

October 30, 2014

FILED ELECTRONICALLY

Secretary to the National Energy Board
National Energy Board
517 Tenth Avenue SW
Calgary Alberta T2R 0A8

Attention: Ms. Sheri Young

Dear Ms. Young:

Re: **Hearing Order OH-001-2014, Trans Mountain Expansion Project
Trans Mountain Project Application, 16 December, 2013 – File OF-Fac-Oil-
T260. Intervenor Marc Eliesen’s Withdrawal from Hearing.**

The Intervenor, Marc Eliesen, wishes to withdraw from the National Energy Board hearing on the Trans Mountain Expansion Project (TMEP).

I applied as an intervenor with expertise to offer the Board in good faith that my time and personally incurred costs would be well spent in evaluating Trans Mountain’s proposal, questioning the Proponent, preparing evidence commensurate with my expertise, answering questions on that evidence, and providing final argument. Unfortunately, I have come to the conclusion that the Board, through its decisions, is engaged in a public deception. Continued involvement with this process is a waste of time and effort, and represents a disservice to the public interest because it endorses a fraudulent process.

I have a professional background that includes over 40 years of experience in senior executive positions in the energy sector of Canada, and an understanding and working knowledge of the mandate and operations of the National Energy Board, including an appreciation of the principles of natural justice and the rules and practices of quasi-judicial bodies in Canada. I have reached my conclusions based on my wealth of experience.

I rigorously reviewed Trans Mountain’s application and developed extensive questions in the first round of Information Requests. I was dismayed when the oral cross-examination phase—that has served as a critical part of all previous Section 52 oil pipeline hearings—was inexplicably removed from this hearing. It is my experience that when a Proponent does not face the spectre of oral cross-examination, their written responses to interrogatories suffer from a lack of detail and accountability. Still, I was willing to see the results of the Information Request process the Board promised would be sufficient.

The unwillingness of Trans Mountain to address most of my questions and the Board’s almost complete endorsement of Trans Mountain’s decision has exposed this process as

deceptive and misleading. Proper and professional public interest due diligence has been frustrated, leading me to the conclusion that this Board has a predetermined course of action to recommend approval of the Project and a strong bias in favour of the Proponent. In effect, this so-called public hearing process has become a farce, and this Board a truly industry captured regulator.

In addition to gutting the oral-cross examination feature of a public hearing process that supports proper questioning and an adequate level of due diligence, there are other Board decisions that have been made over the course of this hearing that reflect a pre-determined outcome.

The evidence on the record shows that decisions made by the Board at this hearing are dismissive of Intervenors. They reflect a lack of respect for hearing participants, a deep erosion of the standards and practices of natural justice that previous Boards have respected, and an undemocratic restriction of participation by citizens, communities, professionals, and First Nations either by rejecting them outright or failing to provide adequate funding to facilitate meaningful participation.

The above is reflected in the following:

1. The Board elected not to request assistance from the Intervenors in the formulation of issues that would assist the Board in the conduct of the proceedings at the commencement of this hearing. This approach represents a double standard. Trans Mountain requested and received an amendment to the List of Issues in the earlier Part IV Toll Application. Also, this “no more issues” position is completely a reversal of what took place in the Northern Gateway Project hearing when the Board actively solicited assistance from Intervenors in the determination of issues to be included in the scope of the review. The Gateway Panel also included three sets of Information Requests (two on initial evidence and one on reply evidence) and an oral cross-examination of the evidence.
2. Given the highly technical nature and voluminous size of the TMEP application, requests from numerous participants, including municipal governments, environmental organizations and First Nations were made asking the Board to provide significant additional time to prepare Information Requests. The Board basically rejected these requests.
3. The Board has been alerted to numerous instances where Trans Mountain studies by its employees and commissioned consultants lack basic professional standards of disclosure, source verification, references, data, assumptions and methodology. It is shocking that in a process such as this where due diligence is required on a major capital project that the Board has not held Trans Mountain to a minimum professional standard of accountability and transparency. This is especially reflected in the Board’s own written Information Requests to the Proponent on the alleged economic benefit materials put forward. The Board’s veneer examination of the Proponent’s case is reflective of a decision not to dig too deeply for fear the economic case may crumble,

or a lack of economic, financial and business acumen on behalf of the Board to know where and how to dig. The Board's Information Requests related to Trans Mountain's economic case are tantamount to a sweetheart written cross. And when basic business questions from Intervenorers are asked to test the evidence at a higher level of scrutiny, Trans Mountain refuses to answer them.

4. The Board, in an unprecedented fashion, has rejected the previously established practice in Section 52 public hearings on oil pipelines to provide for oral cross examination on the evidence submitted at the hearing. The Board maintains that two rounds of written information requests is sufficient to test the evidence. Even the Government of Canada's Department of Justice (DOJ) has informed the Board that evidence given without cross-examination should be rejected. The DOJ stated "Canada's position is that cross-examination is necessary to ensure a proper evidentiary record..." Furthermore, "cross -examination serves a vital role in testing the value of testimonial evidence. It assists in the determination of credibility, assigning weight and overall assessment of the evidentiary record. It has been termed 'the greatest legal invention ever invented for the discovery of truth'...without cross-examination the Board will be reviewing only untested evidence."
5. With the absence of oral cross-examination of Trans Mountain executives and their experts, the only process now available to understand and test the application is through written Information Requests. The National Energy Board Rules of Practice and Procedure provides the NEB with the power to direct a party "to provide full and adequate" responses to Information Requests, without which the hearing process cannot be meaningful and cannot meet the requirements of procedural fairness and natural justice.

For most Intervenorers submitting Information Request #1, Trans Mountain has failed to respond and address the actual core elements of the question. They have either provided non-responses, general statements, or referred back to the inadequate information in the original application that gave rise to the question in the first place. In many instances Trans Mountain has assumed the regulator's role declaring that the question asked is outside the List of Issues established by the NEB.

Given the Board's lack of objectivity it is not surprising that out of the approximately 2000 questions not answered by Trans Mountain that Intervenorers called on the Board to compel answers, only 5% were allowed by the Board and 95% were rejected.

The Board had stated that the elimination of cross-examination of the Proponent's evidence can be evaluated through the two scheduled Information Requests. But we have a Kafkaesque outcome. Trans Mountain refuses to answer questions and the Board does not compel them to do so.

6. The Province of British Columbia stated that "Trans Mountain's failure to file the evidence requested by the Province in Information Request No. 1 denies the Board, the Province and other Intervenorers access to the information required to fully understand

the risk posed by the Project, how Trans Mountain proposes to mitigate such risk and Trans Mountain's ability to effectively respond to a spill related to the Project.”

The Province of British Columbia has the responsibility for undertaking due diligence on behalf of the public trust of British Columbians. The 80 questions Trans Mountain refused to answer—which the Province believed important enough to ask the Board for assistance and compel Trans Mountain to answer,—were denied by the Board.

The Board has sided with Trans Mountain dismissing the Province of BC's need for answers in pursuit of its duty to British Columbians. The NEB's bias in support of the Proponent is reflecting poorly on the Province of BC in that it is unable to obtain necessary answers to conduct its due diligence. Accordingly, it raises the question as how it is possible for the Province of BC to continue to participate in this hearing process. The Province should cancel the Equivalency Agreement with the NEB on this project and undertake its own environmental assessment as the only meaningful way in which it will be able to effectively obtain the answers it seeks.

The National Energy Board is not fulfilling its obligation to review the Trans Mountain Expansion Project objectively. Accordingly it is not only British Columbians, but all Canadians that cannot look to the Board's conclusions as relevant as to whether or not this project deserves a social license. Continued involvement in the process endorses this sham and is not in the public interest.

Yours truly,

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