National Energy Board

Office national de l'énergie

File OF-Fac-Oil-T260-2013-03 02
2 October 2014

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Hearing Order OH-001-2014
Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
Ms. Lynne M. Quarmby and others – notices of motion dated 6 and 15 May 2014
Ruling No. 34

On 6 May 2014, the National Energy Board (Board or NEB) received a notice of motion (Charter Motion) from Lynne M. Quarmby, Eric Doherty, Ruth Walmsley, John Vissers, Shirley Samples, ForestEthics Advocacy Association, Tzeporah Berman, John Clarke, and Bradley Shende (the Applicants) asserting that either the standing test in the *National Energy Board Act* (NEB Act) or the Board's participation decisions in the Project hearing infringe the freedom of expression guarantee in section 2(b) of the *Canadian Charter of Rights and Freedoms* (Charter). The Applicants served a Notice of Constitutional Question on 5 May 2014.

On 15 May 2014, the Board received a second notice of motion (Procedural Motion) from the Applicants. In it, they request an oral hearing of the Charter Motion on procedural fairness and evidentiary grounds.

In a 26 May 2014 letter (Process Letter), the Board set up a comment period on both the substance of the Charter Motion and the additional procedural steps, if any, that should be adopted around it. That process closed on 11 July 2014. In the Process Letter, the Board noted that it could choose to decide the Charter Motion based solely on any written submissions and evidence filed by that date.

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The Applicants filed further comments. Comments were also received from various intervenors, Trans Mountain,[1] and the Attorney General of Canada (Canada).

On the basis of the record now before it, and for the reasons set out below, the Board dismisses both the Procedural Motion and Charter Motion.

1. The Applicants' Procedural Motion

As a preliminary matter, the Board is not persuaded that further oral or other process is warranted before it decides the Charter Motion.

More process would primarily serve to allow parties to further adduce and test factual evidence. However, the Board established a comment process to allow parties wishing to do so the opportunity to more fully describe their positions and file affidavits. The Board concludes that the parties do not materially disagree on the facts relevant to this motion. They disagree on the law.

In their 15 May 2014 Procedural Motion, the Applicants set out two grounds for asking for an oral hearing. First, they assert that the Board's common-law duty of procedural fairness requires it to hold an oral hearing. Second, they claim an oral hearing is required to establish the adjudicative and legislative facts the Board needs to decide the Charter Motion. In their motion submissions, the City of Burnaby, Robyn Allan, the City of Vancouver, and Tsartlip First Nation concur with the Applicants.

In Trans Mountain's response comment, it argues against any further process, taking the position that the Board can decide the "matters of law" raised in the Charter Motion on written submissions alone. The Canadian Association of Petroleum Producers (CAPP) also questioned the need for an oral hearing in its comment. CAPP submits that both the Federal Court of Appeal and Supreme Court of Canada deal with many matters in writing only.

Canada, in its comment, argues that a proper evidentiary record on the Charter Motion requires cross-examination.

(a) Procedural fairness

A common-law duty of procedural fairness falls on the Board whenever it issues an administrative decision affecting a person's rights, privileges, or interests.[2] As stated by the Supreme Court of Canada, the duty exists to ensure decisions "are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker."[3]

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1 Trans Mountain provided both an initial response to the Charter Motion on 16 May 2014, as well as a response comment on 30 June 2014.

2 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*) at para. 20.

3 *Baker* at para. 22.

However, in the words of Justice L'Heureux-Dubé:

> The existence of a duty of fairness … does not determine what requirements will be applicable in a given set of circumstances. As I wrote in Knight v. Indian Head School Division No. 19, … 'the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.' All of the circumstances must be considered in order to determine the content of the duty of procedural fairness.[4]

In its decision in *Baker v. Canada*, the Court recognized five non-exhaustive factors relevant to determining what the duty requires in particular circumstances. These include:

(1) the nature of the decision being made;
(2) the nature of the statutory scheme in question;
(3) the importance of the decision to the individuals affected;
(4) the legitimate expectations of those individuals; and
(5) the relevant agency's choice of procedure.[5]

In their Procedural Motion, the Applicants address factors (1), (3), and (4), arguing that these, together, "necessitate a high degree of procedural fairness."

With respect to the Applicants' statement that the Charter Motion engages a "jurisdiction of the highest order that a tribunal may be called on to exercise," the Board agrees that the first *Baker* factor, the nature of the decision, militates in favour of a higher standard of procedural fairness. In ruling on the Applicants' constitutional rights, the Board is necessarily exercising a function that more closely resembles judicial decision-making.

However, an analysis of the other factors listed by the *Baker* Court points toward a more limited duty:

(2) *Statutory scheme*. The Board's statutory scheme provides for both a review before the Board,[6] and an appeal right to the Federal Court of Appeal,[7] on the issues of law and jurisdiction raised within the Charter Motion. *Baker* is clear that greater procedural protection is required where no appeal procedure is provided in a statute.[8]
(3) *Importance of the decision*. The effect of the Board's decision is not to stifle the Applicants' proposed expression generally, but to impose controls on it within the limited context of a quasi-judicial hearing. The Board has also determined that all but one of the Applicants are not "directly affected" by the Project and that much of the group's proposed evidence is not relevant to its decision. The Board's participation limits impose no greater a burden than those that a prospective intervenor might encounter in any other administrative or judicial forum.

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4 *Baker* at para. 21.
5 *Baker* at paras. 23-28.
6 *National Energy Board Act*, R.S.C. 1985, c. N-7 (NEB Act), s. 21(1); *National Energy Board Rules of Practice and Procedure, 1995*, SOR/95-208, s. 44(2)(b)(i).
7 NEB Act, s. 22(1).
8 *Baker* at para. 24.

(4) *Legitimate expectations*. Section 35 of *National Energy Board Rules of Practice and Procedure, 1995* (Rules) expressly provides that notices of motion "shall" be in writing, as should be any answer and reply filings that follow. Only in an oral hearing "may" a motion be given orally. Accordingly, the Applicants lack a basis on which to expect that the Board would hold an oral hearing of the Charter Motion, even if the Board can depart from the Rules in its discretion.

(5) *Choice of procedure*. Section 8(b) of the NEB Act allows the Board to create rules establishing its procedures. Section 22(1) of the Rules allows the Board to decide whether a public hearing will be conducted orally or in writing. The Board's experience with hearings involving large numbers of intervenors and specialized evidence gives it an expertise in designing procedures, including in respect of motions, that allow it to meet applicable statutory timelines.[9]

Beyond the enumerated *Baker* factors, the Supreme Court has been clear that a written process can suffice to meet the needs of procedural fairness, specifically a party's right to be heard.[10] While courts have occasionally held fairness to warrant an oral process, they have typically done so where the need to assess a person's credibility requires it.[11] Even then, any credibility issue would have to be vital to the decision in question. The Federal Court of Appeal, for instance, has held that "[a]n administrative tribunal is not required by considerations of fairness to order an oral hearing merely because there is an issue of credibility as to some matter before it when there is otherwise an adequate basis in the record for its decision."[12]

The parties' exchange on the Charter Motion raises no credibility issues. In fact, nothing in the Applicants' affidavit evidence – relating to climate change effects and the Board's Application to Participate process – has been contradicted by other parties, who instead focus their submissions on legal argument.

For all of the reasons above, the Board views a written process as sufficient to meet the requirements of procedural fairness. As further discussed in Part (b) below, this process gave parties an adequate opportunity to challenge each other's assertions.

(b) <u>*Adjudicative and legislative facts*</u>

In their Procedural Motion, the Applicants argue that the constitutional nature of the Charter Motion requires that the Board hold an oral hearing in order to establish the adjudicative and legislative facts required to assess the impact of the NEB Act's impugned provisions.

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9 In the context of the Project, see NEB Act, s. 52(4).

10 *Quebec (Labour Relations Board) v. Canadian Ingersoll Rand Co.*, [1968] S.C.R. 695; *Nicholson v. Haldimand Norfolk (Regional) Police Commissioners*, [1979] 1 S.C.R. 311.

11 *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. No. 11. See e.g. *Khan v. University of Ottawa* (1997), 34 O.R. (3d) 535 (Ont. C.A.) (an oral hearing deemed necessary where a law student's claim that she had completed an allegedly-lost exam booklet was the central issue in her appeal of a failing grade).

12 *Nuosci v. Canada (Royal Canadian Mounted Police)* (1994), 46 A.C.W.S. (3d) 924 (Fed. C.A.).

The Applicants are correct to note that the Supreme Court has warned against deciding Charter cases in a "factual vacuum." However, in this case, additional affidavit filings in the Board's comment period have already produced a significant extended record. Moreover, not all issues in the Charter Motion clearly require that record, but rather engage points of law. Even in the case cited by the Applicants, the Court expressly identifies an issue before it "that does not require a factual foundation."[13]

The Applicants do not expand on the "findings of credibility" they claim could be made in an oral hearing and how these would assist the Board. The case for further oral process, at its core, goes to the need to hear evidence in a specific oral form or, as urged by Canada, to "test" evidence already brought. The parties have otherwise had ample time to commit the adjudicative and legislative facts essential to their case to affidavits.

In this respect, Canada, in its comment, submits that the Applicants' assertions that the Board has limited their freedom of expression "would warrant further probing, particularly since Canada has offered evidence that the applicants have engaged in a wide range of expression." Yet the Applicants do not contradict Canada's evidence in their reply comment. Rather, the Applicants submit that the Board is "the only meaningful forum in which to express their concerns about the proposed Project."

While a court will generally conclude that a party, by not cross-examining on facts another has put forward, has accepted that evidence,[14] the Board is here neither bound by the strict rules of evidence nor by any legal requirement to hold cross-examination itself.

Where the Board has evidence sufficient to render its decision in full, it will not entertain "evidence for evidence's sake." In this case, the need for cross-examination has not been established. The Board will decide the Charter Motion based on the evidence and written submissions filed.

The Board is not, in coming to this conclusion, indicating the procedure it would have adopted had an arguable case for a Charter violation been presented to it during the comment period. The requirement of an oral process is necessarily a fact-specific inquiry, and the Board could find it necessary to engage in such a process if, on the specific facts before it, it required evidence to conduct a "reasonable limits" analysis under section 1 of the Charter. As set out below, however, the Board finds that the Applicants' claim of a section 2(b) infringement is without foundation.

2. The Applicants' Charter Motion

The Charter Motion consists of several constitutional claims. First, the Applicants request a declaration that section 55.2 of the NEB Act violates the freedom of expression guarantee in section 2(b) of the Charter (Legislation Challenge). Section 55.2 reads as follows:

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[13] *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at para. 22.

[14] See Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed. (Markham, ON: LexisNexis, 2009) at 1162.

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

The Applicants submit that "there can be no doubt" that the NEB Act's "directly affected" standard, enacted by Parliament in 2012, suppresses expression.

Alternatively, the Applicants raise three further claims, requesting in each a declaration that the Board itself has interpreted the otherwise-constitutional section 55.2 in a section 2(b)-infringing and unreasonable manner. First, the Applicants allege that the Board has created an unduly complex Application to Participate process (Application Process Challenge). They then allege that the Board has adopted an "extremely limited" interpretation of the NEB Act's "directly affected" standard in its Ruling on Participation (Participation Ruling Challenge). Finally, they allege that the Board has unreasonably excluded consideration of upstream and downstream environmental and socio-economic effects from the hearing (List of Issues Challenge).

As a remedy, the Applicants ask the Board to re-open the Application to Participate process to allow "all persons interested in and affected by" the Project to participate "fully" and to hear evidence on upstream and downstream environmental and socio-economic effects.

In her 16 May 2014 response to the Charter Motion, Robyn Allan writes in general support of the Applicants' position. Likewise, Tsartlip First Nation, in its 24 June 2014 comment, concurs with the Applicants and further submits that the Board's exclusion of upstream and downstream environmental and socio-economic effects from its List of Issues "fails to provide an information base that will support a meaningful consultation process."

In Trans Mountain's 15 May 2014 response, the company opposes the Charter Motion, arguing that section 2(b) "does not place a positive obligation on the Board to allow parties, who it has determined are not directly affected or have insufficient relevant information or expertise, to participate in its process." In its 30 June 2014 comment, CAPP adopts a similar position.

In its 27 June 2014 comment, Canada also opposes the Charter Motion with respect to the Legislation Challenge, arguing that section 2(b) "does not guarantee standing to everyone who may wish to make representations before the Board."

As set out in sequence below, the Board is not persuaded that the Legislation Challenge, the Application Process Challenge, the Participation Ruling Challenge, or the List of Issues Challenge have merit.

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(a) Legislation Challenge

The term "expression," as defined by the Supreme Court of Canada, is a sweeping concept: it includes any activity that conveys or attempts to convey meaning.[15] In this case, there can be no question that the Charter Motion involves "expression," nor do Trans Mountain, CAPP, or Canada argue otherwise.

The scope of expression "protected" from the state under section 2(b) of the Charter, however, is more limited. The Court has held that violent expression, for example, is not Charter-protected,[16] nor is the right to expression in certain "restricted access" venues of government.[17]

Likewise, starting in its 1993 decision in *Haig v. Canada*, the Supreme Court has expressly recognized that section 2(b) generally imposes a "negative" obligation of non-interference on the government, but not a "positive" obligation of assistance. As the Court has phrased it:

> The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones.[18]

In its subsequent 1994 decision in *Native Women's Association of Canada v. Canada*, the Court held as follows regarding the expression right:

> The freedom of expression guaranteed by s. 2(b) of the Charter does not guarantee any particular means of expression or place a positive obligation upon the Government to consult anyone. The right to a particular platform or means of expression was clearly rejected by this Court in Haig.[19]

In its more recent 2007 decision in *Baier v. Alberta*,[20] the Court set out the conditions for finding a Charter violation in cases raising "positive rights" claims as follows:

> (1) that the claim is grounded in a fundamental freedom of expression rather than in access to a particular statutory regime; (2) that the claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s. 2(b) freedom of expression, or has the purpose of infringing freedom of expression under s. 2(b); and (3) that the government is responsible for the inability to exercise the fundamental freedom.[21]

Trans Mountain and Canada each argue that the Applicants are claiming a "positive entitlement" to which the *Baier* test applies.

The Applicants, on the other hand, argue that they merely seek access to an existing platform on which they could previously express themselves. As such, the Applicants submit that the ordinary test for section 2(b)-protected expression on government property applies. That test is set out in the Supreme Court's decision in *City of Montréal v. 2952-1366 Québec Inc.* as follows:

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15 *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 (*Irwin Toy*) at page 969.
16 *Irwin Toy* at pages 969-70.
17 *City of Montréal v. 2952-1366 Québec Inc.*, 2005 SCC 62 (*City of Montréal*) at para. 79.
18 *Haig v. Canada*, [1993] 2 S.C.R. 995 at page 1035.
19 *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 at para. 73.
20 2007 SCC 31 *(Baier).*
21 *Baier* at para. 30.

> The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:
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> (a) the historical or actual function of the place; and
> (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.[22]

(i) Application of Baier

The Board is persuaded that *Baier* applies to the Legislation Challenge. In *Baier*, the Court held that "positive rights" are at issue where a claim is made that the government "must legislate or otherwise act to support or enable an expressive activity."[23] The Board is of the view that the Legislation Challenge represents such a claim.

Among other things, the Applicants assert that "all persons interested in and affected by" the Project should be able to participate in the hearing – a materially broader threshold than section 55.2's "directly affected" standard. While the Board has considered the *Greater Vancouver Transportation Authority*[24] decision cited by the Applicants, the Board finds it distinguishable. Unlike the impugned restriction in *Vancouver*, section 55.2 concerns the issue of who may participate on a state-provided platform, not what can be said within it.

Here, the Applicants, in essence, call on the government to legislate to support their participation as a group. To the extent the Applicants submit that the Board's pre-2012 standing test is relevant in casting their claim as one for negative and not positive rights, the following *Baier* passage is instructive:

> In *Dunmore*, the statutory platform at issue had previously been extended to the claimants and had been withdrawn by amending legislation. The Court in that case nonetheless concluded that the claim presented was one of positive entitlement. The same is true in this case. The appellants had previously been included in the statutory scheme in question. The LAEA Amendments excluded them. They now seek inclusion in an underinclusive statutory scheme, the hallmark of a positive rights claim. The appellants are asking this Court to in effect constitutionalize the prior regime.[25]

Applying the test in *Baier*, the Board finds that the Charter Motion revolves around a claimed right to participate in the Board's process, not the exercise of a fundamental freedom. The Applicants seek a re-opening of the Application to Participate process and the Board's List of Issues.

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[22] *City of Montréal* at para. 74.
[23] *Baier* at para. 35.
[24] *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31.
[25] *Baier* at paras. 37-38.

The Applicants do not contest Canada's evidence that they have expressed themselves vigorously outside the Board on the matters they intend to bring to the Board's attention. Accordingly, the Board accepts that evidence, which demonstrates that the Applicants have expressed themselves via means that include panel discussions, newspaper editorials, online blog posts, articles and reports, Twitter, town hall meetings, public protests, and petitions.[26]

The Applicants' claim that the Board alone is "the forum that matters" echoes the *Baier* claimants' arguments concerning the "unique role" of a school trustee.[27] The Supreme Court rejected that argument as follows:

> In my view, the appellants have not established that their practical exclusion from school trusteeship substantially interferes with their ability to express themselves on matters relating to the education system. The LAEA Amendments may deprive them of one particular means of expression, but it has not been demonstrated that absent inclusion in this statutory scheme, they are unable to express themselves on education issues. As Bastarache J. noted in Delisle at para. 41, diminished effectiveness in the conveyance of a message does not mean that s. 2(b) is violated. There must be substantial interference with the fundamental freedom. School employees may express themselves in many ways other than through running for election as, and serving as, a school trustee.[28]

Moreover, the Board on 23 July 2014 issued Ruling No. 25 on motions to amend the List of Issues from the City of Vancouver and Parents from Cameron Elementary School Burnaby. In that ruling, the Board found that any link between the Project and upstream environmental effects would be "indirect" and "not necessarily incidental" to the Project's approval. Accordingly, the Applicants' claim that the Board is "the forum that matters" for climate change is, in the Board's view, a mischaracterization. As noted by Canada, the Applicants have numerous options for expression at their disposal, many of which they have already made use of.

Further, the Board is not persuaded that the Project hearing's participation limits amount to a "substantial" interference with the Applicants' expressive rights. These limits, as noted above, are no different than those that a prospective intervenor might find in any other administrative or judicial forum. More importantly, they impose no bound on the range of other expression available to the Applicants on the matters they wish to voice at the Board. A "substantial" interference with freedom of expression does not follow simply because the Applicants have been denied their preferred *means* of expression.

The Board notes that when parties were invited in its Process Letter to provide any specific legal authority for the issue of whether section 2(b) of the Charter places an obligation on a quasi-judicial tribunal or court to allow any interested member of the public to participate in its process, the Applicants did not do so.

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[26] See affidavit of Wendy Andrews, appended to Canada's comment.
[27] *Baier* at para. 44.
[28] *Baier* at para. 48.

The sole case the Applicants cite, *Doré v. Barreau du Québec*,[29] stands for the limited proposition that the Board must balance Charter rights against its statutory objectives when making decisions. Neither the Applicants nor any other party has provided a legal basis to support section 2(b) serving to constrain a tribunal or court's standing decisions. Such a precedent would have sweeping implications for the efficacy of court or tribunal systems.

Since the first two *Baier* factors are sufficient to dispose of the Legislation Challenge, the Board finds it unnecessary to consider the third factor or, for that matter, to conduct a section 1 Charter analysis.

(ii) Application of City of Montréal

Even if the Board is wrong to conclude that the *Baier* test applies to the Charter Motion, the Applicants' preferred *City of Montréal* test is no more helpful to its Legislation Challenge. Under that test, the question is whether the Board – a quasi-judicial administrative tribunal – is "a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve."

CAPP, in its 30 June 2014 comment, answers as follows:

> The NEB is not the public space of an airport. It is not the side of a bus. It is not a public street or a public park or other similar type of public space. It is not any of the kinds of public places where freedom of expression has been found to be or is expected to be exercised. Just as political debate among the citizenry at large has no place in a court, so too it has no place in the quasi-judicial process. The NEB is not the town commons.

In the Charter Motion, the Applicants assert that the Board is "intended for expression," and that public participation lies at the "core of its mandate." In the Board's view, however, the Applicants misconstrue the clear sense in which the Court uses "expression" in *City of Montréal*, as embodied in the following passage from the decision:

> Is the function of the place – the activity going on there – compatible with open public expression? Or is the activity one that requires privacy and limited access? Would an open right to intrude and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity? Many government functions, from cabinet meetings to minor clerical functions, require privacy. To extend a right of free expression to such venues might well undermine democracy and efficient governance.[30]

The question, for section 2(b) purposes, is whether the government property at issue is compatible with "open public expression." Quasi-judicial tribunals like the Board invariably establish expression-limiting rules of procedure, relevance, and decorum. They have never been forums for free, open-ended expression. Like in a court, one cannot simply "intrude and present one's message."

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[29] 2012 SCC 12.
[30] *City of Montréal* at para. 76 (emphasis added).

The Board invites public participation in its process not merely for the sake of the exercise, but to assist it in fulfilling its statutory mandate of regulating pipelines, energy development, and trade in the Canadian public interest. In the context of a section 52 hearing, public participation allows the Board to hear evidence relevant to the questions it must answer regarding safety, the environment, and Aboriginal points of view. The evidence and submissions of parties enable the Board to make an informed recommendation to the Governor in Council as to whether any given project is in the public interest. However, under its statutory scheme, the Board is required to hear only from those persons who, in its opinion, are directly affected by a project or have relevant information or expertise.[31]

An untrammeled right of the public to "open public expression" at the Board would undoubtedly come at the expense of the Board's statutory objectives. It would also come at the expense of a value core to the section 2(b) guarantee: truth-finding.[32] The Board cannot efficiently, effectively, or fairly hear the evidence it needs to assess the public interest in a project if it must hear from any and all persons wishing to express an opinion on it.

This is not to suggest that the Board is unable to hear a wide variety of viewpoints in the Project hearing. The Board has granted intervenor and commenter status to approximately 400 and 1,250 persons or groups, respectively. This level of participation enables the Board to hear from a broad cross-section of the Canadian public affected by Trans Mountain's proposal.

For the reasons set out above, the Board finds that even if the Supreme Court's test in *City of Montréal* applies, the Applicants' Legislation Challenge cannot succeed.

(b) Alternative challenges

In a set of alternative arguments, the Applicants challenge the Board's own decision-making rather than the NEB Act. Specifically, the Applicants challenge the Board's Application to Participate process, Ruling on Participation, and List of Issues determination on the basis that each infringes section 2(b) of the Charter. As a result, the Applicants argue, the Board has exceeded its jurisdiction under law.

(i) Application Process Challenge

First, the Applicants claim that the Board has established an "inordinately complex" Application to Participate process that has had the effect of suppressing expression. In particular, The Applicants criticize the Board's procedures for posting parties' contact information and its submission timelines. The Applicants also suggest that section 2(b) supports interested parties' right to make a brief oral statement.

Trans Mountain argues that section 2(b) is not engaged by the Applicants' Application to Participate claim, noting that there is "no positive obligation upon the government or the Board to permit the Applicants to participate in a particular process."

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[31] *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 2(2).
[32] *City of Montréal* at para. 74.

The Board finds that the *Baier* analysis outlined above also applies to a challenge to the Board's decisions. The Applicants' complaints about the Board's process amount to a "positive rights" claim that the Board must alter its process to support parties' "effective" participation in the hearing. That claim centers around the terms of their access to the Board's hearing, not freedom of expression. On a *Baier* analysis, the "diminished" ability to convey a message does not measure up to the substantial infringement required to engage section 2(b).[33]

As per its reasoning in the Legislation Challenge, the Board is also of the view that if *Baier* does not apply, a *City of Montréal* analysis leads to the same conclusion: the Board's procedures do not engage section 2(b).

Accordingly, the Board finds the case relied upon by the Applicants, *Doré v. Barreau du Québec*,[34] unhelpful to their argument. The Supreme Court in *Doré* set out the need for tribunals, when issuing decisions impacting the Charter, to "balance the severity of the interference of the Charter protection with the statutory objectives" assigned to them.[35] The Court's test asks whether the "decision-maker disproportionately, and therefore unreasonably, limited a Charter right."[36] That justification analysis, however, can only follow a finding of section 2(b)'s infringement. Here, the Applicants cannot ask the Board to apply a *Doré* balancing analysis without first demonstrating how section 2(b) rights are, in fact, engaged by its Application Process Challenge on the applicable tests.

The Applicants cite the Board's public information sessions as "telling" as to the section 2(b)-infringing character of its process. However, as noted in the Board document filed in the Skuce affidavit, these sessions were not a manifestation of the current Project hearing, but have been in place for several years, including for the Enbridge Northern Gateway Project hearing.[37] They serve to enhance the accessibility of the hearing and, in turn, the ability of participants to express their views before the Board. Information sessions are especially important for participants who are unfamiliar with Board or court processes, or who lack legal representation. The Board notes that few tribunals or courts do not provide some form of assistance (either in the form of documents or services) to the public in respect of their processes. Such assistance recognizes the learning curve inherent in any adjudicative process.

(ii) Participation Ruling Challenge

The Applicants' second claim is that the Board violated section 2(b) by adopting an unduly narrow interpretation of "directly affected" in section 55.2 of the NEB Act. Although the Applicants do not allege specific errors of law in the Board's decision, they submit that the Board had the discretion to, and should have, adopted a "liberal and generous" public-law standard of participatory rights.

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[33] *Longley v. Canada (Attorney General)*, 2007 ONCA 852 at para. 109.
[34] 2012 SCC 12 (*Doré*)
[35] *Doré* at para. 56 (emphasis added).
[36] *Doré* at para. 6 (emphasis added).
[37] Affidavit of Nikki Skuce at para. 8 (filed with the 6 May Charter Motion).

Trans Mountain argues that the Board adopted "reasonable policies" to interpret and apply the section 55.2 standard and that The Applicants' claim does not, again, engage section 2(b) of the Charter.

Similarly to the Application Process Challenge, the Board finds *Baier* to apply to the Applicants' challenge to its Ruling on Participation. The Applicants again raise a "positive rights" claim that the Board must act to extend the platform it has created for expression to include a broader range of participants in the hearing. That claim, for the same reasons described above, cannot survive a *Baier* analysis.

As with the Application Process Challenge, the Board need not conduct a *Doré* balancing analysis where section 2(b) rights are not engaged.

Notwithstanding this, the Board is of the view that its application of section 55.2 represents a reasonable balancing of the expressive interests of potential hearing participants against its statutory objectives. In particular, the Board considered how every applicant uses the area where the Project would be located, how the Project would affect the environment, and how any such effects would, in turn, impact the applicant's use of the area. Assessing the NEB Act's "directly affected" standard by virtue of the closeness by which these elements are connected ensures that those most affected by the Project have a reasonable opportunity to express their views while, at the same time, providing for an efficient process. The Board also considered interests and direct effects of a commercial or financial nature and the use of land and resources for traditional Aboriginal purposes.

In the Charter Motion, the Applicants rhetorically ask: "how is any resident of the Greater Vancouver area not directly affected by this Project?" In the Board's view, such a sweeping interpretation of section 55.2 would frustrate the ability of any person to engage in meaningful participation in the Project hearing. It would also frustrate one of the shared aims of section 2(b) and the Board's statutory mandate – the search for truth – by rendering the timing and logistics of the hearing functionally unmanageable.

(iii) List of Issues Challenge

Finally, the Applicants allege that the Board's exclusion of upstream and downstream environmental and socio-economic effects from its List of Issues violates their expressive rights.

Trans Mountain submits that section 2(b) is not engaged by the List of Issues claim, and further submits that it would be unreasonable to require the Board to focus on issues outside of its jurisdiction.

The Board is not persuaded that its List of Issues determination violates the Applicants' freedom of expression. While that determination is a content restriction, it is not one that infringes section 2(b). Following the Supreme Court's reasoning in *Greater Vancouver Transportation Authority*,[38] the Board finds *City of Montréal*, rather than *Baier*, applicable. However, in *City of*

…/14

[38] *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at para. 35.

Montréal, the Supreme Court clearly held that not every content restriction on public property engages section 2(b). As canvassed in the Legislation Challenge above, while such restrictions may attract Charter scrutiny in a public park, they are indispensable to the just and efficient management of a tribunal hearing.

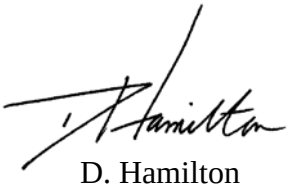
Given the Board's conclusion that section 2(b) is not engaged on the facts of the List of Issues Challenge, it follows that the need for a *Doré* balancing analysis does not arise.

The Board also notes that the Applicants have raised numerous substantive objections to the List of Issues relating to the *Canadian Environment Assessment Act, 2012*, global climate change commitments, and other matters, together with supporting evidence. However, the Applicants host these objections within their *Doré*-based constitutional argument that the Board's decisions "did not properly balance statutory obligations and Charter rights."[39] Unlike the City of Vancouver and Parents from Cameron Elementary School Burnaby, whose motions were dismissed in the Board's Ruling No. 25, the Applicants do not bring a free-standing challenge to the List of Issues. Accordingly, the Applicants' objections must fall with the List of Issues Challenge itself.

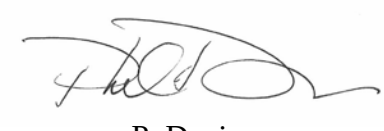
3. Disposition

As the Applicants have not established that section 55.2 of the NEB Act or the Board's actions in the Project hearing violate the Charter, their requests for declaratory relief, in addition to their request to re-open the Application to Participate process and List of Issues, are denied.

In the result, the Applicants' 6 May 2014 Charter Motion and 15 May 2014 Procedural Motion are dismissed.



D. Hamilton
Presiding Member



P. Davies
Member

A. Scott
Member

[39] See Charter Motion at para. 100.

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