



File OF-Fac-Oil-T260-2013-03 02
19 August 2014

Mr. Joseph J. Arvay, Q.C. and Ms. Alison M. Latimer
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Dear Mr. Arvay and Ms. Latimer:

**Hearing Order OH-001-2014
Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
Mr. L.D. Danny Harvey – notice of motion dated 12 August 2014
Ruling No. 29**

The National Energy Board (Board or NEB) is in receipt of a [notice of motion](#) from Mr. L.D. Danny Harvey, dated 12 August 2014. For the reasons set out below, the motion is dismissed.

In its 2 April 2014 [Ruling on Participation](#), the Board denied Mr. Harvey standing in this hearing. He now seeks a review of that ruling, together with the Board's 29 July 2013 decision establishing the List of Issues, on the basis that both infringe section 7 of the *Canadian Charter of Rights and Freedoms* (Charter). Section 7 states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In Mr. Harvey's view, the List of Issues engages the Charter rights to "life" and "security of the person" by excluding the Project's upstream and downstream environmental effects, including the Project's contribution to climate change. He submits that these effects "would have significant adverse impacts on health and life," and that the List of Issues

ensures that the NEB will not consider any of these potentially adverse impacts on health and life prior to making its final decision which may be to allow the Project to proceed.

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The Supreme Court of Canada has held, in unambiguous terms, that section 7 “cannot reasonably be read as imposing a duty on the government to refrain from those acts which might lead to consequences that deprive or threaten to deprive individuals of their life and security of the person.”¹ A deprivation must, in other words, be “proven to result” from the challenged act.² A section 7 claim cannot be founded on speculation as to effects that “may” happen.

Here, Mr. Harvey does not argue that the List of Issues itself endangers health and life. Rather, he asserts a causal link between the List of Issues and the human impact of climate change. That link, however, depends on a number of assumptions, including the assumptions that:

1. the Board will recommend approval of the Project;
2. the Governor in Council will approve the Project;
3. Trans Mountain will meet all conditions imposed on it by the Board and construct the pipeline expansion;
4. the constructed pipeline expansion will, in fact, fuel upstream oil sands development; and
5. oil sands development will, by contributing to climate change, adversely affect human health.

Mr. Harvey provides and refers to affidavit evidence supporting the final assumption above. However, he has not persuaded the Board that a deprivation of life and security of the person can be “proven to result” from the Board’s List of Issues decision or from its Ruling on Participation.

Mr. Harvey also makes no mention of the Board’s 23 July 2014 [Ruling No. 25](#) on motions to amend the List of Issues from the City of Vancouver and Parents from Cameron Elementary School Burnaby. In that ruling, the Board stated that any link between the Project and upstream environmental effects would be “indirect” and “not necessarily incidental” to the Project’s approval. That finding itself disposes of any argument that the Board’s procedural decisions – which themselves precede approval – could be “proven to result” in harm to Canadians’ health.

Owing to Mr. Harvey’s failure to establish how his motion engages section 7, the Board need not consider whether his claimed limitation would be “in accordance with the principles of fundamental justice” if made out. However, at a minimum, the Board’s decision to exclude Mr. Harvey or others from the hearing cannot be described as “arbitrary.” The Board applied the “directly affected” standard mandated by section 55.2 of the *National Energy Board Act* to the facts before it. As noted in the Ruling on Participation, that standard embodies a valid state goal for Board hearings: to “promote fairness and efficiency by focusing consultation on individuals directly affected by an application and persons with relevant information or expertise.”

Mr. Harvey raises no other grounds to cast doubt on the correctness of its List of Issues decision and Ruling on Participation. Therefore, the Board dismisses Mr. Harvey’s review applications, including his request for intervenor standing and a re-opening of the Application to Participate process.

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¹ *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at para. 29 [emphasis in original].

² *Operation Dismantle* at para. 29.

Finally, the Board notes that Mr. Harvey has filed a Notice of Constitutional Question in this matter under section 8 of the British Columbia *Constitutional Question Act*. Given that the Board is declining a Charter remedy in this case, that notice does not require the Board to suspend its decision in order to hear from interested attorneys general. Nor, in the circumstances, do the comparable notice provisions in section 57 of the *Federal Courts Act* apply.³ As such, the Board will neither create a comment process in this matter nor wait for potential responses from Trans Mountain or any attorneys general.

Yours truly,

Original signed by

Sheri Young
Secretary of the Board

c.c. Trans Mountain

All intervenors

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³ Those provisions apply only to constitutional challenges of legislation or regulation: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 57(1). Here, only the Board's decisions – not the authorities enabling them – are alleged to be unconstitutional. See also *Mikisew Cree First Nation v. Canada*, 2004 FCA 66 at paras. 77-79.

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