No. VLC-S-S-183541
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TRANS MOUNTAIN PIPELINE LLC

Plaintiff

AND:

DAVID MIVASAIR, BINA SALIMATH, MIA NISSEN, COREY SKINNER (AKA CORY SKINNER), UNI URCHIN (AKA JEAN ESCUETA), ARTHUR BROCINER (AKA ARTUR BROCINER), KARL PERRIN, YVON RAQUL, EARLE PEACH, SANDRA ANG, REUBEN GARBANZO (AKA ROBERT ARBESS), GORDON CORNWALL, THOMAS CHAN, LAUREL DYKSTRA, RUDI LEIBIK (AKA RUTH LEIBIK), JOHN DOE, JANE DOE, AND PERSONS UNKNOWN

Defendants

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

Intervenor /Respondent

NOTICE OF APPLICATION & *CHARTER* NOTICE

PURSUANT TO SECTIONS 7 & 24(1) OF THE *CHARTER*

Names of Applicants: David A. Gooderham & Jennifer Nathan

To: The Attorney General of British Columbia

TAKE NOTICE that an application will be made by the Applicants to the Honourable Mr. Justice Affleck at the Courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on **Monday, December 3, 2018 at 10:00 a.m.** for the orders set out in Part 1 below.

Part 1: THE ORDER OR ORDERS SOUGHT:

1. In light of this Court's ruling in *Trans Mountain Pipeline ULC v. David Mivisair,* 2018 BCSC 874 relevant to Thomas Sandborn on May 10, 2018 and your Lordship's further ruling in the case as against Mr. Charles Coleman on June 13, 2018, wherein

your Lordship held that you would not consider any other defences of necessity, the Applicants seek the following orders:

a. Leave of this Honourable Court to raise the defence of necessity as part of the Applicant's defence to their charges of criminal contempt the Order of this Honourable Court of June 1, 2018, and in particular:

   i. To call evidence concerning the growth of oil sands production in Canada to 2030 and the projected increase of CO_2 and other greenhouse gas (GHG) emissions accompanying that growth; the significance of the Trans Mountain Expansion project in facilitating that growth; and related evidence about whether the resulting increase in oil sands emissions is consistent with Canada meeting its 2030 reduction target;

   ii. Evidence concerning whether Canada's projected expansion of oil sands production to 2030 and 2040 is consistent with keeping global average surface warming below the 2°C threshold;

   iii. Evidence concerning the Trans Mountain Expansion approval process, including the (i) National Energy Board (NEB) inquiry report May 19, 2016 recommending approval of the project, (ii) the Trans Mountain upstream emissions assessment report dated November 25, 2016, and (iii) the Ministerial Panel report November 1, 2016, showing that prior to the Order in Council authorizing the project of November 29, 2016, no public inquiry process addressed or answered questions about whether the growth of oil sands emissions to 2030 can be consistent with meeting Canada's commitments under the Paris Agreement or whether the projected expansion of oil sands production to 2040 is consistent with keeping warming well below the 2°C threshold;

iv. Evidence concerning the current level and projected increase of global GHG emissions to 2030, the rising atmospheric carbon concentration level and the relationship between that increase and warming, the current rate of warming, and the impacts of warming and related changes in the earth's climate system, the severity of the impacts that have already occurred and are occurring, and the projected impacts to 2030 and after;

b. A declaration that the Applicants, along with all Canadians, have a fundamental right to a climate system capable of sustaining human life; the state action of the Canadian Government to expand the Trans Mountain Pipeline imperils the Applicants' and all citizens' right to Life, Liberty and Security as protected by section 7 of the *Charter of Rights and Freedoms,* being Part I of the *Constitution Act, 1982,* enacted by the *Canada Act, 1982* (U.K.) c. 11 (hereinafter the "Charter");

c. A remedy pursuant to section 24(1) of the *Charter* staying the prosecution of the Applicants as a breach of process;

d. Such further and other order or orders as counsel may request and this Honourable Court deem just.

Part 2: FACTUAL BASIS:

2. Oil sands production in Canada is projected to expand from 2.5 million barrels per day (bpd) in 2015 to 4.236 million bpd by 2030.[1]

3. On November 29, 2016, the Government of Canada approved the Trans Mountain pipeline expansion project. The project will increase the shipping capacity of an existing

[1] Exhibit "A" to Affidavit of David Anthony Gooderham sworn on November 21, 2018, described as Outline of Proposed Evidence (hereinafter "Outline"): see Introduction at p. 5 and Figure i, and also Part 1, "Oil sands production: evidence of growth to 2030" pages. 5-6; and Outline, Part 9 at paragraph 9.6.

pipeline from 300,000 bpd) to 890,000 bpd, adding 590,000 bpd of new shipping capacity (about 25% of the projected expansion of oil sands production between 2015 and 2040).[2]

4. If Canada continues to expand oil sands production as currently projected, the annual level of greenhouse gas emissions in that industry will be about 44 million tonnes (Mt) higher by 2030 than in 2015.[3]

5. Technological innovation in the oil sands production process will not reduce carbon intensity per barrel sufficiently to offset the currently projected 44 Mt increase in the annual level of oil sands emissions to 2030, above the 2015 level.[4] While Alberta has legislated a "cap" that purports to limit the growth of oil sands emissions to an annual upper limit of 100 Mt, the cap does not cover all of the emissions associated with the expansion of the industry. The cap will do nothing to curb the 44 Mt increase in oil sands emissions that is expected to occur between 2015 and 2030, if production expands as currently projected.[5]

6. The oil and gas sector, including oil sands, is Canada's largest emitting sector, comprising about 26% of the total.[6]

7. In December 2015, Canada became a signatory to the Paris Agreement. Canada agreed to reduce the level of its total annual emissions by 30% below the 2005 level by 2030. The 2005 level was 732 Mt. The commitment is 517 Mt.[7]

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[2] Outline, Part 9 at para. 9.7.

[3] Outline, Part 2, "Oil sands emissions: evidence of growth to 2030", page 6-8, in particular paragraphs. 2.4 - 2.5; Part 5, "Evidence on growth of oil and gas sector emissions to 2030" at para. 5.1 and Figure iii at p. 12.

[4] Outline, Part 3, "Evidence about the capability of technology to reduce oil sands emissions"; and Appendix C at p. 71, "Technology and the carbon intensity of oil sands emission".

[5] Outline, Part 4, "Evidence about Alberta's 100 Mt cap on oil sands emissions," and Appendix D at page 78, "Alberta's 100 Mt oil sands emissions "cap".

[6] Outline, Appendix A at page 65-68 (Figures xiii and xv) show oil and gas sector emissions.

[7] Outline, Appendix B, "The Government of Canada's Commitments", paragraph B.12 at page 70. For Canada's total emissions in 2005, see Figure xiii in Appendix A at page 65.

8. Canada's total annual emissions are currently projected to increase to 728 Mt by 2020. To meet its target, Canada's annual emissions level would have to be cut by 211 Mt during the next decade.[8]

Global emissions, atmospheric carbon, and warming

9. Global mean surface temperature for the decade 2006-2015 was 1.0°C higher than the average between the 1850-1900 period. The dominant cause of the observed warming is emissions caused by fossil fuel burning. Estimated global warming caused by human activity is now increasing at 0.2°C per decade. [IPCC October 7, 2018, SPM A.1; IPCC, 2013, The Physical Science Basis, D.3][9]

10. More than two thirds of the total surface warming has occurred since 1970.

11. The total annual level of emissions released into the atmosphere globally includes both carbon emissions from fossil fuel burning as well as other greenhouse gases (methane, nitrous oxide and others) and also emissions from human activities relating to land use, deforestation, and land use change. In 2016, the annual level of all global emissions is estimated to have reached **53.4 billion tonnes** (Gt) of CO_2eq.[10] The share of the total emissions in 2016 from burning fossil fuels is estimated to have been 36.2 $GtCO_2$, almost 70% of the annual total.[11] The annual level is still increasing.[12]

[8] Outline, Appendix A at page 65 shows Canada's total projected emissions reaching 728 Mt by 2020, based on current policies.

[9] Outline, Part 18 at paragraphs 18.3 and 18.4.

[10] Outline, Part 14, "Evidence about global CO_2 emissions" at paragraph 14.9. The UN *Emissions Gap Report 2017* estimated total GHG emissions in 2016 at a slightly lower figure of 51.9 $GtCO_2$eq. See Part 17, para. 17.17 and Appendix T at page 112.

[11] Outline, Part 14 at paragraph 14.5; also see Part 17 at paragraph 17.17, where the PBL Netherland report gives a slightly lower figure of 35.8 for global CO_2 emissions from fossil fuel burning in 2016. Also see Appendix T, Figure xxiii at page 113.

[12] Outline, Part 14 at paragraphs 14.19 to 14.30.

12. In December 2015, under the terms of the Paris Agreement, Canada and other countries agreed to reduce their emissions. The magnitude of each country's commitment is voluntary. There is no mechanism to impose larger commitments, or to enforce compliance.[13]

13. Under the terms of the Paris Agreement, Canada and 195 other countries also committed to "holding the increase in global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the increase to 1.5°C."[14] Those thresholds reflect the conclusion of the scientific evidence that warming exceeding 1.5°C will have grave impacts on human settlements, livelihoods and on biodiversity and ecosystems, and that the risks of more destructive outcomes markedly increase as warming approaches or exceeds 2°C.

14. A carbon concentration level of 450 parts per million (ppm) correlates with a rise in global surface temperature of 2°C.[15]

15. The conclusion of the scientific evidence is that the rising atmospheric carbon concentration shows a linear relationship with the observed warming of global surface temperature. The carbon concentration level reached an annual average of 405 ppm in 2017, a rise of 2.3 ppm above the previous year.[16] Sixty years ago, it was 315 ppm. The rise in global CO_2 concentration since 2000 is about 20 ppm per decade.[17]

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[13] Outline, Part 17, at paragraph 17.15. Appendix T at T.12 addresses the mechanism for individual parties to review their NDCs and raise their commitments, but the process is voluntary.

[14] Outline, Appendix B at B.12.

[15] Outline, Part 15, "Evidence about the atmospheric carbon concentration level" at paragraph 15.3, and Appendix R, "Climate sensitivity: warming and the level of atmospheric warming"; Part 16 at paragraphs 16.19 to 16.23.

[16] Outline, Part 15, in particular paragraph 15.2 with respect to the atmospheric carbon concentration level recorded in 2017; paragraph 15.4 on the size of the annual increases in recent years; and paragraph 15.9 on the sources of the data.

[17] Outline, Part 15 at paragraph 15.4.

Mitigation and the global emissions gap

16. The UN report concludes that by 2030 global GHG emissions from all human-induced sources must not exceed 41.8 $GtCO_2eq$, if the 2°C target is to be attained with higher than a 66% chance of success.[18]

17. The UN report concludes that even assuming all of the nationally determined contributions (NDCs) made by signatories to the Paris Agreement are fully implemented and achieved over the next decade (including Canada's promised 30% reduction, which represents approximately 0.215 $GtCO_2eq$), total global emissions (51.9 $GtCO_2eq$ in 2016) are projected to rise to **55.2 $GtCO_2eq$** by 2030.[19]

18. Implementation of all the NDCs will not be enough to offset the growth of emissions in other countries which are projected to substantially increase over the next decade and to achieve the deep cuts required to meet the 41.8 $GtCO_2eq$ target.[20]

19. In order to meet the 2030 reduction target (to allow a 66% chance to keep future warming of global average surface temperature within the 2°C threshold), the world's leading economies would have to find an additional 13.5 $GtCO_2eq$ of reductions.[21]

20. The existing NDCs (including Canada's pledge) represent only one-third of the total reductions needed to meet the 2°C reduction target.[22]

21. Oil accounts for 34% of global CO_2 emissions, comprising 12.5 billion tonnes of the total 36.2 billion tonnes ($GtCO_2$) released into the atmosphere in 2016.[23]

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[18] Outline, Part 17, "The global emissions gap and the significance of Canada's commitment", paragraph 17.21.

[19] Outline, Part 17, paragraph 17.19.

[20] Outline, Part 17, paragraph 17.14.

[21] Outline, Part 17, paragraph 17.22.

[22] Outline, Part 17, paragraph 17.14.

[23] Outline, Part 14, "Evidence about global CO_2 emissions", paragraph 14.10.

22. The scientific evidence concludes that if the world is going to keep warming to less than 2°C, global oil consumption must start to decline by 2020. One study, the International Energy Agency's (IEA) 450 Scenario, has concluded that global oil consumption will have to decline from 90.6 million bpd in 2014 to 74.1 million bpd by 2040.[24]

23. The UN report, published November 3, 2017, concludes that full implementation of all existing conditional and unconditional NDCs by 2030 and comparable action after 2030 is consistent with a temperature increase of about 3.2°C by 2100 relative to pre-industrial levels. The report further concludes that if the emissions gap is not closed by 2030, it is extremely unlikely that the goal of keeping warming to well below 2°C can still be reached.[25]

Impacts

24. The impacts to human and ecological systems caused by warming and related change in the earth's climate system are already far advanced, and have accelerated during the past two decades.

25. Warming in the Arctic regions is already 3°C above the preindustrial level, rising an average 1°C per decade since 1990.[26] The result has been melting of permafrost and loss of Arctic sea ice, loss of the historical extent of snow cover, and loss of the earth's albedo, which is the capacity of the earth's surface to reflect solar energy back into the atmosphere. More than two-thirds of surface warming has occurred since 1970. Warming has already increased inland continental average surface temperatures in the

[24] Outline, Part 13, "Global oil consumption to 2040", at paragraphs 13.5 and 13.6; Appendix M, "Global oil consumption and the 2°C limit", and Figure xxii at p. 97.

[25] Outline, Part 17, at paragraphs 17.24 and 17.25.

[26] Outline, Part 18, "Evidence about the consequences of climate change", at paragraph 18.8.

range of 1.5°C, for example in Canada's boreal forests and in South Asia.[27] Observed changes include increased frequency and intensity of heat waves.[28]

26. Between 1901 and 2010, sea level rose by 19 cm (7 ½ inches).[29] The average rise over that period was 1.7 mm per year. The rate has accelerated, rising by an average 3.2 mm per year between 1993 and 2010.[30] The impacts in some coastal regions are already acute in densely populated low-lying agricultural river deltas, in particular the Mekong, in Bangladesh, and the Nile delta, where salinification is degrading and destroying the productivity of agricultural land and flooding is displacing settled populations.[31] About 38% of the observed sea level rise is attributed to thermal expansion of the warming ocean. The balance of the increase in sea level comes from melting ice on land, namely glaciers in the world's mountain ranges, as well as melting of the Greenland and Antarctic ice sheets.[32]

27. Loss of glacier area and mass has already occurred worldwide and is far advanced in some regions. The rate of loss is accelerating. Glacier loss is measured in gigatonnes (Gt) of ice loss. A single gigatonne is equal to one cubic kilometre of freshwater. For the period 2005-2009, the IPCC estimate glacier loss is a range of 166-436 Gt per year. There are 170,000 to 200,000 glaciers on the earth's surface. In the HinduKush-Himalayas and Tibetan Plateau, the majority of glaciers are receding. Over half of the world's population lives in watersheds of major rivers that originate in mountains with glaciers and snow. The Indus, the core water system of Pakistan, is fed in part by glacial melt from the Himalayas. After these sources of glacial melt-water disappear, or when they are greatly reduced, the flow-rate of these rivers will then be limited by the pattern of local precipitation (seasonal rain and in some places seasonal snow at high altitudes). The rivers will then provide little or no runoff during the dry season, especially

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[27] Outline, Part 18, at paragraphs 18.7 and 18.19. **(revise later to check changes in para)**

[28] Outline, Part 18, at paragraph 18.20.

[29] Outline, Part 18, at paragraphs 18.52 to 18.67, "Evidence about sea level rise".

[30] Outline, Part 18, at paragraph 18.52.

[31] Outline, Part 18, at paragraph 18.54.

[32] Outline, Part 18, at paragraphs 18.56 and 18.57.

in arid or semi-arid regions. Assuming global average temperature increase is limited to 1.5°C, about one third of present-day ice mass of glaciers in the high mountains of Asia will be lost by the end of this century. About two thirds will be lost by 2071-2100 if no further effort is made to curb emissions.[33]

28. The recently released IPCC *Special Report on Global Warming to 1.5 degrees C* provides a comprehensive picture of the substantial differences in the outcomes for human and natural systems as warming increases from the current level of 1.0°C to 1.5°C, and the worsening adverse impacts to 2°C. The failure to implement unprecedented measures now to halt the continued growth of global GHG emissions will have marked and significant consequences as warming move above 1.5°C and approaches 2°C. In the case of threatened ecosystems (which support human livelihoods) the risks as we move above 1.5°C are characterized as "high" and become "very high" closer to 2°C. Above 1.5°C, and even as we approach that level, the risk of extreme weather events is characterized as "high". Above 1.0°C all coral reefs are at "high risk" (as they now are), and at 1.5°C virtually all coral reefs will be gone by 2100.[34]

The National Energy Board (NEB)

28. The NEB was charged with conducting the environmental review of the Trans Mountain project. The review commenced in early 2014 and concluded when the NEB released its report on May 19, 2016, recommending that the project be approved.

29. On December 19, 2013, the NEB released a report recommending that the Northern Gateway project be approved. During the Northern Gateway inquiry, the NEB had refused to admit or consider evidence relating to the GHG emissions associated with the expected increase of bitumen production facilitated by that project, and refused to

[33] Outline, Appendix U, "Evidence about glacier loss and the impacts on human settlement", at pages 115-119.

[34] Outline, Part 17 at paragraphs 17.31 and 17.32, and Part 18.

admit scientific evidence about the impact of increased emissions and climate change.[35]

30. On December 18, 2013, the City of Vancouver voted unanimously to intervene in the NEB hearing for the Trans Mountain Project, pursuant to a Council motion stating that one of the specific purposes of the intervention by the City was to seek a ruling that the pipeline inquiry should include an assessment of the emissions implications of the project, including the climate impact of the expansion of oil sands production facilitated by the project.[36]

31. At that time, the rules governing the NEB process barred any right of Canadian citizens, or groups of citizens, to participate in the Trans Mountain inquiry with the right to call evidence and question the merits of the proponent's Project unless they could establish that they were directly affected by the project.

32. Accordingly, the proposed intervention by the City of Vancouver offered a lawful avenue for residents of Vancouver to put forward their concerns that the NEB address the emissions and climate issues, and to do that in a reasoned and informed way by calling evidence on those issues. A large number of Vancouver residents attended the City Council meeting and spoke publicly in the Council Chamber in support of the motion to intervene.[37]

33. On April 2, 2014, when it issued the Hearing Order for the Trans Mountain Project which included the List of Issues, the NEB excluded from the List of Issues the environmental impacts associated with the upstream activities and development of the

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[35] Second Affidavit of David Anthony Gooderham sworn the 21st day of November, 2018, (hereinafter Second Gooderham Affidavit) at paragraphs 31 and 32, and Exhibit "A"

[36] Outline, Part 8, "National Energy Board (NEB) Report (May 19, 2016)", at paragraphs 8.1 to 8.2. Also, Second Gooderham Affidavit at paragraphs 30 to 40.

[37] Second Gooderham Affidavit, at paragraphs 30 to 40.

oil sands, including greenhouse gas emissions. The City of Vancouver applied for an order expanding the List to include those issues.[38]

34. In a ruling on July 23, 2014, the NEB rejected an application by the City of Vancouver to expand the List of Issues, which would have permitted the City and other intervenors to call expert evidence about emissions and climate change.[39] On October 24, 2014, the Federal Court of Appeal dismissed an application by the City of Vancouver for leave to appeal that ruling. On October 11, 2014, following an appeal from a substantially identical ruling concerning a different pipeline project designed to transport bitumen, the Federal Court of Appeal upheld the ruling by the NEB that excluded all evidence relating to climate change and emissions.[40]

35. At that time, public discussion, including intervention by many of Canada's leading energy economists and climate scientists, publicly challenged the prudence of excluding consideration of emissions and climate science from the NEB approval process. On May 26, 2014, three leading scientists from U.B.C. and S.F.U. published an open letter, co-signed by 300 scientists from universities across Canada, with leading American climate scientists, expressing grave concern that the panel in the Northern Gateway case did not look at the increase in global greenhouse gas emissions that would result from the projected expansion of oil sands production.[41]

36. On June 10, 2014, 110 senior scientists and researchers from across North America signed a public statement calling for a moratorium on proceeding with any new infrastructure projects, including pipelines, explaining that the continued expansion of oil sands production would be inconsistent with Canada's commitments to reduce CO_2 emissions. Seven of the signatories, including a leading energy economist and climate scientists knowledgeable about the pace and impact of rising global GHG emissions,

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[38] Outline, Part 8, at paragraph 8.2.

[39] Outline, Part 8, at paragraph 8.2.

[40] Outline, Part 8, at paragraphs 8.4 to 8.6.

[41] Second Gooderham Affidavit, at paragraph 42.

published an article on June 24, 2014, in the journal *Nature*, warning that the existing approval process failed to look at the cumulative impact of resource development projects.[42]

37. However, when the House of Commons on June 19, 2014, debated the Government of Canada's formal approval of the Northern Gateway pipeline, speakers for both of the two main opposition parties opposed the project for various stated reasons but not a single question was raised in the House about the fact that the NEB inquiry had refused to consider evidence about the emissions implications of the project. The subject of emissions and climate change was not mentioned in Parliament.[43]

38. Through the summer and fall of 2015, leading up to the October 19, 2016 Federal election, I participated as a volunteer in door-to-door canvassing in the new created Granville constituency in the City of Vancouver in an attempt to encourage electors to consider climate policy and the position of candidates with respect to reform of the NEB pipeline inquiry process to ensure it would address the emissions implications of proposed pipeline projects.[44]

39. Following the Federal election held in October 2015, the Government of Canada announced on January 27, 2016, what it described as "interim measures for Pipeline Reviews". The new government declared that the ongoing NEB inquiries into the Trans Mountain, Line 3, and Energy East pipeline projects would continue unchanged. In the case of the Trans Mountain expansion, the creation of a new process was announced that would "assess the upstream greenhouse gas emissions associated with this project and make this information public".[45]

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[42] Second Gooderham Affidavit, at paragraph 43

[43] Second Gooderham Affidavit at paragraphs 44 and 45.

[44] Second Gooderham Affidavit at paragraph 47.

[45] Outline, Part 9, at paragraph 9.1.

40. On March 19, 2016, the Government of Canada published a notice containing details of the new emissions assessment procedure. The notice stated that the assessment would include "a discussion of the project's potential impact on Canadian and global emissions". The new process was officially called the *Review of Related Greenhouse Gas Emissions Estimates for the Trans Mountain Expansion project* (hereinafter the "upstream emissions review").[46]

41. However, the methodology governing the emissions assessment set out in the March 18, 2016 notice did not require that the review assess the potential impact of *the expected expansion of oil sands production to 2040* on Canadian and global emissions. The upstream emissions assessment was not mandated to determine whether the projected growth of oil sands production, which would provide the economic rationale for the proposed pipeline project, could be consistent with Canada's emissions reduction commitments.[47]

42. When the NEB issued its report on May 19, 2016, recommending approval of the Trans Mountain Project, the document did not consider the emissions implications of expanding oil sands production and excluded any discussion of the impact of emissions on the climate system.[48]

Upstream emissions review

43. The draft report for the upstream emissions review was also released on May 19, 2016, two months after the public notice describing the process and methodology.

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[46] Outline, Part 9, at paragraph 9.2.

[47] Outline, Appendix G, "The methodology (Canada Gazette, March 19, 2016)", at page 82. The proposed evidence on how the Trans Mountain upstream emissions assessment dealt with the projected increase of oil sands emissions to 2030 is found in the Outline Part 9, at paragraphs 9.8 to 9.21, and at 9.22 to 9.27. Also, Second Gooderham Affidavit at paragraphs 50-56. The March 19, 2016 notice entitled "Estimating upstream GHG emissions" will be put in evidence at trial, and is attached as Exhibit "B" to the Second Gooderham Affidavit.

[48] Outline, Part 8.

44. The draft document reported that the oil sands production would increase from the 2014 level of 2.4 million bpd to 4.8 million bpd by 2040 – a doubling of production over the next twenty-five years.[49] That projected growth was lowered to 4.3 million bpd in the final report released on November 25, 2016. The draft report found that the volume of new production accounted for by the expanded capacity of the Trans Mountain pipeline would add 13.5 to 17 Mt of new emissions to Canada's annual total, lowered to 13 Mt to 15 Mt in the final report (which would represent a 20% increase in total oil sands emissions above annual level in 2016.)[50]

45. The March 19, 2016 draft upstream emissions report did not consider, and did not answer whether that proposed expansion of oil sands production, and the oil sands emissions growth associated with the Trans Mountain project, was consistent with Canada's commitment under the Paris Agreement. The report did not address the impact of the pipeline project on Canada's cumulative emissions.[51]

46. The draft report also failed to answer whether the proposed expansion of oil sands production to 2040 was consistent with Canada's commitment to holding the increase in global average temperature to well below 2°C. The draft report concluded that it was "unclear" whether the projected growth of oil sands production could be economically viable in a world that was committed to keep warming below 2°C.[52]

47. The upstream emissions review was not a public inquiry. There was no public or media access. There was no record of its deliberations, or of the identity of the persons who wrote the documents, or with whom they discussed the evidence and their findings. There was no opportunity for citizens, or groups of citizens, to call evidence or to cross-

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[49] Outline, Part 9, at paragraph 9.6. The final report released on November 25, 2016, lowered estimated oil sands production by 2040 to 4.3 million bpd. With respect to changes made to projections of oil sands growth during 2016 and the sources of those revisions, see Part I, "Oil sands production: evidence of growth to 2030". For a more detailed outline of oil sands production estimates to 2030 and the sources, see Appendix D at page 78.

[50] Outline, Part 9, at paragraph 9.8.

[51] Outline, Part 9, at paragraphs 9.8 to 9.21; also 9.22 to 9.27 and Appendix G.

[52] Outline, Part 13, "Global oil consumption to 2040", and Appendices M and N, in particular Appendix N at N.2, N.3, and N.4. Also see Appendix P.

examine or otherwise question the information adopted by the report. The notice published March 19, 2016, stipulated that "only publicly available data provided by the proponent (the owner of the pipeline) will be used". Because it was not a juridical process, there was no opportunity for a citizen, or a group of citizens, to challenge the findings of the draft report, or challenge the methodology.[53]

48. After the draft report was published on May 19, 2016, citizens were permitted to send written comments about the report by email to the office of Environment and Climate Change Canada.

49. The final version of the upstream emissions report was released publicly on November 25, 2016. The only significant change from the draft report was that the increased in Canada's annual emissions attributed to the project was slightly reduced, to a range of 13 Mt to 15 Mt, and the projected growth of oil sands production to 2040 was lowered to 4.3 million bpd, instead of 4.8 million bpd given in the draft report.[54]

50. The upstream emissions assessment report did not answer either of the key questions that are essential to determining whether the projected expansion of oil sands production to 2030 and 2040, which provides the economic rationale for the Trans Mountain project, can be consistent with Canada's commitments under the Paris Agreement.

The Ministerial Panel

51. The Ministerial Panel on the Trans Mountain Pipeline was appointed in May 2016. The Panel's mandate was to listen to members of the public at a series of public meeting in Alberta and British Columbia, at which citizens could attend and express their support for the project, or express concerns about what issues and evidence had been overlooked or inadequately dealt with during previous processes. The Ministerial Panel

[53] Outline, Part 9, at paragraphs 9.28 to 9.32.

[54] Outline, Part 9, at paragraph 9.4.

had no powers to make findings or draw conclusions based on evidence. The Panel had no power to make recommendations to the government.[55]

52. The Panel conducted a number of public meetings in British Columbia, including a meeting in Vancouver on August 17, 2016. The Panel's report was delivered to the government and was publicly released on November 1, 2016.[56]

53. In its report, the Panel acknowledged that its role was not to propose solutions, but to identify important questions that remain unanswered. The Panel stated this question: "Can construction of the Trans Mountain Pipeline be reconciled with Canada's climate change commitment?" (Ministerial Panel Report, November 1, 2016, page 46). The Panel described this as a "high-level question" and concluded that it "remains unanswered".[57]

Political activity to avoid the peril

54. During the past six years**,** the applicant, Gooderham, has exhaustively pursued avenues of political activity to encourage, persuade, and induce the Government of Canada to reconsider its plans to approve new pipeline capacity that will facilitate substantial expansion oil sands production to 2040, because of his grave concern about the emissions implications of the proposed expansion.

55. To that end, starting in 2013 and through to November 2016 and after, he has made written and oral submissions to public bodies and to Members of Parliament and others, calling on the Federal government to conduct an independent and public inquiry to assess whether the projected increase in oil sands emissions to 2030 is compatible with Canada's commitment to reduce its total GHG emissions, and to determine

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[55] Outline, Part 10, "The Ministerial Panel on the Trans Mountain Pipeline (November 1, 2016)", at page 26. The Panel's full report will be produced in evidence at trial. Also, Appendix O, "The Ministerial Panel and the 2°C limit," at page 101.

[56] Second Gooderham Affidavit, at paragraphs 71 to 75.

[57] Outline, Part 10, at paragraphs 10.3 and 10.4.

whether the projected growth of oil sands production to 2040 is consistent with Canada's commitment to keep the increase of average global surface warming to less than 2°C, as Canada agreed to do under the Cancun Agreements in December 2010 and under the Paris Agreement of December 2015.[58]

56. Gooderham, together with other citizens, made an oral submission to Vancouver City Council on December 18, 2013, urging elected Councillors to support a motion authorizing the City of Vancouver to intervene in the pending NEB inquiry for the Trans Mountain expansion project with the express purpose that the City would apply as an intervenor to ensure that the NEB inquiry would consider the upstream emissions associated with the planned expansion, the impact of that expansion on Canada's cumulative emissions, and related issues based on climate science.[59]

57. The NEB inquiry rejected the City of Vancouver's application to include upstream emissions and climate in the List of Issues.[60]

58. After examining the draft upstream emissions assessment report for the Trans Mountain expansion released May 19, 2016, Gooderham filed a detailed written submission with Environment Canada on June 20, 2016. The submission pointed out that the draft report had failed to answer core questions about whether the projected expansion of oil sands emissions facilitated by the proposed pipeline could be reconciled with Canada's emissions reduction commitments for 2030, and also that the report had failed to determine if the planned expansion of oil production to 2040 was consistent with Canada's commitment to keep warming well below 2°C.[61]

59. On August 17, 2016, Gooderham made an oral submission to a public meeting in Vancouver held by the Ministerial Panel, and delivered to the Panel a written report

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[58] Second Gooderham Affidavit, at paragraphs 30 to 93.

[59] Second Gooderham Affidavit, at paragraphs 35 to 40.

[60] Outline, Part 8, at paragraphs 8.2 to 8.8.

[61] Second Gooderham Affidavit, at paragraphs 49 to 56 and 62 to 70, and Exhibit "C" (extracts from Submission to Trans Mountain emissions assessment, June 20, 2016).

containing an analysis of the emissions implications of the proposed expansion of Alberta's oil sands production, the impacts of projected oil sands emissions growth to 2030 on Canada's chances of meeting its emissions reduction target under the Paris Agreement, and an analysis of the draft upstream emissions assessment report demonstrating that the May 19, 2016 document had failed to answer whether the Trans Mountain project was consistent with Canada's emissions reduction commitments.[62]

60. Through September and October 2016, Gooderham wrote individually to elected Members of Parliament in the Vancouver region, forwarding to them his written analysis of the Trans Mountain upstream emissions assessment, and urging them to reconsider the proposed pipeline project, in view of the very serious emissions implications of the project, and the fatal omissions of the upstream emissions report to provide answers to the important questions.[63]

61. Through September and October 2016, Gooderham raised his concerns about the adequacy of the emissions review process directly with his own Member of Parliament by letter, and at a public meeting on September 7, 2016.[64]

62. On November 1, 2016, the Ministerial Panel's report was publicly released. The Panel's report quoted substantial portions of Gooderham's August 17, 2016 submission, and affirmed that the question "remains unanswered" whether the project could be reconciled with Canada's climate change commitments.[65]

63. The Trans Mountain Project was authorized by Order in Council, dated November 29, 2016.[66]

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[62] Second Gooderham Affidavit, at paragraphs 71 to 75, and Exhibit "D" (Submission to Ministerial Panel, August 31, 2016).

[63] Second Gooderham Affidavit, at paragraph 93.

[64] Second Gooderham Affidavit, at paragraphs 76 to 93.

[65] Outline, Part 10, at paragraph 10.5.

[66] Outline, Part 11, "The Order in Council (November 29, 2016)".

Political activity subsequent to November 29, 2016

64. Over a period of twenty months after the approval of the Trans Mountain project, the applicant, Gooderham, continued his political efforts to persuade the Government of Canada to reconsider proceeding with the project.

65. Gooderham's principal political activity during this twenty-month period between November 2016 and July 2018 was preparing and sending carefully researched papers to elected Members of Parliament, including to his own Member of Parliament, Joyce Murray, and to several Members of the B.C. Legislature, including to his own MLA, David Eby, and to other individuals who might be in a position to influence the course of the public discussion.

66. On December 9, 2016, ten days after authorizing the construction of the Trans Mountain Project, the Government of Canada released the *Pan-Canadian Framework on Climate Change*, described as a "national climate plane." The published document purported to show how Canada's total emissions could be reduced to 523 Mt by 2030, to meet the Paris Agreement emissions reduction commitment. The applicant, Gooderham, carefully examined the published document. He subsequently also examined the updated version of the *Pan-Canadian Framework* that was published a year later, on December 29, 2017, when the government's promised future reductions under that plan, in revised form, were included in new report called *Canada's 3rd Biennial Report*.[67]

67. Based on his examination of the government's promised future emissions reduction policies contained in the *Framework* document and the updated version released on December 29, 2017, and taking into account his understanding of the existing constraints on achieving rapid emissions cuts in the Canadian economy, particularly with projected substantial growth in oil sands emissions, Gooderham concluded that

[67] Outline, Part 12, "Pan-Canadian Framework on Climate Change (December 9, 2016)", at pages 30 to 35; also, Appendix I.

the *Pan Canadian Framework* offered no reasonable assurance, or no assurance at all, that Canada would be able to meet its 2030 emission reduction target.[68]

68. On March 27, 2018, the Auditor General of Canada in collaboration with the auditors general of all ten provinces (except Quebec) issued a joint report entitled *Perspectives on Climate Change in Canada: A Collaborative Report from the Auditors General*. The report stated that "Meeting Canada's 2030 target will require substantial effort and actions beyond those currently in place or planned." It further stated: "It is unclear how Canada will meet this target". Gooderham reviewed the report shortly after it was published.[69]

69. In the context of what any Canadian citizen could do to contribute to alleviating the further advance of the global peril, the most salient emitting activity in Canada is the projected expansion of oil sands production in Alberta to 2030 and 2040. The projected increase in the annual level of oil sands emissions between 2015 and 2030 is 44 Mt, which is projected to be the largest source of emissions growth in Canada over that period, compared to any other industry or any other economic sector. The material question is whether that increase can be reconciled with obtaining a 200 Mt reduction of Canada's total emissions over the next decade, which will have to be obtained from Canada's other economic sectors.[70]

70. Canada's second largest emitting sector is transportation. Based on the Government of Canada's most recent projections, taking into account current policies implemented up to September 2017, total transportation sector emissions across Canada between 2015 and 2030 are expected to decline by only 18 Mt. Even if other "additional measures" promised under the government's most recent emissions reduction plan

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[68] Second Gooderham Affidavit, at paragraphs 94 to 106. The "additional measures" that promise aggregate reductions of 79 Mt by 2030 are identified by sector in Figure viii at page 31, in Part 12.

[69] Outline, Appendix J, "Report of the Auditors General".

[70] Outline, Appendix F, at page 81, summarizes the proposed evidence at trial that will explain why, if oil and gas sector cannot contribute a significant share of the needed emissions reductions in Canada, the burden of deep cuts will fall disproportionately on a limited number of other sectors.

published on December 29, 2017, are fully implemented, the total projected reduction in the entire transportation sector will still be only 32 Mt by 2030, measured against the 2015 level. (The promised additional transportation measures are not yet implemented and in many cases have not yet been developed). Emissions growth in the oil sands sub-sector between 2015 and 2030 will negate all the emissions cuts that Canada hopes to achieve from the entire transportation sector across Canada, which includes all passenger cars, all road freight transport, rail, domestic aviation, and marine shipping.[71]

71. In the global context, Canada's planned expansion of oil sands production to 2030 is gravely consequential. The available evidence is unequivocal that global oil consumption must start to decline by about 2020, and decline from the 2014 level of 90.6 million bpd to about 74 million bpd by 2040, or less, if surface warming is to be limited to less than 2°C above the pre-industrial level.[72]

72. The International Energy Agency (IEA) projections show that under current policies (also referred to as business-as-usual projections) global oil consumption is expected to rise to 103.5 million bpd by 2040, a 12.9 million bpd increase above the 90.6 million bpd level in 2014. Only six or seven major oil producing countries have large enough oil reserves to satisfy that increase in demand. Canada is one of those suppliers.[73]

73. To stay within the 2°C pathway, global suppliers would have to cut production levels by at least 30 million bpd by 2040, below the currently projected level for 2040.

74. The Government of Canada's recent projections show that oil sands production is expected to increase by 1.7 million bpd between 2015 and 2030, with additional growth

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[71] Outline, Appendix I, at paragraphs I.12 to I.14, provide particulars of the proposed evidence about transportation emissions reductions in the *Pan-Canadian Framework*. Other proposed evidence about transportation emissions data is found in the Outline, Appendix A.

[72] Outline, Part 13; also Appendices M, N, and O

[73] Outline, Part 13; also Appendices M, N, and O.

during the following decade to 2040. That planned expansion is inconsistent with a 2°C world.[74]

75. By the end of July 2018, Gooderham had concluded that there remained no realistic prospect that the Government of Canada would be persuaded or induced to reconsider its decision to proceed with construction of the Trans Mountain Project and the Line 3 expansion project, which together will provide sufficient new pipeline capacity to transport about 50% of the total projected expansion of oil sands production between 2015 and 2040.[75]

Belief on reasonable grounds

76. By the end of July 2018, and for at least a full year before that, Gooderham had come to believe that there is no reasonable likelihood that global emissions can be reduced fast enough to keep the increase in global surface warming within the 2°C pathway. His belief is that while the 2°C commitment is still technologically and economically feasible if very stringent carbon reduction policies are adopted and implemented in multiple countries, any estimation of that occurring is conjectural because it depends on evidence that does not exist.[76]

77. The available evidence shows that even if all countries that have made commitments (NDCs) under the Paris Agreement fully implement all of their promised reductions, the world will still be on a pathway to a temperature increase exceeding 3°C. The existing NDCs account for only about one third of the reductions needed to stay within the 2°C pathway. The remaining emissions gap is 13.4 $GtCO_2$ of additional reductions. That amount is twice the magnitude of all the existing reduction commitments that have been given by the signatories to the Paris Agreement, including by the wealthiest and the

[74] Outline, Part 1, "Oil sands production: evidence of growth to 2030".

[75] Second Gooderham Affidavit, at paragraphs 107 and 108.

[76] Second Gooderham Affidavit, at paragraph 115

most technologically advanced economies. There is no existing plan that explains how the 13.4 $GtCO_2eq$ emissions gap can be satisfied.[77]

78. Gooderham's belief is that adequate emissions reduction cannot be achieved within the next twelve years to keep warming within the 1.5°C pathway.[78]

79. Gooderham's belief is that by 2030 the earth's climate system will be irrevocably committed to surface warming of at least 1.5°C, and that we have no assurance that by the end of the decade we will not be committed to more than 2°C of warming. We will not know the answer to the second question until well into the next decade, when we may see whether, and to what extent, emitting countries have taken any of the essential and exceptional steps required to address the emissions gap. Essential steps would include halting further growth of global oil consumption, and the beginning of a substantial decline in oil demand by 2020.[79]

80. The warming of the earth is already far advanced. The impacts are already degrading human and natural systems. The losses are irreversible. We know that, if we act to the full extent of our capacities now and during the next twelve years, we have it in our power to halt this unfolding peril and curb the losses. We will not be able to avoid the further losses that will be caused as surface warming increases from the current level of 1°C to 1.5°C, and we probably cannot curb the deepening losses that will occur as warming moves above 1.5°C to 2.0°C. But our opportunity is to at least limit the further loss and peril as warming moves significantly above 2°C. The scientific evidence is clear that the greatest losses and risks to human systems and natural systems will occur as warming approaches and then exceeds the 2°C. That is the immediate peril we can act to avoid.[80]

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[77] Second Gooderham Affidavit, at paragraph 116

[78] Second Gooderham Affidavit, at paragraph 117

[79] Second Gooderham Affidavit, at paragraph 118.

[80] Second Gooderham Affidavit, at paragraph 119

Part 3: LEGAL BASIS:

Defence of Necessity

81. Section 8(2)&(3) of the *Criminal Code* preserves the common law of England in Canada and in particular establishes:

> "(3) Every rule and principle of the common law that renders any circumstances a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far asthey are altered by or are inconsistent with this Act or any other Act of Parliament." [81]

82. Marie Henein in her commentary on this section[82] notes that:

> "The only common law crime which has been preserved is contempt of court. On the other hand, this section preserves any common law defence, except as it may be inconsistent with a statutory prevision. . . . It is under this provision that defences such as necessity, due diligence, intoxication, mistake of fact and entrapment have remained an uncodified part of the criminal law. Recently section 7 of the Charter has also been used to interpret the scope of these defences."[83]

83. Generally speaking, the defence of necessity covers all cases where non-compliance with the law is excused by an emergency *or justified by the pursuit of some greater good.*[84] The principle is of ancient origin. Aristotle indicated that a necessary action is involuntary because it is compelled by the circumstances and involves damages sustained to avoid greater harm.[85] During the Middle Ages, St. Thomas Aquinas

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[81] R.S.C. 1985, c. C-46, (hereinafter the "Code").

[82] *Martin's Annual Criminal Code, 2018,* published by 2018 Thomson Reuters Canada Limited, page 40. (hereinafter Martin's Annual Criminal Law.

[83] Martin's Annual Criminal Law, 2018, page 40.

[84] *Regina v. Perka,* [1984] 2 S.C.R. 232 (hereinafter "Perka") at page 246 (QL page 11) quoting from Justice MacDonald in *Regina v. Salvador* 1981 CanLII 3357 at page 542.

[85] Aristotle, *Magna Moralia,* translated by St George Stock, in WD Ross ed, *The Works of Aristotle* (Oxford: Clarendon Press, 1915) book I.14-16. As quoted by Hugh Tremblay, *Eco-terrorists Facing Armegeddon: The Defence of Necessity and Legal Normativity in the Context of Enviornmental Crisis,* McGill Law Journal, Volume 58, Number 2, December 2012, (hereinafter "Tremblay") at page 333.

commented on the observance of the law when an individual is faced with sudden peril needing instant remedy:

> "Since . . . the lawgiver cannot have in view every single case, he shapes the law according to what happens more frequently, by directing his attention to the common good. Wherefore, if a case arises wherein the observance of that law would be hurtful to the general welfare, it should not be observed."[86]

84. The rationale of necessity, however, is clear. Essentially it involves two factors. One is the avoidance of greater harm or the pursuit of some greater good, the other is the difficulty of compliance with law in emergencies. From these two factors emerge two different but related principles. The first is a utilitarian principle to the effect that, within certain limits, it is justifiable in an emergency to break the letter of the law if breaking the law will avoid a greater harm than obeying it. The second is a humanitarian principle to the effect that, again within limits, it is excusable in an emergency to break the law if compliance would impose an intolerable burden on the accused.[87]

85. Justice Dickson (as the then was) in *Regina v. Perka* outlined three elements that must be present for the defence of necessity:

    a. First, there is the requirement of imminent peril or danger.

    b. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook.

    c. Third, there must be proportionality between the harm inflicted and the harm avoided.[88]

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[86] St. Thomas Aquinas, *On law, Morality and Politics,* ed buy William P Baumgarth & Richard J Regan (Indianapolis: Hackett, 1988) at 75, Tremblay, at page 333.

[87] *Perka,* page 246 (QL page 11).

[88] *Regina v. Latimer,* 2001 SCC 1, (hereinafter Latimer),paragraph 28.

The Concept of *Involuntariness* in *Perka*:

86. The *rationale* for excuses in the criminal law rests on the principle that the law ought not to punish involuntary acts.[89] But, in the hypothetical example of the lost Alpinist, his conduct is "not literally behaving in an involuntary fashion". Dickson J. further elaborates: "this sort of involuntariness is often described as moral or normative involuntariness"; it is "normatively involuntary". [90] The defence is limited "to acts that are truly involuntary in the requisite sense".[91] The question is, what is the "requisite sense"?

87. The meaning of normatively involuntary conduct is expressed this way in the hypothetical case of the lost Alpinist:

> He has control of his actions to the extent of being physically capable of abstaining from the act. Realistically, however, his act was not a "voluntary" one. His "choice" to break the law was no choice at all.[92]

88. Dickson J. explains the rationale that underlies the proposition that, in the hypothetical case, the choice to break the law was "no choice at all":

> At the heart of this defence is the perceived injustice of punishing violations of law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable.[93]

89. Further explaining this reasoning, Dickson J. states that this "conceptualization of the law" (using the concept of moral or normative involuntariness to excuse culpability) integrates the defence of necessity into the normal rules for criminal liability:

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[89] *Perka,* page 250, QL page 13.

[90] *Perka,* page 249, QL page 13.

[91] *Perka,* page 251, QL page 14.

[92] *Perka,* page 249, QL page 13.

[93] *Perka,* page 250, QL page 13.

> "Such a conceptualization accords with our traditional legal, moral, and philosophical views as to what sorts of acts and what sort of actors ought to be punished."[94]

90. The concept of "moral or normative involuntariness" therefore incorporates a moral evaluation into what we mean when we say: "His "choice" to break the law was no choice at all." We say there "was no choice at all" where the other choice, of not taking action to avoid an immediate peril of the gravest kind, would be contrary to our deepest values. The defence of necessity recognizes that a liberal and humane criminal law cannot hold people to the strict obedience of the laws in emergency situations, which Justice Dickson elaborates in the following words:

> "where normal human instincts, whether self-preservation or altruism, overwhelmingly impel disobedience."[95]

91. In determining whether the choice of an accused to break the law "was no choice at all", the court is bound to consider the full evidentiary context relating to the nature of the peril, the gravity of the peril measured in terms of its consequences, the probability or certainty of its onset, and the time remaining to avoid it.

92. The determination is therefore guided by a normative standard, or a moral standard, which can only be applied to the facts of the case after the court has a full appreciation the seriousness of the immediate peril. In the hypothetical case of the lost Alpinist, the facts of the situation (the imminent death of a person with a warm cabin close at hand) are uncomplicated. Normative standards accept that, in such a case, it would be 'unthinkable' or 'unacceptable' to choose not to act in disobedience of the law.

93. In the case at bar, answering the question is more complicated because of the complexity of the evidence. Conduct actuated by altruism may, in a proper case, excuse the act of disobedience. Because Dickson J. chooses as a hypothetical example the act of the lost Alpinist who breaks into a cabin to save *his own life*, his

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[94] *Perka,* page 250, QL page 14.

[95] *Perka,* page 248.

judgment. Dickson J. also extends the analysis on justification or excuse to altruistic acts:

> The police officer who shoots the hostage-taker, the innocent object of an assault who uses force to defend himself against his assailant, the Good Samaritan who commandeers a car and breaks the speed laws to rush an accident victim to the hospital, these are all actors whose actions we consider *rightful,* not wrongful. For such actions people are often praised, as motivated by some great or noble object. The concept of punishment often seems incompatible with the social approval bestowed on the doer.[96]

94. Altruism is disinterested and selfless concern for the welfare of others as a principle of action. In terms of traditional moral views, altruism is a central principle of religious teaching. It is sometimes spoken of as benevolence, and is closely related to compassion.

95. Justice Dickson's real distinction between "voluntary" and "involuntary" turns on a moral (normative) evaluation, which is essentially whether, based our on *normal* standards (which includes our entire cultural outlook, i.e. "legal, moral, and philosophical"), we would say, in a particular case, that the choice of refusing to disobey the law "**was no choice at all".** Our "traditional legal, moral, and philosophical views" surely have absorbed the Nuremburg notion that when the positive law directs that citzens do the unspeakable, they have a moral obligation to refuse.

Justification or Excuse:

96. A Justification challenges the wrongfulness of an action which technically constitutes a crime.[97]

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[96] *Perka,* page 246.

[97] *Perka,* page 246 (QL page 11).

97. The conduct of the applicants challenges the decision of the cabinet in approving the construction of the Tran Mountain Project by Order in Council dated November 29, 2016. The stated reasons by the Government of Canada for approving the pipeline project are that the expanded shipping capacity of the project is necessary to facilitate the planned expansion of Canada's oil sands production to 2030 and 2040. The applicants have acted to oppose the project for reasons related to the emissions implications of expanding oil sands production. No environmental approval process conducted by the Government of Canada prior to the authorization of the project on November 29, 2016 conducted any inquiry to ascertain whether the substantial increase GHG emissions that will accompany the planned increase of oil sands production can be consistent with Canada's commitment under the Paris Agreement to reduce its total emissions to 517 Mt by 2030.

98. Nor did any inquiry process consider and determine whether the projected expansion of oil sands production to 2040, which will be facilitated by this project, is consistent with Canada's further commitment under the Paris Agreement to keep the increase in global warming to less than 2°C, and to pursue efforts to keep the increase to less than 1.5°C. The proposed evidence will show that the plan to expand Canada's oil sands production to 2030 and 2040 is not consistent with those commitments.

99. The losses to human systems and natural systems that will occur as the increase in average global surface temperature (above the pre-industrial level) rises from 1 degree C today to 2.0°C will be massive and destructive, and irrevocable.

100. A justification would exculpate actors whose conduct could reasonably have been viewed as "necessary" in order to prevent a greater evil than that resulting from the violation of the law. As articulated, especially in some of the American cases, it involves a utilitarian balancing of the benefits of obeying the law as opposed to disobeying it, and when the balance is clearly in favour of disobeying, exculpates an actor who contravenes a criminal statute. This is the "greater good" formulation of the

necessity defence: in some circumstances, it is alleged, the values of society, indeed of the crimi-nal law itself, are better promoted by disobeying a given statute than by observing it.

101. An excuse on the other hand is conduct that we choose not to treat as criminal is "justifiable" if our reason for treating it as noncriminal is predominantly that it is conduct that we applaud, or at least do not actively seek to discourage: conduct is "excusable" if we deplore it but for some extrinsic reason conclude that it is not politic to punish it.[98]

The *Mens Rea* of Necessity:

102. As to *mens rea* for the first two factors cited by Justice Dickson (imminent peril and no reasonable legal alternative)[99] the Supreme Court in *Latimer* employed a modified objective standard that takes into account the particular circumstances of the accused, including his or her ability to perceive the existence of alternative courses of action. The third factor proportionality is to be assessed on an objective standard.[100]

The Application of the Facts to the Elements of the Defence of Necessity:

The Peril, Danger and Harm are Imminent and Unavoidable:

103. Canada's plan to continue increasing oil sands production provides the economic rationale for the Trudeau Government's pipeline approval decisions on November 29, 2016. We are embarking on a bold path of expanding crude oil production that,

[98] *Perka,* page 247 (QL page 12).

[99] See *supra,* paragraph 6.

[100] Latimer,paragraph 33.

if followed by the other six or seven big suppliers, would take the world above the 2°C threshold, according to the International Energy Agency's analysis.

104. The effects of climate change on human and natural systems from the increase in average global surface temperature include: global warming, an advancing pattern of extreme weather events, threatened ecosystems (that support human livelihoods), the melting of the glaciers, and rising in sea levels. The latter endangers many coastal regions and cities of the world.[101]

105. The United Nations *Emissions Gap Report 2017* leaves no doubt that even the full implementation of all existing commitments to reduce the annual level of their national emissions by 2030 (referred to as their "nationally determined commitments" or NDCs) made by Canada and all other signatories under the December 2015 Paris Agreement will be insufficient to put the world on an emissions pathway consistent with keeping global warming "well below 2°C." The NDCs are not enough:

> Full implementation of the unconditional NDCs and comparable action afterwards is consistent with a temperature increase of about 3.2°C by 2100 relative to pre-industrial levels. Full implementation of the conditional NDCs would lower the projection by about 0.2°C.[102] (emphasis added)

106. The above statement, based on the scientific evidence, is consistent with similar warnings in leading studies over the past six years. In November 2012 the World Bank warned that the then existing emissions trends put the world possibly on a path toward 4°C warming within this century. The International Energy Agency (IEA) in *Redrawing the Energy-Climate Map* published in 2013 warned "limiting the global warming rise to 2°C remains technically feasible though it is extremely challenging". The IEA concluded that based on its 450 Scenario, to have a 50%

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[101] Outline of Proposed Evidence (Exhibit "A" to Affidavit of David Anthony Gooderham), Parts 14, 15, 16, 17, and 18, and Appendices R, S, T, U, and V; Second Gooderham Affidavit paragraphs 13, 18 to 20, 24 to 28, and 115 to 119.

[102] *The Emissions Gap Report 2017,* Executive Summary, p. xviii, [Outline of Evidence 17.25]

chance of keeping to 2°C, growth in energy-related CO_2 emissions "need to halt and start to reverse within the current decade".[103]

107. The Ministerial Panel appointed by the Minister of Natural Resources on May 17, 2016 quotes political scientist Kathryn Harrison, who has researched and published widely on energy policy and the efficacy of Canada's emissions reduction efforts:

> "To embrace the economic viability of this project is to self-consciously make an economic bet on a world of catastrophic climate change that the Government of Canada itself explicitly committed to avoid*."*[104]

The commitment referred to by Dr. Harrison is the Paris Climate Accord.

108. A peril is considered imminent enough if it is remote in time but its realization is inevitable:

> [A] "'peril' appearing in the long term might be held to be "imminent" as soon as it is established at the relevant point in time that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable."[105]

109. The applicants submit that the science summarized in the supporting affidavit filed with this application establish the condition of imminent peril. Most of the evidence set out in Outline of Evidence describes the probabilities (i.e., Part 17 at paragraph 17.23, "it is extremely unlikely the goal of keeping warming to well below 2°C" if the emissions gap is not closed). But on some crucial issues, such as whether the 13.4 $GTCO_2eq$ emissions "gap" can be closed within the next twelve years (paragraphs 17.21 and 17.22), the answer is unknown. It is "conjectural" because it depends on what multiple countries decide to do (or decide not to do) over the next twelve years. However, we have <u>no reasonable assurance</u> that the gap <u>will</u> be closed.

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[103] Outline, Appendix S at S.3 and S.4; Appendix M.

[104] Outline, Appendix O, "The Ministerial Panel and the 2 degrees C limit", at paragraph 0.6.

[105] Tremblay, page 335.

25. In the absence of that high level of assurance, the Applicants' argument is that continued expansion of oil sands production must be halted. We should not run the risk, because it is an existential risk. That explains, for example, the Applicants' decision to act in order to halt the pipeline. In the unique facts situation unfolding of climate peril, the world's large emitting countries will fail to close the 13.4 $GtCO_2eq$ emissions gap by 2030. The Applicants submit that our evidence will show:

    a. the gap is enormous, and

    b. that there is an appreciable uncertainty whether it can be closed, and

    c. if it is not closed warming will almost certainly exceed the 2°C pathway.

110. To determine whether the peril is imminent, the Supreme Court in *Latimer*[106] applied the modified objective standard that takes into account the particular circumstances of the accused, including his or her ability to perceive the existence of alternative courses of action.[107] Applying this test to the within circumstances, the Applicants' subjective concerns are eminently supported objectively by science. In law the peril is imminent. The first criterion for the necessity defence is therefore met.

The Absence of Reasonable Legal Alternatives:

111. This Honourable Court in addressing potential legal alternatives to disobeying the injunction stated:

> "All orders of this Court are subject to variation or to appellate review. No attempt was made to seek a variation of the injunction order nor to appeal it."[108]

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[106] *Regina v. Latimer,* 2001 SCC 1, page __.

[107] *Supra,* footnote number 8.

[108] Trans Mountain Pipeline ULC v. Mivasair et al.,2018 BCSC 874, (hereinafter "Trans Mountain"), paragraph 23.

112. The Applicant's entire purpose in attending at the Burnaby Terminal was to halt or delay the construction of the pipeline. Had they applied to your Lordship to address the injunction, it would only have been to ask the Court to dissolve the injunction because the Applicants wished to attend at the site and block the road, with the declared intention that their purpose was to interfere with the work of Trans Mountain Pipeline.

113. The Applicant's cannot imagine that your Lordship would have acceded to such a request.

114. Any "lawful alternative" must be a reasonable one, that is to say one that offers some realistically viable means to stop the peril.

115. Any other application to Your Lordship to challenge the rightness of allowing Trans Mountain Pipeline to expand the pipeline (for reasons related to climate and emissions), would surely be a prohibited "collateral attack". The Applicants only viable avenue to attack the Order in Council was to have launched a judicial review back when the Order in Council was approved in 2016. The order in Council was quashed by the Federal Court of Appeal on specific grounds related to the failure of the NEB to address marine related environmental risk, and the inadequacy of the Federal government's consultation process with Indigenous peoples. The Federal Court of Appeal did not consider or touch upon issues of emissions. The subsequent direction to the NEB from the government is that the NEB further inquires will be limited to the marine shipping and Indigenous consultation problems.[109]

116. The other "lawful alternative" raised by your Lordship in your ruling of May 10, 2018 pertained to political activity:

> "Lastly, I will observe that what seems to have been forgotten when the excuse of necessity is argued in this instance is that we live in a robust democracy.

[109] Tsleil-Waututh Nation v. Canada (A.G.), 2018 FCA 153, paragraphs 773-734.

> Governments change their policies when public pressure is brought to bear and governments themselves not infrequently leave office following elections and therefore policies of one kind an another change."[110]

117. As the applicants herein submit, any meaningful opportunities for political participation or social action to halt the Trans Mountain project (and to question or challenge plans to continue expansion of oil sands production to 2030 and 2040) ceased to exist after the lengthy approval process was completed on November 29, 2016, when the cabinet signed the Order in Council (Part 11). The crucial time for political and social engagement was during the three years leading up to the Order in Council.[111]

118. In this case, starting with the NEB inquiry (which excluded all evidence about emissions and climate science in its key Ruling 25 on July 23, 2014), each successive stage of the pipeline approval process effectively **closed the door** on any opportunity for a citizen to put in issue, publicly question, cross-examine, or challenge the findings (or absence of findings) on the crucial issues, namely (1) the impact of oil sands emissions on Canada's 2030 reduction target and (2) the contradiction between Canada's expanding oil sands production and the need to curb global oil consumption starting by 2020.[112]

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[110] *Trans Mountain,* paragraphs 29.

[111] In relation to the lawful avenue of political activity during that time, especially through the year 2016, the relevant evidentiary context is found in to the Outline, Parts 8, 9, and 10. The important issue of whether Canada's projected expansion of oil sands production to 2040 is compatible with a 2 degrees world was entirely excluded from the NEB process and left unanswered by the upstream emissions assessment. No ordinary Canadian citizen had any lawful means to challenge that outcome. The treatment of that issue is examined in detail in Part 13, and in Appendices M, N, O, and P.

[112] Second Gooderham affidavit, paragraphs 30-49 with respect to the NEB process; paragraphs 49 to 56 with respect to the upstream emissions assessment process. Also see Outline, Part 8 (the NEB process), Part 9 (the upstream emissions assessment), and Part 10 (the Ministerial Panel process), and Appendix G (the methodology governing the upstream emissions assessment). Citizens were excluded from both the NEB process and the upstream emissions assessment.

119. Neither the Trans Mountain upstream assessment nor the Ministerial Panel were juridical inquiries - there was no lawful pathway (no judicial review or any kind of appeal) to challenge their methodology or findings. The crucial Trans Mountain upstream emissions assessment was a “closed” process - its entire proceedings were behind closed doors.[113]

120. Once the Order in Council was finally approved by cabinet on November 29, 2016, the pipeline project was authorized. After that date, all legitimate and meaningful avenues for Canadian citizens to question and challenge the project had been shut down. Political activity is more than voting. Constitutional government requires lawful processes for participation, and reasoned public inquiry. All that was denied in this case, and any potential opportunities for that kind of activity were gone by the time the Order in Council was passed.[114]

121. By the summer of 2018, in assessing the reasonableness of any further avenues for political activity (as a “lawful alternative”) this court must carefully examine the evidentiary context about the relevant climate science, the rising atmospheric carbon concentration,[115] and time-lines remaining to forestall warming exceeding the 2°C threshold.[116] Without considering of the proposed scientific evidence and the mitigation scenarios, and the emissions “gap,”[117] this court can have no inkling of the extreme gravity of the present situation.

122. By the Spring and Summer of 2018, there remained no viable or reasonable legal alternative to halt the planned expansion of Canada’s oil sands production to 2030 and 2040, which will be directly facilitated or enabled by the construction of the expanded Trans Mountain pipeline. The Applicants therefore chose to act by

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[113] Outline, Parts 9 and 10, in particular paragraphs 9.28 to 9.32.

[114] Second Gooderham affidavit, paragraphs 115 to 119.

[115] Outline, Part 15 and Appendix R.

[116] Outline, Part 16 and Appendix S.

[117] Outline, Part 17 and Appendix T.

attempting to block construction work at the Burnaby Terminal, with the intention of halting or delaying the start of construction on the project, and by their action to signify to the proponents of the project, and to elected politicians, that the project is opposed for reasons related to the emissions implications and the grave consequences for climate change.

123. The Applicants therefore submit that there was no reasonable legal or political alternative means to halt the Trans Mountain Pipeline expansion than their physical obstruction of the roadway.

Proportionality Between the Harm Inflicted and The Harm Avoided:

124. The irreversible losses to human systems and natural systems that will occur as the increase in average global surface temperature (above the pre-industrial level) rises from 1 degree C today to 2.0°C, as the proposed evidence shows, will be so massive and destructive that, in comparison, any harm caused by disobeying the court order, or harm caused by halting or delaying the construction of the Trans Mountain expansion project had that occurred, would be very small in relation to the terrible harm that will be incurred if warming exceeds the 2°C threshold. The losses also must take into account the impacts that are already being incurred and will continue to mount over the next decade as global average surface temperature continues to increase.

125. The Applicants' conduct was therefore a proportional response to the imminent peril that we face. The three criterion for the defence of necessity have been met.

Prior Case Law on the Defence of Necessity:

Canada:

126. In *MacMillan Bloedel v. Simpson,* Chief Justice McEachern held that the defence of necessity could not be raised by protesters in their defence for breach of an injunction order restraining such protests:

> "45 In my judgment, this defence cannot be applied in this case for at least two reasons. First, the Defendants had alternatives to breaking the law, namely, they could have applied to the court to have the injunction set aside. None of them did that prior to being arrested. I do not believe this defence operates to excuse conduct which has been specifically enjoined. By granting the order, the court prohibited the very conduct which is alleged against the Defendants. An application to the court, which could be heard on fairly short notice, would have determined whether the circumstances were sufficient to engage the defence of necessity.
>
> 46 Second, I do not believe the defence of necessity can ever operate to avoid a peril that is lawfully authorized by the law. M & B had the legal right to log in the areas in question, and the defence cannot operate in such circumstances."[118]

127. In principle, if in all other respects the test for necessity is satisfied, where there exists an "imminent peril" and after applying the "moral or normatively involuntary" test, the Applicants clearly had "no choice." How can it make any difference that the peril is authorized by law?

128. In any event, in this case the injunction order does not "authorize the peril". The peril is the increase of emissions from expanding oil sands production (both upstream emissions and also downstream emissions from the combustion of the refined fuels). The pipeline facilitates that expansion. The injunction order itself has a very narrow focus (solely about unlawful interference at the work site), and it was granted by your Lordhsip without any evidence or consideration, at all, of whether or to what degree the pipeline project would facilitate an increase of oil sands production, or the emissions implications of that, or scientific evidence about climate change or the peril from it.

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[118] *MacMillan Bloedel v. Simpson,* 1994 CanLII 1731 (BCCA) paragraphs 45-46.

129. Nor does the Order in Council "authorize" the peril. It authorized the construction of the pipeline.

130. In the United States decision of *Washington v. Brockway* the Court allowed the defendants to advance the defence of necessity as they:

> "Believed that they could bring this case outside of, and distinguish this case from others throughout the country by presenting expert testimony regarding the only harm sought to be averted by these acts, as they relate to global climate change, but also what was more compelling to me as an offer of proof that they would be able to show a change in local BNSF as a result of their protests.[119]

131. While the court in *Washington v. Brockway* permitted the evidence to be led, it ultimately instructed the jury to exclude any consideration of the expert evidence as the points raised were political:

> "Quite frankly [the defendants] are tireless advocates who we need in this society to prevent the kind of catastrophic effects that we see coming and that our politicians are ineffectively addressing, but that does not mean that this court will engage in politics and violate its obligation to adhere to legal precedent which in this case overwhelming supports the state's position regarding the necessity defence."[120]

132. Also in the United States decision of *State v. Klapstein*[121] three respondents travelled to the rural town of Leonard with the intention of shutting down a petroleum pipe line valve station. The pipeline was carrying tar sands oil from Canada. The respondents used bolt cutters to cut the chain securing the valve enclosure, entered and then cut the chain securing the valve device itself. They then contacted Enbridge, the company operating the pipeline, to inform them what

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[119] *United States v. Tim DeChristopher* (16 November 2009, 2009 WL 3837208 (Utah); *People v. Hamlin,* 2015 WL 8487591 (unpublished) as cited in Long, LN and Hamilton T (2017) "Case Comment – Washington v Brockway: One Small Step Closer to Climate Necessity" *McGill Journal of Sustainable Development Law, 13(1)(hereinafter "Long and Hamilton")* at page 166.

[120] Long and Hamilton, supra at page 173.

[121] 2018 Minn. App. Unpub. LEXIS 312, Court of Appeals of Minnesota

was occurring and to provide them with an opportunity to remotely shut down the pipeline valve, which they ultimately did. The defendants were each charged with felony criminal damage to property, aiding and abetting felony criminal damage to property, gross misdemeanor trespassing and aiding and abetting gross misdemeanor trespassing. At trial the District court granted the respondent's request to present evidence on the defence of necessity:

> "The court's grant is not unlimited and the Court expects any evidence in support of the defence of necessity to be focused, direct and presented in a non-culmuative manner."

The state appealed. The appeal was dismissed. The respondents were acquitted at trial.[122]

United Kingdom:

133. In the United Kingdom, only one case to date has been successful when raising the defence of necessity in the context of climate change. In *R. v. Hewke,*[123] six activists protested against a coal-fired power plant by climbing a chimney and painting the name "Gordon," who was the prime minister of the UK at the time (Gordon Brown). Their actions resulted in £30, 000 of property damage. The activists raised the defence of "lawful excuse" and claimed that the harm inflicted (property damage) was less than the harm they intended to avoid (climate change). Evidence was heard from experts (an environmentalist and an Inuit leader) noting that imminent harm to the planet was caused by coal-fired power plants. The jury ultimately acquitted the six accused.[124]

Conclusion on Necessity:

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[122] Klapstein, supra, pages 1-3.

[123] *R v Hewke* (10 September 2008), No T20080116, Maidstone Crown Court, UK as cited in Long and Hamilton at p. 165

[124] Grist Staff, "Greenpeace protesters acquitted in coal-activism case" (September 2008). Retrieved from: https://grist.org/article/greenpeace/

134. Tremblay, *supra,* postulates two functional dynamic factors in any system of law: certainty and flexibility. Certainty appears inherently tied to the law's normative role. In order to regulate conduct and order social interactions, the law must provide clear standards prospectively guiding the behavior of those subject to it. On the other hand, flexibility is essential to ensure that the law adapts to all possible situations and covers evolving social realities. Legal regimes often have specific rules designed to deal with exceptional events on a prospective basis. Such mechanisms suspend the application of general norms in particular situations. For example, the doctrines of *force majeur* and frustration of contract law grant flexibility to legal interactions in unforeseen circumstances. Similarly, necessity justifies a departure from penal norms in exceptional cases where adherence to the law would produce undesirable results. The defence of necessity thus increases the law's flexibility by processing unique situations.[125]

135. Tremblay concludes that: "[n]ecsesity knows no law". This proverb encapsulates the fundamental tension between legal frameworks that seek to normalize social behavior and urgent action in response to unpredictable events. The defence of necessity provides a mechanism to accommodate this tension and fosters the law's adaption to unforeseen circumstances. . . Necessity augments legal flexibility. . . As a result, the law's resilience to socio-ecologicial changes is enhanced.[126]

136. For these reasons, the Applicants respectfully submit that this court should permit the applicants to raise the defence of necessity to the within charges. Doing so will underwrite the dialectic between certainty and flexibility on which the rule of law must function.

Section 7 of the *Charter*:

137. The Applicants submit that the expansion of the Trans Mountain Pipeline is now a state action fomented by the government of Canada.

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[125] Tremblay, pages 329-331.

[126] Tremblay, page 363.

138. The Applicants along with all Canadians, have a fundamental right to a climate system capable of sustaining human life; the expansion of the Trans Mountain Pipeline imperils the Applicants' and all citizens' right to Life, Liberty and Security as protected by section 7 of the *Charter.*

139. Section 7 of the Charter:

> "Everyone has the right to **life**, **liberty and security** of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." (emphasis added)

Liberty Interest:

140. The Applicants are charged with criminal contempt of court. This court has held that the *Criminal Code* does not apply to these proceedings. There is no prescribed penalty at law. The Crown's Third Amended Notice of Motion # 1, filed August 3, 2018 stipulates that for a category five sentencing following trial the Crown will request of this Honourable Court a sentence of 28 days in jail.[127] The liberty interest of the applicants are thereby engaged.

Life and Security:

141. The Applicants further submit that factual matters listed above and set forth in the affidavit of David Gooderham, sworn the __ day of November 2018, fully raise the risks to life and security arising from climate change directly affected by the expansion of the Trans Mountain pipeline.

Principles of Fundamental Justice:

142. The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice.[128]

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[127] Third Amended Notice of Motion # 1 (Further Crown Sentencing Positions – Category 5), page 6, paragraph 31.

[128] Canadian Foundation for Children, Youth and the Law v. Canada (AG), 2004 SCC 4, paragraph 8

143. A climate system capable of sustaining human life is fundamental to all citizens including the Applicants and their family's rights to life, liberty and security. Further the expansion of the Trans Mountain Pipeline approved and now owned by the Canadian government constitutes state action directly imperilling citizen's rights to a stable climate within which life may be maintained. These dangers are directly contrary to Canada's international commitments and risk the catastrophic effects of climate change. These are legal principles, vital or fundamental to our societal notion of justice and are identified herein with sufficient precision to link climate change and CO_2 concentrations that will arise from the expansion of the Trans Mountain Pipeline currently threatening the public health and welfare of this and future generations.[129]

Canada's International Commitments:

144. In the Paris Agreement on Climate Change, 195 nations, including Canada acknowledged that governments should respect, promote, and consider human rights when taking actions to address climate change.[130] This explicit recognition of linkages between human rights and climate change follows four decades of international precedent.[131]

145. At the 1972 United Nations Conference on the Human Environment, Canada and the global community endorsed an explicit link between environmental protection and the fulfillment of human rights, including the right to life.[132]

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[129] Ibid.

[130] Paris Agreement preamble. para. 11, Dec. 15, 2015, T.I.A.S No. 16-1104.

[131] Amicus Brief, United States of America, et al., v. United States District Court for the District of Oregon, Eugene v. Kelsey Cascadia Rose Juliana et al., (hereinafter "Amicus Brief"), page 5

[132] Ibid.

146. The 1972 Stockholm Declaration on the Human Environment, endorsed by 112 countries recognized that the environment is essential to the enjoyment of basic human rights, including the right to life; and the solemn duty to protect the environment for present and future generations.[133]

147. In the 1992 U.N. Framework Convention on Climate Change (UNFCCC), Canada, along with virtually every other country, expressly recalled the Stockholm principles and acknowledged the human threats posed by climate change.[134] Canada thereby committed to achieving the Convention's objective of stabilizing atmospheric greenhouse gas concentrations at a level that "would prevent dangerous anthropogenic interference with the climate system ... within a time frame sufficient" to avoid threatening certain functions necessary for life.[135] Additionally, UNFCC recognized that the Canada and the international community "should protect the climate system for the benefit of present and future generations of humankind."[136]

148. Since 2008, the Member nations of the United Nations Human Rights Council (HRC) have repeatedly affirmed that climate change has "an adverse impact on the full and effective enjoyment of human rights" and have recognized that a stable climate system is necessary for the realization of human rights, including the right to life.[137]

149. In 2015, the Office of the United Nations High Commissioner for Human Rights (OHCHR) informed the States Party to the UNFCCC, "States ... have an affirmative

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[133] 11 I.L.M 1416, preamble. para. 1, Principle 1 (1972), Amicus Brief, page 5.

[134] UNFCCC preamble. paras. 2, 7, May 9, 1992, 1771 U.N.T.S. 107, Amicus Brief, page 5.

[135] UNFCCC at art. 2, Amicus Brief, page 5.

[136] Id. at art. 3(1), Amicus Brief page 5.

[137] See Human Rights Council Res. 32/33, U.N. Doc. A/HRC/RES/32/33 (July 18, 2016); accord Human Rights Council Res. 31/8, U.N. Doc. A/HRC/Res/31/8, at pmbl., para. 4(a) (Apr. 22, 2016); Human Rights Council Res. 35/20, U.N. Doc. A/HRC/35/20 (July 7, 2017); see also Organization of American States General Assembly, AG/RES. 2818 (XLIV-O/14), at pmbl. para. 2 (June 4, 2014) (U.S. joining consensus), Amicus Brief, page 6.

obligation to take effective measures to prevent and redress these climate impacts, and therefore, to mitigate climate change."[138]

150. International human rights bodies have interpreted the right to life broadly: the right to life is the "supreme right" and "should not be interpreted narrowly".[139]

151. In negotiating, signing, and ratifying the Paris Agreement, Canada acknowledged that achieving this objective would require, at minimum, "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C" to avoid the most catastrophic impacts of climate change, including by inference those impacts that threaten fundamental rights.[140]

United States:

152. United States Declaration of Independence holds that:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." (emphasis in the original)[141]

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[138] OHCHR, Submission to the 21st Conference of the Parties to the UNFCCC (27 November 2015) at 2 [hereinafter OHCHR Key Messages]; see also Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/31/52, paras. 23-39, 65, 68 (Feb. 1, 2016) (declaring that "each State has an obligation to protect those within its jurisdiction from the harmful effects of climate change" and the "greater the increase in average temperature, the greater the effects on the right to life and health"); Office of the U.N. High Commissioner for Human Rights, An Open Letter from Special Procedures mandate-holders of the Human Rights Council to the State Parties to the UNFCCC (Oct. 17, 2014) (declaring climate change has "consequences that transform life on earth"); Joint statement by UN Special Procedures on the occasion of World Environment Day (June 5, 2015), (reiterating that "an average increase in global temperature of even 2.0°C will adversely affect a wide range of human rights, including the rights to life ..."). Of particular significance to the present Petition is the government's duty to ensure current and future generations affected by climate change have "access to meaningful remedies including judicial ... mechanisms." OHCHR Key Messages at para. 3.

[139] See, e.g., U.N. Human Rights Committee, General Comment No. 6: Article 6 (Right to life), para. 1 (1982)

[140] Paris Agreement at art. 2(1)(a)(b).

[141] The **United States Declaration of Independence** is the statement adopted by the Second Continental Congress meeting at the Pennsylvania State House (now known as Independence Hall) in Philadelphia, Pennsylvania on July 4, 1776: (Wikipedia).

153. The Fifth Amendment to the United States Constitution established a citizen's due process rights in criminal proceeding, *inter alia:*

> " . . .Nor shall any person . . . be deprive of life liberty or property without due process of law."[142] (emphasis added)

154. In 2007, the United States Supreme Court's found in *Massachusetts v. EPA*, 549 U.S. 497, 499 (2007), held that

"[t]he harms associated with climate change are serious and well recognized,"

155. As recently as July 2017, the United States joined the consensus adopting a new HRC resolution acknowledging that climate change contributes "to the increased frequency and intensity of both sudden-onset natural disasters and slow-onset events, and that these events have adverse effects on the full enjoyment of all human rights" and emphasizing the "urgent importance of continuing to address ... the adverse consequences of climate change impacts for all."[143] In joining the consensus, the U.S. expressly recognized "the effects of climate change have a range of implications for the effective enjoyment of human rights." [144]

The U.S. Juliana Litigation:

156. In Juliana v. The United States, the Plaintiffs, include a group of younger individuals (aged 8- 19) who assert concrete harm from excessive carbon emissions. Also among the plaintiffs are associations of activists who assert they are beneficiaries of a federal public trust which is being harmed by allegedly substantial impairment and alienation of public trust resources through ongoing actions to allow fossil fuel

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[142] Bill of Rights, 1791.

[143] H.R.C. Res. 35/20 at paras. 1-2.

[144] U.S. Explanation of Position on HRC Climate Change Resolution, https://geneva.usmission.gov/2017/06/22/u-s-explanation-of-position-on-hrc- climate-change-resolution/; accord U.S. Statement at the HRC 29 on Human Rights and Climate Change, https://geneva.usmission.gov/2015/07/02/u-s- statement-at-the-hrc-29-on-human-rights-and-climate-change/.

exploitation. Finally, plaintiff Dr. James Hansen participates as a guardian for plaintiff "future generations."[145]

157. Plaintiffs are suing the United States and various government officials and agencies because, they assert, the government has known for decades that carbon dioxide (CO_2) pollution has been causing catastrophic climate change and has failed to take necessary action to curtail fossil fuel emissions. Moreover, plaintiffs allege that the government and its agencies have taken action or failed to take action that has resulted in increased carbon pollution through fossil fuel extraction, production, consumption, transportation, and exportation. [146]

158. The relief sought by Juliana et al. includes, *inter alia*:

a. A declaration that Defendants have violated and are violating Plaintiffs' fundamental constitutional rights to life, liberty, and property by substantially causing or contributing to a dangerous concentration of CO_2 in the atmosphere, and that, in so doing, Defendants dangerously interfere with a stable climate system required by the nation and Plaintiffs alike; and

b. Enjoining Defendants from further violations of the Constitution underlying each claim for relief.[147]

159. In response to this claim the United States government has conceded:

a. That for over fifty years some officials and persons employed by the federal government have been aware of a growing body of scientific research concerning the effects of fossil fuel emissions on atmospheric concentrations of CO_2—including that increased concentrations of atmospheric CO_2 could cause measurable long-lasting changes to the global climate, resulting in an

[145] 217 F.Supp 3d 1224, page 2.

[146] Ibid.

[147] Ibid, pages 2-3.

array of severe deleterious effects to human beings, which will worsen over time.

b. That global atmospheric concentrations of CO_2, methane, and nitrous oxide are at unprecedentedly high levels compared to the past 800,000 years of historical data and pose risks to human health and welfare.

c. That from 1850 to 2012, CO_2 emissions from sources within the United States (including from land use) comprised more than 25 percent of cumulative global CO_2 emissions.

d. That there is a scientific consensus that the buildup of GHGs[2] (including CO_2) due to human activities (including the combustion of fossil fuels) is changing the global climate at a pace and in a way that threatens human health and the natural environment.

e. That CO_2 emissions are currently altering the atmosphere's composition and will continue to alter Earth's climate for thousands of years.

f. That in 2013, daily average atmospheric CO_2 concentrations (measured at the Mauna Loa Observatory) exceeded 400 ppm for the first time in millions of years [and that in 2015 reached] levels unprecedented for at least 2.6 million years.

g. That the Earth has now warmed about 0.9°C above pre-industrial temperatures.

h. That climate change is damaging human and natural systems, increasing the risk of loss of life, and requiring adaptation on larger and faster scales than current species have successfully achieved in the past, potentially increasing the risk of extinction or severe disruption for many species.

i. That current and projected atmospheric concentrations of six well-mixed GHGs, including CO_2, threaten the public health and welfare of current and

future generations, and this threat will mount over time as GHGs continue to accumulate in the atmosphere and result in ever greater rates of climate change.

j. That human activity (in particular, elevated concentrations of GHGs) is likely to have been the dominant cause of observed warming since the mid-1900s. Plaintiffs' characterize the 1965 White House Report, which speaks for itself and is the best evidence of its contents. With respect to the third and fifth sentences, Federal Defendants admit that global surface temperatures on earth in 2014 were warmer than all the preceding years and 2015 was warmer still, with global surface temperatures having exceeded temperatures of the mid-to-late 19th century by more than 1°C.

k. That climate change is likely to be associated with an increase in allergies, asthma, cancer, cardiovascular disease, stroke, heat-related morbidity and mortality, food-borne diseases, injuries, toxic exposures, mental health and stress disorders, and neurological diseases and disorders.

154. That global temperatures are projected to increase by 2.5 to more than 11° Fahrenheit by 2100, depending on future emissions and the responsiveness of the climate system.[148] In summary, the (United States) government has has admitted that human- induced climate change threatens the public health and welfare of current and future generations and increases the risks of loss of life. As the Order notes, the right to a climate system capable of sustaining human life is fundamental to free and ordered society and a necessary condition to exercising the rights to life, liberty, and property. [149]

155. In denying certification for appeal, the U.S. District court concluded that:

[148] *Juliana v. The United States,* 2017 U.S. Dist. LEXUS 88122, page 2-3.

[149] Ibid, page 5.

> "Plaintiffs have alleged, and federal defendants have since admitted, that human induced climate change is harming the environment to the point where it will relatively soon become increasingly less habitable causing an array of severe deleterious effects to them which includes an increase in allergies, asthma, cancer, cardiovascular disease, stroke, heat related morbidity and mortality, food-borne disease, injuries, toxic exposures, mental health and stress disorders, and neurological diseases and disorders. These are concrete, particularized, actual or imminent injuries to the plaintiffs that are not minimalized by the fact that vast numbers of the populace are exposed to the same injuries. It would surely be an irrational limitation on standing which allowed isolated incidents of deprivation of constitutional rights to be actionable, but not those reaching pandemic proportions."[150]

156. The District Court of Oregon's conclusion that a "climate system capable of sustaining human life "is fundamental to our enjoyment of our Fifth Amendment rights to 'life, liberty and property' is further supported by a growing body of foreign jurisprudence.[151]

International Precedents:

157. International jurisprudence supports a constitutional right to a stable climate system. In 2015 the Lahore High Court in Pakistan invoked constitutional rights to address climate change. In *Ashgar Leghari v. Federation of Pakistan*, W.P. No. 25501/2015, a farmer alleged that the government's delay in implementing the National Climate Change Policy and addressing vulnerabilities associated with climate change violated fundamental constitutional rights to life and dignity. In a September 2015 order, the court declared: "Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system. ... On a legal and constitutional plane this is clarion call for the protection of fundamental rights of the citizens of Pakistan."[152] The Lahore High Court invoked the right to life

[150] Ibid, page 7.

[151] Amicus brief, page 12,

[152] Ashgar Leghari v. Federation of Pakistan, W.P. No. 25501/2015 (hereinafter "Leghari", paragraph 6; Amicus Brief pae 13.

and the right to dignity protected by the Constitution of Pakistan and international principles to call for a "move to Climate Change Justice." [153]. Recognizing the threat to food, water, and energy security, it directed the government to identify and begin implementing climate change adaptation measures to protect Pakistani citizens and established a Climate Change Commission to help the court monitor progress and achieve compliance with guidelines. [154]

158. Also in 2015, the Hague District Court in the Netherlands adjudicated a complaint by 900 Dutch citizens after the government decided to retreat from its international commitments to address climate change. While acknowledging that the Netherlands' treaty commitments could not be directly enforced by plaintiffs, the court concluded that these international commitments create "the framework for and the manner in which the State exercises its powers" and thus inform the government's duty of care to its citizens. [155] The court then found "[d]ue to the severity of the consequences of climate change . . . the State has a duty of care to take mitigation measures" and the impacts of the government's retreat from climate action would fall disproportionately on youth and future generations.[156] The court ultimately concluded that the Netherlands government must further reduce greenhouse gas emissions to meet its obligations to the plaintiffs.

159. For decades, courts in India have recognized that the right to life encompasses the right to live in a healthy environment. Article 21 of India's Constitution, in language nearly identical to the due process clause of the U.S. Constitution, guarantees: "No person shall be deprived of his life or personal liberty except according to a procedure established by law."[157]

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[153] Leghari, paragraph 7; Amicus Brief page 13.

[154] Leghari, paragraph 8; Amicus Brief page 13.

[155] Urgenda Found. v. The State of the Netherlands, C/09/456689/HA ZA 13-1396 (24 June 2015) (Para.4.63); Amicus Brief, page 14.

[156] Id. at para. 4.83; Amicus Brief page 14,

[157] India Constitution, article 21; Amicus Brief page 15.. art. 21.

160. In *T. Damodhar Rao v. Municipal Corp. of Hyderabad*, 1987 A.I.R (AP) 171, the High Court of Andhra Pradesh explained:

> Examining the matter from the . . . constitutional point of view, it would be reasonable to hold that the enjoyment of life and its attainment and fulfilment guaranteed by Art. 21 of the Constitution embraces the protection and preservation of nature's gifts without [which] life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Art. 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to violation. . . .[158]

161. Courts in Bangladesh, Nigeria, Pakistan, and Costa Rica have also recognized a sufficiently healthy environment as inherently linked to the right to life and other fundamental rights.[159]

Conclusion on Section 7 of the Charter:

162. International precedent strongly supports that section 7 rights to life, liberty and security engage a right to an environment that will sustain life and preserve our security. The admissions by the United States Government in the *Juliana* litigation expressly establish the linkage climate change and CO_2 concentrations from human

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[158] Id. at paras. 24-25; see also Shantistar Builders v. Narayan Khimalal Totame (1990) 1 SCC 520 (Supreme Court of India recognized the right to life includes the right to a decent environment); M.C. Mehta v. Union of India, Writ Petition No. 182 of 1996 (2000) ("Any disturbance of the basic environment elements, namely air, water and soil, which are necessary for 'life', would be hazardous to 'life' within the meaning of Article 21 of the Constitution.").

[159] See, e.g., Mohiuddin Farooque v. Bangladesh [1997] 17 B.L.D. (A.D.) 1 (the right to life "encompasses within its ambit, the protection and preservation of the environment, ecological balance free from pollution of air and water, and sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life."); Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd. [2005] AHRLR 151 (the right to life includes right to healthy environment and dignity of the human person); Shehla Zia v. WAPDA, P.L.D. 1994 S.C. 693 (Pakistan) (the rights to life and dignity incorporate rights to a clean atmosphere and unpolluted environment); Sentencia 6240-93, la Sala Constitucional de la Corte Suprema de Justicia (26 de noviembre de 1993) (Costa Rica) (the right to life coupled with the state's duty to protect natural beauty creates other enforceable rights equal in hierarchy to these enumerated rights, including the right to a healthy environment); Amicus Brief page 16.

activity that currently "threaten the public health and welfare of current and future generations."[160]

163. On this basis, the applicants submit that upstream emissions resulting from the substantial expansion oil sands production facilitated by the Trans Mountain Pipeline project directly affect their life and security and that of all Canadians. The Applicants submit that on a balance of probabilities, their arrest and prosecution for opposing the expansion of the Trans Mountain Pipeline constitutes an abuse of process which breaches Applicant's section 7 rights.

Section 24(1) of the Charter:

164. Section 24(1) of the *Charter:*

> "Anyone whose rights of freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisidiction to obtain such remedy as the court considers appropriate and just in the circumstances."

165. The Applicants seek as stay of these proceedings as constituting an abuse of process. The prosecution of the Applicants arising from their efforts to address issues of climate change directly tied to the expansion of the Trans Mountain Pipeline is a breach of their section 7 rights.

166. Abuse of process acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.[161]

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[160] *Juliana v. The United States,* 2017 U.S. Dist. LEXUS 88122, page 3.

[161] *Regina v. O'Connor,* [1995] 4 S.C.R. 411, paragraph 69.

167. The perpetration by the Canadian government of the growth of oil sands production in Canada to 2030, the projected increase of CO_2 and other greenhouse gas (GHG) emissions accompanying that growth and the failure of the government to conduct any assessment to establish that Canada will have a realistic prospect of meeting its commitments pursuant the Paris Climate Accord establishes the clearest of cases why those who raise these issues in public should not be prosecuted for their conduct.

168. A stay of the prosecution of the Applicants is warranted.

Part 4: MATERIAL TO BE RELIED ON:

169. The Applicants seek to rely upon the following material:
    a. First Affidavit of David Anthony Gooderham sworn the 21st day of November, 2018;
    b. Second Affidavit of David Anthony Gooderham sworn the 21st day of November, 2018;
    c. First Affidavit of Jennifer Nathan, sworn the 21st day of November 2018;
    d. The Applicant's brief of authorities;
    e. Such further and other materials as counsel may advise and this Honourable Court deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Vancouver, in the Province of British Columbia, this 21st day of November, 2018.

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Martin Peters, Counsel for the Applicants

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