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BY ELECTRONIC FILING

National Energy Board
517 10th Ave SW
Calgary, AB T2R 0A8

Attention: Sheri Young
Secretary of the Board

Dear Ms. Young:

**Re: Trans Mountain Pipeline ULC (“Trans Mountain”)
Trans Mountain Expansion Project (the “Project”)
File OF-Fac-Oil-T260-2013-03-02 – Hearing Order OH-001-2014
Response to National Energy Board Letter dated August 21, 2015**

We write on behalf of the City of Burnaby (“Burnaby”) in relation to Trans Mountain’s letter of August 28, 2015 ([A4S9W3](#)) and attachment ([A4S9W4](#)) responding to the National Energy Board’s (“NEB” or the “Board”) letter dated August 21, 2015.

1. The Review Process for the Project must Start Again

The Panel has not gone far enough in only striking the evidence of Mr. Steven Kelly. Burnaby is of the view that the review process for the Project has been irrevocably tainted by the appointment of Mr. Kelly as a permanent Board member, and must start again from the beginning with the appointment of a new panel in order to cure what the Board has referred to as “concerns about the integrity of this hearing process”.¹ The striking of Mr. Kelly’s evidence by the Board in no way cures the perception of this review process as biased or unfair; additional steps must be taken on an urgent basis to restore the integrity of the hearing.

The Panel members cannot disabuse their minds of the evidence of Mr. Kelly on the need for the Project. This is evidence that has been on the record for some time, and has been the subject of

¹ Exhibit A208-1, National Energy Board, Letter Striking of evidence prepared by or under the direction of Mr. Steven J. Kelly and postponement of oral summary argument in Calgary and Burnaby, <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2812678/A208-1 - Letter - A4S8Y8.pdf?nodeid=2813274&vernum=-2>, at 1.

multiple rounds of information requests by the Panel and by intervenors, and the Panel has subsequently ruled on motions to compel better responses to those information requests. The Panel is intimately familiar with the evidence of Mr. Kelly, and it is unreasonable to assume, whether it is on the record or not, that it will not impact on any future decisions of this Panel.

The Panel has already made a number of decisions based on the evidence of the need for the Project, including the issuing of the draft conditions and various other decisions throughout the review process for the Project. Of particular concern to Burnaby, is the decision to allow the destruction of the Burnaby Mountain Conservation Area on the basis that it would not be in the public interest for the Panel to make its recommendation on the Project without the studies on Burnaby Mountain.² These decisions are based on the underlying assumption that there is a need for the Project established by Trans Mountain – an assumption that is largely based on the evidence of Mr. Kelly. These decisions must be revisited by a new Panel in light of the striking of the evidence of Mr. Kelly on the need for the Project.

The draft conditions for the Project must be withdrawn and reconsidered. The draft conditions for the Project currently defer the consideration of many of the most critical issues for the Project, including fire and seismic risk and emergency preparedness and response until after the approval of the Project. The only basis for the NEB to conclude that the Project is sufficiently in the public interest to deal with these critical matters after approval is the need for the Project. Given that the evidence of the need for the Project has now been struck, the draft conditions must similarly be struck and reconsidered in light of the new evidence to be filed by Trans Mountain.

Mr. Kelly's evidence has tainted this entire hearing, and the process must begin again to erase the perception of bias towards Trans Mountain. If the Panel does not take the necessary steps to remedy the perception of the hearing process as lacking in integrity, the hearing will continue to lack public support and more intervenors will refuse to participate in the process.

2. Impacts on the Toll Methodology Hearing

Based on the logic of the Board, that “the dual role of Mr. Kelly, as a person who prepared evidence in this proceeding and as a future Board member, may raise concerns about the integrity of this hearing process”³, all other rulings made in relation to the Project in which Mr. Kelly's evidence was relied upon are now tainted and must be considered null, and re-decided.

Mr. Kelly's evidence was relied upon by Trans Mountain for the Toll Methodology Hearing for the Project. The decision in that hearing was in part based on the evidence of Mr. Kelly. That decision is now tainted by the Board's ruling in this hearing that Mr. Kelly's evidence must be struck to maintain the integrity of the Board. Burnaby is of the view that the evidence of Mr. Kelly should also be struck from the record of the Toll Methodology Hearing for the Project and

² Exhibit A97-1, National Energy Board, Ruling No. 40, Trans Mountain notice of motion and Notice of Constitutional Question dated 26 September 2014, <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/2540944/A97-1 - Ruling No. 40 - Trans Mountain notice of motion and Notice of Constitutional Question dated 26 September 2014 - A4D6H0.pdf?func=doc.Fetch&nodeid=2540944>.

³ Exhibit A208-1, National Energy Board, Letter Striking of evidence prepared by or under the direction of Mr. Steven J. Kelly and postponement of oral summary argument in Calgary and Burnaby, <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2812678/A208-1 - Letter - A4S8Y8.pdf?nodeid=2813274&vernum=-2>, at 1.

that hearing re-decided in order to restore the integrity of the Board, and quash any view that the Board is captured by industry.

3. The City of Burnaby is Deeply Disturbed and Very Concerned with the Review Process

Burnaby is deeply concerned with this Panel and the review process for the Project. Burnaby has alerted this Panel, on numerous occasions, as to Panel actions and decisions that reflect a preference for the needs and concerns of the proponent at the expense of the principles of natural justice and procedural fairness. This Panel has consistently rejected Burnaby's, and other intervenor's, attempts to ensure the review process is fair and considers whether this Project is in the interest of the broader Canadian public, as opposed to the interest of the proponent and the oil industry.

We wrote to the Panel in March 2014 about our concerns that Trans Mountain's application was incomplete.⁴ Our request was effectively ignored although within months it became clear that Trans Mountain's application was indeed incomplete. A delay in the process was required while Trans Mountain determined the feasibility of an alternative route through Burnaby Mountain.

This search for an alternative route, as the Board is well aware, ripped at the fabric of our community, and caused significant damage to the Burnaby Mountain Conservation Area. It resulted in a significant and highly publicized protest by concerned citizens, including many Burnaby residents, and consequently the improper arrest of many citizens opposed to Trans Mountain's application. Trans Mountain brought the full weight and influence of their corporate power and deep pockets – filled by a previous decision made by the NEB – to force its private need against the public will.

We further wrote to the Board in April 2014 supporting the re-instatement of cross-examination into the hearing timetable. Burnaby sought an oral hearing on the matter.⁵ The Board refused.⁶ The beneficiary of this ruling is Trans Mountain – not intervenors or the broader public interest – as the Project is pushed through a review process that is viewed by the public as nothing more than a rubber stamp for industry.

Many intervenors argued strongly for the Board to include cross-examination at this hearing in order to allow the evidence of Trans Mountain to be tested, to allow any inconsistencies in the evidence to come to light and to allow the credibility of the experts to be tested. Ironically, had the Board included cross-examination, consistent with all past Section 52 oil pipeline hearings,

⁴ Exhibit C69-1-1, City of Burnaby, Letter to the Board, March 17, 2014, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450531/2434880/C69%2D1%2D1_%2D_Letter_%2D_A3V3D8.pdf?nodeid=2434549&vernum=-2.

⁵ Exhibit C69-3-1, City of Burnaby, Response to Notice of Motion by Robyn Allan dated April 14, 2014, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450531/2451992/C69-3-1_-_City_of_Burnaby_-_Response_to_Notice_of_Motion_of_Robyn_Allan_-_A3W0L2.pdf?nodeid=2451425&vernum=-2.

⁶ Exhibit A32-1, National Energy Board, Ruling No. 14, Notices of Motion from Ms. Robyn Allan and Ms. Elizabeth May to include cross examination of witnesses, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2453401/A32%2D1_%2D_Ruling_No%2E_14_%2D_Notices_of_motion_from_Ms%2E_Robyn_Allan_and_Ms._Elizabeth_May_to_include_cross%2DExamination_of_witnesses_%2D_Trans_Mountain_Project_%2D_A3W5J1.pdf?nodeid=2453205&vernum=-2.

and as it did for the related Trans Mountain Expansion Project Part IV Toll Methodology Hearing, this review process would now be in the cross-examination phase. Regrettably, the Board held that there was insufficient time to include cross-examination. We now find that its inclusion could have been accommodated in the current hearing schedule – as there is currently time to accommodate the conflict of interest created by the Board and Trans Mountain – and potentially even have expedited the hearing process, with issues of credibility coming to the surface earlier.

Burnaby's additional concerns regarding the Board's process are documented on the hearing record and will not be further elaborated upon here. Burnaby, along with seven other lower mainland Municipality Mayors, declared non-confidence in this process on March 31, 2015.⁷ We requested the review be put on hold until an adequate public hearing process could be put in place. Burnaby finds that the Panel's decision to delay these hearings because of the obvious conflict of interest surrounding Mr. Kelly's appointment, as important as it is, does not account for the numerous other failings of this hearing process that need to be addressed, and should be addressed at this time. The striking of Mr. Kelly's evidence from the record and replacing it at the eleventh hour, in no way legitimizes this hearing process. The Board's recent decision, and its timing, is further indication of a broken process and evidence of an erosion of the integrity of the NEB.

Burnaby requests that the Board use the current delay in the hearing timetable to address some of the serious deficiencies with the NEB process for the Project to date. Particularly, Burnaby requests the opportunity to cross-examine Trans Mountain on all of its evidence to test, amongst other things, the credibility of the experts being relied upon by Trans Mountain. Burnaby proposes that this cross-examination take place during the timeline set for the previous oral hearings.

4. Conflict of Interest and Mr. Kelly's Appointment

The appointment of Mr. Kelly as a permanent Board member by Order in Council 2015-1137 on July 28, 2015 (the "OIC")⁸, along with the Panel's decision to strike Mr. Kelly's evidence more than three weeks later, is the latest in a series of Panel decisions that have exposed this hearing as deeply flawed.

Mr. Kelly's appointment was more than six months in the making, since Mr. Kelly responded to a posting for permanent Board members released in January 2015.⁹ The NEB was aware of the application and involved in the decision, even as Mr. Kelly continued to prepare written evidence for the Board for the hearing for the Project.

⁷ Exhibit C69-44-13, City of Burnaby, Mayors Declaration on Kinder Morgan National Energy Process, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450531/2785208/C69-44-13_-_Mayors_Declaration_on_Kinder_Morgan_National_Energy_Board_Process_-_A4L8G7.pdf?nodeid=2785519&vernum=-2.

⁸ Privy Council Office, Order in Council 2015-1137, July 28, 2015, <http://pco-bcp.gc.ca/oic-ddc.asp?lang=eng&txtToDate=&txtPrecis=&pg=11&Page=secretariats&txtOICID=&txtAct=&txtBillNo=&txtFromDate=&txtDepartment=&txtChapterNo=&txtChapterYear=&rdoComingIntoForce=&DoSearch=Search+%2F+List&pedisable=true&viewattach=31472&blnDisplayFlg=1>.

⁹ Canada Gazette, Government Notices, January 31, 2015, <http://gazette.gc.ca/rp-pr/p1/2015/2015-01-31/html/notice-avis-eng.php>.

Further developments in the past week suggest internal conflict at the NEB over this issue. Panel Chair, David Hamilton, has publicly stated that the decision to halt the hearing and remove Mr. Kelly's evidence came from the Panel and not the larger Board – stating “[i]t was the Panel, absolutely.”¹⁰ Although earlier in this hearing participants were advised that the Panel represents a quorum of the Board, and thus, is the Board – “[t]he Panel of three Board Members, including Member Hamilton, is the appropriate decision-maker to hear this motion and represents a quorum of the Board.”¹¹

When asked how much the Panel knew about Mr. Kelly's appointment, Mr. Hamilton indicated that questions should be addressed to Mr. Watson, Chair and CEO of the Board. Mr. Hamilton did not confirm or deny whether the Panel knew Mr. Kelly had applied as a permanent Board member, or the status of his application, prior to the OIC on July 28, 2015.

An NEB spokesperson indicated that Mr. Watson was involved in the appointment process. Yet, Mr. Watson refuses to answer any questions related to this matter. Natural Resources Canada (NRC), however, has previously confirmed that Board member appointments are decisions of the entire Board. In another recent appointment announced June 30, 2015, NRC confirmed, “[a]ppointments to the National Energy Board are based on merit and ability. The competitive vetting process including the non-partisan public service and independent National Energy Board was unanimous in favour of Dr. Lytle's selection.”¹²

Regarding Mr. Kelly's appointment, it is assumed that the same process was followed as was followed for Dr. Lytle, including approval by the Board. Thus, this Panel would have been aware some time ago that Mr. Kelly would become their colleague. Burnaby is concerned about this delay and the lack of candor from the Board on the true reasons for halting the review process for the Project at this time.

Even assuming the Panel was unaware of Mr. Kelly's application and pending appointment, the Panel's decision to halt this hearing was delayed for almost a month after Mr. Kelly's appointment received an OIC. The Panel's letter came on the heels of Trans Mountain filing reply evidence, its final written argument and claiming on August 20, 2015 that a new witness – Steven Fekete – would adopt Mr. Kelly's evidence, and only a few days before the Panel was set to hear Trans Mountain's oral argument.

The Panel has not offered a sufficient explanation for this delay, which has resulted in prejudice to intervenors and wasted expense in preparing argument in response to Trans Mountain's economic evidence. There is no explanation for why Mr. Kelly was not excluded from potential candidates due to his close relationship with Kinder Morgan, and his preparation of evidence for

¹⁰ Burnaby Now, Burnaby questioning timing of NEB delays, August 27, 2015,

<http://www.burnabynow.com/news/burnaby-questioning-timing-of-neb-delays-1.2042458>.

¹¹ Exhibit A27-1, National Energy Board, Ruling No. 11, Notice of Motion by Mr. Marc Eliesen – Question of Reasonable Apprehension of Bias by Panel Chair, Mr. David Hamilton, April 28, 2014, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2452125/A27%2D1_%2D_Ruling_No%2E_11_-_Notice_of_motion_by_Mr%2E_Marc_Eliesen_-_Question_of_reasonable_apprehension_of_bias_by_Panel_Chair%2C_Mr._David_Hamilton%2D_Trans_Mountain_Expansion_Project_%2D_A3W1U4.pdf?nodeid=2451640&vernum=-2, at 2.

¹² National Observer, Harper gov't appoints another oil and mining exec to NEB, July 3, 2015, <http://www.nationalobserver.com/2015/07/03/news/harper-gov-t-appoints-another-oil-and-mining-exec-neb>.

this hearing. There is further no explanation for why Mr. Kelly's appointment was not delayed until after the decision on the Project application was made. Given that this is such a blatant conflict of interest to warrant the striking of evidence, surely the NEB should have considered these issues prior to approving Mr. Kelly. Failure to consider these issues points to a concerning lack of regard for impartiality and objectivity on the part of the NEB.

The Panel's August 21, 2015 letter assures intervenors that the Panel members do not know Mr. Kelly personally. This assertion is inconsistent with the facts. Two out of three of the Panel members' relationship with Mr. Kelly, and their personal familiarity with his evidence at the Part IV related hearing, is recorded in sworn transcripts.¹³ Mr. Kelly's tenure as a long time paid consultant on behalf of Trans Mountain's operator, Kinder Morgan Canada Inc. is well documented within the NEB. He was their expert witness during the Application for Firm Service to the Westridge Marine Terminal RH-2-2011, as well as the Application for Approval of the Toll Methodology of Trans Mountain once Expanded RH-001-2012.

Burnaby urges this Board to recognize that the withdrawal of Mr. Kelly's evidence hardly addresses the serious conflict of interest Mr. Kelly represents on a go forward basis on any and all applications involving Mr. Kelly's previous clients – in particular Kinder Morgan and Enbridge. The appointment of Mr. Kelly only further proliferates the view that “[t]he NEB have totally become a captured industry regulator” and that the scales are permanently tilted towards the energy sector.¹⁴ It is completely inappropriate to appoint to a Board, who is supposed to be making objective decisions on pipeline projects, a member who has provided evidence on the economic justification for these types of projects on multiple occasions. This Panel further should be asking if Mr. Kelly has met the requirement of good behaviour required by his appointment if he knowingly produced written evidence for this hearing, while he was applying for and subsequently accepted a permanent Board position.¹⁵

5. Trans Mountain's Response of August 28, 2015 to Board Letter of August 21, 2015

The Board letter required Trans Mountain to provide a list identifying all evidence prepared by or under the direction of Mr. Kelly that was filed in this proceeding. The Board also requested that Trans Mountain advise the Panel whether it plans to replace this evidence; and if so, the date by which this evidence could be filed with the Board and served on all intervenors.

Trans Mountain provided a list of evidence as Appendix A to its letter. We address the insufficiencies in this list in Appendix 1 attached hereto, and request that the Board order Trans Mountain to file an updated list incorporating the items to be struck as identified by Burnaby, and the date on which such items can be updated. The list of additional evidence Burnaby has

¹³ National Energy Board, RH-001-2012, Hearing Transcript Volume 1, February 12, 2013, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/552980/954292/828580/917792/917686/A3F3Y2_%2D_13%2D02%2D12_%2D_Volume_1.pdf?nodeid=917789&vernum=-2.

¹⁴ National Observer, [BREAKING: Harper gov't appoints Kinder Morgan Consultant to NEB, August 1, 2015, http://www.nationalobserver.com/2015/08/01/news/harper-gov%E2%80%99t-appoints-kinder-morgan-consultant-neb](http://www.nationalobserver.com/2015/08/01/news/harper-gov%E2%80%99t-appoints-kinder-morgan-consultant-neb).

¹⁵ Exhibit B421-43, Trans Mountain, Affidavit of Steven Fekete, August 20, 2015, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2812276/B421%2D43_%2D_Affidavit_of_Stephen_Fekete_%2D_A4S8J3.pdf?nodeid=2813166&vernum=-2.

identified is provided in Appendix 1 along with comments on why this evidence should be struck.

Trans Mountain has advised the Board that it intends to replace the evidence prepared by Mr. Kelly and amend the evidence prepared by Mr. Hodgson and Mr. Reed that relied on Mr. Kelly's evidence by September 25, 2015. Burnaby requests that the Board order Trans Mountain to amend additional items as identified in Appendix 1, including sections of its original application, its final argument and affidavits, as appropriate, and include these amended items with its submission on September 25, 2015, or on a date to be determined by the Board.

6. Mr. Kelly's Evidence Does Not Relate to a "Narrow Issue"

Trans Mountain submits to the Board that Mr. Kelly's evidence relates to a "narrow issue". If the need for the Project, its economic feasibility, and commercial and economic impacts are a "narrow issue", then this would be accurate. However, these are significant issues and encompass four of the twelve issues this Panel has said it will consider in its List of Issues.¹⁶ The Board has a responsibility under the *National Energy Board Act*, R.S.C. 1985, c. N-7 to determine the economic feasibility of the Project and the public interest to be affected by the Project. Trans Mountain, by suggesting feasibility is narrow, has trivialized the entire review. This does not serve the public interest nor does it serve the Board.

Although Trans Mountain wishes to engage in a self-serving re-characterization of the role Mr. Kelly's evidence plays, Burnaby wishes to direct the Board's attention to how Mr. Kelly's evidence was presented in the initial application. The terms of Mr. Kelly's engagement with Trans Mountain were indicated on page 6 of his report. Specifically, Mr. Kelly was asked to address the following questions:

- 1) If the TMEP is constructed as planned, is it reasonable to expect that the facilities will be highly utilized?
- 2) If the TMEP is built as planned, is it reasonable to expect that it will produce a benefit for Canadian producers in the form of higher netback prices for their crude oil production? What is the expected aggregate amount of economic gain to producers from the Project's development?
- 3) Would the TMEP provide access to new markets, and is access to these new markets a benefit to producers?¹⁷

These are not narrow questions, or questions that do not have a bearing on whether the Project should proceed. These are questions that go to the heart of the Board's determination of whether

¹⁶ Exhibit A15-3, National Energy Board, Hearing Order OH-001-2014, April 2, 2014, Appendix 1, List of Issues, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2445930/A15%2D3_%2D_Hearing_Order_OH%2D001%2D2014_%2D_A3V612.pdf?nodeid=2445615&vernum=-2.

¹⁷ Exhibit B1-5, Trans Mountain, Trans Mountain Expansion Project Application, Volume 2, Appendix A, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2385938/B1%2D5_%2D_V2_4of4_PROJ_OVERVIEW_%2D_A3S0R1.pdf?nodeid=2392869&vernum=-2, at 6.

the Project is and will be required by the present and future public convenience and necessity, including the need for the proposed project, the economic feasibility of the proposed Project and the potential commercial and socio-economic impacts of the proposed Project

The Board has consistently ruled that the Part IV Hearing has no bearing on the List of Issues at this Hearing and thus Kinder Morgan's false assertions that binding contracts exist, and determinations made at the Part IV Hearing provide proof for the need, financial feasibility and commercial impact, are without any merit or weight.

*"In RH-001-2012, the Board did not decide on economic feasibility. Rather, the Board found that the open season was fair, the allocation of capacity appropriate, and the toll methodology would produce just and reasonable tolls. The Board noted that the Toll Order and specified relief are contingent on the expanded system's approval under Part III of the NEB Act. This in no way suggests whether the Board's recommendation will be to approve or to deny the current Application. It also does not suggest there has been a predetermination of any matter on the List of Issues for the Application. Whether a witness for the applicant has referred to something in his or her evidence from a previous hearing is not determinative of any future Board finding."*¹⁸ (emphasis added)

Thus, the only evidence Kinder Morgan had on the record to allow consideration of the first three items on the List of Issues, and a critical component of the evidence provided on the fourth item in the List of Issues, was Mr. Kelly's evidence. Without this evidence, the Board cannot recommend approval for this Project.

7. Trans Mountain Bears the Responsibility for the Delay

Trans Mountain has requested the Board, "minimize any further delay and prejudice to Trans Mountain, and in light of the fact that this delay was in no way caused by the actions of Trans Mountain and that Trans Mountain is only re-filing evidence relating to a narrow issue, Trans Mountain respectfully requests that the Panel expedite the remaining procedural steps required to conclude its review of the Project Application."¹⁹ In doing so, Trans Mountain has failed to acknowledge the role that Trans Mountain had in delaying this process and has underplayed the importance of Mr. Kelly's evidence.

Trans Mountain's unfounded deflection of responsibility is astounding. It is Trans Mountain's executives that are, to a large degree, responsible for the delay in the proceedings. Trans Mountain has failed to ensure that the consultant it commissioned finished the job he was hired to do. Trans Mountain's inability to put in place a contract sufficient to ensure its consultant completed the duties required of an expert witness, and did not engage in activities directly in

¹⁸ Exhibit A27-1, National Energy Board, Ruling No. 11, Notice of Motion by Mr. Marc Eliesen – Question of Reasonable Apprehension of Bias by Panel Chair, Mr. David Hamilton, April 28, 2014, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2452125/A27%2D1_%2D_Ruling_No%2E_11_-_Notice_of_motion_by_Mr%2E_Marc_Eliesen_-_Question_of_reasonable_apprehension_of_bias_by_Panel_Chair%2C_Mr._David_Hamilton%2D_Trans_Mountain_Expansion_Project_%2D_A3W1U4.pdf?nodeid=2451640&vernum=-2, at 4.

¹⁹ Exhibit B422-1, Trans Mountain, Response to National Energy Board Letter dated August 21, 2015, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/2813116/B422-1_-_Trans_Mountain_Pipeline_ULC_-_Response_to_National_Energy_Board_Letter_dated_August_21%2C_2015_-_A4S9W3.pdf?func=doc.Fetch&nodeid=2813116, at 2.

conflict with those duties, is the reason why intervenors at these hearings, including Burnaby, have been unduly prejudiced. It is intervenors who are being asked to accommodate the costs and consequences of a delayed hearing. It is intervenors who must spend additional time and expense to ensure an adequate understanding and testing of Trans Mountain's new evidence. But for Trans Mountain's inability to manage its consultant and ensure he finished his job, Burnaby would not be faced with this situation and prejudice.

It was Trans Mountain that hired Mr. Kelly as a key expert in these hearings, not the Board and certainly not the intervenors. A request to Mr. Kelly was made verbally in a meeting with Trans Mountain in June 2013. Mr. Kelly prepared a proposal for consulting services based on the request and a contract was completed between Kinder Morgan Canada Inc. and IHS in July 2013.²⁰ Surely Kinder Morgan would ensure, as part of the terms of this contract that their expert would comply with the duties of an expert until the hearing was complete.

The only parties that bear no responsibility for this disruption to the hearing are the intervenors. Yet, the intervenors will bear the costs of this delay, resulting in extreme prejudice.

6. The Board Must Not Accept Trans Mountain's Request for Expedited Procedural Steps

The Board must not accept Trans Mountain's request for expedited procedural steps to conclude the hearing. It is critical in setting a new timeline that this hearing respects procedural fairness, and provides intervenors with adequate time to review the new evidence, test the new evidence, respond to the new evidence, and prepare argument on the new evidence, particularly given that this delay is in no way the responsibility of intervenors, and has resulted in extreme prejudice to intervenors, including Burnaby.

The process set out by the Board must be consistent with natural justice and the procedural fairness rights of those entitled to participate. The duty of fairness requires at a minimum that intervenors are provided with "a meaningful opportunity to present their case fully and fairly".²¹ Here, the Board's procedural fairness obligations are at the high end of the spectrum, given that the Project involves a major pipeline expansion that will potentially have significant impacts on the public, the environment, the economy, and the safety of marine transportation in Western Canada, with particular risks and impacts to Burnaby and its residents. The Project must be subject to a rigorous review by the Board with full participation by intervenors to determine whether it is in the public interest.

The Board must not let Trans Mountain's succeed in its attempt to rush this Project through to approval with as little process as possible and as little public input as possible. Burnaby is concerned that Trans Mountain seeks an expedited review as a way to ensure its new evidence is given little scrutiny. Burnaby sees Trans Mountain's request as an attempt to avoid proper due diligence on the evidence review because market forces have revealed the many weaknesses in its financial, commercial and economic case.

²⁰ Exhibit B60-1, Trans Mountain, Trans Mountain Response to Eliesen M IR No. 1, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2478561/B60%2D1_%2D_Trans_Mountain_Response_to_Eliesen_M_IR_No.1_%2D_A3X6D1.pdf?nodeid=2478128&vernum=-2, at 3.

²¹ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at 842.

Burnaby can assure the Board that significant time and effort was expended over the past twenty months to understand Mr. Kelly's evidence, how it fits into evidence prepared by other Trans Mountain experts, and how Trans Mountain relied on it to support its claim that this expansion is needed, financially feasible, commercially viable and of economic benefit. Burnaby does not share Trans Mountain's conclusions with respect to the first four issues on the Board's List of Issues, has filed evidence to this effect, and was prepared to address the reasons in final argument.

Trans Mountain references Board Rulings 61 and 56. The issues ruled on by the Board are related to additional filing of a late seismic hazard update in Ruling 61 and three outstanding filings in Ruling 56. These filings are fundamentally different than the replacement of major pieces of evidence related to a number of items on the Board's List of Issues, after the evidentiary phase of the Project review has been completed. Much hinges on this evidence and Burnaby, and other intervenors, will be unduly prejudiced if the procedural steps are expedited.

Fairness demands proper due diligence. Fairness demands a proper schedule with adequate time lines introduced to review Trans Mountain's new filings. The procedural steps necessary for the review of the new evidence include adequate time to:

- review and understand the new evidence;
- prepare information requests on the new evidence, and for Trans Mountain to respond fully and adequately to those information requests;
- prepare notices of motion on any information requests that have not been answered fully and adequately;
- prepare follow-up information requests to test any outstanding issues as a result of the responses to the initial round of information requests;
- prepare notices of motion on any information requests that have not been answered fully and adequately;
- engage experts to prepare evidence in response to the new evidence filed by Trans Mountain;
- information requests to intervenors on any evidence in response;
- notice of motion to compel answers to intervenor information requests;
- Trans Mountain to prepare and file reply evidence;
- intervenors to prepare and file sur-reply evidence;
- Trans Mountain and intervenors to file affidavits adopting evidence;
- Trans Mountain to prepare and file written argument; and
- intervenors to prepare and file written argument.

If the Board responds favourably to Trans Mountain's request for expedited procedural steps this would represent another, in a long line of decisions, that provide Trans Mountain with an unfair advantage in this review, and would be a violation of the rules of procedural fairness and principles of natural justice. The Board has recognized that "[a]t the heart of the analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful

opportunity to present their case fully and fairly.”²² It is critical that the Board respect this principle in setting the new hearing schedule.

Burnaby’s interests have significantly been affected by the removal and replacement of key evidence at this hearing. The procedure suggested by Trans Mountain of expedited hearing steps will not allow Burnaby the opportunity to prepare and present our case fully and fairly, or allow the prejudice to Burnaby to be ameliorated.

7. Additional Procedural Steps to be Built into the Timeline

The amendment to the hearing timetable as a result of the conflict of interest created by Trans Mountain and the Board, and the subsequent striking of Mr. Kelly’s evidence, provides the Board with a significant opportunity to address other procedural failings in the process to date.

Trans Mountain has presented an exorbitant amount of evidence in “reply” (approximately 3950 pages), which goes far beyond the bounds of proper reply. Trans Mountain has responded to particular reports of intervenors, but also has gone beyond this to include its own commentary on all aspects of the Project. This evidence was not included in Trans Mountain’s original application, and under the previous hearing schedule would not have been tested by intervenors.

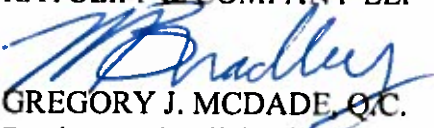
For the Board to allow this evidence in on reply, without the opportunity to test that evidence, is contrary to natural justice and the procedural fairness rights of intervenors. Intervenors must be given the opportunity to test all the evidence of Trans Mountain. Burnaby requests that the Board grant intervenors the opportunity to test the reply evidence of Trans Mountain through oral cross-examination. To date the information request process for the Project has proved an inadequate and inefficient substitute for cross-examination, as it has allowed Trans Mountain to dodge requests, not allowed parties to adequately follow-up on requests, and not allowed parties to clarify issues of ambiguity and ensure that conflicts in the evidence are brought to light. In contrast, cross-examination will allow for a more thorough and efficient testing of the reply evidence.

Burnaby further applies for the opportunity to submit evidence as a sur-reply to the reply evidence of Trans Mountain that is directed at the reports of Burnaby. Allowing Burnaby’s experts to address the issues raised by Trans Mountain in their reply evidence will provide the Board with a more thorough record on which to base its decision, not result in any additional hearing extension given the current delayed schedule, and allow some of the inconsistencies and

²² Exhibit A32-1, National Energy Board, Ruling No. 14, Notices of Motion from Ms. Robyn Allan and Ms. Elizabeth May to include cross examination of witnesses, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2453401/A32%2D1_%2D_Ruling_No%2E_14_%2D_Notices_of_motion_from_Ms%2E_Robyn_Allan_and_Ms._Elizabeth_May_to_include_cross%2DExamination_of_witnesses_%2D_Trans_Mountain_Project_%2D_A3W5J1.pdf?nodeid=2453205&vernum=-2, at 3.

limitations in the evidence to come to light. This additional step in the timetable for the hearing would serve the public interest in a thorough review of this Project.

Yours truly,
RATCLIFF & COMPANY LLP


For: GREGORY J. MCDADE, Q.C.

Barrister and Solicitor*

GJM:lw

*Gregory J. McDade Law Corporation

Enclosures

cc: intervenors

Appendix 1

City of Burnaby

**Evidence to be struck from the Hearing Record
Resubmission at Trans Mountain's Determination**

Direct Evidence			
Document	Title	Sections	Comments
A3S0Q7	Volume 1 Summary	Paragraph 21, page 1-5 21. The long-term need for the Project... their economic life. Paragraph 22, page 1-5 22. The construction and operation of the Project...in Alberta. Paragraph 24, page 1-5 24. Furthermore, oil producer revenues...federal government \$6.1 billion. Section 2.1.4 Project Need, page 1-22 Section 4.5 BC's Fair Share of Benefits	Trans Mountain must strike out any portions of its application that rely on the evidence of Mr. Kelly, including the evidence of others that relied on Mr. Kelly, and resubmit, if Trans Mountain choses to do so, those sections based on the new evidence of Muse Stancil. Trans Mountain is in the best position to identify which sections were based on the evidence of Mr. Kelly. However, Burnaby has noted some of the sections that may have been based on Mr. Kelly's findings. These sections are not exhaustive, and it is expected that Trans Mountain would be able to provide an exhaustive list.
A3S0R0	Volume 2 Project Overview, Economics and General	Section 3.3.1 Supply and Demand Page 2-40 Section 3.4.1 Macroeconomic and Fiscal Benefits Page 2-41	See above.

	Information	Section 3.4.2 Energy Industry Benefits page 2-42 Section 3.5 Economic Feasibility page 2-43	
A4S8J3	Affidavit filed August 20, 2015	Steven Fekete	This affidavit adopting the evidence of Mr. Kelly must be struck, along with the evidence of Mr. Kelly.
A4S8F3	Affidavit filed August 20, 2015	Scott Stoness	This affidavit must be struck and re-filed with the new evidence.
A4S8I1	Affidavit filed August 20, 2015	John Reed	This affidavit must be struck and re-filed with the new evidence.
A4S8H1	Affidavit filed August 20, 2015	Greg Hodgson	This affidavit must be struck and re-filed with the new evidence.
A4S7U5 and A4S7U6	Final Argument		Any and all sections that relied on Mr. Kelly's evidence, including the evidence of others that relied on Mr. Kelly, must be struck and re-submitted based on the updated evidence.