



Case No: S-170912
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

**In the matter of a Decision to approve the Kinder Morgan Pipeline made January 10, 2017,
pursuant to the *Judicial Review Procedure Act*, RSBC 1996 c. 87**

BETWEEN:

DEMOCRACY WATCH and PIPE UP NETWORK

PETITIONERS

AND:

**ATTORNEY GENERAL OF BRITISH COLUMBIA and TRANS MOUNTAIN
PIPELINE ULC**

RESPONDENTS

AND:

**INDEPENDENT CONTRACTORS AND BUSINESSES ASSOCIATION, PROGRESSIVE
CONTRACTORS ASSOCIATION OF CANADA, CANADIAN IRON, STEEL AND
INDUSTRIAL WORKERS' UNION and CANADA WEST CONSTRUCTION UNION**

PROPOSED INTERVENORS

NOTICE OF APPLICATION

Names of Applicants: Independent Contractors and Businesses Association (“ICBA”), the Progressive Contractors Association of Canada (“PCA”), the Canadian Iron, Steel and Industrial Workers’ Union (“CISIWU”), and the Canada West Construction Union (“CWCU”) (collectively, the “Coalition Intervenors”).

TO: **Democracy Watch and PIPE UP Network** (the “Petitioners”)
c/o Gratl & Company
601 – 510 West Hastings Street
Vancouver, BC, V6C 1L8
Attention: Jason Gratl

AND TO: Attorney General of British Columbia (“AGBC”)
c/o Eyford Macaulay Shaw & Padmanabhan LLP
1510-650 West Georgia Street
Vancouver, BC, V6B 4N9
Attention: Angus M. Gunn, Q.C.

AND TO: Trans Mountain Pipeline ULC (“TMP”)
c/o Osler, Hoskin & Harcourt LLP
Suite 1700 - 1055 West Hastings Street
Vancouver, BC, V6E 2E9
Attention: Maureen Killoran, Q.C.

AND TO: Premier Christy Clark
c/o Sugden, McFee & Roos LLP
700 – 375 Water Street
Vancouver, BC V6B 5CS
Attention: E. David Crossin, Q.C.

TAKE NOTICE that an application will be made by the applicants to the presiding judge or master at the courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia, on August 08, 2017 at 10:00 AM, for the orders set out in Part 1 below.

9:45

Part 1: ORDER(S) SOUGHT

1. That the Coalition Intervenors be granted leave to intervene jointly in this proceeding and to make oral and written submissions;
2. That there shall be no costs of this motion or costs of the hearing or the proceeding for or against the Coalition Intervenors; and
3. Such further and other relief as this Honourable Court may deem just.

Part 2: FACTUAL BASIS

A. The Petition

1. The Petitioners seek to quash a January 10, 2017 decision of the provincial government to issue a certificate (the “**Certificate**”) under the *Environmental Assessment Act*, S.B.C. 2002, c. 43, approving the Trans Mountain Expansion Project (the “**Project**”).
2. The Project involves the construction of terminals, facilities, stations, and pipelines between Edmonton and Burnaby, as well as the expansion of facilities and intake capacity at the Westridge Marine terminal, in order to facilitate the transportation of oil across the provinces and into international markets.
3. The legal basis for the relief set out in the Petition is essentially that donating to political parties can raise a reasonable apprehension of bias in circumstances where government decision makers (who are members of political parties) pursue policies or render decisions that directly or indirectly benefit or advance the interests or views of the donors.
4. The relief sought in the Petition, if granted, will significantly delay or obstruct the Project, which is of great concern to the proposed coalition of intervenors.
5. The Petition also raises important questions relating to the ability of non-government organizations, such as the proposed intervenors, to participate in the democratic process.
6. The Coalition Intervenors, who represent over a thousand construction companies and thousands of workers who want to participate in, and work on, the Project, seek to intervene in this Petition to represent their constituents’ perspectives and unique interests regarding the implications of the Petition on the Project and the democratic process.

B. The Proposed Intervenors

7. The ICBA was established in B.C. over forty years ago and is the oldest open shop organization in Canada. Representing more than 2,000 companies and clients, including over 1,000 construction companies, ICBA members and their skilled workers are involved in virtually all major capital and infrastructure projects built in British Columbia. The ICBA advocates on behalf of free enterprise and the principle of open and fair bidding for projects, without discrimination on the basis of an employer’s association with specific unions. ICBA is also the single largest sponsor of construction apprentices in BC and trains over 3,000 construction professionals annually.

Affidavit #1 of Christopher Gardner, made July 7, 2017 (“**Gardner Affidavit**”), at paras 4-12.

8. The PCA represents approximately 115 construction companies with unionized workforces across Canada, including many in British Columbia. It advocates in favour of sustainable economic development initiatives and reasonable regulatory reforms, and seeks to promote

productive and collaborative labour-management relationships that serve both worker and employer interests. To achieve these goals, it engages in public and industry-level advocacy on behalf of its members, and provides a range of advisory and educational services to its member companies.

Affidavit #1 of Paul de Jong, made July 6, 2017 (“**de Jong Affidavit**”), at paras 5-18.

9. The two other organizations making up the Coalition Intervenors are trade unions: the Canadian Iron, Steel and Industrial Workers’ Union (“**CISIWU**”), and Canada West Construction Union (“**CWCU**”), both of whom have collective bargaining relationships with construction companies that have an interest in participating in the Project.

Affidavit #1 of Ken Baerg, made July 6, 2017 (“**Baerg Affidavit**”), at paras 7-12;

Affidavit #1 of Frank Nolan, to be made (“**Nolan Affidavit**”).

10. The CISIWU and the CWCU represent thousands of members who work in the construction industry across British Columbia.

Baerg Affidavit, at paras 3-5, 7-8;

Nolan Affidavit.

C. The Intervenor’s Interest in the Petition

Direct Interest

11. The Coalition Intervenors have a direct interest in the Petition in terms of their interest in supporting and obtaining work on the Project itself, which would be delayed or obstructed if the relief sought in the Petition is granted.

12. Large scale construction ventures like the Project are of significant importance to the economic strength and prosperity of ICBA and PCA members in the construction industry.

Gardner Affidavit, at paras 24-27;

de Jong Affidavit, at paras 19-22.

13. Therefore, the Project – estimated at approximately \$7.4 billion dollars – represents an important economic opportunity for the companies represented by the ICBA and the PCA.

Gardner Affidavit, at paras 13-23;

de Jong Affidavit, at paras 19-22.

14. The Project will also provide a large number of jobs for construction workers represented by the other Coalition Intervenors – CISIWU and CWCU.

Baerg Affidavit, at paras 7-12;

Nolan Affidavit.

Public Interest

15. Equally important, from the perspective of the Coalition Intervenors, is the broader public law principles at stake in this proceeding, and its potential impact on the right of organizations like the Coalition Intervenors to participate in the democratic process.
16. The Petition effectively seeks to prohibit or limit the ability of non-governmental organizations to financially support political parties whose policy agenda supports their views and interests.
17. Specifically, the Petition alleges that decisions favourable to economic growth and employment – and therefore favourable to non-governmental bodies or persons who support such decisions or policies – can be quashed on the basis that those non-governmental bodies or persons participated in the political process by donating to political parties that they believe would best represent their views or further their interests.
18. The implications of the court reaching this conclusion would be significant, in that it would effectively prohibit non-governmental organizations from exercising their democratic right to financially contribute to political parties that advance social and economic policies that these organizations support.
19. As entities who would be directly impacted by any legal developments that would undermine the ability of non-governmental persons or entities to freely contribute on behalf of their constituencies to political parties and political causes whose policies they support, the Coalition Intervenors have a genuine and direct interest in the public law issues raised in this Petition.

D. Proposed Arguments

20. If permitted leave to intervene, the Coalition Intervenors propose to make the following submissions, subject to revision based on the intended arguments of the parties and any orders of this Court:
 - i. If the Petition is successful, the precedent established will significantly restrict, if not preclude, the ability of corporations, unions and other persons to donate to political parties, and hence will significantly undermine their ability to participate in the political process in support of their interests and views;
 - ii. Decisions of government will favourably or unfavourably impact corporations, unions, and other persons, both specifically and generally;
 - iii. Some government decisions may favour certain corporations over others, such as in awarding public contracts; some decisions may favour union interests over corporate interests, or vice versa; and some, like approving the Project, will advance both corporate and union interests, as well as the public interest;

- iv. If a political or policy decision made by a government that favourably impacts unions or business entities that have donated to political parties can raise an apprehension of bias, that will effectively prevent such organizations from participating in the political process and making donations to support particular parties, whose social and economic policies they support;
- v. Such a finding would represent a serious interference with the democratic rights of business entities and union organizations, who are entitled to participate in the political process on behalf of their constituents, both through direct advocacy for their members' interests as well as indirectly through supporting political parties they believe will advance their interests;
- vi. It is for the legislature, not the courts, to determine how to balance the importance of public participation with or on behalf of political parties with ensuring openness, accessibility, accountability, and transparency in democratic decision making processes;
- vii. In light of the democratic interests engaged by such a decision, it is therefore necessary for the courts to take a contextual approach to 'reasonable apprehension of bias', which
 - a. makes practical sense in the context of the nature of the decision at issue;
 - b. accounts for the broader consequences of finding an apprehension of bias in that context; and
 - c. avoids the risk of chilling or undermining the ability of organizations to participate in the political processes on behalf of their constituents;
- viii. Circumstances that will raise an apprehension of bias in the context of an adjudicative tribunal decision are fundamentally different from circumstances that will raise an apprehension of bias in the context of inherently political and policy decisions; and
- ix. Properly understood in this context, Government decisions or policies made in accordance with legislative requirements which advance the interests of business and workers through the promotion of economic development and employment opportunities do not raise a reasonable apprehensions of bias on the basis that these decisions may benefit financial supporters of the Government in power, as alleged by the Petitioners.

Part 3: LEGAL BASIS

21. The test for leave to intervene has been set out by the courts as follows:
- a) the applicant must have a direct interest in the matter; or

- b) the applicant must have a public interest in a public law issue in question, and
- c) the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues on appeal that differs from that advanced by the parties.

Halalt First Nation v. British Columbia (Environment), 2012 BCCA 191 at para 12;

EGALE Canada Inc. v. Canada (Attorney General), 2002 BCCA 396 at para 7;

Carter v. Canada (Attorney General), 2012 BCCA 502 at para 13.

- 22. The Coalition Intervenors have both a direct interest in the outcome of this Petition and can also make a valuable and unique contribution to the important public law issues raised in this Petition.
- 23. As set out in the factual basis above, the Coalition Intervenors have a direct interest in the ability of their members to have an opportunity to obtain work on the Project that the Petition is attempting to halt or delay.
- 24. If the Petitioners are successful, the Court's decision will likely have a direct and prejudicial effect on the economic interests of the members of the Coalition Intervenors, all of whom will lose the opportunity to obtain economic benefits arising out of participation in the \$7.4 billion project.

Garcia v. Tahoe Resources Inc., 2016 BCCA 320 at para 11;

Faculty Association of the University of British Columbia v. University of British Columbia, 2008 BCCA 376 at para 7.

- 25. The Coalition Intervenors have a further legitimate and direct interest in the public law issues raised by the Petitioners' claim, including the administrative law standard of 'bias' in public decision making, and the importance of protecting the democratic rights of organizations to participate in the democratic process.
- 26. It is critically important to the Coalition Intervenors – unions, companies, and associations alike – that they be entitled to exercise their democratic right to support political parties and causes that they believe will advance the interests of their members.
- 27. The Coalition Intervenors want to intervene in this Petition in order both to protect their common interests in the Project itself and similar projects, and to ensure the ability of organizations and other persons to participate in the democratic process.
- 28. The Coalition Intervenors will provide a unique perspective not otherwise represented in this Petition – namely, that of key businesses and a broad segment of the workforce who expect to obtain work on the Project – and will advance arguments that will be of assistance

to the Court in terms of understanding the broader impact of the relief sought by the Petitioners, and the legal bases advanced in support of that relief.

29. More specifically, the Coalition Intervenors are in an ideal position to make submissions on how the public law issues raised in this Petition impact the ability of corporate and union organizations to freely participate in the political process and exercise their democratic rights.
30. The participation of the Coalition Intervenors will not expand the scope of the proceedings or prejudice any of the parties, and efforts will be made to ensure that the submissions of the Coalition Intervenors will not duplicate those submissions made by the parties to this Petition.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Christopher Gardner, made July 7, 2017;
2. Affidavit #1 of Ken Baerg, made July 6, 2017;
3. Affidavit #1 of Paul de Jong, made July 6, 2017;
4. Affidavit #1 of Frank Nolan, to be filed;
5. The affidavits and pleadings filed in this Petition;
6. Any further materials as this Court may permit.

The applicant(s) estimate(s) that the application will take 1 hour.

This matter is within the jurisdiction of a master.

This matter is not within the jurisdiction of a master.

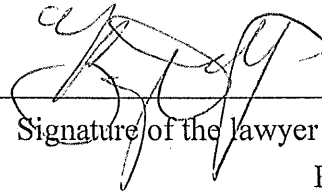
TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

- (i) a copy of the filed application response;
- (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
- (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Dated: July 7, 2017



Signature of the lawyer for the Applicants
Peter A. Gall, Q.C.

For:

To be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this notice of application

with the following variations and additional terms:

.....
.....
.....

Date:[dd/mmm/yyyy].....

.....
Signature of Judge Master

Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

discovery: comply with demand for documents

discovery: production of additional documents

other matters concerning document discovery

extend oral discovery

other matter concerning oral discovery

amend pleadings

add/change parties

summary judgment

summary trial

service

mediation

adjournments

proceedings at trial

case plan orders: amend

case plan orders: other

experts