National Energy Board

Office national de l'énergie

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Mr. Scott A. Smith
Gowling WLG (Canada) LLP
550 Burrard Street, Suite 2300
Vancouver, BC V6C 2B5
Email scott.smith@gowlingwlg.com

Mr. Paul Seaman
Gowling WLG (Canada) LLP
550 Burrard Street, Suite 2300
Vancouver, BC V6C 2B5
Email paul.seaman@gowlingwlg.com

Ms. Dyna Tuytel
Ecojustice
800, 744 – 4th Avenue SW
Calgary, AB T2P 3T4
Email dtuytel@ecojustice.ca

Dear Mr. Smith, Mr. Seaman, and Ms. Tuytel:

Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)

National Energy Board (Board) reconsideration of aspects of its Recommendation Report (Report) as directed by Order in Council P.C. 2018-1177 (Reconsideration)
MH-052-2018

Ruling No. 22 – Applications for review from Living Oceans Society (Living Oceans) and Raincoast Conservation Foundation (Raincoast), and Tsleil-Waututh Nation (TWN)

A. BACKGROUND

Upon receipt of Order in Council P.C. 2018-1177 dated 20 September 2018 (the OIC), the Board sought comments on a number of matters, including:

1) whether, "on a principled basis," Project-related marine shipping should be included in the "designated project" to be assessed under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012);
2) the draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012, and the draft List of Issues to be considered in the Reconsideration hearing; and
3) the design of the hearing process to be used for the Reconsideration.

The Board received numerous comments on these general matters, including comments from TWN and Living Oceans/Raincoast.

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In its 5 October 2018 letter, the Board sought additional, focused comments from the Parties on the following limited issue:

> Assuming Project-related marine shipping is included in the "designated project" to be assessed under the CEAA 2012, should the designated project be defined as including:
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> a) Project-related marine shipping between the Westridge Marine Terminal (WMT) and the territorial sea limit; *or*
>
> b) Project-related marine shipping between the Westridge Marine Terminal and the outer boundary of Canada's economic exclusion zone (EEZ)?

Many Parties provided comment on this spatial limit issue, including TWN and Living Oceans/ Raincoast.

On 12 October 2018, the Board issued various decisions regarding, amongst other things, the inclusion of Project-related marine shipping between the WMT and the 12-nautical-mile territorial sea limit in the "designated project" to be assessed under the CEAA 2012, the confirmed List of Issues, and design of the hearing process. On 29 October 2018, the Board issued reasons for its decision regarding the spatial limit for its assessment of Project-related marine shipping (Spatial Limit Decision),[1] as well as reasons for its conclusions on the List of Issues and the process to be used for the Reconsideration hearing (Process Design Decision).[2]

On 16 November 2018, the Board received a review application from TWN, in which it requests that the Board revisit the conclusions made as part of, or flowing from, Hearing Order MH-052-2018, including that the Board:

a) determine that Project-related marine shipping in the EEZ forms part of the "designated project" to be assessed under the CEAA 2012 in this Reconsideration hearing;
b) determine that a *de novo* hearing is required in view of the newly-reconstituted Panel Members involved in this Reconsideration hearing not hearing the original evidence and submissions of the Parties (the **De Novo Hearing Review – addressed in Part E of this ruling**); and
c) determine that the need for and the socio-economic effects of the Project must be included in the List of Issues (the **Need for and Socio-Economic Effects Review – addressed in Part F of this ruling**).

On 16 November 2018, Living Oceans/Raincoast jointly filed their own review application, requesting that the Board:

a) review its decision to limit the scope of the Reconsideration to Project-related marine shipping between the WMT and the 12-nautical-mile territorial sea limit; and
b) issue a new decision that includes Project-related marine shipping between the WMT and the outer boundary of Canada's EEZ as part of the "designated project" under the CEAA 2012.

The relief sought in Part a) of TWN's request is essentially the same as Living Oceans/ Raincoast's request. Accordingly, these requests will collectively be referred to as the **Spatial Limits Review (addressed in Part D of this ruling)**.

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[1] Board, Spatial Limit Decision (29 October 2018) (A6J4X5).
[2] Board, Process Design Decision (29 October 2018) (A6J4X7).

On 21 November 2018, the Board established a comment period for all Parties with respect to the review applications. With consideration to the expedited nature of the Reconsideration, the Board decided to receive submissions on both the threshold question and the merits at the same time.

TWN filed supplemental information on the threshold question and merits on 27 November 2018. Living Oceans/Raincoast did not file supplemental information. A number of intervenors filed comments in support of the review applications. The Government of Alberta (Alberta) and Trans Mountain provided submissions opposing the review applications. On 6 December 2018, TWN, Living Oceans, and Raincoast provided reply comments.

B. GENERAL PRINCIPLES ON AN APPLICATION FOR REVIEW

Subsection 21(1) of the *National Energy Board Act* (NEB Act) provides that the Board may review, vary, or rescind any decision made by it. Part III of the *National Energy Board Rules of Practice and Procedure, 1995* (Rules) describes the procedures and grounds for a review. There is no automatic right of review of a Board decision. The Board's power to review its decisions is discretionary, and must be exercised sparingly and with caution.[3]

The Board considers applications for review through a two-step process. In the first step, also known as Phase I, the Board considers the threshold question of whether the applicant has raised a doubt as to the correctness of the Board's decision. The grounds that the Board will consider in deciding whether the applicant has raised a doubt as to the correctness of the decision include, but are not limited to, any error of law or jurisdiction, changed circumstances or new facts that have arisen since the close of the original proceeding, or facts that were not placed in evidence in the original proceeding and that were then discoverable by reasonable diligence.[4] The Board agrees with the submissions made by TWN in reply that these grounds are disjunctive.

If the Board, in its discretion, finds that the threshold for Phase I is met, then the Board will proceed to the second step (or Phase II) to review the decision on the merits.

C. DISPOSITION

The Board has considered the submissions filed in relation to the review applications and has decided the following:

- The Spatial Limits Review is denied on the merits.
- The De Novo Hearing Review is denied on the threshold question. In the event the Board erred in determining the threshold question, the merits of the review have been considered. The De Novo Hearing Review is also denied on the merits.
- The Need for and Socio-Economic Effects Review is denied on the threshold question.

Accordingly, TWN and Living Oceans/Raincoast's applications for review are dismissed.

The Board's full reasons are below. The Board has carefully considered all submissions filed in relation to these review applications, but has focused its reasons on those portions of the submissions which the Board has found to be most relevant to whether the applicants have raised

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[3] Board Filing Manual at 5O-2; Board Ruling No. 3, NOVA Gas Transmission Ltd. Application for the Sundre Crossover Project, Hearing Order GH-002-2017 – Applications to Review Ruling No. 2, Amending Order AO-001-GH-002-2017 (27 October 2017) at 3 (A87308).

[4] Rules, para 44(2)(b).

a doubt as to the correctness of the decisions, or their merits, as appropriate. The Board's reasons must be read as a whole to ensure that individual elements are not taken out of context.

D. SPATIAL LIMIT REVIEW

1. Executive summary of the Spatial Limit Review

The Board considered the new facts and submissions raised in the reviews regarding statutory interpretation, the Federal Court of Appeal's decision in *Tsleil-Waututh Nation*,[5] the Governor in Council's (GIC) direction in the OIC, the Canadian Environmental Assessment Agency's (CEA Agency) Guide to Preparing a Description of a Designated Project under the CEAA 2012[6] (CEA Agency Guidance), and environmental assessment (EA) considerations. The Board examined new evidence regarding Trans Mountain's proposal for voluntary route adjustments in relation to a special Deviation Point within the EEZ. The Board finds that this information does not materially change its original findings regarding the lack of certain or established routes within the EEZ and the extent of Trans Mountain's ability to direct and influence shipping in the EEZ.

Many of the arguments raised in the reviews are similar or identical to those from the comment process for the original Spatial Limit Decision. Such comments essentially invite the Board to reweigh arguments it has already considered in the course of its initial reasons on an issue that the Court has said is not one of pure statutory interpretation, but rather a mixed question of fact and law heavily suffused by evidence.

Many Parties disagreed with the Board's findings regarding EA considerations, but failed to provide evidence or facts to support their views. Parties did not provide the Board with detailed evidence regarding the specific locations of routes within the EEZ. Parties did not adequately explain how an EA could be carried out in a meaningful way in the EEZ where the route of the tankers is uncertain. Lastly, none of the Parties were able to provide an example of an EA under the CEAA 2012 that considered project-related marine shipping outside of the territorial sea where the primary physical activities for a project are onshore.

The Board's original decision to limit its assessment of Project-related marine shipping to the territorial sea was not arbitrary; it was made after weighing numerous factors. Faced with the possibility of delineating its assessment of Project-related marine shipping to the extent of the territorial sea, the EEZ, or indeed a foreign port, the Board conducted a principled analysis and chose a middle ground informed by the facts and the law heavily suffused by evidence. The new facts and submissions do not warrant overturning the Board's Spatial Limit Decision. The Board has decided to confirm the Spatial Limit Decision and deny Living Oceans/Raincoast's and TWN's requests to include Project-related marine shipping in the EEZ as part of the "designated project" to be assessed under the CEAA 2012.

2. Phase I – Have the applicants raised a doubt as to the correctness of the Spatial Limit Decision?

The issue of whether Project-related marine shipping should be included in the "designated project" to be assessed under the CEAA 2012 turns on whether Project-related marine shipping is a "physical activity that is incidental" to the pipeline component of the Project, as that phrase

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5 *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at para 391 [*Tsleil-Waututh Nation*].

6 (Updated March 2015), online: <https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/guide-preparing-description-designated-project-under-canadian-environmental-assessment-act-2012.html>.

is used in section 2 of the CEAA 2012.[7] In *Tsleil-Waututh Nation*, the Court stated that "[t]his is not a pure issue of statutory interpretation. Rather, it is a mixed question of fact and law heavily suffused by evidence."[8] An important component of this analysis of fact and law is the appropriate spatial limit of Project-related marine shipping.

The Board's Spatial Limit Decision was based on careful consideration of the factual record before it, the statutory scheme, the CEA Agency Guidance, and submissions from various Parties with diverging views that the geographic extent should be at the border of the territorial sea, the border of the EEZ, or indeed extend to the final destination of the marine shipping associated with the Project.

TWN, Living Oceans/Raincoast, and various intervenors assert that the Spatial Limit Decision is both factually and legally incorrect. The Board notes that many of the legal arguments raised are similar or identical to those raised previously in the comment process for the original Spatial Limit Decision. The Board is of the view that a review application is not an opportunity to re-argue the same points previously raised. Other information raised was previously available and should have been brought forward during the earlier comment process. Further, although TWN, Living Oceans/Raincoast, and various intervenors submit that routes within the EEZ are known and can be identified with certainty, none of them provided new evidence to demonstrate the actual location of these routes. Disagreement with how the Board weighed the facts and the law is not sufficient to raise a doubt as to the correctness of the Spatial Limit Decision.

Despite the above, the Board does find that new facts have arisen, which may be relevant to its Spatial Limit Decision. TWN asserts that Trans Mountain's direct evidence filed on 31 October 2018 regarding a special Deviation Point within the EEZ "clearly suggests" that Trans Mountain" can force ships to follow a particular route in the EEZ."[9] While, arguably, this should have been more properly included in TWN's review application as opposed to its reply, the Board will still consider the submission. The Deviation Point may have relevance to routing within the EEZ and the extent of Trans Mountain's ability to direct and influence shipping in the EEZ. The Board is mindful of the fact that it should not be delving deeply into the merits or weighing evidence at this step. Given that Phase I is meant to be an initial threshold merely requiring a *prima facie* case, the Board finds that there is a doubt as to the correctness of the Spatial Limit Decision to warrant a review of the decision on its merits. In light of this, the Board finds there is no need to look further at the other new facts in the context of Phase I.

3. Phase II – Review of the merits of the Spatial Limit Decision

3.1 New facts

The Board will start with addressing the new facts raised by the Parties. TWN provides information on its cultural relationship with Southern resident killer whale (SRKW), economics of the Project, and an oil spill on Husky Energy's SeaRose floating production platform in Canada's EEZ off the coast of Newfoundland & Labrador. The Board is of the view that TWN has not adequately explained how these facts are directly relevant to the analysis of what is "incidental" and what constitutes a "designated project" under the CEAA 2012.

Living Oceans/Raincoast and TWN also rely on the fact that an updated recovery strategy for SRKW has been released identifying new critical habitat for SRKW, most of which falls within the EEZ. The Board is of the view that neither Living Oceans/Raincoast nor TWN have justified

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7 *Supra* note 5 at para 391.

8 *Ibid.*

9 TWN reply comments in connection with TWN's application for review of November 16, 2018 (6 December 2018) at 7 (A96516).

how the presence of critical habitat within the EEZ ought to drive the definition of "designated project" under the CEAA 2012. The Board is not persuaded that this new critical habitat for SRKW has much relevance to the five criteria set out in the CEA Agency Guidance or the Board's overall analysis of what is "incidental." However, the identification of critical habitat for SRKW is an additional consideration for the Board when it looks at the environmental effects of the designated project under paragraph 5(1)(b) of the CEAA 2012. The Board discusses environmental effects in the EEZ in greater detail below in Section 3.5 – EA Considerations.

Another new fact is Trans Mountain's direct evidence regarding routing in relation to a special Deviation Point within the EEZ. In particular, TWN submits:

> [I]t is clear that Trans Mountain, through its existing Tanker Acceptance Standards or through new ones, can force ships to follow a particular route in the EEZ. Indeed, pp. 50-51 of Trans Mountain's own direct evidence clearly suggests that Trans Mountain can do so. There, Trans Mountain itself sets out additional factors regarding how it can exercise "care and control" over Project-related marine shipping in an area "largely outside the 12 nm limit…"[10]

Trans Mountain's evidence in this regard is contained in a chapter of its direct evidence titled "Topic 3: Southern Resident Killer Whale" under the subheading "Measure 1: Special Routing Instructions." The evidence is provided in the context of Trans Mountain identifying three new plausible mitigation measures to address effects of Project-related marine shipping on SRKW. In its evidence, Trans Mountain states the following:

> As discussed above, Trans Mountain is aware that the continental shelf off SWVI (largely outside the 12 nm limit), including Swiftsure and La Pérouse Banks, has recently been proposed as Northern and Southern Resident Killer Whale critical habitat.
>
> In light of this, and incorporating guidance of the IMO on routing to mitigate effects of shipping in sensitive areas, **subject to receiving support from the responsible authority, TC, and confirmation from DFO** concerning potential environmental benefits, Trans Mountain would be prepared to take the following **voluntary steps** for passage of Project-related shipping:
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> i) Noting in the WMTROG a special Deviation Point in the vicinity of 48° 07' N[11] and 126° 07' W, **bearing about 242° x 50 nm** from the Buoy J. It is approximately 50 nm distance from the west coast of Vancouver Island and the Olympic Peninsula; this location is within Canada's EEZ.
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> ii) Project-related vessels **would be requested to include** the Deviation Point as part of the vessel's passage plan both for arrival and departure.
>
> iii) Project-related vessels (arriving and departing) **would be requested to proceed** at not more than 12 knots when transiting between the Deviation Point and Buoy J, **safe navigation permitting and, for arriving vessels, if feasible to do so given pilot and berthing arrangement**.
>
> iv) The current route advice for departing tankers would be adjusted to take effect from the vessels' final departure from the Deviation Point.
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> v) The area is within the coverage of MCTS Prince Rupert Traffic who would be the body charged with monitoring the above requirements.

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[10] *Ibid.* at 7.

[11] Trans Mountain made the correction from 46° 07' N to 48° 07' N in a 4 December 2018 letter (A6L4H0).

…

> Trans Mountain recognizes that numerous factors need to be considered in assessing possible marine shipping route alternatives and that **could require cross-border discussions between relevant agencies in Canada and the US**. However, **if this measure were to be supported by DFO and approved by TC**, Trans Mountain is prepared to consider requesting **voluntary route adjustments** to protect productive foraging grounds as described above and to apply those adjustments to existing tanker traffic, subject to **monitoring** by MCTS [Emphasis added].[12]

The WMTROG (WMT Regulations and Operations Guide) was filed as part of Trans Mountain's evidence. The WMTROG is stated to be based on "international and local requirements, procedures, best practices and guidance" found in various documents.[13] It explicitly states that Trans Mountain "provides the instructions in this guide for convenience only, and takes no responsibility for their accuracy or currency, as the official rules and procedures may be revised at any time,"[14] though Trans Mountain does reserve the right to deny berth access to any vessel in breach of the WMTROG.[15] Trans Mountain states that the WMTROG is a guide and includes advice on requirements of the WMT.[16]

The Board finds that TWN's characterization of Trans Mountain's ability to "force ships to follow a particular route in the EEZ" is overstated. Trans Mountain's direct evidence, viewed objectively, is that Trans Mountain is prepared to request that Project-related vessels include a set "Deviation Point" approximately 50 nautical miles into the EEZ as part of the vessel's passage plan. Trans Mountain is also apparently prepared to request that vessels proceed at no more than 12 knots, safe navigation permitting and if feasible given pilot and berthing arrangements. These route adjustments are voluntary. All of these proposals are subject to the support of Transport Canada and Fisheries and Oceans Canada (DFO) and are subject to monitoring by parties other than Trans Mountain. The assessment of possible marine shipping route alternatives could also require cross-border discussions between relevant agencies in Canada and the United States (US).

Trans Mountain's level of "control" associated with this special Deviation Point remains consistent with the Board's findings in its Spatial Limit Decision:

> Trans Mountain does have the ability to direct or influence the carrying out of some aspects of marine shipping, primarily through its Tanker Acceptance Standard … a couple of requirements also apply in the EEZ. However, this is far from the level of direction Trans Mountain exerts over the pipeline component of the Project (for example, the ability to direct the shutdown of the pipeline, at any point in time, in the event of a safety concern). Once a tanker leaves the WMT, Trans Mountain's ability to enforce any requirements is very minimal.[17]

Keeping in mind that this evidence regarding the Deviation Point has yet to be fully tested in this proceeding, it is not clear to the Board at this stage whether adding the Deviation Point to a passage plan means that vessels would be requested to travel in a straight line from Buoy J to the Deviation Point. In any event, this is merely a proposal subject to support from Transport

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[12] Trans Mountain direct evidence (31 October 2018) at 50-51 (A95280-2).
[13] WMTROG (10 October 2018) at s. 1.2.3; 10 (A6J6H7).
[14] *Ibid* at s. 1.2.5; at 11.
[15] *Ibid* at s. 3.1.3.1; at 13.
[16] Trans Mountain response to Board Reconsideration Information Request No. 1 (10 December 2018) at 81 (A96565-2).
[17] *Supra* note 1 at 14.

Canada, DFO, and, possibly, US agencies. The currently proposed Deviation Point only extends 50 nautical miles into the EEZ from Buoy J. Thus, even if vessels were somehow requested to follow a straight line from the Buoy J to the Deviation Point (which is not clear at this stage), that accounts for only a fraction of the distance into the EEZ, and still leaves a large area of open ocean within which ships could follow any number of routes, subject to the 270° west heading limit. The Board is of the view that the potential route adjustments related to the Deviation Point would not create a delineated route. Therefore, the new evidence regarding the Deviation Point does not warrant overturning the Board's Spatial Limit Decision.

3.2 *Tsleil-Waututh Nation* and the OIC

Living Oceans/Raincoast and TWN submit that the geographical extent of the marine shipping was not directly in issue before the Court in *Tsleil-Waututh Nation*, and they question the Board's reliance on the Court's conclusion that "[g]iven the Board's approach to the assessment and its findings, the Board's report was adequate for the purpose of informing the GIC about the effects of Project-related marine shipping on the Southern resident killer whales and their use by Indigenous groups."[18] This conclusion of the Court was also referenced in the GIC's explanatory note to the OIC.[19]

In its Spatial Limit Decision, the Board recognized that the OIC and *Tsleil-Waututh Nation* did not give express instruction regarding the geographic extent of the marine shipping to be included in the "designated project."[20] However, based on the record before them, both the GIC and the Court were aware of the 12-nautical-mile spatial limit used in the Board's original assessment of Project-related marine shipping. If either were of the view that there was a glaring deficiency, they had the opportunity to make their concerns known. In any event, this factor was just one among many in the factual and legal matrix faced by the Board in reaching its conclusion. Therefore, this argument does not warrant overturning the Board's Spatial Limit Decision.

3.3 Statutory interpretation

Turning to the principles of statutory interpretation, the Board must reiterate that many of the legal arguments raised in the review are similar or identical to those from the comment process for the original Spatial Limit Decision. However, in the interest of clarity and transparency, the Board is providing reasons for some of the arguments regarding statutory interpretation.

TWN, Living Oceans/Raincoast, and various intervenors take issue with the Board's interpretation of "designated project" and "incidental." For example, some Parties argue that shipping within the EEZ is still incidental to the Project since the causal connection is the same. In another example, Living Oceans/Raincoast state that the Board unduly emphasized one purpose of the CEAA 2012 (timeliness) over others. Such comments essentially invite the Board to reweigh arguments it has already considered in the course of its initial reasons on an issue that the Court has said is not one of pure statutory interpretation, but rather a mixed question of fact and law heavily suffused by evidence. The fact that some Parties have a different view than the Board, or a preference for more weight to have been put on some factors compared to others, does not mean that the Board erred in its original decision. A different outcome than that desired by some Parties is not necessarily an incorrect outcome under the law.

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[18] *Supra* note 5 at para 439.
[19] Canada Gazette Part I, Vol 152, No 39 (29 Sept 2018) at 3279.
[20] *Supra* note 1 at 10.

TWN submits that the "plain language of CEAA 2012 must indeed dominate" supporting the conclusion that "physical activities of any kind (whether incidental or not) that occur in the EEZ are part of the 'designated project' that must be assessed."[21] TWN further states there is "no ambiguity present which would allow the Board to resort to purposive, policy or practical considerations to disregard the plain language of CEAA 2012."[22] The Board is of the view that TWN's emphasis on "plain language" is inconsistent with the guiding principle of statutory interpretation, which requires that the words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, and the intention of Parliament."[23] TWN re-argues the same points it already made and ignores the different interpretations outlined in the Board's Spatial Limit Decision, which indicate a degree of ambiguity in the definition of "designated project" with respect to what is "incidental."[24]

The Board also considered arguments regarding the *Taseko* case,[25] which, at the time of these reasons, remains good law. While TWN did note some distinguishing features of that case, as noted by Alberta, that case remains the only judicial consideration of the phrase "incidental to." In particular, the Board remains of the view that the requirement of "proximity" discussed in that case remains relevant, and is indeed consistent with the intention of Parliament in the CEAA 2012 that some reasonable limits must exist within the EA process. It is, in the Board's view, entirely possible to maintain some limits and, at the same time, fulfill the letter and spirit of the CEAA 2012. In any event, the *Taseko* case was only one factor considered along with many other factors that the Board took into account in its original reasons.

Therefore, the arguments regarding statutory interpretation do not warrant overturning the Board's Spatial Limit Decision.

3.4 CEA Agency Guidance

Living Oceans/Raincoast and TWN only reference certain components of the CEA Agency Guidance criteria. The Board notes that no Party seriously disputed the Board's findings regarding the following criteria:

i) The nature of the proposed activities and whether they are subordinate or complementary to the designated project

ii) Whether the activity is within the care and control of the proponent

iv) Whether the activity is solely for the benefit of the proponent or is available for other proponents as well

The Board does not believe it is necessary to revisit its analysis of the five CEA Agency criteria in great detail, but will address submissions made by the Parties in relation to Criteria iii) and v).

iii) If the activity is to be undertaken by a third party, the nature of the relationship between the proponent and the third party and whether the proponent has the ability to "direct or influence" the carrying out of the activity

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[21] TWN application for review of Board Hearing Order MH-052-2018 (16 November 2018) at 11 (A95819). The same argument was also put forward in TWN's comments on the spatial limit of Project-related marine shipping (9 October 2018) at 2 (A94687).

[22] *Ibid* at 12.

[23] *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27 at para 21.

[24] *Supra* note 1 at 11. Specifically, an alternative to TWN's interpretation of "designated project" and "federal lands" was put forward by BC Nature and Nature Canada, Living Oceans, and Raincoast.

[25] *Canada (Canadian Environmental Assessment Agency) v Taseko Mines Limited*, 2018 BCSC 1034.

The degree to which Trans Mountain can "direct or influence" the carrying out of marine shipping is discussed earlier in these reasons. The new evidence regarding the Deviation Point does not change the Board's findings in relation to Criterion iii).

TWN sought to elevate this criterion by claiming that the Board is "again impermissibly looking to rewrite the relevant section of CEAA 2012, but this time to state that it 'includes any physical activity that is incidental to those physical activities *and that the proponent controls in the same manner as all other physical activities.*"[26] To be clear, Trans Mountain's limited ability to control marine shipping in the EEZ is merely one factor that the Board considered under the CEA Agency Guidance for interpretation of the term "incidental."

Accordingly, this criterion still slightly leans against being incidental outside of the territorial sea.

v) *The federal and/or provincial regulatory requirements for the activity*

There was much argument regarding the regulatory regime applicable to marine shipping in the EEZ, including the *Oceans Act* and the *United Nations Convention on the Law of the Sea*, as well as the extent of Parliamentary authority over the protection of the marine environment. While it is true that Parliament has some authority to regulate marine shipping in the EEZ, it is very clearly not as extensive as its authority to regulate within the territorial sea. None of the arguments raised change the Board's underlying conclusion that, beyond the territorial sea, Parliament's authority over shipping is materially reduced. Accordingly, this criterion still slightly leans against being incidental outside of the territorial sea.

Therefore, a reassessment of the CEA Agency Guidance does not warrant overturning the Board's Spatial Limit Decision.

3.5 EA considerations

The Board's analysis in its Spatial Limits Decision was heavily informed by the facts and the Board's technical expertise in relation to conducting an EA. Many Parties disagreed with the Board's findings regarding EA considerations, but failed to provide evidence or facts to support their views.

None of the submissions have changed the Board's view that knowing the project location or route is fundamental to conducting an EA.[27] The Board disagrees with TWN's characterization that the Spatial Limit Decision "turned on this issue,"[28] but the lack of a certain route by vessels transiting the EEZ remains crucial to the Board's ability to conduct an EA and was one of several important considerations in the Spatial Limit Decision.

TWN, Living Oceans/Raincoast, and various intervenors submit that routes within the EEZ are known and can be identified with certainty. Specifically, TWN points to Trans Mountain's Tanker Acceptance Standard, which requires departing vessels to steer a course no more northerly than due West (270°) upon exiting the Juan de Fuca Strait to take the shortest route out of the EEZ, and the fact that there are a limited number of destinations for tankers (namely California and Asia).

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[26] Supra note 21 at 9 (emphasis in original).
[27] *Supra* note 1 at 15.
[28] *Supra* note 21 at 4.

None of the Parties referred to any facts that call into question the Board's previous finding: "given that there are no defined shipping lanes in the EEZ – a vast area of ocean – no shipping 'route' for the Project can be identified with any degree of certainty."[29] Of particular significance is the fact that Parties have not provided the Board with detailed evidence regarding the specific locations of routes within the EEZ.

The 270° northerly limit raised by TWN was already considered by the Board in its Spatial Limits Decision.[30] There is a large area of open ocean south of the 270° northerly limit. Trans Mountain submits that there is an infinite number of routes that outbound ships could take in Canada's EEZ and remain in compliance with the Vessel Acceptance Standard, which only provides a northerly limit, to access markets in the US and the Pacific Rim.[31] Even accepting TWN's argument that "movements to Washington State do not require transit within or through the EEZ,"[32] the Board is of the view that there are still many possible routes within the EEZ to other destinations, including California and Asia. Further, weather, sea conditions, and hazards could all influence the most direct route out of the EEZ – in terms of time or distance.[33] The Board notes that the 270° northerly limit only applies to departing ships; the Board accepts that inbound ships can come from anywhere and, thus, from nearly any direction.[34]

In contrast to the EEZ, designated shipping lanes in Canada's territorial sea require vessels to navigate in accordance with conditions set out in *Canada Shipping Act, 2001* and its regulations, including maps and charts that outline the designated shipping routes and are subject to enforcement.[35] Parliament does have limited authority, in accordance with international rules and standards, to implement ship routing measures in the EEZ to protect sensitive areas, but no such routing measures have been prescribed in Canada's EEZ. The Board cannot assess something that does not currently exist.

Living Oceans/Raincoast submit that extending the definition of "designated project" into the EEZ "would be useful in protecting the environment and reducing harm in a more complete manner than under the current Spatial Limit Decision" because "the geographical scope of the environmental assessment and its outcomes would be more complete if it included the entire area."[36] Importantly, as was the case with the Spatial Limit Decision, the Board must emphasize that none of the Parties adequately explained how an EA could be carried out in a meaningful way in the EEZ where the route of the tankers is uncertain.[37]

TWN also provides examples of two offshore drilling projects within the EEZ, where the CEA Agency is assessing associated marine shipping activities in the EEZ as part of the designated project under the CEAA 2012. The Board is of the view that TWN has not adequately explained

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29 *Supra* note 1 at 15-16.

30 *Supra* note 1 at 14 & 16. The Board is aware that the wording of this requirement has slightly changed in the updated versions of the WMTROG (10 October 2018) at s.14.12.1, at 73 (A6J6H7) and Master's Declaration and Vessel Information Checklist which forms part of the Trans Mountain Vessel Acceptance Standard (formerly known as the Tanker Acceptance Standard) (11 November 2018) at s.2.7.11, at 12 (A6L2A5). However, the primary concept of the 270° northerly limit remains the same.

31 Trans Mountain's reply to intervenor motion and applications of 16 November 2018 (4 December 2018) at 10 (A96389).

32 *Supra* note 21 at 8.

33 See, for example, Trans Mountain's responses to information request from Pacheedaht First Nation (18 June 2014) response 1.07.2 at 76 (A3Y3X4).

34 *Supra* note 31 at 10.

35 *Supra* note 31 at 10.

36 Living Oceans/Raincoast reply on application for review of spatial limit decision (6 December 2018) at 2-3 (A96514).

37 *Supra* note 1 at 16.

how the assessment of marine support vessels for Mobile Offshore Drilling Units with known locations within the EEZ has any bearing on this case. In the Spatial Limit Decision, the Board already found that EAs of designated projects where the primary activities themselves have an identified location in the EEZ, such as offshore drilling, can be distinguished from the current situation.[38] TWN has merely provided an example of the former and the Board already considered this. The Board finds it telling that none of the Parties were able to provide an example of an EA under the CEAA 2012 that considered project-related marine shipping outside of the territorial sea where the primary physical activities for a project are onshore.

Living Oceans/Raincoast further submit that, in making the Spatial Limit Decision, the Board relied on unproven facts regarding the decline in probability and consequence of marine incidents with distance from the coast. As an expert tribunal, the Board has the discretion to determine the relevance and weight of the evidence before it. In this case, the Board was also mindful of the extensive record from both the OH-001-2014 Certificate hearing and this Reconsideration.[39] The Board notes that Living Oceans/Raincoast did not provide opposing evidence to contradict the contested statement. In any event, this was only one of many factors that the Board balanced in its overall reasons.

Lastly, the Board does not agree with the suggestion that environmental effects in the EEZ will be ignored if the EEZ is not included in the definition of "designated project." The Board reiterates that it is important to distinguish the *effects* from the designated project from the extent of the designated project itself. The environmental *effects* of the project can still be considered under paragraph 5(1)(b) of the CEAA 2012 even if they occur in the EEZ or elsewhere outside of Canada. The Government of Canada's evidence also discusses the Oceans Protection Plan, Whales Initiative, and other measures to preserve and restore marine ecosystems and habitats. Transport Canada is leading a Cumulative Effects of Marine Shipping initiative, which includes work on regional cumulative effects assessments.[40] It also remains open to the Minister of Environment and Climate Change to consider whether a regional study of marine shipping in the large area of the EEZ would be useful.[41] These tools and initiatives are not an "excuse to avoid the mandatory requirements of CEAA 2012 and SARA" as alleged by Living Oceans/ Raincoast.[42] Rather, they are a way to address overall regional cumulative environmental effects in the EEZ, whereas a project-specific assessment in this case "would produce speculative, as opposed to meaningful, information about project impacts and, accordingly, would not be useful as a planning and decision-making tool for the GIC."[43]

Therefore, the arguments regarding EA considerations do not warrant overturning the Board's Spatial Limit Decision.

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38 *Supra* note 1 at 18.

39 For example, past evidence related to this point include Transport Canada, A Review of Canada's Ship-source Oil Spill Preparedness and Response Regime – Setting the Course for the Future (15 November 2013) at 10-13 (A4L7F7); WSP Canada Inc., Risk Assessment for Marine Spills in Canadian Waters, Phase 1, Oil Spills South of the 60th Parallel (January 2014) at 72-88 (A4L7L4).

40 Federal Authorities direct evidence (31 October 2018) at 27-29 (A6J6L9). The spatial and temporal boundaries for the regional cumulative effects assessment of marine shipping activities (including for South Coast British Columbia) are not yet known as these will be developed collaboratively through ongoing engagement. Response to Board Information Request No. 1 to Federal Departments and Agencies (10 December 2018) IR 1.27 at 182 (A6L8X5).

41 CEAA 2012, ss 73-77.

42 *Supra* note 36 at 4.

43 *Supra* note 1 at 16.

E. DE NOVO HEARING REVIEW

1. Executive summary of the De Novo Hearing Review

TWN filed a review application alleging, with respect to the Reconsideration hearing, a legal error by the Board in "failing to conduct a *de novo* hearing because the Panel appointed to undertake this Reconsideration hearing did not hear the original evidence and submissions of the parties."[44]

The Board finds that "he who hears must decide" is ousted expressly or by necessary implication. The Board considered that the nature of the focused Reconsideration is different than the original hearing. The Board also took into consideration that the NEB Act expressly provides that any quorum of the Board is "the Board." The Board provides that Members have term limits, and that temporary members, as well as permanent members, may be assigned to hearings. The Chair of the Board has discretion in assigning Panels, and time limits are part of the scheme of the legislation. Section 53 contains different requirements than section 52. Section 53 is analogous to section 21 where review and variance applications are heard by any quorum of the Board.

In the relevant factual circumstances of this case, one of the original Panel Members' term had expired and the GIC did not re-appoint him as a Board Member. Had only two of the original three Panel Members on the section 52 application been assigned to the Reconsideration, quorum requirements under the NEB Act would have been violated. If a *de novo* hearing had been set out, as TWN requests, the Reconsideration would have been unlikely to have concluded within the time limit set by the GIC. A *de novo* hearing would also have been inconsistent with the direction of the Federal Court of Appeal and the requirements of the OIC.

2. Factual background

On 16 December 2013, Trans Mountain filed its application with the Board for a Certificate of Convenience and Necessity and other relief.

On 9 July 2014, the Chair of the Board, pursuant to subsection 6(2) of the NEB Act, assigned a Panel of three Board Members (David Hamilton – presiding, Phil Davies, and Alison Scott) to consider the Project application.[45] Two of the Board Members, David Hamilton and Alison Scott, were temporary Members appointed under terms prescribed by the GIC. [46]

A Hearing Order was issued, the scope of issues was identified in the List of Issues, and evidence and argument were received. On 16 May 2016, the Board issued its OH-001-2014 Report, including its recommendations, to the GIC under section 52 of the NEB Act and the CEAA 2012.

On 30 August 2018, the Federal Court of Appeal quashed the GIC's approval of the Project. One of the reasons for quashing the GIC's approval was that "the Board erred in unjustifiably excluding Project-related marine shipping from the Project's definition." [47] As a result of this conclusion, the Court directed that the GIC "must refer the Board's recommendations and its terms and conditions back to the Board or its successor for reconsideration."[48] The Court

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[44] *Supra* note 21 at 2.
[45] Record of Decision of the Chair, Assignment of Panel (9 July 2014).
[46] In David Hamilton's case, the OIC re-appointed him as a temporary Member of the Board, to hold an office for a term of three years, effective 1 July 2015. The GIC did not re-appoint David Hamilton after his term expired.
[47] *Supra* note 5 at para 468.
[48] *Ibid.* para. 769

directed that the Board reconsider on a principled basis whether Project-related shipping is incidental to the Project. If so, the Board was also to reconsider the application of section 79 of the *Species at Risk Act* (SARA) and the Board's EA, including the Board's significance recommendation under the CEAA 2012 and any other matter the GIC should consider appropriate.[49]

On 20 September 2018, through the OIC,[50] the GIC referred specific aspects of the Board's Report for the Project back to the Board for reconsideration. The GIC referred back to the Board for reconsideration "the recommendations and all terms and conditions set out in its 19 May 2016 report … **that are relevant to addressing the issues specified by the Federal Court of Appeal in paragraph 770 of *Tsleil-Waututh Nation***" [emphasis added]. The GIC further directed that the Board conduct the reconsideration taking into account environmental effects of Project-related marine shipping in view of the requirements of the CEAA 2012 and section 79 of the SARA. As directed by the OIC, the Board must complete its reconsideration by 22 February 2019 (within 155 calendar days after the Order was made).

On 24 September 2018, the Chair of the Board, pursuant to subsection 6(2) of the NEB Act, assigned a Panel of three Board Members (Lyne Mercier – presiding, Alison Scott, and Murray Lytle) to conduct the Reconsideration of the recommendation report on the Project pursuant to section 53 of the NEB Act.[51] The Panel was assigned by the Chair of the Board to "make all decisions with respect to the National Energy Board's work in response to the 20 September Order in Council … for reconsideration of the Report." At the time of the Panel assignment by the Chair of the Board, David Hamilton's appointment as a NEB Act section 4 temporary Member had expired. Prior to the end of his term, pursuant to subsection 16(6), the Chair of the Board had authorized David Hamilton to continue to inquire into, hear, and conclude certain specific proceedings that were already underway.[52]

On 26 September 2018, the Board requested comment on a number of matters, including on the design of the hearing process to be used for the Reconsideration.

TWN provided submissions that:

> [T]he case law and the Board's own rules recognize that a full *de novo* hearing is required as a consequence of the Board appointing a new panel for the Reconsideration Hearing. The age-old maxim of natural justice that 'he who decides must hear' applies to the Board. There is no statutory authority for the new panel members appointed by the Board to form opinions on evidence and submissions they did not hear, and agree with findings and conclusions they did not make. This clear breach of natural justice constitutes a reviewable error of law or jurisdiction.[53]

In making its argument on this point, TWN referred the Board to *Johnny v. Adams Lake Indian Band,*[54] amongst other authorities.

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49 *Ibid.* para 770
50 *Supra* note 19.
51 As referenced in Board letter (26 September 2018) at 1 (A94153).
52 Record of Decision of the Chair (20 June 2018).
53 TWN comments on the draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012, the draft List of Issues, and the design of the hearing process (3 October 2018) at 1-2 (A6I2W8).
54 2017 FCA 146 [*Johnny*].

After considering a number of comments received, the Board issued a Hearing Order MH-052-2018 and the List of Issues for the Reconsideration on 12 October 2018. On 29 October 2018, the Board issued the reasons for its decisions reached on 12 October 2018. On the issue of the *de novo* hearing that TWN has requested, the Board stated in part:

> The rule that "he who hears must decide" does not apply where legislation expressly, or by necessary implication, ousts its application. In this case, the legislative scheme ousts the application of this rule. The addition of the reconsideration provision in the NEB Act in 2012 indicates Parliament's intention to have an option that is distinct from a new project application. Subsection 53(2) provides specific authorization for the GIC to "direct the Board to conduct the reconsideration taking into account any factor specified in the order." It is clear from this wording that Parliament intended that the Board could be directed to reconsider specific issues only, in which case there is no requirement for a de novo hearing or for all previous evidence heard orally to be reheard.
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> A careful reading of the NEB Act suggests that the legislation does not require a reconsideration to be carried out by the same Panel, but it does not prevent it either. Section 53 does not refer to the Board Panel, but says only that any recommendation can be referred back to "the Board." Under the NEB Act, any quorum of the Board is "the Board" and can carry out the statutory obligations of the Board. The fact that an exception to quorum requirements exists for the original section 52 proceeding (see subsection 7(2.1)), but not for the section 53 reconsideration, also indicates that the reconsideration does not require the same Panel.
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> The rule that "he who hears must decide" can also be ousted by necessary implication in these circumstances. The legislation does not set a limit on the number of times that a report can be reconsidered. It would not be practical to expect the original Panel Members to remain available through an unlimited number of reconsiderations.[55]

TWN now seeks a review of that determination.

3. Brief summary of comments in the review application

TWN's comments[56] in support of its application included the following:

- While TWN agrees that the rule of "he who hears must decide" does not apply where legislation expressly or, by necessary implication, outs its application, neither exception applies here.
- The same Panel must hear the Reconsideration that heard all previous evidence in the previous hearing, otherwise a *de novo* hearing is required.
- The plain meaning of "reconsideration" ought to be used, and quorum requirements referenced in the Board's original decision as being different under section 52 then section 53 of the NEB Act "does not comport with a *Rizzo Shoes*[57] analysis.
- Practical considerations may only be considered when there is genuine ambiguity and, here, the plain meaning of "reconsideration" is obvious.

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[55] *Supra* note 2 at 16-17.

[56] See TWN's review application, *supra* note 21; TWN supplemental filing in support of TWN's application for review (27 November 2018) (A96156); and reply, *supra* note 9.

[57] *Supra* note 23.

- The structure of the NEB Act leads to the opposite conclusion that the Board found since the Board is described as a "court of record" under section 11 of the NEB Act and is subject to fairness requirements.
- Cases from the Supreme Court of Canada, including *Ocean Port Hotel,*[58] directed that "courts will not lightly assume that legislators intended to enact procedures that run contrary to" fundamental principles of natural justice, and that a sound interpretation will always depend on statutory language, the nature of an agency's task, and the type of decision it is required to make.
- To depart from the standard established by the Supreme Court requires "irresistible clearness."
- When Trans Mountain submits that the Board is master of its own process, such an argument is misplaced because "he who decides must hear" is a principle of natural justice and not evidence.
- Reviewing a written transcript of past oral evidence is insufficient, particularly when singing and ceremony is involved.

A number of other intervenors provided comments supporting TWN's review application. Many of the comments were consistent with those of TWN or, in many cases, were less detailed.

Trans Mountain and Alberta argue that there is no need for a *de novo* hearing. Their comments included the following points:

- Most of TWN's arguments and case references simply repeat previous arguments and merely disagree with the result. The threshold question takes more than repeating an argument to raise doubt about correctness.
- Alberta cites *Consolidated Bathurst*[59] for the application of *audi alteram partem rule* where the Supreme Court discussed that the essence of the rule is that parties have a fair opportunity of answering the case against them. Citations by Alberta include paragraph 26 where the Court stated: "it has long been recognized that the rules of natural justice do not have a fixed content, irrespective of the nature of the tribunal and of the institutional constraints it faces."
- For Indigenous intervenors, there was no impediment to providing whatever oral traditional evidence they wished during the Reconsideration.
- Alberta submits that the NEB Act ousts the application of the "he who decides must hear" rule. It points specifically to section 53 that provides for a referral back to "the Board" and that the Board includes "all Board Members." It references that the Federal Court of Appeal also directed that the Reconsideration could be heard "by the Board or its successor." Alberta also points to term limits, the unlimited number of reconsiderations that could occur, and the discretion of the Chair of the Board.
- Similar to Alberta's arguments, Trans Mountain points to section 53 of the NEB Act as indicating an intention by Parliament to have an option distinct from a new project application. Further reference is made to the quorum provisions and the intention of Parliament to avoid an inflexible requirement.

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[58] *Ocean Port Hotel v British Columbia (General Manager, Liquor Control and Licensing Branch),* 2001 SCC 52 at para. 21.

[59] *IWA, Local 2-69 v Consolidated Bathurst Packaging Ltd,* [1990] 1 SCR 282 [*Consolidated Bathurst*].

- Trans Mountain focuses on the limited and discrete issues properly referenced in the OIC and identified by the Federal Court of Appeal, and these issues will be determined by the Panel assigned to the Reconsideration. It further states that the Reconsideration Panel will have access to all past filings, but that the Reconsideration Panel is not "rehearing" the original evidence or matters already decided.
- Trans Mountain points to *CRTC* where the Supreme Court found that the overarching scheme in that case did not require the imposition of a strict rule.[60]
- Trans Mountain states that the GIC remains the final decision-maker.

4. Phase I – Has TWN raised a doubt as to the correctness of the Board's decision not to have a *de novo* hearing?

The Board considers that many of the legal arguments raised and cases cited are similar or identical to those raised previously in comments received about the design of the hearing process for the Reconsideration. There are no new facts that were not discoverable at the time of the Board's original decision not to have a *de novo* hearing. Any additional Court precedents referred to now could also have been discussed during that initial comment process.

With respect to its argument alleging an error of law, TWN agrees with the legal test the Board used: the Rule of "he who hears must decide" does not apply where legislation expressly, or by necessary implication, ousts its application. However, TWN disagrees with the Board's previous determination that "the legislative scheme ousts the application of this rule." In TWN's original submissions, it acknowledged the time limit set by the OIC. It also discusses the case law on the *de novo* issue from the Supreme Court of Canada and Federal Court of Appeal, including the *Johnny* case which TWN discusses further in its review application.

Essentially, TWN does not like the conclusion reached after the Board considered TWN's comments on hearing process at first instance, and TWN has re-argued the same points raised initially in somewhat more detail. TWN acknowledges that the Board relied in-part on an interpretation of subsection 53(2) that allows the GIC to direct a focused reconsideration hearing, but TWN argues the plain meaning of "reconsideration" ought to be used and that quorum requirements referenced in the Board's original decision as being different under section 52 then section 53 of the NEB Act "does not comport with a *Rizzo Shoes* analysis." Other than focusing on plain meaning, TWN does not say how the specific language of section 53, or the Board's conclusion about quorum requirements, was an error of law.

TWN does include some brief comment about section 11 of the NEB Act and argues that taking into account this section will lead to an opposite conclusion than the Board found. However, TWN provides very little analysis regarding the overall structure of the NEB Act, or to sections other than section 11 that may have relevance, including those previously discussed by the Board.

The Board is mindful that it should not delve deeply into the merits or weighing evidence at this step and that Phase I is meant to be an initial threshold merely requiring a *prima facie* case. However, in this case the Board is of the view that TWN has not met the initial threshold requirement of establishing a *prima facie* case that an error of law was made in the circumstances of the Reconsideration. As the Board has stated previously:

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[60] *Canadian Radio-Television & Telecommunications Commission v CTV Television Network Ltd. et al*, [1982] 1 SCR 530 [*CRTC*].

> [A] review request is not an opportunity to re-argue the same points previously raised, or to provide new argument that could have been raised in the Original Motion.[61]

Here, TWN has provided a similar argument to the one it previously provided prior to the Board's decision on the *de novo* hearing issue. TWN disagrees with the Board's past conclusions without raising a *prima facie* case that a legal error was made, although largely it merely re-argues points that the Board previously considered. While not delving fully into all the case law discussed by all Parties, in *Ocean Port Hotels,*[62] which TWN has cited, the Court stated: "interpretation will always depend on statutory language." The Board is of the view that TWN has provided minimal analysis about the overall statutory language of the NEB Act.

As a result of TWN failing to raise a doubt as to correctness, its review application is dismissed. However, should it be determined that the Board erred in its Phase 1 determination, the Board has gone on to consider the merits of TWN's arguments.

5. Phase II – Review of the merits of the Board's decision not to have a *de novo* hearing

5.1 Legal test

TWN, Trans Mountain, and Alberta agree that the Board used the correct legal test for determining if the rule that "he who hears must decide" applies in this case. At issue is whether the NEB Act expressly or, by necessary implication, ousts its application in the specifics of this Reconsideration.

As stated by the Supreme Court of Canada in *Consolidated Bathurst*:

> [I]t has long been recognized that the rules of natural justice do not have a fixed content, irrespective of the nature of the tribunal and of the institutional constraints it faces. This principle was reiterated by Dickson J. (as he then was) in *Kane v. University of British Columbia Board of Governors*, [1980] 1 S.C.R. 1105 at 1113, 18 B.C.L.R. 124, [1980] 3 W.W.R. 125, 110 D.L.R. (3d) 311, 31 N.R. 214: 2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which, as Harman L.J. said, [*Ridge v. Baldwin*, at p. 850] is only 'fair play in action'. In any particular case, the requirements of natural justice will depend on 'the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth', per Tucker L.J. in *Russell v. Duke of Norfolk*, at p. 118. **To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.**
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> [Emphasis added.] The main issue is whether, given the importance of the policy issue at stake in this case and the necessity of maintaining a high degree of quality and coherence in Board decisions, the rules of natural justice allow a full Board meeting to take place subject to the conditions outlined by the Court of Appeal and, if not, whether a procedure which allows the parties to be present, such as a full Board hearing, is the only acceptable alternative.

Consistent with its decision in *Consolidated Bathurst*, the Supreme Court in *Ocean Port Hotel* discussed that it will not lightly assume that legislators intended to depart from the "he who hears must decide" principle and that it will depend "**on all circumstances, and in particular on the**

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[61] Board Ruling No. 122 – Pro Information Pro Environment United People's Network – 30 December 2015 request for a review of Ruling No. 101, 1 March 2016 (A4Y4G2).

[62] *Supra* note 58.

language of the statue under which the agency acts, the nature of the task it performs and the type of decision it is required to make" [emphasis added].[63] As *Consolidated Bathurst* and other cases such as *Ocean Port Hotel* make clear, when deciding if this requirement of natural justice applies, it is necessary to look in detail at the nature of the Reconsideration, the language of the legislation, and the relevant factual circumstances. Those points will form the structure of the Board's analysis.

5.2 Nature of the Reconsideration

As detailed above in the factual background, the Federal Court of Appeal directed that the Board reconsider, on a principled basis, whether Project-related marine shipping is incidental to the Project. If so, the Board is to reconsider the application of section 79 of the SARA and the Board's EA, including the Board's significance recommendation, under the CEAA 2012, and any other matter the GIC should consider appropriate.

The GIC, in its OIC, limited the reconsideration of the recommendations and terms and conditions to all those "that are relevant to addressing the issues specified by the Federal Court of Appeal in paragraph 770." The Board, therefore, considers that the subject matter of the Reconsideration is distinct from a new project application and is focused on marine shipping that is incidental to the Project and on the application of the CEAA 2012 and section 79 of the SARA. While there can be changes to recommendations and certain conditions, it is a much more narrow mandate than the OH-001-2014 Certificate hearing. As a result, the List of Issues for the Reconsideration is also narrower than the original hearing. There have also been some changes in Parties, with a number of intervenors from the original hearing not participating in the Reconsideration, and new intervenors being added after submitting applications to participate.[64]

TWN appears to assume that the original hearing and the Reconsideration hearing are the same. They are not. Section 53 allows the GIC to direct the Board to take into consideration only "factor(s) specified in the order." Consistent with the direction of the Federal Court of Appeal, the GIC has directed the Board to conduct a focused reconsideration that is different than the scope of the original hearing. While the Board will have to reconsider its recommendation under the CEAA 2012 about significance, as well as its section 52 NEB Act recommendation about the present and future public convenience and necessity for the Project, the Board will only be considering changes related to the List of Issues in the Reconsideration. While Parties may refer to previous evidence as it is relevant to the List of Issues, the Board will not be reconsidering all of the benefits and burdens of the Project.

The Chair of the Board assigned a Panel for the original hearing and the Panel issued its Report. More than two years after the original Report was issued, the Federal Court of Appeal quashed the Project certificate. The Federal Court of Appeal directed that the Board's recommendations must be referred back to "the Board or its successor, for reconsideration." The resulting OIC then outlined specific factors for the reconsideration and imposed a time limit. The Chair of the Board then assigned a specific Panel consistent with both his authority under subsection 6(2) of the NEB Act and the direction of the Federal Court of Appeal.

Cases such as *Johnny*, which are relied on by TWN, are not helpful in understanding the specific nature of a reconsideration as set out under section 53 of the NEB Act. Here, the Board is dealing with a focused reconsideration about Project-related marine shipping and will submit a report and recommendations to the GIC. This can be contrasted to the facts in *Johnny* which involved a

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[63] *Supra* note 56.

[64] The OH-001-2014 Certificate hearing had approximately 400 intervenors. The Reconsideration hearing has approximately 120 intervenors. Approximately 73 per cent of current intervenors were intervenors in the original hearing.

decision to remove a Councillor made by an elected Community Panel. In *Johnny*, some of the Members of the Community Panel were not present for significant portions of the oral evidence where credibility was at issue and yet they still participated in the removal decision. *Johnny* is not analogous to this Reconsideration.

5.3 Language of the legislation

At issue is whether the language of the NEB Act either expressly or, by necessary implication, ousts the strict application of "he who hears must decide." The interpretation of the NEB Act must be based on the modern principle of interpretation, which requires the words in the statue to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the NEB Act and the intention of Parliament.[65]

Section 11 refers to the Board as a "Court of record," but it is one of a number of relevant sections, and it is not determinative. The Board disagrees that a plain reading of the word "reconsideration" is determinative as TWN does not appear to consider the language and provisions surrounding this term.

There are a number of sections of the NEB Act relevant to interpreting Parliament's intent. These include the following:

- Board means the National Energy Board established by section 3.
- Section 4 allows for temporary Members appointed on terms the GIC may prescribe.
- Subsection 6(2) provides the Chair of the Board with discretion as to the formulation of any Panel of the Board.
- Subsection 7(2) establishes quorum requirements. As the original decision of the Board stated,[66] any quorum of the Board is "the Board" and can carry out the statutory obligations of the Board.
- Subsection 7(2.1) provides an exemption to quorum requirements for the original section 52 proceeding, but not for a section 53 reconsideration.
- Subsection 6(2.2) authorizes the Chair of the Board to take measures appropriate to ensure a time limit is met under section 52. Such authorization does not apply for section 53.
- Subsection 11(4) requires that "all applications and proceedings before the Board are to be dealt with as expeditiously as the circumstances and considerations of fairness permit, but, in any case, within the time limit provided for under this Act, if there is one."
- Section 21 provides that the Board may review, vary and rescind any decision or order made by it.
- Section 52 sets out a broad list of factors that that the Board may have regard to in preparing a report under this section.
- As discussed previously, section 53 provides for the option for the GIC to direct the Board to conduct a focused reconsideration "taking into account any factor specified in the order."
- Section 53 also provides that the GIC may specify a time limit within which the Board must complete its reconsideration.

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[65] *Supra* note 23.
[66] *Supra* note 2 at 16.

- Subsection 53(9) allows the GIC to refer the Board's reconsideration report back to the Board for reconsideration again. There is no limit to the number of times a reconsideration can be directed.

Parliament expressly provides that, under the NEB Act, any quorum of the Board is "the Board" and can carry out the statutory obligations of the Board. Section 53 states that the GIC may refer the recommendation, or any terms and conditions, "back to the Board for reconsideration." Had Parliament intended that only the original Panel Members could participate in a reconsideration, different language could have been used. Subsection 6(2) provides the Chair of the Board with broad authority in assigning a Panel of the Board.

Section 53 is analogous to section 21 where "the Board" may review, vary, or rescind any decision or order made by it. There is no time limit for when a review application may be filed. In some instances, the original Panel Members will hear a review application and, in other instances, the reviewing Panel may include different Members as they are a quorum of the Board.

Parliament would have known that it has appointed temporary Members as well as permanent Members, all with term limits. Such Members will not necessarily be available or eligible for any number of reconsiderations under section 53. Parliament also intended that reconsiderations require a quorum of three Board Members. As Alberta states, since nothing in the NEB Act precludes the reconsideration of a recommendation where a Board Member's term has expired, by necessary implication, it follows that such a Member could be replaced.

Given the quorum requirements under section 53, it is not logical or practical that the GIC could specify a time limit under section 53, but yet if not all three original Members are available or eligible for assignment that a strict application of "he who hears must decide" would be required and a rehearing of the entire proceeding would follow. Focused hearings and time limits under section 53 would have no meaning if a *de novo* hearing were frequently required due to quorum requirements. It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences.[67]

For all of these reasons, a purposive approach to interpreting the NEB Act, expressly or by necessary implication, ousts the application of "he who hears must decide."

While the language of the legislation is clear and persuasive, it is also informative to consider the relevant factual circumstances.

5.4 Relevant factual circumstances

As the Court directed in *Consolidated Bathurst*, it is necessary to look at the relevant factual circumstances in this situation.

In this case, the OIC directing a focused reconsideration was issued almost 2.5 years after the original Board Report was issued. When the Chair of the Board assigned a Panel of the Board to the Reconsideration, one of the original Panel Members' (David Hamilton) term had expired. At that time, David Hamilton was only a Board Member for the limited purpose of concluding specific proceedings under subsection 16(6). David Hamilton was not re-appointed as a Board member by the GIC, and the Chair of the Board did not appoint him as a Member of the Reconsideration Panel. Had only two of the original Panel Members been assigned to hear the Reconsideration, quorum requirements under subsection 7(2) would not have been satisfied.

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[67] *Supra* note 23 at para 27; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis Canada, 2014) at §10.4.

Directing a *de novo* hearing would not have been consistent with the direction of the Federal Court of Appeal or the OIC. It is also highly unlikely that a *de novo* hearing could have been completed in anywhere close to the time limit specified in the OIC.

In the context of this Reconsideration hearing, the Board is of the view that Indigenous intervenors and other Parties have a fair opportunity to answer the case. Just as an opportunity for Indigenous intervenors to present oral traditional evidence was provided in the original hearing, it has also been provided in this Reconsideration hearing. Decisions about what evidence to provide in the Reconsideration were left to each Indigenous intervenor.[68] Also, much of the evidence in the original hearing was written, as is the case in this Reconsideration hearing.

Notwithstanding that the procedural fairness owed in the Reconsideration is significant, it remains unchanged that the GIC is the ultimate decision-maker and will make its decision based on the entire record before it.

The overall factual circumstances support that the Board's initial decision on this issue was correct and should not be varied.

F. NEED FOR AND SOCIO-ECONOMIC EFFECTS REVIEW

Phase I – Has TWN raised a doubt as to the correctness of the Board's decision to exclude the need for and socio-economic effects of the Project from the List of Issues?

TWN submits that the economics of the Project have changed materially since the Board's OH-001-2014 Report was issued, and that new evidence is required as a result of a "wide range of issues" in connection with the justification analysis under the CEAA 2012 and the Board's consideration of the public interest under the NEB Act.[69] TWN further submits that "[i]t goes without saying that the Project is not in the public interest and the environmental effects it will visit upon the environment cannot be justified in the circumstances because it is not needed and it is uneconomic."[70] Various other intervenors provided comments in support of TWN. For example, Georgia Strait Alliance states that "it would not be reasonable for the Board to come to a justification recommendation by trying to weigh on the same scale the current information regarding Project-related marine shipping along with three-year-old evidence regarding other aspects of the Project."[71] Trans Mountain and Alberta provided comments opposing TWN's Need for and Socio-Economic Effects Review.

The Board is not persuaded that the submissions raise a doubt as to the correctness of its Process Design Decision as it relates to the need for and socio-economic effects in the List of Issues. TWN's submissions in its review application are almost identical to its comments provided during the Board's initial comment process, which the Board already considered in its Process Design Decision. The Board must reiterate that a review application is not an opportunity to re-argue the same points previously raised. TWN fails to make an arguable case that there was any error of law or of jurisdiction. Although TWN filed evidence regarding Project need and economics, it does not adequately explain the basis for expanding the List of Issues in a manner that is inconsistent with the direction in the OIC and *Tsleil-Waututh Nation*.

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68 *Supra* note 2 at 17.
69 *Supra* note 21 at 18-19.
70 *Supra* note 9 at 15-16.
71 Georgia Strait Alliance comments on motion and applications (30 November 2018) at 4 (A96424).

TWN's review application does not change the Board's findings in relation to this issue:

> The Board is also not persuaded that it should re-examine issues that are outside of the GIC's direction in the OIC. In the Board's view, it is consistent with the purpose of section 53 of the NEB Act for the GIC to direct the Board to conduct a reconsideration focused on a specific issue or issues. To interpret section 53 as requiring new evidence or *de novo* findings on all issues, despite the direction in the OIC, would not be consistent with the statutory scheme of the NEB Act, including the requirement for expeditious proceedings under subsection 11(4). In this case, the OIC was specific about the issues the Board was to reconsider under the CEAA 2012 and the SARA. The Board was not directed to reconsider all issues from the OH-001-2014 Certificate hearing, nor does paragraph 770 of the Federal Court of Appeal's decision speak to all issues. The Board accepts that, as time passes, there will always be some changes in facts and short-term changes in markets. However, the need for the Project is not negated by short-term market fluctuations. As the Board stated in its OH-001-2014 Report, "[t]here is always a degree of uncertainty in projecting the long term utilization of transportation facilities since utilization is influenced by many variables, including supply, market development and the evolution of transportation infrastructure overall."[72]

Further, no Party dealt with the Board's reference to Condition 57, the "commercial support" condition, which ensures that the pipeline will be used and useful.

Lastly, while TWN's and other intervenors' submissions on this topic focused on the "need for" the Project, the grounds for review also include the Board's apparent decision to exclude the socio-economic effects of the Project from the List of Issues. The Board is of the view that this is not an accurate characterization of its treatment of socio-economic effects. In its Process Design Decision, the Board clarified the List of Issues by adding a footnote to explain that all references to environmental effects in the List of Issues include health and socio-economic matters as described in section 5 of the CEAA 2012.[73] None of the Parties adequately addressed this clarification.

The Board is not persuaded that TWN has raised a doubt as to the correctness of the Board's Process Design Decision with respect to the need for and socio-economic effects in the List of Issues. Therefore, the Need for and Socio-Economic Effects Review is denied.

G. CONCLUSION

For the reasons above, TWN's and Living Oceans/Raincoast's applications for review are dismissed.

Yours truly,

Original signed by L. George for

Sheri Young
Secretary of the Board

c.c. All Parties

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[72] *Supra* note 2 at 11-12.
[73] *Supra* note 2 at 10.