PART I. OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Federal Court of Appeal ("**FCA**") dismissed the Applicants' motion for leave to appeal the National Energy Board ("**NEB**") Ruling at issue, with costs to the Respondents. The Applicants now seek leave to appeal to the Supreme Court of Canada ("**SCC**" or "**this Court**") from the Ruling on three issues alleged to be of national importance (the "**Leave Issues**"). However, the Leave Issues do not satisfy the criteria for national or public importance and do not warrant consideration by the SCC. The Applicants' arguments are entirely without merit.

> **Order of the Federal Court of Appeal ("FCA") Dismissing Leave, Court File No 14-A-62, dated January 23, 2015 (FCA Leave Order) – Tab 4 at 22-23 (Applicants' Application Record ("AR"), Vol 1).**

2. In July 2013, the NEB issued a list of issues (the "**List of Issues**") for the Project and stated, among other things, that the NEB "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."

> **Hearing Order OH-001-2014, dated April 2, 2014 [Hearing Order] – Tab 9-B at 155 (AR, Vol 1).**

3. The Applicants argue that, in assessing the Project, the NEB is obliged to expand its consideration of issues and its participation limits; they assert that the NEB must consider (and hear applicants) on the environmental and socio-economic effects of upstream activities (oil sands development) and the general end-use of resources that may be transported by the Project pipeline (downstream use) (the "**Excluded Issues**"). This argument must fail. The NEB has the authority to, both: determine what is relevant in fulfilling its mandate under the *National Energy Board Act* ("**NEB Act**"); and, govern its own process, without interference from the courts.

> ***National Energy Board Act,* RSC 1985, c N-7, s 52 [*NEB Act*] – Tab 5-D at 83-85 (AR, Vol 1).**

4. The Applicants further assert that the NEB's: (i) failure to consider the Excluded Issues; and, (ii) restrictions as to the manner and extent to which applicants may participate in the Project hearing process (the "**Hearing**") under s. 55.2 of the NEB Act ("**s. 55.2**"), unjustifiably infringe s. 2(b) of the *Canadian Charter of Rights and Freedoms*, *infra*., (the "***Charter***"). The Applicants

argue that the standards inherent in s. 55.2 ("directly affected" and having "relevant information or expertise") serve to suppress expression.

> ***Canadian Charter of Rights and Freedoms, Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK)*, 1982, c 11, s 2(b) [*Charter*] – Tab 5C at 70 (AR, Vol 1).**
> ***NEB Act*, s 55.2 – Tab 5-D at 87 (AR, Vol 1).**

5. However, the Applicants misstate the impact of the Ruling on their freedom of expression rights under the *Charter*. Neither s. 55.2 on its face, nor the NEB's interpretation and application of s. 55.2 in the Ruling, impact the Applicants' s. 2(b) *Charter* rights. The NEB's Ruling that s. 2(b) of the *Charter* is not infringed ought to be upheld and this Leave Application dismissed.

> ***Charter*, s 2(b) – Tab 5-C at 70 (AR, Vol 1).**
> ***NEB Act*, s 55.2 – Tab 5-D at 87 (AR, Vol 1).**

6. Moreover, these arguments have already been considered and dismissed with costs by the FCA. In its application of the unique test for leave to appeal a decision or order of the NEB, the FCA determined that the Applicants failed to meet the test. The FCA decision to deny the Applicants leave is entitled to deference, as was the NEB decision that preceded it.

> **FCA Leave Order – Tab 4 at 22-23 (AR, Vol 1).**

7. Leave to appeal to this Court may be granted on issues of public or national importance. Where, as is the case here, an appellate court has denied leave to appeal, leave to appeal to the SCC will be granted sparingly, and only where there is a risk that a question of major constitutional importance might otherwise escape the review of the SCC. There are no such issues demanding review by the SCC. In fact, the law governing s. 2(b) of the *Charter* is well settled and has already been addressed by the SCC.

> ***Supreme Court Act*, RSC 1985, c S-26, s 40(1) [*Supreme Court Act*].**

8. None of the grounds raised by the Applicants are of public or, for that matter, major constitutional importance. The test for leave to appeal is not met. Leave must be denied.

B. The Facts

(i) Legal and Administrative History

9. The Applicants, Lynne M. Quarmby, Eric Doherty, Ruth Walmsley, John Vissers, Shirley Samples, Forest Ethics Advocacy Association ("**Forest Ethics**"), Tzeporah Berman, John Clarke, and Bradley Shende, seek leave to appeal (the "**Leave Application**") the decision of the FCA denying the Applicants leave to appeal National Energy Board (the "**NEB**" or the "**Board**") Ruling No. 34 ("**Ruling**") issued on October 2, 2014 in relation to Hearing Order OH-001-2014 for the Trans Mountain Pipeline ULC (the "**Respondent**" or "**Trans Mountain**") application ("**Application**") for a Certificate of Public Convenience and Necessity ("**CPCN**") in connection with the Trans Mountain Expansion Project (the "**Project**").

NEB Ruling No. 34, dated October 2, 2014 (Ruling No. 34) – Tab 3 at 7-21 (AR, Vol 1).

10. The Project is a designated project under s. 2 of the *Canadian Environmental Assessment Act, 2012* ("**CEAA 2012**"), and therefore the NEB is required, as the sole responsible authority, to prepare an environmental assessment ("**EA**") under CEAA 2012. Both regulatory functions fall within the jurisdiction of the NEB under the NEB Act.

***Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, ss 2, 15 – Tab 5-B at 56 (AR, Vol 1).**

11. The Project is comprised of the following components: (i) pipeline segments that complete a twinning (or "looping") of the pipeline in Alberta and BC with approximately 987 kilometres of new buried pipeline; (ii) new and modified facilities, including pump stations and tanks; and, (iii) three new berths at the Westridge Marine Terminal in Burnaby, BC, each capable of handling Aframax class vessels.

Trans Mountain Expansion Project Application, dated December, 16 2013 (Trans Mountain Application) – Tab 6 at 88 and 98-99 (AR, Vol 1).

12. On December 16, 2013, Trans Mountain filed the Application that triggered the regulatory proceeding at issue and, specifically: (a) an NEB process, including a public hearing (the "**Hearing**"), to prepare a report setting out, *inter alia*, its recommendation as to the CPCN; and, (b) the NEB's preparation of an EA (pursuant to CEAA 2012) as the sole responsible authority.

Trans Mountain Application – Tab 6 at 110 (AR, Vol 1).
NEB Act, s 52.

13. Trans Mountain filed in excess of 15,000 pages of materials in support of its Application including a broad range of EA information prepared in accordance with the NEB's Filing Manual (and supplemental filing guidelines issued by the NEB) to address the cumulative effects of the Project, including the consideration of a potential contribution to greenhouse gases. The Filing Manual contains guidance regarding the consideration of upstream and downstream effects of the Project. An application must clearly identify, describe and substantiate:

(a) the scope of the applied for project;

(b) other physical facilities and activities necessary to enable the project to proceed, including directly-related ancillary facilities, such as access roads including temporary and permanent bridge crossings, construction camps, or pipe lay-up and storage areas, marine terminals and loading facilities; and,

(c) other physical facilities and activities likely to occur if the applied for project is approved and proceeds, which may include power lines or upstream and downstream petroleum development activities and works directly related to the proposed project. [Emphasis added.]

Affidavit of Lesley Matthews, sworn November 16, 2014 [Matthews Affidavit] – Tab 2-A at 34 (Trans Mountain Response ("TM")).

(ii) The Regulatory Process

14. On December 31, 2013, the NEB issued an Application to Participate ("**ATP**") Notification in which it advised that: (a) it was in the process of assessing the completeness of the Application; (b) it would determine whether a hearing would be required; and (c) those interested in participating in the hearing should apply.

NEB Application to Participate Notification for Trans Mountain Pipeline ULC, dated December 31, 2013 – Tab 7 at 113-117 (AR, Vol 1).

15. All but one of the Applicants completed ATP forms in response.

Matthews Affidavit – Tab 2-A at 37 (TM).

16. The NEB issued its Ruling on Participation (the "**Ruling on Participation**") on April 2, 2014, in which:

> (i) Ruth Walmsley, Bradley Shende, Tzeporah Berman, John Clarke, Shirley Samples, and John Vissers were denied intervenor status;
>
> (ii) John Clarke, Shirley Samples and John Vissers were granted Commenter status;
>
> (iii) Eric Doherty was denied Commenter status; and,
>
> (iv) Forest Ethics was granted Intervenor status.
>
> **NEB Ruling on Participation, dated April 2, 2014 – Tab 9-C at 157-166 (AR, Vol 1).**

17. Lynne M. Quarmby was not granted Intervenor or Commenter status because she did not complete an ATP.

18. On April 2, 2014, the NEB issued the Hearing Order for the Project, which included the following List of Issues:

> 1. The need for the proposed project.
>
> 2. The economic feasibility of the proposed project.
>
> 3. The potential commercial impacts of the proposed project.
>
> 4. The potential environmental and socio-economic effects of the proposed project, including any cumulative environmental effects that are likely to result from the project, including those required to be considered by the NEB's Filing Manual.
>
> 5. The potential environmental and socio-economic effects of marine shipping activities that would result from the proposed project, including the potential effects of accidents or malfunctions that may occur.
>
> 6. The appropriateness of the general route and land requirements for the proposed project.
>
> 7. The suitability of the design of the proposed project.
>
> 8. The terms and conditions to be included in any approval the Board may issue.
>
> 9. Potential impacts of the project on Aboriginal interests.
>
> 10. Potential impacts of the project on landowners and land use.

> 11. Contingency planning for spills, accidents or malfunctions, during construction and operation of the project.
>
> 12. Safety and security during construction of the proposed project and operation of the project, including emergency response planning and third-party damage prevention.
>
> **Hearing Order – Tab 9-B at 155 (AR, Vol 1).**

19. The NEB expressly excluded the Excluded Issues from its List of Issues:

> The Board 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.
>
> **Hearing Order – Tab 9-B at 155 (AR, Vol 1).**

(iii) The Applicants' NEB Motions

20. In a Notice of Motion filed on May 6, 2014 (the "**Charter Motion**") and a related Notice of Constitutional Question ("**NCQ**") filed on May 5, 2014, the Applicants applied to the NEB for an order that the Board declare s. 55.2 a violation of the Applicants' 2(b) *Charter* rights, which violation cannot be justified under s. 1 of the *Charter*. The Applicants requested the NEB therefore find s. 55.2 to be of no force and effect pursuant to s. 52(1) of *The Constitution Act, 1982*.

> **Quarmby et al, Notice of Motion re Charter, dated May 6, 2014 (Charter Motion) – Tab 11 at 176-216 (AR, Vol 2).**
> **Quarmby et al, Notice of Constitutional Question, dated May 5, 2014 – Tab 10 at 171-175 (AR, Vol 1).**
> ***Charter*, ss 1, 2(b) – Tab 5-C at 70 (AR, Vol 1).**
> ***NEB Act*, s 55.2 – Tab 5-D at 87 (AR, Vol 1).**
> ***The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 52(1) – Tab 1 at 22-24 (TM).**

21. In effect, the Applicants sought the Board's expansion of both the Ruling on Participation and the List of Issues to include consideration of the Excluded Issues. In the Charter Motion, the Applicants made, *inter alia*, the following requests:

> 4. <u>This Board reopen the Application process, permitting</u>:
>
> i. All applicants, without exception, to write a letter of comment;
> ii. All applicants wishing to submit a letter of comment or to make an application for intervenor status to do so via email, letter or fax;
> iii. All applicants to make a brief oral statement limited to five minutes, with the Board reserving the discretion to extend the time limitation;
> iv. <u>All applicants to be granted intervenor status upon application</u>; and
> v. <u>All applicants to speak freely about climate change, the upstream and</u>

> downstream effects of the Project, and the development of the oil sands. [Emphasis added]
>
> **Charter Motion – Tab 11 at 216-217 (AR, Vol 2).**

22. In the Charter Motion, the Applicants also sought, in the alternative: (i) a declaration that the NEB had interpreted its authority under s. 55.2 in an unconstitutional manner that violates the Applicants' freedom of expression; and, (ii) a review pursuant to s. 21(1) of the NEB Act of the Board's Ruling on Participation and, a declaration that the Board's decisions limiting freedom of expression are unreasonable and contrary to the principles of procedural fairness.

> **Charter Motion – Tab 11 at 176-177 (AR, Vol 2).**

23. The Charter Motion was supported by the affidavit evidence of each of the nine Applicants as well as: Mark Jaccard; Danny Harvey; Marc Lee; Nikki Skuce; and Sven Biggs.

> **Quarmby et al, Affidavits (Affidavits) – Tabs 11-A, B, C, D, E, F, G, H, I, J, K & L (AR, Vol 2).**

(iv) The Ruling

24. On October 2, 2014, the NEB issued the Ruling and concluded, *inter alia*:

> (i) the Board is not persuaded that the Legislation Challenge, the Application Process Challenge, the Participation Ruling Challenge, or the List of Issues Challenge have merit;
>
> (ii) the Board is not persuaded that the Project Hearing's participation limits amount to a "substantial" interference with the Applicants' expressive rights. These limits, as noted above, are no different than those that a prospective intervenor might find in any other administrative or judicial forum. More importantly, they impose no bound on the range of other expression available to the Applicants on the matters they wish to voice at the Board. A "substantial" interference with freedom of expression does not follow simply because the Applicants have been denied their preferred *means* of expression;
>
> (iii) s. 2(b) of the *Charter* is not engaged by Application Process, the Participation Ruling, or the List of Issues determination; and,
>
> (iv) as the Applicants have not established that s. 55(2) of the NEB Act or the Board's actions in the Project Hearing violate the Charter, their requests for declaratory relief, in addition to their request to re-open the Application to Participate process and List of Issues, are denied. [Emphasis added.]

Ruling No. 34 – Tab 3 at 12, 15, 28 & 20 (AR, Vol 1).

(v) Related NEB Ruling

25. On July 23, 2014, the NEB issued Ruling No. 25 ("**Ruling 25**") in response to a Notice of Motion filed on May 16, 2014 by the City of Vancouver ("**Vancouver**") - also for an order expanding the List of Issues to include the environmental and socio-economic effects associated with upstream activities including the development of oil sands crude and the downstream use of the oil transported by the proposed pipeline. The NEB concluded in Ruling 25:

> (a) the NEB has the authority to determine what is relevant to it in fulfilling its mandate under the NEB Act and it does not consider that upstream and downstream effects, including those of GHG emissions, are relevant in the circumstances of this Hearing;
>
> (b) while there is a connection between the NEB's possible recommendation that the Project be approved and upstream production in that the Project would transport a portion of that production, the NEB was not persuaded that the effects from that production are directly linked or necessarily incidental to the NEB's recommendation under the NEB Act;
>
> (c) no particular upstream development is dependent on the Project in that oil sands production has continued to increase during a period when the existing Trans Mountain pipeline has not been able to transport all the oil that shippers were prepared to ship;
>
> (d) oil sands development is subject to provincial and federal environmental assessment processes. Duplication of environmental assessments is discouraged by CEAA 2012; and,
>
> (e) CEAA 2012 does not require the NEB to consider downstream effects from the end-use of oil shipped by the Project; the effects of end use are not directly linked or necessarily incidental to the NEB's regulatory process regarding the Project.

NEB Ruling No. 25, dated July 23, 2014 (Ruling No. 25) – Tab 12-E at 388-389 and 391 (AR, Vol 2).

26. The NEB further concluded that it may consider reasonable regulatory, or market-related evidence as relevant if it demonstrates stability or change that could notably increase or decrease confidence in the Project's long-term supply, markets, and economic feasibility outlooks. The NEB described the economic factors related to supply markets and economic feasibility that it may have regard to under the NEB Act as: (i) the availability of oil…to the pipeline; (ii) the existence of markets, actual or potential; and, (iii) the economic feasibility of the pipeline. The NEB stated

that these factors are directly relevant to the need for, and the continued use of, the Project. In this regard, the information required from project applicants is described in the Filing Manual.

Ruling No. 25 – Tab 12-E at 390 (AR, Vol 2).

27. In Ruling 25, the NEB distinguished between its consideration of regulatory and market related evidence and environmental and socio-economic upstream and downstream effects:

> The Board may consider reasonable regulatory- or market-related evidence as relevant if it demonstrates stability or change that could notably increase or decrease confidence in the application's long-term supply, markets, and economic feasibility outlooks.
>
> However, a full environmental and socio-economic assessment of upstream and downstream effects is not required or relevant. Such an assessment would have to consider effects on all the relevant biophysical and socio-economic elements listed in the Filing Manual for each potential upstream activity and downstream use, including determining the adequacy of mitigation for both upstream production processes and downstream end use. In addition, assessing effects on most of those elements would be dependent on the particular upstream activity or downstream use, which cannot be known. This would go well beyond the evidence and argument directly relevant to supply, markets, and economic feasibility. [Emphasis added.]

Ruling No. 25 – Tab 12-E at 390-391 (AR, Vol 2).

28. The NEB also concluded in Ruling 25 that it has the authority to determine what is relevant in fulfilling its mandate under the NEB Act. It concluded that upstream and downstream effects are not relevant.

Ruling No. 25 – Tab 12-E at 391 (AR, Vol 2).

(vi) Applicants' FCA Leave Application Dismissed with Costs

29. The test for leave to appeal to the FCA from a decision of the Board is well-settled: the Applicants must demonstrate an arguable case that the specific Board order or decision contains a material error of law or jurisdiction. The Applicants allege substantially the same three errors of law in this Leave Application as were alleged to be errors of law and jurisdiction in the FCA Leave Application.[1]

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[1] The Applicants alleged in the FCA Leave Application that the Board erred in: (1) finding that s. 55.2 of the NEB Act does not breach s. 2(b) of the *Charter*; (2) finding that its interpretation and application of s. 55.2 of the NEB Act was reasonable and consistent with *Charter* values; and, (3) failing to conduct a justification analysis of the legislation under s. 1 of the *Charter*.

***NEB Act*, s 22(1) – Tab 5-D at 69 (AR, Vol 1).**
***Federal Courts Rules*, SOR/98-106, Rule 352 – Tab 1 at 25-28 (TM).**

30. In response to the FCA Leave Application, Trans Mountain argued that the impugned Board Ruling contained no error of law or jurisdiction. Trans Mountain further argued that, in the Ruling the Board applied both the correct legal test *Baier v Alberta* and the alternative legal test *City of Montreal v 2952-1366 Québec Inc*. in determining that s. 2(b) of the *Charter* was not infringed by s. 55.2.

***Baier v Alberta*, 2007 SCC 31 [*Baier*].**
***City of Montreal v 2952-1366 Québec Inc*, 2005 SCC 62 [*City of Montreal*].**
***NEB Act*, s 55.2 – Tab 5-D at 87 (AR, Vol 1).**

31. In an Order dated January 23, 2015, a Panel of Justices Nadon, Ryer and Webb dismissed the FCA Leave Application with costs. Implicit in this Order was the Panel's determination that the test for leave to appeal to the FCA was not met. In a related Order on the same date, Webb J.A. also dismissed the Applicants' Motion to file the reply affidavit of Dianne Kaiser affirmed November 28, 2014 (the "**Reply Affidavit**") with costs. The Reply Affidavit primarily concerned evidence regarding: (i) the International Panel on Climate Change report released in November 2014; and (ii) climate change from the governments of Ontario and Quebec, in the form of newspaper articles.

FCA Leave Order – Tab 4 at 22-23 (AR, Vol 1).
Order of the FCA Dismissing Reply Affidavit of Dianne Kaiser, Court File No 14-A-62, dated January 23, 2015 – Tab 2-B at 43-50 (TM).

(i) Related Federal Court of Appeal Reasons

32. On October 16, 2014, the FCA issued an Order dismissing (with costs) the application by Vancouver seeking leave to appeal from NEB Ruling 25.

Order of the FCA Dismissing City of Vancouver Leave to Appeal Ruling No. 25, Court File No 14-A-55, dated October 16, 2014 – Tab 2-C at 51 (TM).

33. On October 24, 2014, the FCA issued an Order dismissing (with costs) the application by L.D. Danny Harvey ("**Harvey**") seeking leave to appeal from NEB Ruling No. 29 ("**Ruling 29**") related to the Project Hearing. Ruling 29 was issued by the NEB on August 19, 2014 in response to Harvey's August 12, 2014 Motion for an order expanding the List of Issues to include the

environmental and socio-economic effects associated with upstream activities, oil sands development, or downstream use of the oil.

Order of the FCA Dismissing Danny Harvey Leave to Appeal Ruling No. 29, Court File No 14-A-59, dated October 24, 2014 – Tab 2-D at 52-53 (TM). NEB Ruling No. 29, dated August 19, 2014 – Tab 2-E at 54-57 (TM).

34. On October 31, 2014, the FCA issued Reasons for Judgment in *Forest Ethics Advocacy Association v The National Energy Board* (the "**Line 9B Reasons**") in response to an application (the "**Line 9B Application**") by Forest Ethics and Donna Sinclair (the "**Line 9B Applicants**") for judicial review of three interlocutory decisions of the NEB in relation to the Enbridge Pipelines Inc. Line 9B Reversal and Line 9 Capacity Expansion Project ("**Line 9B Project**").

***Forest Ethics Advocacy Association v The National Energy Board*, 2014 FCA 245 [*Forest Ethics*].**

35. The Line 9B Applicants challenged virtually identical interlocutory decisions of the Board concerning the Line 9B Project in the Line 9B Application as are at issue in this Leave Application: (i) the process to determine participation rights under s. 55.2 for the Line 9B Project hearing; (ii) the inclusion and exclusion of certain issues, and specifically the Board's determination that certain issues (including climate change) were irrelevant for the purposes of the Line 9B Project hearing; and, (iii) the decision to deny Ms. Sinclair (who is not an Applicant in this Leave Application) participation in the Line 9B Project hearing.

***Forest Ethics* at ¶¶ 7-18.**

36. The Line 9B Applicants challenged these three interlocutory decisions of the NEB on the basis of the constitutional guarantee of the freedom of expression in s. 2(b) of the *Charter*, and administrative law unreasonableness. The Line 9B Applicants requested a declaration that s. 55.2, the NEB's ATP process and the ATP form unjustifiably violate s. 2(b) of the *Charter*.

***Forest Ethics* at ¶¶ 7-18.**

37. In the Line 9B Reasons, the FCA dismissed the Line 9B Application with costs to the respondents and concluded the three interlocutory decisions of the Board were reasonable, offering detailed reasons.

PART II. QUESTION IN ISSUE

38. There is one question at issue: should leave to appeal be granted?

39. In order to achieve leave in the circumstances, the Applicants must meet the test established by statute, namely that the proposed appeal raises issues of public importance. Where an appellate court has already denied leave to appeal in respect of the same issue, leave to appeal to the SCC will be granted sparingly, and only if there is a risk that a question of major constitutional importance might otherwise escape the possibility of review by this Court.

> ***Supreme Court Act*, s 40(1).**
> ***MacDonald v City of Montreal,* [1986] 1 SCR 460 at 503-504 [*MacDonald*].**
> ***R v M(SH)*, [1989] 2 SCR 446 at 457-458.**

40. The consideration by this Court of questions of law of national importance serves the interest of promoting uniformity in the application of the law across the country, especially with respect to matters of federal competence. As such, the SCC is designed to serve not the private interests of dissatisfied litigants but the community's interest in obtaining an authoritative settlement of questions of law of importance to the whole nation.

> ***R v Gardiner*, [1982] 2 SCR 368 at 397.**
> **Peter H. Russell, "The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform" (1968), 6 Osgoode Hall LJ 1 at 28-29.**

PART III. ARGUMENT

A. Introduction

41. The Applicants allege three issues of public importance in relation to the Ruling:

> **Issue 1:**
>
> The National Energy Board erred in finding that s. 55.2 of the NEB Act does not breach s. 2(b) of the *Charter*.
>
> **Issue 2:**
>
> The National Energy Board erred in finding that its interpretation and application of s. 55.2 of the NEB Act was reasonable and consistent with *Charter* values.
>
> **Issue 3:**
>
> The National Energy 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,

(collectively, as previously defined, the "**Leave Issues**").

Applicants' Memorandum of Argument, dated March 19, 2015 (Applicants' Argument) – Tab 5 at 33 (AR, Vol 1).

42. It is submitted that none of the three Leave Issues raise matters of national or public importance such that leave to appeal to this Court ought to be granted.

B. No Errors in the FCA Decision

43. Significantly, the Applicants do not argue that the FCA decision denying leave raises issues of national importance. The FCA applied the unique test for leave to appeal a decision or order of the Board and determined that the Applicants did not meet the leave test.

44. Deference is owed to an appeal court decision rendered in the exercise of the discretionary power to control its own docket, as was the case here. Although this Court has jurisdiction to hear an appeal where leave to appeal has been denied by the court below, such jurisdiction is to be exercised sparingly. Leave ought not to be granted on the basis of an error in the leave decision of the appeal court unless there is a risk that a question of major constitutional importance might otherwise be put beyond the possibility of review by the Court. That is simply not the case here.

***MacDonald* at 503-504, 507.**
***Ernewein v Canada (Minister of Employment & Immigration)*, [1980] 1 SCR 639 at 668, Wilson J. dissenting [*Ernewein*].**
***Roberge v Bolduc*, [1991] 1 SCR 374 at 376.**

45. The FCA has been legislatively empowered with the jurisdiction and expertise to consider leave applications from any decision or order of the Board. As then Chief Justice Laskin stated in *Ernewein v Canada (Minister of Employment & Immigration)*: "There are so many considerations that enter into a refusal to give leave as to make the matter one peculiarly for the experienced judgment of the Court from which leave is sought."

***MacDonald* at 507.**
***Ernewein* at 646-647.**

46. That the FCA offered no reasons in dismissing the FCA Leave Application is irrelevant to this Leave Application. Although the FCA in practice rarely issues reasons in dismissing leave, in the Line 9B Reasons it issued lengthy written reasons in dismissing a near-identical leave to appeal

application made by nearly all of the Applicants on virtually the same substantive interlocutory decisions of the NEB.

***Forest Ethics*.**

47. The Applicants allege no judicial errors of the FCA. Further, there is no suggestion that the leave procedure of the FCA requires correction. This in itself should be determinative of this Leave Application.

C. The Ruling was an Interlocutory Decision of the Board

48. The Ruling was an interlocutory decision of the Board. It is rarely appropriate to grant leave on interlocutory issues.

49. The NEB's administrative process should be respected. Pursuant to s. 21(1) of the NEB Act, the Board may review, vary or rescind any decision or order made by it or rehear any application before deciding it. The Applicants had the opportunity to exhaust the administrative process with the NEB and request that the Board review or rehear the Ruling, but chose not to avail themselves of that process.

***NEB Act*, s 21(1) – Tab 1 at 29-31 (TM).**

D. Issues 1 and 2: Neither s. 55.2 on its face, nor the Board's interpretation of s. 55.2, raise issues of national importance or a major constitutional question

(i) The Relevant Law is Well-Settled

50. The law governing the protection of freedom of expression rights under s. 2(b) of the *Charter* is settled and has already been addressed by this Court. As such, the NEB's interpretation of s. 2(b) in the Ruling is not a matter of public importance.

51. In the Ruling, the Board applied the appropriate legal tests and considered the relevant facts, including the following: (a) the Applicants' Charter Motion raised a "positive rights" claim; (b) as such, the test from *Baier* applied to the Charter Motion; (c) the case of *Greater Vancouver Transportation Authority* cited by the Applicants was distinguishable on the facts; (d) the Board had already issued the related Ruling 25 on motions to amend the List of Issues; (e) in the alternative, the Board considered and applied the *City of Montreal* test to the Charter Motion; and,

(f) on the application of both the *Baier* test and the alternative *City of Montreal* test, the Board found no s. 2(b) *Charter* violation.

Applicants' Argument – Tab 5 at 34 (AR, Vol 1).

(ii) The Ruling is Consistent with Settled Jurisprudence

52. In the Ruling, the NEB considered and applied both the relevant legal test from *Baier* and the alternative legal test from *City of Montreal*. There is no conflicting jurisprudence to be reconciled by this Court. Contrary to the Applicants' assertions, the Ruling does not "gravely undermine" the s. 2(b) guarantee of free expression, nor broaden the application of a positive rights framework far beyond the existing jurisprudence. The Ruling is entirely consistent with settled jurisprudence on freedom of expression rights protected under s. 2(b) of the *Charter*.

***Charter*, s 2(b) – Tab 5-C at 70 (AR, Vol 1).**
Applicants' Argument – Tab 5 at 32 (AR, Vol 1).

(iii) There is Nothing to Suggest that Tribunals or Courts are Improperly Applying the Tests in Baier or City of Montreal

53. There is no evidence to suggest that the NEB or other tribunals have improperly applied the tests in *Baier* or *City of Montreal*. However, even if that were the case, it would not warrant an appeal to this Court. Where the law is settled, leave to appeal to the SCC should not be granted where a lower court has failed to follow the law, unless the misapplication of the law has become widespread.

Speech delivered by the late Justice John Sopinka on April 10, 1997, in Toronto, reproduced with his permission in Henry S Brown, *Supreme Court of Canada Practice* (Toronto: Carswell, 2015) at 567.

(iv) These are Not Issues of Public Importance

54. Although upstream and downstream issues including climate change are the subject of significant public and media attention, these facts do not point to an automatic leave to appeal to this Court. There is no matter of public or national importance in the Leave Application that must be addressed by this Court.

55. Neither is there any social cost in not granting the Leave Application. There is no evidence to support the Applicants' assertion that the history of the 2012 amendments to the NEB Act, and

specifically to s. 55.2, are "tainted by the improper legislative purpose of suppressing public participation in the review process". There is no "stifling effect". On the contrary, the public (including many of the Applicants) is actively participating in the Project's review process in a meaningful way.

> ***Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 362.**
> **Applicants' Argument – Tab 5 at 38 (AR, Vol 1).**

56. Nor is there any evidence to suggest that the Ruling is "glaringly inconsistent with [the Board's] legislative mandate, its history and its actual function as a federal authority charged with the responsibility of holding public hearings in the public interest". Both the List of Issues decision and the Ruling are consistent with the Board's mandate under CEAA 2012 and the NEB Act. Project approval [by the Board] is *not* "pre-ordained", as the Applicants suggest.

> **Applicants' Argument – Tab 5 at 33-34 (AR, Vol 1).**

E. Issue 3: There is no legal requirement to conduct an alternative s. 1 justification analysis

57. The Applicants advanced no authority for the argument that the NEB erred in law by not conducting either an alternative s. 1 *Charter* analysis or a *Doré* analysis. There is no merit to the this argument. After conducting both the *Baier* analysis and the alternative *City of Montreal* analysis (advocated for by the Applicants), the Board concluded that there was no s. 2(b) *Charter* violation.

> ***Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].**
> ***Charter*, s 2(b) – Tab 5-C at 70 (AR, Vol 1).**

58. A s. 1 justification analysis is not required where, as here, the Board found no *Charter* breach. An alternative-alternative analysis is not a legal requirement:

> The first stage of the judicial review is to determine whether the challenged law derogates from a Charter right. If it does not, then the review is at an end: the law must be upheld. But if the law is held to derogate from a Charter right, then the review moves to the second stage. The second stage is to determine whether the law is justified under s. 1 as a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society. [Emphasis added.]
>
> **Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf (consulted on April 13, 2015), (Toronto, Ont: Carswell, 2007), ch 36 at 36-13.**

59. The Applicants' argument also mischaracterizes *Doré* as requiring the Board to conduct a reasonableness analysis despite the fact that the Board concluded there was no s. 2(b) infringement. Having conducted both the relevant *Baier* analysis and alternative *City of Montreal* analysis, and determined the Applicants' *Charter* rights were not affected, the Board was not required to also conduct a reasonableness analysis.

> ***Doré* at ¶6-7.**

60. The Board was not required to conduct either a *Doré* analysis or a s. 1 justification analysis; there is no error in law by not doing so.

F. Inadmissible Opinion Evidence

61. In support of its Leave Application, the Applicants filed thirteen affidavits attaching numerous articles and correspondence totalling 208 pages of material ("**Affidavit Evidence**"). Affiants include: employees of Forest Ethics; a science professor; a science instructor; and a paralegal with the law firm of Applicants' counsel. Among other things, the Affidavit Evidence contains the opinions of the affiants as to, *inter alia*, the Ruling, the FCA decision, other Canadian jurisprudence and regulatory proceedings, the Board's impartiality, and the public importance of the issues in this case (the "**Opinion Evidence**"). The Opinion Evidence also attaches largely irrelevant information that does not address the question of national importance, and contains statements that are speculative and hearsay.

> **Quarmby et al, Affidavits (Affidavits) – Tabs 11-A, B, C, D, E, F, G, H, I, J, K & L (AR, Vol 2).**
> **Applicants' Exhibits – Tabs 12-A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, & S (AR, Vol 2).**

62. In order for supplementary evidence to be admissible in a leave application, it must be relevant. Where affidavit evidence contains that which can be set out in written argument, it is not admissible.

> ***Schmeiser, et al v Monsanto Canada Inc, et al* (March 27, 2003), Doc. 29437.**
> ***KPMG v Montreal Trust Company of Canada* (June 29, 2000), Doc. 27959.**

63. Trans Mountain respectfully submits that the Opinion Evidence is improper and does not assist this Court in determining whether the legal issues before it are of national or public

importance. As such the Opinion Evidence should be disregarded as inadmissible or attributed little weight.

PART IV. COSTS

64. Costs should follow the event.

PART V. ORDERS SOUGHT (INCLUDING COSTS)

65. Trans Mountain respectfully requests that the Leave Application be dismissed with costs.

Dated at Calgary, in the Province of Alberta, this 22nd day of April, 2015.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Maureen Killoran, Q.C. Counsel for the Respondent, Trans Mountain Pipeline ULC	Heather A. Robertson Counsel for the Respondent, Trans Mountain Pipeline ULC

PART VI. TABLE OF AUTHORITIES

		Location (Paragraph/Page)
1.	*Baier v Alberta*, 2007 SCC 31, [2007] 2 SCR 673	Para. 30/ Page 10 Para. 51/ Page 14 Para. 52/ Page 15 Para. 53/ Page 15 Para. 57/ Page 16 Para. 59/ Page 17
2.	*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, [1989] SCJ No 14	Para. 55/ Page 16
3.	*City of Montreal v 2952-1366 Québec Inc*, 2005 SCC 62, [2005] 3 SCR 141	Para. 30/ Page 10 Para. 51/ Page 14 Para. 52/ Page 15 Para. 53/ Page 15 Para. 57/ Page 16 Para. 59/ Page 17
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5.	*Ernewein v Canada (Minister of Employment & Immigration)*, [1980] 1 SCR 639, 103 DLR (3d) 1	Para. 44/ Page 13 Para. 45/ Page 13
6.	*Forest Ethics Advocacy Association v The National Energy Board*, 2014 FCA 245, 465 NR 152	Para. 34/ Page 11 Para. 35/ Page 11 Para. 36/ Page 11 Para. 46/ Page 14
7.	*KPMG v Montreal Trust Company of Canada* (June 29, 2000), Doc. 27959	Para. 62/ Page 17
8.	*MacDonald v Montreal (City)*, [1986] 1 SCR 460, 27 DLR (4th) 321	Para. 39/ Page 12 Para. 44/ Page 13 Para. 45/ Page 13
9.	*R v Gardiner*, [1982] 2 SCR 368, [1982] SCJ No 71	Para. 40/ Page 12
10.	*R v M(SH)*, [1989] 2 SCR 446, [1989] SCJ No 93	Para. 39/ Page 12

11.	*Roberge v Bolduc*, [1991] 1 SCR 374, [1991] SCJ No 15	Para. 44/ Page 13
12.	*Schmeiser, et al v Monsanto Canada Inc, et al* (March 27, 2003), Doc. 29437	Para. 62/ Page 17
13.	Peter H. Russell, "The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform" (1968), 6 Osgoode Hall LJ 1.	Para. 40/ Page 12
14.	Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf (consulted on April 13, 2015), (Toronto, Ont: Carswell, 2007), ch 36.	Para. 58/ Page 16
15.	Speech delivered by the late Justice John Sopinka on April 10, 1997, in Toronto, reproduced with his permission in Henry S Brown, *Supreme Court of Canada Practice* (Toronto: Carswell, 2015).	Para. 53/ Page 15

PART VII. LEGISLATION

A.	*The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK),* 1982, c 11, s 52(1)
B.	*Federal Courts Rules,* SOR/98-106, Rule 352
C.	*National Energy Board Act, RSC 1985,* c N-7, s 21(1)