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| F I L E D | FEDERAL COURT COUR FÉDÉRALE |
| | July 07, 2023 07 juillet 2023 |
| Jonathan Macena | |
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Court File no:

FEDERAL COURT

BETWEEN:

THE INFORMATION COMMISSIONER OF CANADA

Applicant

-and-

PRESIDENT AND CHIEF EXECUTIVE OFFICER OF THE TRANS MOUNTAIN CORPORATION

Respondent

Notice of Application

(Application pursuant to ss. 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended)

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at *(place where Federal Court of Appeal (or Federal Court) ordinarily sits)*.

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 file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-

represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

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

Date: _____

Issued by: _____

Thomas D’Arcy McGee Building
90 Sparks Street, 5th Floor
Ottawa, Ontario
K1A 0H9

**TO: DAWN FARRELL, PRESIDENT AND CHIEF EXECUTIVE
OFFICER TRANS MOUNTAIN CORPORATION
300 5th Avenue SW
Suite 2700
Calgary, AB T2P 5J2**

AND TO: THE ATTORNEY GENERAL OF CANADA
National Capital Region
Civil Litigation Section
50 O’Connor Street
Ottawa, ON
K1A 0H8
Fax: (613) 954-1920
Email: AGC_PGC_OTTAWA@JUSTICE.GC.CA

AND TO: REQUESTER
C/O Jensen Law Group
620 Battle Street, Kamloops BC, V2C 2M3

THIS IS AN APPLICATION seeking an order compelling the President and Chief Executive Officer of Trans Mountain Corporation (“President”), to implement the Commissioner’s order and respond to an access to information request (institution file number ATIA.01.012.2020) as required by the *Access to Information Act* (“Act”). On January 9, 2023, the Information Commissioner of Canada (“Commissioner”) ordered the President, pursuant to section 36.1 of the Act to, “within 30 days of the coming into effect of this order, provide a new response to the complainant confirming or denying the existence of records responsive to the request. If responsive records exist, to provide access to the responsive records, unless access to information contained therein, or a part thereof, may/must be refused under a specific provision(s) of Part 1 of the Act. If this is the case, to indicate the specific provision(s) on which the refusal is based” (hereinafter “the Order”).

The applicant makes application for:

1. A declaration that, as of the date of this Application, the President is in violation of her legal duty by failing to implement the Commissioner’s Order under the Act;
2. A writ of *mandamus*, compelling the President to implement the Order by providing a new response to the access to information request as set out by the Commissioner’s Order, within 10 days of the issuance of an order by this court;
3. An order of costs of this application in favour of the applicant; and
4. Such further and other relief as counsel may advise and this Court may permit.

The grounds for the application are:

5. The President is the Head of Trans Mountain Corporation for the purposes of the Act;
6. On December 11, 2019, the Canada Investment Development Corporation (“CIDC”) received a request under the Act (hereafter, the “Access Request”) for all files, audio or video recordings, text messages, security briefings, documents, reports or correspondence, that refer to any three named individual members of a specified organization. The request further specified that “[t]his includes all records between 2018 to the present”;
7. On January 7, 2020, the CIDC advised the requester that, under subsection 8(1) of the Act, the request had been transferred to an institution with a greater interest in the records, namely the Trans Mountain Corporation (“TMC”);
8. On January 7, 2020, TMC extended the time they had to respond to the request pursuant to paragraphs 9(1)(a) and 9(1)(b) of the Act by an additional 150 days;
9. On March 10, 2021, TMC responded to the Access Request by stating that it was neither confirming nor denying the existence of records requested pursuant to subsection 10(2) of the Act, and that if the requested records existed, they would be withheld under paragraph 16(2)(c) of the Act;
10. On March 19, 2021, the Office of the Information Commissioner (“OIC”) received and investigated a complaint under the Act (OIC file number 5820-04082) from the requester relating to TMC’s refusal to disclose the documents;
11. On November 16, 2022, pursuant to subsection 37(1) of the Act, the Commissioner issued her Initial Report stating her conclusion that the complaint was well founded. She set out the terms of her intended order, which would require the

President to provide a new response to the Access Request within 30 days of the coming into effect of the Order. She further requested pursuant to paragraph 37(1)(c) of the Act, that the President give her notice by December 16, 2022, of whether TMC plans to implement the Order;

12. In response to the Initial Report, the Vice President, Legal of TMC wrote to the Commissioner and stated that TMC expects to respond to the Access Request on or before May 31, 2023;
13. On January 9, 2023, pursuant to subsection 37(2) of the Act, the Commissioner issued:
 - i. a final report of investigation in which she concluded that the complaint was well founded as the requirements of subsection 16(2) had not been met and TMC's reliance on subsection 10(2) to withhold records was not justified; and
 - ii. the Order, per section 36.1 of the Act, requiring the President to provide a new response to the complainant confirming or denying the existence of records responsive to the Access Request within 30 days of the coming into effect of the Order;
14. Pursuant to subsections 36.1(4) and (5) of the Act, an order issued by the Commissioner comes into effect on the 36th business day after its issuance. Therefore, according to both the Order and subsections 36.1(4) and (5), the President was required to provide a new response to the Access Request by March 30, 2023;
15. The President did not seek a review of the Order with the Federal Court in accordance with subsection 41(2) of the Act, the deadline for which was February 27, 2023;

16. The President failed to implement the Order by March 30, 2023, and has yet to provide a new response to the Access Request;
17. The President's ongoing violation of her legal duty to implement the Commissioner's binding Order issued under the Act is contrary to the law. As such, the Commissioner has a direct interest in seeking the present application to ensure compliance with the Act;
18. The President has a public legal duty to implement the Order if a review of the Order pursuant to subsection 41(2) of the Act has not been sought;
19. There is a clear right to the performance of the legal duty in that:
 - i. The Commissioner issued an Order against the President to provide a new response to the Access Request by no later than March 30, 2023;
 - ii. A reasonable period of time to implement with the Order has elapsed and the time to seek review has expired and *inter alia*;
 - iii. As of the day of this application, the President has not implemented the Order, causing unreasonable delay;
20. Under the Act, the President's legal duty to implement the Order with the Commissioner's Order is not discretionary;
21. The Commissioner has a genuine interest in bringing the matter before the court to ensure that government institutions adhere to her orders;
22. The application raises a serious justiciable issue and it is in the public interest to compel government institutions to uphold their statutory duties under the Act by adhering to the Commissioner's orders;

23. The Commissioner has exhausted all of her authority under the Act and there are no other adequate remedies available to the Commissioner to compel the President to comply with her legal duty to implement the Commissioner's Order. The application is therefore a reasonable and effective means to compel compliance under the Act;
24. The order sought in this application will be of practical value and effect, as it will enforce the quasi-constitutional right of access, enforce the Commissioner's Order to ensure compliance with the Act and maintain the rule of law. The lack of responsiveness is in clear contravention of the President's legal duty under the Act and undermines the credibility of the access system and the Commissioner's order-making powers under the Act resulting in an abuse of process;
25. No equitable bar exists to granting the relief sought;
26. The balance of convenience favours an order of *mandamus*;
27. Sections 17, 18, 18.1, 28 and 44 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, and Rules 2, 3, 4, 133, 64, 300-319, and 431 of the *Federal Courts Rules*, SOR-98-106, as amended; and
28. The *Access to Information Act*, R.S.C., 1985, c. A-1.

This application will be supported by the following material:

29. Affidavits to be sworn or affirmed and filed at a later date; and

30. Such further and other materials as counsel may advise and this Court may permit.

July 7, 2023

R. Nadeau.

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