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The Canada Energy Regulator Protects Trans Mountain from Canadians

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Decision Commented On: [Decision on Trans Mountain's Request for Confidential Treatment dated 29 April 2021](#)

The Canada Energy Regulator (CER or Commission) has the statutory duty to assess financial resources plans filed by operating pipeline companies each year and determine whether those resources remain sufficient to cover the company's expected liabilities if a pipeline spills. The written review process is open to the public through postings on the CER's website. Trans Mountain [requested](#) an exception to the typical public filing process, asking the CER to keep their insurers confidential going forward. On April 29, 2021, the CER granted the request by making an order under section 60 of the *Canadian Energy Regulator Act*, [SC 2019, c 28, s 10](#) (*CER Act*) to keep the identity of Trans Mountain's insurers confidential. The decision pertains to the insurance in place to cover liability for the operating Trans Mountain pipeline, not liability associated with its decommissioning or liability associated with the construction or operation of the Trans Mountain Expansion Project.

Trans Mountain's insurers have been contacted by politically active citizens asking them to stop insuring Trans Mountain. Trans Mountain requested confidentiality for all of its future insurers to prevent those citizens from employing this strategy going forward. This post reviews the decision and considers whether corporate identity information should be made confidential to protect corporations from public pressure campaigns.

The Confidentiality Decision

Trans Mountain is required to maintain a minimum of a billion dollars in financial resources, including a maximum of \$500 million in insurance available to cover liabilities from an accident. Trans Mountain described the issue clearly:

If the name of Trans Mountain's insurers is disclosed publicly, ongoing targeting and pressure on those insurers to stop insuring the Pipeline are likely to result in material loss to Trans Mountain and its shippers in the form of (i) higher insurance premiums (due to a smaller pool of insurers available to Trans Mountain); and (ii) challenges in maintaining adequate insurance coverage to fulfil its significant financial resource obligations under section 138 of the CER Act.

Trans Mountain's submissions identify environmental NGO [Stand.Earth](#) and others as likely to target and publicly pressure Trans Mountain's insurers. Trans Mountain did not make any claim

that those mounting this campaign had any ulterior motive. The opposition to Trans Mountain is motivated by [concerns about climate change](#) and [indigenous land rights](#).

Section 60 of the *Canadian Energy Regulator Act* reads:

Confidentiality

60 The Commission or a designated officer may take any measures and make any order that the Commission or designated officer considers necessary to ensure the confidentiality of any information likely to be disclosed in any proceedings under this Act if the Commission or designated officer 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;
- (b) the information is financial, commercial, scientific or technical information that is confidential information provided to the Regulator and
 - (i) the information has been consistently treated as confidential information by a person directly affected by the proceedings, and
 - (ii) the Commission or designated officer considers that the person’s interest in confidentiality outweighs the public interest in disclosure of the proceedings; or
- (c) there is a real and substantial risk that disclosure of the information will compromise the safety and well-being of persons or cause harm to property or the environment.

The CER determined Trans Mountain had met the requirements for confidentiality under both subsections 60(a) and 60(b) (at 6). For 60(a), the CER found “the disclosure of the names of Trans Mountain’s insurers could reasonably be expected to prejudice its competitive position in its dealing with potential insurers” (at 6), and for 60(b)(ii) found that Trans Mountain’s interest in confidentiality outweighs the public interest in disclosure of the names of Trans Mountain’s insurers, and that there was a public interest in knowing the pipeline is sufficiently insured, but not in the particulars of all insurers (at 6-7).

Section 60 governs how the CER must approach granting a limited exception to the fundamental principle that its proceedings will be open, accessible and transparent. The CER has held that the granting of an order under section 60 is an extraordinary order, and the onus to meet the test to set aside and open public process is on the company requesting it. (CER decision in Emera, [GH-1-2006](#) at 112; cited with approval in CER [Keystone Ruling No 3](#), at 6-7. See also CER’s *Legal Framework for Confidentiality Requests*, [here](#).)

Commentary

The CER decision is an administrative decision that should meet the requirements of reasonableness set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#) at paras 73-142. In our view, the decision errs in interpreting and applying section 60 in nearly every component of the statutory test, and falls short of the requirements for intelligibility and justification where it does not follow existing jurisprudence.

Section 60(a) addresses reasonably expected harm that may result from disclosure, and breaks that harm into two categories: material loss, and loss of competitive position. The decision misapprehends both.

The difference between what Trans Mountain would pay for insurance with public disclosure and what it would pay without public disclosure would constitute its material loss. The decision shows no awareness that material loss must be reasonably expected to flow *as a result of* disclosure. In any proper analysis, questions of loss flow from causation. Trans Mountain established in its argument that politically active citizens will contact an insurance company when they learn it underwrites the Trans Mountain pipeline. The CER accepts without evidence or detailed reasoning that the bare receipt of critical contact from those citizens will cause the named insurer to change its policies, thereby decreasing the pool of available insurers. For the logic of loss and causation to hold, the decision must assume that the reduction in competition, alone, is the cause of higher premiums.

In effect, the CER holds that disclosing the identity of a corporation on the CER website can reasonably ground a wholesale shift in insurance market behaviour. Possibly, that shift occurs because politically active citizens are the first people ever to tell insurers about climate change. However, we note such an inference may only be drawn from the reasoning in the decision. Trans Mountain's evidentiary record is silent on that point.

The complex mechanism by which public pressure may or may not materially increase insurance premiums is certainly not a matter to be decided in the absence of evidence. Whether a reasonable person would expect disclosures in annual CER filings to generate Trans Mountain's future material loss hinges on whether a reasonable person would expect insurers to assess risks at an enterprise level only after they receive pressure from the public. To illustrate, we look to global credit rating agency and insurance industry specialist A.M. Best. In financial resources plans, CER expressly directs pipeline companies to disclose each insurer's A.M. Best Rating as a relevant attribute of the insurance. (See s 7.2(a) of the CER [Pipeline Financial Requirements Guidelines](#)). By March 2020, [A.M. Best was aware](#) and warning insurers to assess emerging enterprise level risks presented by a) climate change-driven loss; b) market, economic and financial risks; c) regulatory change, and d) the emerging application of Environmental, Social and Governance principles.

On that point, the early 2020 media and industry publications cited by Trans Mountain and accepted by CER (Decision, at 6) work against Trans Mountain's allegations of expected material loss. Its current certificates were negotiated and signed in the second and third quarters of 2020. No part of the decision shows CER's reasoning on whether a targeted public pressure campaign

manifests known risks, or presents a new, independent risk an existing insurer would respond to once named and pressured in 2021.

Protecting the Pipeline Industry from Other Industries

Under the test for an exemption from open process, the CEA Act s 60(a) allows CER to assess an alternate category of harm in addition to material loss: loss of competitive position. The decision clearly holds the relevant harm is experienced by Trans Mountain, and that the relevant relationship that defines competitive position is the relationship between Trans Mountain and its insurers. While *stare decisis* does not bind tribunal decisions, we question whether it is reasonable for this decision to depart from prior confidentiality [requests approved by CER](#), which properly identify competitive position as that between like competitors in a market place. The CER gives no explanation for this change in approach. Finding out the specific limits one insurer places on liability will give other insurers unfair insight they can use to undercut their competitor. Trans Mountain's recurrent negotiation with its insurers does not reflect its competitive position. It reflects its bargaining position. The decision stretches interpretation of that term far beyond parliament's intent to enact a limited exception that applies in clear and well-understood business contexts.

In order to conclude that "limiting or shrinking the pool of insurers or creditors creates a risk to the public interest," (Decision at 7), the decision invokes the CER Act's [purpose clause](#) (*CER Act* s 6) and opines that Trans Mountain's ability to maintain "adequate insurance at a reasonable price" is "required for the fulfilment of its regulatory obligations and for the protection of people property and the environment as required by the CER Act."

With respect, CER's statutory duty is to determine whether a company has secured the financial resources to mitigate loss and compensate Canadians in the event of an accident. The decision departs from CER's lawful role as monitor of whether Trans Mountain can *demonstrate* statutory compliance, and places it in the role of stalwart protector of the market conditions that indirectly allow Trans Mountain to *attain* statutory compliance. In doing so, the decision relies on irrelevant factors that are *ultra vires* CER's statutory authority, and casts CER as a protector of the companies it is supposed to be regulating.

Protecting Trans Mountain from Canadians

The decision effectively determines that allowing Trans Mountain to obtain reasonably priced insurance is more important than allowing active citizens to conduct lawful public pressure campaigns. CER compromises its analysis of the application the public interest test in s 60(b)(ii) by ignoring the public's general and freestanding interest in open and accessible proceedings and the inclusive and transparent process mandated by the *CER Act*. As CER put it:

In relation to the comments that un-insuring of fossil fuel projects, such as the Trans Mountain Pipeline, is the best and a non-violent way of shifting Canada towards a carbon-free energy future, the Commission finds that Trans Mountain has a statutory requirement, originally set out in by the *Pipeline Safety Act* of 2015, and continued under the CER Act and the *Pipeline Financial Requirements Regulations*, requiring it to have and maintain the

amount of financial resources necessary to pay the amount of the limit of absolute liability as determined pursuant to the CER Act, which may or may not include insurance. Trans Mountain is also required by the Amended Order to maintain insurance policies of at least \$500 million. While determining the nature and composition of Canada's energy future may be a worthy policy debate, the statutory requirement that the pipelines and facilities regulated by the CER carry appropriate insurance or similar financial resources is one which the Commission cannot ignore, and one which serves a vital public interest. (at 5)

In our view, this finding deeply misapprehends the nature of the public's interest in effective access to the information that underlies public decision-making. The contest between Trans Mountain and those who believe Trans Mountain should not exist is a manifestation of incompatible interests that must be contested and resolved in a public forum. That contest need not take place before the CER or under its mandate, but it is inappropriate for the CER to exercise its power to prevent that contest from taking place elsewhere. Rather than respect that boundary, the decision intentionally stifles a legal form of political pressure.

The balancing of the private interest in confidentiality against the public interest in disclosure required by section 60(b)(ii) of the *CER Act* is very thin. The CER says "the Commission considered all facets of the public interest discussed in the submissions, as well as the value to Trans Mountain in keeping the names of its insurers confidential." But does not describe the reasoning used in the balancing, only stating that the balancing was done. The CER also focuses on how there is no public interest in Trans Mountain paying high insurance premiums, when they should have looked at the actual purpose of the pressure campaign: *is there a public interest in the Trans Mountain expansion being stopped?* The balancing under section 60(b)(ii) does not appear to meet the standards for transparency, intelligibility, and justification required of administrative decisions (*Canada (Minister of Citizenship and Immigration) v Vavilov*, at paras 14-15).

We also note that Alberta's Minister of Energy [wrote a letter supporting Trans Mountain's request for confidentiality](#). It says that

It is Alberta's position that parties should not be afforded an opportunity to harass financial institutions seeking to participate in this critically important project. As evidenced in past annual filings, disclosing the project's insurers only exacerbates ongoing targeted attacks, which could negatively impact Trans Mountain's access to insurers, and potentially jeopardize the successful completion of the project.

The Alberta government holds an entrenched view that hydrocarbon development is of such importance that it should be protected from public scrutiny and criticism (see for example, [the Alberta Inquiry](#), [Bill 1](#), and [the 'War Room'](#)). Suspending democratic norms of public debate, protest, and political pressure is a questionable decision even in extreme situations like war. Alberta needs to come to terms with the reality that democratic norms cannot be suspended in order to speed and ease hydrocarbon development.

It would be disappointing to see a federal agency follow Alberta down the same path. The *CER Act's* purpose clause, invoked above, requires CER to ensure its decision-making processes are fair, inclusive, transparent and efficient (*CER Act* s 6(d)). No interpretation of the *CER Act's*

commitment to inclusive participation should allow the CER to construe one honestly maintained and lawfully pursued interest as illegitimate simply because it opposes another. While the decision stops short of doing so, CER's light treatment of the reasoning it used to balance these competing interests raises concern. Civil society actors exist in the same world as corporate actors, and they must engage each other. They cannot do so if a public body erroneously characterizes lawful action outside its scope as a form of "prejudice" to the sector-specific interests that lie within its scope.

Conclusion

Confidentiality orders for regulatory filings should protect corporations from their competitors in their industry, who may use the regulatory filings as a form of simple corporate espionage. Using confidentiality orders to protect corporations from public pressure campaigns is a worrying step and moves Canada closer to a situation where the government will keep information about a broad spectrum of industrial activity secret to protect those industries from criticism and protest.

You may agree or disagree with the CER's decision on reasonably expected harm or on balancing Trans Mountain's interest in confidentiality against the public's interest in disclosure. To be transparent, we do not agree. It is hard to square CER's decision to shield insurers from disclosure with the fact of climate change as "[an existential threat to human life](#)". While the same reasoning could apply to the CER's initial decision to approve the Trans Mountain expansion, effectively relitigating the initial approval, we invite you to contrast the interests involved in the CER's distinct balancing acts: to approve an entire pipeline project, initially, and to shield an insurer from public view, subsequently. Using an exceptional order to broadly protect corporations from public pressure campaigns and protests impairs participatory democracy. The public's interest in reducing GHG emissions from within that democracy remains the same in each decision.

If unchallenged, the decision will likely entrench the practice of using confidentiality orders to stifle protest: it would simply be unfair for one corporation to be permitted to keep their insurers secret while others cannot. These confidentiality requests will likely become routine as protest intensifies against carbon intensive industries. The existing pressure on insurers to insure - or not to insure - will remain, whether or not pipeline companies successfully recruit CER to stifle that protest.

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