



Direct Line: 604-630-9928
Email: Laura@bccla.org

BY EMAIL

January 20, 2016

Page 1/9

Peter Watson, Chair
National Energy Board
517 Tenth Avenue SW
Calgary, Alberta T2R 0A8

RE: The Board's refusal to allow public access to the Kinder Morgan Trans Mountain Hearings

Dear Mr. Watson:

The British Columbia Civil Liberties Association is deeply concerned with the decision of the Trans Mountain Expansion Board Panel to refuse direct public access to its oral summary argument hearings in Burnaby and Calgary. 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 clearly unreasonable and potentially unlawful. Our view in this respect is unchanged from when last we wrote to Board in January 2013, in relation to the Northern Gateway hearings.

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.

A.B. v. Bragg Communications Inc., 2012 SCC 46 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:

Page 2/9

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]

Named Person v. Vancouver Sun, 2007 SCC 43, [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) [...]

Page 3/9

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 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

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 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.

Page 4/9

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:

- (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

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

(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]

Page 5/9

[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).

Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41 (CanLII), [2005] 2 SCR 188

The test applies to all situations where access to proceedings is 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:

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]

Page 6/9

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 Burnaby and Calgary is unjustified and unlawful

Under the *National Energy Board Act*, the Board and Board Panel has the statutory power to control its own proceedings. In "Procedural Direction #19: Revised oral summary argument process: locations, notices of intent, and guidance", the Board Panel used its statutory discretion to refuse public access to the hearings in Burnaby and Calgary. The Panel cited the "past history of disruptions and the publically available information regarding occurrences of civil disobedience associated with the Project", as justification. It stated that it made the decision in order to "limit potential distractions and to

provide a fair, efficient and safe opportunity for all participants that will be providing oral summary argument in front of the Panel members.”

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 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 Burnaby and Calgary hearings.

Page 7/9

The cited rationale does not provide any justification to close the hearing room to the public. Courts and tribunals often hold hearings into controversial matters that are the subject of vigorous public debate and protest.

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 two per intervenor, with some limited exceptions, 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 webcasting are sufficient to justify the harmful effects of the decision.

The provision of webcasting and the opening of the hearings to media are no substitute for an open hearing room where members of the public are free to enter and observe the hearings firsthand.

The Panel casts its decision as one that will “limit potential distractions and to provide a fair, efficient and safe opportunity for all participants that will be providing oral summary argument in front of the Panel members.” 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.

Page 8/9

Moreover, the Supreme Court of Canada is clear 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 Burnaby and Calgary is unreasonable, unjustified under the Supreme Court of Canada’s test for restricting the open court principle, and therefore unlawful. It is not too late for the Board to rectify this matter. We respectfully request that the National Energy Board rescind its direction to close the oral summary 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. The fact that the hearing rooms have been virtually empty, other than NEB staff, private security, police and limited media, due to the strict limitations placed on attendance, is in stark contrast to the numbers of interested members of the public that have been kept outside the proceedings. 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 into its proceedings.

Sincerely,

A handwritten signature in black ink, appearing to read 'L. Track', is centered below the word 'Sincerely,'. The signature is written in a cursive, flowing style.

Page 9/9

Laura Track
Counsel