

**TRANS MOUNTAIN PIPELINE ULC**  
**SECTION 52 OF THE NATIONAL ENERGY BOARD ACT APPLICATION FOR**  
**TRANS MOUNTAIN EXPANSION PROJECT**  
**NEB FILE 0F-FAC-OIL-T260**  
**FILED APRIL 14, 2014**  
**OH-001-2014**

**NOTICE OF MOTION**

**Name of Person Bringing Motion**

This Motion by Intervenor, Robyn Allan, is made pursuant to Hearing Order OH-001-2014 (the “Hearing”) and Section 35 of the National Energy Board Rules of Practice and Procedure, 1995. SOR 195-208.

**Decision or Order Requested**

- (a) The Panel amend the Trans Mountain Pipeline Expansion Project Hearing Order OH-001-2014 to include an oral cross-examination phase for the purpose of cross-examining witnesses in order to effectively test evidence and provide the Panel with greater clarity regarding the reliability and accuracy of the evidence presented to it; and
- (b) The oral cross-examination phase, as introduced in the Hearing process as requested in (a) above, ensure that an opportunity be provided to all Intervenors, the Proponent, NEB legal counsel, and Panel Members, if they so choose, to orally question under oath, all witnesses on their evidence.

**Statement of Facts**

**Role and Purpose of the National Energy Board**

1. The National Energy Board (NEB) is an independent regulatory tribunal. The purpose of the Board is to make decisions that are fair, objective and respected.<sup>1</sup>
2. “The NEB carries out its mandate in the *public interest*. The public interest is inclusive of all Canadians and refers to a balance of environmental, economic and

---

<sup>1</sup> National Energy Board, The Public Hearing Process, 1996, <http://www.pub.nf.ca/hyd01gra/InformationExhibits/I-8.pdf>

social considerations that changes as society’s values and preferences evolve over time.”<sup>2</sup>

3. “The NEB is an independent regulatory tribunal guided by the principles of natural justice and procedural fairness. The NEB is also a court of record...”<sup>3</sup>
4. The public hearing process has a number of features, or phases, that support panels in fulfilling their duty during a public hearing. One of the key features of the public hearing process is the oral cross-examination phase. This phase has been excluded from the Hearing Order for the Trans Mountain Expansion Project.

### **Role and Purpose of Oral Cross-Examination**

5. Cross-examination is a right and a duty; both of which are fundamental to the public hearing process. Cross-examination of witnesses and their evidence assists the NEB in reaching decisions that reflect public interest “considerations that change(s) as society’s values and preferences evolve over time.”
6. Effective cross-examination cannot be achieved through two rounds of written information requests to the proponent, and one round of written information requests to intervenors as outlined in the Trans Mountain Expansion Project Hearing Order.
7. **The Right to Cross Examine:** In order to test the veracity and accuracy of witnesses and their evidence, parties have a right to cross-examine witnesses sworn to tell the truth under oath. Cross-examination affords an opportunity to highlight inaccuracies, clarify apparent contradictions and assist all parties in the preparation of their final argument. Cross-examination assists in indicating, for the benefit of the Panel, the relative weight evidence should be afforded.
8. **The Duty to Cross Examine:** Cross-examination also gives rise to a positive duty in that a party undertaking cross-examination has an opportunity to “put one’s case” to the witness in real time if the cross-examining party intends to rely on evidence for final argument or submit argument which contradicts that witness’ evidence. The duty is aimed at providing the witness with an opportunity to explain any alleged problem with, or contradiction in, their evidence raised during cross-examination. If a party does not take the opportunity to cross-examine a witness on their evidence, that witness’ evidence is uncontested and generally deemed to be correct.

---

<sup>2</sup> <https://www.neb-one.gc.ca/clf-nsi/rsftyndthnvrnmnt/prctngcndnnvrnmnt/vrvw-eng.html>

<sup>3</sup> <https://www.neb-one.gc.ca/clf-nsi/rsftyndthnvrnmnt/prctngcndnnvrnmnt/ntnlngbrd-eng.html>

9. There is much reliance on the results of cross-examination in the preparation of final oral and written argument. The absence of an opportunity to undertake cross-examination affects the quality, and thus the usefulness of final argument. New evidence cannot be introduced in final argument, whereas, during cross-examination the introduction of aids to cross-examination, when considered relevant, can be entered into evidence. An opportunity to introduce evidence during cross-examination is an important element to ensure that the Panel has access to all evidence considered important to it in the determination of its recommendations and conditions.
10. During the *NEB Act*, Part IV review of the Trans Mountain Toll Application for the Expanded Trans Mountain Pipeline System (RH-001-2012) numerous aids to cross-examination were accepted as evidence on the record for the benefit of the proponent's and intervenors' preparation of final argument and for the benefit of the Panel's decision-making.<sup>4</sup>
11. Adherence to the principles of natural justice and procedural fairness is critical in the Trans Mountain Expansion Project *NEB Act*, Part III public hearing because this project is of significant importance to a large portion of the British Columbian population. The public interest importance of this Hearing is reflected in the number of people, organizations and First Nations who formally requested to participate in it. Intervenors represent the public interest directly. The public interest is served in part by affording affected parties, approved by the Panel as intervenors, the opportunity to cross-examine witnesses and their evidence.
12. The Panel is making decisions that seriously affect the rights of many. Trans Mountain intends to construct and operate a new 36" oil pipeline and modify its existing oil pipeline. This will increase the transportation of heavy oil diluted with condensate by 540,000 barrels per day, and increase the transportation of light oil and petroleum products by 50,000 barrels a day. Much of this increased throughput is intended to reach the Westridge marine terminal in Burnaby, BC triggering as many as 816 Aframax supertanker transits a year. These tankers will arrive and offload ballast and on-load, primarily, diluted bitumen. The Westridge marine terminal capacity will grow from one loading bay to three. As well, the project includes a significant increase in storage capacity necessitating the construction of storage tanks at a number of locations.
13. The public generally, and many intervenors specifically, have serious concerns about the economic, social, cultural and environmental consequences of the Trans

---

<sup>4</sup> For example see B21-23, B25-29 and C15. <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=865601&objAction=browse&viewType=1>

Mountain Expansion Project. As well, there is serious public concern about the aggregate terrestrial and marine spill risk associated with this project.

14. There is a legitimate expectation that the opportunity to test the case presented by the applicant will be fulsome and extend beyond written questions to include oral questions, asked in real time, under oath. The cross-examination process, conducted in front of the Panel, removes the opportunity for witnesses to edit their answers to questions or undertake additional research to complement their understanding of particular issues prior to providing answers on the record.

### **Role of Oral Cross-Examination in Past Public Hearings and Precedence**

15. In establishing procedures for public hearings of equivalent or lesser public interest importance than the Trans Mountain Expansion Project, the practice has been to include an oral cross-examination phase. The NEB has defined the role of the intervenor in public hearings as reflective of both the right and the duty vis-à-vis cross-examination and established expectations regarding the function and duty of an Intervenor.

*“Persons granted intervenor status will have the opportunity to fully participate in the proceeding by filing evidence, asking written and oral questions of parties and providing argument. Intervenors who file written evidence are subject to cross-examination by other parties and examination by the Board.”<sup>5</sup>*

16. The NEB further supports the expectation that an oral public hearing will include witness questioning in its communications with the public and potential intervenors even before interested parties register for approval to participate in the hearing process. “An oral hearing...begins with a written process. Participants file their written evidence and then have the opportunity to ask questions in writing of each other...This is followed by the oral portion of the hearing in which participants ask oral questions of witnesses and present their final argument... based on the evidence.”<sup>6</sup>

---

<sup>5</sup> Hearing Order OH-4-2007, page 6. [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/92263/452395/465178/465117/468138/A%2D1A\\_Hearing\\_Order\\_OH%2D4%2D2007\\_%2D\\_Enbridge\\_Pipelines\\_Inc.\\_%2D\\_Alberta\\_Clipper\\_Expansion\\_Project\\_%28A0Z4I6%29.pdf?nodeid=468139&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/92263/452395/465178/465117/468138/A%2D1A_Hearing_Order_OH%2D4%2D2007_%2D_Enbridge_Pipelines_Inc._%2D_Alberta_Clipper_Expansion_Project_%28A0Z4I6%29.pdf?nodeid=468139&vernum=-2)

<sup>6</sup> The Public Hearing Process, National Energy Board, 2011, page 3, [http://www.novachem.com/ExWeb%20Documents/sarnia-lambton/GPEP\\_PublicHearingProcess.pdf](http://www.novachem.com/ExWeb%20Documents/sarnia-lambton/GPEP_PublicHearingProcess.pdf)

17. Public Hearing processes, such as those required by legislation for the Trans Mountain Expansion Project, have historically contained an oral cross-examination phase.
18. Legislative and regulatory changes notwithstanding, if the current Hearing Order is not amended 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.<sup>7</sup>
19. The Enbridge Northern Gateway Project Hearing Order (May 2011) included an oral cross-examination phase.<sup>8</sup> The Enbridge Northern Gateway Project was conducted under a Joint Review Panel process because previous legislation required a joint review under the *NEB Act* and the *CEAA*. A joint review process is no longer possible under revised legislation, however the current NEB panel review for Trans Mountain's Expansion Project is closely aligned with the public interest intent and purpose of the Northern Gateway review process.
20. The Trans Canada Keystone XL Hearing Order (May 2009) included an oral cross-examination phase.<sup>9</sup>
21. The Alberta Clipper Expansion Project Hearing Order (June 2007) included an oral cross-examination phase.<sup>10</sup>

---

<sup>7</sup> Trans Mountain Expansion Project Application Pursuant to Section 52 of the National Energy Board Act, Volume 1, page 1-1. "The Project requires an environmental assessment under the NEB Act. In addition, as the proposed pipeline exceeds 40 km in length and will be regulated by the Board, the Project is a "designated project" under the Regulations Designating Physical Activities (October 2013) and is thus subject to the Canadian Environmental Assessment Act, 2012, (CEA Act, 2012)."

<sup>8</sup> Hearing Order, page 3. [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/384192/620327/624909/686210/A31%2D1\\_%2D\\_Hearing\\_Order\\_OH%2D4%2D2011\\_A1Z0K9.pdf?nodeid=686211&vernum=3](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/384192/620327/624909/686210/A31%2D1_%2D_Hearing_Order_OH%2D4%2D2011_A1Z0K9.pdf?nodeid=686211&vernum=3)

<sup>9</sup> Hearing Order, page 18. Oral Hearing represents cross-examination. [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/418396/550305/556720/556573/A%2D1a\\_%2D\\_Hearing\\_Order\\_OH%2D1%2D2009\\_%2D\\_A1J7Y0\\_.pdf?nodeid=556574&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/418396/550305/556720/556573/A%2D1a_%2D_Hearing_Order_OH%2D1%2D2009_%2D_A1J7Y0_.pdf?nodeid=556574&vernum=-2)

<sup>10</sup> Hearing Order, [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/92263/452395/465178/465117/468138/A%2D1A\\_Hearing\\_Order\\_OH%2D4%2D2007\\_%2D\\_Enbridge\\_Pipelines\\_Inc.\\_%2D\\_Alberta\\_Clipper\\_Expansion\\_Project\\_%28A0Z4I6%29.pdf?nodeid=468139&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/92263/452395/465178/465117/468138/A%2D1A_Hearing_Order_OH%2D4%2D2007_%2D_Enbridge_Pipelines_Inc._%2D_Alberta_Clipper_Expansion_Project_%28A0Z4I6%29.pdf?nodeid=468139&vernum=-2)

22. The Enbridge Line 9 Project Hearing Order (February 2013)<sup>11</sup> did not include an oral-cross examination phase, however the Line 9 review is not an appropriate process comparison to the Trans Mountain Expansion Project. Line 9's application did not automatically trigger a public hearing as it did not fall under the more rigorous section 52 requirements of the *NEB Act*. The Line 9 project did not require an environmental assessment under the *CEAA* because it did not meet the requirements of a "designated project". The Trans Mountain Expansion Project is a designated project.
23. The NEB acknowledges the difference between section 58 applications and applications such as the Trans Mountain Expansion Project. "Applications like this project (Line 9) filed under section 58, or Part IV of the *NEB Act*, do not automatically trigger a public hearing. After the application was submitted, the NEB reviewed it and determined that it was in the interest of Canadians to hold a public hearing for the project, consisting of written evidence and oral final argument."<sup>12</sup>
24. The Trans Mountain Expansion Toll Application formally titled "The Trans Mountain Application for Approval of the Transportation Service and Toll Methodology for the Expanded Trans Mountain Pipeline System" (RH-001-2012) falls under Part IV of the *NEB Act* and therefore does not automatically trigger a public hearing.<sup>13</sup> However, the Board decided to hold a public hearing and provide all parties, including NEB counsel, with the opportunity to cross-examine witnesses on their evidence as part of the Panel's review.
25. The Intervenor in the Trans Mountain Expansion Project toll application consisted of the Canadian Association of Petroleum Producers (CAPP), 15 oil industry corporations, the Alberta Department of Energy and the British Columbia Ministry of Energy, Mines and Natural Gas.<sup>14</sup>
26. The consideration of parties' interests in the Trans Mountain Expansion Project Part IV application is in direct contrast to the treatment of party interests in the current Trans Mountain Expansion Project Part III application. When the Board is mandated to determine if the applied-for toll methodology for Trans Mountain's

---

<sup>11</sup> [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/92263/790736/890819/918701/918444/A3%2D1\\_%2D\\_Hearing\\_Order\\_OH%2D002%2D2013\\_%2D\\_A3F4W7.pdf?nodeid=918357&vernum=2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/92263/790736/890819/918701/918444/A3%2D1_%2D_Hearing_Order_OH%2D002%2D2013_%2D_A3F4W7.pdf?nodeid=918357&vernum=2)

<sup>12</sup> [http://www.neb-one.gc.ca/clf-nsi/rthnb/pplctnsbfrthnb/nbrdgl9brvrsl/nbrdgl9brvrslfq-eng.html#s1\\_3](http://www.neb-one.gc.ca/clf-nsi/rthnb/pplctnsbfrthnb/nbrdgl9brvrsl/nbrdgl9brvrslfq-eng.html#s1_3)

<sup>13</sup> <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objid=828580&objaction=browse>

<sup>14</sup> <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=865824&objAction=browse&viewType=1>

expansion would produce tolls that are just and reasonable it facilitates a full and meaningful role for industry intervenors by including oral cross-examination. When the Board is mandated to determine if Trans Mountain's expansion is in the public interest it hinders the effectiveness of intervenors by eliminating oral cross-examination.

### **Summary of Facts and Grounds for the Motion**

27. In summary, the Panel's decisions are based on an assessment of the credibility of the evidence the Panel considers. The ability of the Panel to clearly assess credibility is severely compromised if the opportunity to cross-examine witnesses is not included as part of the Hearing Order.
28. Cross-examination almost always reveals that the witness has not told the complete story to the Panel in a perfectly candid way. While there may not be outright lies, most often in evidence a witness deliberately avoids stating a particular fact, understates it, or overstates it. Only cross-examination can reveal this. In addition, only cross-examination will reveal the bias or self-interest of a witness.
29. The oral cross-examination phase of the NEB public hearing process has historically represented an integral part of the mandated public review process and provides an important method by which:
  - a) all parties to the hearing can more completely fulfill their rights and duties;
  - b) the evidence on the record may be more thoroughly tested than what is afforded through written information requests as a stand-alone process;
  - c) the preparation of final oral and written argument is more fully, and fairly, supported;
  - d) the expertise and reliability of the witnesses may be directly and more rigorously tested than what is possible with written information requests;
  - e) NEB legal counsel may fulfill one of its two main functions which is to "cross-examine the applicant's and intervenors' witnesses in order to establish clearly the evidence needed for the Board" to arrive at its recommendation and finalize its list of conditions;<sup>15</sup>
  - f) the Panel members may orally question the applicant and intervenor witnesses on the evidence they have prepared; and
  - g) a strong incentive is provided to the applicant and intervenors to ensure they appropriately and rigorously answer written interrogatories since

---

<sup>15</sup> Op Cit., National Energy Board, The Public Hearing Process, 1996, page 3.

they know they may face scrutiny and accountability for their written answers during an oral cross-examination process conducted under oath.

30. Having participated in the cross-examination phase of a public hearing process, and having direct experience with the important contribution cross-examination plays in informing the Panel, assisting all parties in developing final argument, and serving the public interest, I had the reasonable expectation that the opportunity for cross-examination would be afforded during the Trans Mountain Expansion Project Part III Hearing.
31. This reasonable expectation of the right to cross-examine was supported, in part, by the fact that the cross-examination right was provided to the applicant and industry representatives who participated in the Trans Mountain Expansion Project Part IV Toll Hearings.
32. Affording the right to industry intervenors to participate in a cross-examination process in a Part IV Hearing for the Trans Mountain Expansion Project but not the public interest intervenors during the Part III Hearing for the Trans Mountain Expansion Project is not only unfair, it strongly suggests priority is being provided to industry interests as compared to public interests.
33. The elimination of the oral cross-examination phase in the Trans Mountain Expansion Project review undermines the public's need to know that intervenors to the review process are able to fully investigate the proponent's case and undertake fulsome due diligence. The absence of this comfort when due process is undermined not only threatens the legitimacy of the Hearing, it potentially threatens the legitimacy of the NEB itself.
34. If the public believes, or has reason to believe, the NEB review process is biased in favour of the industry and unfair to the public interest because intervenors in this Hearing are not able to fulfill their role, the public may no longer support the hearing process, or the National Energy Board as an institution.

### **Decision or Order Requested**

- (a) The Panel amend the Trans Mountain Pipeline Expansion Project Hearing Order OH-001-2014 to include an oral cross-examination phase for the purpose of cross-examining witnesses in order to effectively test evidence and provide the Panel with greater clarity regarding the reliability and accuracy of the evidence presented to it; and

(b) The oral cross-examination phase, as introduced in the Hearing process as requested in (a) above, ensure that an opportunity be provided to all Intervenors, the Proponent, NEB legal counsel, and Panel Members, if they so choose, to orally question under oath, all witnesses on their evidence.

All of which is respectfully submitted this 14<sup>th</sup> day of April, 2014.

Robyn Allan  
9294 Emerald Drive  
Whistler BC  
V0N 1B9  
604-962-4160