Court File No.

FEDERAL COURT OF APPEAL

BETWEEN:

SIERRA CLUB CANADA FOUNDATION AND MI'GMAWE'L TPLU'TAQNN INC.

Appellants

and

MINISTER OF ENVIRONMENT AND CLIMATE CHANGE, THE ATTORNEY GENERAL OF CANADA, AND EQUINOR CANADA LTD.

Respondents

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Halifax.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the Federal Courts Rules and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the Federal Courts Rules instead of serving and filing a notice of

appearance.

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 APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: _____

Issued by:_____

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APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the judgment of the Honourable Justice Zinn of the Federal Court dated June 16, 2023 (2023 FC 849), by which he dismissed the Appellants' application for judicial review (Court file T-938-22) of a decision dated April 6, 2022 ("Decision") of the Minister of Environment and Climate Change. The Minister's Decision approved the Bay du Nord Development Project environmental assessment, conducted by the Impact Assessment Agency of Canada ("Agency"), and determined that the Project was not likely to cause significant adverse environmental effects. The Decision was made pursuant to sections 27(1), 52(1), 53 and 54 of the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19 ("*CEAA 2012*").

THE APPELLANTS ASK for the following relief:

1. An order setting aside the Federal Court's judgment and allowing this appeal and the application for judicial review in the Federal Court;

2. An order that each party shall bear its own costs in this Court regardless of the outcome of the appeal;

3. An order that each party shall bear its own costs in the Court below, or in the alternative, that costs in the Federal Court are awarded to the Appellants, in the all-inclusive sum of $3,000 as agreed between the Appellants and the Respondent Attorney General of Canada, and in accordance with column 3 of Tariff B as between the Appellants and the Respondent Equinor; and

4. Such further and other relief as may be requested and this Honourable Court may see fit to order.

THE GROUNDS OF APPEAL are as follows:

Overview

1. The Applications Judge erred, and the Minister acted unreasonably, by failing to consider and give appropriate effect to the purposes and requirements of the statutory scheme and the other constraints on the Minister when making the Decision to approve the Project under *CEAA 2012*.

2. The Applications Judge erred by providing his own justifications for the Minister's Decision, and by creating post-Decision reasons for the Decision, and/or by adopting post-Decision reasons offered by the Respondent Equinor to support the Minister's decision, despite the Minister's unreasonable failure to grapple with or provide any such justification or reasons for not considering the effects of downstream greenhouse gas emissions or marine shipping, contrary to the requirements of *CEAA 2012*.

3. The Applications Judge erred in finding that the Crown had correctly determined that only a minimal degree of consultation was required in respect of the Mi'gmag communities represented by the Appellant Mi'gmawe'l Tplu'taqnn Inc. ("MTI").

4. The Applications Judge erred in determining that the Crown had discharged its duty to consult and accommodate the concerns expressed by the

communities represented by MTI, in the circumstances of this case, contrary to the Honour of the Crown and the Crown's obligations under s 35 of the *Constitution Act, 1982*.

5. The Applications Judge erred by striking Exhibits GF-22 and 26 to the Affidavit of Gretchen Fitzgerald and Exhibit MAV-15 to the Affidavit of Marc-André Viau from the record on the basis of irrelevance, even though these were copies of letters or emails about the Project's potential environmental effects sent to the Minister prior to his Decision regarding his Decision and which raised issues of central relevance to the application for judicial review.

Downstream Emissions

6. The Applications Judge erred, and the Minister acted unreasonably, by failing to require that the environmental effects of all greenhouse gas emissions arising from the Project, including "downstream emissions" which occur after the Project and include emissions arising from the end uses of the Project's oil, be considered within the environmental assessment.

7. The Applications Judge erred in determining that the Minister acted reasonably, despite the Minister's failure to consider or respond to submissions from the Appellants and others that the environmental effects of downstream emissions should be included and considered within the environmental assessment, and in accepting the Agency's report which, without explanation or justification, failed to discuss or address downstream

emissions, contrary to law and to *CEAA 2012*, and in particular, but not limited to, sections 5 and 19 of that *Act*.

8. Rather than assessing whether the Minister's failure was justified or justifiable in light of the relevant constraints, the Applications Judge erred by misapplying a decision of this Court made under a different legislative scheme, and by deferring to decisions of a different administrative decision-maker, the National Energy Board, that declined to consider the downstream emissions of pipelines, which did not themselves *produce* oil, based on specific evidence tendered in those proceedings.

9. The Applications Judge further erred by determining, based solely on a post-Decision justification offered by the Respondent Equinor, that it was not possible for the Minister and Agency to consider the environmental effects of downstream emissions, despite the absence of any such finding by the Minister or Agency, or any indication that the Minister or Agency considered or determined the feasibility of such an assessment, and despite evidence that the Minister and Agency did consider downstream emissions in the environmental assessment of another fossil fuel producing project, the Énergie Saguenay LNG Project.

10. The Applications Judge erred in determining that downstream emissions were reasonably excluded from consideration in the environmental assessment despite the Minister's and Agency's failure to put their minds to the question or to consider or decide whether they were within the scope of the

environmental assessment, and in the absence of any evidence demonstrating that the Agency or Minister grappled with this question.

Marine shipping

11. The Project involves marine shipping of oil through Canadian waters and to international markets, but such shipping was not considered in the environmental assessment of the Project or in the Minister's Decision. The Applications Judge erred, and the Minister acted unreasonably, by failing to determine that marine shipment of oil is a physical activity that is incidental to the Project which requires assessment under sections 5(1) and 5(2) of *CEAA 2012*.

12. The Applications Judge erred, and the Minister acted unreasonably and contrary to the requirements of *CEAA 2012*, by failing to properly consider and apply the decision of this Court in *Tsleil-Waututh Nation v Canada* 2018 FCA 153 (*Tsleil-Waututh*), which had quashed the environmental assessment approval of a project due to a failure to consider the environmental effects of marine shipping. As in *Tsleil-Waututh*, the marine shipping associated with the Project is an activity integral to, or incidental to, the Project, within the statutory definition of "designated project" (*CEAA 2012*, s 2) and "environmental effect" (*CEAA 2012*, s 5). The Minister acted unreasonably by failing to consider the effects of marine shipping beyond the immediate and small "Project safety zone" and by relying on the Agency's

environmental assessment which failed to consider marine shipping beyond the "Project safety zone."

13. The Applications Judge erred by offering or adopting post-Decision justification for the Minister's failure to consider the effects of marine shipping outside the Project safety zone where the Minister gave no such reasons or justification. Despite extensive submissions to the Agency from the Appellant MTI on marine shipping effects and requests that marine shipping be assessed, the record before the Minister contained no reasons or justification for the exclusion of Project-related marine shipping from consideration within the environmental assessment.

14. The Applications Judge purported to justify the Minister's failure to require the assessment of the effects of marine shipping by finding such an assessment to be "impossible" due to the location of the Project "beyond the legislative authority of Parliament" and "uncertainty about the destination of the oil from the Project site." The Applications Judge's findings are not supported by the facts or the law. The Project is within the legislative authority of Parliament, which is why it was subject to a federal environmental assessment. There was nothing "uncertain" about the destination of the oil from the Project site – the shipping route was in the record before the Minister and Applications Judge. Oil will be shipped from the Project site through Canada's territorial waters to a location on the island of Newfoundland, which activity is within Parliament's jurisdiction and

subject to environmental assessment under this Court's precedent in *Tsleil-Waututh.* In any event, *CEAA 2012* provides for evaluation of environmental effects that occur outside of Canada.

Breach of duty to consult

15. The Applications Judge erred in determining that only a minimal level of consultation was owing to the communities represented by the Appellant MTI, and failed to examine the evidence provided by MTI as to the potential effects of the Project on those Mi'gmag communities that warranted a deeper level of consultation.

16. The Applications Judge erred by basing his assessment regarding the potential impacts on the communities represented by MTI on his unreasonable and erroneous conclusions regarding consideration of Project marine shipping as set out above. The Applications Judge therefore erred by unjustifiably limiting the scope of the Project and failing to consider the Crown's obligations in light of the full potential impacts of the Project. The Applications Judge further erred in failing to determine that the Minister and the Crown had acted unreasonably by artificially excluding the impacts of marine shipping from the consultation process, without considering the question of whether consultation on such impacts was required in light of the Crown's obligations under section 35 of the *Constitution Act, 1982*.

17. The Applications Judge further erred in reaching the conclusion that Canada's duty to consult under section 35 of the *Constitution Act, 1982* had

been satisfied simply by the fact that MTI had provided comments on the failure to include the impacts from project marine shipping on Atlantic salmon and MTI's communities' constitutionally protected and recognized fishing rights. The Applications Judge reached this conclusion despite the absence of evidence that the Minister considered MTI's comments on project shipping outside the project safety zone, or made any accommodation to address the impact of the Project on Mi'gmag rights, prior to making the Decision. The Applications Judge erred in equating MTI's provision of submissions on marine shipping, even though they were not considered by the Crown, with a genuine discharge of the Crown's constitutional duties or fulfillment of the Honour of the Crown.

18. The Applications Judge erred in concluding that Canada had properly consulted the communities represented by MTI, when the concerns expressed by MTI regarding project marine shipping were excluded from any substantive consideration, without explanation or comment, by the Minister and the Crown.

Costs

19. The Appellants ask for an order that each party bear its own costs in this Court. The Appellant Sierra Club is a public interest litigant, and the Appellant MTI represents Indigenous communities invoking their constitutional right to be consulted due to the significant impacts the Project may have on their rights and livelihoods. Both Appellants have raised issues

of significant importance to the public and to Indigenous communities. Consequently, the Appellants ask that no costs be awarded regardless of the outcome.

20. In the Court below, the Appellants likewise ask for an order that each party bear their own costs. In the alternative, if this Court sees fit to order monetary costs, as between the Appellants and the Respondent Attorney General of Canada costs in that Court should be in the agreed-upon amount of $3,000. As between the Appellants and the Respondent Equinor, costs should be in accordance with column 3 of Tariff B in the Court below.

Date: September 15, 2023 

James Gunvaldsen Klaassen, Joshua Ginsberg, Ian Miron and Anna McIntosh

Counsel for the Appellants Sierra Club Canada Foundation and Mi'gmawe'l Tplu'taqnn Inc. (MTI)

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