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# The Governor in Council Occasions Change and Delay in the National Energy Board's Review of the Trans Mountain Pipeline Expansion Project: The Curious Case of PC 2015-1137

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**Matter Commented On:** *Order in Council* PC 2015-1137

In plain language, it seems that the Governor in Council shot the Trans Mountain Pipeline Expansion Project in the foot just as the Project was about the cross the finish line of a two year environmental assessment and regulatory review process overseen by the quasi-judicial National Energy Board [NEB]. A Governor in Council decision to appoint a Proponent's witness to the NEB, taken while a Panel of the NEB was still considering the Proponent's application, has occasioned the striking of a part of the Proponent's evidence in the ongoing environmental assessment process (described here) and regulatory review process (described here) for the Trans Mountain Pipeline Expansion Project (described here). The Governor in Council's action will cause unexpected changes and delays to these processes; and the clouds of future litigation which lay on the horizon for this Project now darken as a further consequence. This comment is structured around four questions: (1) what happened? (2) how could this happen? (3) will this affect Aboriginal consultation? and (4) what happens next?

## What Happened?

On July 28, 2015, the Governor in Council filled one of two vacancies in the nine-member NEB by exercising powers conferred upon the Governor in Council by section 3 of the *National Energy Board Act*, RSC 1985, c N-7 (see PC 2015-1137 and NEB Governance Information). The appointment was amongst the final Orders in Council promulgated prior to the calling of a general election on August 2, 2015.

On August 20, 2015, the Proponent of the Trans Mountain Expansion Project filed its Final Argument with the NEB. A News Release accompanying the filing described the Final Argument as the culmination of more than three years of work, and concluded: "The scrutiny and rigour this Project has undergone, both inside and outside of the formal NEB process, is unprecedented."

On August 21, 2015, one day after the Final Argument was filed, the Panel of the NEB charged with the responsibility for the environmental assessment and regulatory review of the Trans Mountain Pipeline Expansion project issued a letter [NEB Panel Letter]. The NEB Panel Letter noted that the individual appointed to the NEB by the Governor in Council on July 28 had provided written evidence to the Panel on behalf of the Proponent (see Written Evidence of Appointee), that this evidence addressed issues which included oil market supply and demand, and that the evidence was contested.

The NEB Panel Letter went on to state that the appointment of the Proponent's witness to the NEB could mean that "this Panel of the Board may be in the position of having to assess this evidence after the appointment to the Board became effective." The NEB Panel stated that "[t]here can be no question that public confidence in the impartiality of tribunal decision-makers is integral to the administration of justice" and that the dual role of the appointment "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." The letter stated that the Panel therefore "has decided on its own volition to strike from the hearing record all evidence prepared by or the under the direction of" the witness who had been appointed to the NEB.

The NEB Panel Letter went on to adjourn final arguments, then scheduled to conclude in September of 2015. Parties were invited to make submissions, and the Panel indicated that it "will issue a procedural update shortly thereafter advising all participants how it intends to conduct the remaining process steps to conclude its review of the Project application."

**How Could this Happen?**

The Minister of Natural Resources is 'responsible' for the NEB, and the Order in Council identifies the Minister of Natural Resources as the Minister on whose advice the Governor in Council acted. It is certain that tools were available to the Governor in Council, and also the Minister of Natural Resources, to identify the legal risks of PC 2015-1137 in the course of its passage through the Order in Council process (generally described here).

The appointment process leading to PC 2015-1137 must have involved consideration of section 3(4) of the *National Energy Board Act.* This section provides that a person is not eligible to be appointed as a member of the Board if that person is "as owner, shareholder, director, officer, partner or otherwise, engaged in the business of producing, selling, buying, transmitting, exporting, importing or otherwise dealing in hydrocarbons or electricity or holds any bond, debenture or other security of a corporation engaged in any such business". Beyond an inquiry according to the ambit of this section, however it may be interpreted, one could reasonably anticipate that those involved in PC 2015-1137 should have considered the potential impact of the appointment of a Proponent's witness to the NEB on perceptions of the integrity of the NEB's hearing process for the Trans Mountain Pipeline Expansion Project. After all, the importance of maintaining the appearance of integrity in the NEB hearing process is the foundation for textbook jurisprudence on apprehension of bias: *Committee for Justice and Liberty et al. v National Energy Board et al.*, [1978] 1 SCR 369, 1976 CanLII 2.

The Minister of Justice for Canada is responsible for advising the Government on all matters of law by virtue of the *Department of Justice Act*, RSC 1985, c J-2, and for advising on legal risks in the Order in Council process specifically. The Minister also provides legal advice to Government under the Project Agreement for the Trans Mountain Pipeline Project signed by Deputy Ministers, including the Deputy Minister of Natural Resources, and the CEO of the NEB under the Major Project Management Office initiative (discussed further below). Legal risk management is well documented in Justice Canada (See Legal Risk Management in the Department of Justice). Under the legal risk management regime, the Minister of Justice advises on the nature and extent of legal risk, but the Government ultimately decides whether, or not, to accept the legal risk of its actions.

Critical thought leads to three lines of analysis. First, the tools available were not used (perhaps because of the haste of a Government appointment process undertaken in the summer and within

days of the commencement of a general election; or, perhaps, for other unknown reasons). Second, if the tools were used, the legal risks which arose were not foreseen. Third, if foreseen, the legal risks were not afforded sufficient, or any, weight; or, if given appropriate weight, were thought to be acceptable by those who received the advice. Persons may opine which of these is most likely, but a conclusive forensic legal analysis of why the tools were not effective is impossible because of cabinet confidence in the appointment process leading to PC 2015-1137 by virtue of section 39 of the *Canada Evidence Act*, RSC 1985, c C-5. Why the Governor in Council, acting on the advice of the Minister of Natural Resources, did what was done will remain inexplicable unless cabinet confidence is waived.

PC 2015-1137 was issued under the shadow of imminent economic recession, and after an announcement at the 2015 Energy and Mines Ministers' Conference that "[t]he continued advancement of energy infrastructure projects … is fundamental to … generating economic growth" (See Press Release - Federal, Provincial And Territorial Ministers Responsible For Energy And Mines Highlight Priorities For Upcoming Year). The appointment had been lauded by the Minister responsible for the NEB, who described the appointment as adding " … a valuable asset to the National Energy Board as it continues to fulfil its mandate" … (see here). The NEB Panel was of the view that the appointment created a potential for perception of harm to "the integrity of this hearing process." These are curiously incongruent statements in an economically important context.

The irony of process change and delay occasioned by the Governor in Council is most evident when examined in the context of the legislative reforms of the first omnibus Bill of 'the Harper Government' (the Government of Canada was referred to as the Harper Government as a consequence of an internal directive described here). Process change and delay are not congruent with the legislative reforms introduced in the *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19 (discussed here). That *Act* passed through Parliament as *Bill C-38*. Part 3 of the *Bill* was titled as 'Responsible Resource Development'. R2D was the acronym used to refer to responsible resource development, and R2D was associated with the Government initiative known as 'Canada's Economic Action Plan'. Division 2 of Part 3 made numerous changes to the *National Energy Board Act*. Division 2 was said "to establish time limits for regulatory reviews under the Act and to enhance the powers of the National Energy Board Chairperson and the Minister responsible for the Act to ensure that those reviews are conducted in a timely manner" (See Government Summary of R2D in Bill C-38). It also made the Governor in Council responsible for making all final decisions on whether, or not, to issue Certificates of Public Convenience and Necessity. The Government Summary in Bill C-38 states: "Division 2 of Part 3 amends the *National Energy Board Act* to allow the Governor in Council to make the decision about the issuance of certificates for major pipelines."

**Will this affect Aboriginal Consultation?**

Aboriginal consultation for the Trans Mountain Pipeline Expansion Project is fundamentally integrated into the NEB regulatory review process by virtue of the *Cabinet Directive on Improving the Performance of the Regulatory System for Major Resource Projects* (See here), the Major Project Management Office [MPMO] initiative which followed that Directive, and the Project Agreement concluded under the supervision of MPMO and including the NEB as a signatory. Occasioning change and delay in the NEB process as a consequence of PC 2015-1137 will therefore certainly affect Aboriginal consultation. PC 2015-1137 may also give rise to Aboriginal concerns about the relationship between the Order in Council process, including any future Governor in Council decision about the issuance of certificates of public convenience and

necessity, and the duty to consult. Such concerns fall outside of the NEB hearing process administered by the NEB Panel, and it remains uncertain whether or how these may be addressed.

The R2D initiative included the creation of the MPMO. The MPMO mandate is "to provide overarching project coordination, management and accountability for major resource projects within the context of the existing federal regulatory review process." This is done by ensuring that a Project Agreement is created for each Major Project within the MPMO inventory. MPMO then 'tracks' the timely progress of the Project through the milestones in the Preview process (See MPMO Tracker).

A project agreement outlines roles and responsibilities of federal departments and agencies throughout a particular regulatory review process. In this case the Project Agreement was signed by numerous Deputy Ministers, and also the CEO of the NEB; indeed, the Deputy Minister of Natural Resources appears to have been the first to sign it. The Project Agreement is supposed to ensure a coordinated, 'whole of government' approach to Aboriginal consultation.

According to the Project Agreement, "[t]he Government of Canada will to the extent possible rely on the NEB process, including the hearing, to discharge any duty to consult for the Project. Aboriginal groups that have Project related concerns should convey these concerns to the NEB" (underline added). Appendix I to the Project Agreement is entitled *Key Milestones and Service Standards for the Environmental Assessment, Regulatory Review and Aboriginal Consultation*. It does not expressly anticipate Aboriginal consultation and accommodation after the NEB Report and before the Governor in Council makes a decision in respect of the issuance of a Project Certificate. Appendix III of the Project Agreement is entitled *Aboriginal Engagement and Consultation Approach and Roles and Responsibilities*. It anticipates that all Aboriginal concerns will be addressed within the NEB process, and states that "[s]upplementary Crown consultation activities will occur, should there be outstanding issues or concerns raised by Aboriginal groups that fall outside of the NEB process."

Early in the NEB regulatory process, the NEB wrote to Aboriginal entities describing how the NEB's hearing process would work:

> After receipt of an application and ensuring it is complete, the Board will schedule a public hearing on this Project. One purpose of the hearing process will be to test the Project information (referred to as evidence in the hearing), which will have been filed with the Board. … This information will include details of Trans Mountain's Aboriginal consultation program and the outcomes of that program. It will also include information from Trans Mountain regarding the impacts the Project may have on Aboriginal interests and any proposed mitigation measures.
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> Another purpose of the hearing process will be to allow persons who are directly affected by the Project, or have relevant information or expertise relating to the Project, to express their views. These could include views in favour or against the Project or views on how the Project may impact Aboriginal communities, the use of traditional territory and any potential or established Treaty or Aboriginal rights.

If, in practice, there were a 'Whole of Government' approach to Aboriginal consultation and accommodation for the Trans Mountain Pipeline Project as described in the Project Agreement, then the Minister of Natural Resources and also the Governor in Council must have been aware

that PC 2015-1137 involved the appointment to the NEB of a Proponent's witness in a context where the Crown, itself, was relying on the NEB process to discharge the constitutional obligations of aboriginal consultation in a manner consistent with the Honour of the Crown.

Critical thought suggests three possible scenarios for Aboriginal concerns about the consultation process.

First, if the Governor in Council and Minister of Natural Resources were aware that PC 2015-1137 involved the appointment of a Proponent's witness, then Aboriginal groups may have a concern about how the Crown acted. This is because the NEB Panel states that PC 2015-1137 created a situation which might affect the integrity of the process which discharges constitutional obligations of consultation and accommodation; and, in any case, PC 2015-1137 occasioned unexpected change in and delay to the process.

Second, if the Governor in Council and Minister were not aware that PC 2015-1137 involved the appointment of a Proponent's witness, then Aboriginal groups may have a different concern. This is because lack of awareness implies that PC 2015-1137 actually reveals a systemic dysfunction in the MPMO Project Agreement system, by virtue of which the 'whole of government approach' is merely convenient phrase for public relations rather than a coherent practice.

Third, whether or not anyone knew, Government does not consider the Governor in Council's issuance of PC 2015-1137, acting on advice of the Minister of Natural Resources, to be within the operational ambit of the phrase "whole of government approach." In this type of scenario, Aboriginal groups may have a concern because it necessarily follows that the Crown is of the view that the constitutional duty to consult does not attach to Governor in Council decision making; and, yet, it is the Governor in Council which must ultimately determine whether to direct the issuance of a Project Certificate for the Project. In this scenario, the Project Agreement phrase "to the extent possible" (underlined above) is practically applied by Government as 'absolutely'; and Aboriginal consultation and accommodation is something done by the NEB and the Departments, within their respective regulatory mandates, but is not something that troubles the Minister or the Governor in Council. A very recent example of such absolute reliance on NEB process by Government is seen in *Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA* (TGS), 2015 FCA 179 (See also Professor Nigel Bankes' ABlawg here), where the Court found that the Crown engaged in "no additional or independent consultation" outside of absolute reliance on the NEB process. The Federal Court of Appeal warned the Crown that although the duty to consult may be integrated into "robust" environmental assessment and regulatory review processes, "when the Crown relies on the Board's process, in every case it will be necessary for the Crown to assess if additional consultation activities or accommodation is required in order to satisfy the honour of the Crown."

**What Happens Next?**

PC 2015-1137 is going to occasion additional costs for all involved in the NEB process for the Trans Mountain Pipeline expansion. Overlaying the date of PC 2015-1137 onto the Project Tracker maintained by MPMO reveals that PC 2015-1137 was issued when the Project was at the point bureaucratically described as milestone 19 of 23. The Proponent had made an application to the NEB for a Certificate of Public Convenience and Necessity on December 16,

2013(see here, the narrow *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 had been found to apply, the NEB had issued its Hearing Order OH-001-2014, participant funding was made available and distributed, multiple rounds of information requests had been completed, many motions had been dealt with, the NEB had received many Aboriginal concerns and evidence, and the NEB had released draft conditions. According to the MPMO tracker, all that remained were final submissions, the close of the hearing record, and the submission of the final NEB recommendations to the Governor in Council.

The Proponent must now replace the evidence which was struck, and address procedural changes which are as yet unknown as of the date of publication of this commentary. The Proponent's first response was on August 28. In this letter the Proponent identified the evidence prepared by the witness who had been appointed to the NEB, advised the Panel that it intends to replace the evidence which was struck by September 21, 2015, (described as "narrow") and requested "that the Panel expedite the remaining procedural steps required to conclude its review of the Project Application."

Responses from other participants have also been filed with the NEB. The City of Burnaby calls for a restart of the NEB process before a new Panel. There are many other positions by many other participants in the NEB hearing process, including calls for additional participant funding in order to address an unexpectedly prolonged hearing process.

As of the date of publication of this commentary, the NEB Panel has not yet revealed how it will respond to the numerous submissions it has received. Readers can follow what happens next in that process by reviewing the documents filed in the NEB's online document repository at the link given at the outset of this commentary. It contains all documents filed with the NEB, including the Panel's Procedural Directions and Rulings.

The Governor in Council which appointed the Proponent's witness to the NEB will also ultimately decide whether to direct the NEB to issue a certificate of public convenience and necessity for the Trans Mountain Pipeline Expansion Project. PC 2015-1137 can therefore reasonably be expected to be the subject of judicial consideration far beyond the conclusion of the current NEB process. The next textbook Supreme Court of Canada decision may well deal with whether it is consistent with the Honour of the Crown for the Governor in Council (acting for reasons which are inexplicable because of cabinet confidence) to appoint a Proponent's witness to the NEB while a Panel of the NEB is still considering the Proponent's application (and thereby unilaterally occasion changes to a regulatory review process relied upon by the Crown to discharge constitutional obligations of aboriginal consultation and accommodation in a manner consistent with the Honour of the Crown).

Finally, the Proponent must not be forgotten. In addition to being delayed and obliged to incur unexpected hearing expenses, the Proponent may suffer financial loss if the Crown's consultation process is ultimately found to be inconsistent with the Honour of the Crown by reason of the Governor in Council action. Whether the Proponent may seek, or successfully obtain, financial compensation from the public purse in such a case remains uncertain (see here).