

**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 BROCIER (AKA ARTUR BROCIER), 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**

**APPLICANT:** Dr. Timothy Keen Takaro

To: Trans Mountain Pipeline LLC  
c/o Maureen Killoran, Q.C.  
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And to: The Attorney General of British Columbia  
Attention: Trevor A. Shaw  
Crown Law Division  
6th Floor - 865 Hornby Street  
Vancouver, BC  
V6Z 2G3  
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**TAKE NOTICE** that an application will be made by the Applicant at the Law Courts at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on a date to be arranged by the Court for the order or orders set out in Part 1 below.

Part 1:       ORDERS SOUGHT

1.     Setting aside the Injunction Order of this Court dated June 1, 2018. (the "Order");  
and
  
2.     Such further and other orders as Counsel may request and this Honourable Court deem just.

Part 2:       FACTUAL BASIS:

Overview:

3.     The Plaintiff is in the course of destroying trees at Holmes Creek in Burnaby, British Columbia in order to build an interprovincial pipeline (the "Project") that is currently authorized by the federal Cabinet.
4.     The approval process consisted of the National Energy Board Inquiry, the "Upstream Emissions Assessment", and the Ministerial Panel. No part of the approval process considered whether increased emissions resulting from the expansion of the oil sands production facilitated by the Project would or could be consistent with either of the following:
  - i.     Reconciling growth in emissions resulting from the Project with cutting Canada's total (domestic) emissions sufficient to meet Canada's commitment to the 2015 Paris Climate Accord of 511 Mt (megaton) goal by 2030, (upstream emissions) and
  - ii.    Canada's commitments to keep the increase in global average surface temperature within 1.5 or at least 2 degrees warming limits? (downstream emissions).

## Standing:

5. Dr. Timothy Keen Takaro, ("Dr. Takaro") has been engaged in peaceful, lawful and safe protest of the Project at Holmes Creek in Burnaby, British Columbia<sup>1</sup>. On December 9, 2020, contractors or sub-contractors working for the Plaintiff demolished the protest camp at Holmes Creek and, in the presence of CN and CP police, advised Dr. Takaro to leave the site as it was now a work site for the Project. Accordingly, Holmes Creek has been designated as an "operation site" by the Plaintiff's contractors or subcontractors.<sup>2</sup> The Order has been posted at the Creek.<sup>3</sup> Dr. Takaro thus has received notice of the Order and pursuant to its terms is enjoined from continuing his peaceful, lawful and safe protest at Holmes Creek. Dr. Takaro is thus a person affected by the Order and brings this application to set it aside.<sup>4</sup>

## No Consideration of or Authorization for Downstream Emissions of TMX Expansion

6. Emissions of greenhouse gasses such as carbon dioxide resulting from a pipeline can be understood in one of two ways: upstream or downstream. Upstream emissions are those created by the extraction process; downstream emissions result from consumption of the pipeline's finished product.

7. Fossil fuel emissions from energy use and industry, which mainly comprise emissions from burning oil, coal, and natural gas, grew 2.0% in 2018, reaching a record of 37.5 GtCO<sub>2</sub>eq. Emissions from oil, coal, and natural gas use account for about 70% of all global GHG emissions. Total GHG emissions have risen at a rate of 1.5% per years in the last decade, stabilizing only briefly between 2014 and 2016.<sup>5</sup>

## No Authorization Exists to Permit the Downstream Effects Of The Expanded and Increased Amount of Co2 Resulting from the TMX Expansion:

### The National Energy Board inquiry

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<sup>1</sup> Pursuant to paragraph 14 of the Order.

<sup>2</sup> Pursuant to sections 1(a)(iii) & 2(c) of the Order.

<sup>3</sup> pursuant to section 9 & 10 of the Order.

<sup>4</sup> pursuant to section 17 of the Order.

<sup>5</sup> First Takaro affidavit, paragraph 105.

8. The primary review process was the National Energy Board inquiry commenced in 2013. It released its report on May 19, 2016, recommending to the Government of Canada that the project be approved. In the course of the inquiry, the NEB did not consider downstream or upstream greenhouse gas emissions.

9. Section 1.2.4 of the report states:

Some participants said that the Board should consider upstream and downstream effects of the Project. However, in the circumstances of the hearing of this project, as explained in detail in Ruling No. 25, the Board did not consider upstream and downstream effects, including those of greenhouse gas emissions. In Ruling No. 25, the Board found that no particular upstream development is dependent on the Project. The Board also found that it did not consider there was a necessary connection between the Project and upstream production or downstream uses.

— NEB report, May 19, 2016, p.6 (emphasis added)

#### Upstream Emissions Inquiry

10. The Trudeau government began its tenure in October 2015. In January 2016, the federal government announced that it would **not** alter or amend the NEB process to allow or require that the NEB examine the emissions/climate issue. Instead, the federal government created a new process (the “upstream emissions” inquiry), the purpose of which was ostensibly to consider the impacts of the expanded pipeline on Canada’s emissions and its impact on “global emissions”. The Upstream Emissions inquiry process was not in any sense a quasi-judicial process or any kind of inquiry. Rather, this process involved a group of unidentified government employees working directly with Kinder Morgan producing a draft report on May 19, 2016 and a final report on November 25, 2016. The “Upstream Emissions Assessment” report is called the *Review of Related Upstream Greenhouse Gas Emissions Estimates* for the Trans Mountain Expansion Project, (the “Upstream Emissions Report”).<sup>6</sup>

11. The Upstream Emissions Report affirms that oil sands production will continue to grow between now and 2040. The Upstream Emissions Report adopted the NEB’s view

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<sup>6</sup> Exhibit “I” to the First Affidavit of Dr. Tim Keen Takaro.

that global oil consumption will continue to increase for at least another twenty-five years. Based on that forecast of growing global oil demand, the Upstream Emissions Report adopts the NEB's forecast that **oil sands production will increase from the 2014 level of 2.3 million bpd (barrels per day) to 4.3 million bpd by 2040.**<sup>7</sup>

12. The Trans Mountain pipeline expansion, if built, will have the capacity to transport an additional 590,000 bpd, which is 25% of the proposed total expansion of oil sands production increase between now and 2040. The project will increase the capacity of the existing line from 300,000 to 890,000 bpd.

13. A second pipeline expansion project, called Line 3, was also given final approval on November 29, 2016, the same day as the Trans Mountain approval. Line 3 adds new capacity of 370,000 bpd. The Upstream Emissions Report for Line 3 found that the additional emissions associated with the increased volume of production carried by Line 3 would be approximately 10 Megatons (Mt) to 13 Mt of CO<sub>2</sub>eq per year.

14. The Trans Mountain and the Line 3 projects will together add 960,000 bpd of new shipping capacity. The volume of new production represented by the combined capacity of just those two projects will generate between 23 Mt and 30 Mt of GHG emissions per year.

15. The Trans Mountain Upstream Emissions Report addresses internal Canadian oil and gas production and concedes that oil sands emissions will continue to increase, and they will be the main driver of growth in Canada's total emissions:

The growth in emissions to 2030 is **driven largely by growth in the upstream oil and gas sector and, in particular, from the oil sands.** ECCC projections indicate that GHG emissions from the oil sands are expected to increase from 62 Mt in 2013, to 90 Mt in 2020, and up to 116 Mt in 2030.<sup>8</sup>

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<sup>7</sup> *Review of Related Greenhouse Gas Emissions Estimates for the Trans Mountain Expansion Project Report*, November 25, 2016, section B.2.1 at p. 21, "Canada's Oil Supply Growth." Exhibit I, First Affidavit of Timothy Keen Takaro.

<sup>8</sup> Exhibit J, Report, November 25, 2016, section B.2.2, Canada's GHG Projections, p.22

16. The second part of the report purportedly dealt with emissions. The Upstream Emissions Report's assessment calculated the volume of emissions that would be generated by the additional amount of bitumen carried by the expanded pipeline. However, the Upstream Emissions Report did not address whether the calculated increase in Canada's emissions (measured at 13 to 15 Mt) could be consistent with Canada meeting its international emissions reduction commitments by 2030. The Upstream Emissions Report also did not address or answer whether the projected continuing increase in Canada's overall oil production and exports (facilitated by TMX) could be consistent with a world that must achieve deep reductions in oil, coal, and gas use by 2040 (the latter question if answered would have addressed the "downstream emissions" issue).

17. The Upstream Emissions Report does not answer the question of whether oil sands emissions growth of that kind can be reconciled with our commitment to reduce Canada's total emissions to 517 Mt by 2030. It is silent about whether we can make large enough reductions from other economic sectors to obtain the deep cuts we need – and to offset the continued increases in oil sands emissions. The Upstream Emissions Report provides no data or analysis to demonstrate that we can obtain the needed emissions reductions from other sectors in order to get to 524 Mt by 2030.

#### The Ministerial Panel

18. There was a third process: the Ministerial Panel. The Ministerial Panel was an unusual kind of public consultation, appointed by the Federal Minister of Natural Resources in May 2016. It did not have powers to call evidence, or make findings, or draw conclusions. The Ministerial Panel's only mandate was to listen to members of the public – including some of Canada's leading experts on emissions who volunteered to make submissions.

19. The Ministerial Panel was not empowered to make recommendations; however, it made a series of highly significant findings that identify crucial questions that have not yet been answered. The panel says at page 46 of their report:

**Our role was not to propose solutions, but to identify important questions that, in the circumstances, remain unanswered.**

20. The first “high-level question” that “remains unanswered”, according to the three panel members, is whether the growth of emissions that will result from building the Trans Mountain pipeline can be reconciled with Canada’s climate change commitment, which includes our 2030 emissions reduction target. The Ministerial Panel states the question this way:

**Can construction of a new Trans Mountain Pipeline be reconciled with Canada’s climate change commitments?<sup>9</sup>**

21. The Ministerial Panel unanimously concluded that this important question “remain[s] unanswered”.

22. The Ministerial Panel’s report was delivered to the government on November 1, 2016. The government did not respond. Four weeks later, the Cabinet announced its decision in approving the two pipelines – without any public comment on the unanswered question other than:

Whereas the Governor in Council having considered the estimated **upstream greenhouse gas emissions** associated with the Project and identified in Environment and Climate Change Canada’s Report entitled “Trans Mountain Pipeline ULC – Trans Mountain Expansion Project: Review of Related **Upstream Greenhouse Gas Emissions Estimates**” and measures under the Pan Canadian Framework on Clean Growth and Climate Change is satisfied that the project is consistent with Canada’s commitments in relation to the Paris Agreement on Climate Change.<sup>10</sup>  
(emphasis added)

Significantly, Cabinet did not authorize or approve the downstream emissions and their impact on our international commitments.

### Part 3: LEGAL BASIS:

#### The Test to Set Aside an Injunction:

<sup>9</sup> Ministerial Panel Report, November 1, 2016, p. 46

<sup>10</sup> Exhibit “C” Order in Council PC Number 2019-0820, page 9.

23. On an application to set aside an *ex parte* interlocutory injunction order, the general practice is that the application is heard *de novo* by the judge who heard the application *ex parte*.<sup>11</sup> The applicant who was granted the *ex parte* order must once again bear the burden of justifying the order, but this time must do so in light of both the original material presented on the *ex parte* application and in light of the subsequent material filed by the opposing party.<sup>12</sup>

24. The test on an application to set aside an *ex parte* injunction is the same as the test for granting such an injunction: first, the applicant must satisfy the court that there is a fair question to be tried; second, the applicant must establish that the balance of convenience favours the granting of an injunction.<sup>13</sup> The issue of irreparable harm to the parties is considered in the analysis on the balance of convenience.<sup>14</sup>

25. Dissolution of an *ex parte* order may be ordered not only where it appears that the injunction was improperly made, but where it becomes apparent by reason of a subsequent change in the facts or law that it would not be continued.<sup>15</sup>

Fair Question to be Tried:

26. Accordingly, the fair question to be tried is whether in light of the downstream effects of the Project, the Order should ever have issued.

The Balance of Convenience:

27. The factors to be considered under the “balance of convenience” branch of the test: (1) the adequacy of damages as a remedy for the applicant if the injunction is not granted and for the respondent if the injunction is granted; (2) the likelihood that, if damages are finally awarded, they will be paid; (3) the preservation of contested property; (4) other factors affecting whether harm from the granting or refusal of the

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<sup>11</sup> *Kriegman v. Dill*, 2018 BCCA 86 (“*Kriegman*”) note 6 at para. 49.

<sup>12</sup> *Kriegman*, *supra* note 6 at para. 49, citing *Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.* (1997) 71 A.C.W.S. (3d) 1053 (NLCA) at paras. 14-15.

<sup>13</sup> *Attorney General of British Columbia v. Wale et al.*, [1987] 2 C.N.L.R. 36 (BCCA) at para. 49 (“*Wale*”).

<sup>14</sup> *Taseko Mines Ltd. v. Phillips*, 2011 BCSC 1675 at para. 43 (“*Taseko*”).

<sup>15</sup> *McLachlin & Taylor*, *British Columbia Practice*, 3<sup>rd</sup> Ed.; see also *Wilkie Garment Co. v. Interlock Holding Ltd.*, [1994] B.C.J. No. 4 (BCSC.).



injunction would be irreparable; (5) which of the parties has acted to alter the balance of their relationship and so affect the status quo; (6) the strength of the applicant's case; (7) any factors affecting the public interest; and (8) any other factors affecting the balance of justice and convenience.<sup>16</sup>

28. These factors are not exhaustive. Whether an interim injunction should be granted depends upon a great variety of the circumstances. In every case the ultimate issue is whether in the particular circumstances the most just course is to restrain the defendant from carrying out the acts which are apprehended until the matters which are in issue between the parties can be finally disposed of by the court: *MacMillan Bloedel Ltd. v. Mullin et al.*<sup>17</sup>

29. The government decision to approve the expansion of TMX does not sanction or address the fact that this expanded production of petroleum products drastically reduces Canada's ability to meet its commitments contained in the Paris Climate Accord, guarantees Canada directly and significantly contributes to the growth in global GHG production with the resulting significant increase in global warming.

30. The state of scientific knowledge on the effects of oil production and consumption is set out in the First Affidavit of Tim Takaro:

- a. Canada's commitment under the December 2015 Paris Agreement, referred to as Canada's "Nationally Determined Contribution" (NDC), was to cut the country's total emissions 30% below the 2005 level by 2030, which would be a reduction of 219 Mt<sup>18</sup> - down to an annual level of 511 Mt by 2030. Based on the most recent report by the Government of Canada, projected reductions by 2030 under current policies are only 57 Mt. The shortfall to meet Canada's target is another 162 Mt.<sup>19</sup>

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<sup>16</sup> *Wale*, *supra* note 12 at para. 47.

<sup>17</sup> *MacMillan Bloedel Ltd. v. Mullin et al.*, [1985] 2 C.N.L.R. 58 (B.C.C.A.).

<sup>18</sup> Metric tons

<sup>19</sup> First Takaro affidavit, paragraph 74.

- b. The most recent data published by the Government of Canada shows that the oil and gas sector is the largest source of GHG emissions in Canada's economy, and that between 2005 and 2018 the oil sands sub-sector has been by far the largest source of emissions growth in Canada.<sup>20</sup>
  
- c. Environment and Climate Change's own data shows, that the capacity of Canada's forests to "remove" carbon from the atmosphere and the actual removals attributed to Forest Land in recent years has been very significantly offset by emissions from forest fires in Canada, which include "wildfires" in British Columbia and Alberta.<sup>21</sup>
  
- d. The Auditors General in their report acknowledged that Canada will fail to meet its 2020 Copenhagen target, a commitment made in 2009 by the Conservative Government of Stephen Harper to reduce emissions 17% by 2020, below the 2005 level.<sup>22</sup>
  
- e. Under the terms of December 2015 Paris Agreement, all parties to the United Nations Framework Convention on Climate Change (including Canada) agreed to "holding the increase in global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C." Parties made voluntary commitments to achieve certain emissions reductions by 2030.<sup>23</sup>
  
- f. Fossil fuel emissions from energy use and industry, which mainly comprise emissions from burning oil, coal, and natural gas, grew 2.0% in 2018, reaching a record of 37.5 GtCO<sub>2</sub>eq. Emissions from oil, coal, and natural gas use account for about 70% of all global GHG emissions. Total GHG emissions have risen at a

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<sup>20</sup> First Takaro affidavit, paragraph 57.

<sup>21</sup> First Takaro affidavit, paragraph 83.

<sup>22</sup> First Takaro affidavit, paragraph 98.

<sup>23</sup> First Takaro affidavit, paragraph 102.

rate of 1.5% per years in the last decade, stabilizing only briefly between 2014 and 2016.<sup>24</sup>

- g. The available scientific evidence shows that it is the increasing *cumulative emissions* of CO<sub>2</sub> and other GHGs that are driving the observed warming of the earth's atmosphere. Cumulative CO<sub>2</sub> emissions and global mean surface temperature are approximately linearly related. The three most prevalent GHG's (carbon dioxide, methane, and nitrous oxide) have increased in the atmosphere since pre-industrial times, and this increase is the main cause of climate change.<sup>25</sup>
- h. The concentrations of carbon dioxide, methane, and nitrous oxide exceed any level measured for at least the past 800,000 years.<sup>26</sup>
- i. Without additional new policies that would very substantially reduce the future level of global emissions, projected growth in cumulative emissions to 2100 will result in warming in the range of 3.7°C to 4.8°C above the pre-industrial level.<sup>27</sup>
- j. the reductions in the annual level of global emissions that would be required by 2030 to stay within the 1.5°C warming limit, which are in the range of 25–30 GtCO<sub>2</sub>eq, are vastly greater than the 15 GtCO<sub>2</sub>eq emissions gap to stay within the 2°C warming limit.<sup>28</sup>
- k. Theoretical schemes that place heavy reliance on the viability of future carbon dioxide reduction schemes hold out promise that governments, businesses, and individuals might continue for another decade to defer any deep reductions to burning oil, natural gas, and coal (and thus continue to release additional CO<sub>2</sub> into the atmosphere in very substantial amounts) and then, a few decades in the

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<sup>24</sup> First Takaro affidavit, paragraph 105.

<sup>25</sup> First Takaro affidavit, paragraph 111.

<sup>26</sup> First Takaro affidavit, paragraph 119.

<sup>27</sup> First Takaro affidavit, paragraph 128.

<sup>28</sup> First Takaro affidavit, paragraph 144.

future, require the world's children spend the next hundred years attempting to remove the same amount from the atmosphere at enormous economic cost and by technological means that do not yet exist and which may not prove viable.<sup>29</sup>

- I. Oil production is projected to continue increasing over the next two decades, but the estimated increase to 2040 is larger in absolute terms than it was four years ago.<sup>30</sup>

31. The "inconvenience" to the Plaintiffs if the Order is stayed is that construction of the pipeline will be delayed and perhaps permanently halted. These are strictly economic consequences.

32. The harm to the planet should the Order stand and the expansion of the pipeline occur as described above will continue the increase in global warming. The public interest in avoiding irreparable environmental harm must be weighed against the economic consequences to TMX.

The Defendants therefore submit that the "convenience" favours not maintaining the Order with its effect of supporting the Project and enhancing global warming  
Part 4:  
MATERIAL TO BE RELIED UPON:

- a. The First Affidavit of Tim Takaro affirmed the 9th day of December 2020, and the exhibits attached therein;
- b. A brief of authorities; and
- c. Such further and other material as counsel may advise and this Honourable Court deem just.

The Applicant submits that one day should be sufficient to argue the application.

[Check the correct box.]

This matter is within the jurisdiction of a master.

This matter is not within the jurisdiction of a master.

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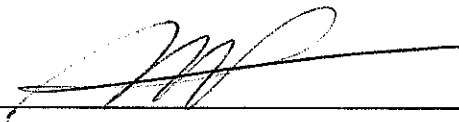
<sup>29</sup> First Takaro affidavit, paragraph 149.

<sup>30</sup> First Takaro affidavit, paragraph 160.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
  - (i) you intend to refer to at the hearing of this application, and
  - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  - (i) a copy of the filed application response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date December 10, 2020



Martin Peters

Signature of  applicant  lawyer for applicant

Martin Peters, Barrister  
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**To be completed by the court only:**

Order made

in the terms requested in paragraphs ..... of Part 1 of this notice of application

with the following variations and additional terms:

.....  
.....  
.....  
.....  
.....

Date: .....[dd/mmm/yyyy].....

.....  
Signature of  Judge  Master

**Appendix**

*[The following information is provided for data collection purposes only and is of no legal effect.]*

**THIS APPLICATION INVOLVES THE FOLLOWING:**

*[Check the box(es) below for the application type(s) included in this application.]*

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery

other matter concerning oral discovery

amend pleadings

add/change parties

summary judgment

summary trial

service

mediation

adjournments

proceedings at trial

case plan orders: amend

case plan orders: other

experts

none of the above

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