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Court File No. A -323-19

FEDERAL COURT OF APPEAL

BETWEEN:

UPPER NICOLA BAND

APPLICANT

AND:

THE ATTORNEY GENERAL OF CANADA and TRANS
MOUNTAIN PIPELINE ULC

RESPONDENTS

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

TO THE RESPONDENTS:

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

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The Applicant requests that this application be heard at Federal Court of Appeal, 701 West Georgia Street, Vancouver, BC V7Y 1B6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the 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.

SEP 11 2019

Date

Issued by:

ORIGINAL SIGNED BY
JULIA ORCHARD
A SIGNÉ L'ORIGINAL
Registry Officer

Address of local office:

Federal Court of Appeal
701 West Georgia Street
Vancouver, BC V7Y 1B6
Telephone: 604-666-2055
Facsimile: 604-666-8181

TO: Jan Brongers
Counsel for the Respondent, Attorney General of Canada

Department of Justice Canada, Vancouver Office
900 - 840 Howe Street
Vancouver, BC V6Z 2S9
Telephone: (604) 666-2054
Facsimile: (604) 666-2710
Email: jan.brongers@justice.gc.ca

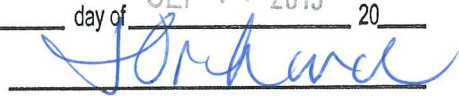
AND TO: Maureen Killoran, QC
Counsel for the Respondent, Trans Mountain Pipeline ULC

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450-1st Street SW
Calgary, AB T2P 5H1
Telephone: (403) 260-7003/7038
Facsimile: (403) 260-7024
Email: mkilloran@osler.com

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the _____

day of SEP 11 2019 A.D. 20 _____

Dated this SEP 11 2019 day of _____ 20 _____


JULIA ORCHARD
REGISTRY OFFICER
AGENT DU GREFFE

APPLICATION

This is an application for judicial review of the decision of the Governor in Council (“**GIC**”) under subsection 54(1) of the *National Energy Board Act*, RSC 1985, c. N-7 (“**NEB Act**”), made by way of Order in Council, P.C. 2019-820 on June 18, 2019 and published in the Gazette on June 22, 2019, deciding that pursuant to subsection 31(1) of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 (“**CEAA, 2012**”) and taking into account terms and conditions, the Trans Mountain Expansion Project is likely to cause significant adverse environmental effects that can be justified in the circumstances and directing the National Energy Board (“**NEB**”) to issue a decision statement concerning the Project; pursuant to s. 54(1) of the *NEB Act*, directing the National Energy Board to issue Certificate of Public Convenience and Necessity OC-65 in respect of the Project, subject to terms and conditions; and pursuant to s. 21(2) of the *NEB Act*, approving the issuance to Trans Mountain Pipeline ULC of Amending Orders AO-004-OC-49, AO-005-OC-2, AO-002-OC-49, and AO-003-OC-2 (the “**Decision**”);

The Applicant makes application for:

- (a) A declaration that the Decision is unlawful as it was made by Canada in breach of its legal and constitutional duty to consult with and accommodate Upper Nicola in respect of the Decision;
- (b) An order quashing or setting aside the Decision;
- (c) A declaration that the Certificate of Public Convenience and Necessity OC-65 is of no force or effect;
- (d) An order prohibiting or staying the agents, servants and officials of Canada including the National Energy Board from issuing any licences, permits, certificates or statutory authorizations that would allow the Project to be carried out in whole or in part until such time as Canada has fulfilled its duty to consult and accommodate Upper Nicola;
- (e) An order prohibiting or staying Trans Mountain Pipeline ULC from taking any steps in reliance on the Decision;

- (f) Costs;
- (g) An order that the Applicant shall not be required to pay costs to the Respondents, pursuant to Rule 400 of the *Federal Courts Rules*, in the event that this Application is dismissed; and
- (h) Such further and other relief as this Honourable Court may deem appropriate.

The grounds for the application are:

A. OVERVIEW

1. The Applicant Upper Nicola, also known as Upper Nicola Indian Band or Upper Nicola Band ("**Upper Nicola**"), is a member community of the Syilx (Okanagan) people ("**Syilx**"), and is also a "band" within the meaning of the *Indian Act*. Syilx, including Upper Nicola, are an Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(c) of *CEAA, 2012*.
2. The Trans Mountain Expansion Project ("the **Project**") would expand the existing capacity of the Trans Mountain Pipeline threefold and increase tanker traffic for transportation of these products sevenfold.
3. The Project would transect Syilx territory, through the specific area over which Upper Nicola exercises title and rights, and over which it bears responsibility and stewardship for the lands, waters and resources ("**Upper Nicola's Area of Responsibility**"). Syilx people, including Upper Nicola, have used, governed and occupied this territory since prior to the assertion of Crown sovereignty.
4. On November 29, 2016, the GIC issued an Order in Council to the NEB to issue a CPCN in relation to the Project to permit its construction and operation (the "**2016 Order**").
5. The 2016 Order was quashed by order of this Court in the matter of *Ts/leil-Waututh Nation v Attorney General of Canada*, 2018 FCA 153 [Federal Court of

Appeal file no. A-78-17 (lead file)] (“**Tsleil-Waututh**”). This Court concluded in *Tsleil-Waututh* that *inter alia*, the 2016 Order was unlawful as it had been made in breach of the Crown’s duty to consult affected Indigenous groups, including Upper Nicola. As a result, Canada was directed to re-do the process of Crown consultation with Indigenous groups prior to any subsequent decision being made by the GIC respecting the Project.

6. Consequently, Canada carried out a further process of engagement with Indigenous groups, including Upper Nicola (the “**Renewed Consultation**”). In the Renewed Consultation, Canada failed to engage with Upper Nicola in a manner and to a degree required to discharge the duty to consult and accommodate, and again fell short of the required mark for reasonable consultation and what was required in accordance with the honour of the Crown.
7. Canada then proceeded to make the Decision on June 18, 2019.
8. In issuing the Order, the GIC acted unlawfully because it did not ensure, prior to making the Decision, that Canada had met its duty to consult and accommodate Upper Nicola. In the Renewed Consultation, rather than engaging in deep and meaningful consultation, Canada failed to engage in meaningful two-way dialogue that was responsive to the concerns of Upper Nicola, failed to grapple with the rights at stake, did not sufficiently assess the impacts of the Project on Upper Nicola’s rights, and declined engage with or offer responsive and meaningful accommodation of impacts to those rights.
9. As set out in detail below, this Application addresses the following issue:

Upper Nicola submits that from August 30, 2018 (the date of the decision in *Tsleil-Waututh*) to June 18, 2019 (the date of the Decision) was the consultation with Upper Nicola was not adequate in law to address the shortcomings in the earlier consultation process.

B. BACKGROUND

(i) *The Project*

10. The Project involves the construction and operation of a second pipeline along the existing 1147 kilometre Trans Mountain pipeline between Edmonton, Alberta and Burnaby, British Columbia and expansion of its Westridge Marine Terminal in Burrard Inlet. The Project would include approximately 987 km of new pipeline, new and modified facilities, such as pump station and tanks and transmission lines, the reactivation of 193 km of existing pipeline, and would increase the capacity of the pipeline system from 300,000 barrels per day to 890,000 barrels per day and increase tanker traffic for transportation of oil products from 5 to 34 tankers per month. The Project would enable the transport of these products, including diluted bitumen, from the oil sands in Alberta to the Southwest Coast of British Columbia, for transport to markets in Asia and the United States.
11. In order for the Project to proceed, it must obtain the necessary certificates of public convenience and necessity ("**CPCN**") pursuant to s. 54 of the *National Energy Board Act*, RSC 1985, c. N-7 ("**NEB Act**"). The Governor-in-Council is the entity within the Government of Canada that was required to determine:
 - (a) whether the Project is likely or not to cause significant adverse environmental effects and whether such effects can or cannot be justified in the circumstances, pursuant to the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 ("**CEAA, 2012**"); and
 - (b) whether a CPCN ought to be issued by the Board, pursuant to section 54(1) of the *NEB Act*.
12. The Respondent Attorney General of Canada represents Her Majesty the Queen in Right of Canada, for purposes of proceedings against the Crown under the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 ("**Canada**").

13. The Respondent Trans Mountain Pipeline ULC ("**Trans Mountain**") proposes to construct and operate the Project. Trans Mountain is now owned by Canada, as a wholly owned subsidiary of the Canada Development Investment Corporation.

(ii) The Significance of the Project to Upper Nicola

14. Approximately 130 kilometres of the Project's proposed new pipeline would cross through Upper Nicola's Area of Responsibility. A new pump station and ancillary developments are also proposed to be constructed in Syilx Territory, including the Kingsvale Transmission Line. As such, Upper Nicola is deeply concerned with the proposed Project and its impacts on Upper Nicola/Syilx rights, including title.
15. Upper Nicola is a member community of the Syilx. The Syilx (Okanagan) are Indigenous Interior Salish people who have lived within Syilx (Okanagan) Territory for thousands of years, acting as stewards of the lands and waters according to Syilx laws and governance. The Syilx are a cultural, political and social entity that has existed since prior to contact with Europeans in what is now British Columbia. The Syilx are the group that hold and assert Aboriginal title over Syilx (Okanagan) Territory, which is generally described as extending north past Revelstoke around Kinbasket; to the east near Kootenay Lake; south to the vicinity of Wilbur, Washington; and west to the Nicola Valley ("**Syilx Territory**").
16. Syilx peoples, including members of Upper Nicola, affirmed and declared the continuing existence of Syilx title and rights through the Okanagan Nation Declaration. The Declaration reflects that Syilx collectively hold Syilx title and rights throughout Syilx Territory for this and future generations, and that Syilx peoples work cooperatively with respect to land and resource decision-making in Syilx Territory.
17. As a Syilx people, the members of Upper Nicola exercise Aboriginal title and rights, including harvesting rights, cultural and spiritual rights, and governance and management rights. Since prior to contact and before the assertion of British Sovereignty, Upper Nicola has been the stewards of the lands, waters and

resources in their Area of Responsibility. Pursuant to the protocols and practices of the Syilx, Upper Nicola has a responsibility to protect and preserve the Aboriginal title and rights held collectively by the Syilx in their Area of Responsibility.

18. Upper Nicola's Area of Responsibility was extensively used and occupied by the Syilx prior to and after the arrival of Europeans in Syilx Territory. Syilx exclusive use and occupation of Upper Nicola's Area of Responsibility was solidified in the 18th Century through an agreement with the Secwepemc. This agreement, which reflects the laws of these neighbouring Indigenous Nations, is known as the Fish Lake Accord. The Fish Lake Accord continues to be affirmed today.
19. Syilx have never surrendered, extinguished or ceded their title and rights in Syilx Territory, including within Upper Nicola's Area of Responsibility. Upper Nicola and the Syilx have, and continue to experience, cumulative impacts to the exercise of their title and rights in Syilx Territory, including from ranching, forestry, construction of transmission lines, and other developments.
20. Syilx laws and governance have been in existence since time immemorial and continue to operate today. These laws constitute a complex system that governs the Syilx relationship with the land, its features, resources and occupants; and governs relationships among Syilx people and with neighbouring nations.
21. Syilx laws and governance over siwłk^w (water) within Syilx Territory are described in the Syilx siwłk^w Declaration, which was affirmed in writing by the Syilx on July 31, 2014. According to Syilx laws, siwłk^w (water) is sacred and must be treated with reverence and respect. As Syilx people, Upper Nicola has a duty and responsibility to ensure that siwłk^w (water) can maintain all of its relationships, known and unknown, by showing due respect and humility to it.
22. Consistent with Syilx internal protocols and practices, Upper Nicola was authorized to take the lead with respect to the Project, having regard to Syilx title and rights. The Chiefs' Executive Council of the Syilx supported Upper Nicola in

its role as the lead Syilx community responding to the Project and engaging with Canada on behalf of the Syilx and Upper Nicola.

(iii) The National Energy Board Process (Phase II)

23. The process for approval of the Project anticipated involving four phases of engagement with Indigenous communities. Following the initial phase after the submission of the Project description (Phase I), the Project would proceed to be reviewed by the NEB at a hearing (Phase II).
24. At the conclusion of Phase II, the NEB was responsible for making a report and recommendations pursuant to s. 52 of the *NEB Act* as to whether certificates of public convenience and necessity should be granted, taking into account whether “the pipeline is and will be required by the present and future public convenience and necessity.” The NEB was also required to conduct an environmental assessment under *CEAA, 2012* and make determinations about whether there would be significant adverse environmental effects and whether those would be justified in the circumstances.
25. Upper Nicola was advised by the NEB that Canada would: rely on the NEB’s hearing process, to the extent possible, to fulfill any Crown duty to consult aboriginal groups for the Project; consider issues and concerns raised by Upper Nicola; and use the NEB hearing process to identify, consider and address potential adverse impacts of the Project on Syilx rights and interests.
26. Upper Nicola applied for and was granted intervenor status in the NEB hearings for the Project. Consistent with their obligation to act as stewards over their lands, Upper Nicola actively participated in the NEB hearings to understand the proposed Project and provide evidence that would inform Upper Nicola’s and Canada’s decisions. Through the NEB hearing process, Upper Nicola provided evidence with respect to the following:
 - (a) Upper Nicola’s Area of Responsibility;

- (b) Syilx title and rights;
- (c) Syilx laws and governance;
- (d) the harvesting of plants, medicines, wildlife, and fish within Upper Nicola's Area of Responsibility,
- (e) important spiritual and cultural practices, and important cultural and spiritual sites within Upper Nicola's Area of Responsibility.

27. Upper Nicola's evidence before the Board included:

- (a) A Traditional Use Study for the Project,
- (b) Three affidavits or witness statements from Upper Nicola cultural knowledge holders, and three expert reports.
- (c) Expert reports including an assessment of spill risks of the Project, an inland spill response logistics analysis within Upper Nicola's Area of Responsibility, and a public interest evaluation of the Project.
- (d) Oral history evidence from Upper Nicola Elders and cultural knowledge holders, describing Syilx laws and governance, Syilx title and rights, and the use and occupation Upper Nicola's Area of Responsibility.
- (e) Written and oral evidence and submissions about how the Project's construction and operations, including the risk of oil spills, would impact Syilx title, rights and interests in Upper Nicola's Area of Responsibility. The impacts identified by Upper Nicola include, but are not limited to:
 - (i) impacts to the exercise of Syilx laws and governance in relation to the lands, waters and other beings in Syilx Territory;
 - (ii) impacts to the right to make decisions and manage the land according to Syilx practices, which Syilx people have used and relied upon for hundreds of years;

- (iii) impacts to the ability to enjoy and use the lands and waters within Syilx Territory;
- (iv) impacts to the right to economically benefit from the lands and waters and resources;
- (v) decreased ability to carry out spiritual and cultural practices, including from disruption due to the Project, resulting in Upper Nicola/Syilx peoples' avoidance of the Project area;
- (vi) impacts to harvesting rights due to construction and operation of the Project. This includes the loss of access to hunting and gathering sites, effects from blasting, heavy equipment use, acid rock drainage and metal leaching, soil erosion, and geohazard and seismic risks;
- (vii) the erosion of identified archaeological and cultural heritage sites, including burial sites and historical trail systems, as well as opening these areas up to others who do not respect these sites;
- (viii) the inability to continue traditional land use activities, with resulting effects on the physical and psychological health of community members.
- (ix) impacts to the use of traditional foods and medicinal plants, due to the introduction of non-native invasive weeds and use of herbicides on the pipeline right-of-way, roads and construction sites;
- (x) impacts to Upper Nicola's Area of Responsibility and to the exercise of Syilx title and rights from spills; and
- (xi) contribution of the Project to existing cumulative effects from industrial and urban development, which have resulted in decreased fish abundance and health, which would contribute to

the total cumulative effects in Syilx Territory and Upper Nicola's Area of Responsibility.

28. Upper Nicola explained, through its evidence and submissions to the Board and to Canada, that there were significant impacts and risks of the Project on Syilx title and rights. Upper Nicola explained that the Project should not proceed without working to seek Upper Nicola's consent, given Syilx's strength of claim within Upper Nicola's Area of Responsibility, and given the Project's impacts on their rights and interests.
29. Upper Nicola also explained to the Board and to Canada in their evidence and submissions that appropriate mitigation and accommodation measures were necessary, given the impacts to Upper Nicola's Area of Responsibility, and to Syilx title and rights. Additionally, Upper Nicola explained through their evidence and submissions that it was premature to approve the Project given the outstanding issues to be addressed through consultation.
30. On May 19, 2016, the Board issued a report on the Project (the "NEB Report") setting out the Board's conclusion that the Project is in Canada's public interest, and recommending that the GIC approve the Project and direct the Board to issue the necessary CPCNs subject to 157 conditions.
31. Despite Upper Nicola having provided detailed evidence and argument about their concerns, the Report did not adequately characterize Syilx title and rights, the significance of the Project's adverse impacts on Syilx Territory, and in particular Upper Nicola's Area of Responsibility, or the significance of impacts on Syilx title and rights, as set out in Upper Nicola's evidence and submissions. Nor did the Report address how Upper Nicola's specific concerns would be addressed by conditions the Board imposed.

(iv) *Canada's initial flawed consultation with Upper Nicola (Phase III) and judicial review of the 2016 Decision*

32. Upper Nicola engaged in consultations with Canada in Phase III, and did so in good faith. Canada agreed that Upper Nicola should be consulted at the deep end of the *Haida* consultation spectrum.
33. During consultation meetings, Upper Nicola continued to bring forward evidence concerning Syilx title and rights and to express outstanding concerns with respect to the impacts of the Project within Upper Nicola's Area of Responsibility, and on their title and rights, and emphasised their concerns with the NEB's findings.
34. Upper Nicola requested information about how Canada intended to address ongoing information gaps related to the assessment of the Project, including but not limited to: a lack of an appropriate cumulative effects assessment of the Project, the failure of Trans Mountain to identify all pipeline water crossings in Upper Nicola's Area of Responsibility, and the lack of research of the properties of spilled dilbit in freshwater, amongst other gaps. Upper Nicola's efforts were not reciprocated and information was not provided by Canada.
35. Upper Nicola put forward various proposals to mitigate and accommodate the impacts of the Project on Upper Nicola's Area of Responsibility and on the exercise of Syilx title and rights. These went unanswered.
36. Despite the flawed and inadequate consultation process and other errors, on November 29, 2016, the Governor-in-Council issued the Order directing the NEB to issue a CPCN in relation to the Project to permit the construction and operation of the Project.
37. Upper Nicola was granted leave to judicially review the 2016 Order. In consolidated judicial review proceedings which considered applications from Indigenous groups, municipalities and Environmental organizations, Upper Nicola argued that the consultation process conducted by Canada was not meaningful and was inconsistent with what was required by the honour of the Crown.

38. In the result of the judicial review proceedings, the Court in *Tsleil-Waututh* concluded, *inter alia*, that Phase III consultations with Upper Nicola fell “well short of the mark” because:
- (a) Canada failed to engage in a considered, meaningful two-way dialogue.
 - (b) Canada failed to do more than listen to and record the concerns of Indigenous groups and transmit those to decision-makers, and left matters unconsidered and undiscussed.
 - (c) Canada was unwilling to genuinely understand the concerns of the Indigenous groups, and to grapple with, consider and respond to them in an adequate way.
 - (d) Canada was unwilling to depart from the Board’s findings and recommended conditions.
 - (e) Canada had an erroneous view that it was unable to impose additional conditions on Trans Mountain.
 - (f) Canada disclosed too late in the process the view that the Project would not have a high impact on established or asserted rights of Indigenous groups.
39. The Court specifically noted in respect of Upper Nicola that
- (a) The Crown consultation team had not been mandated with, and had not provided meaningful two-way dialogue;
 - (b) Canada did not grapple with Upper Nicola’s concerns following the NEB’s report and did not treat those concerns as though they had sufficient merit to be discussed seriously;
 - (c) Canada did not engage with Upper Nicola’s governance or title rights in any detail; and

- (d) Canada did not respond to numerous mitigation measures and accommodations proposed by Upper Nicola related to stewardship, use and governance of the water, and did not provide a rationale why not.
40. The Court held that, regarded as a whole, the consultation process fell well short of the required mark, because it had thwarted meaningful two-way dialogue.
41. As a result of this Court's order in *Tsleil-Waututh*:
- (a) The NEB was required to re-scope and assess the Project to include Project-related shipping so as to provide the GIC with a Report that would permit the GIC to make its decision whether to approve the project; and
 - (b) Canada was required to re-do the Phase III consultation. The Court held that Canada's dialogue must be specific and focussed, and also meaningful.
- (v) ***Canada's Further Flawed Consultation with Upper Nicola in the Renewed Consultation***
42. Throughout the course of the entire review of the Project, Upper Nicola repeatedly expressed their concerns to Canada, at both in-person meetings and in letters, about the timelines for the review of the Project and about Canada's consultation process, and the failure to mitigate or accommodate the impacts that the Project would pose to Upper Nicola's Area of Responsibility and Syilx title and rights, including governance rights. Upper Nicola continued to raise these concerns throughout the Renewed Consultation.
43. Canada repeatedly advised Upper Nicola that they would be consulted at the deep end of the *Haida* consultation spectrum, given the strength of Syilx title and rights and the Project's impacts on the exercise of their title and rights. This was confirmed at the start of the Renewed Consultation between Canada and Upper Nicola.

44. Upper Nicola advised Canada at the beginning of the Renewed Consultation that the process and content of the 2016 CAR Report and Syilx Appendix was flawed and could not be used as a starting point going forward. Upper Nicola also advised Canada that adequate time was needed to carry out meaningful consultation and reach accommodations to address outstanding concerns with the Project, and to address the Project's impacts on their title and rights.
45. Upper Nicola participated in five consultation meetings with Canada from January to May, 2019. At each meeting with Canada, Upper Nicola raised ongoing concerns with respect to the Project, including: impacts to the exercise of Aboriginal title such as the ability to make decisions and manage the land and to economically benefit from the land, impacts to traditional land and resource use, impacts from watercourse crossings in Upper Nicola/Syilx Territory, cumulative effects from projects in Syilx Territory, the risk of oil spills and the need for appropriate spill response in Upper Nicola/Syilx Territory, and concerns over cultural loss and the ability to sustain their way of life.
46. Upper Nicola sought assurances that Canada would review Upper Nicola's record before the NEB and in Phase III consultations so that they would be familiar with the evidence and Upper Nicola's outstanding concerns. At various meetings with Canada and in correspondence, Upper Nicola also raised concerns that Canada was not leaving adequate time to meaningfully consult with them, or to explore mitigation and accommodation measures. At the conclusion of the meetings, there were numerous issues still to be discussed and addressed. Upper Nicola was not satisfied that their concerns about adequate time were heard or addressed. There was insufficient time provided to discuss proposed accommodations for impacts to Upper Nicola/Syilx title and rights.
47. During meetings with Canada, Upper Nicola was not provided details of Canada's views with respect to the evidence Upper Nicola had provided on Upper Nicola/Syilx title and rights, including governance rights and the importance of water in Syilx Territory. Nor was Upper Nicola provided with Canada's views regarding the assessment of impacts on those rights. Upper

Nicola was not advised how spill response would be addressed specifically in Upper Nicola's Area of Responsibility.

48. During the consultation meetings, Upper Nicola was not provided with Canada's views with respect to the impacts from cumulative effects of the Project in Upper Nicola's Area of Responsibility or Syilx Territory, or how those impacts would be mitigated or accommodated once the cumulative effects assessment was completed by Upper Nicola. Upper Nicola only learned of Canada's views on cumulative effects on May 31, 2019, in a letter from Canada. Canada provided no further opportunity for consultation after May 31, 2019.
49. During meetings in the Renewed Consultation, Upper Nicola brought forward issues related to outstanding technical work that needed to be done so that they could understand impacts and effects on Syilx Aboriginal title and rights, and determine what mitigation and accommodation measures would be appropriate to address those impacts. To that end, Upper Nicola sought 9 commitments from Canada and/or Trans Mountain to address the outstanding technical work. These commitments were related to outstanding technical issues and gaps Upper Nicola had first raised in the NEB hearings and in Phase III consultations.
50. The commitments related to undertaking work to: address the lack of a proper cumulative effects assessment of the Project in relation to Upper Nicola's Area of Responsibility and Syilx Territory; identifying impacts and concerns related to 47 watercourse and 17 powerline watercourse crossings from the Project in Upper Nicola's Area of Responsibility and to identify and agree upon mitigation measures to address those impacts; carrying out aquifer mapping in Upper Nicola's Area of Responsibility; collaboratively developing Control Point Plans and Containment Point Plans for inland spills; providing updates on research on the fate and behaviour of diluted bitumen; developing access and monitoring plans collaboratively with Upper Nicola; providing an updated Risk Assessment and an updated Leak Detection System to Upper Nicola and a plan to validate performance of the Plan; amongst other commitments. Many of these commitments have not been addressed and remain outstanding.

51. Upper Nicola provided a proposal to Canada to conduct a cumulative effects assessment in Syilx Territory, given Trans Mountain's failure to conduct a proper cumulative effects assessment, and Upper Nicola raising this as an outstanding issue throughout the NEB hearings and consultations. Instead of engaging with Upper Nicola about the need for assessment of cumulative effects, Canada required Upper Nicola to spend unnecessary time addressing funding, timing and other administrative issues around the proposal. This detracted from the short time available for consultation on substantive matters. It was only at the last consultation meeting, shortly before the Decision was made that Canada agreed to fund the cumulative effects assessment proposal that Upper Nicola had submitted.
52. Upper Nicola also continued to advise Canada that outstanding technical work was required to address gaps in information for the Project, such that Upper Nicola and the Syilx Nation, and Canada could understand and assess the Project's impacts on Syilx title and rights and, with that information, create appropriate and specific accommodations.

Limited Opportunity for Genuine and Meaningful Engagement

53. In the Renewed Consultation, Upper Nicola was advised that the Project would only be considered by the GIC once it was satisfied that the Crown has adequately fulfilled its duty to consult, that consultations with potentially impacted groups are being offered and/or carried out in a meaningful and responsive manner; and accommodations have been considered, where appropriate, and responses provided to Indigenous groups.
54. At meetings with Canada, including on January 18, February 22, April 5, April 30 and May 24, 2019, as well as in Upper Nicola's correspondence to Canada, Upper Nicola expressed their ongoing concern that the same failed process from the earlier Phase III consultation was starting to emerge; that Canada was engaged in an exercise of ticking off boxes for sufficient Crown consultation and was not giving the time required for meaningful consultation to occur. Upper Nicola sought a commitment from Canada that they would seek an extension of

time so that the consultations could be carried out in a meaningful way. Only a brief extension was provided by Canada.

Upper Nicola/Syilx Title and Governance Rights

55. Since the Project review began, Upper Nicola has provided Canada with evidence and information about Syilx laws and governance rights, and has repeatedly raised the impacts of the Project on the exercise of Syilx title and governance rights. In the Renewed Consultation, Upper Nicola provided Canada with further information about Syilx laws and governance rights, including at the April 30, 2019 meeting. At the meetings, Canada did not ask questions about Upper Nicola's governance rights or about the meaning of Syilx laws.
56. To find workable solutions in a way that had the potential to achieve Upper Nicola's consent to the Project, Upper Nicola proposed several specific and reasonable accommodation measures to address impacts to Syilx title and governance rights. For example, in their May 24, 2019 meeting, Upper Nicola shared further details about their proposed co-management model for the Project, including the importance that Syilx laws be included in decision-making about the Project. On May 28, 2019, Upper Nicola provided Canada with a written copy of their proposed approach. At no time did Canada engage in substantive discussion about Upper Nicola's proposals, or respond to them at all.
57. On May 31, 2019, Upper Nicola received a letter from the Crown Consultation lead setting out Canada's perspective on the issues Upper Nicola raised in the consultations and how Canada was prepared to accommodate their concerns. In the letter, Canada listed the measures that, in their view, they had taken to address their concerns, including the funding of Upper Nicola's cumulative effects assessment proposal through the Terrestrial Cumulative Effects Initiative and a presentation on Diluted Bitumen. Canada stated that to address impacts of the Project on Upper Nicola/Syilx rights and title, including the use and management of land and water, they had provided a presentation on watercourse crossings, and that the Aquatic Habitat Restoration Fund to restore fish habitat would

address impacts to title and governance rights. These measures were not responsive accommodation to impacts to Upper Nicola's rights; they focused on environmental effects and outstanding information gaps in the Project assessment.

2019 CAR and Syilx Appendix

58. Upper Nicola learned of Canada's views on Syilx and Upper Nicola's strength of title and their views of Project's impacts on their rights after the Renewed Consultation, in the draft Syilx Appendix to the Consultation and Accommodation Report that was provided on April 24, 2019. Upper Nicola learned that Canada had included much of the same flawed information as in the 2016 Syilx Appendix, despite Upper Nicola providing substantive corrections and comments on the 2016 Syilx Appendix, and also advising at the beginning of the Renewed Consultation that the 2016 Appendix was fatally flawed and should not be used. In the draft 2019 Syilx Appendix, Canada continued to:

- (a) only include strength of claim assessments of Upper Nicola/Syilx title and rights specific to areas that are in immediate proximity to the Project and relying on an outdated strength of claim report that relies on a small spots theory of Aboriginal title rather than a territorial approach;
- (b) focus their assessment of Project impacts on biophysical and ecological effects rather than assessing the Project's impacts on Syilx title and rights;
- (c) limit the assessment of impacts to the Project corridor rather than those that would be experienced in other parts of the Territory, for example, downstream effects of oil spills and invasive species;
- (d) fail to consider the significant impact of Syilx people being denied access to Syilx Aboriginal title lands where the Project is being constructed and operated;

- (e) rely on the NEB's erroneous conclusion that the Project is not likely to cause significant adverse environmental effects on the lands, waters or resources used for traditional purposes by Aboriginal groups, and is not likely to cause significant adverse effects on the ability of Aboriginal groups to utilize lands, waters or resources for traditional purposes, despite strong evidence that the construction, operations and spills from the Project would cause such effects and that most of the mitigation measures and conditions outlined by the NEB had not yet been identified or assessed to determine whether they will be effective;
- (f) rely on the NEB's findings with respect to the Project's impacts to cultural and spiritual practices, with limited explanation as to how the NEB reached those findings given the evidence Upper Nicola put before it regarding these impacts;
- (g) fail to address impacts from cumulative effects, given the lack of a cumulative effects assessment in Syilx Territory;
- (h) fail to address the inadequacy of spill response planning in Upper Nicola's Area of Responsibility despite Upper Nicola repeatedly raising this concern in evidence and written submissions to the NEB and throughout the consultations ;
- (i) fail to address the lack of sufficient spill response equipment and training in Upper Nicola/Syilx Territory despite Upper Nicola raising this concern in their expert reports filed in their evidence and written submissions to the NEB and throughout the consultations.

59. As in the Phase III consultations, Upper Nicola was provided with very little time to review the draft CAR or Appendix and provide their feedback. Upper Nicola was also still engaged in consultations with Canada during that time, having substantive consultation meetings on April 30 and May 24, 2019. Given the timing, the draft Syilx Appendix did not include the information from April 30 or May 24 consultation meetings about title and rights, the Project's impacts to

those rights, their outstanding concerns, or various proposed accommodation measures.

60. On May 31, 2019, Upper Nicola told Canada about their concerns with the process, including serious concerns with the content of the Draft 2019 CAR and Upper Nicola/Syilx Appendix, noting that the documents contained the same errors as the 2016 Syilx Appendix. On May 31, 2019, Upper Nicola provided substantive comments on the draft Upper Nicola/Syilx Appendix. The comments did not address all the errors in those documents due to limited time for response.
61. A copy of the Final 2019 CAR and Upper Nicola/Syilx Appendix was provided to Upper Nicola on June 14, 2019. Upper Nicola was given no opportunity to provide comments on the Final 2019 CAR and Upper Nicola/Syilx Appendix before these were provided to the Governor-in-Council for decision, despite the fact that the Final Syilx Appendix included Canada's perspective on information provided in meetings and correspondence after April 24, 2019. The Final 2019 Upper Nicola/Syilx Appendix did not incorporate the comments and edits Upper Nicola provided to Canada or address the issues they had outlined in comments on the draft.

Upper Nicola's Proposed Accommodations

62. In both Phase III and in the Renewed Consultation, Upper Nicola provided various mitigation and accommodation proposals to Canada, in order to address the outstanding concerns related to the Project and to address the Project's impacts within Upper Nicola's Area of Responsibility and on the exercise of Syilx title and rights.
63. In the Renewed Consultation, Upper Nicola proposed changes to Project conditions, after being encouraged by Canada to do so. Upper Nicola proposed changes in order to address Trans Mountain's engagement with them related to Project Planning and implementation during construction and operations and in relation to emergency response planning. Upper Nicola also proposed a co-

management model for the Project in Upper Nicola's Area of Responsibility to mitigate and accommodate impacts to Syilx title, and to the exercise of Syilx laws and governance rights. Neither of these proposals were discussed or meaningfully responded to by Canada in the Renewed Consultation. For example, even a reasonable proposal to modify Condition 153 to require Trans Mountain to undertake a spill response exercise on the Nicola River, was never addressed by Canada.

64. In the Renewed Consultations, Upper Nicola advised Canada that in order for Upper Nicola and the Syilx Nation to know whether they could agree to the Project, they need to know what the benefit sharing arrangements would be. Upper Nicola requested that benefits of the Project, including taxes and revenues, be shared with Upper Nicola and the Nation. Despite this request, Upper Nicola was advised that the Crown consultation team were not mandated to say 'yes' or 'no' on anything related to economic benefits.
65. For its part, Canada did not advance proposals for accommodation of impacts that were specifically responsive to Upper Nicola's concerns about the Project's impacts on their rights. Any proposals advanced by Canada were generic and were targeted at environmental effects and filling information gaps in the assessment.
66. Upper Nicola treated the Renewed Consultation as an opportunity for Canada to work with Upper Nicola to address their significant concerns with the Project and its impact on the exercise of their title and rights, and to work towards obtaining Upper Nicola's consent to the Project. Canada also advised they were working to do so at the outset of the Renewed Consultation. Canada did not, however, carry out consultation in a manner that would address significant concerns and move toward consent.

C. GROUNDS FOR JUDICIAL REVIEW

67. All statutory decision-makers are bound by the Constitution, including the protection of Aboriginal rights under s. 35(1) of the *Constitution Act, 1982*. The duty to consult and accommodate in accordance with the Honour of the Crown is

an obligation on all statutory decision-makers empowered to make decisions that may implicate Aboriginal rights.

68. The duty to consult and accommodate arises when any decision of the Crown has the potential to affect existing or asserted Aboriginal rights. The honour of the Crown requires that consultation is meaningful. It must be specific. It requires genuine assessment of the rights at stake and impacts to those rights. It requires ensuring that Indigenous peoples' concerns are heard, considered and substantially addressed. Accommodation, where required, must similarly be specific and meaningful. In all consultations, the Crown must act in good faith and the underlying purpose of reconciliation must be pursued.
69. The question of whether the Decision was made contrary to the Canada's obligations to consult meaningfully with Upper Nicola attracts two standards of review:
 - (a) On the legal questions of the existence and the extent of the duty to consult, the standard of review is correctness.
 - (b) On the question of the adequacy of consultation, the standard of review is reasonableness, and the focus for this question is on the process of consultation and accommodation.
70. The duty to consult Upper Nicola with respect to the Project was engaged and that duty was acknowledged by Canada. In making the Decision, the Governor in Council was bound to act in a manner consistent with the Constitution and the honour of the Crown, including ensuring that Canada met its duty to consult and accommodate Upper Nicola.
71. Given the strength of Upper Nicola/Syilx title and rights within Upper Nicola's Area of Responsibility, and the severity and nature of the Project's potential adverse impacts on those rights, Canada's duty to consult and accommodate Upper Nicola fell at the deepest end of the consultation spectrum. This Court previously confirmed in *Tsleil-Waututh* that Canada's duty to consult Upper

Nicola was engaged, that it was required at a deep level, and that Canada's obligation to consult must be discharged meaningfully in relation to the Project. While Canada confirmed that its duty to consult and accommodate Upper Nicola was at the deep end of the consultation spectrum, it failed to meet its duty.

72. The Renewed Consultation conducted by Canada was inadequate and unreasonable, given the strength of Syilx title and rights, and the seriousness of the Project's impacts on Syilx title and rights, including in Upper Nicola's Area of Responsibility.
73. Rather than re-doing consultation with Upper Nicola in a manner that would respond to and satisfy the word and spirit of this Court's decision in *Tsleil-Waututh* and the standards set out by the courts for honourable Crown conduct, Canada again failed to consult meaningfully. Canada again breached its duty to meaningfully consult with Upper Nicola and fell well short of the mark by again:
 - (a) failing to provide sufficient time for consultation;
 - (b) failing to meaningfully grapple with and understand the rights at stake and the impacts to those rights, including subjects of central importance to Upper Nicola as follows:
 - (i) Syilx title and governance rights, including the right to make decisions and manage the land according to their own practices;
 - (ii) Ability to carry out spiritual and cultural practices;
 - (iii) Harvesting and gathering rights;
 - (iv) Impacts to the above rights arising from the Project including from water course crossings, locked access gates; blasting, acid rock drainage, metal leaching, soil erosion, and geo-hazard and seismic risks; oil spills; cumulative effects to Syilx territory.

- (c) failing to consult with Upper Nicola in a manner and with a process that had the potential to achieve their consent to the Decision, particularly where Canada had represented that this was their intention, and given the context of consultation being that the Decision appeared to be a pre-determined outcome;
- (d) deferring plans and assessments of Project impacts on Upper Nicola/Syilx title and rights until after the Decision;
- (e) failing to adequately consider and address Upper Nicola's concerns about the Project's impacts on Upper Nicola/Syilx title and rights, as set out in their evidence before the NEB and in subsequent consultations with Canada; and
- (f) failing to respond to the reasonable and responsive accommodation measures Upper Nicola proactively proposed that would assist in accommodating, mitigating, or avoiding the impacts of the Project on Upper Nicola/Syilx rights, and not providing or proposing reasonable and workable accommodation measures that specifically address the Project's impacts to Upper Nicola/Syilx title and rights.

74. For all of these reasons, Canada did not meet its duty to meaningfully consult and accommodate Upper Nicola prior to issuing the Decision. Instead Canada undermined the potential for reconciliation with Upper Nicola.

D. CONCLUSION

75. Given all of the foregoing, the Governor-in-Council acted unlawfully in making the Decision. As such, the Decision should be quashed.

This application will be supported by the following material:

- (1) Affidavits on behalf of Upper Nicola, to be filed.

- (2) Such further and other affidavits as counsel will advise and this Honourable Court may permit.
- (3) The *Report of the National Energy Board for the Trans Mountain Expansion Project*, dated May 19, 2016.
- (4) The *National Energy Board Reconsideration Report - Trans Mountain Pipeline ULC - MH-052-2018*, dated February 22, 2019.
- (5) The Record before the National Energy Board in relation to both Reports.
- (6) The Record before the Governor-in-Council in relation to both the 2016 Decision and the Decision.
- (7) Such further and other material as counsel may advise and this Honourable Court may permit.

Pursuant to Rule 317 of the Federal Courts Rules, the Applicant requests that the Governor-in-Council send to the Applicant a certified copy of all the material relied on in making the Order and that is not in possession of the Applicant.

Date: September 11, 2019



Crystal Reeves/Elin Sigurdson
Counsel for the Applicant, Upper Nicola
Band

Mandell Pinder LLP
Barristers and Solicitors
422 - 1080 Mainland Street
Vancouver, BC V6B 2T4
Telephone: 604 681-4146
Facsimile: 604.681.0959
Email: crystal@mandellpinder.com;
elin@mandellpinder.com