File No. 36353

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE 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

APPLICANTS
(APPELLANTS)

AND:

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

RESPONDENTS
(RESPONDENTS)

REPLY OF THE APPLICANTS (APPELLANTS)
(in the APPLICATION FOR LEAVE TO APPEAL)
Filed pursuant to Rule 28(1) of the Rules of the Supreme Court of Canada

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REPLY MEMORANDUM OF FACT & LAW

"Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear." H.S. Truman

1. The Applicants hereby provide a single Reply to the separate response submissions of the Attorney General of Canada ("AGC"), Trans Mountain Pipeline ULC ("Trans Mountain") and the Canadian Association of Petroleum Producers ("CAPP") opposing the Leave Application.

2. At the heart of this issue is the extent to which the National Energy Board (the "Board") can curb free expression in order to exclude certain concerns from its environmental assessment and review of the proposed Trans Mountain Pipeline Expansion project (the "Project") that will inform its recommendations regarding whether the Project is in the public interest.

3. There is no dispute among the parties that section 55.2 of the *National Energy Board Act* (the "*NEB Act*")[1] and the Board's decisions there-under serve to *limit what can be said* in the Board's hearing, and *to control who can speak in the hearing based on what they will say*. The Applicants maintain that these content-based limits are in direct conflict with the Board's legislative mandate under the *NEB Act* and the *Canadian Environmental Assessment Act* ("*CEAA 2012*"),[2] an unjustifiable infringement of s. 2(b) of the *Charter of Rights and Freedoms* (the "*Charter*"),[3] offend the values and spirit of the *Charter* and Canadian democratic principles, and violate essential principles of procedural fairness in administrative proceedings.

4. Although the Respondents do not, and cannot, dispute the public consultation function of the Board's hearings, they support the Decision and effectively argue that the Board can exclude public comment on whichever matters it deems fit. If the Respondents are right, the public comment component of the Board's process is emptied of any meaning and the Board's findings, as well as any government decision based on those findings, lack legitimacy. Excluding relevant comments deprives the public record of widely held concerns and scientific evidence about the expansion of major, long-term, infrastructure – the assessments of which the federal government has delegated to this administrative entity.

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[1] *National Energy Board Act*, R.S.C. 1985, c. N-7, Applicants' Record ("AR"), Tab 5-D
[2] *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c.19, AR, Tab 5-B
[3] *Charter of Rights and Freedoms, The Constitution Act*, 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, AR Tab 5-C

5. We live in a democracy. Freedom of speech is guaranteed because it is fundamental to democratic dialogue, truth-seeking and self-fulfillment; it is a component of our democratic contract that has, traditionally, been robustly defended. The project proposals at issue in the Board's assessments are for major works that *cross provincial boundaries* to *transport irreplaceable natural resources to export markets* and that *will have long-term impacts for generations of Canadians*. These proposals engage a range of immediate and long-term issues that must be canvassed and considered. The Board is statutorily obligated to determine whether the Project is in the public interest, and must respect Canadians' section 2(b) rights in doing so. Creating high-threshold standing tests, complex application procedures, a narrow list of issues, and suppressing any speech that addresses what is actually *in the pipe*, is incompatible with both the Board's legislative mandate and the Applicants' *Charter* rights. The infringement of expression in the Board's hearings is, unquestionably, a matter of national public importance.

This case is about limits on Freedom of Expression, not standing; the Board is not a Court

6. The AGC's Response attempts to skirt the *Charter* challenge at issue by overstating the applicability of "an uncontroversial rule of standing" to the case at bar.[4] This case is about unjustifiable limits on free expression and *not* matters of individual, "case specific," assessments of "standing." Characterizing the issue in this manner is a deliberate attempt to obscure the fact that some of the Applicants were denied participation rights, not based on objective criteria such as residency or professional qualifications, but instead because of the content of their expression. Even those Applicants who were granted "standing" are saddled with content restrictions. While the Board has a range of functions from advisory to quasi-judicial,[5] the public consultation aspect of the Board's review process (so that it can make a *recommendation,* not a *decision*) is certainly not one that warrants a standing test comparable to a court or tribunal.[6] The exclusion of competing submissions compromises the comprehensiveness of the record, distorts the truth, shields the Board's findings from review, and undermines the integrity of the process.

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[4] AGC Response, paras. 17, 21, 25-26, 38-39

[5] CAPP's Response; AGC Response, paras. 38-39. That the Board is a "court of record" is relevant but not for the reasons the Respondents submit; for example, written materials before the Board may be "challenged" by way of information requests (notably, not cross-examination under oath, as is typical of judicial and tribunal proceedings) to ensure there is a complete record in the event of appellate review.

[6] Recall that, prior to the 2012 Legislative Amendments that introduced s. 55.2, commenting in the Board's proceedings *did not require meeting a standing test.* As set out in the uncontested evidence below, the purpose of the 2012 Legislative Amendments, the impugned provision, and the changes to the Board's process, was to limit participation and exclude dissenting voices – an impermissible purpose, per *Irwin Toy*, at pp. 974-975, AR Tab K. Incredibly, as it now stands, anyone who has not already been granted "standing" (in last year's application to participate process) is *barred from providing even a one-page letter of comment to the Board.*

Public interest voices are being silenced

7. Contrary to the AGC's submission, this is not a case of individuals who are "dissatisfied" with the Board's decisions on their Applications to Participate.[7] As this Court has stated, the "public interest" includes both the concerns of society generally and the particular interests of identifiable groups; "the government does not have a monopoly on the public interest."[8] The Applicants represent a voice of the public interest that is not merely being *ignored* in the Board's proceedings – *it is being silenced.* The Board is not a *Charter* free zone. The legislature cannot confer upon the Board discretion to infringe the *Charter*, and the Board exceeds its jurisdiction if it does so.[9] The federal government cannot shelter itself, and the public record, from dissenting voices by obfuscating public consultation behind a Board and erecting a novel standing threshold for public comments without attracting *Charter* scrutiny.

Conflicting jurisprudence and the national importance of granting leave to appeal

8. *Charter* protection for the guarantee of free expression in public hearings is not a settled area of the law, and is yet to be addressed by this Court. While there is limited and conflicting Canadian jurisprudence on the issue of free expression in public fora,[10] the question has been extensively canvassed in the United States.[11] To be clear: in addition to being inconsistent with the general s. 2(b) jurisprudence articulated by this Court,[12] the position the Respondents urge on this Court is in sharp contrast to the American approach.

9. The Board and Respondents rely on the positive-rights framework in *Baier* to exclude public comment from the Board's proceedings. In *GVTA* this Court explicitly distinguished the

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[7] AGC Response, paras 4, 17-21. The Applicants, all of whom indicated the sought to address topics in the List of Issues, are deeply troubled that the Board, the only national regulator of pipelines, is refusing to hear cogent concerns and scientific evidence about a major infrastructure project that will impact their lives and those of future generations; trivializing this challenge to the realm of disappointment is offensive.

[8] *RJR -- MacDonald Inc. v. Canada (Attorney General),* [1994] 1 SCR 311, pp. 343-344, AR Tab II

[9] Lamer, J. in *Slaight Communications* [1989] 1 S.C.R. 1038, pp. 1077-78, cited with approval by Bastarache J. in *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v Canada*, 2008 SCC 15, para. 20, AR Tabs JJ & KK

[10] *Ernst v. EnCana Corporation*, 2013 ABQB 537, upheld in *Ernst v Alberta (ERCB),* 2014 ABCA 285, leave to the SCC granted, April 30, 2015, file 36167, AR Tab BB; *BC Civil Liberties Association v. University of Victoria*, 2015 BCSC 39, AR Tab AA; *Ontario (Attorney General) v Dieleman* (1994), 20 OR (3d) 229 (Gen Div), AR Tab FF

[11] In "traditional" public forums (e.g. streets), content-based restrictions on speech are presumptively unconstitutional and the government has the burden to justify a compelling state interest in imposing those limits; where a forum is "designated" for public comment, it is treated as a "traditional" fora: the government must show the limits have been very narrowly tailored; the restrictions must be reasonable and view-point neutral (applying objective criteria such as the time, place and manner). *Pleasant City Grove v. Summum,* 555 US 460 (2009), AR Tab HH; *Good News Club v. Milford Central School*, 533 US 98 (2001), AR Tab EE; *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.,* 473 US 788, 802 (1985), AR Tab DD; *Perry Ed. Assn.* v. *Perry Local Educators' Assn.,* 460 US 37, 44 (1983), AR Tab GG

[12] Applicants' Memo, AR Tab 5, paras 30-31, 38-48; *Committee for the Commonwealth of Canada*, [1991] 1 SCR 139, per L'Heureux-Dubé J. pp. 203-204, per McLachlin J., as she then was, pp. 236-37, 248, AR Tab E

Baier line of cases when it came to content-based restrictions on expression. The Applicants are not seeking access to a statutory platform from which they have been excluded, this is not a positive rights case, and the *City of Montreal* test clearly applies. The fact that the Board found that *Baier* applied demonstrates the need for this Court to clarify section 2(b) jurisprudence.[13]

10. Once it is clear that the *Baier* positive rights analysis does not apply, the inquiry is simple: are the Board's proceedings the type of forum where free expression has traditionally flourished? Unlike courts, or tribunals that do not have historical or actual public consultation functions, the Board's hearings are struck for the very purpose of permitting citizens to express broad-ranging views on a proposed project, and they always have been. The *City of Montreal* test is satisfied. Accordingly, to the extent that limitations are placed on citizens' expression in the Board's public hearings, those limitations must be justifiable under *Charter* scrutiny.[14] Contrary to the Respondents' submissions to the effect that the Board has unfettered discretion to govern its process, the Board's exercise of its discretion to exclude expression must be *Charter* compliant.[15]

11. The *Forest Ethics* decision is distinguishable and does not dispose of this challenge.[16] Therein, the FCA did not hear the applicants' *Charter* challenge to s. 55.2 of the *NEB Act* because it held that the applicants ought to have brought the constitutional issue to the Board, first, as the Applicants herein have done.[17] When the FCA reviewed the Board's administrative decisions, it held that the Board's decision regarding its choice of instrument to assess standing must be

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[13] Although the Board also engaged in a *City of Montreal* analysis, *Baier* is an extremely restrictive test and, if it applies in like circumstances, moving forward, freedom of expression will be curbed in significant ways in Canada.
[14] Either in a section 1 analysis, in considering the validity of the legislation, or within the *Doré* analysis. The Board will, of course, be justified in excluding types of expression that are clearly irrelevant to, or compromise, the proceedings (such as violent or disruptive communications, blatantly irrelevant content, or even endless repetition).
[15] There is no evidence that the Board remained conscious of the impacts of its decisions on the Charter, as required per *Doré v. Barreau du Québec*, 2012 SCC 12, paras. 35 and 54-58, AR Tab F
[16] The facts in this case are drastically different than those in the *Forest Ethics* decision and signal that the Board's narrow approach to expression in the review process is on a slippery slope. In the Line 9 proceedings the Board provided detailed reasons for why it denied eight applications, in the Trans Mountain proceedings, less than one year later, the Board denied 468 applications and simply provided general reasons for why it denied hundreds of ATPs. *Forest Ethics Advocacy Association v. Canada (NEB)*, 2014 FCA 245, para. 42, AR Tab CC, Participation Ruling, AR, Tab 9-C. Critically, the decision makes absolutely no reference to the Board's mandate under the *CEAA 2012*. Absent a full understanding of the Board's responsibility for conducting environmental assessments, the FCA was unable to appreciate that the Board's administrative decisions were inconsistent with the Board's legislative mandate.
[17] Neither the Board's process for considering the Applicants' legislative challenge, nor its Decision, fulfilled the FCA's expectations. Namely, a review of relevant evidence, including any evidence of justification under s. 1 of the *Charter*, cross-examinations and submissions, along with an opportunity to question all parties on the issues, followed by a decision that "set out its factual appreciations, insights gleaned from specializing over many years in the myriad complex cases it has considered, and any relevant policy understandings", thereby providing "a rich, fully-developed record in hand, a party could have brought the matter to this Court on judicial review." *Forest Ethics*, para. 42

reviewed on a standard of "correctness with some deference to the Board's choice of procedure,"[18] yet did not conduct a comprehensive *Doré* analysis; as such, it is inapplicable to the present case.

12. Trans Mountain erroneously suggests the City of Vancouver's unsuccessful administrative challenge to the List of Issues somehow settles the constitutional question. The Issues Ruling was not a *Charter* section 2(b) inquiry.[19] The relevancy justification that the AGC and CAPP trumpet has not been tested through the lens of the *Charter*. Were it so tested, it would fail given that the Board is in fact *mandated* to consider the very issues the Applicants want to address.[20] Indeed, Trans Mountain states that, pursuant to requirements in the Board's Manual, it has provided evidence of upstream and downstream activities.[21] Yet the Board has explicitly excluded applicants from participating in the process if they sought to comment on these same issues.[22] How can the Board require evidence then *expressly prohibit* its examination?[23]

13. This Court has cautioned vigilance when citizen's free speech is proscribed in order to suppress a particular message.[24] Here, the Applicants are being silenced because their views stand in opposition to those of the proponent, which views are supported by the government of the day. Truth seeking and open dialogue are the roots our democracy; when a government deliberately silences dissent – as has happened here – judicial review is a matter of national importance.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, BC, the 4th day of May, 2015.

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[18] *Forest Ethics*, para. 70, AR Tab CC

[19] Memorandum of Fact and Law of the City of Vancouver, Appendix "A"; Kaiser Affidavit, AR Tabs12-E and 12-F

[20] Consistent with its legislative mandate to consider the "upstream impacts" of the carbon production that a pipeline approval will demand, as well as the "downstream impacts" of the consumption of that carbon, the Board's Manual *requires* that a project proponent submit evidence about upstream and downstream petroleum development activities and works directly related to the proposed project. (Trans Mountain Response, para. 13) As this Court has stated, "to limit the effects considered to those resulting from the physical act of transmission is an unduly narrow interpretation of the activity contemplated by the arrangements in question." This Court observed that such an interpretation is inconsistent with the detailed regulatory process, and found it "surprising that such an elaborate review process would be created for such a limited inquiry." Accordingly, this Court concluded that it is proper for the Board to consider, in its decision making process, the overall environmental costs of the proposed project. This Court held that where "the construction of new facilities is required to serve, among other needs, the demands of the export contract," their construction is related to the export and "it becomes appropriate for the Board to consider the source of the electrical power to be exported, and the environmental costs that are associated with the generation of that power." *Quebec (Attorney General) v. Canada (NEB)*, [1994] 1 SCR 159, para. 56, AR Tab L

[21] TM Response, para. 13; Affidavit of Lesley Matthews, Tab 2-A at 34

[22] Ruling on Participation and Supplementary Ruling on Participation, AR Tabs 9-C and 12-G

[23] It is incongruous that Trans Mountain can at once maintain that the Board is quasi-judicial while at the same time argue that the Board can justifiably restrict examination of the evidence that it has put before the Board.

[24] *R. v. Keegstra*, [1990] 3 SCR 697, per McLachlin J., as she then was, at pp. 804-805, AR Tab R

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EE	*Good News Club v. Milford Central School*, 533 US 98 (2001)		4
FF	*Ontario (Attorney General) v Dieleman* (1994), 20 OR (3d) 229 (Gen Div)		4
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Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

CITY OF VANCOUVER

Moving Party

AND:

NATIONAL ENERGY BOARD and TRANS MOUNTAIN PIPELINE ULC

Respondents

CITY OF VANCOUVER MEMORANDUM OF FACT AND LAW

INTRODUCTION

1. The City of Vancouver (the "**City**") seeks leave to appeal to this Court from the decision issued by the National Energy Board (the "**NEB**" or "**Board**") on July 23, 2014, Hearing Order OH-001-2014, *Ruling No. 25*, dismissing the City's Notice of Motion dated May 16, 2014 (the "**Issues Decision**").

2. The City asks this Court to grant it leave to appeal the Issues Decision pursuant to section 22 of the *National Energy Board Act*, RSC, 1985, c. N-7 (the "***NEB Act***")[1] and Rule 353 of the *Federal Courts Rules*, SOR/98-106[2] on the basis there is an arguable case that, in making the Issues Decision, the NEB made one or more of the following errors of law and jurisdiction:

    a. The NEB erred in law or in jurisdiction by refusing to consider the environmental and socio-economic effects associated with upstream activities, including the development of oil sands crude to be transported by the Trans Mountain Project (the "**Upstream Production**") or the

[1] *National Energy Board Act*, s. 22 [Motion Record ("MR"), Vol. 3, Appendix A, Tab 30, p. 000740]
[2] *Federal Courts Rules*, Rule 353 [MR, Vol. 3, Appendix A, Tab 33, p. 000817]

downstream use of the oil to be transported by the Trans Mountain Project (the "**Downstream Use**"), contrary to the statutory responsibilities of the Board under the *NEB Act* and the *Canadian Environmental Assessment Act*, 2012, S.C. 2012 c. 19, s. 52 ("*CEAA*")[3];

b. The NEB breached the principles of natural justice by arbitrarily deciding, in the absence of any evidence on the record, that Upstream Production and Downstream Use were not directly linked or necessarily incidental to the NEB's exercise of authority under the *CEAA* or the *NEB Act* to review and assess the Trans Mountain Project and issue a report to the Governor in Council;

c. The NEB erred in law or in jurisdiction by unlawfully delegating the assessment of the environmental and socio-economic effects of Upstream Production and Downstream Use required to be considered under the *CEAA* to other regulatory bodies;

3. Leave to appeal should be granted to correct these errors of law and jurisdiction; to ensure that the NEB takes into consideration all categories of interests which form part of the public interest in its assessment of the Trans Mountain Project in accordance with its statutory obligations under the *NEB Act*; and to ensure that the NEB fulfills its obligations to undertake a complete environmental assessment of the Trans Mountain Project in accordance with its statutory obligations under the *CEAA*.

PART 1: STATEMENT OF FACTS

1.1 The City of Vancouver and Its Interests

4. The City of Vancouver is Canada's largest coastal city with a population of 630,000 and 69.8 kilometres of waterfront. Due to the City's extensive waterfront and oceanic climate, it is particularly vulnerable to rising sea levels and increasing

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[3] *Canadian Environmental Assessment Act*, 2012, S.C. 2012 c. 19, s. 52 [MR, Vol. 3, Appendix A, Tab 32, p. 000772]

these other entities and has no intention of reviewing and assessing any such report for the purposes of rendering a decision under section 52 of the *CEAA* as to the environmental effects of the Trans Mountain Project.

88. The Issues Decision is more properly characterized as an abdication of the NEB's responsibilities under the *CEAA* which gives rise to a reviewable error of law or jurisdiction justifying the intervention of this Court.

PART 4: ORDER SOUGHT

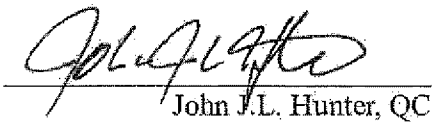
89. The City seeks the following relief from this honourable Court:

a. An order granting the City leave to appeal NEB Hearing Order OH-001-2014, Ruling No. 25, pursuant to subsection 22(1) of the *NEB Act* and Rule 353 of the *Federal Court Rules*;

b. Costs of this motion;

c. Such further and other relief as this Court deems appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of August, 2014.



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Part 5: LIST OF AUTHORITIES

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Statutory Authority

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, s. 52

Federal Courts Rules, SOR/98-106

National Energy Board Act, R.S.C., 1985, c. N-7