NATIONAL ENERGY BOARD

OH-001-2014
Trans Mountain Pipeline ULC
Application for the Trans Mountain Expansion Project
File OF-Fac-Oil-T260-2013-03 02

TSLEIL-WAUTUTH NATION
REPLY SUBMISSIONS
(for Tsleil-Waututh Nation's motion in respect of Trans Mountain's reply evidence)

Dated: September 24, 2015

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PART I OVERVIEW

1. Trans Mountain's response is grounded entirely on a manifestly incorrect view of what constitutes proper reply in law, and ignores the large body of case law that sets out the "well established" rules on the proper scope of reply evidence. Rather than addressing how those "well established" rules ought to apply to the Reply Evidence, Trans Mountain has instead engaged in an unhelpful and misleading exercise of selectively cutting and pasting passages from cases that do not apply in the circumstances nor support its assertions and, if properly read in their full context, actually support TWN's position.

2. Trans Mountain fails to address how any of the roughly 4,000 pages of its Reply Evidence is proper reply—i.e., establish that it is in response to new issue(s) raised in TWN's evidence that Trans Mountain could not have previously addressed.[1] Its position on this motion, if accepted, would in effect give any applicant before the Board unlimited scope to split its case under the guise of attempting to undermine the other party's evidence, contravening "well established" rules to the contrary.

3. Curiously, in a September 11, 2015 letter to the Board, Trans Mountain stated that it does not object to a further round of IRs in relation to the Reply Evidence.[2] This concession can only be interpreted as tacit acknowledgement that intervenors have not been given the opportunity to test the Reply Evidence.

4. In TWN's submission, more is required to address the fundamental unfairness that Trans Mountain has created. In short, fairness demands that the Board remedy the situation by either striking the Reply Evidence, or granting TWN the right to ask Trans Mountain IRs and file sur-reply in relation to it.

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[1] See Notice of Motion at para 35 a) and references cited therein [Motion Record of Tsleil-Waututh Nation (hereafter the "**TWN MR**"), Tab 1 at 15 (Exhibit C358-25, A4T1Y7)].

[2] Exhibit B423-1: Letter from Trans Mountain to the NEB, dated September 11, 2015 re Reply to Intervenors' Responses Regarding Trans Mountain's Response to National Energy Board Letter dated August 21, 2015 at 8 (A4T2S3).

PART II REPLY SUBMISSIONS

A. REPLY TO TRANS MOUNTAIN SUBMISSIONS ON THE LAW OF REPLY EVIDENCE

5. All of Trans Mountain's arguments depend on the Board accepting that the colloquial definition of "reply evidence" found in the *Hearing Process Handbook*, read together with two Federal Court cases, correctly define what constitutes proper reply.[3]

6. However, Trans Mountain's submission ignores and is inconsistent with the "well established" hallmarks of proper reply.[4] For that reason, all of its arguments which rely on this erroneous construct must in turn fail. There are three reasons why the Board should not accept Trans Mountain's position.

7. First, the *Handbook* glossary where Trans Mountain has selectively plucked the unrestrained definition of "reply evidence" from expressly provides that its definitions "are not legal definitions".[5] The definition in question is clearly provided as guidance for laypersons, and has no bearing on the issues which arise in this motion.

8. Second, with respect to the two Federal Court cases Trans Mountain relies on (*Eli Lilly*[6] and *Merck*[7]), both are selectively quoted from without any regard to the unique regulatory context in which they were decided, nor any reference to what the passages actually say, including with respect to what constitutes proper reply.

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[3] Exhibit B426-1: Trans Mountain Response to City of Vancouver, Tsleil-Waututh Nation, Tsawout First Nation, Upper Nicola Band and Metro Vancouver Notices of Motion at para 4 (A4T4S9).

[4] John Sopinka et al., *The Law of Evidence in Canada*, 4th ed. (Markham, ON: LexisNexis, 2014) at 1189–1192 [Sopinka] [TWN Book of Authorities (hereafter the "**TWN BA**"), Tab 23 (Exhibit C358-25-3, A4T1Y8)] applied in *Lockridge v Ontario* (*Director*, *Ministry of the Environment*), 2013 ONSC 6935, 2013 CarswellOnt 15491 at para 14 [*Lockridge* cited to WL] [TWN BA, Tab 14 (Exhibit C358-25-3, A4T1Y8)].

[5] National Energy Board, *Hearing Process Handbook*: *A Guide to NEB Hearings* (Ottawa: National Energy Board, 2013) at 31 ["**NEB Handbook**"].

[6] *Eli Lilly Canada Inc v Apotex Inc*, 2006 FC 953, 2006 CarswellNat 2447 [*Eli Lilly* cited to WL] [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)].

[7] *Merck-Frosst—Schering Pharma GP v Canada* (*Minister of Health*), 2009 FC 914, 2009 CarswellNat 2762 [*Merck* cited to WL] [TWN Supplementary BA, Tab 1].

9. Both cases concerned applications under the *Patented Medicines* (*Notice of Compliance*) *Regulations*.[8] That regulatory scheme is summary in nature,[9] involves an abundance of scientific evidence (that may or may not be relevant),[10] and reply evidence can only be filed with leave.[11]

10. In those cases, the Court held that the "well established" rules of proper reply ought not be strictly applied in the unique circumstances of the NOC regulatory scheme.[12] Despite this fundamental difference from the goals of this Hearing (and how the Board has purposefully structured it, as is discussed in greater detail below), Trans Mountain does not explain why these cases ought to directly apply to this Hearing.

11. Trans Mountain nonetheless submits that *Eli Lilly* stands for the principle that the purpose of reply is to "contradict, qualify or impeach" evidence.[13] However, the passage it cites does not relate to a judicial discussion of the purpose of reply evidence whatsoever. Rather, it discusses criteria to be applied in determining whether the specific sur-reply evidence at issue in *Eli Lilly* was properly "responsive".[14]

12. Trans Mountain also submits that *Merck* stands for the principle that reply evidence is proper if it "critiques, rebuts, challenges, refutes or disproves the opposite party's evidence".[15] Again, the cited passage does not even purport to discuss what constitutes proper reply evidence. Rather, it again sets out criteria to be considered to determine whether proposed evidence is "responsive".[16]

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[8] *Eli Lilly*, *supra* note 6 involved a motion to strike sur-reply evidence filed pursuant to a previous order on a Rule 312 motion for leave to file reply and sur-reply. *Merck* involved a Rule 312 motion for leave to file reply evidence [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)].

[9] *Eli Lilly*, *supra* note 6 at para 26 [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)].

[10] *Merck*, *supra* note 7 at para 26 [TWN Supplementary BA, Tab 1].

[11] *Eli Lilly*, *supra* note 6 at para 26 [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)]; *Federal Courts Rules*, SOR/98-106, Rule 312 [TWN Supplementary BA, Tab 2].

[12] *Eli Lilly*, *supra* note 6 at paras 19, 20 [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)].

[13] Exhibit B426-1: Trans Mountain Response to City of Vancouver, Tsleil-Waututh Nation, Tsawout First Nation, Upper Nicola Band and Metro Vancouver Notices of Motion at para 4 (A4T4S9).

[14] *Eli Lilly*, *supra* note 6 at para 24 [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)].

[15] Exhibit B426-1: Trans Mountain Response to City of Vancouver, Tsleil-Waututh Nation, Tsawout First Nation, Upper Nicola Band and Metro Vancouver Notices of Motion at para 4 (A4T4S9).

[16] *Merck*, *supra* note 7 at para 23 [TWN Supplementary BA, Tab 1].

13. Clearly, and even leaving aside the unique context and distinguishing features of the regulatory regime in which both of these cases were decided, the passages cited by Trans Mountain simply have no application to this Hearing.

14. Notwithstanding these fatal errors, Trans Mountain nonetheless urges the Board to take a second erroneous step and combine the non-legal definition of reply evidence from the *Handbook* with the Court's comments in *Merck* regarding responsiveness. To do so, however, would result in an unlimited scope of reply; indeed, on such flawed reasoning it could be argued that nearly anything would constitute proper reply. This would encourage case-splitting, contravening well-established rules to the contrary.

15. Because all of Trans Mountain's arguments as to the "purpose of reply" within paragraphs 7–10 of its response are grounded upon this selective, misleading, and fundamentally wrong legal submission, they must in turn fail.

16. Finally, to the extent that *Eli Lilly and Merck* do touch upon what may fairly be considered proper reply, they support TWN's position on this motion. In both cases, the Court considered whether evidence at issue was (i) "properly responsive",[17] and (ii) proper reply.[18] Inexplicably, Trans Mountain ignores the clear direction in both cases that, even in that unique regulatory scheme, "regard must be had" to the rules of proper reply.[19] Those well established rules, as set out by the Court in those cases, include:

(a) the evidence must not have been previously available;[20]

(b) a party must not be allowed to spit its case;[21]

(c) introducing "new studies and publications that support or bolster" a party's prior evidence is a species of case splitting and is not proper reply;[22]

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[17] *Eli Lilly*, *supra* note 6 at para 21 [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)]; *Merck*, *supra* note 7 at para 23 [TWN Supplementary BA, Tab 1].

[18] *Eli Lilly*, *supra* note 6 at para 21 [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)]; *Merck*, *supra* note 7 at para 25 [TWN Supplementary BA, Tab 1].

[19] *Eli Lilly*, *supra* note 6 at paras 19, 20 [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)]; *Merck*, *supra* note 7 at para 25 [TWN Supplementary BA, Tab 1].

[20] *Eli Lilly*, *supra* note 6 at para 19 [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)].

[21] *Eli Lilly*, *supra* note 6 at para 19 [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)].

[22] *Eli Lilly*, *supra* note 6 at para 27 [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)].

(d) evidence that is merely confirmatory is not proper reply;[23] and

(e) a party "cannot lie in the weeds and after the opposite party has responded file evidence to bolster its case in light of the defence that has been mounted."[24]

17. Indeed, in applying these "well established" rules, the Court struck out all or parts of 140 paragraphs of the sur-reply at issue in *Eli Lilly*,[25] and significant parts of the proposed reply affidavit at issue in *Merck*. In particular, the Court in *Eli Lilly* was "particularly vigilant" in striking evidence that *introduced new studies and publications* to bolster previous conclusions given in chief.[26] It was struck because the evidence was prejudicial to the opposing party, and there was no opportunity to respond to it.[27]

18. Surely, the forceful result in *Eli Lilly* and the reasoning relied on in both cases (the only two cited by Trans Mountain in relation to what constitutes proper reply) do no more than support TWN's position that Reply Evidence based on *new data, studies, and publications* that TWN has not had the opportunity to address indeed must be struck.

B. REPLY TO TRANS MOUNTAIN'S SUBMISSIONS ON SUR-REPLY

19. Trans Mountain argues that sur-reply is an "extraordinary remedy" granted only in "exceptional cases". It further submits that TWN's request for sur-reply should be denied because TWN has not identified any issues that were raised for the first time in the Reply Evidence.[28] TWN has four submissions in reply.

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[23] *Eli Lilly*, *supra* note 6 at para 19 [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)].

[24] *Merck*, *supra* note 7 at para 25 [TWN Supplementary BA, Tab 1].

[25] *Eli Lilly*, *supra* note 6 at para 29 [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)].

[26] *Eli Lilly*, *supra* note 6 at paras 27, 39, and 40 [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)].

[27] *Eli Lilly*, *supra* note 6 at para 40 [TWN BA, Tab 9 (Exhibit C358-25-3, A4T1Y8)].

[28] Exhibit B426-1: Trans Mountain Response to City of Vancouver, Tsleil-Waututh Nation, Tsawout First Nation, Upper Nicola Band and Metro Vancouver Notices of Motion at paras 6, 19 (A4T4S9).

20. First, none of the authorities cited by Trans Mountain suggest that sur-reply is an "extraordinary remedy". While sur-reply may not be frequently required, this perhaps speaks more to the fortuitously rare phenomenon of parties attempting to sand-bag one another with reams of improper reply evidence as Trans Mountain has done. All of the cases cited by Trans Mountain do, however, clearly state that it is appropriate to provide parties with an opportunity to respond to new issues or arguments raised in reply.[29]

21. Faced with similar circumstances, many adjudicators (including this Board) have readily granted rights of sur-reply "to ensure that each party has a fair opportunity to prepare its case and its response to the other side's evidence."[30] Such right was granted in *Eli Lilly*, the same case Trans Mountain heavily relies upon.

22. Second, TWN has in fact identified all new evidence, analysis, and opinion that it has not had the opportunity to address.[31] It has also filed uncontradicted evidence that the evidence was not available to its experts when they prepared their reports.[32]

23. Third, Trans Mountain has avoided directly addressing the issue of the 10 further studies it filed, which its experts now refer to and rely on to reach new opinions. Many of those studies relate to oil spill fate and behaviour, an issue that was addressed at length in Trans Mountain's initial application. Trans Mountain nonetheless asserts that it could not have previously addressed these issues and states that "additional evidence" was required. It does not explain why this is so, nor why it did not seek leave to file it.[33]

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[29] *Strata Plan LMS 1816 v British Columbia Hydro And Power Authority*, 2002 BCSC 313, 2002 CarswellBC 504 at para 17 [*Strata* cited to WL] [TWN BA, Tab 20 (Exhibit C358-25-3, A4T1Y8)]; Application for the Keystone Pipeline—OH-1-2007: Exhibit 29a: NEB Ruling regarding CEP Sur-Reply Submissions, dated 29 June 2007 (A0Z5R7) [*Keystone*]; Transcript of Proceedings, Volume 39, National Energy Board Hearing Order EH-1-2000, Sumas Energy 2, held on September 23, 2003 [*Sumas*] [TWN BA, Tab 22 (Exhibit C358-25-3, A4T1Y8)].

[30] *Lockridge*, *supra* note 4 at para 31 [TWN BA, Tab 14 (Exhibit C358-25-3, A4T1Y8)]; see also *Sumas*, *supra* note 29 [TWN BA, Tab 22 (Exhibit C358-25-3, A4T1Y8)].

[31] Notice of Motion at paras 21–24, 35–36, 41 [TWN MR, Tab 1 at 10–11, 15–17 (Exhibit C358-25, A4T1Y7)].

[32] Short affidavit at para 9b) [TWN MR, Tab 2 at 34 (Exhibit C358-25, A4T1Y7)]; DeCola affidavit at para 8b) [TWN MR, Tab 3 at 46–47 (Exhibit C358-25, A4T1Y7)]; Gunton affidavit at paras 8(b)–(c) [TWN MR, Tab 4 at 56 (Exhibit C358-25, A4T1Y7)].

[33] Exhibit B426-1: Trans Mountain Response to City of Vancouver, Tsleil-Waututh Nation, Tsawout First Nation, Upper Nicola Band and Metro Vancouver Notices of Motion at paras 9–10 (A4T4S9).

24. Fourth, a right of sur-reply is only being sought by TWN as relief in the alternative, if the Board does not strike the impugned reply evidence. Surely to leave voluminous improper reply on the record, without granting TWN a right of sur-reply, would be a highly prejudicial result. Fairness demands that Trans Mountain's extensive and improper case-splitting exercise be remedied such that TWN is provided with a meaningful opportunity to present its case fully and fairly.[34]

C. REPLY TO TRANS MOUNTAIN'S ARGUMENT ABOUT PROCEDURAL DIRECTION NO. 5 AND "NEW INFORMATION"

25. With respect to the significance of Procedural Direction No. 5, Trans Mountain confusingly argues that: (i) it does not apply to the copious amounts of new data, studies, and reports or the aspects of its "expert" reports that raise new issues because the Hearing Order provides it with an independent right of "reply";[35] and (ii) reply evidence, by definition, is "new information".[36] Finally, it argues that the proper recourse for TWN is to make oral argument on the relevance or weight the Board should attach to the Reply Evidence.[37]

26. In reply, TWN states there are at least five reasons these arguments must fail.

27. First, Trans Mountain's argument that it did not require leave is directly contradicted by its own previous submissions to the Board.

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[34] Exhibit A32-1: NEB Ruling No. 14—Notices of motion from Ms Robyn Allan and Ms Elizabeth May to include cross-examination of witnesses, Decision of May 7, 2014 at 3 (A3W5J1), citing Sara Blake, *Administrative Law in Canada*, 5th ed (Toronto: Lexis Nexis, 2011) at 12–13.

[35] Exhibit B426-1: Trans Mountain Response to City of Vancouver, Tsleil-Waututh Nation, Tsawout First Nation, Upper Nicola Band and Metro Vancouver Notices of Motion at para 11 (A4T4S9).

[36] Exhibit B426-1: Trans Mountain Response to City of Vancouver, Tsleil-Waututh Nation, Tsawout First Nation, Upper Nicola Band and Metro Vancouver Notices of Motion at paras 13–14 (A4T4S9).

[37] Exhibit B426-1: Trans Mountain Response to City of Vancouver, Tsleil-Waututh Nation, Tsawout First Nation, Upper Nicola Band and Metro Vancouver Notices of Motion at paras 15–17 (A4T4S9).

28. Tellingly, the very titles attached to many of the newly-filed studies reveal that they are updates or supplemental reports, not reply in response to TWN's evidence.[38] In that regard, Trans Mountain acknowledged in its motion seeking leave to file the Seismic Hazard Update that it is required to seek leave to file consultation and technical updates.[39] Again, the case law is clear that new evidence which was not previously available is, in substance, new evidence outside of proper reply.[40]

29. Second, Trans Mountain's argument that all reply evidence is by definition "new information" and therefore permissible notwithstanding there being no opportunity for other parties to address it misapprehends both the purpose of proper reply and the role Procedural Direction No. 5 is intended to serve in maintaining fairness in this Hearing.[41]

30. In particular, proper reply must not introduce new issues. Its sole purpose is to respond to matters raised by the responding evidence that were not raised in the evidence led in chief.[42] This maintains basic fairness in that each party will have had an equal opportunity to hear and respond to the full evidence and submissions of the other.

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[38] Exhibit B417-5: Appendix 1A: Trans Mountain Expansion Project Analysis of Draft Conditions (A4S7F2); Exhibit 417-15: Appendix 6C: Consultation Update No. 4—Aboriginal Engagement, dated August 20, 2015, Part 1 of 6 (A4S7G2); Exhibit 417-17: Appendix 6C: Consultation Update No. 4—Aboriginal Engagement, dated August 20, 2015, Part 3 of 6 (A4S7G4); Exhibit 417-27: Appendix 7F: Consultation Update No. 4—Letter to Tsleil Waututh Nation, dated January 23, 2015 (A4S7H4); Exhibit B417-40: Appendix 40A: Supplemental Traditional Land and Resource Use Technical Report No. 4, prepared by Tera, dated August 2015 (A4S7I7); Exhibit B417-41: Appendix 40B: Supplemental Traditional Marine Resource Use—Marine Transportation Technical Report No. 3, prepared by Tera, dated August 2015 (A4S7I8); Exhibit B417-47: Appendix 52C: Technical Memorandum, "English Bay Oil Spill," prepared by Tetra Tech, dated April 13, 2015 (A4S7J2); Exhibit B417-49: Appendix 62B: Independent Review of the M/V Marathassa Fuel Oil Spill Environmental Response Operation, dated July 19, 2015 (A4S7J6).

[39] Trans Mountain's March 31, 2015 Notice of Motion regarding Seismic Update at paras 4(d) and 5.

[40] Sopinka, *supra* note 4 at 1195 [TWN BA, Tab 23 (Exhibit C358-25-3, A4T1Y8)].

[41] Exhibit B426-1: Trans Mountain Response to City of Vancouver, Tsleil-Waututh Nation, Tsawout First Nation, Upper Nicola Band and Metro Vancouver Notices of Motion at paras 13–14 (A4T4S9).

[42] *Halford v Seed Hawk Inc*, 2003 FCT 141, 2003 CarswellNat 1472 at para 14 [*Halford* cited to WL] [TWN BA, Tab 11]; *R v Krause*, [1986] 2 SCR 466, 1986 CarswellBC 330 at para 16 (WL) [TWN BA, Tab 17 (Exhibit C358-25-3, A4T1Y8)]; *Lockridge*, *supra* note 4 at para 14 [*Lockridge* cited to WL] [TWN BA, Tab 14 (Exhibit C358-25-3, A4T1Y8)].

31. TWN's objection is therefore not, as Trans Mountain tritely asserts in straw-man fashion, that the Reply Evidence contains "new information". Its objection is that the Reply Evidence introduces extensive new evidence, analysis, and opinion in relation to issues already addressed by Trans Mountain in its Application, and does so in a way that procedurally prevents TWN from meaningfully responding to it. Such an approach runs counter to the Federal Court's clear and principled holding in *Halford*:

> 14. The conclusion which I draw from this passage is that evidence which simply confirms or repeats evidence given in chief is not to be allowed as reply evidence. It must add something new. But since the plaintiff is not allowed to split its case, that something new must be evidence which was not part of its case in chief. That can only leave evidence relating to matters arising in defence which were not raised in the plaintiff's case in chief. But even this is subject to a limitation which is expressed in the following passage from Sopinka et al. The *Law of Evidence in Canada* 2nd Edition at p. 882:
>
> > Should reply evidence be excluded if the point in respect of which contradictory evidence is sought to be adduced in reply arose in cross-examination of the other parties' witness rather than their evidence in chief? In *Mersey Paper Co v. Queens (County)* (1959) 18 D.L.R. (2nd) 19 (N.S.C.A.), The Nova Scotia Court of Appeal considered this to be an unjustifiable technical distinction. It is submitted that, at least in civil cases, it would depend on whether the matter was part of the plaintiff's case and one which might have been adduced in the plaintiff's case-in-chief. A plaintiff cannot leave part of its case until cross-examination of the defendant's witnesses and then when that goes badly make up for it in reply.[43]

32. Third, Trans Mountain's obvious attempt at an end-run around the requirement of obtaining leave in Procedural Direction No. 5 is an affront to both the hearing structure and procedural safeguards put in place by the Board.

33. In its completeness letter, the Board commented as follows in deciding that Trans Mountain's application was complete and could proceed to a public hearing:

[43] *Halford*, *supra* note 42 at para 14 (emphasis added) [TWN BA, Tab 11 (Exhibit C358-25-3, A4T1Y8)].

> The Board takes a holistic approach to completeness and considers whether there are important issues missing from the application that would make participants unable to engage in debate at a public hearing. In this instance, the Board is of the view that participants will be able to engage in debate on this Application through the hearing process.[44]

34. Concurrently, the Board issued its Hearing Order which, among other things, established the list of issues it would consider in the Hearing,[45] and the order in which Trans Mountain's evidence would be tested by IRs, before interveners would be required to file evidence of their own.[46]

35. In TWN's submission, the purpose of this process, as crafted by the Board, was to ensure fairness. The Board's choice of procedure was obviously intended to provide those whose interests are affected by the Board's decision with "a meaningful opportunity to present their case fully and fairly" and to know the case to be met.[47]

36. The purpose of the restriction for leave before filing new evidence that later appeared in Procedural Direction No. 5 is, in TWN's submission, the functional equivalent of similar rules applicable to Superior Courts. Such a mechanism is intended to allow a tribunal the opportunity to consider any new request to file evidence in order to police and prevent what has occurred here: prejudice caused by improper reply.[48]

37. In view of the clear purpose of these procedural safeguards employed by the Board, Trans Mountain's attempt to shift focus to an abstract debate as to the "purpose of reply evidence" is a red herring. The proper focus is on the purpose of the procedural choices made by the Board, which suggest a traditional, trial-like procedure, which would clearly not tolerate the highly irregular approach Trans Mountain has taken.

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[44] Exhibit A16-1: NEB Letter to Trans Mountain—Completeness Determination and Legislated Time Limit, dated April 2, 2014 at 2 (A3V6H7) (emphasis added).

[45] Exhibit A15-3: Hearing Order OH-001-2014, Appendix I: List of Issues at 18 (A3V6I2).

[46] Exhibit A15-3: Hearing Order OH-001-2014 at 10–11 (A3V6I2).

[47] Exhibit A32-1: NEB Ruling No. 14—Notices of motion from Ms Robyn Allan and Ms Elizabeth May to include cross-examination of witnesses, Decision of May 7, 2014 at 3 (A3W5J1), citing Sara Blake, *Administrative Law in Canada*, 5th ed (Toronto: Lexis Nexis, 2011) at 12–13, citing in turn *Baker v Canada* (*Minister of Citizenship and Immigration*), 1999 CarswellNat 1124 [TWN BA, Tab 2 (Exhibit C358-25-3, A4T1Y8)].

[48] See *Lockridge*, *supra* note 4 at paras 21–23, 31 [TWN BA, Tab 14 (Exhibit C358-25-3, A4T1Y8)].

38. Fourth, Trans Mountain's histrionic response that it would have to be "clairvoyant to anticipate all issues intervenors would raise in their written evidence"[49] has no basis in reality. Long after the Board established the relevant issues in its Hearing Order, and long after Trans Mountain filed its own expert evidence, Trans Mountain elected to forgo asking any IRs and instead later filed new reports, based on new data and containing new analyses and opinions.[50]

39. This is also internally inconsistent with Trans Mountain's own submissions on this motion—that most of the studies in relation to oil spill fate and behaviour, oil spill response, and diluted bitumen it filed as "reply" were available to it before TWN was required to file its evidence.[51] The truth of the matter is that Trans Mountain could have sought leave to file the studies at that time so that TWN could properly consider and respond to them, but chose not to and elected to instead save them as a surprise.

40. In TWN's respectful submission, such an approach does not represent the fair "debate on [Trans Mountain's] Application" envisioned by the Board's completeness order,[52] and later given structure by its Hearing Order and Procedural Order No. 5.

41. In short, Trans Mountain has done indirectly via reply evidence what it could not do directly: file new evidence without notifying the Board of its intention to do so. Bypassing the requirements of Procedural Order No. 5 should bring with it the consequence of the offending evidence being struck, or interveners being afforded the opportunity to file additional IRs and sur-reply evidence.

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[49] Exhibit B426-1: Trans Mountain Response to City of Vancouver, Tsleil-Waututh Nation, Tsawout First Nation, Upper Nicola Band and Metro Vancouver Notices of Motion at paras 7, 9 (A4T4S9).

[50] Affidavit of Jeffrey Short Affidavit, affirmed on August 31, 2015 at para 7 (hereafter the "**Short Affidavit**") at paras 9b), 10–15 [TWN MR, Tab 2 at 34, 35–37 (Exhibit C358-25, A4T1Y7)]; Affidavit of Elise DeCola, affirmed on September 2, 2015 (hereafter the "**DeCola Affidavit**") at paras 8b), 10–23 [TWN MR, Tab 3 at 46–50 (Exhibit C358-25, A4T1Y7)]; Affidavit of Thomas Gunton, affirmed on September 8, 2015 (hereafter the "**Gunton Affidavit**") at paras 8(b)–(c), 10–13, 15–16, 19–20 [TWN MR, Tab 4 at 55–56, 57, 58 (Exhibit C358-25, A4T1Y7)].

[51] Exhibit B426-1: Trans Mountain Response to City of Vancouver, Tsleil-Waututh Nation, Tsawout First Nation, Upper Nicola Band and Metro Vancouver Notices of Motion at para 10 and footnote 32 (A4T4S9).

[52] Exhibit A16-1: NEB Letter to Trans Mountain—Completeness Determination and Legislated Time Limit, dated April 2, 2014 at 2 (A3V6H7).

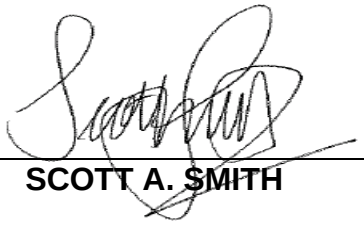
42. Finally, Trans Mountain's suggestion that the unfair situation it has concocted may be remedied by the intervenors simply making oral submissions on the relevance of its voluminous improper reply evidence is no answer.

43. As the Alberta Court of Appeal forcefully held in the *Nortel Networks Inc.* decision, "[w]hile a board has considerable scope in determining what evidence is relevant for its purposes, it is not thereby entitled to deprive an opposite party of the means to effectively challenge such evidence."[53] To rely on such a measure as a remedy would breach the requirements of procedural fairness, and is also impractical.

PART III CONCLUSION

44. For the above reasons, TWN respectfully requests the Board to grant the relief set out in paragraph 4 of its Notice of Motion.

Dated: September 24, 2015



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[53] *Nortel Networks Inc v Calgary* (*City*), 2008 ABCA 370 at para 19 [TWN BA, Tab 16 (Exhibit C358-25-3, A4T1Y8)].