Court File No.

FEDERAL COURT

PIIKANI NATION

Applicant

- and -

THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE, THE ATTORNEY GENERAL OF CANADA and BENGA MINING LIMITED

Respondents

NOTICE OF APPLICATION

Under Sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 and Rule 301 of the *Federal Courts Rules*, SOR/98-106

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

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 the hearing will be as requested by the applicant. The applicant requests that this application be heard at Calgary, Alberta.

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 applicant's solicitor, or where 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.

DATED: September 3, 2021

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Issued by: _____
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TO: Minister of Environment and Climate Change
The Honourable Jonathan Wilkinson
c/o Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

AND TO: Attorney General of Canada
The Honourable David Lametti
284 Wellington Street
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AND TO: Benga Mining Limited
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APPLICATION

This is an application for judicial review in respect of two decisions regarding the Grassy Mountain Coal Project (the "**Project**") as set out in the Decision Statement (the "**Decision Statement**") issued by the federal Minister of Environment and Climate Change (the "**Minister**") on August 6, 2021: (a) the Minister's decision that the Project is likely to cause significant adverse environmental effects pursuant to subsection 52(1) of the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, ("***CEAA 2012***") and to refer the project to the Governor in Council ("**Cabinet**") pursuant to subsection 52(2) of *CEAA 2012* (together, the "**Referral Decision**"); and (b) Cabinet's decision that the significant adverse effects of the Project are not justified in the circumstances pursuant to subsection 52(4)(b) of *CEAA 2012* (the "**Cabinet Decision**").

THE APPLICANT MAKES APPLICATION FOR:

1. A declaration:

    (a) that the Crown breached its constitutional and common law duties in failing to satisfy its duty to consult and accommodate the Applicant Piikani Nation in respect of the Project prior to the Referral Decision and Cabinet Decision; and

    (b) that the Crown was required to engage with Piikani Nation with respect to the potential impact of the Project on Piikani Nation's Aboriginal and Treaty rights, including economic rights;

2. An order:

    (a) quashing or setting aside the Referral Decision;

    (b) quashing or setting aside the Cabinet Decision;

    (c) referring the Referral Decision back to the Minister for reconsideration in accordance with the Court's directions; and

    (d) alternatively, if only the Cabinet Decision is quashed, referring the Cabinet Decision back to Cabinet for reconsideration in accordance with the Court's

directions;

3. An order for costs of this application in favour of the Piikani Nation;

4. An order that Piikani Nation shall not be required to pay costs of this application to the Respondents pursuant to Rule 400 of the *Federal Courts Rules* in the event that this application is dismissed; and

5. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

Parties

6. Piikani Nation is an Indian Band within the meaning of the *Indian Act*, RSC 1985, c I-5. Piikani Nation is also a member of the Blackfoot Confederacy, and a signatory to Treaty No. 7. Piikani Nation holds Treaty Rights and Aboriginal Title, Rights and interests to and surrounding the Project area (collectively, "**Piikani Rights**"), which Piikani Rights are recognized and affirmed under section 35(1) of the *Constitution Act, 1982* (Canada). Such Piikani Rights include, but are not limited to, the rights to hunt, fish, trap, and gather in the ancestral territory of the Piikani Nation ("**Piikani Territory**"), which encompasses the Project area. Piikani Nation exercises its Piikani Rights throughout Piikani Territory.

7. The Respondent Minister is a statutory decision-maker with various powers and obligations under *CEAA 2012*, including the obligation under section 52 to decide whether a designated project is likely to cause significant adverse environmental effects as referred to in subsections 5(1) and 5(2) of *CEAA 2012*, taking into account any mitigation measures he considers appropriate.

8. The Respondent Attorney General of Canada is the Chief Legal Officer of the Federal Crown, with regulation and conduct of all litigation for and against the Federal Crown or any federal department pursuant to the *Department of Justice Act*, RSC 1985, c J-2. The Attorney General of Canada has been named as a Respondent in accordance with Rule 303 of the *Federal Courts Rules*.

Statutory Scheme

9. The Project requires both federal and provincial assessments and approvals, as follows:

   (a) an environmental impact assessment ("**EIA**") under Alberta's *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 and certain provincial approvals under that Act and other provincial legislation; and

   (b) an assessment under *CEAA 2012*, which Act imposed federal environmental assessment over designated projects. Under *CEAA 2012*, the Canadian Environmental Assessment Agency ("**CEAA**") and the Minister have regulatory powers over projects that have been designated for federal review, like the Project. After the conduct of the assessment, the Minister must decide, pursuant to subsection 52(1) of *CEAA 2012*, whether the Minister considers the Project is likely to cause significant adverse environmental effects referred to in subsections 5(1) and (2) of *CEAA 2012*, taking into account any mitigation measures the Minister deems appropriate. Pursuant to subsection 52(4) of *CEAA 2012*, if the Minister decides that significant adverse environmental effects are likely, the Minister must then refer the Project to Cabinet to decide whether those effects are justified in the circumstances. After Cabinet makes its decision, the Minister is obligated to issue a decision statement setting out the Minister's and Cabinet's decision.

10. If the Project is approved provincially and the Minister issues a favourable decision statement, the Project will then require further federal permits and authorizations.

11. *CEAA 2012* was repealed on August 28, 2019 and replaced with the *Impact Assessment Act*, SC 2019, c 28, s 1 ("***IAA***"). Under the *IAA*, the CEAA is continued as the Impact Assessment Agency of Canada (the "**IAA**").

Project

12. The Project is an open-pit metallurgical coal mine in the Crowsnest Pass area of southwestern Alberta proposed by Benga Mining Limited ("**Benga**"). The maximum production capacity of the Project is 4.5 million tonnes of metallurgical coal per year over

a mine life of approximately 23 years. If it proceeds, the Project is expected to create jobs and economic benefits for Indigenous groups, including Piikani Nation, who have agreed to support the Project.

13. The Project is located entirely within Treaty No. 7 lands and within Piikani Territory.

14. Piikani Nation entered into a confidential impact benefit agreement dated July 25, 2016 (the "**Agreement**") with Benga in respect of the Project and its potential impacts on Piikani Nation and Piikani Rights. The Agreement formalizes the relationship between Piikani Nation and Benga, and includes environmental commitments and initiatives, training and employment opportunities, scholarships, and business development opportunities for Piikani Nation and its members.

15. As a result of the Agreement, Piikani Nation does not oppose the Project and would economically benefit from the Project proceeding. Piikani Nation Council considered the direct and indirect benefits obtained through the Agreement and the Project for Piikani Nation members. Council determined that these benefits would serve to provide economic and business development opportunities that would otherwise not be available to Piikani Nation or its members. These benefits are particularly important to Piikani Nation as its reserve is not located in an area that has typically resulted in these types of opportunities. This was the first significant economic opportunity of this kind available to Piikani Nation.

Assessment Process

16. Benga submitted its proposal for the Project in August 2016. On August 16, 2018, the Minister and the Alberta Energy Regulator (the "**AER**") announced a joint federal-provincial review process established by the *Agreement to Establish a Joint Review Panel for the Grassy Mountain Coal Project* dated July 9, 2018. The Joint Review Panel (the "**Panel**") was to undertake both federal and provincial environmental assessment responsibilities in accordance with its terms of reference.

17. Piikani Nation provided input and documentation to CEAA and the Panel prior to the date of the Agreement about the Project and its potential impacts on Piikani Rights.

Subsequently, Piikani Nation provided its letter of support for the Project to the Panel on January 18, 2019 (the "**January 2019 Letter**"), in which Piikani Nation advised that:

(a) It had entered into the Agreement with Benga, the terms of which provide for employment, training, education and business development for Piikani Nation and its members;

(b) Pursuant to the Agreement, Piikani Nation will continue to be the steward of Piikani Territory and in that role, will work with Benga on environmental protection and mitigation activities that encompass both traditional and modern methods; and

(c) The Project would play an important role in reducing the unemployment rate for members, putting highly skilled members to work, increasing the quality of life on reserve, and generally creating a brighter future for generations to come.

18. There was no response from the Panel or the Crown to the January 2019 Letter. The Panel did not inquire or request further information about the benefits of the Agreement to Piikani Nation.

19. Piikani Nation provided an additional letter of non-objection to the Panel on March 7, 2019. The letter stated that site visits had not identified any significant traditional sites in the immediate identified Project area or right of way, and therefore Piikani Nation did not object to the Project.

20. On June 29, 2020, the Panel provided Piikani Nation with notice for the public hearing for the Project (the "**Hearing Notice**"). The Hearing Notice provided Piikani Nation with full participation rights at the hearing.

21. Although Piikani Nation was granted full participation in the hearing, including the ability to make submissions to the Panel, it did not participate. Having previously advised the Panel of its economic and other interests in the success of the Project and the mitigation steps to be taken by Benga in cooperation with Piikani Nation, Piikani Nation reasonably understood that the Panel was aware of and would properly assess Piikani Nation's stake

in the Project, including the economic benefits that Piikani Nation had secured from Benga should the Project proceed.

22. On October 23, 2020, the Government of Alberta's Aboriginal Consultation Office (the "**ACO**") provided the Panel in its capacity as the AER with preliminary assessments of consultation adequacy for various Indigenous groups, including Piikani Nation. The ACO advised that each of these groups provided letters of no concern with respect to the Project. Accordingly, the ACO determined that consultation was adequate pending the outcome of the hearing process. However, no other steps were taken by the ACO to meaningfully assess the adequacy of consultation from that point forward, notwithstanding the volumes of information provided to the Panel regarding a variety of potential impacts. The ACO did not consult Piikani Nation further, and specifically, not in relation to any impacts, whether positive or negative, arising out of the information before the Panel.

23. Like the ACO, CEAA provided the Panel with its assessments of consultation adequacy for various Indigenous groups, including Piikani Nation. In its written submission to the Panel dated September 21, 2020, included as part of the Government of Canada's submissions, CEAA outlined the consultation process and referenced the Agreement. CEAA stated that its submissions were intended to help provide information to the Panel, and was not to replace the Panel's independent consideration of all relevant submissions, including those received directly by the Panel. CEAA further stated that it had encouraged Indigenous groups to provide submissions directly to the Panel that speak to their own perspectives on the proposed Project. Although Piikani Nation had provided submissions to the Panel prior to CEAA's written submissions, which were available to CEAA, CEAA did not reference the content of the Nation's submissions as part of their written submissions. CEAA relied only on information provided by Piikani Nation *prior* to the date of the Agreement.

24. The public hearing was held from October 27, 2020 to December 2, 2020, a total of 29 days. The hearing record closed on January 15, 2021.

Panel Report and Decision

25. In *Decision 2021 ABAER 010: Benga Mining Limited, Grassy Mountain Coal Project, Crowsnest Pass* (the "**Panel Report**") dated June 17, 2021, the Panel set out the following:

    (a) Notwithstanding the letters of support and non-objection to the Project by all of the potentially impacted Indigenous groups, including Piikani Nation, the Panel concluded that the Project would result in the loss of lands used for traditional activities, which would affect Indigenous groups and their members who use the Project area, and that the Project was likely to result in significant adverse effects to physical and cultural heritage for the Blackfoot Nations (including Piikani Nation), which could not be adequately mitigated;

    (b) The Panel declined to approve the Project in its capacity as the AER because it determined that the significant adverse environmental effects on westslope cutthroat trout and surface water quality likely to be caused by the Project outweighed the low to moderate positive economic impacts of the Project;

    (c) The Panel concluded that the Project is not in the public interest in its capacity as the AER (with paragraphs 25(a) and (a), the "**Panel Decision**"); and

    (d) In light of its decision in its capacity as the AER, the Panel expressly declined to complete an assessment of mitigation measures in its federal capacity, stating that without provincial approval the Project cannot proceed.

26. Although the Panel determined that the Project would have an overall positive economic impact, including upon Indigenous groups in the Crowsnest Pass region such as Piikani Nation, it did not specifically assess the effects of the Project on Piikani Nation's socioeconomic conditions after the Agreement had been signed (which Agreement Piikani Nation had determined was sufficient to mitigate any such effects), or undertake an analysis of the effect that a denial of the Project would have on Piikani Nation. Moreover, the Panel did not request any further information from Piikani Nation on the positive socioeconomic benefits that the Project would have for its community and members as a result of the signing of the Agreement.

27. On June 17, 2021, the IAA issued a news release advising that:

    (a) The Minister had received the Panel Report; and

    (b) Prior to making a decision on the Project, the IAA would:

        (i) Consult with Indigenous groups on the Panel Report; and

        (ii) Invite the public and Indigenous groups to comment on potential conditions relating to possible mitigation measures and follow up program requirements that Benga would need to fulfill if the Project is ultimately allowed to proceed (the "**Post-Report Consultation**").

Appeal of Panel Decision

28. On July 16, 2021, Piikani Nation filed an application for permission to appeal the Panel Decision to the Alberta Court of Appeal (the "**ABCA**") pursuant to section 45(1) of the *Responsible Energy Development Act*, SA 2012, c R-17.3 on the grounds that the Panel, in its capacity as the AER, erred in law by, among other things:

    (a) failing to properly interpret, apply, and assess the public interest as a result of its failure to seek information from and engage with Indigenous groups regarding how a rejection of the Project would impact their rights and interests;

    (b) failing to consider and apply the honour of the Crown in its decision to decline to approve the Project without seeking additional information on economic and other benefits form Indigenous groups, notwithstanding that Indigenous groups, including the Piikani Nation, did not oppose the Project and filed evidence with the Panel based on their overall position on the Project; and

    (c) failing to meaningfully and adequately consult with or request that Her Majesty the Queen in Right of Alberta consult with Indigenous groups, including the Piikani Nation, once it had received and reviewed other information that could lead to a potential finding that the Project is not in the public interest.

29. The application for permission to appeal has not yet been scheduled. Companion applications made by Benga and Stoney Nakoda Nation, which also has a benefit agreement with Benga, will be heard by the ABCA concurrently with Piikani Nation's application.

Request for Abeyance by Minister

30. On June 26, 2021, counsel for Benga requested that the Minister hold the issuance of a decision statement in abeyance until the ABCA process had been completed. The request stated that failure to hold the federal process in abeyance would seriously prejudice Benga and Indigenous groups that stood to benefit from the Project if the ABCA challenge were successful.

31. On July 6, 2021, Benga wrote to the IAA, reiterating that failing to hold the federal process in abeyance pending resolution of legal challenges to the AER's decision would seriously prejudice Benga and potentially those Indigenous groups that may benefit from the Project should those challenges be successful.

32. On July 13, 2021, Piikani Nation advised the Minister that it supported Benga's request that a decision statement in relation to the Project be held in abeyance. The Nation also expressed its concerns that the Panel decision to deny the Project the required provincial approvals would result in the loss of benefits and opportunities for Piikani Nation, reiterating the economic and other interests Piikani Nation had in the Project proceeding.

33. On July 22, 2021, the IAA issued its Consultation Report, in which it stated as follows:

    (a) Its role was to assist federal authorities in the consideration of potential impacts on rights in the context of the technical review related to environmental effects;

    (b) It did not receive any requests for further discussion relating to substantive issues connected to the Project;

    (c) It relied on the Panel findings in the Panel Report that there would be a significant adverse effect on physical and cultural heritage for Piikani Nation and the other two Blackfoot Nations;

(d) It considered the consultation process conducted by that point to be reasonable and properly implemented; and

(e) Affected Indigenous communities had been given sufficient opportunity to express their views and share concerns throughout the process.

34. In addition, the IAA referred to the July 13, 2021 letter from Piikani Nation, but then noted that none of the Indigenous communities that had agreements with Benga had raised any issues relating to potential economic or social interests in the Project proceeding and how those interests may be impacted if the Project did not proceed.

35. The IAA concluded its report by stating that in its opinion, the Crown had fulfilled its duty to consult in the event that the Minister accepted the Panel findings of significant adverse environmental effects and prevents the Project from proceeding.

36. On July 27, 2021, the IAA advised Piikani Nation about the next steps in the decision-making process, but did not respond to the request for an abeyance. The IAA stated that it understood that Piikani Nation was seeking further engagement and consultation with respect to the Project, and noted that further communications in that regard would be forthcoming. However, the IAA did not undertake any further engagement or consultation with Piikani Nation.

37. The Minister did not respond to Benga's request for abeyance, and did not respond to Piikani Nation's July 13, 2021 letter, notwithstanding that the IAA had advised that a response would be forthcoming.

Decision Statement

38. On August 6, 2021, the Minister issued the Decision Statement pursuant to section 54 of *CEAA 2012*, advising that the Project would not be permitted to proceed.

39. The Minister decided that the Project is likely to cause significant adverse environmental effects as referred to in subsections 5(1) and (2) of *CEAA 2012*, and in accordance with subsection 52(2) of *CEAA 2012*, referred the matter of whether the significant adverse environmental effects were justified in the circumstances to Cabinet.

40. Cabinet decided that the significant adverse environmental effects that the Project is likely to cause are not justified in the circumstances pursuant to paragraph 52(4)(b) of *CEAA 2012*.

41. Both the Referral Decision and the Cabinet Decision were issued without undertaking and/or completing adequate consultation, including during the period after the hearing had been concluded. Benga's request, which was supported by Piikani Nation, that the decision statement be held in abeyance was not considered, not consulted on, and no reasons for this decision were provided. Moreover, no Post-Report Consultation was undertaken.

Grounds of Review

42. Indigenous peoples have a special constitutional relationship with the Crown. This relationship is recognized and affirmed in section 35 of the *Constitution Act, 1982*. Among other things, section 35 requires the Crown to consult with Indigenous peoples where the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal or Treaty right and contemplates conduct that might adversely affect it.

43. The process of consultation is guided by the honour of the Crown and must further the objective of reconciliation with Indigenous peoples. It requires the Crown to make every reasonable effort to inform and consult. Regulatory processes must provide for mechanisms that allow for participation that corresponds to the Crown conduct contemplated and the rights affected.

44. The existence, extent and content of the duty to consult are legal questions reviewable on the standard of correctness. The adequacy of consultation itself is a question of mixed fact and law reviewable on the standard of reasonableness.

45. At all material times, the Federal Crown was aware that Piikani Nation had an interest in the Project and that any Crown conduct in respect of the Project may adversely affect Piikani Rights. In light of that interest and its previous dealings with the Crown, Piikani Nation held a legitimate expectation that it would be consulted with respect to the potential impacts of the Project on Piikani Rights at each stage of the regulatory process, and that its submissions provided as part of that consultation, including submissions provided to the

Panel directly, would be considered and addressed by the Panel and any resulting decision by the Minister and Cabinet, if required. Consultation should have occurred prior to the hearing, or should have been sought after the Panel had reviewed the Project materials and assessed that a decision against Project approval was likely.

46. The Referral Decision was an unlawful, incorrect, unreasonable, and/or unconstitutional exercise of ministerial discretion and should be quashed or set aside on, *inter alia*, the following grounds:

(a) The Minister did not respond to or address Benga's request for abeyance, which Piikani Nation supported;

(b) The Minister failed to consider the fact that the Panel had not completed its federal mandate after making the Panel Decision that the Project could not proceed; and

(c) The Minister substituted his judgment for what is in the best interests of Piikani Nation, rather than respect and rely upon the leadership and governance of Piikani Nation, by finding that the potential impacts on Piikani Nation and other Indigenous groups outweigh the benefits.

47. With respect to the latter point, the Minister determined what was in the best interests of Piikani Nation without consulting or adequately consulting Piikani Nation regarding the economic benefits it and its members would gain from the Project proceeding, which economic benefits are inextricably linked to and are encompassed in Piikani Rights. This is in direct conflict with the Crown's obligations as set out in the recent decision of this Court in *Ermineskin Cree Nation v Canada*, 2021 FC 758, which was issued on July 19, 2021, approximately three weeks prior to the Decision Statement. In the *Ermineskin Cree* decision, this Court found that the Minister unlawfully exercised his statutory powers by failing to consult with Indigenous groups on potential adverse impacts of the Minister's decision on economic benefits linked to Treaty and Aboriginal rights.

48. The Referral Decision should be quashed or set aside, as it was based on the following errors:

(a) The Minister did not consider the requests to hold the Decision Statement in abeyance pending the outcome of the ABCA proceedings, and provided no reasons for failing to do so;

(b) The Minister relied upon the Panel Report to reach his Referral Decision. However, the Panel Report was prepared in error, without engagement or consultation with affected Indigenous groups, including Piikani Nation, regarding the impacts of the possible rejection of the Project. If the Panel Report is quashed or reconsidered, the Minister's decision must fail;

(c) The Minister unreasonably found that the Project is likely to cause significant adverse environmental effects. Before making this determination, the Minister was required to consider appropriate mitigation measures pursuant to section 52(1) of *CEAA 2012*. However, the Panel provided no recommendation to the Minister on mitigation, as it determined the Project could not proceed under provincial legislation;

(d) The Crown did not fulfil its duty to consult prior to the Referral Decision, in breach of section 35 of the *Constitution Act, 1982* and the principles of procedural fairness, legitimate expectations, and natural justice. The Crown failed to consult Piikani Nation and other Indigenous groups regarding the impacts to their rights, including their economic rights, of a decision denying the Project from proceeding;

(e) The Minister elected to proceed with the Referral Decision instead of honouring the request for an abeyance. He did so without regard for the Federal Court's decision in *Ermineskin Cree Nation v Canada* issued July 19, 2021 and without expanding the scope of the limited consultation done to date in order to better align the Crown's consultation efforts with the Court's reasons in *Ermineskin Cree*;

(f) The Minister incorrectly or unreasonably determined that the Project is likely to cause significant adverse environmental effects to the physical and cultural heritage and traditional land and resource use of the Piikani Nation, despite Piikani Nation's non-objection to the Project; and

(g) The Minister's reasons for the Referral Decision are inadequate.

49. The Cabinet Decision was based upon the above errors, as well as others, and should therefore be quashed or set aside. These errors include:

(a) Cabinet incorrectly or unreasonably relied on the Minister's fundamentally flawed Referral Decision. If the Referral Decision is quashed or set aside, the Cabinet Decision must also be quashed or set aside;

(b) Cabinet improperly relied on the Panel Report, which is flawed as the Panel did not consult with Indigenous groups, including Piikani Nation, about the potential impacts of rejecting the Project on their Aboriginal and Treaty rights (including economic rights derived therefrom);

(c) Cabinet found that the Project is likely to cause significant adverse environmental effects that are not justified in the circumstances without considering appropriate mitigation measures in making its decision, and specifically those mitigation measures secured by Piikani Nation as part of the Agreement with Benga. The Panel did not provide information on these mitigation measures in the Panel Report as it determined that the Project could not proceed under provincial legislation. Cabinet was unable to properly assess the environmental effects of the Project without information about potential mitigation;

(d) The Federal Crown did not fulfill its duty to consult prior to the Cabinet Decision, in breach of section 35 of the *Constitution Act, 1982* and the principles of procedural fairness, legitimate expectations, and natural justice. The Crown failed to consult Piikani Nation and other Indigenous groups regarding the impacts to their rights, including their economic rights, if the Project was denied;

(e) Cabinet elected to proceed with its decision despite requests for an abeyance. It did so without regard for the *Ermineskin Cree* decision issued July 19, 2021 and without expanding the scope of the limited consultation done to date in order to better align the Crown's consultation efforts with the Court's reasons in *Ermineskin Cree*; and

(f) Cabinet's reasons for the Cabinet Decision are inadequate.

50. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

51. One or more affidavits to be sworn;

52. *Decision 2021 ABAER 010: Benga Mining Limited, Grassy Mountain Coal Project, Crowsnest Pass;*

53. The Decision Statement;

54. The record(s) before the Minister and Cabinet in respect of the Project, the Referral Decision, and the Cabinet Decision;

55. Sections 35 and 52 of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982 c 11;

56. *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, and regulations thereunder;

57. *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, and regulations thereunder;

58. *Responsible Energy Development Act*, SA 2012, c R-17.3, and regulations thereunder;

59. Sections 18, 18.1, and 18.2 of the *Federal Courts Act,* RSC 1985, c F-7;

60. *Federal Courts Rules*, SOR/98-106; and

61. Such further and other evidence and legislation as counsel may advise and this Honourable Court may permit.

REQUEST FOR MATERIAL IN THE POSSESSION OF TRIBUNAL:

Pursuant to Rules 317 and 318 of the *Federal Courts Rules*, the Applicant requests that the Minister and Cabinet send to the Applicant and to the Federal Court Registry certified copies of all of the materials that were placed before and/or considered by the Minister and Cabinet in making the Referral Decision and the Cabinet Decision, respectively, or that are in the Minister's and/or Cabinet's possession and otherwise related to the Referral Decision and the Cabinet Decision, and are not in possession of the Applicant.

Dated at Calgary, Alberta this 3rd day of September, 2021

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