COURT FILE NO. _____

FEDERAL COURT OF APPEAL

BETWEEN:

LYNNE M. QUARMBY, ERIC DOHERTY, RUTH WALMSLEY, JOHN VISSERS, SHIRLEY SAMPLES, FORESTETHICS ADVOCACY ASSOCIATION, TZEPORAH BERMAN, JOHN CLARKE, and BRADLEY SHENDE

MOVING PARTIES

AND:

NATIONAL ENERGY BOARD, ATTORNEY GENERAL OF CANADA, TRANS MOUNTAIN PIPELINE ULC, and CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS

RESPONDENTS

MEMORANDUM OF FACT AND LAW OF THE MOVING PARTIES FOR LEAVE TO APPEAL

Overview

1. This case is about government limits on citizen's expression in public hearings. Under the *Canadian Environmental Assessment Act* ("***CEAA 2012***")[1] and the *National Energy Board Act* (the "***NEB Act***")[2], the National Energy Board (the "**NEB**" or "**Board**") is the federal entity charged with conducting reviews to assess whether proposed pipeline infrastructure projects are in the public interest. Legislative amendments in 2012 went too far when they curtailed the scope of public participation in the Board's hearings to exclude the expression of relevant information. These limits on free expression are inconsistent with s. 2(b) of the *Charter of Rights and Freedoms* (the "***Charter***")[3] and the values it is designed to promote: democratic dialogue, truth seeking and self-fulfillment. The Board's position, that freedom of expression is not engaged in its hearings because it would undermine these *Charter* values, requires judicial scrutiny.

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[1] *Canadian Environmental Assessment Act, 2012,* S.C. 2012, c.19 ("***CEAA 2012***") [Appendix "A", Tab 35]
[2] *National Energy Board Act*, R.S.C. 1985, c. N-7, as amended ("***NEB Act***") [Appendix "A", Tab 36]
[3] *Charter of Rights and Freedoms, The Constitution Act,* 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 ("***Charter***"), s. 2 [Appendix "A", Tab 37]

Decision further to which leave is sought

2. This is an application for leave to appeal from a decision of the Board dated October 2, 2014[4] (the "**Decision**") dismissing two motions filed by Lynne M. Quarmby, Eric Doherty, Ruth Walmsley, John Vissers, Shirley Samples, ForestEthics Advocacy Association, Tzeporah Berman, John Clarke and Bradley Shende (the "**Moving Parties**"). The Moving Parties' two motions (the "**Quarmby Motions**") relate to the Board's review of the Trans Mountain Pipeline Expansion Project (the "**Project**"). Specifically:

a) On May 5, 2014, the Moving Parties filed a Notice of Constitutional Question asserting that s. 55.2 of the *NEB Act* violates their freedom of expression as guaranteed by the *Charter*. [5] On May 6, 2014, by way of a Notice of Motion, in addition to the constitutional challenge to the legislation, the Moving Parties also asserted that the Board interpreted s. 55.2 in an unconstitutional manner, and that the Board's decisions limiting freedom of expression on the basis of the content of their expression are unconstitutional, unreasonable and contrary to principles of procedural fairness (the "***Charter* Motion**").[6]

b) On May 15, 2014, the Moving Parties filed a Notice of Motion seeking an oral hearing on the Constitutional Question (the "**Procedural Motion**"). [7] The Moving Parties do not seek leave to appeal the Board's decision on the Procedural Motion.

3. In its Decision, the Board concedes it has expressly limited the issues it will consider in its review and that this is a content-based limitation. The submissions the Moving Parties seek to make are relevant to the Board's review of the Project and none of the other parties contradicted their evidence. Therefore, two critical questions must be addressed: (i) are Board hearings a forum where free expression of relevant information is guaranteed or does the location remove the protection; and (ii) if free expression is engaged, can that free expression be justifiably infringed.

4. The Moving Parties' ask this Court to grant them leave to appeal the Decision pursuant to s. 22 of the *NEB Act*[8] and pursuant to Rules 352 and 369 of the *Federal Courts*

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[4] NEB Ruling No. 34, Oct. 2, 2014 (the "**Decision**") [Motion Record ("**MR**") Vol. 1, Tab 2]
[5] Notice of Constitutional Question, May 5, 2014 [MR Vol. X, Tab 7]
[6] Notice of Motion, May 6, 2014 ("***Charter* Motion**") [MR Vol. X, Tab 8]
[7] Notice of Motion, May 15, 2014 ("**Procedural Motion**") [MR Vol. X, Tab 9]
[8] *NEB Act*, s. 22 [Appendix "A", Tab 36]

Rules[9], on the basis that there is an arguable case that, in making the Decision, the Board made one or more of the following errors of law or jurisdiction:

a) the Board erred in finding that s. 55.2 of the *NEB Act* does not breach s. 2(b) of the *Charter*;

b) the Board erred in finding that its interpretation of the s. 55.2 of the *NEB Act* was reasonable and consistent with *Charter* values; and

c) the Board erred in failing to conduct a justification analysis of the legislation under s. 1 of the *Charter*, or under a modified test for the administrative decisions.

5. Leave to appeal should be granted to correct these errors to ensure that the *NEB Act* complies with the *Charter* guarantee of free expression; to ensure that the Board takes into consideration *Charter* values in making decisions about the scope of its review and public participation in the review process; and to ensure that the Board fulfills its legislative mandate, under the *CEAA* and the *NEB Act,* to consider the public interest and undertake a complete environmental assessment of the Project.

PART 1.0 – STATEMENT OF FACTS

1.1 The Project: Trans Mountain Pipeline Expansion Project

6. Trans Mountain[10] applied to the Board for a Certificate of Public Convenience and related approvals on December 16, 2013 (the "**Project Application**").[11] The existing Trans Mountain pipeline system, which runs approximately 1,147 km, transports various crude petroleum and refined products from Edmonton, Alberta, to multiple locations in British Columbia including deliveries of crude petroleum to the terminal at Sumas Mountain (for export to Washington State), and to the Westridge Marine Terminal in Burnaby (for offshore export) (the "**Pipeline System**").[12]

7. The Project would involve significant construction and would still bisect Metro Vancouver. The overall Pipeline System capacity would increase from 300,000 barrels per

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[9] *Federal Courts Rules,* SOR/98-106, Rules 352 and 369 [Appendix "A", Tab 38]

[10] Trans Mountain Pipeline ULC, a general partner of Trans Mountain Pipeline L.P. (collectively "**Trans Mountain**"), is the proponent of the Project and a wholly owned subsidiary of the Kinder Morgan Energy Partners L.P.

[11] Trans Mountain Pipeline L.P. owns the existing Pipeline System. Kinder Morgan Canada Inc. operates the Pipeline System; Trans Mountain Expansion Project: An Application Pursuant to S. 52 of the *NEB Act*, Volume 1 – Summary, Dec. 16, 2013 ("**Project Application Vol. 1**"), pp.1-1 – 1-2 [MR Vol. 2, Tab 3]

[12] Project Application Vol. 1, pp.1-1 – 1-2 [MR Vol. 2, Tab 3]

day (bpd) to 890,000 bpd. Currently, approximately five crude oil tanker vessels are loaded with refined petroleum at the Westridge Marine Terminal per month; this number could increase to up to 34 Aframax tankers loaded with diluted bitumen per month.[13] Trans Mountain's stated purpose for the Project is to increase the Pipeline System's capacity to transport crude oil from Alberta for export to markets in the west coast of the United States and Asia.[14] As outlined in the *Charter* Motion, oil sands expansion depends on more infrastructure to transport these products.[15] The construction of this type of costly infrastructure perpetuates oil dependency because its relatively low operating costs and the high cost of abandoning it in favour of other options "locks in" its use.[16]

1.2 The Board's Legislative Mandate and Recent Changes

8. The Board's mandate with respect to proposed pipeline projects is set out in the legislative regime of the *CEAA 2012* and the *NEB Act*. As detailed in the underlying *Charter* Motion, the Board is tasked with determining, through a public review process, whether a proposed project is in the public interest.[17] Based on its review, the Board makes recommendations to Cabinet regarding whether issuing a Certificate of Public Convenience and Necessity (the "**Certificate**") would be in the public interest.

1.2.1 Authority Responsible for the Environmental Assessment

9. The legislative authority that renders the Project subject to an environmental assessment by the Board originates under the *CEAA 2012*.[18] As the responsible authority for the environmental assessment, the Board's review must satisfy the mandate set out in the *CEAA 2012* which includes ensuring "opportunities are provided for meaningful public participation during an environmental assessment", taking into account a range of

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[13] *Charter* Motion, paras. 6-11 [MR Vol. 3, Tab 8]; Project Application Vol. 1, p. 1-2 – 1-4, 1-13, 1-21 [MR Vol. 2, Tab 3]
[14] Project Application Vol. 1, pp.1-2, 1-4 [MR Vol. 2, Tab 3]
[15] *Charter* Motion, paras. 12, 16 [MR Vol. 3, Tab 8]; Project Application Vol. 1, p. 1-4 [MR Vol. 2, Tab 3]; Affidavit of Mark Jaccard, affirmed April 25, 2014 ("**Jaccard Affidavit**"), para. 16 [MR Vol. 3, Tab 8.1]; Affidavit of Andrew Read, affirmed Aug. 8, 2014 [MR Vol. 7, Tab 33.4]
[16] Jaccard Affidavit, paras. 29-32 [MR Vol. 3, Tab 8.1]
[17] *Charter* Motion, paras. 20, 73-75 [MR Vol. 3, Tab 8]; Affidavit of Nikki Skuce, affirmed April 28, 2014 ("**Skuce Affidavit**") [MR Vol. 5, Tab 8.7]; Affidavit of Sven Biggs, affirmed May 1, 2014 ("**Biggs Affidavit**"), Exhs. A, B, G [MR Vol. 5, Tab 8.8]
[18] *CEAA 2012*, ss. 2(1), 13, 15(b) [Appendix "A", Tab 35]; *Charter* Motion, paras 18-20 [MR Vol. 3, Tab 8]; Quarmby Reply, para. 28 [MR Vol. 6, Tab 30]

environmental effects including changes to the environment in another province or outside Canada, and changes caused to the environment that are "directly linked or necessarily incidental" to the exercise of powers under other legislation, such as the *NEB Act*.[19]

1.2.2 Authority Responsible for the Issuance of Certificate

10. The Board is also the responsible authority for the Application for a Certificate for the Project, pursuant to the *NEB Act*. Accordingly, the Board has statutory responsibilities with respect to issuing the Certificate. In this respect, the *NEB Act* sets out that, in making its recommendation, the Board must have regard to "all considerations that appear to it to be directly related to the pipeline and to be relevant", and may have regard to "any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application".[20]

1.2.3 2012 Legislative Amendments Bar Public Participation in Environmental Reviews

11. Prior to 2012, s. 53 of the *NEB Act* provided that, on an application for a Certificate, the Board was to consider the views of "any interested person".[21] Consistent with its legislative obligations to assess the public interest, the Board pursued means to facilitate public involvement in the process, such as with the provision of participant funding for groups with limited means.[22] Indeed, this remains an important part of the environmental assessment regime of the Canadian Environmental Assessment Agency.[23]

12. The public aspect of Board hearings was materially reduced when Parliament passed Bill C-38, the *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c. 19, and the associated amendments to the *NEB Act* (the "**2012 Amendments**"). The bill amended 70 laws, and was introduced with little debate and no process for public engagement.[24]

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[19] *CEAA 2012,* ss. 4(1)(e), 5 [Appendix "A", Tab 35]
[20] *NEB Act*, ss. 52-54 [Appendix "A", Tab 36]
[21] *National Energy Board Act*, R.S.C., 1985, c. N-7, s. 53 [Appendix "A", Tab 39]
[22] *Charter* Motion, para. 21 [MR Vol. 3, Tab 8]; Skuce Affidavit [MR Vol. 5, Tab 8.7]
[23] *CEAA 2012*, ss. 9(c), 19(1)(c) [Appendix "A", Tab 35]; see also *Charter* Motion, para. 61 [MR Vol. X, Tab 8]; Quarmby Reply, para. 27 [MR Vol. 6, Tab 30]
[24] Affidavit of Tzeporah Berman, affirmed May 5, 2014 ("**Berman Affidavit**"), paras. 28-36, Exhs. Y-BB [MR Vols. 4a and 4b, Tab 8.4]

13. Among many other significant changes, the 2012 Amendments raised the threshold interested persons had to meet to make representations to the Board by amending the impugned provision, s. 55.2 of the *NEB Act*, to state the following:

> On an application for a certificate, the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information or expertise. A decision of the Board as to whether it will consider the representations of any person is conclusive.[25]

14. The 2012 Amendments occurred as a result of aggressive lobbying by groups such as the Energy Policy Institute of Canada, an industry group whose members include the major oil companies and industry associations, demanding that the federal government reduce public participation in the Board's review process.[26]

15. Public participation in federal reviews declined following the 2012 Amendments. By way of example, in the hearings for Enbridge's Northern Gateway pipeline, a project of comparable scope to the Project in a sparsely populated part of the country, more than 10,000 participants expressed their concerns in the review process in 2011 and 2012. No interested Canadian who applied (by the deadline) to express their views on the project was denied that opportunity.[27] Following the 2012 Amendments, in the Board's 2013 hearings for Enbridge's Line 9 pipeline in Ontario, only 61 individuals and groups were granted intervenor status and 111 individuals and groups were permitted to submit a comment letter.[28] Nevertheless, the Board continues to advertise on its website that public participation in its review processes lies at the core of its mandate.[29]

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[25] *NEB Act*, s. 55.2 [Appendix "A", Tab 36]; see *CEAA Act*, s. 2(2) [Appendix "A", Tab 35]
[26] Berman Affidavit, paras. 37-56, Exhs. CC-FF [MR Vols. 4a and 4b, Tab 8.4]
[27] *Charter* Motion, para. 21 [MR Vol. 3, Tab 8]; Skuce Affidavit [MR Vol. 5, Tab 8.7]
[28] Biggs Affidavit, paras. 38-39, Exhs. K, L [MR Vol. 5, Tab 8.8]
[29] Biggs Affidavit, Exh. A [MR Vol. 5, Tab 8.8]

1.3 The Board's Process for Reviewing the Project

1.3.1 List of Issues: Content Restrictions on the Scope of the Hearings

16. On July 29, 2013, months before Trans Mountain filed its Project Application, the Board posted on its website a list of twelve proposed issues to be considered by the Board in its review of the Project Application (the "**List of Issues**").[30]

17. The Board also indicated that certain issues were excluded from the review process by stipulating it "does not intend to consider the environmental and socio-economic effects associated with upstream activities, the development of oil sands, or the downstream use of the oil transported by the pipeline" (the "**Excluded Issues**"). The Board Decision acknowledges that the List of Issues constitutes a content restriction.[31]

1.3.2 Application to Participate Process: Content Restrictions Bar Participation

18. To participate in the Board proceedings, interested parties were required to file an Application to Participate (an "**ATP**"). The 11 page ATPs were available to those who wanted to participate on January 15, 2014, and had to be submitted by February 12, 2014. The ATP advised applicants that all information they filed with the Board would be made public, including their personal contact information. The ATP process also required that applicants use a financial institution sign-in or government-issued "key" to set up an online account. Applicants were required to indicate which issues, in the List of Issues, were connected to the submissions they sought to make and they were allotted 500 words to elaborate. They were also required to provide the following information:

a) whether they were applying as an individual, or as an authorized representative on behalf of an individual or a group;

b) whether they were applying to submit a letter of comment to the Board or to participate as an intervenor in the hearing; and

c) whether they were applying on the basis of being "directly affected by the Project" or having "relevant information or expertise".[32]

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[30] Project Application Vol. 1, pp.1-1 – 1-2, 1-14 [MR Vol. 2, Tab 3]
[31] Decision, p. 13 [MR Vol. 1, Tab 2]
[32] Biggs Affidavit, para. 23, 26-27, Exh. I [MR Vol. 5, Tab 8.8]

1.3.3 Participation Ruling: Content Restrictions as a Basis for Excluding the Public

19. On April 2, 2014, the Board issued its Hearing Order, the ruling on the ATPs (the "**Participation Ruling**"), and additional documents regarding the scope of the hearings.[33] The Hearing Order provided a schedule of hearing events and detailed the participation rights of intervenors and commenters.[34] In the Participation Ruling, the Board granted intervenor status to 450 applicants and commenter status to 1,250 applicants; 468 individuals or associations that applied to express concerns about the Project were denied any participatory status whatsoever.[35] The List of Issues and Excluded Issues remained unchanged from those posted in July 2013.[36]

1.4 The Moving Parties, their Concerns and the Public Interest

20. The moving parties Lynne M. Quarmby, Eric Doherty, Ruth Walmsley, John Vissers, Shirley Samples, Tzeporah Berman, John Clarke and Bradley Shende, are individuals who have been barred, by s. 55.2 of the *NEB Act* and the Board's decisions thereunder, from expressing their concerns about the Project in the Board's review proceedings.[37] The moving party ForestEthics Advocacy Association ("FEAA"), a non-profit organization with a mandate to conserve and protect the natural environment, sought to express concerns about the Project in the Board proceedings. However, s. 55.2 of the *NEB Act* and the Board's Excluded Issues bar FEAA from doing so.[38]

21. The Moving Parties' concerns are directly relevant to the List of Issues. FEAA's ATP indicated its concerns were connected to all twelve issues in the List of Issues.[39] As

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[33] Completeness Determination and Legislated Time Limit [MR Vol. 2, Tab 6A]; Letter and Hearing Order OH-001-2014, April 2, 2014 ("**Hearing Order**") [MR Vol. 2, Tab 6B]; Application for Trans Mountain Expansion Project – Participation Ruling ("**Participation Ruling**") [MR Vol. 2, Tab 6C]

[34] Hearing Order, pp. 6-7 [MR Vol. 2, Tab 6B]

[35] Participation Ruling, p. 1 [MR Vol. 2, Tab 6C] Intervenors may file written evidence; ask written questions about evidence; file, and potentially respond to, notices of motion; comment on draft conditions; and present written and oral argument; Commenters may submit one letter of comment; the Board warned it would ignore anything else: "[a]ny additional letters or submissions will not be included on the record or considered." See also, Charter Motion, para. 34 [MR Vol. 3, Tab 8];

[36] List of Issues, Hearing Order, p. 18 ("**List of Issues**") [MR Vol. 2, Tab 6B, p. 130]; Project Application Vol. 1, pp.1-1 – 1-2, 1-14 [MR Vol. 2, Tab 3]

[37] *Charter* Motion, para. 35 [MR Vol. 3, Tab 8]; see also Affidavits of Moving Parties [MR Vol. 5, Tabs 8.8 – 8.15]; Affidavit of Dianne Kaiser, affirmed October 28, 2014, Exh. 1: *Table: Moving Parties' Connections to List of Issues* ("***Table: Moving Parties' Connections to List of Issues***") [MR Vol. 7, Tab 33.1, p. 130]

[38] *Charter* Motion, para. 35 [MR Vol. 3, Tab 8]; Biggs Affidavit, paras. 4-11, Exh. J [MR Vol. 5, Tab 8.8]

[39] Biggs Affidavit, Exh. J [MR Vol. 5, Tab 8.8]

set out in their respective ATPs, the remaining moving parties all identified how their concerns related to the List of Issues.[40] Several of the Moving Parties' indicated concerns about the many adverse cumulative impacts of the Project on the environment (Issue 4).

22. Many of the Moving Parties also indicated concerns about the Excluded Issues that the Board refuses to hear. These public interest considerations include the fact that pipeline infrastructure catalyzes increased oil sands expansion and directly exacerbates climate change. Carbon emissions are causing climate change. The Moving Parties provided ample evidence in the underlying *Charter* Motion regarding these changes as well as the direct link between rising carbon emissions and the Alberta oil sands.[41] As the Board noted in its Decision, none of the other parties contradicted this evidence.[42]

23. The cumulative effects of carbon emissions associated with the expansion of the Alberta oil sands are incompatible with the Canadian government's commitment to reduce greenhouse gas emissions.[43] Accordingly, the expansion of pipeline infrastructure that enables oil sands expansion is also inconsistent with those federal commitments. Nevertheless, despite the overwhelming consensus of the global scientific community that climate change is a real and immediate threat to the environment, in recent years the federal government has taken drastic steps to limit discussion and debate about these issues.[44] Notably, 26 climate change academics from the University of B.C. and other B.C. and Alberta universities applied for intervenor status to lend their expertise to the Board's assessment of whether the Project is in the public interest.[45] The Board denied all their ATPs and blocked these esteemed scholars from even submitting a letter.

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[40] Affidavits of the Moving Parties [MR Vol. 5, Tabs 8.8 – 8.15]; *Table: Moving Parties' Connections to List of Issues* [MR Vol. 7, Tab 33.1]
[41] *Charter* Motion, paras. 12-17 [MR Vol. 3, Tab 8]; Jaccard Affidavit [MR Vol. 3, Tab 8.1]; Affidavit of Danny Harvey, affirmed April 25, 2014 [MR Vol. 3, Tab 8.2]; Affidavit of Marc Lee, affirmed April 28, 2014 [MR Vol. 3, Tab 8.3]
[42] Decision, p. 4. [MR Vol. 1, Tab 2]
[43] *Charter* Motion, paras. 12-17 [MR Vol. X, Tab 2]; Jaccard Affidavit, paras. 29-32 [MR Vol. 3, Tab 8.1]; MK Jaccard and Associates, *Impact on GHG Emissions and Climate Targets of the Trans Mountain Expansion Project*, May 14, 2014 [MR Vol. 7, Tab 33.3]
[44] *Charter* Motion, para. 17 [MR Vol. 3, Tab 8]; Jaccard Affidavit, paras. 22-23 [MR Vol. 3, Tab 8.1]; Berman Affidavit, paras. 7-27, Exhs. B-X [MR Vols. 4A and 4B, Tab 8.4]
[45] Affidavit of Sara Harris, affirmed April 30, 2014 ("**Harris Affidavit**")[MR Vol. 5, Tab 8.16]

1.5 The Moving Parties Motions and the Board's Decision

1.5.1 The Quarmby Motions and Responses to the Quarmby Motions

24. Shortly after the filing of the *Charter* Motion[46] and the Procedural Motion[47], a number of intervenors in the Board hearings submitted letters in support of the Quarmby Motions.[48] Notably, if commenters had written regarding their concerns about limits on their freedom to express their view to the Board, it would have exhausted their only opportunity to submit a letter to the Board – an absurd result.

25. On May 26 2014, the Board set out a formal comment process for the Quarmby Motions (the "**Process Letter**") wherein it asked that participants address six specific questions in their responses to the motions.[49] Throughout May and June, parties exchanged correspondence regarding the process.[50]

26. Three parties filed comprehensive responses opposing the Quarmby Motions and related Notice of Constitutional Question: Trans Mountain[51], the Canadian Association of Petroleum Producers ("**CAPP**")[52], and the Attorney General of Canada ("**AGC**").[53]

1.5.2 The Moving Parties' Replies and Requests for a Ruling

27. The Moving Parties provided two replies: a preliminary reply to Trans Mountain's first response[54] and submissions in reply to all answers filed in response to their motions.[55] The Moving Parties twice asked the Board to issue a ruling on the Quarmby Motions.[56]

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[46] *Charter* Motion [MR Vol. 3, Tab 8]
[47] Procedural Motion [MR Vol. 6, Tab 9]
[48] Robyn Allan response, May 16, 2014 [MR Vol. 6, Tab 12]; City of Burnaby response, May 16, 2014 [MR Vol. 6, Tab 13]; City of Vancouver response, May 26, 2014 [MR Vol. 6, Tab 16]; Tsartlip First Nation response, June 24, 2014 [MR Vol. 6, Tab 24]
[49] NEB letter, May 26, 2014 ("**Process Letter**") [MR Vol. 6, Tab 16]
[50] See exchange of various letters between AGC, NEB and Moving Parties [MR Vol. 6]
[51] Response of Trans Mountain, May 16, 2014 [MR Vol. 6, Tab 11]; Supplementary Response of Trans Mountain, June 30, 2014 [MR Vol. 6, Tab 29]
[52] Comments of the CAPP On The Charter Motion, June 30, 2014 [MR Vol. 6, Tab 25]
[53] Written Answer of the AGC, June 27, 2014 [MR Vol. 6, Tab 27]
[54] Quarmby *et al.* Response to Trans Mountain's Submission dated May 16, 2014, May 21, 2014 ("**Quarmby Preliminary Reply**") [MR Vol. 6, Tab 14]
[55] Quarmby *et al.* Reply, July 11, 2014 ("**Quarmby Reply**") [MR Vol. 6, Tab 30]
[56] Quarmby *et al.* letter to Board, Sept. 30, 2014 [MR Vol. 6, Tab 31]; Quarmby *et al.* letter to Board, Aug. 25, 2014 [MR Vol. 6, Tab 32]

1.5.3 The Board's Decision on the Quarmby Motions

28. In dismissing the Procedural Motion, the Board's determined that the written process was sufficient to meet the requirements of procedural fairness had been met. In reaching its decision on this motion, the Board noted that the *Charter* Motion did not raise any credibility issues. Further, the Board noted, "nothing in the Applicants' affidavit evidence – relating to climate change effects and the Board's Application to Participate process – had been contradicted by other parties". [57]

29. In dismissing the *Charter* Motion, the Board found that s. 55.2 of the *NEB Act* did not violate the Moving Parties' freedom of expression under the *Charter*. In so doing, the Board did not proceed to conduct a justification analysis.

30. Further, the Board found that the Moving Parties' s. 2(b) rights were not even engaged with respect to the Board's decisions regarding the List of Issues, the ATP Process or the Participation Ruling. Accordingly, the Board refused to expand the List of Issues, revisit the ATP Process or amend its Participation Ruling.

31. In reaching its decision, the Board relied, in part, upon a ruling issued July 23, 2014, wherein it dismissed motions to amend the List of Issues from the City of Vancouver and Parents from Cameron Elementary School Burnaby (the "**Issues Ruling**"). [58]

PART 2.0 – STATEMENT OF POINTS IN ISSUE

32. The sole issue is whether this Court should grant the Moving Parties leave to appeal the Board's Decision, dated October 2, 2014, on the basis that the Decision raises an arguable question of law or jurisdiction.

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[57] Decision, p. 4 [MR Vol. 1, Tab 2]

[58] NEB Ruling No. 25, dated July 23, 2014 ("**Issues Ruling**") [MR Vol. 7, Tab 33.2] An application for leave to appeal the Issues Ruling to this Court was denied on October 16, 2014 (Court File No. 14-A-55). We note that, in that case, the applicant City of Vancouver did not challenge the constitutionality of any provision of the *NEB Act* nor argue that the Board erroneously failed to consider *Charter* values. Moreover, City of Vancouver attempted, but was denied the right, to reply on two affidavits that the Moving Parties herein filed with the Board and have filed again, herein, in support of their motion seeking leave to appeal.

PART 3.0 – STATEMENT OF SUBMISSIONS

The Moving Parties Meet the Test for Leave

33. Section 22 of the *NEB Act* empowers this Court to grant leave to appeal from a decision or order of the Board on a question of law or jurisdiction. [59] Section 22 is broad enough to include appeals based on the principles of public law such as those engaged in this case.[60] Errors of law and jurisdiction are reviewed on a standard of correctness.[61]

34. The Moving Parties submit that they advance arguable questions of law and jurisdiction in relation to the Decision, and that they should be granted leave to appeal.

3.1 LEGISLATIVE CHALLENGE - The Board Erred in Finding that the Legislation Does Not Breach s. 2(b)

35. There is an arguable case that the Board erred in law or jurisdiction by finding that s. 55.2 of the *NEB Act* does not violate s. 2(b) of the *Charter.* **Section 2(b)** guarantees:

> **2.** Everyone has the following fundamental freedoms:
>
> **(*b*)** freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

3.1.1 The Board's erroneous application of Baier

36. The Board erred in law in applying the *Baier*[62] framework to the Moving Parties' *Charter* claim rather than the framework set out by the Supreme Court of Canada in *City of Montreal.*[63] The Board relied on *Baier* to (i) characterize the *Charter* motion as a positive rights claim to which s. 2(b) did not apply and, then, (ii) to find that s. 2(b) was not engaged as a result. Nevertheless, the Moving Parties submit that, even under the *Bair* test, their s. 2(b) freedom of expression was engaged and violated.

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[59] *NEB Act*, s. 22 [Appendix "A", Tab 36]; *Rockwood Park Inc. v. Emera Brunswick Pipeline Company Ltd.*, 2007 FCA 300, para. 1 [Appendix "B", Tab 40]; *CKLN Radio Incorporated v. Canada (Attorney General)*, 2011 FCA 135, para. 6 [Appendix "B", Tab 41]

[60] *Standing Buffalo Dakota First Nation v. Canada (Attorney General)*, 2008 FCA 222, para. 26 [Appendix "B", Tab 42]

[61] *Dunsmuir v New Brunswick*, 2008 SCC 9, paras. 59-60 [Appendix "B", Tab 43]

[62] *Baier v. Alberta*, [2007] 2 S.C.R. 673, 2007 SCC 31 ("***Baier***") [Appendix "B", Tab 44]

[63] *Montréal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141 ("***City of Montréal***") [Appendix "B", Tab 45]

(a) The Board erred in finding that this is a positive rights case

37. The Board held that s. 55.2 "concerns the issue of who may participate on a state-provided platform, not what can be said within it" (emphasis added).[64] This claim is simply wrong. It is undisputable that the Moving Parties have been barred from expressing relevant concerns in the hearings *because of* the content of their expression. The "directly affected" threshold in s. 55.2, as well as the interplay between the Board's List of Issues, the ATP Process, and the Participation Ruling, all bear this out: who is included and who is excluded from the hearings is contingent on the content of the representations they sought to make to the Board. Accordingly, the so-called positive rights cases relied upon by the Board to dismiss the *Charter* Motion, namely *Baier*, *Haig*, *Native Women's Association of Canada* ("***NWAC***"), and *Dunmore*, are distinguishable.

38. This is not a case like *Haig*[65], wherein Mr. Haig was excluded from voting due to an objective criterion: residency requirements. There was no evidence the exclusion was deliberate and Mr. Haig was not denied the right to vote in the referendum because of *how* he was going to vote. Therein the Supreme Court of Canada issued the following caution, which is directly relevant to the present case:

> While s. 2 (*b*) of the *Charter* does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. The traditional rules of *Charter* scrutiny continue to apply. [Emphasis added.][66]

39. Similarly, this case must be distinguished from *NWAC*, wherein the Native Women's Association of Canada were not provided with funding to participate in a government consultation process. Cognizant of the above-noted "*Haig* exception", Justice Sopinka undertook an exhaustive review of the evidence in the case before finding that the government was not seeking to exclude the group based on *what* they wanted to *say*.[67]

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[64] Decision, p. 8 [MR Vol. 1, Tab 2]
[65] *Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995 ("***Haig***") [Appendix "B", Tab 46]
[66] *Haig*, pp. 1040-1041 [Appendix "B", Tab 46]
[67] *Native Women's Assn. of Canada v. Canada*, [1994] 3 SCR 627 ("***NWAC***"), p. 657-664 [Appendix "B", Tab 47]

40. This case is also distinguishable from *Baier* and *Dunmore*[68], wherein people were excluded from statutory regimes based on the nature of their employment. In *Baier* teachers were disqualified from elected managerial positions because of perceived conflicts with their employment, they were not disqualified based on *what* they would *say*.

41. All of these cases are distinguishable from the case at bar in which the Moving Parties' expression has been limited precisely because of the concerns they sought to express in the hearings – in other words, the content of their expression. The limits the *NEB Act* and the Board's process are meant to stifle the expression of particular content, some of which the government deems controversial (such as that involving the oil sands and climate change). This is exactly what s. 2(b) of the *Charter* is meant to protect against.

42. The *Baier* decision upon which the Board relies bears out this crucial distinction and makes plain that the Board's Decision must not stand. Undoubtedly *Baier* would have been decided differently if the teachers had been barred from sitting as trustees on the basis of what views they would express. At para. 42, the majority of the Supreme Court of Canada was clear about this when it responded to the teacher appellants' concerns that the jurisprudence would allow Alberta to enact legislation forbidding school trustees from criticizing government underfunding of schools:

> [...] challengers to such a law would not be seeking access to a statutory platform. They would be seeking freedom from a constraint placed upon their expression, a typically negative right. Their prior ability to criticize government underfunding would be by virtue, not of their school trusteeship, but their underlying freedom of expression. Their complaint would not be that the legislation is underinclusive and thus would not be considered under the *Haig* line of authority. [emphasis added][69]

43. This is the situation of the case at bar: the Moving Parties seek freedom from a constraint placed upon their expression. The Moving Parties do not seek a positive right, their claim is not against underinclusive legislation, and, therefore, the *Baier* analysis does not apply and the Board erred in law.

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[68] *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94 ("***Dunmore***") [Appendix "B", Tab 48]

[69] *Baier*, para. 42 [Appendix "B", Tab 44]

44. *Greater Vancouver Transportation Authority* ("***GVTA***")[70] further distinguishes *Baier* and confirms that the case at bar is not a positive rights case. Therein, the Supreme Court of Canada cautioned against misconstruing *Baier* as standing for the proposition that all that was required to trigger a "positive rights analysis" was whether the applicants were seeking some government support or enablement.[71] Justice Deschamps, for the majority, cautioned: "Care must be taken not to confuse the notion of an under-inclusive platform for expression with government limits on the content of expression."[72] The government was not at liberty to refuse advertisements from individuals or organizations because the message they sought to convey was "political advertising." The Court noted they were simply seeking to express themselves "by means of an existing statutory platform that they were entitled to use without undue state interference with the content of their expression."[73]

45. *GVTA* conclusively settles any argument that the *Baier* test applies in this case. When the government limits expression based on content, it is not a positive rights case. The Moving Parties are not asking the government to "create" a new statutory platform for expression, as the teachers did in *Baier*, they simply seek to submit their concerns to the Board without having the content of their expression unduly curtailed.

46. Much like in *GVTA*, and unlike *NWAC*, in the case at bar, the evidence clearly shows that the government extended a platform for expression and then unconstitutionally restricted expression in that forum. The moving parties John Vissers, Shirley Samples, FEAA, and John Clarke, while granted standing, cannot talk about the environmental effects associated with inputs (the substance that would be transported in the proposed pipeline) for the export infrastructure. This is a case of content-based exclusion.

47. The moving parties Eric Doherty, Ruth Walmsley, Tzeporah Berman and Bradley Shende are completely barred from expressing their concerns in the hearings based on the content of their ATPs – they cannot even send the Board a letter. However, the "directly affected" test in section 55.2 is premature: the Board lacked the necessary information

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[70] *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component,* [2009] 2 S.C.R. 295 ("***GVTA***") [Appendix "B", Tab 49]
[71] *GVTA*, para. 34 [Appendix "B", Tab 49]
[72] *GVTA*, para. 32 [Appendix "B", Tab 49]
[73] *GVTA*, para. 35 [Appendix "B", Tab 49]

about the Project to assess the magnitude of the effects on the applicants prior to the commencement of the hearings. This, too, is a case of content-based exclusion.

48. Finally, despite the urging of government lawyers, the Supreme Court of Canada has declined to develop the positive/negative rights analysis contained in the cases the Board relies upon in its Decision.[74] As a unanimous Court noted in 2010, while the courts below have been divided over which analysis should apply, "nothing would be gained by furthering this debate."[75] Since that time, the test out in *City of Montreal* has consistently prevailed over the *Baier/Dunmore* framework.

(b) The Board erred in applying *Baier* and determining that s. 2(b) is not violated

49. Having found, in error, that the *Baier* test applies, the Board made a further error by misconstruing the Moving Parties' claim as a right to participate in the Board's process.[76] The Board compounds the error by finding that the Moving Parties' expressive rights were not substantially interfered with because they can express themselves on social media.[77]

50. The Board trivializes s. 2(b) by relying on the volumes of blog and Twitter feeds tendered by the AGC as an alternative to participating in its hearings, as though access to such informal, limited, communication is an adequate substitute for structured participation in the only legislative forum mandated to hear the public's relevant concerns. The Board then confounds this failed logic with the issue of the relevance of the Moving Parties submissions. Citing its finding in the Issues Ruling, that any link between the Project and upstream environmental effects would be "indirect" and "not necessarily incidental" to the Project's approval,[78] the Board concluded that the hearings are not the only "forum that matters" for the Moving Parties to express their concerns.[79] The Board erred in relying on its findings in the Issues Ruling and ignoring the un-refuted evidence tendered by the Moving Parties regarding the relevance of their submissions.

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[74] *Charter* Motion, para. 43 [MR Vol. 3, Tab 8]
[75] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, para. 31, wherein the Court rejected the Government's submission that the *Dunmore/Baier* framework should apply because the Association was seeking access to a statutory platform [Appendix "B", Tab 50]
[76] Decision, p. 8 [MR Vol. 1, Tab 2]
[77] Decision, p. 9 [MR Vol. 1, Tab 2]
[78] Issues Ruling, p. 3 [MR Vol. 7, Tab 33.2]
[79] Decision, p. 9 [MR Vol. 1, Tab 2]

The Moving Parties' claim a fundamental freedom to express relevant concerns

51. The Moving Parties do not seek a positive "right to participate in the hearings" – in fact, many of them have been granted that "right". This is not a complaint about an under-inclusive regime. The Board's process is a public hearing that invites participation. What the Moving Parties challenge is the infringement of their expression in the hearings.

52. Contrary to the Board's finding, the Moving Parties did not, and do not, argue that the Board is open public forum where citizens have an "untrammeled right" to express themselves freely about anything; the Moving Parties do not seek to "intrude" on the platform with no regard to the relevance of their submissions.[80] The Board misconstrued the Moving Parties' application when it found that seeking to freely express relevant concerns about the Project falls within such a realm.

53. The Moving Parties concerns regarding the social, environmental and economic consequences of the Project are relevant to the Board's mandate and the List of Issues. The Supreme Court of Canada has noted that the values underlying freedom of expression in respect of environmental matters warrant an especially high degree of constitutional recognition and protection. The Court stated:

> [...] openness and public participation are of fundamental importance under the *CEAA*. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard... the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.[81]

54. To consider the public interest, the Board must hear and weigh the evidence for relevance, not exclude it prematurely. The "public interest" is a general concept that ought to be interpreted broadly and evidence that is relevant to the public interest ought to be considered.[82] As stated by the Federal Court of Canada in *Nakina*:

> If evidence is relevant to the determination of the question of public interest, it must be admitted and considered. ... Relevance is, of course, always a matter of

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[80] Decision, pp.10-11 [MR Vol. 1, Tab 2]
[81] *Sierra Club v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, para. 84 [Appendix "B", Tab 51]
[82] Quarmby Reply, paras. 30-38 [MR Vol. 6, Tab 30]; *Sumas Energy 2 Inc. v. Canada (National Energy Board)*, 2005 FCA 377, para. 23 [Appendix "B", Tab 52]

> degree and will vary from case to case depending on the surrounding circumstances; that, however, goes to weight rather than admissibility. [83]

Accordingly, in its public review of the Project, the Board must consider the cumulative impacts of this significant long-term resource infrastructure development and look to the "surrounding circumstances" to inform an assessment of relevance. The Moving Parties' seek to freely express these concerns in the Board process – the only place where the relevant evidence can be meaningfully tendered and tested.

55. Finally, while the Board may limit expression on the basis of relevance, this is a consideration that is properly weighed in a balancing analysis either under s. 1 of the *Charter* or as part of a modified justification analysis applying *Doré.*[84]

The availability of other forums for expression is irrelevant

56. The Decision is particularly misguided in relying on the fact that the Moving Parties have other forums in which they can, and have, expressed their concerns.[85] The Board's hearings are the only forum in which to meaningfully express views about a given oil pipeline. It is no answer to the *Charter* Motion to say that the Moving Parties expressed their views in forums such as online, op-eds or at protests. Certain speech is rendered meaningless if it can only take place away from those for whom it was intended.

57. The mere ability to express a message somewhere else does not remove the s. 2(b) *Charter* guarantee. As McLachlin C.J. and Major J. explained, dissenting in part, in *Harper v. Canada*:

> The ability to speak in one's own home or on a remote street corner does not fulfill the objective of the guarantee of freedom of expression, which is that each citizen be afforded the opportunity to present her views for public consumption and attempt to persuade her fellow citizens.[86]

58. This point warrants a brief note on a comment made in *Baier*. Having found that teachers' freedom of expression was not engaged when they were prevented from sitting

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[83] *Nakina (Township) v. Canadian National Railway Co.* (1986), 69 N.R. 124 (F.C.A.), p. 3 ("***Nakina***") [Appendix "B", Tab 53]
[84] *Doré v. Barreau du Québec*, 2012 SCC 12 ("***Doré***") [Appendix "B", Tab 54]
[85] Decision, p. 9 [MR Vol. 1, Tab 2]
[86] *Harper v. Canada (Attorney General)* [2004] 1 S.C.R. 827, 2004 SCC 33 ("***Harper***"), para. 20 per McLachlin C.J. and Major J., dissenting in part [Appendix "B", Tab 55]

as school trustees, the Court observed that school employees could express themselves in many ways including participating and making presentations at school board meetings.[87] There is no equivalent expressive recourse for the moving parties who have been barred from submitting a comment letter to the Board: they have been gagged. For those moving parties who do have participant status, they are still prohibited from expressing concerns about the Excluded Issues despite the relevance of these issues to the Project.

(c) Even if Baier does apply, s. 2(b) is violated

59. The Board also erred in finding that the Moving Parties do not satisfy the test in *Baier*. For all of the reasons outlined *infra,* even if *Baier* were applied, the Moving Parties meet the three requirements of that test: (i) their claims are grounded in freedom of expression rather than solely in access to a particular statutory regime; (ii) this is the only meaningful forum in which to express their concerns; and (iii) exclusion from the hearing has the effect of a substantial interference with their s.2 (b) freedom of expression.

3.1.2 The Board's erroneous application of City of Montreal

60. Recognizing it could be wrong in finding that this was a positive rights case, the Board also dealt with the test that properly applies in this case, namely that articulated by the Supreme Court of Canada in *City of Montreal.* To determine whether an impugned law or government conduct infringes s. 2(b) of the *Charter*, three questions must be asked:

1) Does the claimant's proposed speech have expressive content that brings it within the *prima facie* protection of s. 2(b)?
2) If so, does the method or location of this expression remove that protection? The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that place does not conflict with the purposes that s. 2(b) is intended to serve, i.e. (1) democratic discourse, (2) truth-finding, and (3) self-fulfillment? To answer this question, the following factors should be considered:
    i. the historical or actual function of the place
    ii. whether other aspects of the place suggest that expression within it would undermine the values underlying free expression?

[87] *Baier*, paras. 47-48 [Appendix "B", Tab 44]

3) Do the impugned provisions deny that protection? [88]

If question (3) is answered in the affirmative, the analysis shifts to determining whether the infringement can be justified.

61. The Board's Decision evinces a fundamental misunderstanding of the guarantee of free expression under the *Charter.* The Board misstates the s. 2(b) analysis as follows: "The question, for s. 2(b) purposes, is whether the government property at issue is compatible with "open public expression"".[89] With respect, this is not the test. As the Supreme Court of Canada stated in *City of Montreal* at para. 77:

> Historical and actual functions serve as markers for places where free expression would have the effect of undermining the values underlying the freedom of expression. The ultimate question, however, will always be whether free expression in the place at issue would undermine the values the guarantee is designed to promote. [90]

62. The Moving Parties satisfy the test in *City of Montreal.* There is no aspect of the Board's hearings that suggests that expression within it would undermine the values underlying freedom of expression. The purpose and effect of the impugned legislation, including the Board's decisions thereunder, infringe the Moving Parties' s. 2(b) rights.

(a) The Moving Parties' proposed representations have expressive content

63. The Board recognizes the expressive nature of the submissions the Moving Parties' sought to make. Accordingly, they are, *prima facie*, guaranteed *Charter* protection.

(b) The Board's hearings process does not remove that protection

64. No aspects of the Board's public hearings remove the *Charter* protection. The Board erred in finding that s. 2(b) expression is **not** protected on the basis that the public hearings are not a forum that is compatible with free expression. The Board erred in

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[88] *City of Montreal,* para.74 [Appendix "B", Tab 45]; *GVTA*, paras. 37, 39 [Appendix "B", Tab 49]; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 19 ("***CBC***"), para. 38 [Appendix "B", Tab 56]

[89] Decision, p. 10 [MR Vol. 1, Tab 2]

[90] *City of Montréal*, para. 77 [Appendix "B", Tab 45]

finding that relevant representations from concerned citizens in a public hearing process would undermine democratic discourse, truth finding, and/or self-fulfillment.[91]

65. The Board's finding is glaringly inconsistent with its legislative mandate, its history and its actual function as a federal authority charged with the responsibility of holding public hearings in the public interest.[92] Under the *CEAA* and the *NEB Act*, the Board has had, and continues to have, a mandate to ensure meaningful public participation in environmental assessments.[93] In so doing, the Board may have regard to "any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application".[94] Further, the scope of the Board's review is not restricted to the origin and terminus of the pipeline itself. Through its mandate to consider effects in other jurisdictions and developments that are necessarily incidental to the Project, the Board's jurisdiction extends to consideration of the potential impacts on the entire infrastructure network.[95]

66. It is *absolutely* within the Board's jurisdiction to consider upstream impacts in the course of its review and, historically, it has done so. The Supreme Court of Canada upheld the Board's consideration of the environmental impacts of the increased generation facility requirements that would result from the new hydro line.[96] In that review process, the Board recognized that the project was not merely a "line of wire" because it would create an expanded network for distribution and result in environmental impacts upstream.[97] In overturning the Federal Court of Appeal, the Supreme Court of Canada endorsed the Board's finding that it was within the Board's jurisdiction to both, consider the upstream impacts, and to add conditions to the licenses it issued.[98]

67. Notably, in determining whether there is anything about the nature of the forum that ought to remove *Charter* protection, the Supreme Court of Canada has stated that "content

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[91] Decision, pp. 11, 13 [MR Vol. 1, Tab 2]
[92] Skuce Affidavit [MR Vol. 5, Tab 8.7]
[93] *Charter* Motion, para. 19 [MR Vol. 3, Tab 8]; *CEAA*, s. 4(1)(e) [Appendix "A", Tab 35]
[94] *NEB Act*, s. 52(2)(e) [Appendix "A", Tab 36]
[95] *CEAA 2012,* S.C. 2012, c.19, s.52, ss. 4(1)(e), 5(1), 5(2) [Appendix "A", Tab 35]; *NEB Act*, ss. 52(1)(a), 52(1)(b), 52(2), 52(2)(e) [Appendix "A", Tab 36]
[96] *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 ("***Quebec***"), pp.191-192 [Appendix "B", Tab 57]
[97] *Quebec,* p. 194 [Appendix "B", Tab 57]
[98] *Quebec,* pp. 199-200 [Appendix "B", Tab 57]

is not relevant to the determination of the function of a place."[99] In *GVTA*, the Supreme Court of Canada held that the trial judge erred when he found that the absence of a history of *political* advertising on buses was determinative of whether the sides of buses were a forum for free expression. Nevertheless, as discussed, *supra*, the Moving Parties' concerns are directly relevant to the Board's review and climate change evidence is integral to the determination of most, if not all, of the Board's List of Issues.[100]

68. The governing jurisprudence requires that the Board consider that which it has determined it will not even hear. As the Supreme Court of Canada makes clear in *Quebec, supra,* the Project is not a "line of wire" to be reviewed in isolation. The impacts of the Project are not restricted to its right-of-way or life span; the impact of the pipeline would extend to all the consequences of the production that it would demand and all of the market consumption that it would supply. With the progress that has been made in scientific research related to the impact of greenhouse gases upon climate change, the relevance of the cumulative impacts of a project of this magnitude cannot be ignored.

69. Expression in the Board's hearings does not conflict with the purposes that s. 2(b) is intended to serve. There are no aspects of the Board's process that suggest that expression within it would undermine *Charter* values. There is no evidence that the Moving Parties' expression would disrupt the hearing process. This question is generally only relevant in cases where the primary purpose of the forum at issue is to create a space for something other than expression, which may or not be incompatible with freedom of expression.[101]

70. Public participation in the review is crucial to democratic discourse and truth finding. Moreover, for citizens concerned about the impacts of the Project, the denial of their guaranteed free expression denies their self-fulfillment. It is meaningful public participation that lends legitimacy to the review and any subsequent approval, a legitimacy that hangs in precarious balance under the current legislative and administrative regime.

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[99] *GVTA*, para. 40 [Appendix "B", Tab 10]
[100] *Charter* Motion, para. 95, [MR Vol. 3, Tab 8]; List of Issues [MR Vol. 2, Tab 6B, p. 130]
[101] *Committee for the Commonwealth of Canada*, [1991] 1 S.C.R. 139, p. 157 [Appendix "B", Tab 58]; *Peterborough (City) v. Ramsden*, [1993] 2 S.C.R. 1084 ("***Ramsden***") [Appendix "B", Tab 59]; *CBC,* paras. 40-54 [Appendix "B", Tab 56]

71. By contrast, the exclusion of important and instructive perspectives from the Board hearings does undermine the *Charter* values of democratic discourse and truth finding. The suppression of expression on crucial issues undermines public trust in the Board process and compromises the credibility of its outcomes.[102] A process that is perceived as biased, incomplete, and lacking key participants does not serve the public interest.

72. Freedom of expression through meaningful public participation in the Board's hearing process fosters the purposes of s. 2(b). The Moving Parties' expression would enrich the evidentiary foundation upon which the Board will assess the competing public interests to reach its recommendation. Nothing about the Board forum is inconsistent with expression in the public hearings or warrants removing the *Charter* protection.

(c) Section 55.2 infringes freedom of expression as guaranteed by the *Charter*

73. Both in purpose and effect, s. 55.2 infringes the freedom of expression of Canadians by imposing an unjustifiably high-threshold standing test to participate in the Board's process. Specifically, the legislation mandates that the Board make premature preliminary determinations in the absence of adequate evidence. Beyond that, as noted above, the Board has adopted an even more narrow interpretation by reading in that it is "required to hear only from those persons who, in its opinion, are directly affected by a project or have relevant information or expertise,"[103] whereas s. 55.2 actually states "the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information or expertise."[104]

74. Freedom of expression is the beating heart of democracy. As Justice Cory observed in *Edmonton Journal*: "It is difficult to imagine a guaranteed right more important to a democratic society."[105] Our courts robustly defend freedom of expression because of the importance of the principles and fundamental values inherent therein. In *Irwin Toy*, its seminal decision on s. 2(b), the Supreme Court of Canada explained why freedom of expression is so important to Canadians:

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[102] Harris Affidavit [MR Vol. 5, Tab 8.16]
[103] Decision, p. 11 [MR Vol. 1, Tab 2]
[104] *NEB Act*, s. 55.2 [Appendix "A", Tab 36]; see also *CEAA Act*, s. 2(2) [Appendix "A", Tab 35]
[105] *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 S.C.R. 1326, p. 1336 [Appendix "B", Tab 60]

(1) seeking and attaining the truth is an inherently good activity;
(2) participation in social and political decision-making is to be fostered and encouraged; and
(3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.[106]

75. We must be vigilant about the impacts on democracy when the government seeks to curb free expression of critical views. A law, or decision of a statutory actor, will be found to restrict expression if it has the effect of frustrating "the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing".[107] Because "[governments] have an interest in stilling criticism of themselves, or even enhancing their own popularity by silencing unpopular expression", Justice McLachlin, as she then was, cautioned that "government attempts to [curtail expression] must *prima facie* be viewed with suspicion."[108] She also observed that content-based restrictions on free speech have historically attracted the "most exacting scrutiny" from U.S. Courts and this distinction "has been incorporated...into the analysis under s. 2(b) of the *Charter*."[109]

76. The impugned legislation, s. 55.2 of the *NEB Act*, violates s. 2(b) of the *Charter* in both purpose and effect. The legislation, and the Board's decisions thereunder, limit who can make representations to the Board based on the content of their submissions. The result is that the Moving Parties have had their expression infringed and they cannot express their concerns to the Board in the environmental assessment review process.[110]

77. The history of the 2012 Amendments demonstrates that s. 55.2 is tainted by the improper purpose of suppressing public participation in the review process.[111] The numbers bear out the success of the stifling effect of the new content-based limits on participation. Post-2012 Amendments, public participation has plummeted – and with it

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[106] *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927, (“***Irwin Toy***”), p. 976 [Appendix “B”, Tab 61]
[107] *Irwin Toy*, p. 976 [Appendix “B”, Tab 61]; *Ramsden,* p. 1101 [Appendix “B”, Tab 59]
[108] *R. v. Keegstra* [1990] 3 S.C.R. 697 (“***Keegstra***”), p. 805 [Appendix “B”, Tab 62]
[109] *Keegstra,* supra, p. 817, dissenting in the result [Appendix “B”, Tab 62]
[110] *Table: Moving Parties' Connections to List of Issues* [MR Vol. 7, Tab 33.1]
[111] *Charter* Motion, paras. 21-22 [MR Vol. 3, Tab 8]; Berman Affidavit, paras. 38-51 [MR Vol. 4a and 4b, Tab 8.4]; Skuce Affidavit [MR Vol. 5, Tab 8.7]

the legitimacy of the review process.[112] Despite the fact that the Project would impact one of Canada's largest cities and ports, only 2,118 people applied to participate. Over 460 of those applicants have been barred from expressing their concerns in the hearings based on a subjective and premature dismissal of their concerns.[113]

78. The Government of Canada cannot legislatively mandate a hearing to determine whether a major national infrastructure program is in the public interest and then restrict participation based on content without attracting the s. 2(b) scrutiny articulated by the Supreme Court of Canada in *Irwin Toy* and *City of Montreal*.[114] The only question that remains is whether the *Charter* violation can be justified under s. 1 (see Part 3.3).

3.2 ADMINISTRATIVE CHALLENGE - The Board Erred in Finding its Interpretation of s. 55.2 was Reasonable

79. Alternatively, there is an arguable case that the Board erred in finding that its interpretation of s. 55.2 of the *NEB Act*, and its authority thereunder, was reasonable and consistent with *Charter* values. The Board erred in finding that it was not required to consider s. 2(b) of the *Charter* in making decisions about the its jurisdiction and the scope of its hearings.

3.2.1 The Board's Doré Error

80. The Board erred in law and jurisdiction in finding it was not required to consider

s. 2(b) of the *Charter* in establishing the List of Issues, in structuring the ATP process and in deciding who to include and exclude from the process in the Participation Ruling.

81. The Supreme Court has held that when applying *Charter* values to the exercise of its statutory discretion, an administrative decision-maker must *always* balance the two.[115] This is an exercise in proportionality, which requires the Board to balance the severity of the interference with freedom of expression with the *NEB Act*'s objectives. As the Supreme Court of Canada stated in *Doré*, "[t]he protection of *Charter* guarantees is a

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[112] Skuce Affidavit [MR Vol. 5, Tab 8.7]; Biggs Affidavit, paras. 38-39, Exh, K, L [MR Vol. 5, Tab 8.8]
[113] Participation Ruling [MR Vol. 2, Tab 6C]; Skuce Affidavit, paras. 16, 26 [MR Vol. 2, Tab 8.7]; Biggs Affidavit, Exh. G [MR Vol. 5, Tab 8.8]
[114] *Irwin Toy*, pp. 978-979 [Appendix "B", Tab 61]; *City of Montreal*, para.74 [Appendix "B", Tab 45]
[115] *Doré* para. 35 [Appendix "B", Tab 54]

fundamental and pervasive obligation, no matter which adjudicative forum is applying it."[116] The Board must be "conscious of the fundamental importance of *Charter* values in the analysis."[117]

82. The Board is restricting people from making submissions based on the content of their expression. Clearly, *Charter* values are engaged in the administrative decisions and the Board must consider the impact on those values. It follows that, in the exercise of its discretion in framing the scope of its process, including the issues to be reviewed, whose views will be heard, and whether the Project is in the public interest, the Board must not disproportionately, and therefore unreasonably, limit freedom of expression.[118]

83. Even if the impugned legislation could somehow be read in a manner that is constitutionally sound, which is denied, the Board has interpreted that legislation in a manner that violates the Moving Parties freedom of expression. As a statutory body exercising powers derived from the *NEB Act*, the Board exceeds its jurisdiction if it makes decisions that would result in an infringement of the *Charter.*[119] Legislation that confers an imprecise discretion must be interpreted in a *Charter*-compliant manner. The Board has failed to do so for all of the reasons detailed *infra.*

84. The Board's refusal to consider *Charter* values in making its decisions is troubling. The Board misapplied the jurisprudence and did not complete a *Charter* analysis. Instead, the Board relied on the Moving Parties alternative forms of expression and overstated the Board's quasi-judicial nature. With respect, the Board's misdirected balancing warns of an administrative body that has lost sight of its purpose. Further, to the extent that the Board's Decision that it need not consider s. 2(b) is informed by its finding that this is a "positive rights" case, and that speech in the Board's public hearings is not constitutionally protected (even under the *City of Montreal* test), this conclusion is incorrect in law as set out *infra.*

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[116] *Doré*, para. 4 [Appendix "B", Tab 54]
[117] *Doré*, paras. 7, 54-56 [Appendix "B", Tab 54]
[118] *Doré*, para. 6 [Appendix "B", Tab 54]
[119] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, p. 1078, per Lamer J. [Appendix "B", Tab 63]

3.2.2 The Board's interpretation of s. 55.2 violates s. 2(b) more than is necessary

(a) List of Issues violates s. 2(b)

85. The Board violated s. 2(b) of the *Charter* when it established a List of Issues that unduly restricts the scope of the Board's review and the content of representations that the Board will consider. Read together, the List of Issues and Excluded Issues create an internal inconsistency that renders the Board's review grossly inadequate to meet its mandate, which includes considering cumulative impacts and upstream and downstream environmental effects (including in jurisdictions outside of Canada), with the result that the Board has effectively muzzled expression on matters relevant to its mandate.[120] In the result, although oil sands expansion and climate change fall within the consideration of cumulative impacts, the Board has pre-emptively barred this content from the hearings.

86. Not only is the Board's approach to the scope of its review inconsistent with the Board's legislative mandate and the List of Issues, it is also inconsistent with the position it takes regarding its jurisdiction over other upstream and downstream impacts. The Board has acknowledged that both the upstream availability of oil to the Project and the actual potential downstream markets for the oil transported by the Project are directly relevant to the Board's consideration of the Application under s. 52 of the *NEB Act*.[121] Nevertheless, the Board has refused to expand the List of Issues to include the environmental and socio-economic effects associated with the production (i.e. availability) of the oil and the use by the potential downstream markets for the oil transported by the Project. It is difficult to reconcile how, in an environmental assessment process, the Board could reach the following arbitrary and irrational conclusion: while the upstream and downstream *economics* of the oil in the pipeline is relevant to the review, the upstream and downstream *environmental impacts* of the oil in the pipeline is irrelevant to the review.

87. As noted *infra*, where the government has decided to create a forum for expression they are not free to place unreasonable restrictions on the content of the speech allowed in that forum or restrictions that are divorced from *Charter* values. Accordingly, the Board's

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[120] List of Issues [MR Vol. 2, Tab 6B, p. 130]; *CEAA 2012,* s. 5(1)(b), [Appendix "A", Tab 35]; *Charter* Motion, paras. 92-96 [MR Vol. 3, Tab 8]
[121] Issues Ruling, p. 5 [MR Vol. 7, Tab 33.2]

Decision to uphold the List of Issues as constitutionally valid was in error, and this error is fatal to the validity of the ATP Process and the Participation Ruling.

(b) Application to Participate Process violates s. 2(b)

88. The Board violated s. 2(b) of the *Charter* when it established the ATP Process that involved a subjective, relevance-based, standing test in an evidentiary void. The Board's interpretation of s. 55.2 is inconsistent with the *Charter* because it unduly limited participation in the hearings by making premature determinations based on the content of applicants potential representations, as noted in their ATPs; and it was procedurally unfair by being unduly cumbersome and discouraging interested parties with relevant information from participating in the process.[122]

89. The Decision to uphold the ATP Process was an error of law because it ensured that, despite the obligation to do so under *Doré*, the Board has, and will, fail to account for *Charter* values in deciding whether or not to recommend approval of the Project.

(c) Participation Ruling violates s. 2(b)

90. The Board violated s. 2(b) of the *Charter* when it decided the Participation Ruling. The Board's Participation Ruling is an unreasonable application of the legislation. The Board's determinations with respect to who is prohibited from participating in the proceedings were based on the content of the submissions that applicants intended to make, as indicated in their ATPs.[123] Specifically citizens of Vancouver who live and work virtually on-top of the Project cannot express their concerns to the Board because of a subjective pre-determination that the pipeline would not "directly affect" them; and recognized experts in environmental and infrastructure planning, have been barred from the hearings because of the content of the concerns they sought to express.

91. The Board's interpretation of s. 55.2 is inconsistent with the *Charter* and the Decision to uphold the Participation Ruling as valid was in error.

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[122] *Charter* Motion, paras 79-84 [MR Vol. 3, Tab 8]; Biggs Affidavit, Exh. F [MR Vol. 5, Tab 8.8]; Participation Ruling [MR Vol. 2, Tab 6C]; List of Issues [MR Vol. 2, Tab 6B, p. 130]
[123] *Charter* Motion, paras 35-36 [MR Vol. 3, Tab 8]; Quarmby Reply, para. 22 [MR Vol. 6, Tab 30]

3.3 JUSTIFICATION - The Board Erred in Failing to Conduct a Justification Analysis

The infringements cannot be justified under s. 1 or under a modified *Doré* test

92. The Board did not find that the Moving Parties' freedom of expression was justifiably infringed. Indeed, it never sought to do so. While the Decision cites rationalizations such as efficiency, the Board dismissed the Moving Parties' claim before even reaching the justification stage of the analysis. This was an error.

93. If granted leave, the Moving Parties will submit that the s. 2(b) infringements are not justified. The Moving Parties articulated their position on the justification analyses in the underlying *Charter* Motion however few key points warrant mention.[124]

94. First, the legislation interferes with free expression more than is necessary to achieve the objectives.[125] Any assertions that the 2012 amendments were made to ensure that the hearings proceed "efficiently" are unsubstantiated and the government has failed to meet the test.[126] In brief: the Attorney General bears the burden of proof on the s. 1 inquiry; no evidence has been tendered to show that Board hearings were "inefficient" prior to the legislative changes; no evidence has been tendered to show that the draconian restrictions on public participation that have been adopted are proportionate or the least intrusive means of addressing any identifiable "control" concern that may or may not exist; and the failure to provide any evidence in support of its attempts to justify this unconstitutional legislation is fatal to the governments' claim. Further, justifications on grounds of "efficiency" fail with respect to the level to which the measures impair the Moving Parties' freedom of expression. If the impugned legislation was simply directed at ensuring that "disruptive" parties from squandering public resources, this legislation might be salvageable. Instead, the overly broad legislation has resulted in the complete limitation of expression relevant to the Board's mandate. Fundamental rights cannot be sacrificed in the name of "efficiency" or, as the majority of the Supreme Court of Canada noted in *City of Montreal,* "rights should never be sacrificed to mere administrative convenience."[127]

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[124] *Charter* Motion, paras. 51-70 (legislative challenge of the impugned provision); paras. 72, 76-98 (the administrative challenge of the Board's decisions) [MR Vol. 3, Tab 8]
[125] *R. v. Oakes*, [1986] 1 S.C.R. 103, p. 136-137 [Appendix "B", Tab 64]
[126] *RJR-MacDonald Inc. v. Canada (AG)*, [1995] 3 S.C.R. 199, paras. 128-141 [Appendix "B", Tab 65]
[127] *City of Montreal*, para. 97 [Appendix "B", Tab 45]

95. Second, in the event the legislation is held to be constitutionally salvageable, which is denied, the Board's unreasonably restrictive measures taken under its guise are not. As discussed, *supra*, the Board has disproportionately, and therefore unreasonably, limited s. 2(b) *Charter* rights.[128] The Board has unreasonably limited participation curb free speech rather than neutral, objective, quantifiable limits on participation, such as limits on the length of written or oral submissions. In failing to properly balance *Charter* rights and its objectives, the Board has failed to ensure that freedom of expression is not unreasonably limited. If the legislation is not overly broad, it is vague and fails to provide the Board with clear guidance. There is nothing "efficient" about a process where the decision makers do not hear evidence relevant to their mandate. On the contrary, a constitutionally flawed and unlawful process it is the antithesis of efficiency and a profound waste of scarce public resources, the private energies of the citizenry, and Trans Mountain's time.

Conclusion

96. Given all the foregoing, the Moving Parties submit the Board erred in making the Decision, that leave to appeal should be granted on this basis and that this case raises issues of unquestionable national and public importance that require judicial resolution.

PART 4.0 – STATEMENT OF ORDERS SOUGHT

97. Leave to appeal is granted with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29th DAY OF October, 2014.

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[128] *Doré*, paras. 6-7 [Appendix "B", Tab 54]

PART 5.0 – LIST OF AUTHORITIES REFERRED TO

Statutes / Rules (see APPENDIX "A")

35. *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52
36. *National Energy Board Act*, R.S.C. 1985, c. N-7, as amended
37. *Charter of Rights and Freedoms, The Constitution Act,* 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11
38. *Federal Courts Rules*, SOR/98-106
39. *National Energy Board Act*, R.S.C. 1985, c. N-7

Cases (see APPENDIX "B": CONDENSED BOOK OF AUTHORITIES)

40. *Rockwood Park Inc. v. Emera Brunswick Pipeline Company Ltd.*, 2007 FCA 300
41. *CKLN Radio Incorporated v. Canada (Attorney General)*, 2011 FCA 135
42. *Standing Buffalo Dakota First Nation v. Canada (Attorney General)*, 2008 FCA 222
43. *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9
44. *Baier v. Alberta*, [2007] 2 S.C.R. 673, 2007 SCC 31
45. *Montréal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62
46. *Haig v. Canada; Haig v. Canada (Chief Electoral Officer),* [1993] 2 S.C.R. 995
47. *Native Women's Assn. of Canada v. Canada*, [1994] 3 SCR 627
48. *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94
49. *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component,* [2009] 2 S.C.R. 295, 2009 SCC 31
50. *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, 2010 SCC 23
51. *Sierra Club v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41
52. *Sumas Energy 2 Inc. v. Canada (National Energy Board),* 2005 FCA 377
53. *Nakina (Township) v. Canadian National Railway Co.* (1986), 69 N.R. 124 (F.C.A.)

54. *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, 2012 SCC 12

55. *Harper v. Canada (Attorney General)* [2004] 1 S.C.R. 827, 2004 SCC 33

56. *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 19, 2011 SCC 2

57. *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159

58. *Committee for the Commonwealth of Canada*, [1991] 1 S.C.R. 139

59. *Peterborough (City) v. Ramsden*, [1993] 2 S.C.R. 1084

60. *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 S.C.R. 1326

61. *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927

62. *R. v. Keegstra* [1990] 3 S.C.R. 697

63. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038

64. *R. v. Oakes*, [1986] 1 S.C.R. 103

65. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199