National Energy Board

Office national de l'énergie

File OF-Fac-Oil-T260-2013-03 02
24 September 2015

To: All participants

Hearing Order OH-001-2014
Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
Excluded period from 17 September 2015 to 8 January 2016, pursuant to subsection 52(5) of the *National Energy Board Act* (NEB Act)
Ruling No. 92

Summary of decision regarding the excluded period

On 18 September 2015, the National Energy Board (Board), with the approval of the Chairperson, decided to implement an excluded period pursuant to subsection 52(5) of the NEB Act so that it can acquire information from Trans Mountain and intervenors in relation to the stricken evidence which was prepared by or under the direction of Mr. Steven J. Kelly on behalf of Trans Mountain (Stricken Evidence).

The excluded period began on **17 September 2015 and ends on 8 January 2016**. This will allow sufficient time for Trans Mountain to file evidence to replace the Stricken Evidence and for intervenors to file evidence in response to Trans Mountain's replacement evidence (together, the Replacement Evidence). There is also an opportunity for Trans Mountain to amend its written argument-in-chief to reflect the Replacement Evidence. As a result of the excluded period, the legislated time limit for the Board to issue its report to the Governor in Council is now **20 May 2016**. In the Board's view, the revised hearing steps outlined in Procedural Direction No. 18 (also of today's date) to receive and test the Replacement Evidence meet the requirements of natural justice and procedural fairness.

In reaching this determination, the Board considered the views of Trans Mountain and intervenors. The Board is of the view that the timeframe it has allowed for filing and testing the Replacement Evidence is reasonable and fair. It is somewhat longer than that sought by Trans Mountain and somewhat shorter than that requested by intervenors. The implemented excluded period reflects this decision.

Please see Procedural Direction No. 18 for all new and revised hearing steps and deadlines.

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Background on Replacement Evidence

On 21 August 2015, the Board announced its decision to remove the Stricken Evidence from the hearing record. This evidence addressed, among other things, the issue of oil market supply and demand. The Board's letter asked Trans Mountain to identify all evidence filed in this proceeding that was prepared by or under the direction of Mr. Kelly and to provide its plan to replace this evidence. Finally, the Board sought comments on Trans Mountain's submissions from intervenors and a final reply from Trans Mountain.

Views of Trans Mountain and intervenors on Replacement Evidence

All of the filed submissions acknowledge the requirement for procedural steps to allow Trans Mountain's Replacement Evidence to be tested. In summary, Trans Mountain asked for the process to be expedited, while intervenors argued that an expedited process would not be appropriate.

Trans Mountain's plan to replace the Stricken Evidence

In its 28 August 2015 letter, Trans Mountain indicates that it will replace the Stricken Evidence on 25 September 2015. It says it will file a brief expert report from Muse Stancil to address the issues previously dealt with in Mr. Kelly's direct evidence. It also says it will file consequential amendments to portions of a Conference Board of Canada report and Mr. Reed's direct evidence where those experts relied on the Stricken Evidence.

Trans Mountain requests that the Board expedite the remaining procedural steps required to conclude its Project review because, in its view, the delay was in no way caused by Trans Mountain's actions and because it is only replacing evidence related to a "narrow issue." Specifically, Trans Mountain asks the Board to abridge the procedural steps for participants to address its Replacement Evidence in a manner similar to that which the Board outlined in Ruling Nos. 56 and 61 to address past late evidence of Trans Mountain.

With its submission, Trans Mountain included an appendix of all the evidence said to be prepared by or under the direction of Mr. Kelly.

Intervenors' comments

Within the timeframes of the comment process, the Board received comments from the following intervenors:

Metro Vancouver (Metro)
Katzie First Nation (Katzie)
Living Oceans Society (Living Oceans)
Georgia Strait Alliance (GSA)
Mr. Calvin Taplay
Upper Nicola Band (Upper Nicola)
Kwantlen First Nation (Kwantlen)
Squamish Nation (Squamish)
Coldwater Indian Band (Coldwater)
City of Vancouver (Vancouver)
Tsleil-Waututh Nation (Tsleil-Waututh)
Tsawout First Nation (Tsawout)

Nooaitch Indian Band
City of Burnaby (Burnaby)
Pro Information Pro Environment United People Network (PIPE UP)
Lyackson First Nation (Lyackson)
Stz'uminus First Nation (Stz'uminus)

Metro, Vancouver, and Burnaby are of the view that the Board should consider striking a broader range of evidence than that listed by Trans Mountain. Squamish also requests that the Board strike its 12 August 2015 draft conditions for the Project.

Living Oceans provides detailed submissions about required procedural steps, which are supported by several other intervenors. Living Oceans and several other intervenors are of the view that the Stricken Evidence, which concerned the issue of the Project's economic feasibility, was a significant part of the evidence in support of the Project. Most intervenors oppose an expedited process related to the Replacement Evidence. Living Oceans requests 30 days after Trans Mountain's Replacement Evidence is filed for intervenors to review and file an initial round of information requests (IRs). It then requests a second round of intervenor IRs. Finally, it requests 45 days from the receipt of Trans Mountain's responses to the second round of intervenor IRs to the filing date for new evidence by intervenors on the subject. Several intervenors (including Kwantlen, PIPE UP, Squamish, Coldwater, Stz'uminus, Upper Nicola, and Tsawout) adopt the timeframe and steps suggested by Living Oceans.

Katzie, GSA, and Mr. Taplay all request a process that has sufficient time to allow Trans Mountain's Replacement Evidence to be tested. These intervenors also say that the process must allow intervenors to file new evidence in response to Trans Mountain's Replacement Evidence.

Vancouver and Burnaby both request the opportunity for IRs and oral cross-examination of Trans Mountain's already filed reply evidence.[1] Burnaby and Vancouver submit that Trans Mountain bears significant responsibility for the delay to the hearing and that intervenors had no responsibility for the delay.

Tsleil-Waututh requests two rounds of IRs on Trans Mountain's Replacement Evidence and then a third round of IRs after any reply from Trans Mountain on its Replacement Evidence. On a related point, Burnaby requests sur-reply after any reply from Trans Mountain.

Lyackson states that the Board should circulate a draft revised hearing schedule for comment before finalizing it.

Several intervenors request additional participant funding.

[1] Vancouver's comments included a notice of motion regarding Trans Mountain's 20 August 2015 reply evidence. A number of aspects of the motion are unrelated to the Stricken Evidence. Vancouver requests sur-reply evidence in response to Trans Mountain's reply evidence and oral cross-examination of certain aspects of that evidence. Vancouver's motion is currently subject to a separate process for consideration by the Board, as are similar motions by other intervenors.

Burnaby and Squamish allege that, even with the Stricken Evidence having been recently removed from the hearing record, there is an apprehension of bias by the Board. These concerns are addressed later in this letter.

Some intervenors make requests or ask questions of the Board that are well outside the scope of what the Board sought comments on. Such points were unrelated to the Board's 21 August 2015 decision. This too is addressed later in this letter.

Trans Mountain's reply

Trans Mountain replied to intervenors' comments on 11 September 2015.

Views of the Board on Replacement Evidence

Subsections 52(5) and 52(6) of the NEB Act state the following:

> (5) If the Board requires the applicant to provide information or undertake a study with respect to the pipeline and the Board, with the Chairperson's approval, states publicly that this subsection applies, the period that is taken by the applicant to comply with the requirement is not included in the calculation of the time limit.
>
> (6) The Board shall make public the dates of the beginning and ending of the period referred to in subsection (5) as soon as each of them is known.

Specifics of the Stricken Evidence and its replacement

After considering the comments received from Trans Mountain and intervenors, the Stricken Evidence that has been removed from the hearing record comprises the list of entire, or parts of, documents that Trans Mountain provided as Revised Appendix A to its 11 September 2015 submissions (PDF pages 11 to 18 of 18).

As stated in its 21 August 2015 decision, the Board is striking only the filed evidence prepared by or under the direction of Mr. Kelly. To the extent that other evidence by Trans Mountain or intervenors relied on the Mr. Kelly's evidence, it will be given no weight in the Board's assessment of the Project. The Stricken Evidence remains viewable on the public registry because, in most cases, only portions of the documents were stricken. The Board will label these documents as either "stricken in full" or "stricken in part."

The Stricken Evidence addressed, among other things, the issue of oil market supply and demand. The Board has determined that Replacement Evidence to address this issue is required before it can make a recommendation to the Governor in Council about the Project, pursuant to subsection 52(1) of the NEB Act.

Trans Mountain can proceed with filing its Replacement Evidence to replace the Stricken Evidence. It may also file the consequential amendments to its evidence as described in its 28 August 2015 letter. These filings are due by **25 September 2015** and must be served on all intervenors.

The Board declines to strike its 12 August 2015 draft conditions as Squamish requests. Squamish does not offer any authority for its position, nor did it identify any facts that could support such an argument. Intervenors will have an opportunity to comment on the Board's draft conditions during their written argument-in-chief.

The process for filing Replacement Evidence

The Board does not accept Trans Mountain's position that the subject matter of the evidence in question is sufficiently similar in nature to its late seismic evidence, such that the process should be identical to the one used at that time. The Board accepts intervenors' view that the Replacement Evidence will deal squarely with several issues on the Board's List of Issues, including the need for the Project and the Project's economic feasibility. This differs from the seismic evidence which formed one part of Trans Mountain's geotechnical analysis for the Project. The Board has determined that, in the circumstances, 25 days is an appropriate amount of time for intervenors to review Trans Mountain's Replacement Evidence and to draft and serve any IRs on Trans Mountain.

The Board is not persuaded by intervenors' submissions that the procedural steps required to test Trans Mountain's Replacement Evidence have to exactly match the duration and number of steps used to test the Stricken Evidence. During the time that the now-Stricken Evidence was being tested, so too was the entire evidentiary record across all issues. Intervenors had much more evidence to review when forming their IRs. In this case, Trans Mountain's Replacement Evidence will be significantly limited in scope and size, relative to the Project application as a whole. Intervenors will be able to focus their attention and time on less material, especially considering that the steps pertaining to testing and responding to the remainder of the evidence on the hearing record have been completed. There will also be a process to request that the Board compel full and adequate answers to the IRs, as considered appropriate.

After IR responses are received, intervenors will have an opportunity to file evidence in response to Trans Mountain's Replacement Evidence. While Living Oceans requested 45 days from the receipt of Trans Mountain's responses to the second round of intervenor IRs to the filing date for intervenors' new evidence on the matter, in the Board's view, such a significant amount of time is unnecessary. While intervenors may require responses to IRs before completing their evidence in response, work on intevenor evidence can start as soon as Trans Mountain files its Replacement Evidence on 25 September 2015.

The Board notes that, while Trans Mountain expresses a preference for proceeding without IRs on new intervenor evidence, the Board has determined that an expedited round of IRs on this new evidence is appropriate. It may turn out that the Board or other participants have questions about intervenors' evidence. Intervenors are reminded that the IR process is not intended for participants with similar evidence and interests to ask IRs of each other.

Once the process for IRs to intervenors has been completed, there will be a brief opportunity for Trans Mountain to revise its written argument-in-chief. Hearing steps similar to those that remained prior to striking Mr. Kelly's evidence will then take place (e.g., intervenor written argument-in-chief, participants' oral summary argument, etc.).

With respect to various intervenor comments about Trans Mountain's reply evidence that was not stricken, these issues will be dealt with in a future decision by the Board. As noted previously, there are current motions before the Board from Vancouver and others that are subject to a separate comment process on the issue of the appropriateness of Trans Mountain's reply evidence. The issues raised in those motions have nothing to do with the Stricken Evidence.

Regarding requests for additional participant funding to deal with the Replacement Evidence, the Board notes that decisions on who can receive participant funding, how much, and the timing of those decisions is entirely separate from the regulatory hearing process for the Project. The Panel considering the Project has no influence over these decisions, nor can it comment on the concerns raised with respect to this independent participant funding process. The Participant Funding Program is aware of the requests and will contact intervenors in due course. If you have any questions, please contact the Participant Funding Program by emailing PFP.PAFP@neb-one.gc.ca or calling 1-800-899-1265 (toll-free).

With the procedural steps and deadlines set out in Procedural Direction No. 18, the Board is confident that the Replacement Evidence can be reviewed and tested thoroughly and that the Board will benefit from the contribution of all participants. The Board is also of the view that the benefits to the Board for its upcoming public interest determination and recommendation as a result of a longer timeframe outweigh the prejudice to Trans Mountain caused by that timeframe being somewhat longer than Trans Mountain requests. At the same time, the Board is of the view that some of the timeframes requested by intervenors were too long.

As a result of the excluded period, the legislated time limit for the Board to issue its report to the Governor in Council is now **20 May 2016.**

The excluded period is strictly for Trans Mountain and intervenors to undertake studies and provide information with respect to the subject matter of the Stricken Evidence, as well as to file consequential additions or amendments to evidence already filed that flows from the Stricken Evidence. Evidence filed in the future that is outside of the intended scope will not be considered (without leave being requested and granted) and will be given no weight.

Summary of concerns raised by Burnaby and Squamish alleging an apprehension of bias

Burnaby raises concerns with the way the Board's review process has proceeded. These allegations, claiming an apprehension of bias by the Board, are allegations that the Board takes seriously. In any proceeding, if participants have allegations of an apprehension of bias, they must be brought forward at the earliest opportunity. As Burnaby and Squamish raise such concerns, the Board will address the points raised.

Burnaby states that the Board has shown a preference to Trans Mountain and that this has been at the expense of the principles of natural justice. In support of its allegation, it cites several issues. Burnaby's submissions including the following points:

1) The review process is tainted by the appointment of Mr. Kelly as a permanent Member of the Board. His evidence was on the record for some time and the Board Panel cannot disabuse their minds of Mr. Kelly's evidence.
2) The Board's decision to give Trans Mountain access to Burnaby Mountain for survey and examination purposes resulted in many citizens being improperly arrested. Burnaby adds that the decision to allow access to Burnaby Mountain must have been based on an underlying assumption that there is a need for the Project and this would have been based on Mr. Kelly's evidence.
3) The Board effectively ignored Burnaby's letter in March 2014, in which it questioned whether the Project application was complete.
4) Not having oral cross-examination is an indication of preference for Trans Mountain. Burnaby had expressed views in favour of oral cross-examination.

Similar to some of Burnaby's submissions, Squamish states that a new Board Panel must be appointed since the current Panel has been exposed to the Stricken Evidence for several months. Squamish adds that it was unfair that Aboriginal groups were subject to cross-examination during their oral traditional evidence presentations, while Trans Mountain has not been subject to oral cross-examination.

Trans Mountain's response to the allegations of an apprehension of bias

In response to Burnaby's comments about the need to re-start the review process because "the Panel Members cannot disabuse their minds of the evidence of Mr. Kelly," Trans Mountain states that Burnaby does not provide any legal precedent in support of its position. Trans Mountain submits that, not only has the Board struck Mr. Kelly's evidence, but it has also taken measures to make certain he will have no contact with the members of the Panel involved in reviewing the Project application. In Trans Mountain's view, this goes beyond what is required of an expert tribunal to ensure there is no apprehension of bias.

Views of the Board on the allegations of an apprehension of bias

With regard to the above matters raised by Burnaby and Squamish, there is no basis for finding that there is a reasonable apprehension of bias. The claims are dismissed.

As stated by the Board in Ruling No. 11:

> The rule against bias is a component of the principles of natural justice. The integrity of both the judicial and administrative law systems depends on unbiased decision-makers in order to preserve the public's confidence in their objectivity and impartiality.
>
> > ...public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.[2]
>
> The rule requires decision-makers to approach a matter with an open mind and act independently and free of extraneous factors, real or apprehended, that might taint their judgment.

The test for reasonable apprehension of bias is set out in the dissenting judgment of De Grandpré J. He stated:[3]

> …the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information… [T]hat test is what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?

Whether Burnaby's concerns are considered individually or collectively, there is no reasonable basis to conclude that there is an apprehension of bias on behalf of the Board.

First, Burnaby suggests that its comments about the Board's completeness determination under section 52 of the NEB Act were effectively ignored. In this regard, the Board notes that it acknowledged receipt of Burnaby's 17 March 2014 letter regarding completeness when it made its completeness determination on 2 April 2014. The Board provided reasons for its decision. In reading the decision, there is no basis for a reasonable person to consider that the Board did anything other than make a decision based on the information before it. The fact that Burnaby does not agree with the Board's decision is not relevant to whether there is a reasonable apprehension of bias.

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[2] *Wewaykum Indian Band v. Canada*, [2003] 2 SCR 259, para 57.
[3] (1976) 68 DLR (3d) 716 (SCC).

Another point raised by Burnaby concerns the Board's 23 October 2014 Ruling No. 40. In that ruling, the Board considered a Constitutional Question and determined that it had jurisdiction to issue the order requested and that the facts necessitated granting such an order. The Board notes that this decision has been subject to consideration by the Federal Court of Appeal and the Court did not grant Burnaby's request for leave to appeal. While it is evident that Burnaby disagrees with the Board's decision, as it is entitled to do, there is no basis to conclude that Ruling No. 40 results in the Board appearing to be biased with respect to Burnaby or any other participant. Regarding Burnaby's suggestion that Mr. Kelly's evidence must have influenced the Board's Ruling No. 40, this is incorrect. There is no reference to Mr. Kelly's evidence in Ruling No. 40. Access to lands for pipeline surveys is not based on a pre-determination that a particular project is needed. No determination of whether a pipeline is required by the present and future public convenience and necessity is made until a report to the Governor in Council is finalized.

Burnaby also raises concerns about the Board's 7 May 2014 Ruling No. 14. In that ruling, the Board provided detailed reasons for not granting motions from intervenors for oral cross-examination of witnesses on all the evidence filed. Again, while Burnaby may not agree with the result, a fully informed person would consider all submissions that were filed and the reasons provided, including references to legal authorities. Burnaby does not provide any legal authority to suggest that one or more rulings against a party amount to an apprehension of bias.

With respect to the Stricken Evidence, both Burnaby and Squamish call for either a new Panel to be appointed or suggest that the review process has been "irrevocably tainted" because Mr. Kelly's evidence was on the record for some time. Neither intervenor provides any legal authority for its allegation. The Board notes that both courts and tribunals, from time-to-time, must strike evidence from their records and are able to make decisions based only on the remaining evidence on the record for the proceeding. The Board will not consider the Stricken Evidence in making its recommendation. It will rely entirely on the hearing record for this proceeding.

The last aspect of an apprehension of bias argued is Squamish's submission that Aboriginal groups were subject to oral cross-examination (during the oral traditional evidence phase of the hearing), but that Trans Mountain was not. In this regard, a fully informed person would consider the Board's Procedural Direction No. 6 which stated:

> As explained in the Hearing Order, Trans Mountain and intervenors are given the opportunity to test all evidence filed in the hearing by asking written questions (information requests). In the case of oral Aboriginal traditional evidence, Trans Mountain and intervenors will be given a short amount of time to verbally ask questions about the evidence immediately after it has been provided. The Board may also ask questions. Presenters should be aware of this possibility. This process reflects that it may not be practical or appropriate for Aboriginal groups to answer questions in writing when the evidence they are being asked questions about has been provided orally. Aboriginal groups may choose to answer any questions in writing or orally, whichever is practical or appropriate by their determination.

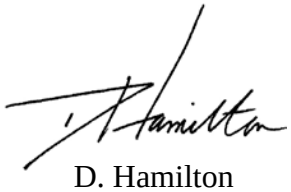
The Board's procedural direction is clear about the reasoning behind the testing of oral Aboriginal traditional evidence. The Board allowed Aboriginal groups to determine whether they wished to answer any questions orally or in writing. In some cases, Aboriginal groups used both options, depending on the type of question. The choice was entirely theirs. This does not support an apprehension of bias by the Board.

In summary, the Board does not find there to be a reasonable basis to suggest any apprehension of bias in favour of Trans Mountain as Burnaby and Squamish claim. Their requests are dismissed. The Board will continue to review the evidence and submissions placed on the record in an open-minded manner that is free from the influence of extraneous factors.

Issues raised unrelated to the Board's comment process regarding Replacement Evidence

As noted above, some intervenors make requests or ask questions of the Board that are well outside the scope of what the Board sought comments on. The comment process established by the Board concerned the identification of evidence prepared by or under the direction of Mr. Kelly and Trans Mountain's plans to replace this evidence. As a result, the Board is not addressing the out-of-scope comments and questions. As stated in the Board's Hearing Order, if any participant wants to ask the Board to do something, it must file a notice of motion detailing that request. Normally, motions must include the information detailed under Section 4.4 of the Hearing Order.

For any questions, please contact the Board's Process Advisor Team for this hearing by phone at 403-292-4800 or 1-800-899-1265 (toll-free), or by email at transmountainpipeline.hearing@neb-one.gc.ca.



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