

OH-001-2014
Trans Mountain Pipeline ULC ("Trans Mountain")
Trans Mountain Expansion Project (the "Project")
File Number OF-Fac-Oil-T260-2013-03 02

NOTICE OF MOTION

Name of person bringing the motion: Province of British Columbia (the "Province")

Decision or order requested: The Province seeks the following relief:

- a. an order that Trans Mountain provide a full and adequate response to those parts of Province of British Columbia Information Request No. 1 identified herein, by a fixed date;
- b. an amendment to the Hearing Order setting a new deadline for subsequent information requests; and
- c. such other relief as the Board may consider appropriate in the circumstances.

Date submitted: July 4, 2014

Signature:



Print Name:

Elisabeth Graff
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Ministry of Justice
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Victoria, BC
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Attached:

Notice of Motion
Organizational Chart

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INTRODUCTION

1. This Motion is brought pursuant to section 35 of the National Energy Board Rules of Practice and Procedure, 1995, SOR/95-208, Hearing Order OH-001-2014 and Procedural Direction No. 3 issued on June 4, 2014 for the following relief:
 - a. an order that Trans Mountain provide a full and adequate response to those parts of Province of British Columbia Information Request No. 1 identified herein, by a fixed date;
 - b. an amendment to the Hearing Order setting a new deadline for subsequent information requests; and
 - c. such other relief as the Board may consider appropriate in the circumstances.

FACTS

2. The purpose of an information request is to obtain more information about the Project and its potential impacts and to test and clarify the evidence filed by the proponent and other parties.
3. On May 12, 2014, the Province filed Information Request No. 1 to Trans Mountain. In doing so, the Province sought a better understanding of the following:
 - The risk posed by the Project and how Trans Mountain proposes to mitigate such risk;
 - The safety "track record" and operating history of both Trans Mountain and its parent company, Kinder Morgan;
 - The strength of Trans Mountain's current and proposed spill response plans; and
 - Trans Mountain's ability to effectively respond to any land-based or marine spill related to the Project.
4. This information is essential to the Province's assessment of the overall safety of the Project. It was hoped that Trans Mountain's answers to the Province's questions would afford the Board, intervenors and the public a meaningful opportunity to assess Trans Mountain's ultimate ability to implement the spill response safeguards referred to in the Application.
5. As is further discussed below, the information sought by the Province is squarely within the scope of the issues identified by the Board for the review of the Project.
6. Pursuant to section 34(1) of the National Energy Board Rules of Practice and Procedure, a party served with an information request must "provide a full and adequate response in writing to each information request".

7. On June 18, 2014, Trans Mountain filed its response to the Information Request No. 1 of the Province.
8. The Province submits that the response fails to fully and adequately respond to a number of the requests set out in the information request. The particulars of the inadequate responses and a full explanation of the reason why the Province takes issue with each response are set out in the attached Organizational Chart.

GROUND FOR MOTION

Relevant considerations

9. The Board is tasked with recommending to the Governor in Council whether a Certificate of Public Convenience and Necessity (CPCN) should be issued to Trans Mountain, and with preparing an environmental assessment report for the Project.
10. Section 52(2) of the *National Energy Board Act*, R.S.C. 1985 c. N-7, provides that, in making its recommendation, “the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to ... any public interest that in the Board’s opinion may be affected by the issuance of the certificate or dismissal of the application” [emphasis added].
11. The jurisprudence is clear that, in making its recommendation with respect to the issuance of a CPCN, the Board may take into consideration a very broad array of factors.

Emera Brunswick Pipeline Co. (Re), 2007 LNCNEB 3, para. 41-48.
12. The matters that form the subject of the Province’s Information Request No. 1 are directly related to the pipeline, and are matters of public interest, which interests may be affected by the issuance of a CPCN for the Project. Therefore, they must be considered by the Board in making its recommendation.
13. On July 29, 2013, the Board issued a list of twelve issues that it will consider during the hearing process. Of particular relevance to this motion are Issue #11, “contingency planning for spills, accidents or malfunctions, during construction and operation of the project”, and Issue #12, “safety and security during construction of the proposed project and operation of the project, including emergency response planning and third-party damage prevention”.
14. The Province submits that all of the requests set out in Information Request No. 1 fall squarely within the scope of either or both of Issue #11 and #12. Accordingly, the questions posed by the Province must be answered fully and adequately.

Trans Mountain's Emergency Response Program

15. It is beyond question that Trans Mountain's emergency response plans are relevant to Issue #12. Therefore, Information Request No. 1 of the Province asks that they be made available for review and evaluation by all parties.
16. In response to the request by the Province in IR 1.9 a), 1.12 k), 1.20 e), and 1.23 c), Trans Mountain declines to file a copy of its Emergency Response Program documents on the basis that they contain information of a confidential and sensitive nature.
17. The Province submits that, if the nature of the information contained in those documents is such that they cannot safely be filed on the public record, then Trans Mountain ought to submit a request to the Board that they be treated as a confidential filing. As stated in the Board's Filing Manual, "Emergency Response Manuals being filed in the course of a regulatory proceeding ... must be accompanied by a request that the NEB treat a filing as confidential pursuant to section 16.1 or 16.2 of the NEB Act" (p. 5) [emphasis added].
18. Section 16.1 of the *National Energy Board Act* provides as follows:

In any proceedings under this Act, the Board may take any measures and make any order that it considers necessary to ensure the confidentiality of any information likely to be disclosed in the proceedings if the Board is satisfied that

 - (a) disclosure of the information could reasonably be expected to result in a material loss or gain to a person directly affected by the proceedings, or could reasonably be expected to prejudice the person's competitive position; or
 - (b) the information is financial, commercial, scientific or technical information that is confidential information supplied to the Board and
 - (i) the information has been consistently treated as confidential information by a person directly affected by the proceedings, and
 - (ii) the Board considers that the person's interest in confidentiality outweighs the public interest in disclosure of the proceedings. [emphasis added]
19. Therefore, it is clear that, in exercising its discretion, the Board must weigh Trans Mountain's interest in confidentiality against the public interest in disclosure. Trans Mountain's assertion of confidentiality alone should not preclude public disclosure.
20. Finally, the Province notes that the Federal Government has announced the introduction of legislation which will include "new, modern safety regulations for pipelines, such as improving transparency by ensuring that companies' emergency and environmental plans are easily available to the public".

<http://eap.gc.ca/en/backgrounder/r2d-dr2/enhancing-pipeline-safety>.

21. As a result, the Province respectfully requests that Trans Mountain file its Emergency Response Program documents. If Trans Mountain requests that they be filed confidentially, the Province reserves the right to make argument in response to such request.

Conclusion

22. Trans Mountain's failure to file the evidence requested by the Province in Information Request No. 1 denies the Board, the Province and other intervenors 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. It further denies the parties a meaningful opportunity to test and clarify the evidence filed by Trans Mountain. If the review process established by the Board is to be honoured, then Trans Mountain's failure must be corrected by an order compelling the submission of full and adequate answers.

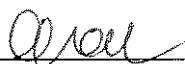
23. The Province is not able to prepare questions for the second round of intervenor information requests in the absence of adequate responses to the requests filed for the first round. Even if Trans Mountain is ordered to provide full and adequate responses before the current deadline of September 11, 2014 for the filing of the second round of information requests, it will be impossible for the Province to file meaningful follow-up information requests by that deadline. Therefore, the Province respectfully asks that the current deadline be extended so as to allow all parties sufficient time to review the additional responses filed and prepare follow-up requests.

ORDER SOUGHT

24. The Province of British Columbia seeks the following relief:

- a. an order that Trans Mountain provide a full and adequate response to those parts of Province of British Columbia Information Request No. 1 identified herein, by a fixed date;
- b. an amendment to the Hearing Order setting a new deadline for subsequent information requests; and
- c. such other relief as the Board may consider appropriate in the circumstances.

All of which is respectfully submitted this 4th day of July, 2014.



Elisabeth Graff
Counsel for the Province of British Columbia