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Our File: 10776249

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Federal Court of Appeal
90 Sparks Street, Main Floor
Ottawa, ON
K1A 0H9

Attention: Judicial Administrator

Dear Sir/Madam:

**Re: Trans Mountain Expansion (“TMX”) Project Litigation
Raincoast Conservation Foundation et al. v. Canada, Court File No. 19-A-35
Canada’s Response to the July 24, 2019 Direction of the Chief Justice**

On behalf of the Attorney General of Canada (“AGC”), we write further to the direction of the Court (Noël C.J.) dated July 24, 2019 in respect of the above-referenced proceeding. In this direction, the Court expressed its concern with the fact that no party has opposed 11 of the 12 motions for leave to seek judicial review that are the subject of this proceeding (“11 Motions”).¹ In order to address this lack of opposition, the direction invites the Attorneys General of Alberta and British Columbia to apply to intervene in this proceeding, and indicates that the Court may consider appointing an *amicus* if ultimately no evidence or representations are submitted in opposition to the 11 Motions.

In the circumstances, the AGC requests an opportunity to clarify and further explain why he has taken no position with respect to the 11 Motions. This clarification is for the benefit of the Court, and for the benefit of the Attorneys General of Alberta and British Columbia (who are copied on this letter) as they decide whether to seek leave to intervene.

Specifically, the AGC’s rationale for taking no position regarding the 11 Motions is set out at paragraph 59 of his memorandum of fact law produced in opposition to the motion for leave brought by the individuals in Court File No. 19-A-46 (the “Climate Strikers”):

59. Canada has carefully reviewed all twelve motions for leave to seek judicial review of the GIC’s decision to approve the Project and to issue the 2019 OIC. It has approached this review cognizant of its responsibility to take reasonable litigation positions that are consistent with ensuring access to justice and respect for the rule of law. Further to that review, Canada accepts that eleven of the

¹ The “11 Motions” are those brought by the Indigenous groups in Court file nos. 19-A-36, 19-A-37, 19-A-38, 19-A-40, 19-A-41, 19-A-42, 19-A-45, and 19-A-46; the environmental non-government organizations in Court file nos. 19-A-35 and 19-A-39; and the municipality in Court file no. 19-A-44. The AGC confirms that it opposes the motion brought by the individuals in Court file no. 19-A-46 (the “Climate Strikers”).

proposed applications for judicial review may warrant consideration by the Court. Should the Court agree and allow one or more of these applications to proceed, Canada intends to vigorously defend the 2019 OIC as it is of the view that the GIC's decision to issue it was lawful, reasonable and entirely compliant with Canada's constitutional obligations.²

In other words, it is the AGC's assessment that the 11 Motions may meet the low threshold of an "arguable case" that we understand the Court applies to applications for leave to seek judicial review.³ This, of course, does not mean that the AGC concedes that these proposed applications are well-founded on the merits. To the contrary, as noted above, the AGC will vigorously contest any applications that the Court permits to proceed. Instead, the AGC is simply acknowledging that the motion material prepared by the eleven applicants may be "of sufficient quality to persuade the Court that the investigation, assessment and scrutiny that takes place in court review is warranted," thereby meeting the Court's low standard for leave.⁴

Finally, it is not uncommon for the AGC to take "no position" in litigation matters where Canada neither actively supports nor opposes specific procedural relief being sought by other litigants. This is particularly the case with applications for leave to seek judicial review pursuant to s. 55 of the *National Energy Board Act*. For example, the AGC took no position on any of the 9 motions for leave to seek judicial review of the November 29, 2016 Order in Council that originally approved the TMX Project. Those motions were all granted by orders of the Court (Noël C.J., Stratas, de Montigny J.J.A.) dated February 22, 2017.⁵ While no reasons for these orders were issued, at no time did the Court express any concern with the fact that the AGC had taken no position on the motions.⁶

We would be grateful if this letter could be forwarded to the Court for its information.

Yours truly,



Jan Brongers
Senior General Counsel

JB/bs

² Canada's memorandum of fact and law in Court file no. 19-A-46 ("Climate Strikers"), at para. 59.

³ Canada's memorandum of fact and law in Court file no. 19-A-46 ("Climate Strikers"), at paras. 25 to 27.

⁴ *Lukacs v. Swoop Inc.*, 2019 FCA 145 at para. 19.

⁵ Court Files Nos. 16-A-45, 16-A-47, 16-A-49, 16-A-51, 16-A-52, 16-A-54, 16-A-55, 16-A-56, and 17-A-1; 22 February 2017 (Noël C.J., Stratas, de Montigny J.J.A.). Following the granting of leave, these proceedings were consolidated and ultimately adjudicated in *Tsleil-Waututh Nation v. Canada*, 2018 FCA 153. It is acknowledged that Trans Mountain Pipeline ULC did oppose the leave applications in that case.

⁶ A similar situation occurred in the legal challenges to the June 17, 2014 Order in Council that approved the Northern Gateway Pipeline project that culminated in the Court's judgment in *Gitxaala Nation v. Canada*, 2016 FCA 187. These challenges included multiple applications for judicial review of the Order in Council pursuant to s. 55 of the *National Energy Board Act* which required leave of the Court before they could proceed. Canada took no position on the leave motions, although the proponent Northern Gateway Pipelines Limited Partnership did oppose them. These motions were all granted, without reasons, by order of the Court (Boivin J.A.) dated September 26, 2014 (Court File Nos. 14-A-39, 14-A-41, 14-A-43, 14-A-44, 14-A-45, 14-A-46, 14-A-47, 14-A-48).

c.c. Counsel for the Attorney General of British Columbia

Counsel for the Attorney General of Alberta

All counsel on the electronic service list for consolidated file no. 19-A-35