SUBMISSION BEFORE SENTENCING

This case raises serious questions about climate change and carbon emissions, and about ethics and disobeying the law. If we continue on the present emissions path, by the time children now about two or three years old complete high school, the concentration of carbon dioxide and other greenhouse gases in the atmosphere will exceed 450 parts per million CO_2eq, bequeathing to them a dire future.[1]

There are times when we must disobey the law. If we are lucky, we may live our entire lives without being confronted by such a time.

My working life was as a lawyer in civil litigation for 35 years.

I don't believe that, for most people, respect for the law derives from the threat of punishment, even severe punishment.

People respect and honour the law because they trust and have confidence in its *process.*

At its best, we have confidence that the law has an extraordinary integrity and capacity to address the most complex and vexing conflicts – ones that often threaten the most vulnerable, those who have little power or influence, or no power at all.

Order in Council: November 29, 2016

The core question we face is whether the planned expansion of Canada's oil sands production to 2040 is compatible with our commitment under the Paris Agreement to limit the increase in global average temperature to "well below 2°C" and make our best efforts to limit the increase to 1.5°C.[2]

We can measure the integrity and strength of our legal culture by examining how the approval process for the Trans Mountain project dealt with that question.

Two years ago, Canada authorized the construction of this project.

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[1] An atmospheric greenhouse gas concentration level of 450 ppm CO_2eq is broadly equivalent to a 2°C increase in global average surface temperature above the pre-industrial level. A detailed summary of the evidence about the GHG concentration level and its significance is found in the Outline of Proposed Evidence, in Part 15; Part 16 at paragraphs 16.19-16.23; and in Appendices R and S. A discussion of the deep emissions cuts required on a global scale by 2030 to keep warming to well below 2°C is found in Part 17 of the Outline.

[2] A detailed summary of the proposed evidence concerning Canada's planned expansion of oil sands production to 2040 and whether that growth can be reconciled with keeping the increase in warming to below 2°C is found the Outline at Part 13, "Global Oil Consumption", and Appendices M, N, O, P, and Q.

The order that lies at the root of that decision is the **Order in Council**[3] dated November 29, 2016.

The Trans Mountain project – together with a second new pipeline known as Line 3 – will provide 50% of the additional pipeline capacity needed to drive the continued growth of Canada's oil sands production to 2040.

The Order in Council stated that the members of the cabinet were "satisfied" that this pipeline expansion project is "consistent with Canada's commitments in relation to the Paris Agreement on Climate Change".[4]

That is obviously a crucial statement. The Order provided the ethical foundation, not just the legal foundation, for the pipeline approval decision.

In authorizing Trans Mountain, the Order cited three reports that, it declared, had furnished the evidence relied on by the cabinet to justify their decision.

But none of the reports cited in the Order provided the cabinet with any evidence that could have justified that conclusion.

The first, the National Energy Board (NEB) inquiry, excluded all evidence about emissions or climate science.[5]

The second report, the "upstream emissions assessment", did not answer the question.[6]

In the third report, the three members of the Ministerial Panel unanimously agreed that the core question remained "unanswered".[7]

None of these processes offered any findings that could have "satisfied" the cabinet that the Trans Mountain project was "consistent" with our climate commitments.

The Trans Mountain Expansion Project Review

How could the approval process have failed us so completely?

From the outset, emissions and climate were excluded from the scope of the NEB inquiry. Everything depended on the integrity of the second process, the upstream emissions assessment.[8]

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[3] Outline, Part 11, "The Order in Council".
[4] Outline, Part 11 at paragraphs 11.5-11.13.
[5] Outline, Part 8, "National Energy Board (NEB) inquiry report".
[6] Outline, Part 9, "Trans Mountain upstream emissions report", and Appendices N and P.
[7] Outline, Part 10 and Appendix O, "The Ministerial Panel Report and the 2°C limit".
[8] Outline, Appendix G, "The methodology (*Canada Gazette*, March 19, 2016)" provides a discussion of the methodology governing the way the upstream emission assessment was obliged to calculate the impact of proposed new pipeline capacity on Canada's total emissions and on global emissions.

It was a closed process. It was not a public inquiry. It provided no opportunity for cross-examination or any public questioning. There were no hearings. There was no public or media access.

The government and the pipeline company controlled the flow of information. Incredibly, the procedure required that only *"publicly available data provided by the proponent will be used"*.[9] The "proponent" was the pipeline company. No representatives of the public could participate or demand the right to call evidence.

A proper inquiry must be *public*, because that is our guarantee that the evidence will not be pre-selected or "cherry-picked". There must be a chance for opponents to cross-examine the government's experts, and an opportunity to call other expert witnesses who may disagree. The integrity of the process must be protected by the basic principles of judicial independence, so we can be confident that decision makers are not being influenced by pressures, discussions, or other sources of information that have not been tested in the hearing room, in public view.

The upstream emissions assessment failed to meet any of these basic standards, quietly deciding behind closed doors what evidence it would look at, and what lines of inquiry it would ignore.

The Order in Council had all the outer markings of a lawful order. But the Order was not derived from any process of inquiry that would allow us to trust the decision.

The Order in Council, therefore, cannot compel our respect.

Conclusion

The Crown told this court that there is *"no need to delve into climate change"*. The problem is that the Federal Government refused to delve into climate change – and then deceived Canadians by claiming that it had done so, even incorporating that misleading claim into the text of the Order itself.

I explain in this way my motivation, why I have acted as I have:

We are embarked on a recklessly destructive path. Our political institutions have failed us at this horrific moment, tainting the lawful roots of this project, which rests on the Order in Council and the woefully inadequate review process that preceded it.

I can no longer trust the government's reviews and approval process. They have cast off the prudent and cautious law-sanctioned rules that allowed us to have confidence in their findings and decisions. I have been forced, in forbidding circumstances, to make my own judgments about the risks ahead.

David Gooderham / March 11, 2019

[9] Outline, Part 9 at paragraph 9.30.