MEMORANDUM OF FACT AND LAW OF THE APPLICANTS

PART I – ISSUES OF NATIONAL IMPORTANCE & STATEMENT OF FACTS

A. National Importance of Expression in Public Interest Proceedings

1. The National Energy Board ("**NEB**" or "**Board**") is excluding the public and the expression of competing opinions from its assessment of whether major pipeline infrastructure proposals are in the public interest. Under the *National Energy Board Act* ("***NEB Act***") and the *Canadian Environmental Assessment Act* ("***CEAA 2012***"), the Board is statutorily required to engage in public consultation as part of its process.[1] In breach of this legislative mandate, and s. 2(b) of the *Charter of Rights and Freedoms* (the "***Charter***"), the Board is applying unjustifiable content-based limits on the comments or representations that can be made in its proceedings.

2. In 2012, with minimal public input, the federal government amended the *NEB Act* and the *CEAA 2012* to *deliberately* limit expression in the Board's proceedings. The result: across Canada, the Board is barring concerned residents and leading scientists from participating in its statutory public interest assessments of proposed pipelines *because of what they might say*. Canadian citizen's constitutionally guaranteed free expression is being curbed based on the content of their speech, and the Board is failing to properly assess the public interest related to long-term energy infrastructure proposals.

3. In this case, the Board relied on the s. 55.2 of the *NEB Act* to exclude applicants from its assessment of the Trans Mountain Pipeline Expansion project (the "**Project**"). Based on information provided in applications to participate, the Board made premature determinations regarding who will be "directly affected" by, and who has "information or expertise" about, the Project. In May 2014, the Applicants challenged the constitutionality of s. 55.2 of the *NEB Act* and the Board's failure to consider s. 2(b) and *Charter* values in establishing and applying its participation procedures. The Board dismissed the Applicants' motion on October 2, 2014 (the "**Decision**").[2] The Applicants seek leave to appeal the judgment of the Federal Court of Appeal, made January 23, 2015, dismissing the Applicants' application for leave to appeal the Decision.[3]

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[1] *Canadian Environmental Assessment Act, 2012,* SC 2012, c19 ("*CEAA 2012*"); *National Energy Board Act,* RSC 1985, c N-7 ("*NEB Act*")
[2] NEB Ruling No. 34, dated October 2, 2014 (the "Decision"), Application Record ("AR") Tab 3
[3] Order of Mr. Justices Nadon, Ryer and Webb, Federal Court of Appeal ("FCA"), Court File No 14-A-62, January 23, 2015 (the "FCA Order"), AR Tab 4

4. The Decision stands for the proposition that the Board can prevent citizens from expressing their relevant concerns in its process based on the content of their expression. The Board's application of *Baier*[4] is inconsistent with this Court's s. 2(b) jurisprudence. The Applicants respectfully request that leave to appeal 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 2012* and the *NEB Act,* to consider the public interest and undertake a complete environmental assessment of the Project which includes full public expression. Finally, the Decision must be reviewed to ensure that administrative boards respect s. 2(b) of the *Charter.*

5. As it stands, the Board has barred hundreds of citizens from expressing their concerns in its process and is even limiting the content of expression of those who have been granted standing.[5] The Applicant Lynne Quarmby is the chair of the Department of Molecular Biology and Biochemistry at Simon Fraser University.[6] More than twenty of Canada's leading scientists (including ecologists, engineers, meteorologists, oceanographers and physicians) were denied the right to participate in the Board's assessment.[7] Incredibly, these scientists have been excluded because they sought to address the long-term impacts of the Project – *a major pipeline meant to carry crude from oil sands to the coastal waters of British Columbia*; these scientists have been excluded because the Board pre-determined that it will not hear scientific evidence related to the larger context of potential impacts. Nor will the Board receive submissions related to how those impacts *foreseeably* intersect with the competing public interests in question. The Board will not even accept a letter of comment from these scientists, nor anyone else who lacks standing.[8]

6. Legislative efforts to prevent the expression of public concerns regarding a major national infrastructure project are inconsistent with post-industrial democratic principles. It is inconceivable that relevant counterpoints could compromise the Board's public consultation –

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[4] *Baier v Alberta*, [2007] 2 SCR 673 ("*Baier*")

[5] The City of Vancouver and Parents from Cameron Elementary School Burnaby filed motions asking that the Board consider upstream and downstream effects. The Board denied these motions in NEB Ruling No 25, dated July 23, 2014 ("Issues Ruling"); Affidavit of Dianne Kaiser, affirmed March 19, 2015 ("Kaiser Affidavit"), AR Tab12-E; Vancouver sought leave to appeal the Issues Ruling. Leave was denied, without reasons, by Order of Justices Nadon, Trudel and Webb, Federal Court of Appeal, Court No 14-A-55, made October 16, 2014, Kaiser Affidavit, AR Tab 12-F; see also Kaiser Affidavit, AR Tab 12-B

[6] Affidavit of Lynne Quarmby, affirmed April 29, 2014 ("Quarmby Affidavit"), AR Tab 11-E

[7] Affidavit of Sara Harris, affirmed April 30, 2014 ("Harris Affidavit"), AR Tab 11-L

[8] Affidavit of Sven Biggs, affirmed May 1, 2014 ("Biggs Affidavit"), Exh "G", AR Tab 11-D

there is simply no rational basis for the Board's suggestions that it would undermine democracy, efficient governance or truth seeking.[9] The Board's tunnel vision regarding its process is drawing widespread criticism of bias with the result that citizens have lost faith in its neutrality and objectivity.[10] How could the Board, the primary national infrastructure regulator, make an advance determination to exclude its own national environmental impacts scientists from being heard at statutorily mandated hearings designed to assess the merits of long term infrastructure projects? History suggests that this type of outcome only occurs when some form of aberrant "anti-scientific" ideology has captured the legislative process. It is precisely in such circumstances that the freedom of expression guarantee, the hallmark of constitutional democracy, fulfills its vital purpose and intent.

The Board's Decision Conflicts with its Legislative Mandate and the Charter

7. The Board oversees large-scale energy projects that have immeasurable economic, environmental, social and political ramifications for Canadians. Under the *CEAA 2012* and the *NEB Act*, the Board is designated as the authority responsible for conducting reviews and environmental assessments to advise the federal government whether proposed pipeline infrastructure projects are in the public interest.[11] Public participation is central to the Board's public interest mandate and is a core component of its assessment.[12] Accordingly, the Board's empowering legislation does not permit the Board to preemptively curb the comments it receives – a limit on the Board's jurisdiction that is consistent with s. 2(b) of the *Charter*. However, both in purpose and effect, recent amendments to the *NEB Act* infringe Canadians' freedom of expression by imposing an unjustifiably high-threshold standing test to participate in the Board's process. Specifically, the impugned legislation mandates that the Board make premature preliminary determinations in the absence of adequate evidence to enable it to determine the relevance of a representation. Perversely, in construing the impugned legislation, 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."[13] This contrary to *NEB Act* s. 55.2, which actually provides 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

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[9] Decision, pp 11 and 13, AR Tab 3
[10] Kaiser Affidavit, AR Tabs 12-D, 12-H, 12-I 12-O, 12-Q, 12-R, 12-S
[11] *CEAA 2012*, ss 2(1), 13 and 15(b); *NEB* s 52
[12] *CEAA 2012*, ss 4(1)(3), 19
[13] Decision, p 11, AR Tab 3

> 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. [emphasis added]

8. The recent barriers to expression that Parliament has erected and the Board has applied in its proceedings are devastating for democratic dialogue. The message is clear: long-term views, including well-established scientific evidence, regarding the potential impacts of major infrastructure projects will be excluded and ignored. The Board's approach to public participation in its assessments of major infrastructure projects is, *prima facie*, an issue of national importance.

The Board's Approach is Undermining Pipeline Review Processes Across Canada

9. The issues raised in this case transcend the Applicants' interests. The Board's interpretation of s. 55.2 and its limits on participation and content in its processes affect the entire country. Recent statements from the governments of Ontario, Quebec and Alberta underscore the national importance of this issue in their calls to include consideration of long-term impacts, including climate change, in assessments of major pipeline proposals being considered across Canada.[14]

10. In the present proceedings, Trans Mountain, the proponent of the Project, applied to the Board for a Certificate of Public Convenience and Necessity and related approvals (the "**Project Application**").[15] The existing Trans Mountain pipeline system, which runs approximately 1,147 km and transects Metro Vancouver, currently transports various refined petroleum products from Edmonton, Alberta, to multiple locations in British Columbia (the "**Pipeline System**"). The purpose of the Project is to increase the Pipeline System's capacity to transport bitumen (also referred to as oil, or tar, sands) from Alberta, for export to markets in the United States and Asia. The Project would involve significant construction to increase the Pipeline System's capacity from 300,000 bpd to 890,000 bpd, and to dedicate the expanded and converted Pipeline System to the transportation of unrefined diluted bitumen, a substance which represents a qualitatively higher risk to the natural environmental in the event of an inevitable spill. Currently, each month, approximately five tanker vessels are loaded with refined petroleum at the Westridge Marine Terminal for export out the Burnaby Inlet; this number would increase to up to 34 Aframax tankers loaded with diluted bitumen per month. The unchallenged evidence below is that oil

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[14] Kaiser Affidavit, AR Tabs 12-J, 12-K, 12-L, 12-M, 12-N, 12-P

[15] Project Application, dated December 16, 2013, pp p 1-2 – 1-4, 1-13, 1-21, AR Tab 6

sands expansion depends on the construction of this type of infrastructure for transportation; the costly infrastructure perpetuates "heavy" oil dependency; and acts as a barrier to alternatives.[16]

11. Recognizing the importance of public input, prior to 2012, any interested individual, group or organization was permitted to make submissions to the Board about a proposed project. By way of example, the joint review panel reviewed feedback from over 1,200 participants and received more than 9,000 letters of comment for Enbridge's proposed Northern Gateway pipeline (a project of comparable scope to the Project, albeit in a sparsely populated region).[17] There was no application process for submitting a comment; anyone could do so by completing a form.

12. Public participation in Board hearings was materially reduced when Parliament passed Bill C-38, containing, *inter alia*, amendments to the *NEB Act* and *CEAA 2012* (the "**2012 Amendments**"). The bill amended 70 laws, and was introduced with little debate and no process for public engagement.[18] The uncontested evidence is that these changes were the product of aggressive lobbying by groups such as the Energy Policy Institute of Canada, whose members include the major oil companies and industry associations, demanding that the federal government reduce public participation in the Board's proceedings.[19]

13. Following the 2012 Amendments, Trans Mountain and other energy industry lobbyists encouraged the Board to adopt a very restrictive interpretation of s. 55.2 designed to further exclude the public.[20] Applying the test set out in s. 55.2 of the *NEB Act,* the Board instituted an application process to determine standing to participate in its proceedings. The Board determines standing based on the submissions applicants intend to make, as indicated in their applications. The Board then determines the level of participation: Interveners 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 is adamant that it will ignore anything else: "[a]ny additional letters or

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[16] Project Application, p 1-4, AR Tab 6; Affidavit of Mark Jaccard, affirmed April 25, 2014, paras 29-32, AR Tab 11-A
[17] Affidavit of Nikki Skuce, affirmed April 28, 2014 ("Skuce Affidavit"), paras 16, 24, 26, AR Tab 11-C
[18] The *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19; Affidavit of Tzeporah Berman, affirmed May 5, 2014 ("Berman Affidavit"), paras 28-36, AR Tab 11-B
[19] Berman Affidavit, paras 37-56, AR Tab 11-B
[20] Trans Mountain Pipeline ULC - Submission, dated February 19, 2014, AR Tab 8

submissions will not be included on the record or considered."[21] Compared to the Enbridge hearings, public participation has sharply declined under the Board's new standing regime:

- In 2013, the Board received 177 applications to participate in the hearings for Enbridge's Line 9B in Ontario. The Board granted standing to 61 Interveners and 111 Commenters; **eight applicants were denied** any opportunity to participate.[22]
- In 2014, the Board received over 2,000 applications to participate in the hearings for Trans Mountain's Project in B.C. In this case, the Board granted standing to 400 Interveners and 1,250 Commenters; **468 applicants were denied** any opportunity to participate.[23]

The Board now considers the submission of a mere letter of comment as a form of "participation" that requires the application of the new s. 55.2 standing test. The Board has adopted archaic private property concepts to determine who is "directly affected" and has held that crucial concerns of communities through which pipelines will flow, will not be even be heard, let alone considered.[24] The impugned legislation and the Board's interpretation of it has eviscerated public participation and reduced the assessment of major infrastructure projects to a charade.

B. PROCEDURAL HISTORY OF THE MATTER AT ISSUE

14. On July 29, 2013, months before Trans Mountain filed its Project Application and with minimal public input, the Board released a list of twelve issues it would consider in its review of the Project Application (the "**List of Issues**").[25] The list explicitly excludes consideration of the "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 had a one-month window during which interested persons could complete an 11-page application to participate; they were required to indicate which issues (from the List of Issues) were connected to the submissions they sought to make and were allotted 500 words to elaborate (the "**ATP Process**").[26] The Board received over 2,000 ATPs.

15. On April 2, 2014, the Board ruled on the ATPs (the "**Participation Ruling**"). As noted above, 468 applicants were denied any ability to express any concerns to the Board. In September 2014, the Board ran another ATP Process to account for Trans Mountain's new "preferred corridor" through Burnaby Mountain. On October 27, 2014, the Board issued a decision wherein

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[21] Participation Ruling, dated April 2, 2014 ("Participation Ruling"), p 1, AR Tab 9-C
[22] Line 9 Participation Ruling, dated May 22, 2013, Kaiser Affidavit, AR Tab 12-C
[23] Participation Ruling, p 1, AR Tab 9-C
[24] NEB *Section 55.2 Guidance Document*, Biggs Affidavit, Exh "F", AR Tab 11-D
[25] List of Issues, Hearing Order, April 2, 2014, p 18, AR Tab 9-B; Project Application, pp 1-14, AR Tab 6
[26] Biggs Affidavit, para 24-27, AR Tab 11-D

another eight applicants were denied standing.[27] The Board used the List of Issues and the Excluded Issues to determine who could participate in its proceedings. The Board explicitly denied ATPs expressing concerns about oil sands development, climate change, and sustainable energy alternatives.[28] The Board's decisions with respect to participation are final.[29]

C. The Matter Under Appeal

16. The applicants Lynne M. Quarmby, Eric Doherty, Ruth Walmsley, John Vissers, Shirley Samples, Tzeporah Berman, John Clarke and Bradley Shende, live and work in the area of the Project.[30] The applicant ForestEthics Advocacy Association ("FEAA") is a non-profit society with a longstanding interest in environmental protection and a mandate to conserve and protect the natural environment while allowing for their sustainable use.[31] The Applicants have concerns about social, economic and environmental effects of the Project that they sought to express to the Board.[32] They are also concerned about the new barriers to public participation and the repression of evidence and submissions in the Board's assessment.

17. In May 2014, the Applicants challenged the Board's content-based exclusion of comments from its proceedings. The Applicants 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*.[33] By way of a Notice of Motion, in addition to the constitutional challenge to the legislation, the Applicants asserted that the Board had interpreted s. 55.2 in an unconstitutional manner, and that the Board's decisions limiting freedom of expression on the basis of the content are unconstitutional, unreasonable and contrary to principles of procedural fairness (the "***Charter* Motion**").[34]

The Board's Decision

18. The Decision dismissed the *Charter* Motion finding that s. 55.2 of the *NEB Act* did not violate the Applicants' freedom of expression under the *Charter*. In so doing, the Board did not conduct a justification analysis, neither pursuant to s. 1 or pursuant to *Doré*.[35] Further, the Board found that the Applicants' s. 2(b) rights were not even engaged with respect to its decisions

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[27] Standing was granted to 4 Interveners and 129 Commenters; Supplemental Participation Ruling, October 27, 2014, Kaiser Affidavit, AR Tab 12-G
[28] Participation Ruling, pp 9-10, AR Tab 9-C; Supplemental Participation Ruling, p 5, AR Tab 12-G
[29] *NEB Act*, ss 23 and 55.2
[30] Affidavits of the Applicants, AR Tabs 11-B, 11-D to 11-K
[31] Registered under the BC *Society Act*, RSBC 1996, c 433; Biggs Affidavit, paras 4-11, Exh "J", AR Tab 11-D
[32] *Table 1: Applicants' Identification of Concerns and Standing Granted*, Kaiser Affidavit, AR Tab 12-A
[33] Notice of Constitutional Question, May 5, 2014, AR Tab 10
[34] Notice of Motion, May 6, 2014 ("*Charter* Motion"), AR Tab 11
[35] *Doré v Barreau du Québec*, [2012] 1 SCR 395, 2012 SCC 12 ("*Doré*")

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.

19. In its Decision, the Board agreed that the Applicants' *Charter* Motion involves expression. The Board also conceded that the List of Issues constitutes content restrictions. Nevertheless, the Board accepted submissions from Attorney General of Canada (the "**AGC**") and Trans Mountain that the Applicants were claiming a "positive entitlement," characterizing their s. 2(b) *Charter* challenge as a claim to inclusion in an under-inclusive statutory regime.

20. The impugned Decision stands for the proposition that the Board can prevent citizens from expressing their relevant concerns in the review process based on the content of their expression. Among other things, the Decision upheld the exclusion of hundreds of concerned citizens from expressing their relevant concerns to the Board *because of what they might say*. Absent a justification analysis, the Board complains that it "cannot efficiently, effectively or fairly hear the evidence that it needs to assess the public interest in a project if it must hear from any and all persons wishing to express an opinion on it"[36] – despite the fact that it is predominantly a written process and the 11-page ATPs are longer than most of letters of comment submitted to date.

21. The Board erred in law in applying the *Baier* framework to the Applicants' *Charter* claim rather than the correct framework as described by this Court in *City of Montréal*.[37] 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. The Applicants submit that, under the test set out in *City of Montréal* (and even under the *Baier* test) their s. 2(b) freedom of expression was engaged and unjustifiably infringed.

22. In reaching its Decision, the Board also erred in relying, in part, upon a ruling issued July 23, 2014, wherein it dismissed motions to amend the List of Issues brought by the City of Vancouver and Parents from Cameron Elementary School Burnaby (the "**Issues Ruling**").[38] The Issues Ruling is distinguishable from the Applicants' constitutional challenge.

23. The Decision poses great risks to the integrity of free expression under the *Charter*, participatory democracy and the legitimacy of administrative review proceedings. It states: "section 55.2 concerns the issue of who may participate on a state-provided platform, not what

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[36] Decision, p 11, AR Tab 3
[37] *Montréal (City) v 2952-1366 Quebec Inc*, [2005] 3 SCR 141 ("*City of Montréal*")
[38] Issues Ruling, Kaiser Affidavit, AR Tab 12-E

can be said within it."[39] *This is a false distinction because the Board determines **who** may participate based on **what** the applicants might say.* Content-based limits on free expression are inconsistent with s. 2(b) and the values the *Charter* is designed to promote: democratic dialogue, truth seeking and self-fulfillment. Freedom of expression is particularly important in matters of ongoing controversy.[40] The Board's position, that free expression is not engaged in its review because it would undermine *Charter* values, demands judicial scrutiny.

The Federal Court of Appeal's Denial of Leave to Appeal

24. The Applicants sought leave to appeal to the Federal Court of Appeal. Justices Nadon, Ryer and Webb denied their application, without reasons, on January 23, 2015.[41] The Applicants maintain that s. 55. 2 of the *NEB Act* and the Board's content-based limits on participation violate the Board's constitutional obligations and further assert that it will thus fail to fulfill its legislative mandate, under the *CEAA Act* and the *NEB Act,* to consider the public interest and undertake a complete environmental assessment of the Project.

25. Absent review by this Court, the Decision will have a number of profound and wide-ranging consequences for the assessment of the Project and the legitimacy of the Board's process. It is a matter of public interest for the public to know whether the Board is correct in upholding the constitutionality of s. 55.2 and relying on it as a basis to curb expression of scientific and alternative views. Finally, the Decision gravely undermines the s. 2(b) guarantee of free expression and broadens the application of a positive rights framework far beyond the existing jurisprudence – a result with potentially serious implications for freedom of expression in administrative proceedings in Canada.

PART II – STATEMENT OF POINTS IN ISSUE

26. The sole issue to be determined is whether this case raises issues of national public importance or otherwise raises issues of law or mixed fact and law warranting leave.[42]

PART III – STATEMENT OF ARGUMENT

27. The overarching question raised by this case is the extent to which the Board can limit the expression of relevant concerns in proceedings established to advise the federal government whether proposed major infrastructure projects are in the public interest. This determination has

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[39] Decision, p 8, AR Tab 3
[40] *Canadian Broadcasting Corporation v. Warden of Bowden Institution*, 2015 FC 173 ("*Warden*"), para 47
[41] FCA Order, AR Tab 4
[42] *Supreme Court Act*, RSC 1985, c S-26, s 40; *MacDonald v City of Montréal*, [1986] 1 SCR 460

serious ramifications for the integrity and legitimacy of the process, as well as any federal decision based on the Board's assessment and recommendations. If, as the Board held, it can exclude and restrict comments on a Project to exclude any matters that it prematurely considers outside its scope of review it will have critical implications for major infrastructure projects that affect Canadians across the country. Long-term macro-considerations are excluded with the result that project approval is pre-ordained.

28. The specific legal issues raised in this appeal and which will ultimately determine this overarching issue are each, individually, also of national and public importance:

- They are important questions of constitutional and administrative law;
- The Board's Decision is based on an extraordinary and unprecedented approach to limiting free expression which has serious implications for future constitutional analyses and consideration of the guarantee;
- The Board's Decision is inconsistent with its legislative mandate; and
- The Board's Decision is inconsistent with decisions of this Court, as well as other lower courts in Canada.

29. The Applicants submit that the Board made three errors each of which, separately, vitiate its decision and give rise to three issues of national importance warranting leave:

Issue 1: The Board erred in finding that s. 55.2 of the *NEB Act* does not breach s. 2(b) of the *Charter*;

Issue 2: The Board erred in finding that its interpretation and application of s. 55.2 of the *NEB Act* was reasonable and consistent with *Charter* values; and

Issue 3: 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.

ISSUE 1: THE BOARD ERRED IN FINDING THAT S. 55.2 OF THE *NEB ACT* DOES NOT BREACH S. 2(B)

30. 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 hinging on: "whether the government property at issue is compatible with "open public expression"".[43] With respect, this is not the test. As this Court stated in *City of Montréal*:

> [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. (emphasis added)[44]

[43] Decision, p 10, AR Tab 3
[44] *City of Montréal, supra* note 37, para 77

31. The Applicants satisfy the test in *City of Montréal*:[45]

a) The Board recognizes the expressive nature of the submissions the Applicants' sought to make, which brings it within the *prima facie* protection of s. 2(b).

b) Nothing about the Board's proceedings removes the protection because of a purpose that s. 2(b) is intended to serve. The historical and actual function of the Board hearings is consistent with the Board receiving full public comments – as it has done for many other proceedings. Further, there are no other aspects of the Board hearings that suggest that the receipt of full commentary would undermine the values of expression – indeed, unfettered public comments further the values of democratic discourse, truth-finding, and self-fulfillment. The Board is in error when it places itself on the more "private" end of the spectrum of government operations requiring the exclusion of the public.

c) The purpose and effect of the impugned legislation, s. 55.2 of the *NEB Act*, including the Board's decisions thereunder, denies the Applicants' s. 2(b) guarantee.

d) The infringement cannot be justified (see Issue 3).

The historical and actual function of the Board's process is consistent with free expression

32. The Board's Decision 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.[46] Under the *CEAA 2012* and the *NEB Act*, the Board has had, and continues to have, a mandate to ensure meaningful public participation in environmental assessments.[47] 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."[48] The Applicants concerns regarding the social, environmental and economic impacts of the Project are relevant to the Board's mandate and the List of Issues.

33. First, this Court has noted that the values underlying freedom of expression in respect of environmental matters warrant an especially high degree of constitutional recognition and protection. Citing the fundamental importance of openness and public participation under *CEAA*, Justice Iacobucci, for the court, found that "the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests."[49]

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[45] *City of Montréal, supra* note 37, paras 74 and 77; *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, [2009] 2 SCR 295 ("*GVTA*"), paras 37 and 39; *Canadian Broadcasting Corp v Canada (Attorney General)*, [2011] 1 SCR 19 ("*CBC*")

[46] Skuce Affidavit, AR Tab 11-C

[47] *CEAA 2012*, ss 4(1)(e), s 19; *Canadian Environmental Assessment Act*, SC 1992, c 37 ("*CEAA 1992*"), preamble and ss 4, 16, 62

[48] *NEB Act*, s 52(2)(e)

[49] *Sierra Club v Canada (Minister of Finance)*, [2002] 2 SCR 522, para 84

34. Second, the scope of the Board's review is not restricted to the origin and terminus of the pipeline. Through its mandate to consider effects in other jurisdictions and developments that are necessarily incidental to the Project, the Board's jurisdiction extends to considering potential impacts on the entire infrastructure network.[50] It is *absolutely* within the Board's jurisdiction to consider upstream impacts in the course of its review and, historically, it has done so. This Court upheld the Board's consideration of environmental impacts of the increased generation facility requirements that would result from the new hydro line.[51] In that review, 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.[52] In overturning the Federal Court of Appeal, this Court endorsed the Board's determination that it was within the Board's jurisdiction to consider the upstream impacts and to add conditions to the licenses it issued.[53]

35. Third, 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.[54] 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 degree and will vary from case to case depending on the surrounding circumstances; that, however, goes to weight rather than admissibility.[55] [emphasis added]

Accordingly, the Board's review of the Project must consider the cumulative impacts of significant long-term resource infrastructure and look to the "surrounding circumstances" to inform an assessment of relevance. The Applicants' seek to express these concerns to the Board – the only place where the evidence can be meaningfully tendered and tested.

36. As this Court makes clear in *Quebec, supra,* the Project is not a "line of wire" to be reviewed in isolation, as evidenced by the Board's consideration of marine shipping activities (List of Issues #5). The impacts of the Project are not restricted to its right-of-way or life span; the impact of the pipeline extends to all the consequences of the production that it would demand and all of the market consumption that it would supply. It is difficult to reconcile how, in an

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[50] *CEAA 2012,* ss 4(1)(e), 5(1), 5(2); *NEB Act,* ss 52(1)(a), 52(1)(b), 52(2), 52(2)(e)
[51] *Quebec (Attorney General) v Canada (NEB),* [1994] 1 SCR 159 ("*Quebec*"), pp 191-192
[52] *Quebec, ibid,* p 194
[53] *Quebec, ibid,* pp 199-200
[54] *Sumas Energy 2 Inc v Canada (National Energy Board),* 2005 FCA 377, para 23
[55] *Nakina (Township) v Canadian National Railway Co* (1986), 69 NR 124 (FCA), p 3

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 are irrelevant to the review. Given modern science, concerns about the cumulative impacts of a project of this magnitude cannot be justifiably silenced in the Board's public assessment process. 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* (see Issue 3).

37. Public participation in the Board's 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 Board's assessment and any subsequent approval, a legitimacy that hangs in precarious balance under the impugned legislative and interpretive regime.

Nothing about the Board's proceedings removes the protection

38. Expression in the Board's hearings does not conflict with the purposes that s. 2(b) is intended to serve. Contrary to the Board's finding, the Applicants did not, and do not, argue that the Board is an "open public forum" where citizens have an "untrammeled right" to express themselves freely about anything; the Applicants do not seek to "intrude" on the platform with no regard to the relevance of their submissions.[56] The Board misconstrued the Applicants' Motion when it found that expressing concerns about the Project falls within such a realm.

39. 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 Applicants' expression would disrupt the Board's proceedings. 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.[57] Clearly public hearings are not such a place. Regardless, in determining whether there is anything about the nature of the forum that ought to remove *Charter* protection, this Court stated in *GVTA* that "content is not relevant to the

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[56] Decision, pp 10-11, AR Tab 3

[57] *Committee for the Commonwealth of Canada*, [1991] 1 SCR 139, p 157; *Peterborough (City) v Ramsden*, [1993] 2 SCR 1084 ("*Ramsden*"); *CBC, supra* note 45, paras 40-54

determination of the function of a place."[58] By contrast, the exclusion of important and instructive perspectives from the Board's assessment does undermine the *Charter* values of democratic discourse and truth finding. As discussed, *supra*, the Applicants' concerns, including the long-term impacts of the Project, are directly relevant to the Board's review and integral to the determination of most, if not all, of the Board's List of Issues.[59] The suppression of expression on crucial issues undermines public trust in the Board's process and compromises the credibility of its outcomes. A process that is perceived as biased, incomplete, and lacking key perspectives does not serve the public interest.

40. Freedom of expression through meaningful public participation in the Board's hearing process fosters the purposes of s. 2(b). The Applicants' 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.

The purpose and effect of s. 55.2 infringes free expression as guaranteed by the Charter

41. Freedom of expression is the beating heart of democracy. As Justice Cory observed: "It is difficult to imagine a guaranteed right more important to a democratic society."[60] Our courts robustly defend freedom of expression because of the importance of the principles and fundamental values inherent therein. In *Irwin Toy*, the seminal decision on s. 2(b), this Court explained why freedom of expression is so important to Canadians:

(i) seeking and attaining the truth is an inherently good activity;

(ii) participation in social and political decision-making is to be fostered and encouraged; and

(iii) 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.[61]

42. We must be vigilant about the impacts on democracy when our government seeks to curb free expression of scientific or opposing 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

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[58] *GVTA*, para 40; therein this Court held 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
[59] *Table 1: Applicants' Identification of Concerns and Standing Granted*, Kaiser Affidavit, AR Tab 12-A
[60] *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, p 1336
[61] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 ("*Irwin Toy*"), p 976

the community, or individual self-fulfillment and human flourishing".[62] 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."[63] 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*."[64]

43. The history of the 2012 Amendments demonstrates that s. 55.2 is tainted by the improper legislative purpose of suppressing public participation in the review process.[65] The numbers bear out the success of the stifling effect of the new content-based limits. Post-2012 Amendments, public participation has plummeted – and with it the legitimacy of the review process.[66] Despite the fact that the Project would impact one of Canada's largest cities and ports, the public, including esteemed scientists, are barred from expressing their concerns in the hearings based on a subjective and premature outright rejection of their concerns.[67] The federal government cannot legislatively mandate a hearing to determine whether a major national infrastructure program is in the public interest and then restrict expression and participation based on content without attracting the s. 2(b) scrutiny articulated by this Court in *Irwin Toy* and *City of Montréal*.[68] The only question that remains is whether the *Charter* violation can be justified (see Issue 3).

The Board misapplies the positive rights framework

44. 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).[69] This claim is plainly wrong. It is undisputable that the Applicants 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 directly and

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[62] *Ramsden, supra* note 57, p 1101
[63] *R v Keegstra,* [1990] 3 SCR 697 ("*Keegstra*"), p 805
[64] *Keegstra,* p 817, dissenting in the result
[65] *Charter* Motion, paras 21-22, AR Tab 11 and evidentiary references cited therein
[66] Skuce Affidavit, AR Tab 11, Biggs Affidavit, paras 38-39, Exhs. "K"-"L", AR Tab 11-D, Kaiser Affidavit, AR Tab 12-C
[67] Participation Ruling, AR Tab 9-C; Skuce Affidavit, AR Tab 11-C; Biggs Affidavit, Exh "G", AR Tab 11-D
[68] *Irwin Toy, supra* note 61, pp 978-979; *City of Montréal, supra* note 37, para 14
[69] Decision, p 8, AR Tab 3

expressly 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 are distinguishable.

45. This is not a case like *Haig*, wherein Mr. Haig was excluded from voting due to an objective criterion: residency requirements. There was no evidence the exclusion was deliberate and he was not denied the right to vote in the referendum because of *how* he was going to vote. Therein this Court 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][70]

46. Similarly, this case must be distinguished from *Native Women's Association of Canada,* wherein the Association was 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*.[71]

47. The present case is also distinguishable from *Baier* wherein teachers were disqualified from elected managerial positions because of perceived conflicts with their employment; they were not disqualified based on *what* they would *say*. *Baier* makes plain that the Decision must not stand – it would have been decided differently if the teachers had been barred from sitting as trustees on the basis of what views they would express. The majority of this Court made this distinction when it addressed the teacher appellants' concerns that the jurisprudence would allow Alberta to enact legislation forbidding school trustees from criticizing government underfunding of schools:

> [42] … 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][72]

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

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[70] *Haig v Canada; Haig v Canada (Chief Electoral Officer),* [1993] 2 SCR 995, pp 1040-1041
[71] *Native Women's Assn of Canada v Canada,* [1994] 3 SCR 627, para 56
[72] *Baier, supra* note 4, para 42

48. *Greater Vancouver Transportation Authority* ("*GVTA*") further distinguishes *Baier* and confirms that the case at bar is not a positive rights case. Therein, this Court 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.[73] Justice Deschamps, for the majority, cautioned: "[c]are must be taken not to confuse the notion of an under-inclusive platform for expression with government limits on the content of expression."[74] The government was not at liberty to refuse advertisements from individuals or organizations because the message they sought to convey was "political" – the content-based exclusion was impermissible. This 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."[75] When the government limits expression based on content, it is not a positive rights case. The Applicants are not asking the government to "create" a new statutory platform for expression, they simply seek to submit their evidence and concerns to the Board without having the content of their expression unduly curtailed. Much like in *GVTA*, the evidence in this case clearly shows that the government extended a platform for expression, then unconstitutionally restricted expression in that forum.

ISSUE 2: THE BOARD ERRED IN FINDING THAT ITS INTERPRETATION AND APPLICATION OF S. 55.2 OF THE *NEB ACT* WAS REASONABLE AND CONSISTENT WITH *CHARTER* VALUES

49. The Board's List of Issues, ATP Process, and Ruling on Participation fail to strike the appropriate balance between expressive rights and the Board's objectives. The Board must manage its process in a way that is consistent with, and does not compromise, the fulfillment of its legislative mandate and respects *Charter* values. Instead, having found, in error, that the *Baier* test applies and misconstrued the Applicants' claim as a right to participate in the Board's process, the Board compounds these errors by finding that the Applicants' expressive rights were not substantially interfered with because they can express themselves through social media platforms.[76] As the Federal Court of Appeal recently stated, an administrative agency must correctly "seek to balance maximum participation on the one hand, and efficient and effective decision-making on the other".[77] The Board's unreasonable limits on expression demand review.

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[73] *GVTA*, *supra* note 45, para 34
[74] *GVTA*, *ibid*, para 32
[75] *GVTA*, *ibid*, para 35
[76] Decision, pp 8-9, AR Tab 3
[77] *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48, paras 34-42

50. The Board's decisions are inconsistent with its mandate under the *CEAA 2012* to consider a Project "in a careful and precautionary manner" and ensure "meaningful public participation."[78] Pursuant to s. 19(1) of the *CEAA 2012*, an environmental assessment must take into account ten enumerated factors.[79] Section 19(2) provides that the reviewing body may determine the scope of *seven* of the ten enumerated factors, *however s. 19(1)(c) is expressly excluded.* Section 19(1)(c) lists comments from the public, or, for projects subject to a Board review, from an interested party, that are received in accordance with the act.[80] *Consistent with s. 2(b) of the Charter, the Board cannot determine the scope of comments received in its environmental assessment.* The Board erred when it curbed comments by determining *who* could participate based on the content of applicants' proposed submissions. Prior to the 2012 Amendments, interested parties merely registered to participate in an environmental assessment review process. If the content of their submissions had been curbed at that time it would have violated both s. 19 of the *CEAA 2012* and s. 2(b) of the *Charter.* It is unacceptable for the Board to do through s. 55(2) of the *NEB Act* what it cannot do under *CEAA 2012.* The Board cannot shield these breaches with its ATP Process.

51. The Board trivializes s. 2(b) by relying on the volumes of blog and Twitter feeds tendered by the AGC as an alternative to participation 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 concerns. It is no answer to a breach of freedom of expression to say that the Applicants can express 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. 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*:

> [20] ... 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.[81]

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[78] *Conseil des Innus de Ekuanitshit v Canada (Procureur général)*, 2013 FC 418, para 68, while the assessment at issue therein was under *CEAA 1992*, the key principles remain in *CEAA 2012*, ss 4(b), (e) and (g)
[79] *CEAA 2012*, s 19
[80] The previous legislation, *CEAA 1992*, contained the same express exclusion: s 16(2) did not list s 16(1)(c)
[81] *Harper v Canada (Attorney General)*, [2004] 1 SCR 827, para 20; cited by Justice Fish in his dissent in *Baier*, finding that the effect of the government's exclusion was more than merely a restriction on a "particular channel" of expression; noting alternative means ("shouting from the sidelines") are a "cold comfort" when barred from the channel that offers a "qualitatively different" and "uniquely effective" means (paras 107-109)

The Board confounded its failed logic about the availability of other forums with the issue of the relevance of the Applicants' submissions. Citing the Issues Ruling, the Board concluded that the hearings are not the only "forum that matters" for the Applicants to express their concerns.[82] The Board erred in relying on its findings in the Issues Ruling and ignoring the un-refuted evidence tendered by the Applicants regarding the relevance of their submissions. Notably, in *Baier*, this Court observed that school employees could still express themselves in many ways including participating and making presentations at school board meetings.[83] Applicants who have been barred from submitting a comment letter to the Board have no alternative recourse, they have been completely excluded – a severe and disproportionate outcome that calls for review.

ISSUE 3: THE BOARD ERRED IN FAILING TO CONDUCT A JUSTIFICATION OR *DORÉ* ANALYSIS

52. While the Decision cites rationalizations such as "efficiency," the Board dismissed the Applicants' claim before even reaching the justification stage of the analysis. If granted leave, the Applicants will submit that the s. 2(b) infringements are not justified, balanced or proportionate.

53. First, the legislation interferes with free expression more than is necessary to achieve the objectives.[84] Any assertions that the 2012 Amendments were made to ensure the hearings proceed "efficiently" are unsubstantiated and the government has failed to meet the test.[85] Briefly: the AGC bears the burden of proof; no evidence has been tendered to show any "harm" or that Board hearings were "inefficient" prior to changes; no evidence has been tendered to show that the draconian restrictions on public participation are proportionate or the least intrusive means of addressing any identifiable "control" concerns that may or may not exist; and the absence of any evidence is fatal to the governments' claim. Further, justifications on grounds of "efficiency" fail with respect to the level to which the measures impair the Applicants' expression. If the impugned legislation was simply directed at ensuring that "disruptive" parties do not squander public resources, it may 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 this Court has noted, "rights should never be sacrificed to mere administrative convenience."[86]

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[82] Issues Ruling, p 3, Kaiser Affidavit, AR Tab 12-E; Decision, p 9, AR Tab 3
[83] *Baier*, *supra* note 4, paras 47-48
[84] *R v Oakes*, [1986] 1 SCR 103, para 66
[85] *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, paras 128-141
[86] *City of Montréal*, *supra* note 37, para 97

54. Second, in the event that the legislation is held to be constitutionally salvageable on the alleged basis of "efficiency," the Board's unreasonably restrictive measures taken under this guise are not. As discussed, *supra*, the Board disproportionately, and therefore unreasonably, limited s. 2(b) *Charter* rights.[87] 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. The Board has failed to provide any evidence to support its claim that allowing concerned citizens to comment on the Project would "frustrate the ability of any person to engage in meaningful participation in the Project hearing."[88] 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

55. The significance of this issue rests not only with the Decision but also the impact of the Board's consistent tailoring of public comments in the assessments of pipelines across Canada, as well as limits on expression in administrative proceedings more broadly. Given all the foregoing, the Applicants submit the Board erred in making its Decision and that leave to appeal should be granted on the basis that this case raises issues of unquestionable national and public importance.

PART IV – SUBMISSIONS ON COSTS

56. If leave to appeal is granted, costs should follow the event on this application.

PART V – ORDERS SOUGHT

57. The Applicants on this motion respectfully request the following relief:

a) an order granting leave to appeal; and

b) any other order that the Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, BC, the 19th day of March 2015.

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Barristers
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[87] *Doré, supra* note 35, paras 6-7; *Warden, supra* note 40
[88] Decision, p 13, AR Tab 3

PART VI – TABLE OF AUTHORITIES

PART VII – LEGISLATION

Tab	Document
A	*Canadian Environmental Assessment Act, 1992*, c 37, preamble and ss 4, 16, 62
B	*Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, ss 1(1), 2(1), 4(1)(e), 5, 9(c), 13, 15(b), 19(1)(c)
C	*Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2(b)
D	*National Energy Board Act*, RSC 1985, c N-7, ss. 16.1, 22, 28.2, 52-54
	Rules of the Supreme Court of Canada, SOR/2002-156
	Supreme Court Act, RSC 1985, c. S-26, s 40(1)