



September 5, 2019

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Canada Energy Regulator
Suite 210, 517 Tenth Avenue S.W.
Calgary, Alberta T2R 0A8

Attention: Ms. Louise George,
Secretary of the Commission

Sarah Hansen
Direct Line: 604.643.1273
shansen@millerthomson.com

File: 0115667.0010

Dear Sirs/Mesdames:

**Re: Trans Mountain Pipeline ULC (“Trans Mountain”)
Trans Mountain Expansion Project (the “Project”)
Certificate of Public Convenience and Necessity OC-065
File OF-Fac-Oil-T260-2013-03 63
Hearing Order MH-014-2018
Statement of Opposition and Continued Objection to the Proposed Detailed
Route (the “Detailed Route”) of the Stk’emlupsemc te Secwepemc of the
Secwepemc Nation Pursuant to National Energy Board July 19, 2019 Decision
Notice of Motion for Confidentiality Order Pursuant to Rule 16.1 of the National
Energy Board Act**

We write on behalf of Chief Ron Ignace and Chief Rosanne Casimir on their own behalf and on behalf of all other members of the Stk’emlupsemc te Secwepemc of the Secwepemc Nation (the “SSN”). Please consider this letter, together with SSN’s 2019 Statement of Opposition to the Detailed Route Form, with land documents (attached as **Schedule “A”**) to register SSN’s continued objection (“SOO”) and SSN’s Notice of Motion seeking confidential filing of evidence.

Continued SOO

On August 9, 2019, the NEB wrote to SSN giving notice of the detailed route approval process for Segments 1 to 5. SSN has reviewed the PPBoR applicable to Segment 5. Trans Mountain confirmed to SSN by email dated August 20, 2019 that it has not filed its updates to the Environmental Alignment Sheets for Spread 5, which corresponds to PPBoR Segment 5. SSN reserves the right to make further opposition once the same are filed.

On April 24, 2017, SSN filed its original Statement of Opposition with the NEB, a copy of which is attached and incorporated by reference into this restated 2019 Statement of Opposition further to the Board’s letter of August 9, 2019 ([**A82838**], hereinafter the “**2017 SOO**”).

SSN continues to have concerns about the proposed route through SSN Territory and the methods and timing of construction of the pipeline as detailed in the 2017 SOO. SSN maintains its position at the hearing that there is a better route for that portion of the pipeline corridor from apx. KP851 -KP858, where the pipeline corridor chosen by Trans Mountain

traverses Pípsell, a cultural heritage site, which cannot be further destroyed by digging up the ground and installing a pipeline.

Statement of Facts

By letter dated June 21, 2019 [C00072], the Board advised that Indigenous people would need to register an SOO, but they would not be required to demonstrate a change in circumstances since the board is of the view that Canada's redone consultation constitutes a reviewable change (p.9).

Footnote 16 indicates that SSN's hearing was "in process". However, this is not correct as SSN's oral hearing MH-014-2018 had concluded at the time of the *Tsleil-Waututh* Federal Court of Appeal decision (the "*Tsleil-Waututh Decision*"), but no decision had been rendered. The Board has not advised whether a decision has been made, but not released, or whether in fact, no decision was finalized prior to the Board Panel no longer being available.

SSN notes that the Board advised that the KGHM Ajax MH-008-2018/MH-009-2028 Board Panel that heard the oral evidence is no longer available to make the decision (Footnote 9). SSN's Board Panel was the same Board Panel as KGHM, therefore, SSN assumes that its Board Panel is no longer available.

By letter dated July 19, 2019 [C00593], upon the Board's further consideration, SSN was directed to describe a material change in circumstances, in order for the Board to consider adding process steps to obtain and test any new evidence. No direction or order was made as to the filing of affidavit evidence.

The Board states that it is of the view that Canada's reinitiated Phase III consultation process constitutes a "reviewable change" to the extent it is shown that such consultation relates to detailed routing issues (that is, the best possible detailed route of the pipeline, or the most appropriate methods or timing of constructing the pipeline) for specific Indigenous peoples.

By letter dated June 21, 2019 [C00072], the Board proposed to complete processes that were underway and rely on decisions and orders that were issued prior to the FCA's decision in *Tsleil-Waututh*, unless the Board determines that relevant circumstances have materially changed. The Board may review its prior decisions and orders if circumstances have changed such that there is now a doubt as to their correctness. A review may be initiated through an affected party filing an application.

The test as set out by the Board in its letter dated June 21, 2019 for a "material change in circumstances" warranting a review is as follows:

"Changed circumstances"

Whether a matter would be considered a material change in circumstances warranting a review would be determined by the Board by applying its expertise to the facts before it. For example, substantive changes to the wording of a condition would be a change in circumstances necessitating a condition compliance review. Relevant changed circumstances in the detailed route context could include different construction methods than Trans Mountain previously proposed. The Board would not, however, generally consider that the mere passage of time, or the change in ownership of the

TMEP, raises a doubt as to the correctness of prior post- Certificate decisions or orders.”

The Board Panel conducted a detailed route hearing for SSN on May 8, 2018 where SSN presented evidence through witnesses and cross-examined Trans Mountain’s panel of witnesses. The Board Panel asked several questions of witnesses during the hearing, seeking evidence to assist it in making a determination on the issues.

Prior to commencing the oral hearing and by Ruling #2 [A91474], the Board Panel attended at Pipsell for a full day on or about April 28, 2018 further to SSN’s request that the Panel take a view of the site concerned. During that site visit, the Board Panel was accompanied by several SSN’s members who provided them with detailed information on SSN’s concerns and Aboriginal rights and title in the area of the proposed pipeline corridor.

Please consider this letter SSN’s application describing how since the conclusion of the hearing, the relevant circumstances have materially changed regarding consultation relating to detailed routing issues (that is, the best possible detailed route of the pipeline) for SSN, and new facts have arisen since the close of the original proceeding.

Legal Test

Applications for rehearing and reviews are governed by s. 21 of *NEBA* and the Rules. Section 21 provides:

Review, etc., of decisions and orders

21 (1) Subject to subsection (2), the Board may review, vary or rescind any decision or order made by it or rehear any application before deciding it.

Rule 44 establishes the parameters for review stating:

44 (1) **Any application for review or rehearing pursuant to subsection 21(1)** of the Act shall be in writing, signed by the applicant or the applicant’s authorized representative, filed with the Board and served on all parties to the original proceeding.

(2) An application for review or rehearing shall contain

(a) a concise statement of the facts;

(b) the grounds that the applicant considers sufficient, in the case of an application for review, to raise a doubt as to the correctness of the decision or order or, in the case of an application for rehearing, to establish the requirement for a rehearing, including

(i) any error of law or of jurisdiction,

(ii) changed circumstances or new facts that have arisen since the close of the original proceeding, or

(iii) facts that were not placed in evidence in the original proceeding and that were then not discoverable by reasonable diligence;

(c) the nature of the prejudice or damage that has resulted or will result from the decision or order; and

(d) the nature of the relief sought.

(3) For the purposes of subsection (2), unless otherwise determined by the Board, an original proceeding is considered to be closed

(a) in the case of an oral hearing, at the end of the final argument; and

(b) in the case of a written hearing, on the close of business for the Board on the later of

(i) the last date for filing of written evidence, and

(ii) the last date for filing argument. **[Emphasis added]**.

In *West Coast Energy Application for Review of Decision of Members Ballem and Lytle* (2017), GH-003-2015 at page 5, the Board briefly touched on the interpretation of s. 44(2)(b), stating that “consistent with previous decisions, the Board will consider grounds for review other than those enumerated in paragraph 44(2)(b) as long as those grounds raise a doubt as to the correctness of the decision”.¹

In *NOVA Gas Transmission Ltd. North Montney Project Certificate, Order XG-N081-010 (2015)*,² the Board found that there were new facts and changed circumstances that occurred since a previous proceeding (GH-001-2014). Nova Gas Transmission Ltd. (“**NGTL**”) applied for an application for variance of a certificate allowing them to construct 8-meter facilities. The Board decided that although the original North Montley Mainline (“**NMML**”) project was not going ahead, gas producers had sought incremental service, and the Board found there was a need for the facilities described in the application. New facts and changed circumstances as described in NGTL’s evidence included:

- reduced potential variance in cost estimates;
- reduced scope of the NMML facilities;
- enhanced contractual underpinnings;
- improved revenue recovery compared to the cost of the NMML Facilities; and
- cancellation of deliveries at the Mackie Creek Interconnection.

Following the Board’s review of the application and the comments received during the comment period, the Board issued a notice of hearing, which stated that it was satisfied that NGTL had demonstrated changed circumstances and new facts, as per 44(2)(b)(ii) of the Rules.

In an application by Newfoundland and Labrador Hydro for review of the Board’s decision to issue six electricity export licences, the Board said the following about the exercise of its s.21(1) powers:

Applications under this section are governed by section 24 [*now ss. 44-46*] of the Rules [*of Practice and Procedure*]. The Board has developed certain practices and principles in dealing

¹ National Energy Board Letter of Decision, Westcoast Energy Inc., Application for Review of the Decision of Members Ballem and Lytle, in Report GH-003-2015 **[A82112]**.

² National Energy Board Letter of Decision, NOVA Gas Transmission Ltd. (NGTL) North Montney Project, Request for Extension of Sunset Clause **[A79417]**.

with applications for review and among these is a recognition that the power to review is a discretionary and unusual power which, in the Board's view, should be exercised sparingly. The onus is always on the applicant to satisfy the Board that a *prima facie* case for review exists in the particular circumstances of any case.³

In *TransCanada Pipelines Limited, Application for Review and Variance of RH-4-2001, Reasons for Decisions, RH-R-1-2002* (2003) at 4-5, the Board described the standard of "correctness" required by the Rules:

The Board agrees with TransCanada that the standard of review in this instance as set out in the Rules is one of correctness. However, one must ask what it is that must be correct. The Decision in RH-4-2001 was a decision as to what a fair rate of return is for mainline. It is clear from the case law...that a determination of a fair return is a matter of balancing a number of factors and involves the application of judgement. As the court noted in *Northwestern Utilities* (1929), such a decision is largely a matter of opinion and is hardly capable of being reduced to certainty by evidence. Accordingly, the standard of review is correctness, the Board recognizes that what is being reviewed for correctness is largely a matter of informed judgment and opinion.⁴

The Board's responsibility, at that stage of the application for review, was not to re-weigh all the evidence and make its own assessment of it. Rather, the Board was to determine three things (at p. 4):

1. whether doubt had been raised as to the correctness of the decision, recognizing that the determination of a fair return is largely a matter of informed opinion;
2. whether doubt had been raised because of an error in the basis upon which the opinion was made, or for example, by examining whether the Board relied on relevant evidence, did not consider relevant evidence, applied inappropriate tests, applied appropriate tests or factors incorrectly, or made the decision in an arbitrary manner; and
3. whether a doubt had been raised as to the correctness of the decision on the basis that the Board did not provide adequate reasons, as may be required given the state of the law on this matter.

In our submission, SSN meets the test in that while SSN cannot raise doubt as to the correctness of a decision of the Board Panel that has not been made, there is additional relevant and material evidence relating to detailed route issues and the Phase III re-do consultation process, as follows.

Material Change in Circumstances

At the hearing, two possible better routes were presented by SSN to the Panel [A90802-3] and were shown to the Panel during the site visit, where both routes would see the pipeline corridor paralleling the existing highway disturbance along the Coquihalla Highway. SSN's

³ Newfoundland & Labrador Hydro Application for Review under Section 17 (1984) as cited in *Canada Energy Law Service*, Ch. VIII at §310 at 1.

⁴ National Energy Board Reasons for Decision, Review of Review of RH-4-2001 Cost of Capital Decision [A05406].

better routes proposed at the detailed route hearing to avoid traversing Pípsell, a cultural heritage site, were the focus of the detailed route hearing.

Trans Mountain's route criteria, the application of that criteria, and the Crown's failure to consult with SSN about routing since the inception of the Project were discussed extensively as part of the Phase III re-do consultation with NRCan and Trans Mountain.

This constitutes a material change in circumstances such that the Phase III re-do consultation relates specifically to detailed routing issues, that is, the best possible detailed route of the pipeline, and the most appropriate methods or timing of constructing the pipeline for the SSN.

In addition, new facts are available in a completed Pípsell Cultural Heritage Study was not available at the time of the hearing and that speaks directly to a better possible pipeline corridor.

Phase III Re-do Consultation Process & Detailed Route Issues

Much of the detailed route hearing concerned SSN's evidence and the Board's consideration of the best possible detailed route which the FCA in the *Tseil-Watuth* decision confirmed is not limited to the approved pipeline corridor (confirming *Emera Brunswick Pipeline Company Ltd., (Re.)* 2008 LNCNEB 10, at p. 30). SSN's evidence of a better possible alternative route is based upon its own evidence, but also a testing of Trans Mountain's evidence on its consideration of route alternatives, and the reasonableness of the same.

The routing through SSN Territory remain a live issue as is the statutory obligation for the Board to consider alternative means of carrying out the designated project, therefore, the Board must consider both evidence of a better route and Trans Mountain failure to consider alternative means of carrying out the designated project where those alternative means may reasonably accommodate significant adverse impacts on SSN's Aboriginal rights and title.

The Phase III consultation re-do evidence includes correspondence and exchanges between Canada and SSN and SSN and Trans Mountain, in support of SSN's position of a better possible route for the pipeline corridor and challenges Trans Mountain's failure to consider, or reasonably consider, alternative means of carrying out the designated project since inception.

For example, at the hearing, Trans Mountains' representatives gave evidence of their route criteria and about their consideration of the Coquihalla Highway as an alternative route. During Phase III consultation with SSN, the Crown Consultation Approach saw Canada's NRCan representatives meeting with SSN, together with Trans Mountain representative Max Nock. During Phase III re-do consultation process, SSN made requests for information from Trans Mountain to inform the consultation and accommodation discussion with Canada about Trans Mountain's due diligence conducted in its route selection process. With respect to its due diligence of a better route along the Coquihalla Highway, Trans Mountain responded to SSN that it had an extensive record with British Columbia's Ministry of Transportation ("MoTi") about route selection, in particular, on February 26, 2019 (**Schedule "B"**), Trans Mountain responded that:

Response to Information Request #5:

Question: Please provide a copy of Trans Mountain's file of any and all dealings with the Ministry of Transportation's with respect to the routing from Merit to Kamloops"

Response: **"With respect to the request for any and all dealings within the ministry of Transportation concerning routing from Merit to Kamloops, Trans Mountain is unable to prepare a response, given the time constraints on the request by SSN. There has been an extensive and on-going dialogue with the MOTI concerning the project, and it would be a major undertaking to review and compile all of the related correspondence."**

After receiving Trans Mountain's response, SSN submitted a Request for Access to Records under the *Freedom of Information and Protect of Privacy Act* dated February 27, 2019 for copies of all of MOTI's documents and records, including but not limited to, correspondence relating to the routing of Trans Mountain Expansion Project for the specific part of the route running from Kamloops to Merit, and any documents and records related to requests, discussions, and consideration of the Coquihalla Highway (Highway 5) as a possible corridor or alternative route for the Trans Mountain Expansion Project. (Date Range for Record Search: From 05/01/2012 To 06/01/2017) (**Schedule "C"**).

The response from MOTI dated April 9, 2019 stated: "After searching for 20 hours through all of the records, we do not have any responsive records. The route proposed by Kinder Morgan was never anywhere close to the Coquihalla Highway as they intended to follow the existing route through the majority of the Southern Interior Region." SSN submitted a complaint dated May 21, 2019 to MOTI stating that MOTI had not completed an adequate search, and the further responses from MOTI on May 28, 2019 (**Schedule "D"**) was that upon reading the request:

"The Ministry found no documents of any discussion between TMEP and MoTI regarding routing specifically from Kamloops to Merit as Trans Mountain chose to keep their alignment following their existing pipeline which runs between Highway 5A and the Coquihalla Highway. Twinning the pipeline along this route had very slow/if almost negligible impacts to MoTI infrastructure and thus there were no concerns brought up by Ministry staff to TMEP.

There were alignment requests, discussions and considerations along the entire pipeline alignment but none of these discussions were centered around the routing between Kamloops and Merit."

SSN submits that this is just one example of how the Phase III consultation process is a material change in circumstances and new facts that have arisen since the close of the hearing.

Further, the Phase III re-do consultation process included topics outlined in the Memorandum of Understanding between Canada and the SSN dated March 13, 2019 (**Schedule "E"**), many of which are relevant to detailed route issues.

Another example of the extent to which Phase III evidence relates to detailed route issues is the extensive discussion with Canada about SSN's proposed indigenous assessment process

for TMX and Canada's response to the same, which concerns the most appropriate timing of constructing the pipeline and construction methods and mitigation measures, specifically SSN concerns including without limitation the lack of a cultural heritage study of the Thompson River crossing and how Canada considered that a review would inform construction and operational phases of the Project.

Crown's March 2019 Notice of Reliance on the Detailed Route Hearing to fulfil its Duty to Consult

The August 9, 2019 letter from the Board [C00922-8] attaches a letter dated March 25, 2019 regarding Canada's intention to "rely to the extent possible on the NEB processes to fulfil its duty to consult, as the NEB has the technical expertise and mandate to consider and address project impacts, including those affecting Indigenous rights and interests."

In addition to the above material change in circumstance, SSN submits that Canada's recent advice to SSN in March 2019 that intends to rely on the detailed route hearing to fulfil its consultation duty in respect of the detailed route decision after the hearing has closed, is in and of itself, a material change in circumstances.

Canada did not previously advise SSN that it was relying on the Board's detailed route hearing process to fulfil its duty to consult. Indeed, in SSN's written submissions [A90802], SSN raised the issue of the Crown's failure to advise on its consultation process for the detailed route decision, as follows:

[para. 80] **There is nothing in the NEB Hearing Order, nor has there been any advice received by SSN from the Crown, that the NEB has been delegated the duty to consult with SSN with respect to the decision to approve the detailed route in the proposed corridor.** Canada's memorandum filed in the Federal Court of Appeal proceedings states that: "in addition to Phase IV consultations, **it is possible that Canada's duty to consult may also be triggered during the NEB's detailed route approval process**".

[para. 81] It is SSN's position that the decision to refuse or approve the detailed route is a decision that has the potential to adversely affect SSN's aboriginal rights, title and interests and that as such, the Crown's duty to consult with SSN prior to the decision being made is triggered. SSN looks forward to the commencement of that consultation process. **[Emphasis added]**.

This constitutes a further material change in circumstances since the May 8, 2018 detailed route hearing MH-001-2018, where SSN had no prior indication from Canada that it was relying on the NEB's detailed route hearing to fulfil its duty to consult and where Canada now purports to do so retroactively.

SSN states that any evidence from Canada on its consultation in respect of detailed route issues must be evidence filed by Canada, and reviewed and tested by SSN, to determine the adequacy of Crown consultation which will ultimately inform the Board Panel's determination of the best possible route.

New Facts - Cultural Heritage Study #2 of Pípsell

As part of the detailed route hearing, SSN argued that Trans Mountain had failed to conduct a cultural heritage study along the proposed route of the pipeline through SSN Territory. This also goes to the issue of TMX's non-compliance with the Amended Condition 100. New information is available that was not available at the time of the hearing.

A second Cultural Heritage Study was prepared for Pípsell ("**Pípsell CHS**") as part of the study of the proposed Ajax Mine Project (which project failed to receive an Environmental Assessment Certificate from BC and Canada).

The Pípsell CHS was commissioned by SSN entitled "Pípsell Heritage Project, Final Report" prepared by Skeetchestn Natural Resources Corporation dated June 2018, after the detailed route hearing MH-014-2018 and is a basis for a rehearing. The study contains new facts in the area of the proposed re-route around Pípsell and these new facts that have arisen since the hearing was closed in May 2018 justifies a review.

The report is the second CHS study following up on the initial KGHM-Ajax CHS in 2014 and contains information relevant to Pípsell and the TMX Project for the re-route in that area at, specifically, it identifies burial sites, burial cairns, archeology sites, and other cultural heritage information including in the area from KP851-KP858.

The Pípsell CHS contains highly confidential and sensitive information. It is based on evidence from interviews with SSN elders and SSN members with respect to Aboriginal rights and title that will be adversely impacted by the Project. Information about specific locations of burial sites, burial cairns, archeology sites and knowledge included in the Report is highly sensitive and confidential. This is information that SSN consistently keeps confidential due to the spiritually, culturally and in some cases commercially sensitive to SSN. Public disclosure of such information could cause cultural and economic harm and further destruction to the site and negatively impact SSN's aboriginal rights and title.

SSN submits that public disclosure of this information, particularly the specific locations of locations of burial sites, burial cairns, archeology sites could reasonably result in a material loss to SSN and SSN's ability to exercise its constitutionally protected Aboriginal rights and title. Due to the nature and content of these materials, SSN is of the view that the Pípsell CHS cannot be redacted in a way that allows for meaningful public review while preserving the confidentiality of the information SSN seeks to protect.

As such, by this letter, SSN applies for an order to protect the confidentiality of the Pípsell CHS in support of its Statement of Opposition to the proposed Detailed Route and as new facts to warrant a rehearing, pursuant to s. 16.1 of the *National Energy Board Act*. Please consider this letter SSN's motion for a confidentiality order pursuant so s. 16.1 of the NEB Act. On such an application, the Board must be satisfied that the circumstances satisfy the conditions set out in 16.1(a) or 16.1(b) for the NEB Act. Rule 16 provides as follows:

16.1(a) disclosure of the information could reasonably be expected to result in a material loss or gain to a person directly affected by the proceedings, or could reasonably be expected to prejudice the person's competitive position

16.1(b) the information is financial, commercial, scientific or technical information that is confidential information supplied to the Board and

(i) the information has been consistently treated as confidential information by a person directly affected by the proceedings, and

(ii) the Board considers that the person's interest in confidentiality outweighs the public interest in disclosure of the proceedings.

SSN submits that it has met the test under s. 16 for a confidentiality order over the Pípsell CHS. The information contained within the Pípsell CHS, if disclosed to the public, could reasonably be expected to result in material loss of cultural heritage objects and artifacts of SSN. The information is sensitive technical and cultural information and has been treated by elders as confidential and SSN's interest in confidentiality outweighs the public interest in disclosure of the proceedings.

SSN relies on the Board's decision dated December 3, 2018 in the matter of MH-052-2018 Reconsideration Hearing in relation to *Tsleil-Waututh's* motion and Ruling No. 17 – Tsleil-Waututh Nation (TWN) request for confidential filing [A96509] December 6, 2018.

By emails dated August 27, 2019, SSN advised Trans Mountain and NRCan of the Pípsell CHS and requested that a Confidentiality Agreement in the form attached be executed. A copy of the proposed Confidentiality Agreement is attached (**Schedule "F"**). No response has been provided by Trans Mountain or NRCan to the proposed form of Confidentiality Agreement.

SUMMARY OF GROUNDS

Given all of the above, there has been a material change circumstances and new facts that have arisen since the close of the original proceeding, and facts that were not placed in evidence in the original proceeding and that were then not discoverable by reasonable diligence. The nature of the prejudice or damage that will result from the decision or order without hearing the additional evidence will prejudice SSN's ability to argue a better route for the pipeline corridor and to challenge Trans Mountain's consideration of alternative routes.

SSN relies on three material change in circumstances:

1. Phase III consultation with the Crown and Trans Mountain which specifically concerned detailed route hearing issues, some of which are described above;
2. The Crown's March 2019 advice that the Crown intends to rely on the detailed route hearing retroactively to satisfy its duty to consult (which was not previously known to SSN), and:
 - a) where the Board must now make a decision about the adequacy of the Crown's consultation and accommodation in the context of the detailed routing of the pipeline; and/or

- b) the Board that heard the first detailed route hearing did not have any evidence before it on Canada's consultation with SSN concerning the detailed route issues to enable the Board to make a determination on the adequacy of the same;
3. There are new material facts available in the Pípsell CHS that were not previously available at the time of the detailed route hearing, identifying burial mounds and other culturally significant components within the pipeline corridor and are evidence of a better possible route, all of which warrants a new hearing.

SSN submits that it will suffer prejudice if the above evidence and facts are not before the Board in making its decision. These material change in circumstances and new facts raise doubt as to the correctness of the pending decision under review.

RELIEF SOUGHT

If there is a decision that the Board is holding in abeyance, SSN is entitled as a matter of procedural fairness to know whether in fact such a decision exists. If there is no decision of the Board Panel, then a new hearing *de novo* must be conducted. SSN relies on the "he who hears must decide" principle. This is particularly the case as Oral History Evidence cannot be read in a transcript (indeed none of the evidence presented in Secwepemc'in was translated) and further, there is no record or transcript of the site visit which the Board Panel had with SSN members.

Further, key evidence given to the Board Panel at the hearing concerning the maps was not captured by the court reporter in the transcript. This was further to the Board Panel process of having all parties work around a table to identify the boundaries of Pípsell.

SSN's hearing was largely an oral hearing and SSN agrees with the Board that *Little Narrows* is not applicable in the manner suggested by Trans Mountain. In addition, the case law goes further to say, that in an administrative law context:

"The purpose of the right to present one's case is defeated if the decision is made or influenced by person's who have not heard the evidence. Thus a member of a tribunal who participates in a decision should not absent from the hearing or any part of it, unless the parties consent to the temporary absence of the member is present by electronic means."⁵

Further, different decision-makers may require evidence beyond the existing record. In the case of MH-014-2018, the Panel was very active in questioning the parties, which is indicative of the different evidence the new decision-makers may require.

SSN requests that the Board issue a notice of hearing *de novo*, which states that is satisfied that SSN had demonstrated material changed circumstances and new facts and that the

⁵ [Re Doyle and R.T.P.C.](#); [1985] F.C.J. No. 17 (F.C.A), leave to appeal refused [1985] S.C.C.A No. 46 [Bailey v. Langley Local Board of Health](#), [1981] B.C.J. No. 1902 (B.C.S.C); [O'Brien v. Canada \(National Parole Board\)](#), [1985] F.C.J. No. 155 (F.C.T.D.); [Hayes v. Saskatchewan Housing Corp.](#), [1982] S.J. No. 183 (Sask. Q.B.)

Board order that the Pípsell CHS be filed with the Board and kept confidential in its entirety in accordance with Rule 16.

Yours truly,

MILLER THOMSON LLP

Per: 

Sarah Hansen
SDH/sdh

Enclosures: All Schedules
cc. Trans Mountain Expansion Project, attn.: Mr. Alain Parisé, TMEP_Land@transmountain.com