Court File No. T-938-22

FEDERAL COURT

BETWEEN:

SIERRA CLUB CANADA FOUNDATION, ~~and~~ ÉQUITERRE and MI'GMAWE'L TPLU'TAQNN INC.

Applicants

and

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

Respondents

APPLICATION UNDER SECTION 18.1 OF THE *FEDERAL COURTS ACT*, RSC 1985, c F-7

AMENDED NOTICE OF APPLICATION
Amended pursuant to Court Order dated June 8, 2022

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Applicants. The relief claimed by the Applicants 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 Applicants. The Applicants request that this application be heard at Halifax, Nova Scotia.

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 Applicants' solicitor or, if the Applicants are self-represented, on the Applicants, 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.

June 10, 2022

ORIGINAL SIGNED BY
MICHAEL KOWALCHUK
ORIGINAL SIGNÉ PAR

Issued by: _____

(Registry Officer)

Address of local office:

Halifax Local Office
Suite 1720 - 1801 Hollis Street, 17th Floor
Halifax, NS B3J 3N4

TO: MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and the ATTORNEY GENERAL OF CANADA
Atlantic Regional Office
Department of Justice Canada
Suite 1400 – 5251 Duke St.
Halifax NS B3J 1P3

AND TO:
EQUINOR CANADA LTD.
c/o McInnes Cooper
5th Floor, 10 Fort William Place
P.O. Box 5939
St. John's NL A1C 5X4

AND TO:
IMPACT ASSESSMENT AGENCY OF CANADA
10 Barters Hill, Suite 301
St. Johns, NL, A1C 6M1

APPLICATION

This is an application for judicial review of the Minister of Environment and Climate Change's April 6, 2022 decision, made pursuant to sections 27(1), 52(1), 53 and 54 of the *Canadian Environmental Assessment Act, 2012* (***CEAA 2012*** or ***Act***), approving, with conditions, the environmental assessment for the Bay du Nord Development Project (**Decision**).

The Project is proposed by Equinor Canada Ltd. (**Equinor** or **Proponent**) and involves the production of at least 300 million barrels of oil at a floating offshore oil and gas production facility in the Atlantic Ocean approximately 500 km east of St. John's, NL, as well as transportation of produced oil by shuttle tanker to an existing transshipment facility in Whiffen Head on the island of Newfoundland, or directly to international markets. The Minister had information before him that the oil produced by the Project will cause approximately 129 megatonnes (**MT**) of greenhouse gas (**GHG**) emissions. If the Project increases production beyond the core production area, it could cause significantly greater GHG emissions.

In making the Decision, the Minister determined that the Project was not likely to cause significant adverse environmental effects as identified in section 5 of the *Act*, taking into account the implementation of mitigation measures. Accordingly, the Minister authorized Equinor to proceed with the Project and to seek further necessary permits and approvals, subject to conditions.

In making the Decision, the Minister's wholesale omission to consider shipment and transportation of oil produced by the Project, despite the impacts on First Nations, was a breach of the Crown's duty to consult and accommodate the Nations represented by the Applicant Mi'gmawe'l Tplu'taqnn Inc. This failure is contrary to section 35 of the *Constitution Act* and the honour of the Crown.

The Minister lacked the jurisdiction to make the Decision, and acted unreasonably, as he did not comply with a statutory condition precedent. Before making the Decision, the Minister was required to take into account a report with respect to an environmental assessment that complied with the *CEAA 2012*. Although the Decision was based on an environmental assessment conducted by the Impact Assessment Agency of Canada (**Agency**), this assessment, and the

report in which it culminated on April 6, 2022 (**Report**), did not satisfy requirements established under *CEAA 2012* or the guidelines for the environmental impact assessment for the Project. The assessment and Report did not satisfy the statutory condition precedent.

Further, or in the alternative, the Decision was unreasonable because the Minister failed to have regard to relevant legal and factual constraints in making it, failed to consider the information before him, and also failed to justify the Decision. In determining that the Project was not likely to cause significant adverse environmental effects, the Minister failed to consider downstream (**GHG**) emissions, the cumulative effects of such emissions, the effects of shipment and transportation of oil, and other effects of the Project. The Minister also failed to justify this failure.

The Applicants make application for:

(a) An order declaring that the Decision is *ultra vires* and beyond the jurisdiction of the Minister, and therefore invalid;

(b) An order declaring that the Decision is unreasonable and therefore invalid;

(c) An order declaring that the Decision is invalid due to the Crown's failure to consult and accommodate the Applicant Mi'gmawe'l Tplu'taqnn Inc.;

(d) An order in the nature of *certiorari* quashing the Decision;

(e) An order that each party shall bear its own costs, regardless of the outcome of the application; and

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

The grounds for the application are:

Overview

1. Climate change is an existential threat to all people living in Canada and in all nations. There is a scientific consensus that failure to take urgent steps over the next 9 years will lead to catastrophic consequences. A global climate catastrophe can be averted if Canada and other countries ensure rapid reductions in GHG emissions before 2030 and reach net zero emissions by 2050.

2. The international scientific community also agrees that global warming must be held to below 1.5°C above pre-industrial temperature levels in order to avoid some of the worst impacts of climate change, and that the impacts of climate change become even more devastating if temperatures rise beyond 2°C.

3. In a global effort to curb this existential threat, Canada, 193 other countries and the European Union have signed the Paris Agreement within the United Nations Framework Convention on Climate Change (the "**Paris Agreement**"). The Paris Agreement commits parties to holding the increase in global average temperature to "*well below* 2°C above pre-industrial levels" (emphasis added) and with best efforts made to limit the temperature increase to 1.5° C.

4. In 2021, the International Energy Agency concluded that there can be no new oil, gas or coal projects if the world is to reach net zero emissions by 2050 and have a fighting chance of meeting the Paris Agreement target. Full production of currently operating projects will already cause temperature rise above 1.5° C, and countries' future fossil fuel development plans place global climate coals at serious risk.

5. In February 2022, the Intergovernmental Panel on Climate Change warned that there is now "a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all" and that there can be no further delay in action to mitigate and adapt to climate change.

6. Environmental assessment legislation plays an important role in responding to the climate emergency, as it requires decision-makers to assess potential GHG emissions from proposed development projects before those emissions occur.

7. In Canada, the *CEAA 2012* requires the Minister or a responsible authority to consider a complete environmental assessment report and decide whether proposed major projects are likely to cause significant adverse environmental effects. If the Minister decides that the project is not likely to cause significant adverse environmental effects, the project is federally approved subject to the conditions listed in the approval and future permits Equinor will need to acquire under other Acts of Parliament.

8. In reaching the Decision at issue, as with other similar decisions, the Minister was required to consider local changes to the environment, changes to the environment in a province other than the one in which the Project is taking place, changes to the environment outside Canada, changes that may be caused to the environment and that are directly linked or necessarily incidental to a federal authority's exercise of a power to permit all or part of the Project, and cumulative effects, among other factors.

9. The Applicants, and others, placed evidence and submissions before the Agency and Minister regarding the GHG emissions of the Project, including its downstream emissions and the climate impacts that will result from the burning of the oil that it will produce in Canada and elsewhere. "Downstream emissions" are GHG emissions that occur after the project, including emissions arising from the end use of products made by a project. They arise from transportation, refining, storing and end uses of the product. They are also by far the Project's largest source of GHG emissions.

10. Participant submissions indicated that the Project was likely to produce at least 129 million tonnes of GHG emissions, based on the Project's estimated production of 300 million to over a billion barrels of oil, They noted that downstream emissions can account for 90% of a project's lifecycle emissions. They also referenced numerous reports from international agencies, reputed organizations and respected journals which point to the imperative of stopping new fossil fuel production to meet the 1.5° C target.

11. Despite this, the Report and the Decision refused to acknowledge, determine, quantify, assess, or mitigate the environmental effects of the Project's downstream emissions or emissions arising from the handling and disposal of Project drilling wastes, or respond in any way to participants' submissions on this matter. The Report only acknowledged that

the Project would produce 177,770 to 309,407 tonnes of GHGs per year – which is less than 7% of the Project's total lifecycle emissions. The analysis of GHG emissions conducted by the Agency and taken into account by the Minister ignored all downstream emissions, and unlawfully restricted the assessment artificially to consider only the emissions from the extraction facility itself.

12. Moreover, the Report and Decision were not based on an accurate estimate, or indeed any clear estimate, of the volume of oil that the Project will produce. While the proponents' materials estimated that 300,000 barrels of oil would be produced from the "core" Project area, this estimate does not appear within the Report. Equinor sought and received permission from the Minister for additional production within an area which is 10 times larger than the "core" area. Relying on maximum daily production volumes, between 1-2 billion barrels of oil could be produced if production occurs within the larger area. The Agency and Minister should have considered, and failed to, the effects of such expanded production, including the effects arising from downstream emissions.

13. The Minister's Decision is unreasonable. In purporting to rely on the deficient Report and in making the Decision, the Minister failed to put his mind to the interpretation of the relevant statutory provisions as to whether downstream emissions were to be considered, or, in the alternative, implicitly interpreted those provisions as not requiring him to consider the Project's downstream emissions. This interpretation ignores key statutory and interpretive constraints, fails to grapple with the submissions and evidence placed before him and departs from past practice. The Minister fails to justify, through his reasons or the record, his failure to consider the Project's significant downstream emissions.

14. The Minister purported to make his approval of the Project conditional on, among other things, that, beginning on January 1, 2050, the Project must not emit greater than 0 kilotonnes of carbon dioxide equivalents per year. The Minister has the power to issue conditional approvals pursuant to section 53 of the *CEAA 2012*. This is the only significant constraint on GHG emissions in the Project conditions, and it does not apply to any emissions prior to 2050, nor to any downstream emissions at any time, whether they happen before or after 2050. The condition further demonstrates that no

consideration was given to the vast majority of Project GHG emissions and the critical imperative to dramatically reduce GHG emissions between now and 2050.

15. In addition, the Minister approved the project based on an environmental assessment that was scoped unlawfully narrowly. The Agency omitted, and explicitly refused to consider, the shipment and transportation of oil from the production facility, which is an "incidental" activity included in the statutory definition of "designated project." As a result, contrary to the requirements of *CEAA 2012* the Agency and Minister failed to consider the environmental effects of shipment and transportation of oil, including the effects of malfunctions or accidents that may occur in connection with it and any cumulative environmental effects that are likely to result from it. The Agency and Minister further failed, contrary to the requirements of *CEAA, 2012,* to assess the significance of any effects of the shipment and transportation of oil and failed to consider mitigation of such effects.

16. By unlawfully omitting to include shipment and transportation of oil in the environmental assessment, the Agency further failed to discharge the duty of the federal Crown to consult, and, where appropriate, accommodate Indigenous peoples when contemplating conduct that might adversely impact asserted or established Aboriginal or treaty rights. The Applicant Mi'gmawe'l Tplu'taqnn Incorporated, on behalf of eight First Nations, requested consultation on the possible effects of shipment and transportation of oil, in particular the impacts on the aquatic environment and fish and fish habitat, but was refused. The Agency and Minister further failed to discharge the requirement in *CEAA, 2012* to consider effects of the designated project with respect to the Applicant Mi'gmawe'l Tplu'taqnn Incorporated and to "Aboriginal peoples."

The Parties

17. The Applicant Sierra Club Canada Foundation ("SCCF") is an environmental non-governmental organization, a not-for-profit corporation and a registered charity. It is a national grassroots organization that empowers people to be leaders in protecting, restoring and enjoying healthy and safe ecosystems. The SCCF has been involved in issues related to ocean ecosystem protection, endangered species, climate change and the

offshore oil and gas industry for two decades. The SCCF is incorporated under the laws of Ontario, with a registered address at 231-211 Bronson Avenue, Ottawa ON K1R 6H5. The SCCF participated in the Bay du Nord environmental assessment process.

18. The Applicant Mi'gmawe'l Tplu'taqnn Incorporated ("MTI") is a not-for-profit organization created by the Mi'gmaq First Nations of New Brunswick to promote and support the recognition, affirmation, exercise, and implementation of their members' Aboriginal and Treaty Rights and title. In the Bay du Nord environmental assessment, MTI represented eight of its member Nations: Amlamgog (Fort Folly) First Nation, Natoaganeg (Eel Ground) First Nation, Oinpegitjoig (Pabineau) First Nation, Esgenoôpetitj (Burnt Church) First Nation, Tjipõgtõtjg (Buctouche) First Nation, L'nui Menikuk (Indian Island) First Nation, Ugpi'ganjig (Eel River Bar) First Nation and Metepenagiag Mi'kmaq Nation. On behalf of these Nations, MTI submitted comments on the Proponent's environmental impact statement and the draft environmental assessment report and made requests for consultation and accommodation, including with respect to the impacts of marine shipping of crude oil from the Project.

19. The Applicant Équiterre is the largest environmental organization in Québec, with offices in Montréal, Quebec City and Ottawa. As a non-profit, charitable organization, Équiterre has worked for over 20 years to raise awareness and advocate for sound environmental and energy policies in Quebec, Canada and internationally. Équiterre has 24,000 members and more than 120,000 supporters located largely in Eastern Canada. Équiterre has worked on a wide range of environmental and energy issues in Canada, including climate change, clean energy and transportation. Équiterre made submissions to the Minister and advocated publicly against the approval of the Project.

20. The Applicants have a genuine interest in protecting the environment from the risks associated with oil production facilities, including climate change. The Applicants have undertaken extensive public advocacy, including to the Agency and the Minister, regarding the Project's environmental impacts, and its impacts on Aboriginal and Treaty rights.

21. The Minister is responsible for the administration of the *Act* and for the Agency, and

made the Decision under Review.

22. The Attorney General of Canada is responsible for the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada, pursuant to s 5(d) of the *Department of Justice Act* and s 18(1)(b) of the *Federal Courts Act*. Further or in the alternative, the Attorney General of Canada is named as Respondent pursuant to Rule 303(2) of the *Federal Courts Rules*.

23. The Project proponent Equinor, formerly known as Statoil Canada Ltd., is 67 percent owned by the State of Norway. Equinor's parent company is headquartered in Stavenger, Norway. Equinor's head office in Canada is in Calgary Alberta, and the company is extra-provincially registered to carry on business in Newfoundland and Labrador.

The Environmental Assessment and the Minister's Decision

24. On August 9, 2018, the Agency commenced an environmental assessment of the Project under the *CEAA 2012*. The provisions of the *CEAA 2012* continued to apply to the environmental assessment conducted in relation to the Project, notwithstanding the *CEAA 2012*'s subsequent repeal, by operation of section 181(1) of the *Impact Assessment Act*.

25. On September 26, 2018, the Agency issued Guidelines for the Environmental Impact Statement (**EIS**) for the Project. The EIS Guidelines required Equinor to include a description of the Project's GHG emissions in a regional, provincial, national and international context, and that a cumulative effects assessment should be done for GHGs. Equinor provided an EIS in July 2020, and updated it in July 2021. The EIS did not contain the required description or assessment of downstream GHG emissions.

26. The Agency delivered its Report to the Minister in December 2021. The final Report was not made public and did not come to the Applicants' attention, until the Decision was on April 6, 2022.

27. On April 6, 2022, the Minister purported to issue the Decision Statement pursuant to section 54 of *CEAA 2012*. The Decision Statement stated that the Project is "not likely to cause significant adverse environmental effects referred to in subsections 5(1) [and 5(2)]

of the *CEAA 2012*." Pursuant to section 184 of the *Impact Assessment Act*, the Decision Statement is deemed to be a decision statement issued under subsection 65(1) of the *Impact Assessment Act*.

The Legislative Framework

28. The Project was a "designated project" under *CEAA 2012*. Section 2(1) of the Act defines a "designated project" as one or more physical activities and "any physical activity that is incidental to those physical activities."

29. As set out in section 4(1), the *CEAA 2012* aims, among other things, to:

    a. protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project;

    b. ensure that designated projects that require the exercise of a federal permitting power are considered in a careful and precautionary manner to avoid significant adverse environmental effects; and

    c. ensure that opportunities are provided for meaningful public participation during an environmental assessment.

30. To further those objectives, section 4(2) of the *CEAA 2012* constrains all exercises of the Minister's powers under it by requiring the Minister to exercise those powers in a manner that protects the environment and human health and applies the precautionary principle.

31. The *CEAA 2012* imposes further explicit constraints upon the Minister when he makes decisions about environmental assessments, including the Decision.

32. First, section 27(1) establishes a statutory condition precedent requiring the Minister to take into account the report with respect to the environmental assessment conducted by the Agency before making the decision:

> **27** (1) The responsible authority or, when the Agency is the responsible authority, the Minister, after taking into account the report with respect to the environmental assessment of the designated project, must make decisions under subsection 52(1). [emphasis added]

33. Second, section 52(1) requires the Minister to decide whether the Project is likely to cause significant adverse environmental effects:

> **52** (1) For the purposes of sections 27, 36, 47 and 51, the decision maker referred to in those sections must decide if, taking into account the implementation of any mitigation measures that the decision maker considers appropriate, the designated project
>
> (a) is likely to cause significant adverse environmental effects referred to in subsection 5(1); and
>
> (b) is likely to cause significant adverse environmental effects referred to in subsection 5(2).

34. Section 5(1) of the *CEAA 2012* requires the Minister to take into account a wide range of environmental effects that may be caused by the Project, including local, regional, extra-provincial, and international effects. With respect to Aboriginal peoples, the Minister must take into account an effect occurring in Canada, among other things, on health and socio-economic conditions, physical and cultural heritage, and current traditional uses of lands and resources.

35. Section 5(2)(a) of the *Act* provides that where, as in the present case, the carrying out of the project requires a federal authority to exercise powers under other federal legislation, the Minister must consider changes that may be caused to the environment that are directly linked or necessarily incidental to a federal authority's exercise of said powers

36. The Minister must further take into account the factors set out in section 19, including but not limited to cumulative environmental effects and effects of malfunctions and accidents.

The Agency's Report fails to satisfy the condition precedent under sections 27 and 52 of *CEAA 2012*

37. When making a decision under section 52(1) of the *CEAA 2012*, section 27(1) requires the Minister to "take into account" an environmental assessment report for the designated project.

38. In its assessment and the Report, the Agency failed to conduct an environmental

assessment of the Project, and the assessment and Report were conducted contrary to the requirements of the *CEAA 2012*. The Report did not address crucial issues raised by the Applicants and others, and therefore cannot constitute, in law, a valid Report. As the Decision was based in part on this flawed Report, and as the Minister did not consider those crucial issues, the Minister unlawfully purported to approve the environmental assessment of the Project without an assessment report under either *CEAA 2012* or the *Impact Assessment Act* of the myriad of environmental harms that will be caused by the Project's construction and operation.

39. In particular, contrary to sections 5 and 19 of the *Act*, the Report failed to address:

    (a) Downstream emissions and emissions arising from transport, handling and disposal of drilling wastes;

    (b) Local, regional, extraprovincial and international effects of such emissions; and

    (c) Cumulative effects of such emissions, and the significance of those effects, and the effects set out in (a) and (b) above, when considered together with the effects of other projects.

40. Further, the Agency failed to comply with its statutory obligation to assess shipment and transportation of oil, an activity which is directly related or necessarily incidental to the Project. Transportation of produced oil by shuttle tanker to the island of Newfoundland, and direct to international markets is an acknowledged component of the Project: oil tankers would make 78 trips per year to and from the drilling site.

41. Despite the centrality of oil shipping to the Project and its inclusion in the statutory definition of "designated project", the environmental assessment stated in response to the request of the Applicant MTI to assess such shipping, that "shipment and transportation of oil was outside the scope of the Project." As a result, the environmental assessment contains no consideration of the effects of 78 tanker trips per year, including and especially the potential for spills of crude oil from these tankers, including on Indigenous rights, fish and fish habitat, endangered species, and GHG emissions.

42. In the present case, the Minister did not examine the Report to determine whether it was a valid, complete report and failed to put his mind to the question of whether the Report

satisfied the requirements of *CEAA 2012*. Further, as the Report failed to consider the issues described above, it cannot qualify as an "environmental assessment report". The Minister therefore failed to satisfy the statutory condition precedent for making the Decision, and acted without jurisdiction and contrary to law when purporting to consider the flawed and incomplete Report. The Decision is therefore invalid and *ultra vires*.

43. Further, the Report, and the Minister's Decision, are unlawful and invalid as they fail to consider or are inconsistent with the precautionary principle as required by sections 4(1)(b) and 4(1)(g) of the *CEAA 2012*.

44. To the extent, if at all, that the Agency and/or the Minister relied on policy of the Government of Canada to purportedly relieve them of the requirement to consider the totality of Project GHG emissions, the Minister unlawfully fettered his discretion and/or acted unreasonably in failing to consider all emissions of this fossil fuel megaproject.

The Minister's Decision was unreasonable

45. In making the Decision, the *Act* required the Minister to consider all the Project's effects, the Applicants' submissions, and comments from the public. The Minister was, among other things:

    (i) required by section 5 of the *Act*, and expressly refused or failed, to assess and/or consider the environmental effects of all GHG emissions, including downstream emissions, associated with extraction, transport, refining and end uses of oil and gas produced by the Project, including in respect of the full area approved by the Minister, and including, for greater certainty, all downstream effects of such oil and gas and all emissions caused by transport, processing and disposal of all drilling wastes associated with the Project;

    (ii) required by section 5 and expressly refused or failed, to assess and/or consider the local, extra-provincial, and international effects of the Project, including the downstream emissions and effects set out in paragraph (i) above;

    (iii) required by section 2(1) and expressly failed to include consideration of shipment and transportation of oil within the scope of the designated project; and

(iv) required by sections 4(1)(i), 5 and 19(1)(a) and (b) of the *Act*, and expressly refused or failed, to assess and/or consider the effects, including cumulative effects and their significance, of the effects set out in paragraphs (i) to (iii) above, when combined with the existing and future effects from all human activities which have caused and contributed to the current climate crisis.

46. The Minister's Decision was also unreasonable and unlawful, as the Minister took into account considerations that were irrelevant when making a decision under section 52 of *CEAA 2012*.

The Minister and Agency breached the duty to consult First Nations

47. The Mi'gmaq have occupied, relied on, used, and been stewards of the lands and waters in Mi'kma'ki since time immemorial. The Mi'gmaq entered into Peace and Friendship Treaties with the British Crown, which have been renewed many times and form a covenant chain. These treaties are in the process of being implemented through a Mi'gmaq /New Brunswick/Canada Framework Agreement.

48. The potential approval of the Project triggered the Crown's constitutional duty to consult the First Nations represented by the Applicant MTI. The Mi'gmaq have established Aboriginal and Treaty Rights to — among others — hunt, fish and gather from the lands and waters of their territory for food, social and ceremonial purposes, as well as to trade and to earn a moderate livelihood, all of which have been upheld by the Supreme Court of Canada.

49. The conduct contemplated by the Project may adversely affect the rights of MTI Nations. The Project area and shipping routes overlap with fishing grounds in the territory of MTI Nations. Culturally and economically important species, including those harvested by MTI Nations, migrate between the Project area and MTI territory.

50. The Applicant MTI specifically requested on behalf of its member Nations to be consulted on marine shipping of oil on tankers into Canadian waters, because its member nations are concerned the potential effects of marine shipping of and accidental spills from oil tankers on fish such as Atlantic salmon and Atlantic bluefin tuna, and the impacts on MTI fishers with commercial and communal-commercial fishing licenses.

MTI noted that the environmental impact statement and environmental assessment Report failed to consider the effects of marine shipping of oil on tankers into Canadian waters, and did not include any modelling around the potential spill trajectories if a tanker were to spill along any of its routes within Canadian waters. MTI requested, among other things, "a robust assessment of the marine shipping by oil tanker from the Project site to shore facilities" and "modelling around the potential spill trajectories if a tanker were to spill along any of its routes within Canadian waters."

51. The Agency served as the "Crown consultation coordinator" for the purposes of the environmental assessment, and the ultimate responsibility for discharge of the duty to consult and accommodate remains with the Minister and federal crown.

52. The Agency incorrectly assessed the degree of consultation to be at the "low" end of the spectrum. The asserted and established rights include fishing in the Project area and along the shipping route. The impact of the Project upon those rights is serious: the Project proposes full-scale production and shipping of oil and gas through areas used for traditional activities. As a result, the scope of the duty was high.

53. In breach of the duty to consult, the process followed by the Agency was marked by a lack of timely notification of important developments in the environmental assessment, such as the Memorandum of Understanding between the Agency and the Canada-Newfoundland and Labrador Offshore Petroleum Board. The Agency failed to engage MTI in important steps in the assessment process, such as the development of the EIS and associated meetings between the Agency and proponent. The Agency further rushed the comment process, even in the face of COVID-19 restrictions, and failed to provide funding proportionate to the large scale and impact of the Project.

54. Whether the duty is scoped at the low end or high end of the spectrum, the Agency and Minister's wholesale omission to consider shipment and transportation of oil was in breach of the duty to consult and accommodate MTI.

55. Not only did the Agency and Minister fail or refuse to include a "robust" assessment of shipping, they refused to perform any assessment or modelling. Instead, the Agency erroneously and unlawfully told MTI that: "shipment and transportation of oil was

outside the scope of the Project." In addition to violating the *CEAA, 2012*, as explained above, the Agency scoping decision constitutes a failure to consult and accommodate. This failure was not addressed or remedied by the Minister.

Costs

56. The Applicants are public interest litigants and have been advocating for the public's interest in environmental health and protection, and for urgent and responsible action to address the climate crisis. The Applicants have raised issues of public importance, both within the environmental assessment process and by bringing this application for judicial review. Their application makes possible judicial scrutiny of the Crown's consultation process, the Minister's refusal to consider the environmental effects and effects on Indigenous rights, including climate impacts, and cumulative impacts of all emissions associated with oil and gas production within a climate crisis. The Applicants respectfully request an order pursuant to Rule 400 that no costs should be awarded to any party, regardless of the outcome of the judicial review application.

This application will be supported by the following material:

1. Affidavit on behalf of Sierra Club Canada Foundation;
2. Affidavit on behalf of Équiterre;
3. Affidavit(s) on behalf of Mi'gmawe'l Tplu'taqnn Inc.;
4. The Environmental Assessment Report regarding the Bay du Nord Development Project, dated December 2021, and first made public on April 6, 2022;
5. Minister's Decision Statement of April 6, 2022;
6. Materials from the certified tribunal record produced under Rules 317-318 of the *Federal Courts Rules*; and
7. Other affidavits and evidence that the Applicants may seek leave to file and this Court may see fit to consider.

Rule 317 Request

The Applicants request the Minister and/or the Impact Assessment Agency of Canada (the "Agency") send a certified copy of the following material, that is not in the possession of the Applicants but is in the possession of the respondents or the Agency, to the Applicants and to the Federal Court Registry, not including materials posted on the Agency's on-line registry page for the Project before April 7, 2022.

The Applicants request the record of consultation for the Applicant MTI.

The Applicants further request all documentation and communications (i) put before the Agency during the environmental assessment and/or in the process of advising the Minister regarding the Project, and/or (ii) put before and/or considered by the Minister in making the decision under section 52 of the *CEAA 2012*, as follows:

1. All documentation and communications relating to consideration of projected or potential greenhouse gas emissions in respect of the Project, including but not limited to documents relating to (i) emissions in respect of transportation and disposal of wastes associated with, or generated from, the Project, (ii) emissions associated with the extraction, transportation, shipping and refining of oil and gas produced by the Project and (iii) documents relating to all downstream emissions associated with end uses of oil and gas produced by the Project;
2. All documentation relating to Project oil and gas production estimates and projections, and/or projected or estimated GHG emissions in respect of extraction, transport, refining and end uses of oil and gas produced by the Project, including upstream and downstream emissions, annually and over the lifespan of the Project;
3. All documentation relating to cumulative effects and/or extra-provincial effects associated with the Project, including but not limited to the effects of climate change regionally, nationally and globally in relation to GHG equivalent emissions from any or all sources that are or may be associated with the Project and oil and gas produced by the Project;
4. All documentation regarding transportation of produced oil and potential crude oil

spills;

5. All summaries, briefing notes or other material provided to or prepared by the Agency within the environmental assessment and/or in connection with the Minister's Decision;

6. All documentation and communications between the Minister and/or the Minister's staff and/or departmental officials, and/or the Agency, and the Governor in Council, and/or other members of Cabinet or their respective departments, including without limiting the foregoing, communications with the Prime Minister and/or the Prime Minister's staff and/or officials of the Privy Council Office, with respect to the Minister's making a decision regarding the Project under s 52 of the *CEAA 2012*;

7. Any and all correspondence or communications between or among the Minister and the Agency in respect of the environmental assessment of the Project and/or the Decision;

8. Any memoranda, briefing notes, summaries or other material received by or generated by the Minister or his staff leading to, or in respect of, the Decision; and

9. Such further and other material as may be requested.

Date: June 10, 2022

James Gunvaldsen Klaassen, Joshua Ginsberg, Ian Miron and Anna McIntosh
Counsel for the Applicants Sierra Club Canada Foundation, Équiterre and Mi'gmawe'l Tplu'taqnn Inc.

Ecojustice
520-1801 Hollis St.
Halifax, NS B3J 3N4

Tel: (902) 417-1700 ext. 642 and/or
Tel: (613) 562-5800 ext 3399
Fax: (902) 417-1701
Email: jgunvaldsenklaassen@ecojustice.ca
jginsberg@ecojustice.ca
imiron@ecojustice.ca
amcintosh@ecojustice.ca