural and cultural attributes, and as an integral part of their relationship with water, land, earth, sky and each other.
89. SSN has identified the approximate boundaries of Pípsell to the Crown on multiple occasions.
90. SSN has set land use objectives for Pípsell following an indigenous-led assessment of the proposed KGHM Ajax Mine Project, also at Pípsell, which took place in the community before a 46 person review panel comprised of SSN members (the "**Review Panel**") as part of the joint federal/provincial

environmental assessment process for the proposed Ajax Mine Project which has been abandoned since 1991 and resurrected briefly from 1994 lasting until 1997. The hearing of the Panel Review took place from May 2-6, 2016 and was informed by SSN laws and governance and included assessments which respect SSN cultural perspectives, knowledge and history, and which respect SSN rights and title.

91. On February 23, 2017, SSN released its the Recommendations Report (the **"Panel Recommendations Report"**) outlining the findings and recommendations of the Review Panel following SSN's environmental assessment of the Ajax Mine Project at Pípsell. The Recommendations Report includes a detailed review of Pípsell and SSN's land use objectives for Pípsell which were adopted by SSN Joint Council on March 4, 2017 in the *Decision of the SSN Joint Council on the Proposed Ajax Mine* (the **"Joint Council Decision"**).
92. The land use objectives set for Pípsell by SSN Joint Council on March 4, 2017 are based on the overarching objective that as a cultural keystone area, Pípsell must be preserved in a state consistent with the traditional importance of the site to the Secwépemc people, and must only be used in ways which preserve and sustain the area, and which allow for the culture of the Secwépemc people to be exercised and maintained.
93. In accordance with SSN's land use objectives for Pípsell, there is to be no further destruction or disturbance of the Pípsell lands, rather the lands are to be revitalized for the benefit of the Secwepemc people and all Canadians in accordance with Secwepemc Laws.
94. By letter dated March 26, 2019, SSN demanded that Canada look at all reasonable alternatives to avoid interfering with, infringing, or disturbing SSN's aboriginal rights and title at Pípsell and requesting that Trans Mountain be directed to immediately work up other alternatives that avoid Pípsell as a pathway to reconciliation.

95. By letter dated April 24, 2019, SSN summarized its exchanges with Trans Mountain and the British Columbia Ministry of Transportation for the Crown on the re-routing of the proposed corridor to avoid Pípsell by paralleling the Coquihalla Highway corridor (either from Merritt, or a 16 km route around Pípsell), highlighting the discrepancy between Trans Mountain and the Ministry of Transportation - where Trans Mountain claims to have had extensive and ongoing dialogue with the Ministry concerning the Project in response to SSN's request specific to this segment of the pipeline corridor - and the Ministry's responds that after looking through all of their records, they cannot locate any documents or records relating to routing of the propose Project from Kamloops to Merritt.
96. There has been little to no adequate and meaningful consultation with SSN with respect to the proposed routing and new right-of-way of the new pipeline through Pípsell. Throughout the NEB processes, SSN voiced its concerns regarding the proposed new routing in what is a sensitive grasslands area, integral to SSN's use of the area and way of life. The proposed routing of the Project is also runs through one of the last remaining old growth forests in the grasslands area near Jacko Lake at Pípsell.
97. The Lac du Bois Grasslands and other significant grassland areas, which will also be impacted by the Project, contain a multitude of plants relief upon the Secwepemc for medicine, food, technology, and the continuance of SSN traditional practices. The Lac du Bois Grasslands also provides a home for the wildlife that many of the Secwepemc rely on for cultural, social and spiritual purposes including for fur and for food.
98. SSN participated in the NEB's Detailed Route Hearing following the 2016 GIC decision to approve the Project. It filled extensive evidence before the NEB Panel in that hearing including oral history evidence and knowledge of adverse impacts the routing of the proposed Project had through Pípsell, as well as the

identification of Pípsell as a cultural heritage site over which it exercised caretakership.

99. SSN's experience at the conclusion of the hearing is that it is an unfair burden and evidentiary standard to place on First Nations to argue against a well-funding pipeline company as to a better route for the pipeline corridor. The Crown did not participate in the process.
100. TMP had several witnesses who testified on a panel as to the depth of their technical studies and investigation and it was left to SSN to cross examine those witnesses whose statements were not challenged by Canada.
101. SSN has proposed two alternative routes to avoid traversing through Pípsell and the burial mounds along the proposed pipeline corridor for the Project. The first route is a 16 km loop around Pípsell towards the Coquihalla Highway and the second route is 60 km from Merritt to Kamloops along the Coquihalla Highway.
102. Despite request to do so, the NEB has not released any decision on the Detailed Route Hearing after the FCA decision was rendered.
103. On April 25, 2019 Natural Resources Canada provided SSN with a draft Consultation and Accommodation Report (the "**CCAR**"). SSN's CCAR contained references to Upper Nicola and Coldwater in error.
104. By letter dated May 28, 2019, Canada confirmed that it was in the process of investigating options to purchase part or some of Pípsell and co-manage it with the SSN as a means of mitigating the impacts of the proposed route through Pípsell.
105. SSN developed and proposed its own project assessment process ("**PAP**") to assess major projects and facilitate informed decision making in a manner

consistent with the SSN's laws, traditions, and customs. SSN provided the SSN PAP Plan for the Project to CCT member Kimberly Lavoie on May 22, 2019.

106. SSN has had no further response from the Crown on either its investigation to purchase part of Pípsell or its response to SSN's detailed PAP process.
107. On May 29, 2019 SSN provided an independent submission to Minister Sohi and Mitch Taylor on May 29, 2019 comprised of SSN's 360° Review Report on the Phase III consultation process and the draft CCAR (the "**360° Report**"), a tracking table detailing SSN's comments on the draft CCAR (the "**CCAR Tracking Table**") and SSN's consultation record up to May 28, 2019.
108. On June 18, 2019, the GIC accepted the Board's recommendation to approve the Project and issued Order in Council P.C. 2019-820, with amended conditions.

BREACH OF THE DUTY TO CONSULT AND ACCOMMODATE

109. The Respondents failed to adequately and meaningfully consult with SSN prior to the Decision being made. The Decision should to be quashed or set aside as a result of the duty to consult and accommodate further to the *Constitution Act*.
110. The Crown is under a constitutional duty to consult in respect of the Decision and any proposed Crown decision to be made in respect of the Project, because:
 - (a) The Secwepemc have asserted Aboriginal title, Aboriginal rights and other Aboriginal interests in the area of the proposed pipeline Project;
 - (b) The Secwepemc have asserted Aboriginal title, Aboriginal rights and Aboriginal interests in the Project area and have, over the years, provided the Crown with information and evidence to support its claims to these rights;

- (c) The Crown and the Minister are aware of and have notice of asserted Secwepemc Aboriginal title, Aboriginal rights and other Aboriginal interests in the area of the proposed Project;
- (d) The Project will have a significant adverse or potential effect on the ability of the Secwepemc to exercise their Aboriginal title and Aboriginal rights, including, without limitation:
 - (i) They are part of an overall legislative scheme that fails to consider SSN's Aboriginal and title rights;
 - (ii) The overall legislative scheme further fails to adequately consider and meet Canada's obligations and international standards outlined in the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**");
 - (iii) They allocate land resources to third parties that belong to the Secwepemc;
 - (iv) They are part of a legislative regime that permits construction and operation of a pipeline(s) and associated activities that cause environmental degradation by destroying, disrupting or harmfully altering habitat used by the Secwepemc for the purpose of exercising their Aboriginal rights and title and the taking up of land and interferes with the self-governance of the SSN and the ability of SSN's right to make its own decision on the use the land is to be put;
 - (v) They threaten the water, land and other resources of the SSN should a disastrous event occur such as a pipeline leak without any input from SSN in monitoring and managing that threat as a preventative measure within SSN Territory; and

- (vi) They deprive the Secwepemc of the ability to control what use is made of their territory that is subject to Aboriginal title.

Conclusion

- 111. Given all of the foregoing, including the grounds relied upon above, the GIC acted unlawfully in making the OIC Decision. As such, the OIC Decision should be quashed.
- 112. As the OIC Decision was unlawful, Certificate OC-65 lacked any statutory precondition, and should also be quashed.

THE APPLICANT WILL RELY ON THE FOLLOWING MATERIAL:

- (a) Affidavit of Chief Ron Ignace, sworn July 3, 2019;
- (b) Affidavits of SSN, to be filed;
- (c) Such further and other affidavits as counsel will advise and this Honourable Court may permit;
- (d) *National Energy Board Act*, RSC 1995, c. N-7;
- (e) *Constitution Act*, 1867;
- (f) *Constitution Act*, 1982;
- (g) *Indian Act*, RSC 1985, c I-5, as amended, s. 88;
- (h) *Federal Courts Act*, RSC 1985 c. 41;
- (i) *Federal Court Rules*;
- (j) UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 61st Sess, Supp No 49, A/RES/61/295, (2007); and
- (k) Such further and other material as counsel may advise and this Honourable Court may permit.

Rule 317 Request:

113. Pursuant to Rule 317 of the *Federal Court Rules*, the Applicant requests that the GIC send to the Applicants a certified copy of all the material relied on in making the OIC including the Decision Statement and that is not in possession of the Applicant.

DATED at the City of Vancouver, in the Province of British Columbia, this 11th day of September, 2019.



Sarah D. Hansen and Megan E. Young
Counsel for the Applicants
Miller Thomson LLP
400 – 725 Granville Street
Vancouver, BC V7Y 1G5
phone: 604-687-2242
Fax: 604-643-1200
Email: shansen@millerthomson.com
and myoung@millerthomson.com