BY EMAIL

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RE: The Board's refusal to allow public access to the Enbridge Northern Gateway Community Hearings

Dear M. Caron

The British Columbia Civil Liberties Association is deeply concerned with the decision of the Northern Gateway Joint Review Panel to refuse direct public access to its community hearings in Victoria and Vancouver. The Panel's decision is, in our view, a violation of the open courts principle that governs all federal quasi-judicial tribunals and, as such, is certainly unreasonable and potentially unlawful.

The open court principle

The open court principle is a central feature of the rule of law and democratic governance in Canada, and is enshrined in the Constitution. Recently, in a unanimous decision, the Supreme Court of Canada clearly set out the requirement that hearings be open to the public:

> The open court principle requires that court proceedings presumptively be open and accessible to the public and to the media. This principle has been described as a "hallmark of a democratic society" (*Vancouver Sun (Re)*, 2004 SCC 43 (CanLII), [2004] 2 S.C.R. 332, at para. 23) and is inextricably tied to freedom of expression.
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> *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 (CanLII), at para. 11.

In another decision, the Supreme Court highlighted that the open court principle includes the right of the public to be physically present at hearings:

> The open court principle is now well established in Canadian law. This Court has on numerous occasions confirmed the fundamental importance and constitutional nature of this principle (see *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 (CanLII), [2005] 2 S.C.R. 188, 2005 SCC 41;

> *Vancouver Sun (Re)*, 2004 SCC 43 (CanLII), [2004] 2 S.C.R. 332, 2004 SCC 43; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII), [2002] 2 S.C.R. 522, 2002 SCC 41; *R. v. Mentuck*, 2001 SCC 76 (CanLII), [2001] 3 S.C.R. 442, 2001 SCC 76; *R. v. O.N.E.*, 2001 SCC 77 (CanLII), [2001] 3 S.C.R. 478, 2001 SCC 77; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326; *Canadian Newspapers Co. v. Canada (Attorney General)*, 1988 CanLII 52 (SCC), [1988] 2 S.C.R. 122). In general terms, the open court principle implies that justice must be done in public. Accordingly, legal proceedings are generally open to the public. **The hearing rooms where the parties present their arguments to the court must be open to the public,** which must have access to pleadings, evidence and court decisions [emphasis added].
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> *Named Person v. Vancouver Sun*, 2007 SCC 43 (CanLII), [2007] 3 SCR 253 at para 81.

The court went on in that case to state that

> Openness ensures both that justice is done and that it is seen to be done. For justice to be seen to be done is necessary to preserve public confidence in the administration of justice (at para 84) […]
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> The open court principle, which was accepted long before the adoption of the Charter, is now enshrined in it. This is due to the fact that the principle is associated with the right to freedom of expression guaranteed by s. 2(b) of the Charter. It is clear that members of the public must have access to the courts in order to freely express their views on the operation of the courts and on the matters argued before them. The right to freedom of expression protects not only the right to express oneself on an issue, but also the right to gather the information needed to engage in expressive activity (see *Canadian Broadcasting Corp. v. New Brunswick*, at para. 27 (para 88).

The Ontario Court of Appeal has stated, in interpreting the open court principle as set out in that province's *Courts of Justice Act*, that "in my view the phrase "open to the public" when interpreted to foster its enormously important purposes must be taken to mean a forum where the public understands it is free to enter without specifically requesting admission." *Palkowski v. Ivancic*, 2009 ONCA 705 (CanLII) at para 26. The Federal Court of Appeal, which hears judicial reviews from decisions of the National Energy Board, states in its own "Policy on Public and Media Access" that: "The general rule in Canada is that court hearings are open to the public and may be reported in full. Every court in Canada has significant statutory and inherent powers to ensure that its proceedings are conducted fairly and to protect the integrity of the court's process, which includes the power to provide guidelines for public and media access to court proceedings. […] Hearings of the Federal Court of Appeal are generally open and accessible to the public and media, as are documents filed in Court."[1]

[1] Accessed at http://www.fca-caf.gc.ca/bulletins/media/media_coverage_e.shtml.

Section 11 of the *National Energy Board Act* establishes the Board as a court of record with all the powers, rights and privileges of a superior court. As a court of law, the Board must be seen as being bound by the open court principle in the same way as any court. In addition to any legal requirement, as a matter of policy, it is clearly desirable that a body exercising powers as significant as the Board should operate according to the open court principle.

Restrictions on public access to hearings must be justified according to a strict test

The Supreme Court has further held that the presumption of full public access can only be displaced if it is justified by a "serious risk" to the administration of justice that is "real, substantial and well-grounded in the evidence", and if the restriction impairs the right of access as little as possible, under what is called the "Dagenais/Mentuck test":

> [26] The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck*, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when:
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> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
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> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. [para. 32]
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> [27] Iacobucci J., writing for the Court, noted that the "risk" in the first prong of the analysis must be real, substantial, and well grounded in the evidence: "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained" (para. 34).
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> *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 (CanLII), [2005] 2 SCR 188

The test applies to all situations where access to proceedings are affected, not just publication bans, and includes situations where a court exercises its discretion under a statute to restrict access:

> [13] The analytical approach developed in *Dagenais* and *Mentuck* applies to all discretionary decisions that affect the openness of proceedings. In *Vancouver Sun (Re)*, 2004 SCC 43 (CanLII), 2004 SCC 43, [2004] 2 S.C.R. 332, Iacobucci and Arbour JJ. wrote the following:
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> > While the [*Dagenais/Mentuck*] test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in

> accordance with the Charter, whether it arises under the common law, as is the case with a publication ban (*Dagenais*, *supra*; *Mentuck*, *supra*); is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII), [2002] 2 S.C.R. 522, 2002 SCC 41). The burden of displacing the general rule of openness lies on the party making the application: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, at para. 71. [para. 31]
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> *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3 (CanLII), [2011] 1 SCR 65

In dealing with a request for a publication ban to protect an individual's privacy in *A.B. v. Bragg Communications Inc.*, the Supreme Court of Canada commented that any restriction must minimally impair the right of access:

> The inquiry is into whether each of these [restrictive] measures is necessary to protect an important legal interest and impairs free expression as little as possible. If alternative measures can just as effectively protect the interests engaged, the restriction is unjustified.

The decision of the National Energy Board to restrict access to its public hearings in Victoria and Vancouver is unjustified and unlawful

Under the *National Energy Board Act*, the Board and the Joint Review Panel, which sits as the Board, has the statutory power to control its own proceedings. In **Procedural Direction #13 Community Hearings for Oral Statements in Victoria, Vancouver and Kelowna,** the Joint Review Panel used its statutory discretion to refuse public access to the hearings in Vancouver and Victoria, while deciding to allow public access to the hearings in Kelowna. The Panel cited the fact of the large population in Vancouver and Victoria, and the fact that there have been protests against the Northern Gateway project in both cities, as justification. It stated that it made the decision in order to reduce distractions for presenters who have put effort into their statements:

> The Panel has designed a process for these locations that allows for hearing comments of those who registered to provide oral statements in a respectful and orderly fashion.
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> The Panel appreciates that oral statement presenters have put a great deal of effort into the preparation of their statements. The hearing formats for Victoria, Vancouver and Kelowna reflect the Panel's commitment to provide a process that will allow for listening to oral statements without potential distractions.
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> Given the large urban nature of Victoria and Vancouver and previous protests held in both locations regarding the proposed Enbridge Northern Gateway Project (the Project), the Panel has decided that it will limit access to the hearing room to registered oral statement presenters, one guest each, and media in these locations. The Panel is committed to a fair, transparent

process and has established a viewing room for all others to attend and watch a live videocast of the hearing.[2]

The Panel's decision, in our view, clearly violates the open court principle as set out by the Supreme Court of Canada. The mere fact of a large population and that there have been protests in the past is no evidence of any risk to the proceedings that is "real, substantial and well-grounded in the evidence". The Panel has cited no "serious danger" that it seeks to avoid that might possibly justify the restriction on the constitutional and democratic right of access to its proceedings. Beyond the vague statements above, the Panel's procedural direction disclosed no evidence of any actual threat to the orderly conduct of its Victoria and Vancouver hearings.

Neither of these cited rationales provides any justification to close the hearing room to the public. Courts and tribunals hold hearings all the time in large population centres. Courts and tribunals often hold hearings into controversial matters that are the subject of vigorous public debate and protest.

Indeed, the Joint Review Panel has held hearings without incident all over British Columbia, even through there have been from time to time significant protests against this project in cities like Prince George, Fort St. James, Smithers, Terrace, Kitimat, and Prince Rupert, and in Edmonton, Alberta. Often these protests have occurred at the very same time as the hearings were underway. In all instances, the hearings have proceeded without any incident threatening the integrity of the proceedings. On the one occasion in which the Panel cancelled hearings in Bella Bella on account of concerns about a protest, the local RCMP made clear that the protests had been safe and that there were no incidents of concern.[3] The fact that there have been protests as well in the large population centre of Kelowna, and yet the Panel will admit members of the public to the hearings there, underlines the nonsensical nature of this decision. In short, the protests plus population rationale for the Panel's decision is unconvincing and does not satisfy the Supreme Court of Canada's test.

In the event of any disruption to the Panel's proceedings, the Panel has sufficient power to control its proceedings and to ensure order by ejecting those who might disrupt the hearing without resorting to closing the hearing room. For example, warning disruptive individuals, and potentially using its powers to eject disruptive individuals are carefully tailored and perfectly adequate ways of protecting the integrity of the Board's process that minimally impair the right of open public access to its proceedings. The broad refusal to allow any member of the public other than a single guest for each speaker is simply unjustified under the Supreme Court of Canada's test.

Having failed to provide even the slightest evidence of any risk to its proceedings or to the administration of justice, the Panel's decision to restrict access fails the first branch of the test. It is not necessary to consider whether the "benefits" of refusing public access, and the Panel's substitute method for providing information to the public using video viewing rooms and webcasting – are sufficient to balance against the harmful effects of the decision. The existence of video viewing rooms, in each case several kilometres away, the provision of webcasting, and the opening of the hearings to

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[2] Accessed at https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624909/892042/A305-1_-_Panel-Commission_-_Procedural_Direction_No._13_-_Oral_Statements_in_Victoria,_Vancouver_and_Kelowna_-_A3D9U6?nodeid=891991&vernum=0.

[3] See http://www.pacificfreepress.com/opinion/11349-crying-wolf-enbirdge-pipeline-panel-cancels-bella-bella-citing-qsafety-fearsq-rcmp-deny-danger.html.

media are no substitute for an open hearing room where members of the public are free to enter and observe the hearings first hand.

The Panel casts its decision as one that will benefit the individuals giving testimony and honour the time they have spent preparing their statements, and benefit the hearing process itself, by providing a "process that will allow for listening to oral statements without potential distractions". This purported justification forgets one of the key features of the open court principle. By refusing to allow a public audience in the hearing room itself, the Panel deprives the speakers of their ability to give testimony in the presence of their community members. Moreover, the Supreme Court of Canada is clear on the point that in justifying a deviation from open courts, "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained" (*Toronto Star*, *supra*). Providing an atmosphere free of distraction is possible without barring the public from the hearing room, and in any case, providing this benefit without demonstrating any serious risk cannot serve as a justification for the Panel's decision.

It is the BCCLA's contention that the Panel's decision to refuse public access to the hearings in Victoria and Vancouver is unreasonable, unjustified under the Supreme Court of Canada's test to restrict the open court principle, and therefore unlawful. While it is too late to provide a remedy to residents of Victoria for the violation of their right of free access to the National Energy Board's proceedings, it is not too late for the Board to rectify this matter in time for its Vancouver hearings. We respectfully request that the National Energy Board, and the Joint Review Panel which sits as the National Energy Board, rescind its direction to close the community hearings to the public and to throw open the hearing room doors to those who are interested in observing these important proceedings.

In closing, we note it is a particular shame that these hearings are closed given the high level of public interest in them. Hearing rooms have been packed all over British Columbia with people eager to have a window onto this process that has the potential to affect so many people's lives. It is unfortunate that the National Energy Board has chosen to close itself off from the public rather than to use this opportunity to allow the public to have a genuine, in-person window onto its proceedings.

Sincerely

Lindsay M. Lyster
President