



File OF-Fac-Oil-E266-2014-01 02  
9 September 2016

To: All participants

**Hearing Order OH-002-2016**

**Energy East Pipeline Ltd. and TransCanada PipeLines Limited**

**Energy East Project and Asset Transfer (Energy East), and Eastern Mainline Project (Eastern Mainline)**

**Notices of motion from Stratégies Énergétiques and the Association québécoise de lutte contre la pollution atmosphérique, and Transition Initiative Kenora (TIK)**

**Ruling No. 28**

On 11 August 2016, Stratégies Énergétiques and Association Québécoise de lutte contre la pollution atmosphérique filed a letter with the National Energy Board (NEB or Board) seeking the following relief:

1. The recusal of Members Lyne Mercier and Jacques Gauthier from the panel assigned to hear the Energy East and Eastern Mainline applications (Hearing Panel).
2. The recusal of the Presiding Member of the Hearing Panel, Roland George.
3. The withdrawal of NEB Chair Peter Watson and Vice-Chair Lyne Mercier from their functions as Chair and Vice-Chair with respect to the applications, and the designation of an acting Chair or Vice-Chair pursuant to subsection 6(4) of the *National Energy Board Act* (NEB Act).
4. Suspension of the current hearing until a new panel is named to hear the applications.
5. That staff who willingly attended the impugned meetings be removed from further involvement in the Board's assessment of the applications, as well as their superiors for failing to ensure that the Code of Conduct and associated procedures were followed.
6. That the Board publish all information and documents regarding the impugned meetings.
7. That the newly assigned panel hold an inquiry, such that everyone involved in the impugned meetings could be cross-examined.

TIK filed a subsequent notice of motion on 22 August 2016. It requests similar relief to Item 1 above, namely, that Members Gauthier and Mercier recuse themselves from the Hearing Panel or, alternatively, that the matter be referred to the Federal Court of Appeal pursuant to subsection 18.3(1) of the *Federal Courts Act*.

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The Board decided to consider both of these requests as motions and [established](#) a written process through which hearing participants were allowed to file comments by 7 September 2016.

The Board received many comments on the motions and has considered them. The Board is of the view that the following decisions address the majority of comments received. However, certain comments were made which, in the Board's view, warrant additional explanation.

Comments were made that the Board should halt its review until a modernization of the Board is effected through new legislation. When the Board is seized by an application, it must deal with the application as expeditiously as the circumstances of fairness permit but, in any case, within the time limit imposed by the NEB Act. The Board cannot suspend its work pending speculative legislative changes that may occur in the future. If and when legislative changes are made, the Board will implement them.

Concerns were also raised about the process to dispose of bias allegations, suggesting that it was improper for the Members to be decision-makers on these motions. By their nature, bias allegations make it necessary for the accused decision-maker to first assess whether a reasonable apprehension of bias exists against him or herself. If a decision-maker does not agree to recuse him or herself, that decision may be judicially reviewed by the courts and, in this case, this would be the Federal Court of Appeal.

Comments were also submitted about restarting the hearing, using the existing record going forward, keeping the same timetable of events, reviewing the process in collaboration with Aboriginal People, and voiding decisions made after the impugned conduct. It will be up to the future hearing panel, once it is assigned to hear the Energy East and Eastern Mainline applications, to decide how it wants to go forward.

The Hearing Panel is of the view that, while all of the relief requested may be properly before the Board for determination, only Items 1, 2, and 4 of the list above fall within the scope of the delegation given to the Hearing Panel.

Therefore, the text below, including the appendices, only addresses Items 1, 2, and 4, namely, the requests calling for the recusal of Members George, Mercier, and Gauthier and the adjournment of the OH-002-2016 hearing process. Also discussed is the alternate relief requested by TIK to refer the matter to the Federal Court of Appeal.

The Hearing Panel has collectively, and individually, as appropriate, considered the two motions and related comments and has reached the following decisions:

### **OH-002-2016 Hearing Order and adjournment of the hearing**

In light of our decisions that are about to be made below to recuse ourselves from the Hearing Panel, our last decision as a Hearing Panel prior to signing our individual recusal decisions is to adjourn the Energy East and Eastern Mainline hearing. The OH-002-2016 Hearing Order and all

associated process steps, including the Panel Sessions, are therefore adjourned until the Chair of the NEB (or a Member authorized to act as such) designates a new panel to hear the applications and decide on the process going forward. Decisions on any outstanding requests and motions will also be adjourned until such time that a new panel is assigned to consider them.

**Referral to the Federal Court of Appeal**

Deciding as we will below, there is no need to refer the recusal matters to the Federal Court of Appeal, as TIK requests in its motion.



Roland R. George  
Presiding Member



Lyne Mercier  
Member



Jacques Gauthier  
Member

## **Appendix 1                      Recusal decision of Member Gauthier**

In November 2014, Peter Watson, our Chair and CEO, launched the National Engagement Initiative. We asked Canadians to tell us what was most important to them about the work that we do, and how they felt we could adjust our pipeline safety program, public engagement activities, and communications. From December 2014 to May 2015, under the direction of our Chair, the Board held meetings with municipal and provincial leaders and staff, Aboriginal organizations, landowners, environmental groups, first responders, students, and academics, as well as professional and industrial organizations.

The purpose of these sessions was to get a clear understanding of the concerns of the public and potential stakeholders regarding the Board, pipeline safety, and environmental protection, and I participated in them in good faith.

During the planning process for the National Engagement Initiative, the Board was particularly interested in engaging with Quebeckers more effectively, and asked several leaders in Quebec for advice on whom the Board should meet. One of these meetings was held in January 2015 with Jean Charest, former Premier of Quebec, and our Chair Peter Watson, Vice-Chair Lyne Mercier, two Board staff members, and me.

As with all of the meetings held as part of the National Engagement Initiative, the purpose of the meeting with Mr. Charest was to get a clear understanding of the concerns of Quebeckers regarding the Board, pipeline safety, and environmental protection.

This being said, this meeting would never have taken place if we had known that Mr. Charest was at that time a consultant for TransCanada PipeLines Limited, one of the applicants.

However, neither Mr. Charest nor his people informed us that he was a consultant for one of the applicants at that time.

In order to preserve the integrity of the Energy East and Eastern Mainline projects' review process, I have decided to recuse myself and thereby help maintain a climate of trust, impartiality, and objectivity. This should help all Canadians contribute fully to the review process.

I will cease any involvement in the review of these two applications, and will not discuss these two applications with other Board members or Board staff.



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Jacques Gauthier  
Member

9 September 2016


## **Appendix 2                      Recusal decision of Member Mercier**

The impugned January 2015 meetings held in Quebec were a precursor to the National Engagement Initiative launched by the Chair and CEO of the Board. The National Engagement Initiative was fully supported by the Board and me. I participated, along with Member Gauthier, in the impugned meetings in good faith and with the best intentions. Our goal was to genuinely understand the public dynamics in Quebec and what matters most to key stakeholders.

Nonetheless, I understand that, given the rules of natural justice and procedural fairness, my participation in these meetings may have cast a doubt on my impartiality as a member of the Hearing Panel and I understand how, notwithstanding our good faith and best intentions, an apprehension of bias may exist in the eyes of a reasonable person.

As a result, and with the goal of preserving the integrity of the NEB and the Energy East and Eastern Mainline review, I have decided to recuse myself from the Hearing Panel tasked to assess the Energy East and Eastern Mainline applications. I believe that my decision to recuse myself is in the best interest of all.

I will cease any involvement in the review of these two applications, and will not discuss these two applications with other Board members or Board staff.

A handwritten signature in cursive script, appearing to read "Lyne Mercier", is written above a horizontal line.

Lyne Mercier  
Member

9 September 2016


**Appendix 3                      Recusal decision of Member George**

I have supported the strategic priority of the NEB of engaging with Canadians. I firmly believe that reaching out to stakeholders to better understand what matters to them is an important function of a regulator in the 21<sup>st</sup> century. That being said, I have never participated in any engagement meetings as part of the National Engagement Initiative or any stakeholder meetings related to that initiative.

Still, I too understand the rules of natural justice and the need for justice not only being done but being seen to be done. Given that I have deliberated with my fellow members of the Hearing Panel for an extended period following the engagement meetings, I am of the view that a reasonable person could think that I have been tainted as a result.

My continued presence on the Hearing Panel has the potential to undermine the public's confidence in the integrity of the Board's decision-making process. As an adjudicator in a quasi-judicial function, I hold above all else the need for impartiality and integrity. As a result, I have decided to recuse myself from the Hearing Panel to avoid any apprehension of bias as it relates to the Energy East and Eastern Mainline applications.

I will cease any involvement in the review of these two applications, and will not discuss these two applications with other Board members or Board staff.



Roland R. George  
Presiding Member

9 September 2016