CITY OF
VANCOUVER

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File Number: 12-0961

April 24, 2014

VIA ELECTRONIC MAIL

National Energy Board
444 Seventh Avenue SW
Calgary, AB T2P 0X8

Attention: Sheri Young, Board Secretary

Dear Ms. Young:

Re: Trans Mountain Pipeline ULC ("Trans Mountain")
Trans Mountain Expansion Project Application ("Application")
Hearing Order OH-001-2014
Board File OF-Fac-Oil-T260-2013-03 02
Response to Notice of Motion by Robyn Allan dated April 14, 2014

We write on behalf of the Intervenor City of Vancouver to provide the City of Vancouver's response to the Notice of Motion brought before the National Energy Board (the "Board") by Robyn Allan dated April 14, 2014.

The City of Vancouver supports the motion by Intervenor Robyn Allan to amend the Hearing Order to include oral cross-examination of all witnesses on their evidence by Intervenors, the NEB, and Trans Mountain, if they choose do so.

As Ms. Allan correctly states in the Notice of Motion, a refusal to amend the Hearing Order to allow for oral cross-examination would mean that the Trans Mountain Expansion project will be the first NEB public hearing on an oil pipeline, triggering an environmental assessment under the *Canadian Environmental Assessment Act* ("*CEAA*"), which does not include the cross-examination of witnesses.

In its Response Letter dated April 22, 2014 (the "Trans Mountain Response"), Trans Mountain argues that the Board ought to refuse Intervenors the right to oral cross-examination on the basis of the 15 month statutory timeframe. However, this argument wrongly assumes that the Board could not meet the July 2, 2015 if it were to allow oral cross-examination of

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witnesses. If Trans Mountain were to succeed on this argument, it would mean that there could never be a public hearing on an oil pipeline involving an environmental assessment in which oral cross-examination would be permitted. The public hearing requirement in section 24(1) of the *National Energy Board Act* ("*NEB Act*") would be completely undermined by the Board's procedural decision to, in effect, hold a hearing without a hearing.

This Application involves a major pipeline proposal that raises significant issues of environmental, health and safety impacts that are of enormous concern to the City of Vancouver and the other Intervenors. It is critical that the Intervenors be given full and meaningful participation in the public hearing on this Application.

The opportunity to cross-examine witnesses, both in courts of law and in administrative proceedings, has long been regarded as fundamental to a participant's ability to present its position and answer the case against it. This is particularly true where, as in the case of Trans Mountain's Application, participants' have been granted the right of a public hearing by statute.

The Supreme Court of Canada has confirmed the importance of cross-examination in administrative tribunal proceedings in *Innisfil (Township) v. Vespra (Township)*, [1981] 2 S.C.R. 145 ("*Innisfil*") at p. 166, as follows:

> It is within the context of a statutory process that it must be noted that cross-examination is a vital element of the adversarial system applied and followed in our legal system, including, in many instances, before administrative tribunals since the earliest times. ... **[W]here the rights of a citizen are involved and the statute affords him the right to a full hearing, one would expect to find the clearest statutory curtailment of the citizen's right to meet the case made against him by cross-examination, before it would be precluded.**

Trans Mountain has referred the Board to the decision of the Supreme Court of Canada in *R v. Lising*[1], a criminal case decided on a narrow issue. That decision does not change the law on cross-examination in administrative proceedings as stated in the passage from *Innisfil* quoted above.

The *NEB Act* provides, in section 24(1), that hearings before the Board with respect to the issuance of a certificate **shall** be public. There is no provision in the *NEB Act* that states, in clear terms or otherwise, that the Board may refuse to allow cross-examination of the applicants witnesses in the public hearing process.

While the Board does have the jurisdiction, pursuant to section 8 of the *NEB Act*, to make rules respecting the conduct of hearings, those rules are subordinate legislation that cannot, as a matter of law, override the statutory provisions.

[1] 2005 SCC 66

While the Board does have the jurisdiction, pursuant to section 8 of the *NEB Act*, to make rules respecting the conduct of hearings, those rules are subordinate legislation that cannot, as a matter of law, override the statutory provisions.

In the Trans Mountain Response, at page 3, Trans Mountain refers to the absence of oral cross-examination in some provincial administrative processes to support Trans Mountain's position that oral cross-examination should not be allowed by the Board on this Application. The two administrative proceedings relied on are, first, applications before British Columbia's Oil and Gas Commission under the *Oil and Gas Activities Act* (the "*OGAA*") and, second, environmental assessments under the British Columbia *Environmental Assessment Act* (the "*EA*"). The key difference between those administrative proceedings and the Application that is before the NEB is that there is no requirement in either the *OGAA* or the *EA* that the authority hold a public hearing.

As noted above, there is a clear statutory requirement in the *NEB Act* that the Board conduct a public hearing. In the absence of clear statutory language authorizing the Board to refuse oral cross-examination in the public hearing process, the Hearing Order must be amended to include oral cross-examination of witnesses.

Cross-examination in an administrative proceeding is of particular importance where the facts are complex, credibility is an issue, or there is a conflict in the evidence.[2]

It is too early in the Trans Mountain Application process for the Board to make a determination about whether there are issues of credibility of witnesses or conflicts in the evidence, as none of the parties apart from Trans Mountain have filed any evidence. However, many of the Intervenors, including the City of Vancouver, will be submitting their own expert evidence that challenges the claims made by Trans Mountain in its Application. Further, it is abundantly clear from the evidence filed to date that the facts and issues that must be considered by the Board in the public hearing process are complex. They are issues of immense importance to the Intervenors and raise significant questions of public interest.

The complexity and importance of the facts and issues before the Board are sufficient, on their own, to require that Intervenors be given an opportunity for oral cross-examination of Trans Mountain's witnesses.

A decision at this early stage in the process to refuse oral cross-examination would put the Board in breach of its duty of fairness and seriously undermine the public hearing process. Accordingly, the Board must either permit oral cross-examination now or, in the alternative, vary the Hearing Order to leave the question of oral cross-examination open for further submissions by the Intervenors based on a more complete record of the evidence.

[2] Brown and Evans, *Judicial Review of Administrative Action in Canada*, at 10-80

All of which is respectfully submitted.

Yours truly,

CITY OF VANCOUVER

Per: Frances J. Connell

Frances J. Connell
Director of Legal Services

SBH: