



File OF-Fac-Oil-T260-2013-03 02
16 May 2014

Mr. Richard D. Pesklevits
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Dear Mr. Pesklevits and Mr. Gunn:

**Hearing Order OH-001-2014
Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
Requests for intervenor status from Mr. Richard D. Pesklevits and the Concerned
Professional Engineers (CPE)
Ruling No. 15**

The National Energy Board (Board) has received requests from Mr. Richard Pesklevits, dated 13 April 2014, and Mr. Brian Gunn, on behalf of the Concerned Professional Engineers (CPE), dated 1 May 2014, for intervenor status in this hearing. The Board has considered both of these requests as applications for a review of the Board's [Ruling on Participation](#) under section 21 of the *National Energy Board Act* (NEB Act), as amended by [Ruling No. 7](#) (dated 17 April 2014), which granted both Mr. Pesklevits and the CPE commenter status.

Decision

For the reasons given below, the Board is not persuaded that a doubt has been raised as to the correctness of the Board's Ruling on Participation. As a result, both requests for intervenor status from Mr. Pesklevits and the CPE are denied. Mr. Pesklevits and the CPE are reminded that the deadline to file and serve their letters of comment is **9 September 2014**.

Views of Mr. Pesklevits

Mr. Pesklevits states that the Board found him to be directly affected, as he indicated on his Application to Participate (ATP) and that, once it did so, it had no choice but to grant him the intervenor method of participation he had requested.

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Mr. Pesklevits states that the natural justice requirement that those who are impacted by a decision be heard by the decision-maker requires the decision-maker to hear from them in the manner requested by the impacted person. Similarly, he states that where section 55.2 of the NEB Act requires that the Board “shall consider” the representations from any person who is directly affected, it has no choice but to hear those representations in the manner the directly affected person chooses. Mr. Pesklevits states that there is no authority in the NEB Act to deny active engagement (including the ability to provide sworn evidence, question other parties, or provide comments on conditions) or force passive participation. Finally, Mr. Pesklevits states that he was not told the case to be met because the Board never indicated that, once an applicant established that they were directly affected, they would not be given the method of participation they sought.

For these reasons, Mr. Pesklevits states that the Board erred in law and exceeded its jurisdiction by only granting him commenter status, as a person found to be directly affected by the Project and seeking to be an intervenor.

Views of the CPE

In their review request, the CPE provide detail regarding their members’ expertise beyond what was provided in their original ATP. They state that they are prejudiced without intervenor status by not being able to test the evidence, and that they have demonstrated that they do not have a bias against the movement of petroleum products or export of Canadian resources and deserve intervenor status. Finally, they wish to be advised of the administrative error the Board corrected in Ruling No. 7.

Views of the Board

Under Part III of the *National Energy Board Rules of Practice and Procedure, 1995* (Rules), on an application for a review, the Board first considers whether the application has raised a doubt as to the correctness of the Board’s decision.

Section 55.2 of the NEB Act states:

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 provision does not specify how the Board is to hear those representations it “shall consider” and makes no reference to method of participation. There are no references to intervenor or commenter status in the NEB Act.

There is also no requirement to provide the requested or preferred method of participation in the principles of natural justice, including the duty of fairness. The content of the rules of natural justice and the duty of fairness are variable, depending on the case, the statutory provisions, and the nature of the matter to be decided¹. Processes which only provided for submissions limited to the form of a questionnaire² or an exchange of correspondence³ can fulfill the requirements of natural justice.

The author Sara Blake states:

The right to be heard is not a right to the most advantageous procedure⁴ ... It is only a right to have one's views heard and considered by the decision maker.

In this case, the Board is required under the NEB Act to make a recommendation, one that is polycentric in nature and involves a wide variety of considerations and interests. The Board accepted ATPs and provided detailed guidance as to what applicants had to demonstrate to meet the criteria of being directly affected or possessing relevant information and expertise, clearly outlining the case to be met. The Board did not state that those persons meeting either or both of the criteria would be given the method of participation they had requested and created no such legitimate expectation.

In carrying out its hearing responsibilities, particularly in circumstances where, as in this case, there were over 1,000 requests for intervenor status, the Board must find a balance between the accommodation of the requests of those seeking to participate and the need for an efficient regulatory process.

After the conclusion of the ATP process, the Board issued its Ruling on Participation, where it indicated that it evaluated each application on a case-by-case basis. In all cases where applicants demonstrated based on their ATP that they were directly affected or had relevant information or expertise, the Board granted participation, meeting the requirements of the NEB Act, the *Canadian Environmental Assessment Act, 2012*, and natural justice.

The Board provided reasons for why some persons who sought intervenor status were given commenter status instead. As stated in the Board's reasons: "[i]n these cases, the Board determined that the person was directly affected, but an intervenor method of participation was not appropriate or necessary for the concern raised." The Board went on to provide additional specifics as to why, in some instances, it reduced the method of participation. Mr. Pesklevits has

¹ *Syndicat des employés de production de Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879, paragraph 20.

² *Cannella v. Toronto Transit Commission*, [1999] OJ No 2282 (Ont Div Ct), where a personal mobility interest was at stake. Leave to appeal was refused.

³ *McLeod v. Alberta Securities Commission*, 2006 ABCA 231, paragraph 39.

⁴ *Administrative Law in Canada*, 5th ed, 2011, page 12. Blake refers to *Ironside v. Alberta (Securities Commission)*, 2009 ABCA 134 paragraph 107 where the Alberta Court of Appeal stated that, even in a criminal court, where a liberty interest is at stake, "the accused's right to adjudicative fairness is not a right to the most advantageous procedure or reading of law that may be imaginable" in upholding the procedure utilized by the Alberta Securities Commission in that case.

provided no persuasive legal authority to raise a doubt about the correctness of the Board's approach.

With respect to CPE's concern where it requested intervenor status based on having relevant information and expertise, there is no legal requirement that the Board must hear from CPE in the manner in which it requested. Where the Board determined that applicants possessed relevant information or expertise, it also exercised its discretion to provide the method by which such relevant information or expertise could best be gathered to assist the Board. CPE has not persuaded the Board that this approach is incorrect.

For these reasons, the Board is not persuaded that a doubt has been raised as to the correctness of the Board's amended Ruling on Participation granting commenter status to Mr. Pesklevits and the CPE. As a result, the Board did not consider new information provided by Mr. Pesklevits and the CPE in their review applications in support of seeking intervenor status and the requests are denied.

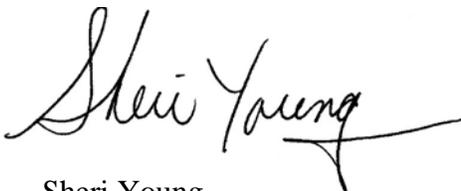
Regarding some of the submissions made by the CPE, the Board notes that it cannot and does not consider an applicant's position on this Project or others when deciding whether they will be able to participate and through which method. In response to the CPE's question about the administrative error that was corrected, the Board made an error originally when it did not give CPE standing. This was corrected in Ruling No. 7.

With respect to Mr. Pesklevits' request that a comment period be instituted, the Board is not persuaded that a formal process is required. The Board also declines his request to send e-mail notification as each document is filed on the online registry. Except in instances of confidentiality, all filings are available for review by commenters as well as members of the public. Many commenters do not wish to receive electronic notice of all filings as this can be a large volume of material.

As stated in the Board's reasons about participation, letters of comment are a valuable and important contribution. Each letter will be read and considered.

For questions about the Board's hearing process, please see the Board's OH-001-2014 [Hearing Order](#), or contact any member of the Board's Process Advisor Team at 403-292-4800 or 1-800-899-1265 (toll-free), or by email at transmountainpipeline.hearing@neb-one.gc.ca.

Yours truly,

A handwritten signature in black ink that reads "Sheri Young". The signature is written in a cursive, flowing style with a long horizontal line extending from the end of the name.

Sheri Young
Secretary of the Board

c.c. Trans Mountain