

FEDERAL COURT OF APPEAL

BETWEEN:

AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE,
SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN,
YAKWEAKWIOOSE

APPLICANTS

AND:

ATTORNEY GENERAL OF CANADA and
TRANS MOUNTAIN CORPORATION

RESPONDENTS

APPLICATION UNDER SECTIONS 18, 18.1, and 28 of the *Federal Courts Act*, RSC 1985, c F-7, s. 55(1) of the *National Energy Board Act*, RSC 1985, c N-7 and Rule 301 of the *Federal Courts Rules*, SOR/98-106

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the applicants. The applicants request that this appeal 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 Courts Rules* and serve it on the applicants' solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS of being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on

request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

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

Date: SEP 11 2019

ORIGINAL SIGNED BY
JOYCE FAN

Issued by: A SIGNÉ L'ORIGINAL

Address of
local office: Federal Court of Appeal
Pacific Centre
701 West Georgia Street
Vancouver, BC V7Y 1B6

TO: British Columbia Regional Office
 Department of Justice Canada
 840 Howe Street, Suite 900
 Vancouver, BC V6Z 2S9
 Tel: (604) 666-2061
 Fax: (604) 666-2760
 Email: jan.brongers@justice.gc.ca
 dayna.anderson@justice.gc.ca
 sarah.bird@justice.gc.ca
 catherine.douglas@justice.gc.ca
 bre.stuart@justice.gc.ca

JAN BRONGERS
 DAYNA ANDERSON
 SARAH BIRD

COUNSEL FOR THE
 RESPONDENT,
 ATTORNEY GENERAL OF
 CANADA

TO: Osler, Hoskin & Harcourt LLP
 Suite 2500, 450 - 1st Street SW
 Calgary, AB T2P 5H1
 Tel: (403) 260-7000
 Fax: (403) 260-7024
 Email: rnkilioran@osler.com
 odixon@osler.com
 ssutherland@osler.com
 jwalker@osler.com
 acarnahan@osler.com
 kdesrochers@osler.com

MAUREEN KILLORAN,
 Q.C.
 OLIVIA DIXON
 SEAN SUTHERLAND

COUNSEL FOR THE
 RESPONDENT, TRANS
 MOUNTAIN PIPELINE ULC

TO: National Energy Board
 210, 517 Tenth Avenue SW
 Calgary, AB T2R OAS
 Tel: (403) 607-3476
 Email: paul.johnston@neb-one.gc.ca
 litigationparalegal@neb-one.gc.ca

PAUL JOHNSTON

COUNSEL FOR THE
 NATIONAL ENERGY
 BOARD

APPLICATION

This application is for judicial review of the Governor-in-Council's ("**GIC**") decision to issue Order in Council P.C. 2019-0820 ("**2019 OIC**") dated June 18, 2019 and published in the *Canada Gazette, Part I*, Vol. 153, No. 25, on June 22, 2019 with respect to the Trans Mountain Expansion Project ("**Project**").

The 2019 OIC, *inter alia*:

- (a) accepts the recommendation of the National Energy Board ("**NEB**") that, if the terms and conditions ("**Terms and Conditions**") set out in the NEB's report ("**Reconsideration Report**") are complied with, the Project is likely cause significant adverse environmental effects under the *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 52 ("**CEAA 2012**");
- (b) accepts that such significant adverse environmental effects "can be justified in the circumstances";
- (c) accepts the NEB's view that the Project is required by the present and future public convenience and necessity and is in the Canadian public interest;
- (d) undertakes to implement all of the recommendations of the NEB to the GIC;
- (e) is satisfied that the Project is consistent with Canada's commitments in relation to the Paris Agreement on Climate Change;

- (f) decides, taking into account the Terms and Conditions in the Reconsideration Report, that the Project is likely to cause significant adverse environmental effects under *CEAA 2012* that can be justified in the circumstances;
- (g) considers that the Project would increase access to diverse markets for Canadian oil and support economic development;
- (h) is satisfied that, having considered Justice Iacobucci's oversight, direction and advice, the consultation process undertaken was consistent with the honour of the Crown and meets the guidance set forth in the decision in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 ("**FCA Decision**") for meaningful two-way dialogue focused on: rights and the potential impacts on rights;
- (i) directs the NEB to supersede conditions 6, 91, 98, 100, 124 and 151 with the conditions as amended by the GIC ("**Amended Terms and Conditions**"); and
- (j) directs the NEB to issue a Certificate of Public Convenience and Necessity ("**Certificate**") to Trans Mountain Corporation ("**TM Canada**") in respect of the proposed construction and operation of the Project, subject to the conditions contained therein.

The Applicants make application for:

1. The following orders:

- (a) a declaration that the Crown breach its constitutional and common law duties in failing to satisfy its duty to consult and accommodate the Applicants in respect of the impacts and/or

infringements from the Project prior to the GIC issuing the 2019 OIC;

- (b) a declaration that the Crown was required as part of its consultation with respect to the Project to engage with the Applicants with respect to the *prima facie* infringement of the Applicants' established Aboriginal right to fish for food, social and ceremonial purposes ("**Established FSC Right**") which will result from the Project and the justification of that infringement;
 - (c) quashing or setting aside the 2019 OIC, or in the alternative, setting it aside and referring it back to the GIC for redetermination in accordance with the Court's directions;
 - (d) a declaration that the Certificate is a nullity, invalid, or unlawful;
 - (e) in addition or in the alternative to sub-paragraph (d), quashing or setting aside the Certificate;
 - (f) prohibiting or staying any person or body from issuing any other authorization for the Project, until the Crown's consultation obligations to the Applicants are satisfied; and
 - (g) quashing any such authorizations that are issued before the Court reaches a decision in this matter.
2. An order for costs of this application in favour of the Applicants.
 3. An order that the Applicants shall not be required to pay costs of this application to the Respondents pursuant to Rule 400 of the *Federal Court Rules* in the event that this application is dismissed.
 4. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE APPLICATION ARE:

THE PARTIES

1. The Applicants are seven Ts'elxwéyeqw villages ("**Seven Villages**") of Stó:lō people, being Aitchelitz, Skowkale, Tzeachten, Squiala First Nation, Yakweakwioose, Shxwhá:y Village and Soowahlie. These Seven Villages collectively comprise the Ts'elxwéyeqw Tribe ("**Tribe**"). Each of the Seven Villages are *Indian Act* bands within the meaning of the *Indian Act*, RSC 1985, c I-5.
2. The Attorney General of Canada is a respondent pursuant to Justice Sharlow's July 23, 2014 Practice Direction – Applications for leave to apply for judicial review under subsection 55(1) of the *NEB Act* of an order of the Governor in Council made under subsection 54(1) of the *National Energy Board Act* ("**Practice Direction**").
3. The Respondent, TM Canada, a Crown Corporation, is now the owner of the Project for which an application was filed with the NEB seeking regulatory approval of the Project (the "**Project Application**") and is therefore a respondent pursuant to the Practice Direction and Rule 303 of the *Federal Courts Rules*.

THE PROJECT

4. In 2013, Trans Mountain Pipeline ULC ("**Trans Mountain KM**"), a wholly owned subsidiary of Kinder Morgan Canada, filed the Project Application with the NEB to build and operate the Project.

STÓ:LŌ PEOPLE, RIGHTS AND TITLE

5. One translation of the term Stó:lō is "People of the River", being the Fraser River. Since time immemorial, Stó:lō have lived in, occupied

and used their traditional territory known as *S'olh Téméxw*, which includes the lower Fraser River watershed in southwestern British Columbia. Stó:lō are Halq'eméylem-speaking Coast Salish people who maintain a wide range of political, socio-cultural and economic ties, including occupation, use and management of the land and resources within *S'olh Téméxw*. The Applicants assert Aboriginal title to *S'olh Téméxw* and exercise Aboriginal rights throughout, including fishing, hunting, gathering and trapping.

6. Pursuant to the "Ts'elxwéyeqw Tribe Declaration of Aboriginal Rights and Title", the Seven Villages authorized and empowered the Tribe to manage and exercise their sovereign and inherent authority, rights and jurisdiction over the lands, air, waters and resources within *S'olh Téméxw*. Accordingly, the Tribe has represented the Seven Villages in consultation with the Crown on the Project since about May 2014.
7. Modern uses of *S'olh Téméxw* by others, without recognition and input of the Stó:lō, has put the territory under stress and negatively affected the Applicants' ability to exercise of their Aboriginal rights, including title.
8. The Stó:lō have a deeply established connection to and reliance on salmon, sturgeon and other aquatic species, all of which are integral elements of their society, culture, economy, politics, and traditions. Water quality was and remains a core factor of this relationship.
9. As Stó:lō, the Applicants have established Aboriginal rights to fish for food, social and ceremonial purposes on the Fraser River, as affirmed by the Supreme Court of Canada in *R. v. Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*]. The Crown acknowledged the Established FSC Right throughout its consultation on the Project, and it was found as fact by this Court in the FCA Decision.

INFRINGEMENT OF STÓ:LŌ RIGHTS AND TITLE

10. The existing Trans Mountain pipeline and the Project's proposed new pipeline route cross approximately 195 km of *S'olh Téméxw*, including by the base of Sumas Mountain and across a valley that was once Sumas Lake, which was an important feature for certain Stó:lō communities. Seven Project facilities fall within *S'olh Téméxw*.
11. The proposed pipeline right-of-way is immediately adjacent to a number of the Applicants' communities and First Nation Reserves, including crossing Tzeachten IR No. 13 and the Project's new pipeline proposes to cross 131 waterbodies within *S'olh Téméxw*, in which over 240 Stó:lō fisherman rely on fish for various purposes.
12. The Project will directly affect the Aboriginal rights and title of the Applicants and represents yet another in a series of linear corridors (including Highway #1, two railroads, the existing Trans Mountain pipeline, hydro lines, and roads) that have severed the Stó:lō from the Fraser River. The cumulative effects of all of these linear corridors is to leave the Stó:lō with very few places where they can access the river that gives them their name.

THE FIRST HEARING AND INITIAL PROJECT APPROVAL

13. The Crown split its consultation with Indigenous groups with respect to the Project into four phases: (a) Phase I: early engagement; (b) Phase II: the first NEB regulatory hearing to consider the Project ("**First Hearing**"); (c) Phase III: post-First Hearing to a decision by the GIC on Project approval; and (d) Phase IV: post-Project approval.
14. The Applicants were active intervenors in the First Hearing, participating as part of the Stó:lō Collective, a larger group of Stó:lō

communities.

THE INTEGRATED CULTURAL ASSESSMENT

15. Due to the direct effects of the Project on the Established FSC Right and asserted rights and title, and as part of the Applicants' effort to engage with the Crown on the Project, a detailed technical submission known as the "Integrated Cultural Assessment for the Proposed Trans Mountain Expansion Project" ("**ICA**") was filed as evidence in the First Hearing. The ICA uses a Stó:lō Cultural Model to evaluate the Project, and concluded that the Project poses a significant risk to the unique Indigenous way of life of the Stó:lō, threatening cultural integrity and survival of core relationships. Among other impacts, the ICA warned that if the Project were approved without deep, meaningful consultation and accommodation of Stó:lō land management goals, rights and title, and decision-making, the Project would negatively impact Stó:lō governance.
16. The ICA also concluded that there would be "[s]ignificant post-mitigation adverse impacts" on two critically important rights (fishing and spiritual), and that, as planned, the Project "would significantly jeopardize the survival of the unique Indigenous lifeway of the Stó:lō and unjustifiably infringe upon Stó:lō's Aboriginal rights, protected under s. 35 of the Constitution".
17. Accordingly, the ICA included 89 recommendations ("**89 Recommendations**") which, if implemented would mitigate the Project's adverse effects on Stó:lō communities. The 89 Recommendations included measures to mitigate the Project's impacts, including those to Stó:lō governance and the Established FSC Right.

JUDICIAL REVIEW AND PURCHASE OF TMX

18. On November 29, 2016, following the recommendation of the NEB in its report released in May 2016 ("**Recommendation Report**"), the GIC issued the 2016 approval of the Project ("**2016 OIC**") without adopting any of the 89 Recommendations.
19. The 2016 OIC was the subject of multiple judicial review applications, including one brought in December 2016 by the Applicants, who, in early 2017, were among others granted leave to seek judicial review of the GIC's decision to issue the 2016 OIC. These judicial review proceedings were consolidated into one proceeding which was heard in October 2017.
20. On May 29, 2018, while awaiting a decision from this Court, Canada announced its decision to purchase the Project and its existing pipeline infrastructure (collectively, "**TMX**") from Trans Mountain KM. In response, on June 8, 2018, the Applicants wrote to the Prime Minister and the Minister of Natural Resources ("**June PM Letter**") to register a formal objection to Canada's decision to purchase TMX without any prior notice to, or consultation with, the Applicants.
21. On August 17, 2018, the Minister of Natural Resources, Amarjeet Sohi, responded to the June PM Letter, explaining that Canada was purchasing TMX to "secure [the Project's] timely completion" and to "guarantee the resumption of construction work, protecting thousands of jobs in Alberta and British Columbia".
22. On August 30, 2018, this Court released the FCA Decision, quashing the 2016 OIC and remitting the issue of Project approval back to the GIC for redetermination. The decision to quash was based on two central issues:

- (a) the NEB unjustifiably excluded Project-related tanker traffic from the definition the scope of the Project under review, which led to successive, unacceptable deficiencies in the Recommendation Report, and as a result, the GIC could not rely on it; and
 - (b) Canada failed to adequately discharge its duty to consult in Phase III of the consultations on the Project ("**Flawed Phase III**") by neither meaningfully engaging in discussion nor grappling with the real concerns of the Indigenous applicants so as to explore possible accommodation of those concerns.
23. The Applicants were among the successful Indigenous applicants in the FCA Decision, with this Court specifically finding, *inter alia*, that:
- (a) the Applicants possess established Aboriginal fishing rights on the Fraser River;¹
 - (b) Canada had concluded that Project construction and routine maintenance during operation was expected to result in impacts on the Applicants' freshwater fishing and marine fishing and harvesting activities;²
 - (c) Project-related marine vessels would also cause temporary disruption to the Applicants' marine fishing and harvesting activities;³
 - (d) Canada's consultation analysis lacked: (i) any mention of the Applicants' constitutionally protected right to fish and how that constitutionally protected right was taken into account by Canada; and (ii) any explanation as to how the consultation

¹ FCA Decision at para. 40.

² *Ibid.*, at para. 726.

³ *Ibid.*, at para. 727.

process affected the Crown's ultimate assessment of the impacts of the Project on the Applicants;⁴ and

- (e) Canada's consultation with the Applicants failed as a result of, *inter alia*, it not grappling with the specific concerns raised by the Applicants, including the 89 Recommendations.⁵

24. In the FCA Decision, this Court ordered, *inter alia*, that Canada must re-do its Flawed Phase III ("**Court Directed Phase III**"), further stating that, only after the Court Directed Phase III was completed and any accommodations made, could the Project be put before the GIC again for re-approval.

RECONSIDERATION HEARING

25. Following the FCA Decision, on September 20, 2018, the GIC issued an Order in Council referring aspects of the Recommendation Report on the Project back to the NEB for reconsideration ("**Reconsideration Hearing**") and ordering that the NEB conclude the Reconsideration Hearing and render its Reconsideration Report within 155 calendar days.
26. The Reconsideration Hearing began with the NEB's request for comments and applications to participate on September 26, 2018. The Applicants participated in the Reconsideration Hearing again as interveners throughout the 155-day hearing, as part of the Stó:lō Collective, by, *inter alia*: filing letters of comment, objections, letters of support for motions of other interveners, written evidence; as well as issuing information requests; providing oral traditional evidence; and filing written Argument-in-Chief.

⁴ *Ibid.*, at para. 712.

⁵ *Ibid.*, at para. 717 and 727.

COURT DIRECTED PHASE III

Delayed Implementation by Canada- October to December 2018

27. Following the FCA Decision, the Applicants did not receive any immediate communication from federal Natural Resources Canada ("**NRCan**"), the lead agency responsible for Aboriginal consultation on the Project, about Canada's intentions with respect to how it would proceed.
28. On October 5, 2018, Minister Sohi and Chief David Jimmie, President of the Tribe, had a meeting ("**October Meeting**"), during which Minister Sohi listened to the Applicants' position regarding their outstanding concerns with the Project; however, he did not meaningfully engage with these concerns, or provide any substantive response on behalf of the Crown.
29. At the October Meeting, Chief Jimmie also hand-delivered a letter ("**First October Letter**") to Minister Sohi, outlining, *inter alia*, the Applicants' concerns with the Flawed Phase III and clarifying their expectations for the Court Directed Phase III, centred on this Court's findings in the FCA Decision. The Applicants clearly communicated their expectation that Canada would consider in detail the 89 Recommendations and engage with the Applicants concerning the infringement of the Established FSC Right as part of consultation.
30. After failing to receive a substantive response to the issues set out in the First October Letter or communicated in the October Meeting, the Applicants again wrote to Minister Sohi on October 23, 2018 ("**Second October Letter**"), reiterating their hope that Canada would develop an approach to Court Directed Phase III capable of providing a meaningful opportunity for Indigenous voices to be heard, and that the

first step towards meaningful consultation was for Canada to respond to the Applicants' concerns raised in the First October Letter and at the October Meeting.

31. There was no substantive consultation between the Applicants and the Crown in the remainder of October or November 2018 and no response to the First October Letter, the Second October Letter, or the issues raised in the October Meeting.
32. Due to the lack of response from Canada, on December 10, 2018, the Applicants again wrote to the Prime Minister ("**December PM Letter**") to discuss, *inter alia*, the Applicants' issues with the Court Directed Phase III, including: the lack of clarity provided to date by Canada on the Court Directed Phase III process; the lack of an agenda or other information surrounding the upcoming roundtable meeting with Justice Iacobucci on December 11, 2018 ("**Roundtable**"); Canada's failure to provide a justification analysis with respect to the Established FSC Right ("**Justification Analysis**"); and the procedurally unfair Reconsideration Hearing.
33. On December 11, 2018, representatives of the Applicants attended the Roundtable which included various other Indigenous groups and counsel. Justice Iacobucci did not provide substantive responses to the issues raised by the participants and there was no content specific to the Applicants. At the Roundtable, the Applicants reminded Justice Iacobucci that they expected to receive a Justification Analysis from Canada as the Court Directed Phase III moved forward.
34. Other than the Applicants' unanswered December PM Letter, there was no substantive engagement between the Applicants and Canada in December 2018; nor did Canada respond to the correspondence between August and December, the issues raised at the October

Meeting and the Roundtable, or the December PM Letter at all in 2018.

Court Directed Phase III Begins- January 2019

35. The first direct meeting between Canada and the Applicants during the Court Directed Phase III was held on January 17, 2019 ("**First Meeting**"). Just prior, the Applicants sent a letter to Justice Iacobucci ("**Iacobucci Letter**"), dated January 15, 2019, to help guide the Applicants' upcoming discussions with Canada. The Iacobucci Letter reiterated, *inter alia*, that the Applicants expected a Justification Analysis and for Canada to address the conflict of interest position it put itself in upon purchasing the TMX.
36. At the First Meeting, NRCan and the Applicants spoke at a high level about expectations for the ensuing Court Directed Phase III, and the Applicants reiterated their concerns related thereto, including their opinion that the Crown had put itself in a position of conflict of interest as a result of its purchase of TM Canada. The Applicants also reminded NRCan that they expected the Crown to conduct a Justification Analysis, and that, as a critical component of moving forward with the Court Directed Phase III, they expected a response from Canada to the 89 Recommendations ("**Canada's ICA Response**"). NRCan acknowledged this and committed to conducting a thorough review of the ICA and to holding technical working group workshops ("**TWG Workshops**") on the 89 Recommendations in the ICA. The TWG Workshops were originally proposed by the Applicants in 2015 and only agreed to by Canada at the First Meeting in 2019. However, despite knowing of the critical importance of the 89 Recommendations to the Court Directed Phase III, Canada did not come prepared to address them at the First Meeting.

37. Also at the First Meeting, NRCan advised that the Crown took the position that the timelines for a decision under the *NEB Act* and the completion of the Court Directed Phase III were inextricably related and that Court Directed Phase III therefore had to be completed within three months after release of the Reconsideration Report on February 22, 2019, in accordance with a statutory timeline under the *NEB Act*. This came as a complete surprise to the Applicants and immediately heightened their concerns over the ability of the process to be meaningful, given a drop dead date of mid-May 2019. However, the Crown did assure the Applicants that the Court Directed Phase III would not be completed until there had been meaningful consultation.
38. One of the substantive tasks agreed to between Canada and the Applicants at the First Meeting was co-developing terms of reference ("**Terms of Reference**") on the process for Court Directed Phase III. The first draft was prepared by the Applicants and circulated on January 30, 2019.
39. On January 28, 2019, Justice Iacobucci responded to the Iacobucci Letter without addressing any of the substantive issues raised, but simply suggesting that the NRCan's Consultation Lead for the Project, Deborah Corber, would be addressing these issues. In her response of January 29, 2019, Ms. Corber broached some of the issues, at a very high level, but did not mention the Justification Analysis. Ms. Corber also indicated that Justice Iacobucci would be responding to the Applicants directly, but no further communication was received from Justice Iacobucci.
40. On January 29, 2019, Minister Sohi finally responded to the August PM Letter and the First October Letter, and on March 1, 2019, responded to the December PM Letter; however these responses did

not substantively address the issues raised by the Applicants in their correspondence.

41. On January 31, 2019, the Applicants met with NRCan for the second time ("**Second Meeting**"). At the Second Meeting, *inter alia*, NRCan advised that it had established a technical working group to review and respond to the 89 Recommendations and that it might be in a position to provide Canada's ICA Response by February 15, 2019.
42. NRCan did not provide Canada's ICA Response on February 15, 2019.
43. The Applicants advised the Crown that they were reluctant to schedule further meetings when neither the Crown nor TM Canada had provided critical information, such as their respective responses to the 89 Recommendations and updated construction alignment sheets ("**Alignment Sheets**") that included Stó:lō-specific cultural sites. This crucial information was the only means for the TWG Workshops to foster meaningful dialogue and actual outcomes. Canada had promised an iterative process which meant the timely exchange of information and the opportunity for it to be considered, not just NRCan's team being able to report up within the federal government that there had been a "meeting".
44. On February 25, 2019, the Applicants circulated a revised second draft of the Terms of Reference ("**Second Draft**") aimed at addressing Canada's comments from the Second Meeting. The Second Draft contemplated a renewed process in furtherance of the Court Directed Phase III, including the development of a collaborative approach to identifying impacts and mitigation or accommodation measure for each identified impact to be developed as a joint report to the GIC ("**Joint Report**") to inform the GIC's decision on Project approval.

45. The Applicants also expressed their concerns to Canada with the way in which the Court Directed Phase III was unfolding, including the Crown's continued failure to provide Canada's ICA Response to the 89 Recommendations.
46. On March 6, 2019, NRCan provided Canada's ICA Response, a revised version of the Second Draft of the Terms of Reference, and a concordance table describing Canada's changes made to the Applicants' Second Draft Terms of Reference sent on February 25, 2019. Of particular note for the Applicants in Canada's proposed revisions to the Terms of Reference was the removal of the requirement that the Joint Report be provided to the GIC prior to any decision on Project approval, a significant change to the proposed outcome of the collaborative process originally contemplated by the Terms of Reference. Further drafts of the Terms of Reference were exchanged. A term requiring that Canada complete the Justification Analysis as part of the Court Directed Phase III was expressly rejected by NRCan on April 1, 2019.
47. On March 14, 2019, the Applicants again wrote to the Prime Minister ("**March PM Letter**") concerning the serious issues that remained unaddressed by Canada—despite the Applicants repeatedly raising them— including timelines, Canada's conflict of interest and the Justification Analysis.
48. By April 1, 2019, the Applicants were still unable to finalize the schedule for the TWG Workshops, as they still had not received necessary information from TM Canada to inform these workshops, including the updated Alignment Sheets incorporating Stó:lō cultural data and TM Canada's responses to the 89 Recommendations ("**TM Canada's ICA Response**"). Without these, the Applicants feared that

the TWG Workshops would not be meaningful, effective or complete. Nevertheless, the Applicants indicated that they hoped to be able to meet on April 22, 2019 or May 6, 2019, if TM Canada could provide the requisite information by then.

49. On April 10, 2019, the Applicants again spoke with TM Canada concerning the need for TM Canada to update its Alignment Sheets, which the Applicants had been requesting for several years. The Alignment Sheets, which were supposed to contain information relating to the specific technical data concerning mitigation measures imperative for identifying gaps and possible accommodation, were a key component in informing discussions around possible conditions and mitigation measures to be discussed at the TWG Workshops and potentially included in the Joint Report.
50. Minister Sohi responded to the March PM Letter on April 10, 2019, affirming Canada's belief that the timelines in the *NEB Act* applied to the Court Directed Phase III, and finally addressing, and rejecting, the Applicants' request for a Justification Analysis as part of the Court Directed Phase III. Minister Sohi did acknowledge, however, the importance of the TWG Workshops to ensuring that Project impacts "are minimized or eliminated".
51. By letter dated April 17, 2019, the Crown provided a status update on its views on the Court Directed Phase III ("**Status Update**"), implying a lack of responsiveness on the Applicants, which was entirely inappropriate in the circumstances. The Applicants were disappointed with the insinuations made in the Status Update as they had been entirely responsive and proactive throughout. Further, since the First Meeting and consistently thereafter, the Applicants had repeatedly raised their capacity issues with Canada.

52. The Applicants clearly viewed the TWG Workshops as critical for the Court Directed Phase III, and in fact, had requested such meetings since 2015, but required Canada, and TM Canada, to do their part to ensure they were meaningful and effective. The TWG Workshops were the means by which the 89 Recommendations could be grappled with- an express requirement arising from the FCA Decision and a pre-condition to any consideration of Project approval.
53. When the Applicants finally received the Alignment Sheets on April 23 and 24, 2019, they failed to include draft mitigation measures, despite this information being critical and available to TM Canada since 2014. The Applicants expected that TM Canada would complete the work needed on the Alignment Sheets by preparing draft mitigation notes to be included in the “Resource Specific Mitigation Tables”, which could then be discussed at the TWG Workshops.
54. On April 24, 2019, the Crown sent the Applicants the draft Crown Consultation and Accommodation Report (“**Draft CCAR**”) and the Applicants’ specific draft annex (“**Draft Annex**”). The Applicants considered the Draft Annex to be ill-informed, misleading and an inaccurate characterization of the status of the Court Directed Phase III given the TWG Workshops had not even begun. Further, it contained information from TM Canada concerning work done in relation to Provincial permitting that was in fact engagement relating to a different process with a different, broader Stó:lō organization.
55. On April 30, 2019, the Applicants finally received TM Canada’s ICA Response.
56. On May 3, 2019, the Applicants provided NRCan with the Applicants’ preliminary review of Canada’s ICA Response. Unfortunately, given the delayed delivery of TM Canada’s ICA Responses, the Applicants

did not have time to include these in their review, a further hindrance to realizing a meaningful, iterative process, and effective TWG Workshops.

57. Throughout this time period, the Applicants continued to express their concerns to the Crown about how the Court Directed Phase III was unfolding and, in particular, how the Applicants' capacity and resources were being stretched without any substantive outcomes. Throughout the correspondence relating to the scheduling of TWG Workshops, Canada clearly failed to recognize the Applicants' diligent efforts to ensure that the TWG Workshops were efficient, had the appropriate knowledge holders in attendance on behalf of the Applicants and resulted in meaningful dialogue around mitigation measures and accommodation.
58. Despite the concerns repeatedly raised by the Applicants concerning the ability to complete the Court Directed Phase III within the timelines set by the Crown, and the assurances by Canada that decision-makers at the highest level were being actively briefed on the consultation process, beginning in at least February 2019, Minister Sohi made public statements that Canada was in a "very strong position" to conclude the Court Directed Phase III within the timeline relied on by Canada under the *NEB Act*, being in or around mid-May 2019.

The Deficient TWG Workshops- May 2019

59. The TWG Workshops among Canada, TM Canada and the Applicants were: (i) a water workshop ("**Water Workshop**") on May 6, 2019 related to fisheries and emergency management; (ii) a socio-economic workshop ("**Socio-Ec Workshop**") on May 16, 2019; (iii) a cultural heritage workshop ("**Cultural Heritage Workshop**") on May 23, 2019; and (iv) a follow-up to the Water Workshop ("**Remedial Water**").

Workshop") on May 31, 2019, held due to TM Canada failing to come to the Water Workshop prepared to address necessary issues. Similarly, Canada and TM Canada both attended the Socio-Ec Workshop and Cultural Heritage Workshop unprepared, and acknowledged that further TWG Workshops were required to address the consequential outstanding issues; however, there was insufficient time remaining in the Court Directed Phase III to schedule additional follow-up workshops.

60. On May 9, 2019, NRCan circulated a draft Table of Contents for the Joint Report. At this time, only an incomplete Water Workshop had taken place, and the additional TWG Workshops were scheduled for mid- to late-May. In the Applicants' view, insufficient substantive outcomes had yet to be achieved to inform the drafting of the Joint Report.
61. On May 19, 2019, in response to a request made at the Water Workshop, TM Canada finally provided information to demonstrate how information contained in the ICA and Cultural Heritage Overview Assessment were incorporated into TM Canada's environmental plans. However, this information from TM Canada amounted to a significant volume of material for the Applicants to understand and evaluate, plus cross-reference for accuracy and adequacy, with little-to-no time to do so.
62. On May 29, 2019, the Applicants specifically requested that the individuals attending the Remedial Water Workshop come prepared to speak to all issues and topics listed on the agenda. However, despite this being a workshop related to fisheries, and despite the Applicants' significant concerns surrounding Project impacts on the Established FSC Right, no representative from the federal Department of Fisheries

and Oceans attended, no emergency response representative was present on behalf of TM Canada and no representative was present on behalf of the NEB to speak to Project conditions, relevant regulatory filings or enforcement mechanisms.

63. At the Remedial Water Workshop, which took place on May 31, 2019- the very day that Canada would ultimately end its substantive engagement on the 89 Recommendations- the Applicants expressed frustrations with, *inter alia*: TM Canada constructing water-crossings outside of the period of lowest riparian activity for 13 water-crossing sites; the inadequate level of collaboration; rushed timelines; and the absence of technical and traditional knowledge-holders in the room. Canada simply acknowledged that this had been an unsatisfactory process for the Applicants and that the timeline had been “challenging” with the volume of concerns that needed to be addressed.

Court Directed Phase III is Unilaterally Concluded by Canada- June 2019

64. On May 28, 2019, NRCan wrote to the Applicants to advise that the Court Directed Phase III was “coming to a close” and that all comments on the Draft CCAR and the Draft Annex had to be provided by May 31, 2018. It further imposed a deadline of June 6, 2019 to provide independent submissions to the GIC on the adequacy of the Court Directed Phase III (“**Independent Submissions**”).
65. On May 29, 2019, just two days prior to the Court Directed Phase III ending, NRCan emailed the Applicants regarding the Applicants’ outstanding concerns over the very recent integration of 400 Stó:lō cultural sites (“**400 Stó:lō Cultural Sites**”) into TM Canada’s Alignment Sheets. The Crown recognized that the 400 Stó:lō Cultural Sites had yet to be meaningfully accommodated, but opined that the detailed work involving mitigations (and thus accommodation) for all

400 Stó:lō Cultural Sites did not have to be completed in order for the GIC to make an informed decision. Canada offered the Applicants additional funding to “advance [their] interests...following the GIC decision”. There was no indication of how, if at all, any outcomes of this additional capacity funding post-approval would factor into regulatory oversight for the Project.

66. On May 31, 2019, the Applicants responded to NRCan’s email of May 28, 2019 regarding the deadline to file comments on the Draft Annex, stating that the Draft Annex should not even be considered as acceptable to put before the GIC, as it was not representative of the status of the Court Directed Phase III. Rather, the Applicants stated that the Draft Annex was a misleading narrative of a consultation process that was nowhere near complete, and specifically identified the significant issues with the Court Directed Phase III, including, *inter alia*:
 - (a) The timeline and capacity for the Court Directed Phase III did not allow for any updates to the ICA to be completed, despite it being over five years old;
 - (b) Critical information meant to inform TWG Workshops, and thus accommodation and mitigation measures, was not provided in a timely way which contributed a lack of effectiveness of these workshops;
 - (c) The TWG Workshops would be incomplete prior to the GIC making a decision on Project approval;
 - (d) Canada was misrepresenting the actual amount of time spent in active consultation as part of the Court Directed Phase III;

- (e) Canada was over-emphasizing the role of actual decision makers as participants in the Court Directed Phase III; and
 - (f) Rather than specifically address the concerns raised by the Applicants throughout the Court Directed Phase III, Canada was relying on form letters sent to all Indigenous communities on behalf of the Crown as being responsive.
67. The Applicants were also concerned that they would be receiving the final Crown Consultation and Accommodation Report ("**Final CCAR**") and the Applicant's final annex ("**Final Annex**") for the first time at the same time as they were delivered to the GIC, and would be given no opportunity to review the updates relating to the TWG Workshops, all of which occurred after the one and only Draft CCAR and Draft Annex were circulated by Canada.
68. On June 4, 2019, the Crown responded that, although it looked forward to future discussions, the Court Directed Phase III was now concluded.
69. On June 6, 2019, the Applicants provided their Independent Submissions, which stated, *inter alia*, that, despite the clear direction of this Court in the FCA Decision, Canada had once again failed to meaningfully consult with the Applicants with respect to the clear impacts on their rights, title and interest that will result from the Project, including and especially the Established FSC Right.
70. On June 14, 2019, the Crown provided the Applicants and the GIC with the Final CCAR and the Final Annex.

GIC APPROVES PROJECT

71. On June 18, 2019, a mere four days (and only two working days) after receiving the Final Annex and Final CCAR, the GIC made an order under s. 54(1) of the *NEB Act*, issuing the 2019 OIC and directing the NEB to reissue a Certificate in respect of the Project, subject to the Terms of Conditions.

GROUND FOR JUDICIAL REVIEW

Standard of Review for Indigenous Consultation

72. The existence, extent and content of the duty to consult are legal questions reviewable on the standard of correctness. Where, for example, the government “misconceive[s] the seriousness of the claim or impact of the infringement” – factors negatively impacting the extent or content of the duty to consult – these are questions of law which are also appropriately judged on the standard of correctness.⁶
73. The adequacy of consultation itself is a question of mixed fact and law reviewable on the standard of reasonableness.⁷
74. Reasonable consultation requires, at minimum, that the government ensure that “every reasonable effort is made to inform and consult.” The phrase “every reasonable effort” means that consultation cannot be deemed adequate merely because some effort to engage in consultation can be identified by the Crown. If the consultation opportunities are only “brief, hurried and inadequate” when it “would have taken Canada little time and little organizational effort to engage

⁶ *Yellowknives Dene First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, 2015 FCA 148 (“*Yellowknives*”) at para. 46; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (“*Haida*”) at para. 61.

⁷ *Haida* at para. 61-63, KA Tab 11; *Yellowknives* at para. 46.

in meaningful dialogue,” such efforts cannot be held to be reasonable.⁸

75. In the context of regulatory processes, “in substance an appropriate level of consultation [must be] provided.” Such processes must provide for mechanisms which allow for participation which reasonably corresponds to the spectrum of consultative actions and accommodation required in a particular situation as stated in *Haida*.⁹

Crown’s Duty to Consult was not Discharged During the Court Directed Phase III

76. The Applicants bring this application based on the following:

- (a) Canada breached its constitutional obligations in failing to adequately consult and accommodate the Applicants during the Court Directed Phase III, including by, *inter alia*:
 - (i) Failing to respond to the specific concerns of the Applicants in a timely way, or at all, resulting in a lack of meaningful dialogue;
 - (ii) Failing to provide sufficient authority and mandate to the Crown representatives engaged in the Court Directed Phase III; rather, Canada relied on reporting up by its officials with no meaningful two-way dialogue between the Applicants and the actual decision-makers;
 - (iii) Placing unreasonable reliance on inaccurate summaries of the status of the Court Directed Phase III;

⁸ *R. v. Nikal*, [1996] 1 S.C.R. 1013 at para. 110, cited with approval in *Haida* at para. 62; *Gitxaala Nation v. Canada*, 2016 FCA 187 at para. 325.

⁹⁹ *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 39; *Haida* at para. 43-47; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at paras. 47-49.

- (iv) Failing to provide itself sufficient time to consider the Final CCAR, Final Annex and Independent Submissions; and
 - (v) Placing unreasonable restrictions on the time for consultation for the Court Directed Phase III;
- (b) It was clear that Project approval by the GIC would infringe the Established FSC Right of the Applicants, but the Crown refused to consider whether such infringement was justified and engage with the Applicants concerning the Justification Analysis as part of the Court Directed Phase III prior to the issuance of the 2019 OIC. The Crown was incorrect in finding that the content and scope of its duty to consult the Applicants did not include engagement on the infringement of their established right. An incorrect determination of the content of the Crown's duty to consult is an error in law that is fatal to the GIC's decision to issue the 2019 OIC.
77. As a result of the foregoing, the GIC erred in law and/or jurisdiction in issuing the 2019 OIC on the following grounds:
- (a) The GIC erred and acted unreasonably in finding that the Crown had adequately consulted and accommodated the Applicants during the Court Directed Phase III; and
 - (b) It was incorrect and/or unreasonable to conclude that the content and scope of the Crown's consultation with the Applicants did not require the Crown to consider the *prima facie* infringement of the Applicants' Established FSC Right.
78. The duty to consult must be fulfilled before the GIC can consider the

Project for approval. If the Crown's duty has not been fulfilled the 2019 OIC cannot stand. The Applicants submit that as a result of the foregoing errors, the 2019 OIC must be quashed.

79. The Applicants rely upon s. 35 of the *Constitution Act, 1982*, the *NEB Act*, the *Federal Courts Act*, RSC, 1985, c. F-7 and the *Federal Courts Rules*, SOR/98-106, and such as provisions as counsel will advise.

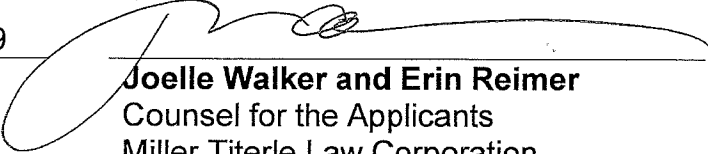
This application will be supported by the following material:

- (a) The Reconsideration Report;
- (b) Portions of the written record before the NEB in the First Hearing and the Reconsideration Hearing;
- (c) Portions of the record before the GIC when it made the 2019 OIC;
- (d) Affidavit No. 1 of Tanny Nguyen sworn on July 6, 2019;
- (e) Affidavit No. 2 of Tanny Nguyen sworn on July 6, 2019;
- (f) Affidavit No. 3 of Tanny Nguyen sworn on July 7, 2019;
- (g) Affidavit No. 4 of Tanny Nguyen sworn on July 8, 2019;
- (h) Additional Affidavits to be sworn; and
- (i) Such further and additional materials as counsel may advise and this Honourable Court may allow.

Rule 317 Request:

Pursuant to Rule 317 of the *Federal Court Rules*, the Applicants request that the GIC send a certified copy of all materials that were placed before and considered by the GIC in making the 2019 OIC that are not in the possession of the Applicants.

Dated: September 11, 2019



Joelle Walker and Erin Reimer
 Counsel for the Applicants
 Miller Titerle Law Corporation
 300 – 638 Smithe Street
 Vancouver, BC V6B 1E3
 Tel: 604-681-4112
 Fax: 604-681-4113

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 _____
SEP 11 2019

Dated this _____ day of _____ 20 _____

