Case No: S-173649
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE SQUAMISH NATION (also known as SQUAMISH INDIAN BAND) and XÁLEK/SEḴYÚ SIÝAM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the SQUAMISH NATION

PETITIONERS

AND:

MINISTER OF ENVIRONMENT, MINISTER OF NATURAL GAS DEVELOPMENT 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: **The Squamish Nation** and **Xálek/Seḵyú Siýam, Chief Ian Campbell** ("**Petitioners**")
c/o Ratcliff & Company LLP
500 - 221 West Esplanade
North Vancouver BC V7M 3J3
Attention: Matthew Kirschner

AND TO: **Minister of Environment**
c/o Attorney General of British Columbia
PO Box 9290 Stn Prov Govt
Victoria BC V8W 9J7

AND TO: **Minister of Natural Gas Development**
c/o Attorney General of British Columbia
PO Box 9290 Stn Prov Govt
Victoria BC V8W 9J7

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.

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 31, 2017 at 9:45 AM, for the orders set out in Part 1 below.

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. In granting the Certificate, the provincial government and respondent Ministers relied on the adequacy of consultation undertaken by the federal government with respect to the Project, which is currently under review by the Federal Court of Appeal in parallel proceedings.

4. The primary legal basis for the relief set out in the Petition is that the Government of British Columbia failed to adequately consult with the Petitioners prior to granting the Certificate, which the Petitioners allege was contrary to their rights under section 35 of the *Constitution Act, 1982*.

5. The relief sought in the Petition, if granted, may significantly delay or obstruct the Project, which is of great concern to the proposed coalition of intervenors.

6. Whether the Petitioners were appropriately consulted with respect to the Project is also raised in the proceedings currently before the Federal Court of Appeal with respect to the federal government's approval of the Project. The Petitioners are participating in that Federal Court of Appeal proceeding against the federal government.

7. The Petition raises important public law issues regarding the duty to consult, the division of powers, as well as the efficient use of judicial resources in challenging the adequacy of that consultation.

8. In particular, this Petition raises issues relating to whether the Provincial Crown owes a separate and independent duty to consult over a proposed resource development project, notwithstanding that the primary responsibility over the approval of the project – and a corresponding duty to consult – rests with the Federal Crown.

9. It also raises issues with respect to having substantively identical and parallel consultation processes engaged in by two levels of government, followed by overlapping court proceedings ongoing simultaneously in the federal and provincial jurisdictions, with the risk of wasting judicial resources and producing inconsistent court findings.

10. The Coalition Intervenors, who represent over a thousand construction companies and thousands of workers who want to participate in, and work on, the Project, do not question the importance of the Crown fulfilling its obligation to consult and accommodate First Nations to whom it owes that obligation.

11. However, it is important to the Coalition Intervenors – as supporters of large construction projects, on which they rely for economic opportunities and jobs – that those consultations,

and any resulting court proceedings, be carried out in an efficient and appropriate manner without unnecessary delay or duplication.

12. Therefore, the Coalition Intervenors 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 efficiency and appropriateness of any environmental approval and consultation processes and resulting court proceedings.

B. The Proposed Intervenors

13. 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, to be made ("**Gardner Affidavit**").

14. 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, to be made ("**de Jong Affidavit**").

15. 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 August 9, 2017 ("**Baerg Affidavit**"), at paras 7-12;

Affidavit #1 of Francis W. Nolan, made July 25, 2017 ("**Nolan Affidavit**"), at paras 5, 8.

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

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

Nolan Affidavit, *supra* at para 8.

C. The Intervenor's Interest in the Petition

Direct Interest

17. 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.

18. 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, *supra*;

de Jong Affidavit, *supra*.

19. 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, *supra*;

de Jong Affidavit, *supra*.

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

Baerg Affidavit, *supra* at paras 7-12;

Nolan Affidavit, *supra* at paras 7-13.

Public Interest

21. 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 ability of governments to support construction and resource extraction projects without undue delay.

22. The Petitioners allege that in approving the Project, the provincial Crown failed to fulfil its duty to consult the Petitioners.

23. In the Federal Court of Appeal, the Petitioners – along with many other First Nations who may be impacted by the Project and other stakeholders – make essentially an identical claim against the federal government with respect to the federal approval of the same project.

24. In granting approval, the provincial government relied on the consultation processes and procedures undertaken by the federal government, given the federal government's primary responsibility over the regulation and approval of interprovincial pipelines.

25. The provincial government cannot lawfully obstruct the Project, given the federal government's primary constitutional responsibility over interprovincial pipelines. As a result, the provincial government must follow the federal lead on this matter.

Campbell-Bennett v. Comstock Midwestern Ltd., [1954] SCR 207;

Westcoast Energy Inc. v. Canada (National Energy Board), [1998] 1 SCR 322;

Burnaby (City) v. Trans Mountain Pipeline ULC, 2015 BCSC 2140 at para 60, aff'd 2017 BCCA 132.

26. From the Coalition Intervenors' perspective, it is important that the jurisdictional lines with respect to the approval of such projects be maintained, in order to promote consultations with the appropriate government authority and to avoid the risk of undue delay and inefficiency in the approval process.

27. While fully supporting the importance of the Crown fulfilling its constitutional obligations to the Petitioners, it is also important that the protection of aboriginal rights does not result in a means by which large scale projects can be effectively paralyzed by overlapping consultation processes and court challenges.

28. Maintaining clear jurisdictional lines, and therefore clear lines of responsibility in terms of the duty to consult, is particularly important in large scale, cross-jurisdictional projects which may impact many First Nations groups.

29. If both levels of government owe a duty to consult with every group impacted with respect to the approval of a single project, the duplicative consultation processes and subsequent court challenges in multiple jurisdictions could represent an undue obstruction to project approvals with no benefit in terms of the quality or meaningfulness of the consultation.

30. The risk of overlapping duties to consult across multiple jurisdictions – and subsequently overlapping and potentially conflicting court proceedings and remedies – is of serious concern to the Coalition Intervenors and others who depend on resource extraction and project construction for jobs and economic prosperity.

31. This Petition therefore raises important public law issues of significance to the Coalition Intervenors, and the public at large, which may result in the blurring of the division of powers with respect to ultimate responsibility over the approval of interprovincial pipeline projects and obligations to First Nations communities.

D. Proposed Arguments

32. 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. Efficiency and timeliness in the approval of large scale resource extraction and construction projects is important to the construction community and others who depend on such projects for economic growth and jobs, such as the Coalition Intervenors;

ii. The Coalition Intervenors fully acknowledge and accept the constitutional significance of aboriginal rights and appropriate consultation by the Crown, and recognize that meaningful consultation and accommodation necessarily may delay or, in some circumstances, even prevent certain forms of development;

iii. However, the Coalition Intervenors intend to submit that the legal principles and requirements in this area should be designed to ensure that consultation takes place as efficiently as possible and with clear lines of jurisdictional authority over the approval of large scale projects;

iv. In this context, promoting efficiency and clear jurisdictional lines means that the duty to consult should be concentrated in the body with the primary jurisdiction to approve interprovincial pipelines, i.e., the *federal* Crown, otherwise it could lead to conflicting government or court decisions with respect to approval;

v. Judicial review is discretionary, and the courts have the widest possible discretion to refuse to grant relief, even if a case for relief on the merits has been made out;

vi. Among the basis upon which the courts will exercise their discretion is if they conclude that the interests of the party seeking relief will be adequately – albeit perhaps not perfectly – protected elsewhere;

Strickland v. Canada (Attorney General), 2015 SCC 37 at paras 38-44.

vii. The Petitioners are seeking relief against both the province and the federal government with respect to two different approvals for the same project;

viii. The federal government has the ultimate authority over the Project, and therefore even if the province disagrees, the federal government's decision to approve or not approve the Project will prevail;

ix. It follows that the province necessarily has to rely on the adequacy of the federal government's consultation in terms of whether to approve the Project;

x. As a result, the party with the real power to affect the interests of the Petitioners is the federal government, and the Petitioners are currently challenging the adequacy of consultation by the federal government in the Federal Court of Appeal;

xi. If the federal government adequately fulfilled the Crown's duty to consult, the Project will go ahead, and that issue will be decided by the Federal Court of Appeal;

xii. The Petition challenging the provincial government's decision therefore serves no valid legal purpose, given that the province has no power to halt or obstruct the Project;

xiii. And as the Supreme Court of Canada has recently decided, the Crown's duty to consult can be fulfilled by other state actors that have the power to make the "final decision" over a project, so long as the process "affords an appropriate level of consultation to the affected Indigenous group";

Clyde River (Hamlet) v. Petroleum Geo -Services Inc., 2017 SCC 40 at para 29-31, 39;

Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., 2017 SCC 41 at paras 31-32, 37, 44.

xiv. In this case, federal consultation conducted primarily through the NEB was the appropriate mechanism to fulfil the Crown's duty to consult, given the federal government's power to make the "final decision" with respect to the Project, and the Federal Court of Appeal will decide whether that duty has been fulfilled;

xv. In summary, the Coalition Intervenors will respectfully submit that the court should exercise its discretion to deny relief in this Petition, given that:

a. the Petitioners' real, substantive constitutional interests will be adjudicated in the federal jurisdiction because of the federal government's exclusive power over the ultimate approval of the Project;

b. the Petitioners' position and constitutional interests will be adequately protected in the Federal Court of Appeal proceedings in adjudicating the sufficiency of federal consultation; and

c. duplicative consultations and overlapping proceedings would unnecessarily increase costs and delay, and would risk of conflicting decisions on approval by two different orders of government as well as conflicting court decisions, even though only one level of government has the authority to make a "final decision" with respect to the Project.

Part 3: LEGAL BASIS

33. The Supreme Court of British Columbia has inherent jurisdiction to grant leave to intervene, which it will exercise more readily in cases raising public law issues.

Canadian Labour Congress v. Bhindi and London (1985), 1985 CanLII 384 (BC CA), 61 B.C.L.R. 85 (C.A.) at para 33-34;

Choi v. Brook at the Village on False Creek Developments Corp., 2013 BCSC 1535 at para 7-8.

34. 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.

35. The Coalition Intervenors have a direct interest in the outcome of this Petition, and can make a valuable contribution to the important public law issues raised in this Petition in light of their unique perspective.

36. 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.

37. 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.

38. The Coalition Intervenors have a further legitimate and direct interest in the public law issues raised by the Petitioners' claim, particularly in terms of ensuring clear jurisdictional lines for the approval of large scale resource extraction and construction projects.

39. It is critically important to the Coalition Intervenors – unions, businesses, and associations alike – that environmental approval and consultation processes with First Nations be undertaken by the level of government with the final constitutional authority over those approvals and consultations.

40. This would recognize and ensure clear lines of authority with respect to consultation procedures, and avoid encouraging parties to raise substantively similar claims in parallel proceedings in two different jurisdictions with respect to the same project.

41. From the perspective of the Petitioners, who assert that they have not been adequately consulted and their constitutional interests not adequately protected, raising claims against

both levels of government is understandable, as it would best ensure that the Project does not move forward until adequate consultation has been undertaken.

42. However, from the perspective of maintaining the constitutional division of powers and ensuring the economical use of judicial resources, substantively duplicative proceedings in federal and provincial courts with respect to the approval of a single project risk blurring jurisdictional lines and causing undue and unnecessary delay.

43. Indeed, it is respectfully submitted that in the long run, dueling consultation procedures would promote uncertain lines of authority over the approval of construction and resource extraction projects.

44. This could encourage levels of government to interfere with projects beyond their jurisdiction, or seek to diminish their own responsibility to fulfill the duty to consult regarding those projects over which they have final authority.

45. In advancing the above positions, the Coalition Intervenors will be providing 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.

46. More specifically, the Coalition Intervenors are in an ideal position to make submissions on the importance of ensuring clear jurisdictional lines with respect to the approval of large-scale resource extraction and construction projects, as well as with respect to the ability of courts on judicial review to exercise their discretion to ensure that those jurisdictional lines are respected, while at the same time ensuring that the rights of the claimants will be adequately safeguarded in the parallel proceedings.

47. 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 Francis W. Nolan, made July 25, 2017;
2. Affidavit #1 of Ken Baerg, made August 9, 2017;
3. Affidavit #1 of Christopher Gardner, to be made;
4. Affidavit #1 of Paul de Jong, to be made;
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.

[X] 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

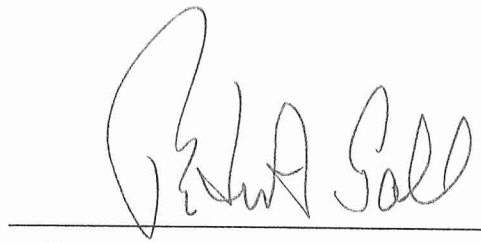
(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(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: August 10, 2017



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

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