IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

LONE PINE RESOURCES INC.

Claimant

AND

GOVERNMENT OF CANADA

Respondent

CLAIMANT'S COMMENTS ON AN APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* SUBMISSIONS

ICSID CASE NO. UNCT/15/2
30 August 2017

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I. Introduction

1. The Centre québécois du droit de l'environnement ("**Applicant**") has brought an Application for leave to file written submissions as *amicus curiae* ("**Application**").[1] There are three reasons why the Application does not meet the grounds upon which the Tribunal may grant leave to a potential *amicus*.

2. First, the written submissions proposed by the Applicant do not bring a perspective, particular knowledge or insight that is different from that of the disputing parties.

3. The Applicant advances a "precautionary principle" concept which posits that a state may intervene to protect the environment in instances involving an absence of complete scientific knowledge, the possibility of serious or irreparable harm, and a reasonable basis for concern.[2] While the Respondent Government of Canada ("**Canada**") does not employ precisely the same terminology as the Applicant, its arguments already advance the same propositions and elaborate on each of these three elements.

4. Throughout its submissions, the Applicant addresses rules, treaties, statutes, and documents that are cited extensively by Canada to the same effect. Much of the Applicant's proposed submissions, for instance, deal with the findings of SEA-1 and the BAPE 273 Report, which are analysed at length by the disputing parties.

5. Moreover, under its interpretation of the police powers doctrine, Canada asserts that a state can expropriate property without compensation if the measure was intended for the

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1 Demande d'autorisation de déposer un mémoire écrit à titre d'*amicus curiae*, 16 August 2017.

2 See paragraph 21 of the proposed submissions.

protection of the public good – including protection of the environment – provided only that the measure in question was non-discriminatory and adopted in good faith.

6. Put simply, the Applicant advances various key arguments already made by Canada.

7. Second, the Applicant does not have an interest in the present dispute that is any different from that advocated by Canada. Both maintain that the impugned legislation (*An Act to limit oil and gas activities* ("***Act***")) was motivated by the intention to protect the St. Lawrence River. In this respect, the Applicant is not taking a position that is distinguishable from that of Canada, and does not promote a point a view that is likely to change or enrich the debate.

8. Third, given the short timeframe until the hearing, the Parties should not be burdened with being asked to comment on arguments already in the pleadings. The effect is duplicative, and places an undue burden on the Claimant, while the Respondent is able to benefit from an intervener re-stating its arguments.

II. The Tribunal's Discretion and the Criteria to Grant *Amicus Curiae* Applications

9. According to Rule 37(2) of the *ICSID Arbitration Rules*, the filing of *amicus curiae* Applications is subject to the discretion of the tribunal. In exercising its discretion to allow or disallow submissions by third parties, the tribunal must consider a number of non-exhaustive factors. Among these are the novelty of the proposed submissions, the third-party's interest in the dispute, and the fair treatment of the named parties:

> **Rule 37 - Visits and Inquiries; Submissions of Non-disputing Parties**
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> [...]
>
> (2) After consulting both parties, *the Tribunal may* allow a person or entity that is not a party to the dispute (in this Rule called the "nondisputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, *the Tribunal shall consider, among other things, the extent to which*:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding *by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties*;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) *the non-disputing party has a significant interest in the proceeding.*
>
> *The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party*, and that both parties are given an opportunity to present their observations on the non-disputing party submission.[3]

10. The factors listed in Rule 37(2) of the *ICSID Arbitration Rules* are cumulative in nature such that each must be satisfied in order for leave to be granted.

11. Rule 17 of the *UNCITRAL Arbitration Rules* (as revised in 2010) states that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case." It goes on to state that "[t]he arbitral tribunal, *in exercising its discretion, shall conduct the*

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[3] *ICSID Rules of Procedure for Arbitration Proceedings* (April 2006) rule 37 (emphasis added).

proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."[4]

12. The NAFTA Free Trade Commission has noted that the tribunal's exercise of discretion to allow non-disputing parties participation must consider the same cumulative factors as those contained in Rule 37(2) of the *ICSID Arbitration Rules*. Among other things, the tribunal must consider whether the submission would assist it "in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties" and whether "the non-disputing party has a significant interest in the arbitration."[5] The tribunal must also ensure that "neither disputing party is unduly burdened or unfairly prejudiced by such submissions."[6]

III. The Applicant Does Not Meet the Required Criteria

(a) The Applicant does not bring a perspective, particular knowledge, or insight different than Canada

13. According to the Applicant, the proposed written submissions are intended to address the precautionary principle in matters of the environment and to explain how the *Act* is a concrete application of this principle. The Applicant also asserts that the written

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4 *UNCITRAL Arbitration Rules* (as revised in 2010), rule 17 (emphasis added).

5 NAFTA Free Trade Commission, "Statement of the Free Trade Commission on non-disputing party participation" (7 October 2003) (CLA-109), sections 6(a) and (c).

6 NAFTA Free Trade Commission, "Statement of the Free Trade Commission on non-disputing party participation" (7 October 2003) (CLA-109), section 7(b).

submissions are based on different considerations from those of Canada and will complement the Respondent's position.[7]

14. The Applicant maintains that the proposed submissions should be included in the record because they aim to show that the *Act* was a measure adopted for legitimate public interest reasons, and in a manner that was reasonable, coherent, and foreseeable in the circumstances.[8]

15. It follows that, on its very face, the Applicant wishes to recapitulate some of the central arguments developed by Canada as to the alleged legitimacy of the *Act*, the manner in which it was adopted, and the public interest it was allegedly intended to protect.

16. This is confirmed by the written submissions themselves, which put forward assertions and arguments that are almost identical to those of Canada. As demonstrated by the table below, in almost every instance the Applicant covers ground that has already been amply briefed by Canada:

Applicant's Proposed Submissions	**Respondent's Written Arguments and Witness Statements**
There was scientific uncertainty given the lack of knowledge (para. 23)	Canada's Counter Memorial, paras. 10, 114,115, 129, 143-152 Canada's Rejoinder, paras. 52, 101, 241, 365
The uncertainty raised by SEA-1 (paras.	Canada's Counter-Memorial, paras. 122-130,

7 Demande d'autorisation de déposer un mémoire écrit à titre d'*amicus curiae*, 16 August 2017, paras. 20, 21.

8 Demande d'autorisation de déposer un mémoire écrit à titre d'*amicus curiae*, 16 August 2017, paras. 22, 23.

26 and 27)	194, 202, 207-210 Canada's Rejoinder, paras. 102, 147, 231, 234, 241, 243, 332
The uncertainty raised by the BAPE 273 Report (paras. 28-30)	Canada's Counter-Memorial, paras. 143-152; 191-210 Canada's Rejoinder, paras. 57, 101, 122, 231, 241, 243, 258, 326, 332
The importance of the St. Lawrence River (para. 32)	Witness Statement of Jacques Dupont, 15 July 2015, paras. 38-51 Canada's Rejoinder, paras. 98, 99, 159-161, 232, 233
Reasonable basis to believe that the risks could materialize (paras. 34-36)	Canada's Counter-Memorial, paras. 122-130, 143-152, 191-210 Canada's Rejoinder, paras. 57, 101, 102, 147, 231, 234, 241, 243, 258, 326, 332
Other circumstances to be taken into account (paras. 37-42)	Canada's Counter-Memorial, paras. 34, 41, 162, 168-170 Canada's Rejoinder, paras. 75-88

17. The Applicant relies on the precautionary principle, which it states is recognized where three conditions are met: a) there is an absence of complete scientific knowledge; b) there is the potential for serious and irreparable harm; and c) there are legitimate reasons for being concerned.

18. The parties to the dispute do not expressly elaborate on the precautionary principle. But, as the chart above demonstrates, its three conditions are at the very centre of Canada's arguments. The Counter-Memorial and Rejoinder contain substantial arguments

concerning these same issues, through the use of different legal terminology and Canada's interpretation of the NAFTA.

19. In its Counter-Memorial, for example, Canada dedicated two entire sections in its Statement of Facts (C and D) to the issues of scientific knowledge, risk assessment, and governmental concern and action. The headings and sub-hearings of the Counter-Memorial speak for themselves:[9]

- "Studies performed on behalf of the Quebec government bring to light much uncertainty about the environmental impacts of shale gas development and raise doubts that such development would be beneficial to Quebec;"
- "BAPE Report 273 identifies risks of environmental contamination and gaps in scientific knowledge;"
- "The St. Lawrence River is a unique environment protected by several measures;"
- "The adoption of the Act recognizes that the St. Lawrence River is not a suitable environment for oil and gas exploration and development in the St. Lawrence River."

20. Indeed, a careful analysis of the proposed submissions reveals that they address issues that are already dealt with by Canada in an exhaustive manner.

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9 Government of Canada Counter-Memorial, 24 July 20150, pages ii and iii.

21. This is true of the preliminary submissions made with respect to international and domestic law, particularly as the latter relates to the *Sustainable Development Act*,[10] the *Environment Equality Act,*[11] and *An Act to affirm the collective nature of water resources and provide for increased water resource protection.*[12] It is also true as it concerns the application of the precautionary principle to the facts of this case.

22. Canada also pleads a police powers doctrine that in many ways resembles the precautionary principle advanced by the Applicant. According to Canada, "[i]nternational law recognizes that states have the power to adopt measures for the protection of the public good without having to compensate for any property interference that may result, as long as the measures are non-discriminatory and were adopted in good faith."[13]

23. Canada further submits that "NAFTA Chapter 11 does not limit the State's police powers, quite the contrary. The Parties expressly mention them several times in order to preserve their sovereign right to legislate for, among other things, environmental protection."[14]

24. In other words, like the Applicant, Canada puts forward a legal doctrine which would allegedly justify a state in taking measures – including the expropriation of property

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10 Government of Canada Counter-Memorial, 24 July 2015, paras. 112-121; 133, 142, 143, 146,171,173, 211, 217, 227, 336 and 374; Canada's Rejoinder, 4 August 2017, paras. 67, 242, 334, 340, 343 and 448.

11 Witness Statement of Jacques Dupont, 15 July 2015, paras. 17-25.

12 Witness Statement of Jacques Dupont, 15 July 2015, paras. 37-45.

13 Government of Canada Counter-Memorial, 24 July 2015, para. 492.

14 Government of Canada Counter-Memorial, 24 July 2015, para. 501.

without compensation – in order to protect the environment, even in the absence of scientific certainty.

25. Whether or not this argument is advanced under the heading of "police powers" or "the precautionary principle," it fundamentally makes the same point. The application of the doctrines to the merits raises the same questions as to whether or not there was a legitimate basis for Quebec to have passed the *Act*.

26. It is up to a respondent to characterize its arguments in the manner that it chooses. The only practical effect of granting the Application would be to reformulate, along slightly different conceptual lines, what the Respondent has already argued. It is submitted that an *amicus curiae* Application should not be granted in this instance.

(b) The Applicant Has No Significant Interest in the Proceeding Distinct from that of Canada

27. The Claimant does not take issue with the Applicant's qualifications as an environmental organization, experience or involvement in other cases. It is respectfully submitted, however, that the Application should be assessed on its own merits, and that this Tribunal should ask whether it satisfies the criteria outlined in Rule 37(2) of the *ICSID Arbitration Rules* and sections 6 and 7 of the NAFTA Free Trade Commission's Statement.

28. In addition to the superfluous nature of its proposed submissions, the Applicant has not shown how its interests in this dispute are different from those advocated by Canada.

29. Far from being different, the interests of the Applicant and Canada are perfectly aligned since they both maintain the same position: that the Government of Quebec had the right

under international and domestic law, as well as under the NAFTA, to expropriate the Claimant's property rights without compensation.

30. Both Canada (under police powers) and the Applicant (under the precautionary principle) effectively argue the same thing: that a state can act to protect the environment on the basis of incomplete scientific knowledge, the potential for serious harm, and a reasonable belief that such harm could materialize.

31. As a result, allowing the Applicant to file its proposed submissions would not give voice to a point of view or constituency that is currently unrepresented in the arbitration. It would merely enable the Applicant to echo Canada's arguments.

(c) The Filing of the Submissions Would Unduly Burden the Claimant

32. The Claimant acknowledges that the Applicant does not seek leave to make oral submissions during the arbitration hearing.[15]

33. But the Claimant does not agree that the Applicant will not place any additional burden on the Parties.

34. While the proposed submissions reformulate the arguments made by Canada using a different legal doctrine and terminology, the Claimant will still need to respond to these reformulations.

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15 Demande d'autorisation de déposer un mémoire écrit à titre d'*amicus curiae*, 16 August 2017, para. 25.

35. Having to rebut the proposed written submissions will not only be a distraction for the Claimant and this Tribunal, but it will add another layer of complexity to a case that is already sufficiently intricate.

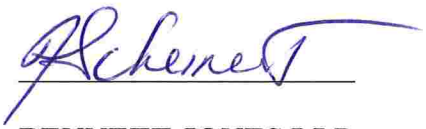
36. In this respect, the filing of the submissions would impose an undue burden on the Claimant and cause it to incur unnecessary expense. This would be at a time when it is in the final stages of preparing for a hearing that is years in the making.

IV. Conclusion

37. For these reasons, the Claimant requests that the Tribunal dismiss the Application on a without-costs basis.

ALL OF WHICH is respectfully submitted.

Date: 30 August 2017



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