Court File No.

FEDERAL COURT

BETWEEN:

STONEY NAKODA NATIONS

Applicant

- and -

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

Respondents

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

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED 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 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 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.

DATED at the City of Calgary, Alberta this 3 day of September, 2021

RAE AND COMPANY
Suite 900, 1000 – 5th Avenue SW
Calgary, Alberta T2P 4V1

Sara Louden
Brooke Barrett
Telephone: (403)-264-8389
Facsimile: (403)-264-8399
Email: slouden@raeandcompany.com
bbarrett@raeandcompany.com

Issued by:_____
(*Registry Officer*)

Address of local office: Canadian Occidental Tower
635 Eighth Avenue SW
3rd Floor, PO Box 14
Calgary, AB T2P 3M3

TO: Minister of Environment and Climate Change
The Honourable Jonathan Wilkinson
c/o Attorney General of Canada
284 Wellington Street
Ottawa, Ontario KIA 0H8

AND TO: Attorney General of Canada
The Honourable David Lametti
284 Wellington Street
Ottawa, Ontario KIA 0H8

AND TO: Benga Mining Limited
c/o Martin Ignasiak and Sean Sutherland
Osler, Hoskin & Harcourt LLP
Suite 2700, 225 – 6 Ave SW
Calgary, Alberta T2P 1N2

APPLICATION

This is an application by the Stoney Nakoda Nations (the "**Stoney Nakoda**") for judicial review of two decisions regarding the Grassy Mountain Coal Project (the **"Project"**) communicated in the August 6, 2021 Decision Statement (the "**Decision Statement**") of the Minister of Environment and Climate Change Canada (the "**Minister**"):

1. The Stoney Nakoda seek judicial review of the Minister's decision pursuant to s. 52(1) of the *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 19, s. 52 ("***CEAA 2012***") that the Project is likely to cause significant adverse environmental effects and to refer the matter to the Governor in Council ("**Cabinet**") pursuant to s. 52(2) of *CEAA 2012* (together, the "**Minister Decision**"); and

2. The Stoney Nakoda seek judicial review of Cabinet's decision pursuant to s. 52(4)(b) of *CEAA 2012* that the significant adverse environmental effects of the Project are not justified in the circumstances (the "**Cabinet Decision**").

THE APPLICANT MAKES APPLICATION FOR:

1. The following orders:

   a) quashing or setting aside the Minister Decision;

   b) quashing or setting aside the Cabinet Decision;

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

   d) referring the Cabinet Decision back to Cabinet for reconsideration in accordance with the Court's directions.

2. An order for the Applicant's costs of this application; and

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

THE GROUNDS FOR THIS APPLICATION ARE:

The Parties

1. The Stoney Nakoda are comprised of the Bearspaw First Nation, the Chiniki First Nation, and the Wesley First Nation. The Stoney Nakoda are the original "people of the mountains", or *Îyârhe Nakoda*, and are signatories to Treaty No. 7. The traditional territory of the Stoney Nakoda extends as far north as Jasper, Alberta, extends south into the state of Montana, extends west into British Columbia and includes the proposed location of the Project. The Stoney Nakoda have Aboriginal and Treaty rights and interests in land in and around the Project area as recognized and affirmed by section 35 of the *Constitution Act, 1982*.

2. The Stoney Nakoda have an ongoing action in the Court of Queen's Bench of Alberta (Action No. 0301-19586) against both Canada and Alberta in which they seek a declaration of unextinguished Aboriginal title, rights and Treaty rights over their traditional territory.

3. The Respondent Minister is a statutory decision-maker with various powers and obligations under *CEAA* 2012. This includes the obligation pursuant to s. 52 of *CEAA 2012* to decide, in consideration of any mitigation measures the Minister considers appropriate, whether a designated project is likely to cause significant adverse environmental effects as referred to in ss. 5(1) and 5(2) of *CEAA 2012*.

4. 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 pursuant to Rule 303 of the *Federal Courts Rules*.

5. The Respondent Benga Mining Limited ("**Benga**") is a Canadian resource company incorporated pursuant to the laws of British Columbia, with offices in Blairmore and Calgary, Alberta. Benga is a wholly-owned subsidiary of Riversdale Resources Pty Ltd. Benga is the Proponent of the Project.

The Project

6. The Project is a proposed open-pit metallurgical coal mine in the Crowsnest Pass area of southwestern Alberta. The Project is located within Treaty 7 territory and the traditional territory of the Stoney Nakoda, in the headwaters of the Oldman watershed. The maximum production capacity of the Project would be 4.5 million tonnes of metallurgical coal per year over a mine life of approximately 23 years.

7. The Stoney Nakoda are parties to a confidential relationship agreement with Benga in respect of the Project (the "**Relationship Agreement**"), which formalized the relationship between the parties, accommodated potential impacts of the Project on the rights and interests of the Stoney Nakoda, and created opportunities including for employment and business development. As a result of the Relationship Agreement, the Stoney Nakoda concluded that they support the Project given it would result in economic, social and cultural benefits and that the Relationship Agreement adequately addressed their Project-specific concerns.

The Project Assessment Process

8. Both provincial and federal assessments and approvals are required for the Project to proceed.

9. Provincially the Project requires an environmental impact assessment under Alberta's *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 ("**EPEA**") as well as certain approvals under the *Coal Conservation Act*, RSA 2000, c C-17, the *EPEA*, the *Water Act*, RSA 2000, c W-3 and *Public Lands Act*, RSA 2000, c P-40.

10. Federally the Project requires an assessment under *CEAA 2012*, following which the Minister must decide, pursuant to s. 52(1) of *CEAA 2012*, whether, taking into account the implementation of mitigation measures the Minister deems appropriate, the Minister considers the Project is likely to cause significant adverse environmental effects as referred to in ss. 5(1) and 5(2) of *CEAA 2012*. If so, and pursuant to s. 52(2) of *CEAA 2012*, the Minister must refer the Project to Cabinet which must decide, pursuant to s. 52(4), whether those significant adverse environmental effects are justified in the circumstances.

11. On August 16, 2018, the Alberta Energy Regulator (the "**AER**") and the Minister of Environment and Climate Change Canada 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 "**JRP Agreement**"). Pursuant to the JRP Agreement the Joint Review Panel (the "**JRP**") was charged with discharging both provincial and federal environmental assessment responsibilities pursuant to the JRP Agreement terms of reference.

12. On the matter of Indigenous rights the JRP was required, pursuant to s. 5 of *CEAA 2012*, to assess whether the Project would cause changes to the environment that would affect health and socio-economic conditions; physical and cultural heritage; the current use of lands and resources for traditional purposes; or any structure, site, or thing that is of historical, archaeological, paleontological, or architectural significance. The JRP was also required pursuant to the JRP Agreement to consider the adverse impacts of the Project on asserted or established Aboriginal and Treaty rights.

13. Pursuant to the JRP Agreement the JRP was not authorized to make any determinations regarding the validity of asserted or established Aboriginal or Treaty rights; the scope of the Crown's duty to consult an Indigenous group; whether the Crown met its duties to consult or accommodate; or any matter of Treaty interpretation.

14. As part of the JRP assessment process the Stoney Nakoda submitted information to the JRP regarding their land use, cultural practices, and Aboriginal and Treaty rights in and around the Project area. Prior to the JRP public hearing on the Project, the Stoney Nakoda submitted a letter of no concern indicating that their project-specific concerns had been addressed by Benga through the Relationship Agreement and that they therefore supported the development of the Project. The Stoney Nakoda participated in the public hearing, which began on October 27, 2020 and concluded on December 2, 2020, including providing written and oral submissions and answering cross-examination questions from the JRP.

15. The JRP and the federal departments and agencies that participated in the JRP review were aware that the Stoney Nakoda had secured economic, social, cultural and other benefits

flowing from, and as accommodation for, the potential impacts of the Project on their Aboriginal and Treaty rights.

The JRP Decision

16. In the June 17, 2021 *Decision 2021 ABAER 010: Benga Mining Limited, Grassy Mountain Coal Project, Crowsnest Pass* (the "**JRP Report**"), the JRP in its capacity as the AER declined to issue the provincial approvals for the Project. The JRP in its capacity as the AER concluded that the Project is not in the public interest because the significant adverse environmental effects on westslope cutthroat trout and surface water quality likely to be caused by the Project outweigh the low to moderate positive economic impacts of the Project.

17. As a result of its decision in its provincial capacity to deny the Project, the JRP in its federal capacity expressly declined to complete an assessment of mitigation measures, thereby not completing the federal component of its review.

18. On June 17, 2021, the Impact Assessment Agency of Canada (the "**Agency**"), the successor to the Canadian Environmental Assessment Agency, issued a news release stating that the Minister had received the JRP Report and that, prior to making a decision on the Project, the Agency would consult with Indigenous groups on the JRP Report and also 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 were ultimately allowed to proceed.

19. On July 19, 2021, the Stoney Nakoda, pursuant to s. 45(1) of the *Responsible Energy Development Act*, SA 2012, c R-17.3, filed an application for permission to appeal the JRP's decision, in its capacity as the AER, to the Alberta Court of Appeal. In its application, the Stoney Nakoda submit that the JRP, in its capacity as the AER, made several errors of law and jurisdiction.

The Decision Statement

20. On August 6, 2021, the Minister issued the Decision Statement which concluded that the Project cannot proceed. The Decision Statement included the Minister Decision and the Cabinet Decision. The Minister Decision determined pursuant to s. 52(1) of *CEAA 2012* that the Project is likely to cause significant adverse environmental effects as referred to in ss. 5(1) and 5(2) of *CEAA 2012*, and referred the matter to Cabinet in accordance with s. 52(2) of *CEAA 2012*. Cabinet decided that the significant adverse environmental effects that the Project is likely to cause are not justified in the circumstances pursuant to s. 52(4)(b) of *CEAA 2012*.

Grounds of Review

Minister Decision

21. The Minister Decision was an incorrect, unreasonable and unlawful exercise of ministerial discretion and should be quashed or set aside.

22. The Minister Decision was based on at least the following errors which individually and/or together require that the Minister Decision be quashed or set aside:

    a) The Minister improperly relied on a fundamentally flawed JRP Report to reach his decision. The JRP Report is a statutory prerequisite to the Minister Decision, and the Minister relied on the JRP Report to reach his decision. The errors in the JRP Report include:

        i. The JRP did not include in its assessment the effects of the Project on the socioeconomic conditions of the Stoney Nakoda;

        ii. The JRP failed to consider the fact that the Relationship Agreement between the Stoney Nakoda and Benga included accommodation for the potential adverse impacts on the rights and interests of the Stoney Nakoda, and incorrectly or unreasonably found that the Project would have adverse residual effects on the Stoney Nakoda's rights, notwithstanding that the

Stoney Nakoda informed the JRP that it supported the Project based on the Relationship Agreement;

iii. The JRP failed to seek information from or adequately consult or suggest consultation with the Stoney Nakoda when contemplating the rejection of the Project and the resulting impact such a rejection would have on the economic, social, cultural and other rights of the Stoney Nakoda;

iv. The JRP fettered its discretion under the JRP Agreement terms of reference by not considering what the beneficial impacts would have been on the Stoney Nakoda if the Project were to proceed, and by not considering the adverse impacts that denial of the Project would have on the Stoney Nakoda;

v. The JRP acted *ultra vires* the JRP Agreement terms of reference by making a determination on the strength of the Stoney Nakoda's claims; and

vi. The JRP failed to consider, apply and uphold the Honour of the Crown.

b) The Minister failed to consider that the JRP had not completed its federal mandate. Under s. 52(1) of *CEAA 2012*, the Minister must consider mitigation measures in determining whether the Project is likely to result in significant adverse environmental effects. Information about mitigation measures comes from the JRP's assessment. However, given the JRP's decision, in its capacity as the AER, to deny the Project, the JRP in its federal capacity did not assess the adequacy of mitigation measures and therefore did not provide a recommendation to the Minister regarding proposed mitigation measures. This information was required in order to reasonably determine whether the Project will result in significant adverse environmental effect.

c) The Minister failed to consider in his determination of the Project's likelihood to cause significant adverse environmental effects that the Relationship Agreement between the Stoney Nakoda and Benga included mitigation and accommodation for the potential impacts on the rights and interests of the Stoney Nakoda.

d) Prior to the Minister Decision, the Federal Crown failed to consult with, or inadequately consulted with the Stoney Nakoda in breach of s. 35 of the *Constitution Act, 1982*, and the principles of natural justice, procedural fairness and legitimate expectations. The Minister unreasonably and incorrectly issued the Minister Decision notwithstanding that the Federal Crown failed to consult or failed to adequately consult the Stoney Nakoda regarding the JRP Report, as well as the impacts that denying the Project would have on the Stoney Nakoda's rights and interests. The potential impacts of denying the Project on the rights of Indigenous groups is a factor that the Minister must consider in determining whether the Project is likely to result in significant adverse environmental effects.

e) The Minister's reasons for the Minister Decision are inadequate

Cabinet Decision

23. The Cabinet Decision was also incorrect, unreasonable and unlawful and should be quashed or set aside.

24. The Cabinet Decision was based on at least the following errors which individually and/or together require that the Cabinet Decision be quashed or set aside:

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

b) Cabinet improperly relied on a fundamentally flawed JRP Report to reach its decision. The JRP Report is a statutory prerequisite to the Cabinet Decision, and Cabinet relied on the JRP Report in reaching its decision. The errors in the JRP Report include:

i. The JRP did not include in its assessment the effects of the Project on the socioeconomic conditions of the Stoney Nakoda;

ii. The JRP failed to consider the fact that the Relationship Agreement between the Stoney Nakoda and Benga included accommodation for the potential

adverse impacts on the rights and interests of the Stoney Nakoda, and incorrectly or unreasonably found that the Project would have adverse residual effects on the Stoney Nakoda's rights, notwithstanding that the Stoney Nakoda informed the JRP that it supported the Project based on the Relationship Agreement;

iii. The JRP failed to seek information from or adequately consult or suggest consultation with the Stoney Nakoda when contemplating the rejection of the Project and the resulting impact such a rejection would have on the economic, social, cultural and other rights of the Stoney Nakoda;

iv. The JRP fettered its discretion under the JRP Agreement terms of reference by not considering what the beneficial impacts would have been on the Stoney Nakoda if the Project were to proceed, and by not considering the adverse impacts that denial of the Project would have on the Stoney Nakoda;

v. The JRP acted *ultra vires* the JRP Agreement terms of reference by making a determination on the strength of the Stoney Nakoda's claims; and

vi. The JRP failed to consider, apply and uphold the Honour of the Crown.

c) Cabinet failed to consider that the JRP did not complete its federal mandate as it did not assess the adequacy of mitigation measures, and did not provide a recommendation to the Minister regarding proposed mitigation measures. In order for Cabinet to consider and reasonably determine whether significant adverse environmental effects are justified in the circumstances, Cabinet must consider appropriate mitigation measures. Cabinet did not have this information before it.

d) Cabinet failed to consider in its determination of whether the significant adverse environmental effects are justified in the circumstances that the Relationship Agreement between the Stoney Nakoda and Benga included mitigation and accommodation for the potential impacts on the rights and interests of the Stoney

Nakoda, and that it provided economic, social, cultural and other benefits to the Stoney Nakoda.

e) Prior to the Cabinet Decision, the Federal Crown failed to consult with, or inadequately consulted with the Stoney Nakoda in breach of s. 35 of the *Constitution Act, 1982*, and the principles of natural justice, procedural fairness and legitimate expectations. Cabinet unreasonably and incorrectly issued the Cabinet Decision notwithstanding that the Federal Crown failed to consult or failed to adequately consult the Stoney Nakoda regarding the JRP Report, as well as the impacts that denying the Project would have on the Stoney Nakoda's rights and interests. The potential impacts of denying the Project on the rights of Indigenous groups is a factor that Cabinet must consider in determining whether adverse environmental effects of the Project are justified in the circumstances.

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

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

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. One or more affidavits to be sworn;

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

3. The Decision Statement;

4. The records before the Minister and Cabinet in respect of the Project, the Minister Decision and the Cabinet Decision;

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

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

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

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

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

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

11. 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:

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

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

RAE AND COMPANY
Suite 900, 1000 – 5th Avenue SW
Calgary, Alberta T2P 4V1

Sara Louden
Brooke Barrett
Telephone: (403)-264-8389
Facsimile: (403)-264-8399
Email: slouden@raeandcompany.com
bbarrett@raeandcompany.com