Hearing Order OH-001-2014
File No.: OF-Fac-Oil-T260-2013-03 02

NATIONAL ENERGY BOARD

IN THE MATTER OF TRANS MOUNTAIN EXPANSION PROJECT

AND IN THE MATTER of a Notice of Constitutional Question dated May 5, 2014 and a Notice of Motion dated May 6, 2014 with regard to the constitutionality of section 55.2 of the *National Energy Board Act*, R.S.C. 1985, c. N-7, made by the Applicants Lynne M. Quarby, Eric Doherty, Ruth Walmsley, John Vissers, Shirley Samples, ForestEthics Advocacy Association, Tzeporah Berman, John Clarke and Bradley Shende

---

WRITTEN ANSWER OF THE ATTORNEY GENERAL OF CANADA

Under Rule 35(4) of the National Energy Board Rules

William F. Pentney
Deputy Attorney General of Canada
Per: Michael P. Doherty and Liliane Bantourakis
Department of Justice Canada
900 - 840 Howe Street
Vancouver, British Columbia
V6Z 2S9

Solicitors for the Attorney General of Canada

David J. Martin
Martin & Associates
863 Hamilton Street
Vancouver, British Columbia
V6B 2R7

Solicitor for the Applicants

Maureen Killoran, Thomas Gelbman and Jeremy Barretto
Osler Haskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 - 1st Street S.W.
Calgary, Alberta T2P 5H1

Solicitors for Trans Mountain ULC

INDEX

OVERVIEW

1. The Attorney General of Canada ("Canada") appears on this motion in response to a Notice of Constitutional Question dated May 5, 2014. Canada is responding to the applicants' motion for a declaration that s. 55.2 of the *National Energy Board Act*[1] [the *"NEB Act"*] infringes section 2(b) of the *Charter* in a manner that is not justified under section 1 of the *Charter*.

2. Section 55.2 of the *NEB Act* does not infringe freedom of expression. Section 2(b) of the *Charter* does not guarantee standing to everyone who may wish to make representations before the Board. Neither does section 2(b) place a positive obligation on Parliament to craft section 55.2 of the *NEB Act* in terms that would allow any person the right to make representations, regardless of the degree to which that person may be affected by the proceedings, the relevance of the information they wish to bring forward, or their level of expertise.

3. The applicants' argument that section 2(b) of the *Charter* guarantees them expansive rights to participate in a hearing before the Board and to make submissions on any issue they deem relevant to Trans Mountain's application is wrong. The purpose of a hearing is to gather in evidence and argument that will allow the agency to fulfil its statutory mandate.[2]

4. Even if section 55.2 of the *NEB Act* did infringe section 2(b) of the *Charter*, that infringement would be justified under section 1. Section 55.2 promotes efficiency and allows the Board to more effectively carry out its statutory mandate, by focusing consultation on individuals directly affected by an application and persons with relevant information or expertise. Section 55.2 minimally impairs freedom of expression, and impacts those who are not directly affected or do not have relevant information or expertise to offer the Board.

---

[1] RSC 1985, c. N-7, as amended

[2] Robert W. Macaulay & James L.J. Sprague, *Practice and Procedure Before Administrative Tribunals,* looseleaf (Toronto, Thomson Canada, 2004) Chap. 12.2 at p. 12-9.

I. FACTS

5. Trans Mountain Pipeline ULC has applied to the National Energy Board (the "Board") under section 52 of the *NEB Act*. Trans Mountain has applied for a Certificate of Public Convenience and Necessity and related approvals for a pipeline expansion project (the "Project").

6. Section 55.2 of the *NEB Act* states:

> 55.2 On an application for a certificate, the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information or expertise. A decision of the Board as to whether it will consider the representations of any person is conclusive.

7. The Board reviewed 2,118 applications to participate from persons who wished to make representations with regard to the Project pursuant to section 55.2 of the *NEB Act*. Of those, 1,650 were granted participant status. Specifically:

(a) 400 requested and were granted intervener status;

(b) 798 requested and were granted commenter status;

(c) 452 requested intervener status and were granted commenter status;

(d) 468 were denied intervener or commenter status.[3]

8. Of the nine applicants, eight are individuals and one is an organization. They sought intervenor and commenter status in the context of the Board's consideration of the Project. Some were successful in obtaining that status, while others were not.[4] One of the applicants chose not to apply for intervener or commenter status because she concluded that the matters on which she wanted to make submissions fell outside the scope of the issues the Board would be considering.[5]

---

[3] Ruling on Participation, April 2, 2014.

[4] See Affidavit of Tzeporah Berman, made May 5, 2014; Affidavit of Eric Doherty, made April 28, 2014; Affidavit of Sven Biggs, made May 1, 2014; Affidavit of Ruth Walmsley, made April 28, 2014; Affidavit of John Vissers, made April 28, 2014; Affidavit of Shirley Samples, made April 29, 2014; Affidavit of John Clarke, mdate April 30, 2014; Affidavit of Bradley Shende, made April 30, 2014.

[5] See Affidavit of Lynne Quarmby, made April 29, 2014, at para. 13

9. By Notice of Motion dated May 6, 2014 the applicants seek various orders in response to the Board's Ruling on the applications to participate, including:

> A Declaration that s. 55.2 of the *National Energy Board Act*, [...], is unconstitutional as it violates the Applicants' freedom of expression as guaranteed by section 2(b) of the *Charter of Rights and Freedoms* (the "*Charter*"), that this violation cannot be justified under section 1 of the *Charter*, and thus that the law is of no force and effect.

10. The applicants have also served a Notice of Constitutional Question dated May 5, 2014 with regard to their motion for a declaration that s. 55.2 of the *NEB Act* infringes section 2(b) of the *Charter* and that the infringement is not justified under section 1 of the *Charter*.

11. Publicly available information suggests that the applicants have engaged in a wide range of expression with regard to the Project, pipelines, and climate change. That expression includes online articles, media interviews and involvement, social media posting, public demonstrations, townhall meetings and panel discussions.[6]

12. The Board's letter dated May 26, 2014 established a formal comment process with regard to the Motion (the "comment process letter"). Comments and evidence, if any, were to address the following issues:

(1) Does section 55.2 of the *NEB Act* violate section 2(b) of the *Charter* and, if so, is the infringement demonstrably justified under section 1 of the *Charter*?

(2) Does section 2(b) of the *Charter* place an obligation on a quasi-judicial tribunal, including the Board, or a court, to allow any interested members of the public to participate in its process? Please provide and discuss any legal authority or argument that specifically addresses this issue.

(3) Did the Board's Application to Participate process and 2 April 2014 Ruling on Participation unduly limit participation and violate section 2(b) of the *Charter*? Did the Board interpret its authority under section 55.2 of the *NEB Act* in a manner consistent with section 2(b) of the *Charter*?

---

[6] Affidavit of Wendy Andrews, made June 26, 2014 ["Andrews Affidavit"], Exhibits "A"-"I".

(4) Did the Board's statement in the List of Issues [...] that it does not intend to consider the environmental and socio-economic effects associated with upstream activities, the development of the oil sands, or the downstream use of the oil transported by the pipeline violate section 2(b) of the *Charter*?

(5) If there is a violation of section 2(b) of the *Charter* and the violation cannot be justified under section 1 of the *Charter*, does the Board have authority to declare that section 55.2 of the *NEB Act* is unconstitutional and of no force and effect?

(6) Is additional process required including an oral process, for hearing the *Charter* Motion? [...]

13. Canada intervenes on this motion in response to service of the Notice of Constitutional Question dated May 5, 2014. Canada therefore confines its submissions on this motion to the constitutionality of s. 55.2 of the *NEB Act* and matters arising in relation to the constitutionality, specifically points (1), (5) and (6) in the Board's comment process letter. Canada takes no position with regard to the other aspects of the applicants' motion and the remaining points in the Comment Process Letter. Canada takes this approach without prejudice to Canada's ability to take a position on those issues in future, including at subsequent judicial proceedings.

II. ISSUES

14. Canada addresses the following issues arising from the motion of the applicants:

A. Is additional process required for hearing of the applicants' *Charter* motion? In particular, should allowance be made for cross-examination on affidavits?

B. Does s. 55.2 of the *NEB Act* infringe s. 2(b) of the *Charter*?

C. If yes, is the infringement justified within the meaning of s. 1 of the *Charter*?

D. If s. 55. 2 of the *NEB Act* is unconstitutional does the Board have authority to declare that section 55.2 of the *NEB Act* is unconstitutional and of no force and effect?

III. ARGUMENT

A. ADDITIONAL PROCESS IS REQUIRED: CROSS EXAMINATION

15. Canada's position is that cross-examination is necessary to ensure a proper evidentiary record on this motion. The Comment Process letter makes no provision for cross-examination on affidavit evidence. In the circumstances, the Board is restricted in its ability to assess the applicants' claims that their ability to express themselves has been unconstitutionally limited.

16. Cross-examination serves a vital role in testing the value of testimonial evidence. It assists in the determination of credibility, assigning weight, and overall assessment of the evidentiary record. It has been termed "the greatest legal engine ever invented for the discovery of truth."[7]

17. The Board should allow cross-examination in this case, because of the particular constitutional issues and the adversarial context of the Motion. While the necessity of cross-examination in the context of administrative processes will vary depending on the specific features of the administrative process in issue and the nature of the evidence proffered,[8] the Supreme Court of Canada has repeatedly observed that *Charter* issues should be decided on the basis of a proper and adequate evidentiary record.[9]

18. Without cross-examination, the Board will be reviewing only untested evidence. For instance, the applicants assert that the Board has limited their right to freedom of expression by refusing to allow them to participate at all, or in the way they would have preferred. These assertions would warrant further probing, particularly since Canada has offered evidence that the applicants have engaged in a wide range of expression.

---

[7] *Innisfil Township v. Vespra Township*, [1981] 2 SCR 145, at 166-167 ["*Innisfil*"].
[8] *Innisfil* at 167-169, 173; see also: *Allard v. British Columbia (Assessor of Area #10 - North Fraser Region)*, 2010 BCCA 437, at paras. 90-101.
[9] *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, at para. 28 (and cases cited therein).

19. If the Board does not provide an opportunity for Canada to cross examine the affiants, Canada submits that the Board should give little weight to this affidavit evidence, because the evidence would not have benefited from adequate testing.

B. SECTION 55.2 OF THE *NEB ACT* DOES NOT INFRINGE SECTION 2(B) OF THE *CHARTER*

1. Positive Rights and Freedom of Expression

20. Section 55.2 of the *NEB Act* does not infringe section 2(b) of the *Charter*. Section 55.2 identifies who has standing to make representations in the context of a particular statutory process. Supreme Court of Canada jurisprudence confirms that section 2(b) should not be used to constitutionalize access to particular government-created processes that provide channels for expression.[10] As noted by Sopinka J.:

> The freedom of expression guaranteed by s. 2(b) of the *Charter* does not guarantee any particular means of expression or place a positive obligation upon the Government to consult anyone. The right to a particular platform or means of expression was clearly rejected by this Court in *Haig*.[11]

21. Likewise in this case, s. 2(b) of the *Charter* does not guarantee all who may wish to obtain it standing to make representations before the Board and does not require the Board to consult anyone. Section 2(b) does not oblige Parliament to craft section 55.2 of the *NEB Act* in terms that would allow anyone the right to make representations, regardless of their level of expertise, the relevance of the information they wish to present, or the degree to which they may be affected by the proceedings.

22. The applicants do not allege that section 55.2 of the *NEB Act* interferes with their ability to express themselves generally on the issues that concern them. In fact, the evidence suggests that the applicants continue to advocate widely on those issues.[12] Rather, the

---

[10] *Haig v. Canada*, [1993] 2 SCR 995 ["*Haig*"]; *Native Women's Assn. of Canada v. Canada*, [1994] 3 SCR 627 at 651 ["*NWAC*"]; *Baier v. Alberta*, 2007 SCC 31, [2007] SCR 673 ["*Baier*"]; see also *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989, at para. 26.
[11] *NWAC*, note 10, at para. 73.
[12] Andrews Affidavit, Exhibits "A" – "I"

applicants complain that their other advocacy efforts are "rendered meaningless" because "the NEB is the forum that matters in this context".[13]

23. The applicants' argument on this point is misguided in at least two respects. First, it demeans many of the expressive activities that are important to the functioning of liberal democratic states such as writing to members of Parliament, Parliamentary debate, media reporting and commentary whether traditional or internet-based, appearances on radio or television, attending public demonstrations, and participating in public meetings or panel discussions.

24. Second, the applicants are not seeking freedom from governmental or legislative action that limits expression. Instead, the applicants are seeking a positive right to express themselves at a Board hearing, with the hope of influencing the Board's decision in a statutorily-created process. Section 55.2 of the *NEB Act*, which is about standing before the Board, is constitutional even though it does not provide an unqualified right to appear.

25. A claim is for a positive right if the government must legislate or act to support or enable the expressive activity. By contrast, a negative right requires the claimant to seek freedom from government legislation or action that suppresses expression in which people would otherwise be free to engage, without any need for any government support or enablement.[14]

26. In *Baier*, the claimant wanted to run for school trustee while remaining a school Board employee. He argued that the position of school trustee provided a unique position from which to express views on educational policy. The Court found that this was a positive rights claim. The statutory platform of school trusteeship had previously been extended to the claimant and was withdrawn by amending legislation, but that did not transform the claim into a negative right. Governments would otherwise be unable to change or repeal any statutory platform for expression without justification under section 1.[15]

---

[13] Notice of Motion, dated May 6, 2014, para. 67.
[14] *Baier*, note 10, at para. 35.
[15] *Ibid.* at paras. 35-37.

27. The Supreme Court of Canada has held that positive rights claims fall within the scope of section 2(b) only if the claimant meets all of the following criteria:

(a) The claim is grounded in fundamental freedom of expression rights rather than in access to a particular statutory regime;

(b) The claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with section 2(b) freedom of expression or has the purpose of infringing freedom of expression under section 2(b); and

(c) The government is responsible for the inability to exercise the fundamental freedom.[16]

28. The applicants' challenge to section 55.2 of the *NEB Act* does not meet any of the requirements in *Baier*. The Board should dismiss the applicants' claim that section 55.2 of the *NEB Act* infringes section 2(b) of the *Charter*.

(a) The claim is grounded in access to a particular statutory scheme

29. The applicants claim a right to participate in a hearing and make submissions on issues of concern to them, without having to establish that they meet any test for standing. This is a claim for unfettered access to a particular statutory process, not a claim grounded in freedom of expression.

30. The applicants claim that this application is about exercising a fundamental freedom, because participating in the Board's process is the only way to express themselves in "the forum that matters."[17] The Supreme Court of Canada rejected that argument in *Baier*. Although the court acknowledged that a school trustee is in a unique position to express views on educational policy, claiming that an opportunity for expression is unique is not the same as claiming a fundamental freedom.[18]

31. Even though the former legislation made it possible for the applicants to participate in the Board's process, Parliament did not transform this possibility into a negative right by

---

[16] *Ibid.* at para. 30.
[17] Notice of Motion, at para. 67.
[18] *Baier*, note 10, at para. 44.

amending the legislation to remove the possibility of participation. As well, Parliament's amendments do not render the current provision unconstitutional. In *Baier*, the school trustee position had previously been open to school Board employees, but the Alberta legislature amended the statute to prevent school Board employees from running for election as school trustees. The Supreme Court of Canada concluded that this change did not transform the claim into a negative right. The same argument applies to the present case.

32. *Baier* follows a line of case law in the Supreme Court of Canada which confirms that section 2(b) does not require the government to provide access to a particular statutory platform for expression:

(i) *Haig* – the claimant was unable to vote in a federal referendum on constitutional reform because of residency requirements. Section 2(b) was not infringed because the referendum itself, far from stifling expression, simply provided a particular forum for such expression. The government was under no constitutional obligation to extend this statutorily-created platform to anyone, let alone to everyone.[19]

(ii) *Native Women's Association of Canada* – the claimant group alleged that the government was required to fund its participation in constitutional reform discussions. The decision to provide funding to other Aboriginal groups to meet with the government and express their view on potential constitutional amendments encouraged expression. It did not suppress expression. The Court held that it would be "rare indeed" that the provision of a platform or funding to one or several organizations to promote expression will have the effect of suppressing another's freedom of speech.[20]

33. The British Columbia Supreme Court reflected the *Baier* analysis in *Office and Professional Employees' International Union*.[21] The union sought to challenge amendments to the *Hydro Act* which prevented the union from continuing with its application to the Utilities Commission. The Court held that section 2(b) of the *Charter* did not include a positive obligation on the government to provide the claimants with a specific forum for expression.[22]

---

[19] *Haig*, note 10, at 1039-1040.
[20] *NWAC*, note 10, at 651.
[21] *Office and Professional Employees' Union, Local 378 v. British Columbia (Hydro and Power Authority)*, 2004 BCSC 422.
[22] *Ibid.* at paras. 56-62. See also: *Canadian Arab Federation v. Canada (Minister of Citizenship and Immigration)*, 2013 FC1283 at paras. 82-94.

34. The *Dunmore* case is distinguishable from the present case. In *Dunmore*, the claimants did not seek access to the *Labour Relations Act*, but instead sought a constitutional freedom to organize a trade association.[23] The Supreme Court of Canada found a breach of section 2(b), because the right to organize was essentially impossible to exercise without a statutory protection for the right. By contrast, the applicants in the present case do not require access to the Board hearing process to exercise their freedom of expression. They can continue to use their freedom of expression rights outside of the Board hearing process.[24]

(b) Exclusion from the statutory scheme does not have the purpose or effect of substantial interference with s. 2(b) rights

35. Neither the purpose nor the effect of section 55.2 of the *NEB Act* interferes with section 2(b) rights.[25]

36. Section 55.2 has no improper purpose. The purpose of rules of standing is to promote fairness and efficiency in the hearing process by focusing on what is relevant both to the Board's mandate under Part III of the Act and to the application before the Board.[26] The applicants' assertions to the contrary should be given no weight. First, they are speculative. Second, they are based largely on media commentary, which is not evidence. Third, to the extent that they are included in the applicants' affidavit evidence, they are in the nature of argument and are therefore improper.[27]

37. Section 55.2 does not infringe the applicants' section 2(b) rights. The applicants do not claim that section 55.2 prevents them from expressing themselves on the environmental issues that concern them. Indeed, the applicants have engaged in and continue to engage in various forms of expression with regard to these very issues.[28] Instead, the applicants argue that the Board process provides a more meaningful opportunity to express their arguments. The applicants' claim amounts to a complaint that their most desired forum for delivering

---

[23] *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016, at para. 24 ["*Dunmore*"]
[24] Andrews Affidavit, Exhibits "A"- "I"
[25] See *Baier*, note 10, at paras. 53-54
[26] Ruling on Participation, April 2, 2014, p. 4; see also: Macauley & Sprague, Chap. 12.2, at 12-9 to 12-11.
[27] See e.g. Affidavit of Tzeporah Berman, made May 5, 2014, at paras. 7-10.
[28] Andrews Affidavit, Exhibits "A"-"I"

their message is not available to them. Diminished effectiveness in a claimant's ability to convey a message does not amount to an infringement of section 2(b) rights.[29]

38. The government is not constitutionally required by section 2(b) to create a public forum to encourage discussion about pipeline projects. As well, a section 2(b) infringement does not occur when a forum is available for some, but not all, interested persons.[30]

39. Even if the applicants are alleging that section 55.2 of the *NEB Act* has had a chilling effect on the exercise of their freedom of expression, they have not presented any direct evidence to support their allegation[31] (Lynn Quarmby suggests that the List of Issues put forward by the Board dissuaded her).

40. Finally, the applicants' attempt to establish that they were dissuaded by comparing participation rates in this hearing with the Northern Gateway Project is untenable. Building a new pipeline is very different from expanding an existing one, as is the case here. In any event, relative rates of participation in these two Board processes do not in any way establish a chilling effect on freedom of expression more generally, in terms of the applicants' ability to express their views publicly about the project.

(c) The government is not responsible for an inability to exercise the fundamental freedom

41. The third *Baier* factor does not apply and the Board does not need to consider it. The applicants have not established a substantial interference with their freedom of expression rights, and do not claim to be unable to express themselves on the issues of interest to them The government has not interfered with the applicants' right to express their opinions on Trans Mountain's application, pipeline issues, or the oil sands development.

---

[29] *Longley v. Canada (Attorney General)*, 2007 ONCA 852, at para. 109.
[30] *Haig*, note 10, at 1039-1040; *NWAC*, note 10, at 650, 654, 657.
[31] *R. v. Khawaja*, 2012 SCC 69, [2012] 3 SCR 555, at paras. 79-80.

2. The *Irwin Toy/City of Montreal* test does not apply

42. The applicants rely on the *Irwin Toy*[32] framework for considering section 2(b) of the *Charter*, which was adopted in *Montreal (City) v. 2952-1366 Quebec Inc.*[33] ["*City of Montreal*"]. The *Irwin Toy* framework involves three inquiries: (1) does the activity in question have expressive content, thereby bringing it within the reach of s. 2 (b)? (2) is there something in the method or location of that expression that would remove that protection? and (3) if the activity is protected, does the state action infringe that protection, either in purpose or effect? That analysis does not apply here, however, because *Irwin Toy* was a negative rights case, not a positive rights case.

43. The *Irwin Toy* framework was relied on in several cases cited by the applicants where the central issue was whether the claimants could exercise their freedom of expression rights on government-owned or controlled property.[34] Those cases are inapplicable here, since this is a case about access to statutorily created process, not access to government owned or controlled property.

44. Further, the applicants rely on several distinguishable cases in support of their argument that the Supreme Court of Canada has rejected the *Baier* approach for determining positive rights cases. For instance, the applicants submit that the Supreme Court of Canada has rejected the *Baier* approach in determining positive rights cases. However, the Supreme Court of Canada specifically acknowledged and confirmed the *Baier* approach in the *GVTA* decision:

> As well, although s. 2(b) protects everyone from undue government interference with expression, it generally does not go so far as to place the government under an obligation to facilitate expression by providing individuals with a particular means of expression (*Haig v. Canada*, [1993] 2 S.C.R. 995). Thus, where the government

---

[32] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.
[33] *Montreal (City) v. 2952-1366 Quebec Inc.*, 2005 SCC 62, [2005] 3 SCR 141.
[34] *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139 at 156-158, 236-237; *City of Montreal*, at paras. 61, 72-74, 81; *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 1 SCR 295 at paras. 32, 35 ["*GVTA*"]; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 SCR 19, at paras. 45-46, 53-54.

> creates such a means, it is generally entitled to determine which speakers are allowed to participate. A speaker who is excluded from such means does not have a s. 2(b) right to participate unless she or he meets the criteria set out in *Baier*.[35]

45. In *GVTA* the Court did not ultimately apply the *Baier* approach because, unlike in *Baier*, the respondents in that case were not asking for the creation of a particular *means* or platform for expression. What they sought, instead, was access to an already existing and generally accessible means of expression (advertising space on the sides of buses) which had been denied them solely because of the political *content* of their expression. GVTA was therefore not a positive rights case, and for this reason *Baier* did not apply.

46. This is not a case, like *GVTA*, where access to an otherwise accessible platform is denied on the basis of *content*. Section 55.2 is itself entirely neutral as to the content of representations made to the Board. Instead, the applicants take issue with section 55.2 of the *NEB Act* on the basis that it should provide a particular *mechanism* for expression, in the context of a particular statutory process, to a broader category of people than it does (namely those who are not "directly affected" or who do not relevant information or expertise). This is a positive rights case, like *Haig* and *NWAC*, and *Baier* therefore applies.

47. The applicants also rely on *Criminal Lawyers' Association*[36] for the proposition that the Supreme Court of Canada has rejected the approach it took in *Baier*. [37] *Criminal Lawyers' Association* was not about access to a particular statutory forum for expression, however, but about the ability to express oneself generally. The Court recognized a "narrow right" only "in limited circumstances" to disclosure of government documents under freedom of information legislation where the disclosure of documents is required to allow a claimant to get sufficient information about a matter of public importance to speak meaningfully on the subject.[38] It was in that narrow context that the *Baier* framework did not apply. *Criminal Lawyers' Association* is not, therefore, a "platform" case overruling

---

[35] *GVTA*, note 34, at para. 29.
[36] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 SCR 815 ["*Criminal Lawyers' Association*"]
[37] Notice of Motion, at para. 43.
[38] *Criminal Lawyers' Association*, note 36, at para. 5.

Baier, but a *sui generis* case about access to government information, which is not in issue here.

48. This is not a case about denial of access to a particular physical location for expression, nor is it a case about access to government information. The applicants' claim, rather, is about access to a particular statutory process in which they seek the ability to make submissions on issues they deem to be relevant. The analysis in *Baier* applies.

3. Even if the *Irwin Toy/City of Montreal* test did apply, the applicants have not made out a breach of section 2(b)

49. Even if the *Irwin Toy/City of Montreal* section 2(b) test did apply, the applicants still have not proved that section 55.2 of the *NEB Act* infringes their freedom of expression. The Board is not intended for expression.[39] The Board is an administrative tribunal charged with making decisions about the construction, operation and regulation of pipelines and international power lines. Further the Board is a court of record.[40] The purpose of the Board hearing is to gather in evidence and argument allowing it to fulfil that mandate.[41] Unfettered participation rights in Board hearings would be incompatible with the Board's jurisdiction to control its own process and would hinder the Board in fulfilling its mandate.

50. Section 2(b) does not include a right to unfettered participation in judicial proceedings. As the Prince Edward Island Supreme Court held in *Kelly*: "I feel certain the Supreme Court of Canada would give short shrift to persons without standing who came to the Supreme Court of Canada courtroom and insisted on voicing their opinions about the case being heard."[42] The same reasoning applies to the administrative proceeding here at issue.

---

[39] Notice of Motion, para. 49.
[40] Section 11(1), *NEB Act*.
[41] Macaulay & Sprague, at 12.2(a), 12-9.
[42] *Kelly v. Canada (Attorney General)*, 2007 PESCTD 15 at paras. 19-20, 26.

4. Conclusion on Section 2(b)

51. Section 2(b) of the *Charter* is not engaged on the facts of this case. Section 55.2 of the *NEB Act* does not infringe section 2(b) of the *Charter*. The applicants improperly seek to constitutionalize access to Board hearings. There is no basis for such an entitlement. As the Supreme Court of Canada held in *Haig*: "the freedom of expression contained in section 2(b) prohibits gags, but does not compel the distribution of megaphones."[43] The Board should dismiss the applicants' request for an order declaring section 55.2 of the *NEB Act* to be unconstitutional.

C. ALTERNATIVELY, IF SECTION 2(B) IS INFRINGED, THAT INFRINGEMENT IS JUSTIFIED WITHIN THE MEANING OF SECTION 1 OF THE *CHARTER*

52. For a law that infringes a *Charter*-protected right to be a reasonable limit under section 1, the law in question must meet the following criteria: (1) the legislative objective is pressing and substantial; (2) there is a rational connection between the limit and the objective; (3) the limit "minimally impairs" the right or freedom in question; and (4) the deleterious effects of the limit are proportional to the objective sought to be achieved.[44]

1. Legislative Objective

53. The *Jobs, Growth and Long Term Prosperity Act*,[45] in force July 6, 2012, effected a number of amendments to the *NEB Act*, including section 55.2. In addition to establishing a statutory test for standing, Parliament imposed fixed timelines on the Board, within which the Board was now required to complete its review process.[46] Overall, the purpose of these amendments was to increase fairness and efficiency in the Board's hearing process. Section

---

[43] *Haig*, note 10, at 1035.
[44] *GVTA*, note 34; *Canada (Attorney General) v. JTI-Macdonald Corp.*.[2007] 2 SCR 610 ["*JTI-Macdonald*"].
[45] *Jobs, Growth and Long Term Prosperity Act*, SC 2012, c. 19, Division 2, National Energy Board Act, pp. 98-141.
[46] *NEB Act*, ss. 52(4) and 52(7)-(9), 58(4), (5) and (10); *House of Commons Debates*, 117 (May 4, 2012) at 7599 (Hon. Bob Zimmer). See also *House of Commons Debates*, 121 (May 10, 2012) at 7869-7870 (Hon. Laurie Hawn).

55.2 in particular was designed to achieve efficiency and allow the Board to more effectively carry out its statutory mandate by focusing consultation on individuals directly affected by an application and on persons with relevant information or expertise who can provide submissions relevant to the Board's mandate.[47]

54. The applicants' allegation that one of the purposes of section 55.2 of the *NEB Act* is to limit or eliminate the speech of environmental groups and others who oppose pipeline projects is unsupported by the evidence. It is also inconsistent with the terms of section 55.2 of the *NEB Act* which, as explained below, sets out a test for standing that is broader and more generous even than that mandated by the rules of procedural fairness at common law.

2. Rational Connection

55. The applicants concede a rational connection between the decisions made by the Board and the aim of increasing the efficiency of proceedings before the Board.[48]

3. Minimal Impairment

56. The applicants have pointed to a number of other public hearing processes that have somewhat different procedures and standing rules from those of the Board.[49] However, these examples are taken out of context and without reference to the different statutory mandates and purposes being fulfilled by the different agencies and proceedings in question. In any event, the fact that there are other agencies with more liberal rules on participation does not mean that this is what is required for all administrative hearings, regardless of their subject matter, in order to be minimally impairing from a *Charter* perspective.

57. Section 55.2 imposes a standard that is more generous than that recognized by the rules of procedural fairness. The rules of fairness generally require that standing be granted to individuals who will be directly and necessarily affected by the decision to be made. In other words, standing is to be granted to those who are affected in a greater way than the

[47] House of Commons Debates, 115 (May 2, 2012) at 7472 (Hon. Joe Oliver).
[48] Notice of Motion, at para. 56.
[49] Notice of Motion, at paras. 60-63.

public at large. So long as standing is granted to those "directly affected", the duty of fairness under the common law will be met. [50]

58. Despite this, section 55.2 not only contemplates that standing be given to those directly affected, but grants the Board discretion to also grant standing to those who have "relevant information and expertise." Section 55.2 therefore represents a reasonably minimally impairing approach to balancing the important interests of fairness and efficiency being pursued, as against the value of public participation in the process and the opportunity for expression of a wide range of views.[51]

4. Salutary effect outweighs deleterious effect

59. The salutary effect of section 55.2 is promoting fairness and efficiency in the Board hearing process by focusing consultation on individuals directly affected by an application and persons who can assist the Board in its decision-making through their relevant information or expertise.

60. Conversely, any prejudicial impact is limited and remote. Individuals denied the right to participate by the terms of section 55.2 of the *NEB Act* are those not directly affected by the decision. Section 55.2 *NEB Act* also confers discretion with regard to those who have relevant information or expertise, but clearly excludes those who do not. This is in a broader context in which individuals remain entirely free to voice their opinions in other public *fora*. The "prejudice" thus largely amounts to the denial of a right to express to the Board views on issues which do not impact them directly, or on issues on which they are uninformed. Even if this were found to have an impact on prospective participants' freedom of expression, that impact would be outweighed by the requirements on an administrative tribunal to administer its processes efficiently in carrying out its statutory mandate.

---

[50] Macauley & Sprague, Chap. 9.7 and 12.3(c), 12-27, citing *Canadian Transit Co. v. Public Service Staff Relations Board (Canada)* (1989), 99 NR 330 (F.C.A.).
[51] *JTI-Macdonald*, note 44, at paras. 42-43

D. THE BOARD HAS AUTHORITY TO CONSIDER THE CONSTITUTIONALITY OF SECTION 55.2 OF THE *NEB ACT*

61. The Board has jurisdiction to consider the constitutionality of section 55.2 of the *NEB Act*. Under section 12 of the *NEB Act*, the Board has full jurisdiction to hear and determine all matters of law or of fact. No statutory provision precludes it from deciding *Charter* questions. Further, the application of section 55.2 of the *NEB Act* in the context of the proceedings here in issue is a question linked to matters properly before the Board, namely an application pursuant to section 52 of the *NEB Act* and the participatory rights of interested persons in that context.

62. The Supreme Court of Canada has made clear that administrative tribunals with the power to decide questions of law, and from which constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them.[52]

63. If the Board concludes that section 55.2 of the *NEB Act* is unconstitutional, it must treat section 55.2 as invalid for the purposes of the matter before the Board, but the Board cannot make a formal declaration of invalidity.[53]

64. For the reasons set out above, Canada maintains that section 55.2 of the *NEB Act* complies with the *Charter*.

IV. ORDER SOUGHT

65. Canada seeks an order dismissing the applicants' motion for a declaration that s. 55.2 of the *NEB Act* infringes section 2(b) of the *Charter* and is not saved by section 1 of the *Charter*.

---

[52] *R.v. Conway*, 2010 SCC 22, at para. 78; see also *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 SCR 322.
[53] *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 SCR 5 at para. 17.

66. If the Board decides to order further procedural steps before determining this Motion on its merits, Canada seeks an order providing for cross-examination on affidavits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Vancouver, in the Province of British Columbia, this 27th day of June, 2014.

William F. Pentney
Deputy Attorney General of Canada
Per: Michael P. Doherty, General Counsel
Liliane Bantourakis, Counsel
Department of Justice
900 - 840 Howe Street
Vancouver, BC V6Z 2S9

Tel: (604) 666-5978
Fax: (604) 666-2710

Solicitor for the Attorney General of Canada

TO: **The National Energy Board**

AND TO: **David J. Martin**
Martin & Associates
Barristers
863 Hamilton Street
Vancouver, BC V6B 2R7

Solicitor for the Applicants

AND TO: **Maureen Killoran, Thomas Gelbman and Jeremy Barretto**
Osler Haskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 - 1st Street S.W.
Calgary, Alberta T2P 5H1

Solicitor for Trans Mountain ULC

V. LIST OF AUTHORITIES

Caselaw

Allard v. British Columbia (Assessor of Area #10 - North Fraser Region), 2010 BCCA 437

Baier v. Alberta, 2007 SCC 31, [2007] SCR 673

British Columbia (Attorney General) v. Christie, 2007 SCC 21

Canada (Attorney General) v. JTI-Macdonald Corp [2007] 2 SCR 610

Canadian Arab Federation v. Canada (Minister of Citizenship and Immigration), 2013 FC 1283

Canadian Broadcasting Corp. v. Canada (Attorney General), 2011 SCC 2, [2011] 1 SCR 19

Committee for the Commonwealth of Canada v. Canada, [1991] 1 SCR 139

Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 SCR 5

Delisle v. Canada (Deputy Attorney General), [1999] 2 SCR 989

Dunmore v. Ontario (Attorney General), 2001 SCC 94, [2001] 3 SCR 1016

Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component, 2009 SCC 31, [2009] 1 SCR 295

Haig v. Canada, [1993] 2 SCR 995

Innisfil Township v. Vespra Township, [1981] 2 SCR 145

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927

Kelly v. Canada (Attorney General), 2007 PESCTD 15

Longley v. Canada (Attorney General), 2007 ONCA 852

Montreal (City) v. 2952-1366 Quebec Inc., 2005 SCC 62, [2005] 3 SCR 141.

Native Women's Assn. of Canada v. Canada, [1994] 3 SCR 627

Office and Professional Employees' Union, Local 378 v. British Columbia (Hydro and Power Authority), 2004 BCSC 422

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23, [2010] 1 SCR 815

R.v. Conway, 2010 SCC 22

R. v. Khawaja, 2012 SCC 69, [2012] 3 SCR 555

Westcoast Energy Inc. v. Canada (National Energy Board), [1998] 1 SCR 322

Statutes and Legislation

Constitution Act, 1982, Part I – Canadian Charter of Rights and Freedoms

Jobs, Growth and Long Term Prosperity Act, SC 2012, c. 19

National Energy Board Act, R.S.C. 1985, c. N-7, ss. 12, 52, 55.2, 58(4), (5) and (10)

Other

House of Commons Debates, Vol. III (May 18, 1959) at 3767-3773 (Hon. Gordon Churchill)

House of Commons Debates, Vol. IV (May 22, 1959) at 3297, 3931 (Hon. Gordon Churchill)

House of Commons Debates, Vol. IV (May 27, 1959) at 4070 (Hon. Hazen Argue)

Senate of Canada, Proceedings of the Standing Committee on Natural Resources, No. 1, Evidence (June 23, 1959)

House of Commons Debates, 115 (May 2, 2012) at 7472 (Hon. Joe Oliver)

House of Commons Debates, 116 (May 3, 2012) at 7499 (Hon. Peter Kent)

House of Commons Debates, 117 (May 4, 2012) at 7599 (Hon. Bob Zimmer)

House of Commons Debates, 115 (May 2, 2012) at 7472 (Hon. Joe Oliver).

House of Commons Debates, 121 (May 10, 2012) at 7869-7870 (Hon. Laurie Hawn).

Senate of Canada, Standing Senate Committee on Energy, the Environment and Natural Resources, Issue No. 23 (May 17, 2012) at 23:6-23:7, 23:14-23:15 (Brenda Kenny, President and CEO, Canadian Pipeline Association)

Senate of Canada, Standing Senate Committee on Energy, the Environment and Natural Resources, Issue No. 23 (May 17, 2012) at 23:14 (Hon. Senator Lang)

Robert W. Macaulay & James L.J. Sprague, *Practice and Procedure Before Administrative Tribunals,* looseleaf (Toronto, Thomson Canada, 2004) Chaps. 9.7, 12.2 and 12.3(c), 12-27, citing *Canadian Transit Co. v. Public Service Staff Relations Board (Canada)* (1989), 99 NR 330 (F.C.A.)