



File OF-Fac-Oil-T260-2013-03 02  
7 May 2014

Ms. Robyn Allan  
9294 Emerald Drive  
Whistler, BC V0N 1B9  
Email: [robyn@robynallan.com](mailto:robyn@robynallan.com)

Ms. Elizabeth May, O.C., M.P.  
#1 – 9711 4<sup>th</sup> Street  
Sidney, BC V8L 2Y8  
Email: [emay@magma.ca](mailto:emay@magma.ca)

Dear Ms. Allan and Ms. May:

**Hearing Order OH-001-2014  
Trans Mountain Pipeline ULC (Trans Mountain)  
Application for the Trans Mountain Expansion Project (Application)  
Notices of motion from Ms. Robyn Allan and Ms. Elizabeth May to include cross-  
examination of witnesses  
Ruling No. 14**

The National Energy Board (Board or NEB) is in receipt of a notice of motion, dated 14 April 2014, from Ms. Robyn Allan (motion) and a similar notice of motion, dated 5 May 2014, from Ms. Elizabeth May.

The motion requests that the Board amend the Hearing Order for the Application to include a phase for the oral cross-examination of witnesses. The motion also requests that an opportunity be provided for all intervenors, Trans Mountain, and the Board to orally question, under oath, all witnesses on the evidence they file.

**The Board's decision**

For the reasons that follow, both motions are dismissed.

**Views of intervenors and Trans Mountain**

Ms. Allan's motion includes the submissions that:

- The NEB is an independent regulatory tribunal guided by the principles of natural justice and procedural fairness. Cross-examination “is a right and a duty; both of which are fundamental to the public hearing process.”
- The Board's recommendation whether to approve the Application or not is “based on an assessment of the credibility of the evidence.”
- Cross-examination cannot be achieved through two rounds of written information requests to the proponent, and one round of written information requests to intervenors.

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- Based on other past section 52 *National Energy Board Act* (NEB Act) hearing processes and other Board information, there is a legitimate expectation of oral cross-examination for a hearing of significant importance such as this Application. This would be the first NEB public hearing on an oil pipeline under the *Canadian Environmental Assessment Act* that does not include oral cross-examination.

A number of intervenors filed comments in support of the motion, which were considered by the Board and included the following submissions:

- Restricting the oral evidentiary hearing to collecting and questioning oral Aboriginal traditional evidence is unfair to other hearing participants.
- Greater procedural protection is being given to commercial interests as the recent Trans Mountain toll hearing included oral cross-examination.
- Rather than not having oral cross-examination, the Board has other procedural tools available, including limiting questioning time.
- Section 35 of the *Constitution Act, 1982* imposes substantive constraints on the Board and requires oral cross-examination in order for Aboriginal groups to meaningfully participate in the Board's process.
- It is unfair that Trans Mountain can orally question the oral traditional evidence of Aboriginal groups without Aboriginal groups having an opportunity to orally cross-examine Trans Mountain's witnesses.
- In past hearings, written information requests have not provided sufficient information in response to the questions asked.
- Subsection 24(1) of the NEB Act does not clearly state that the Board may refuse to allow cross-examination in a public hearing.

The City of Burnaby (Burnaby) made the following submissions both for and against the motion:

- It supports the motion, although it requests that the motion be set to a full oral hearing and that further time be provided for submissions on the motion.
- The motion is premature because it is unclear what evidentiary issues will arise and that there will likely be substantial conflicts on the evidence.
- If the motion is denied, then the Board should issue an order granting Burnaby the right to renew a motion for cross-examination of witnesses after Trans Mountain has responded to the first round of information requests.

Trans Mountain opposed the motion. Its submissions included the following points:

- As an administrative agency, the Board is the master of its own procedure and has full authority to determine whether a public hearing should be written or oral. This is supported by section 22 of the *National Energy Board Rules of Practice and Procedure, 1995* (Rules).
- The Board has a legislated time deadline of 2 July 2015 to issue a report to the Governor in Council. Given the number of intervenors, the current process provides ample opportunity for all parties to question the evidence, submit evidence, and deliver argument. The procedures apply equally to everyone.
- At common law, there is no absolute right in these circumstances to cross-examination and this is within the discretion of the decision-maker.

In reply, Ms. Allan made submissions that included the following points:

- Trans Mountain's response focuses on its private interests at the expense of the Board's obligation to uphold natural justice and the intervenors' right to full and meaningful participation.
- The NEB Act allows the Minister of Natural Resources to extend the time limit for the issuance of the Board's report and; therefore, there are a number of options available to the Board to ensure fairness and efficiency.

Ms. May's 5 May 2014 motion asked for the right to cross-examine any witness offering evidence. The motion adopts and relies on the facts set out in Robyn Allan's motion. Ms. May had also previously provided a letter of comment in support of the original motion. Ms. May's motion included the following points:

- The duty of fairness will generally require that persons with a right to an oral hearing be afforded the right to cross-examine witnesses.
- There is no compelling reason to override the presumptive right of cross-examination in this case.

### ***Views of the Board***

Given that the 5 May 2014 motion from Ms. May is, in essence, the same motion as Ms. Allan's, Ms. May's motion will be addressed as part of the overall motion decision and reasons. Both motions are dismissed.

As a preliminary matter, the Board is not persuaded by Burnaby's request for the motion to be set to a full oral hearing with additional time provided for submissions. Intervenors and Trans Mountain had a fair opportunity to comment on the motion and have done so. Despite Burnaby's submission that the motion is premature, the motion was properly put before the Board in response to the Board's Hearing Order and the Board will rule on the request that was made.

The Application, which the motion refers to, was filed pursuant to the section 52 of the NEB Act. The Application also requires an environmental assessment under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012).

The Board is an independent regulatory tribunal and must act in accordance with the principles of natural justice. The process outlined in the Hearing Order meets the natural justice requirements for notice, an opportunity to know the case to be met, and to be heard. The Board is of the view that there is sufficient opportunity to probe evidence that is filed by asking and receiving answers to written information requests. If responses are not considered satisfactory, there is more than one opportunity to bring a motion to compel a further and better response. Both the evidence filed and the answers to written information requests must be sworn under oath.

As stated by the author Sara Blake:<sup>1</sup>

The concept of procedural fairness [natural justice] is not a fixed concept. It varies with the context and the interests at stake. "At the heart of the analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly."

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<sup>1</sup> *Administrative Law in Canada*, 5<sup>th</sup> ed, 2011, pages 12 and 13. Blake refers to the Supreme Court decision *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No. 39

Here, the context is that the Board will be making a recommendation to the Governor in Council. The recommendation will take into account whether the pipeline is and will be required by the present and future public convenience and necessity. The Board's recommendation will be polycentric in nature as it involves a wide variety of considerations and interests. Persons directly affected by the Application include Aboriginal communities, land owners, governments, commercial interests, and other stakeholders. The motion and several of the comments in support of it appear to place significant reliance on the potential credibility of witnesses. The Board notes that this is not a criminal or civil trial. The Board's hearing also does not involve an issue of individual liberty. It is a process for gathering and testing evidence for the Board's preparation, as an expert tribunal, of its recommendation to the Governor in Council about whether to issue a certificate under section 52 of the NEB Act. The Board will also be conducting an environmental assessment and making a recommendation under CEAA 2012.

Hearing processes are designed individually and independently by the Board based on the specific circumstances of the application. Each process is designed to provide for a fair hearing, but the processes are not necessarily the same. For this Application, the Hearing Order provides two opportunities to ask written information requests. There is also an opportunity to file written evidence, and to provide both written and oral final argument. For Aboriginal groups that also wish to present Aboriginal traditional evidence orally, there is an opportunity to do this.

Regarding the nature of the statutory scheme, section 8 of the NEB Act authorizes the Board to make rules about the conduct of hearings before the Board. The Rules provide that public hearings may be oral or written, as determined by the Board. The Board has previously held fully written hearings for section 52 oil and gas pipeline applications<sup>2</sup>. Hearings can also be oral, with significant written components, as is the case here. In addition to the hearing procedures set out in the Rules, the Board makes rules about hearing procedures in its Hearing Order and associated rulings and bulletins.

Subsection 24(1) requires the Board to have a public hearing with respect to the issuance of a certificate. This applies to the current Application before the Board. The Board also has discretion to hold public hearings for other matters<sup>3</sup>. Whether a public hearing is mandatory or discretionary, the Board has authority to establish the hearing procedures. Discretionary public hearings have also occurred with written questioning and oral final argument<sup>4</sup>.

Additional legislative requirements for the Board's public hearings are found in subsection 11(4) of the NEB Act, which requires that applications before the Board are to be dealt with as expeditiously as the circumstances and considerations of fairness permit, and within the time limit provided. This subsection of the NEB Act was added in 2012. For this Application, the legislated time limit, which is 15 months after the completeness determination is made, is 2 July 2015.

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<sup>2</sup> Novagas Clearinghouse Ltd. Application for the Kahntah Pipeline Project, NEB Reasons for Decision GHW-1-94, December 1994; ISH Energy Ltd. Application for the Desan Pipeline Project, NEB Reasons for Decision OHW-1-95, September 1995

<sup>3</sup> Subsection 24(3) of the NEB Act.

<sup>4</sup> OH-002-2013, Enbridge Pipelines Inc. Line 9B Reversal, where there was written evidence and oral final argument; MHW-1-2010 Cenovus Energy Inc. Application, regarding the Express Pipeline, which involved commercial toll and tariff matters and was a written hearing with oral final argument.

As the legislative time limits are recent, there is no legitimate expectation as to the hearing procedures that will be used to test the evidence. In this case, the Board has provided notice about the procedures that will apply.

In the Board's view, the legislation makes it clear that the Board is master of its own procedure and can establish its own procedures for each public hearing with regard to the conduct of hearings. This includes the authority to determine for a particular public hearing the manner in which evidence will be received and tested. In the circumstances of this hearing, where there are 400 intervenors and much of the information is technical in nature, the Board has determined that it is appropriate to test the evidence through written processes. All written evidence submitted will be subject to written questioning by up to 400 parties, and the Board.

Letters in support of the motion submit there is a right to oral cross-examination. The case cited in support of the motion by the City of Vancouver of *Innisfil Township v. Vespra (Township)*<sup>5</sup> was a decision where there had been no opportunity to probe the evidence at issue and the legislation in that case provided a right to cross-examination. The Board is not persuaded that there is a right to have oral cross-examination of all evidence in the circumstances of this Application. In addition to the common law and the NEB Act not providing an absolute entitlement to oral cross-examination, there is also no such requirement in the CEAA 2012, which also applies to this hearing.

With respect to the submission that allowing oral traditional evidence is unfair to other, non-Aboriginal intervenors, the Board does not find this concern to be persuasive. Aboriginal people have an oral tradition that cannot always be shared adequately in writing. In this light, the current process provides an opportunity for Aboriginal people to bring project-related concerns before the Board, should they wish to do so.

Regarding concerns about questioning Aboriginal oral traditional evidence, this reflects that it may not always be practical or appropriate to provide written answers when the evidence they are being asked questions on is oral traditional evidence. Aboriginal groups may choose to answer any questions in writing or orally, whichever is practical or appropriate by their determination. If a written response is chosen, both the questions and responses to the questions should proceed through the current process for submitting information requests to intervenors, which have a deadline of 14 November 2014.

While there are legislative time limits for the Board to provide its recommendation, the Board's review of the Application will be no less rigorous compared to past assessments. This Application is subject to a full review pursuant to the requirements of the NEB Act, CEAA 2012, the Board's Filing Manual, and additional filing requirements the Board identified relating to marine shipping. In considering the full hearing process, the Board is of the view that it is fair to all participants and meets natural justice requirements.

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<sup>5</sup> *Innisfil (Township) v. Vespra (Township)*, [1981] 2 SCR 145.

Given the Board's dismissal of this motion, this leaves to be addressed the request by Burnaby for leave to renew this motion for oral cross-examination at a future time. The Board declines to grant this request. The Board does not normally grant requests relating to potential future motions. If Burnaby chooses to file such a motion, the Board will consider it along with any submissions or objections that may be raised at that time.

Yours truly,



for  
Sheri Young  
Secretary of the Board

c.c. All intervenors  
Trans Mountain  
Clayton Ruby and Gerald Chan at Ruby Shiller Chan Hasan Barristers,  
Emails: [ruby@rubyshiller.com](mailto:ruby@rubyshiller.com), [gchan@rubyshiller.com](mailto:gchan@rubyshiller.com)