

NATIONAL ENERGY BOARD

IN THE MATTER OF the *National Energy Board Act*, R.S.C. 1985, c. N-7, as amended, (“NEB Act”) and the Regulations made thereunder;

AND IN THE MATTER OF the Certificate of Public Convenience and Necessity OC-064 (“Certificate”) held by Trans Mountain Pipeline ULC as General Partner of Trans Mountain Pipeline L.P. (collectively “Trans Mountain”), in respect of the Trans Mountain Expansion Project (“Project”);

AND IN THE MATTER OF National Energy Board (“NEB” or “Board”) Orders XO-T260-003-2017, MO-021-2017, XO-T260-007-2016 and XO-T260-010-2016 for Project-related work at the Burnaby Terminal and Westridge Marine Terminal.

**NOTICE OF MOTION AND CONSTITUTIONAL QUESTION
OF TRANS MOUNTAIN**

October 26, 2017

To: The Secretary
National Energy Board
517 – 10th Avenue S.W.
Calgary, AB T2R 0A8

DECISION OR ORDER REQUESTED

1. Trans Mountain hereby requests that the Board:
 - (a) issue an Order pursuant to sections 12, 13 and paragraphs 73(c), (e), (g) and (i) of the NEB Act declaring that:
 - (i) Section 7.3 of City of Burnaby's Zoning Bylaw (Bylaw No. 4742) ("**Zoning Bylaw**") and Section 3 of Burnaby's Tree Bylaw (Bylaw No. 10482) ("**Tree Bylaw**") do not apply to the Trans Mountain Project-related work ("**Terminal Work**") at the Burnaby Terminal, the Westridge Marine Terminal ("**WMT**") and the Kask Brothers Temporary Infrastructure Site ("**KB Site**"); and,
 - (ii) that Trans Mountain may commence the Terminal Work and use the KB Site pursuant to the terms and conditions of the applicable Certificate and NEB Orders notwithstanding the fact that the City of Burnaby ("**Burnaby**") has not issued preliminary plan approvals ("**PPAs**") or tree cutting permits for the Terminal Work;
 - (b) grant relief (pursuant to Condition 1) from Condition 2 and Trans Mountain's commitment to comply with Burnaby's bylaws insofar as that commitment requires Trans Mountain to obtain the necessary PPAs and other municipal permits from Burnaby prior to commencing the Terminal Work and using the KB Site but subject to its commitments made to Burnaby in the permit application process; and
 - (c) establish an efficient, fair, and timely process for Trans Mountain to bring similar future matters to the Board for its determination in cases where municipal or provincial permitting agencies unreasonably delay or fail to issue permits or authorizations in relation to the Project.

NOTICE OF CONSTITUTIONAL QUESTION

2. Take notice that Trans Mountain intends to raise constitutional questions in relation to the applicability and operability of certain Burnaby municipal bylaws in the context of the Terminal Work. As such, Trans Mountain intends to seek a determination from the Board on whether the doctrines of interjurisdictional immunity and/or paramountcy apply to relieve Trans Mountain from the obligation to obtain municipal approval under section 7.3 of Burnaby's Zoning Bylaw and section 3 of the Tree Bylaw prior to conducting the Terminal Work.

ADDITIONAL ISSUES

3. In addressing the Constitutional Question, Trans Mountain will also address the following related issues:
 - (a) Does the Board have the legal authority to determine that Burnaby's specific bylaws that require Trans Mountain to obtain PPAs and Tree Permits for the

Terminal Work are inapplicable, invalid, or inoperative in the context of Trans Mountain's exercise of its powers under section 73 of the NEB Act?

- (b) If so, on the facts before the Board, should the Board find that those bylaws are inapplicable, invalid, or inoperative?

SUPPORTING MATERIALS

4. In addition to, and in support of this Notice of Motion and Constitutional Question, Trans Mountain has filed the Affidavit of Michael Davies, sworn October 26, 2017 ("**Davies Affidavit**").

STATEMENT OF FACTS

5. Trans Mountain is a Canadian corporation and a "company" within the meaning of section 2 of the NEB Act.
6. On November 29, 2016 the Governor in Council ("**GIC**") issued Order in Council P.C. 2016-1069 approving the Project and authorizing the issuance of the Certificate pursuant to section 52 of the NEB Act.
7. Trans Mountain holds the Certificate for the Project and NEB Orders XO-T260-003-2017 (Filing ID [A82717](#)), MO-021-2017 (Filing ID [A82725](#)), XO-T260-007-2016 (Filing ID [A5C4Z0](#)) and XO-T260-010-2016 (Filing ID [A77401](#)) in relation to the Terminal Work.
- (a) *The Terminal Work*
8. The Burnaby Terminal is an industrial site that operates as the end point of the existing Trans Mountain Pipeline ("**Pipeline**"). Currently, it serves as a distribution point for crude oil and refined products. Part of the Project entails expanding the Burnaby Terminal within the existing property boundaries, including: (i) demolishing one of the existing 13 tanks; (ii) building 14 new tanks (for a total of 26 tanks); (iii) relocating existing delivery pipelines; (iv) installing fire-protection systems and odour abatement equipment on all new tanks; and, (v) installing an enhanced storm water treatment system ("**BT Expansion**"). To accommodate the associated facility piping relocation work, brush and tree removal is required in select areas on Burnaby Terminal property owned by Trans Mountain in fee simple. The details of this work were included in the main Project Application,¹ which was considered by the Board and approved pursuant to NEB Order XO-T260-010-2016.
9. In order to accommodate the BT Expansion, Trans Mountain must decommission and relocate select facility piping that would otherwise be in the way of the construction of tanks and associated infrastructure. This work is referred to as the Burnaby Terminal Modifications ("**BTM**"). Trans Mountain applied to the NEB for approval of the BTM on January 25, 2017, and received approval less than three months later on April 20, 2017 via NEB Orders XO-T260-003-2017 and MO-021-2017.

¹ Davies Affidavit, paras 22-25.

10. The WMT is a loading facility where tankers that transport products from the pipeline (including its expansion) to overseas markets are loaded with products from the pipeline. Through the issuance of the Certificate, the NEB approved an expansion of the WMT (“**WMT Expansion**”) to accommodate increased delivery capacity on the pipeline. The federally approved WMT Expansion includes the installation of a new dock complex with three berths, a utility dock to moor tugs, boom boats and emergency response vessels, additional delivery pipelines and an extension of the land along the shoreline to accommodate expanded operations. The full scope of this work was included in Trans Mountain’s main Project application, which the Board considered prior to approving the WMT Expansion as part of the Project through the issuance of the Certificate. The WMT has now received authorizations from all applicable federal regulators, including Fisheries and Oceans Canada (Filing ID [A85941](#)) and the Vancouver Fraser Port Authority.²
11. As part of the construction of the WMT expansion work, Trans Mountain requires the use of the KB Site located at 7585 Barnet Highway in the City of Burnaby. The KB Site will be used to house a temporary construction office, material storage and assembly and a parking lot for construction personnel who will be shuttled by bus to the WMT site. The KB Site, which was approved under the Certificate, is subject to NEB Order XO-T260-007-2016 (Filing ID [A5C4Z0](#)). That Order exempts Trans Mountain from the detailed routing approval requirements under the NEB Act in relation to temporary infrastructure sites. Pursuant to Certificate Condition 61, which is not explicitly subject to Board approval, Trans Mountain filed a list of temporary infrastructure sites for the Project that includes the KB Site (Filing ID [A5Q9D6](#)).³ Trans Mountain’s assessment of the environmental and socio-economic effects and mitigation measures for temporary infrastructure sites, prepared pursuant to Condition 60, included the KB Site and was approved by the Board on September 27, 2017 (Filing ID [A5U5S4](#)).⁴
12. With the exception of the foreshore activities at the WMT (which will occur on federal lands) and the KB Site (which will be constructed on lands temporarily leased to Trans Mountain) the entirety of the Terminal Work will take place on fee simple lands owned by Trans Mountain. As detailed in the Davies Affidavit, the Board has authorized all of the Terminal Work, subject to conditions.⁵
13. The Terminal Work will be conducted in accordance with Environmental Protection Plan (“**EPP**”) including the Facilities (Filing ID [A86536](#), [A86546](#)) the Temporary Construction Lands & Infrastructure EPP (Filing ID [A5U9Y9](#) and [A5U9Z0](#)) and the WMT EPP (Filing ID [A85541](#)), which were prepared pursuant to Certificate Conditions 78 and 81. The EPPs are comprehensive sets of documents and plans that set out the mitigation measures that

² Davies Affidavit, Exhibits 15 & 16.

³ Davies Affidavit, paras 105-107.

⁴ Davies Affidavit, paras 104.

⁵ As discussed in the Davies Affidavit, Trans Mountain has sought approval from the NEB for a variance to NEB Order XO-T260-010-2016 in relation to the Burnaby Terminal expansion work pursuant to section 21 of the NEB Act. NEB Approval is anticipated for December 2017.

will be implemented during pre-construction, construction and post-construction activities to ensure Project effects are minimized to the extent feasible.

(b) *Trans Mountain's Commitment to Obtain Permits*

14. The NEB's May 2016 recommendation report for the Project ("**NEB Report**") stated that:

Trans Mountain said it would apply for, or seek variance from, all permits and authorizations that are required by law, and would continue to work with all municipalities to understand the applicability of bylaws and standards related to the construction and operation of the Project [page 251].

15. Certificate Condition 2 requires Trans Mountain to "implement all of the commitments it made in its Project application or to which it otherwise committed on the record of the OH-001-2014 proceeding." However, the Board has flexibility in enforcing condition requirements pursuant to Certificate Condition 1, which states that "Trans Mountain must comply with all of the [certificate/order] conditions, unless the NEB otherwise directs."

(c) *Burnaby's Steadfast Opposition to the Project*

16. Burnaby's opposition to the Project and its inclination to strictly enforce the terms of its bylaws - even when doing so will impair or conflict with a federal undertaking - is demonstrated by its conduct in 2014 in relation to the Burnaby Mountain Tunnel geotechnical work. In that case, the details of which are set out in the Davies Affidavit at paras 38-47, Burnaby refused to grant access to Trans Mountain to conduct corridor studies on the basis that the work conflicted with Burnaby's bylaws. Burnaby used physical, enforcement and legal (via an injunction application) means to try and prevent Trans Mountain from conducting the studies, and was wholly unresponsive to Trans Mountain's arguments that it had the right to proceed under federal law absent Burnaby's consent.
17. Trans Mountain filed a Notice of Motion and Notice of Constitutional Question (Filing ID [A63063](#)) with the Board to determine, among other things, whether Trans Mountain had the right to proceed under federal law absent Burnaby's consent. The Board established a process for written submissions and affidavit evidence. In addition, oral argument took place at the Board's offices on October 9, 2014 (Filing ID [A4D1D6](#)). This gave rise to Ruling No. 40 (Filing ID [A63788](#)), a key decision that was upheld by the Federal Court of Appeal.
18. Ultimately, the NEB and the courts agreed that the prohibitive bylaw was inoperative or inapplicable in the circumstances and that Trans Mountain had the right to proceed without further approval from Burnaby. Burnaby and its representatives were forbidden from interfering or obstructing Trans Mountain from exercising its right to conduct the studies.
19. Burnaby's public opposition to the Project has continued since that time. For several years, Burnaby's Mayor (Derek Corrigan) and representatives have stated that Burnaby:
- is staunchly opposed to the Project;
 - will do everything it can to frustrate the Project;

- will continue to work to stop the pipeline, storage tanks and marine terminal docks associated with the Project from coming to Burnaby.⁶
20. In August 2016, the Burnaby online newsroom published a statement from the Mayor that Burnaby “remains steadfastly opposed” to the Project.⁷ Subsequently, on November 19, 2016, the Mayor stated in a speech that “We will ensure that the Kinder Morgan Pipeline never goes through our community”.⁸
21. At least one publication reported that the Mayor believed the permitting process was a legitimate method of slowing down the Project,⁹ even though the Board had already determined that the Project was in the public interest and ought to proceed.
- (d) *Burnaby Bylaw Requirements Applicable to the Terminal Work*
22. The following approvals from Burnaby apply to the Terminal Work:
- (a) Section 7.3 of Burnaby’s Zoning Bylaw (Bylaw No. 4742) states that a Preliminary Plan Approval (“**PPA**”) is required whenever there is a change of use, density or external appearance proposed for a property. This can be in the form of a new land use, building or structures, or in the form of an addition or alteration to an existing land use, building or structure.
 - (b) Section 3 of Burnaby’s Tree Bylaw (Bylaw No. 10482) provides that a tree-cutting permit must be obtained if trees are to be removed that meet the definition of “protected trees”.
- (e) *Burnaby’s Failure to Issue Permits for the Terminal Work*
23. A chronology of the PPA application process to date is as follows:
- (a) On April 4, 2017, Trans Mountain representatives attended a pre- Technical Working Group (“**TWG**”) meeting with Burnaby officials. At that meeting, Mr. Dipak Dattani, Deputy Director of Engineering for Burnaby, requested Trans Mountain officials direct any permit applications to Burnaby through the TWG meetings.
 - (b) In June 2017, Trans Mountain submitted four PPA applications to Burnaby in relation to the Terminal Work:
 - (i) KB Site PPA application number 17-00165 (“**KB Application**”) for a change of use of industrial lands to be used for manufacturing and

⁶ Davies Affidavit, Exhibits 19, 20, 21.

⁷ Davies Affidavit, Exhibit 22.

⁸ Davies Affidavit, Exhibit 23.

⁹ Davies Affidavit, Exhibit 24

fabrication, storage of materials, tools and equipment, parking, a construction office trailer and a bus staging area;

- (ii) Burnaby Terminal Modification PPA application number 17-00178 (“**BTM Application**”) for the excavation and backfill for utility trenches for relocations of existing underground infrastructure, the placement of temporary buildings for construction purposes, the installation of perimeter fencing and the removal of trees;
- (iii) Burnaby Terminal Expansion PPA application number 17-00172 (“**BTE Application**”) for the construction and installation of 14 new oil storage tanks, intermediate storm water retention areas, a firewater reservoir, a water pump building and an unoccupied electrical service building; and
- (iv) Westridge Marine Terminal Expansion PPA application number 17-00173 (“**WMT Application**”) for improvements to existing systems and the construction of a new receiving manifold area, fire water hydrants, three new pipelines, new fencing a new unoccupied electrical service building and a sending and receiving trap

(collectively, the “**PPA Applications**”).

- 24. After the submission of the PPA Applications, Trans Mountain received various e-mail communications from Burnaby in respect of the PPA Applications.
- 25. With respect to the BTM Application, Trans Mountain received zoning and other comments on August 9, 2017. Since then, Trans Mountain has submitted revised drawings and additional materials in support of the BTM Application on September 1, 2017 [Exhibit 36 Affidavit] and October 16, 2017 [Exhibits 37 and 38 Affidavit].
- 26. Trans Mountain has received responses from other Burnaby Departments in respect of the PPA Applications, but to date has not received zoning review comments on any application other than the BTM Application [Exhibit 57 Affidavit].
- 27. After submitting the PPA Applications. Trans Mountain became aware that the tree management plan submitted in support of the BTM, BTE and WMT Applications did not comply with Burnaby’s Tree Bylaw [Exhibit 52, Affidavit] and accordingly requested an exemption to the non-complying sections of the Tree Bylaw, which the Director of Planning has the authority to grant [Exhibits 53 and 54 Affidavit].
- 28. On October 10, the Director of Planning refused the request for varying the requirements of the Tree Bylaw.¹⁰
- 29. To date, Burnaby has failed to issue any of the outstanding PPAs for the Terminal Work or provide a reasonable explanation for the timeframe for their issuance. Burnaby has had

¹⁰ Davies Affidavit, Exhibit 55.

the applications for 22 weeks. Other than the BTM Application, Burnaby has not provided specific zoning comments on the PPA Applications.

QUESTION 1: Does the Board have the legal authority to determine that Burnaby’s specific bylaws that require Trans Mountain to obtain PPAs for the Terminal Work are inapplicable, invalid, or inoperative in the context of Trans Mountain’s exercise of its powers under section 73 of the NEB Act?

30. Yes, the NEB has the legal authority to determine that the Burnaby Zoning Bylaw and Tree Bylaw (collectively the “**Bylaws**”) are inapplicable or inoperative in the context of section 73 of the NEB Act.
31. The NEB has jurisdiction to enquire into and determine the issues raised by the interplay between section 73 of the NEB Act and the Bylaws. This question was specifically addressed by the Board in Ruling No. 40 in relation to the Project (Filing ID [A63788](#)) as follows:

The Board has legal authority to consider constitutional questions relating to its own jurisdiction and this is such a question. Preventing access to lands as needed for the completion of surveys and studies relating to pipeline routing (Corridor Study Access) is contrary to the NEB Act. The Board has the authority to determine that specific bylaws at issue are inapplicable or inoperative for the purpose of the matter before the Board.

32. The Federal Court of Appeal denied Burnaby’s request for leave to appeal Ruling No. 40, and thus this conclusion remains determinative. Moreover, this point of law was confirmed in *Burnaby (City) v Trans Mountain Pipeline ULC* (“*Burnaby BCSC*”), which was upheld on appeal.¹¹:

The NEB had the jurisdiction to address the constitutional questions which were before it in order to decide that Trans Mountain could perform the engineering studies in the face of Burnaby's attempted enforcement of its bylaws: see *Cuddy Chicks Ltd. v. O.L.R.B.*, [1991] 2 S.C.R. 5.¹²

33. The NEB Act establishes that the NEB is a court of record¹³ with the full and exclusive jurisdiction to inquire into, hear and determine any matter within its jurisdiction,¹⁴ whether a matter of law or a matter of fact.¹⁵
34. It is settled that administrative tribunals that have the jurisdiction to determine questions of law can address division of powers questions, and courts will then review those decisions

¹¹ *Burnaby (City) v Trans Mountain Pipeline ULC*, 2017 BCCA 132 (“*Burnaby BCCA*”). [TAB 6]

¹² *Burnaby (City) v Trans Mountain Pipeline ULC*, 2015 BCSC 2140 ¶ 42 [TAB 5]

¹³ NEB Act, s 11(1).

¹⁴ *Ibid*, s 12(1).

¹⁵ *Ibid*, s 12(2).

subject to a standard of correctness. In *Cooper v. Canada (Human Rights Commission)*,¹⁶ Justice La Forest for a majority of the Supreme Court of Canada noted that “it is well accepted that a tribunal has the power to address questions on the constitutional division of powers”.¹⁷

35. The law is clear. The NEB has the jurisdiction to determine constitutional issues that are relevant to the exercise of its authority, which includes determining the constitutional validity and applicability of a statutory provision such as Burnaby’s bylaws. The Board has already ruled on this issue and exercised this power in Ruling No. 40, which was upheld when challenged to the Federal Court of Appeal and was reaffirmed by the British Columbia courts in *Burnaby (City) v Trans Mountain Pipeline ULC* (“*Burnaby BCCA*”) and the judgement below:

The authority of the NEB to address division of powers under the *Constitution Act, 1867* was addressed by Madam Justice Brown in the injunction hearing:

[37] The NEB is given powers pursuant to its Act that includes, 11 that provides it is a court of record with all powers, rights and privileges as are vested in the Superior Court of Record. By s. 12 of the Act, it is given full and exclusive jurisdiction to inquire into, hear, and determine any matter, and has full jurisdiction to hear and determine all matters whether of law or fact.

[38] By s. 13 of the Act, the NEB is given the power to make mandatory orders.

[39] The NEB has jurisdiction to determine the constitutional issues that are relevant to the exercise of its authority: *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54 at para. 28; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 at para. 39; *Calgary (City) v. Canadian Natural Resources Limited*, 2010 ABQB 417 at paras. 80-86.

[40] In *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, the Supreme Court of Canada said that, while an administrative tribunal cannot issue a formal declaration of invalidity (assuming, for example, that the NEB determined that the Burnaby bylaws were invalid in this context), which is a remedy exercisable only by the Superior Courts, the tribunal may treat any impugned provision as invalid for the purposes of the matter before it. Therefore, although it could not issue a declaration that s. 73 of the Act or the Burnaby bylaws were invalid, nonetheless, the NEB would be able to treat the impugned provision as invalid for the purposes of the matter before it.

I agree with this analysis. Burnaby’s contention that the NEB exceeded its jurisdiction and struck out into uncharted constitutional waters when it considered

¹⁶ *Cooper v. Canada (Human Rights Commission)*, [1996] 3 SCR 854 [TAB 12].

¹⁷ *Cooper* ¶ 64 [TAB 12].

the applicability of laws outside its enabling statute is, with respect, without merit.¹⁸

36. Likewise, delaying the issuance of, or failing to issue, municipal permits because of either conflicting requirements relative to federal approvals, or simply a failure to act, which prevents the construction and operation of an approved federal undertaking such as the Project, must be contrary to the NEB Act. It is clear the Board has the authority to determine that, in the circumstances, the impugned permitting requirements imposed by the Bylaws are inapplicable to or inoperable in respect of the Project.
37. In addition, the Board has the authority to grant relief from condition requirements pursuant to Certificate Condition 1, which states that Trans Mountain “must comply with all of the [certificate/order] conditions, unless the NEB otherwise directs”. The NEB has the authority and flexibility to grant relief from specific condition requirements without varying the Certificate itself. Indeed, the Board can grant the relief from Condition 2 as requested on its own determination and without approval from the Governor-in-Council (“GIC”) under section 21 of the *National Energy Board Act*. This view is consistent with the NEB’s interpretation of Condition 1 in the NEB Report:

The intent of the phrase “unless the NEB otherwise directs” in Condition 1 is to provide the Board with some flexibility to vary conditions in a timely manner, if needed, without requiring the Governor in Council approval. Changes would be considered by the Board on a case-by-case basis, within the context of the conceptual design presented by Trans Mountain in its application and the hearing, the associated level of safety and environmental protection, and the recommendation and decisions of the Board and the Governor in Council. More substantial changes to the Project would require a variance pursuant to section 21 of the NEB Act, and variance of a Certificate would not be effective until approved by the Governor in Council [page 118].

38. The “unless the NEB otherwise directs” wording in Condition 1 has been relied on by the Board in many previous instances to grant relief from condition requirements without seeking a formal variance under section 21. For example, the Board regularly grants timing relief without GIC approval,¹⁹ which it did recently in relation to Certificate Condition 30.²⁰ Trans Mountain submits that the relief sought herein is limited in scope (i.e., it relates to a single commitment insofar as it applies to a single municipality), will not result in any harm to third parties and does not constitute a “substantial change” to the Project that would require a section 21 variance – indeed, the relief sought would not result in a change to the Project at all.
39. Not only is this approach legally valid, it is also eminently practical. Trans Mountain has made best efforts to obtain PPAs and permits from Burnaby in relation to the Terminal Work. It has committed to pay compensation or replant in accordance with the Tree Bylaw.

¹⁸ *Burnaby BCCA* ¶ 34 [TAB 6].

¹⁹ See, for example, the NEB’s letters regarding the Keystone Pipeline Cushing Expansion (30 October 2008) [A1H5U3], Bear River West Lateral Loop (September 16, 2010) [A1U6C6], Vantage Pipeline (October 26, 2012) [A3A1Y3], Chinchaga Lateral Loop No. 3 (May 29, 2013) [A3H9Y5], and the North Montney Mainline Project (July 22, 2015) [A4R6G8].

²⁰ NEB Letter to Trans Mountain re. Request for timing relief from Condition 30 (May 19, 2017) [A5Q0Q5].

The Terminal Work will occur on Trans Mountain's lands and in accordance with strict requirements imposed by the NEB to minimize all potential environmental and socio-economic impacts. Burnaby has not offered any reasonable basis for its permitting delay. In tandem with its permitting process, Burnaby's Mayor has been very vocal in his opposition and desire to stop the Project from proceeding.

40. As before, Burnaby is using its municipal bylaws to stop a Federal work and undertaking and challenge the direct will of the Federal cabinet.
41. In addition, having to seek approval from the GIC would undermine the request for relief because of the additional time that Cabinet approval takes (often 2-3 months or more). Requiring GIC approval for these types of requests would frustrate efficient construction of federal pipeline projects and would facilitate illegitimate attempts made by permitting agencies to stop the Project, which would not be in the public interest.

QUESTION 2: If so, on the facts before the Board, should the Board find that those bylaws are inapplicable, invalid, or inoperative?

42. Yes. The Board must conclude that the Bylaws are inapplicable or inoperative in the context of Trans Mountain's rights under section 73 of the NEB Act and the Certificate and NEB Orders that approve the Terminal Work.

(a) Burnaby's Bylaws

Zoning Bylaw

43. A local government in British Columbia may pass a zoning bylaw to generally regulate the use of land, buildings and other structures and also designate, by bylaw, the specific system of land use permits that a municipality may require.²¹
44. Burnaby enacted its Zoning Bylaw in 1965 and its stated purpose is to regulate "the development and use of land and the location and use of buildings and structures erected thereon".²² The Zoning Bylaw provides the following:

Within the City of Burnaby no land, buildings and structures, regardless of the form of ownership or tenure, including the surface of water, shall hereafter be used or occupied, and no building or structure or part thereof shall be erected, moved, altered or enlarged, unless in conformity with this Bylaw, and the contrary shall be unlawful.²³

45. The Zoning Bylaw requires that any person who wishes to "undertake a development shall apply for and receive a preliminary plan approval from the Director of Planning before the

²¹ *Local Government Act*, RSBC 2015, c 1 [LGA], Part 14.

²² *Zoning Bylaw*, s 2.

²³ *Ibid*, s 4.1 [emphasis added].

issuance of a building permit or business license”.²⁴ The definition of “development” is provided as follows:

"DEVELOPMENT" means a change in the use of any land, building or structure for any purpose, and shall include the carrying out of any building, engineering, construction or other operation in, on, over or under land, or the construction, addition, or alteration of any building or structure.²⁵

46. An application for a PPA must include various pieces of information as set out in section 7.3(2) of the Zoning Bylaw, including a landscaping plan “and such further or additional land use information as the Director of Planning may require”.
47. Burnaby has published a PPA approval guide in which it is stated that a PPA requires a “tree management plan including all existing protected trees, trees to be removed or retained, tree protection fences, and location of replacement trees”.²⁶
48. The Zoning Bylaw sets out various development standards in which development must comply with. These include, *inter alia*, the permitted uses of land in an applicable zoning district, the height of buildings, building setbacks, parking requirements and landscaping standards.
49. The Zoning Bylaw defines “landscaping” as follows:

"LANDSCAPING" means the planting of lawns, shrubs and trees, and the addition of fencing, walks, drives, or other structures and materials as used in landscape architecture.²⁷

50. Burnaby’s Zoning Bylaw also sets out a scheme in which development must be setback between 5-30 metres from a “streamside protection and enhancement area” (“SPEA”) which is determined through a detailed analysis of the fish bearing status of a stream and areas near the stream containing existing vegetation or the potential for vegetation.²⁸
51. The Zoning Bylaw states the following:

No development shall occur on any land within a streamside protection and enhancement area.²⁹

52. A discretionary variance of the SPEA boundaries is contemplated by the Zoning Bylaw:

The Director Planning and Building may, with the approval of the Department of Fisheries and Oceans, vary the boundaries of a streamside protection and

²⁴ *Ibid*, s 7.3(1).

²⁵ *Ibid*, s 3.

²⁶ City of Burnaby, *Preliminary Plan Approval: A Guide to the City Approvals Process in Burnaby*, online:

²⁷ *Ibid*, s 3.

²⁸ See section 6.23 of the Zoning Bylaw which contains the provisions related to calculating SPEA.

²⁹ Zoning Bylaw, s 6.23(4),

enhancement area in circumstances where the establishment of the streamside protection and enhancement area pursuant to the criteria set out in subsection (2) is unfeasible. The following factors may be considered:

- (a) physical conditions;
- (b) existing parcel sizes;
- (c) existing roads, trails, works or services;
- (d) proposed roads, trails, works and services needed to provide access or services to otherwise developable land or to connect to existing roads, trails, works or services.³⁰

53. With respect to temporary buildings, the Zoning Bylaw provides the following:

Temporary buildings may only be erected or placed on land for the following purposes and for the following time periods:

- (a) for construction office and construction equipment or material storage purposes on a lot undergoing development for a period not to exceed the duration of such construction;³¹

54. The definition of a Temporary Building is:

"BUILDING, TEMPORARY" means a building or structure placed on a lot for a limited period of time but does not include a mobile home which is located in a mobile home park or a recreational vehicle.³²

55. With respect to off-street parking areas that are shared by two or more buildings or uses the Zoning Bylaw requires the following:

- (2) Except in the case of dwellings located in residential districts off-street parking spaces may be provided and used collectively by two or more buildings or uses, provided that the total number of parking spaces when used together is not less than the sum of the requirements for the various individual uses, and that such parking facilities shall be located not more than 122 m (400.26 ft.) from any building or use to be served.³³

56. According to the Zoning Bylaw a PPA will be issued when a development conforms to the Bylaw:

³⁰ *Ibid*, s 6.23(3).

³¹ *Ibid*, s 6.7(1).

³² *Ibid*, s 3.

³³ *Ibid*, s 800.5(2)

When such application for development conforms to the provisions of this Bylaw and does not contravene any approved land use or road plan, preliminary plan approval shall be given by the Director of Planning.³⁴

57. Outside of variances to the SPEA setback and other minor variance power for siting and parking requirements of temporary buildings³⁵, the Zoning Bylaw provides no power to the Director of Planning to vary other provisions of the Zoning Bylaw for the purposes of approving a PPA.
58. The LGA requires a municipality to establish a board of variance³⁶ and Burnaby has passed Bylaw No. 5843 which establishes a Board of Variance for Burnaby (the “**Burnaby BOV**”).³⁷
59. A board of variance may approve a variance of a zoning bylaw if a person is caused hardship in respect of complying with the siting, size or dimensions of a building or other structure.³⁸
60. The board of variance has the power to grant a minor variance of the Zoning Bylaw:

542 (1) On an application under section 540, the board of variance may order that a **minor variance** be permitted from the requirements of the applicable bylaw, or that the applicant be exempted from section 531 (1) [alteration or addition while non-conforming use continued], if the board of variance

- (a) has heard the applicant and any person notified under section 541,
- (b) finds that undue hardship would be caused to the applicant if the bylaw or section 531 (1) is complied with, and
- (c) is of the opinion that the variance or exemption does not do any of the following:
 - (i) result in inappropriate development of the site;
 - (ii) adversely affect the natural environment;
 - (iii) substantially affect the use and enjoyment of adjacent land;
 - (iv) vary permitted uses and densities under the applicable bylaw;
 - (v) defeat the intent of the bylaw.³⁹

³⁴ *Ibid*, s 7.3(3).

³⁵ *Ibid*, s 6.7(3)

³⁶ *LGA*, s 536(1).

³⁷ City of Burnaby, revised bylaw, No. 5843, *Burnaby Board of Variance Bylaw 1971*, (5 April 1971).

³⁸ *LGA*, s 540.

³⁹ *Ibid*, s 542 [emphasis added].

61. A decision of the board of variance is final.⁴⁰

Tree Bylaw

62. The *Community Charter* provides that a council of a municipality may, by bylaw, regulate, prohibit and impose requirements in relation to trees.⁴¹
63. Burnaby enacted its Tree Bylaw in 1996 and while it has no stated purpose, there are a number of City Council reports, and amending bylaw reports, available on Burnaby's website setting out the purpose of the Tree Bylaw.⁴² One of these reports states that "[o]ne of the main objectives of the Bylaw is to protect mature trees".⁴³
64. Burnaby's Tree Bylaw sets out the following:
- Except as permitted by this Bylaw, no person shall damage a protected tree and no person shall cut down a protected tree unless that person holds a valid tree cutting permit.⁴⁴
65. The Tree Bylaw sets out a detailed regulatory scheme in which a person may apply to the Director of Planning to obtain a permit to remove a tree falling within the category of a "protected tree".⁴⁵ An application to cut down a protected tree must contain various pieces of information as set out in section 5(1) of the Tree Bylaw, including the provision of a "tree plan".⁴⁶
66. A "tree plan" is defined as follows:

(v) "tree plan" means one or more plans, including a survey plan prepared by a B.C. licensed surveyor showing the legal boundaries and dimensions of the site to which it relates and the location and diameter of each protected tree on the site or within 2m (6.562 ft.) of the boundary of the site, and containing the following information:

- (i) the type (coniferous or deciduous) of each protected tree;
- (ii) each protected tree proposed to be retained;

⁴⁰ *Ibid*, s 542(4).

⁴¹ SBC 2003, c 26, s 8(3).

⁴² See "Council Reports" section of Burnaby Tree Bylaw website at <https://www.burnaby.ca/City-Services/Building/Burnaby-Tree-Bylaw.html>.

⁴³ City of Burnaby, Manager's Report No. 11: Council Meeting 98/04/20, *Tree Protection Bylaw Update*, online: <https://search.heritageburnaby.ca/media/hpo/Data/CouncilMinutesAndReports/Unrestricted/1998/20-Apr-1998/61395.pdf> [emphasis added].

⁴⁴ Burnaby Tree Bylaw, s 3.

⁴⁵ *Ibid*, s 2(o), 5(1).

⁴⁶ *Ibid*, s 5(1)(c).

- (iii) each protected tree proposed to be cut down;
- (iv) the previous location and type of each protected tree that was cut down within the three (3) month period immediately preceding the date the tree plan is submitted;
- (v) the location, species and size of all proposed replacement trees; and
- (vi) the location and timing of any proposed demolition, excavation, construction or use of explosives on the site.⁴⁷

67. The Director of Planning may issue a tree cutting permit only in certain circumstances:

6. (1) Upon receipt of an application that complies with section 5, the Director Planning may issue a tree cutting permit, with or without conditions as provided for in subsection (2), where: (BYLAW 10968)

(a) it is proven to the satisfaction of the Director Planning that (i) the tree is a dangerous tree, and; (ii) removal of the tree is reasonably necessary in accordance with accepted arboricultural practice and in accordance with the actual written recommendations of a certified arborist retained by the applicant;

(b) removal of the protected tree or trees is necessary to accommodate the construction or installation of a driveway, required off-street parking area or utilities or services; or

(c) retention of the protected tree or trees would have the effect of preventing all uses of the land permitted, or preventing the development of the land to the density permitted, under the Zoning Bylaw, unless Council, by resolution, has committed the City to pay compensation or provide alternate means for the land to be used or developed pursuant to section 50(3) of the Community Charter. (Bylaw No. 13293).⁴⁸

68. The Tree Bylaw provides that every “development application” made to Burnaby “shall be accompanied by a tree plan”.⁴⁹

69. The Director of Planning may also exempt a person from the “tree plan” requirements in accordance with the Tree Bylaw if the Director “is satisfied that such trees can be readily identified on the site from other information provided by the applicant”.⁵⁰

70. A tree cutting permit, if issued, is valid only for a period of six months.⁵¹

⁴⁷ *Ibid*, s 1(v).

⁴⁸ *Ibid*, s 6(1) [emphasis added].

⁴⁹ *Ibid*, s 11(1). See also section 2(h) of Tree Bylaw which defines “development application” to include a PPA application.

⁵⁰ *Ibid*, s 12(b).

⁵¹ *Ibid*, s 9.

(a) *Application of Burnaby's Bylaws to Trans Mountain's PPA Applications*

BTM Application

71. The scope of development proposed by the BTM Application was approved by NEB Order XO-T260-003-2017 (Filing ID [A82717](#)) and MO-021-2017 (Filing ID [A82725](#)) and is more particularly described in the Davies Affidavit at paras 74-93.
72. The clearing and loss of vegetation, including trees, was specifically contemplated as part of the applications filed with the NEB for approval of the BTM by the NEB and is necessary to give effect to the decommissioning and piping relocation activities approved by the NEB.
73. Burnaby's Tree Bylaw provides a comprehensive scheme with the central purpose of protecting trees. A permit is required to remove protected trees and requires the Director of Planning to exercise a discretionary power in choosing to issue the permit. There is no guarantee of approval. Further, the criteria used by the Director in assessing whether to issue a Tree Cutting Permit pursuant to section 6(1) of the Tree Bylaw does not appear to be supportive of issuing a permit to remove protected trees necessary to give effect to a federal approval.
74. The Tree Management Plan submitted to Burnaby on September 1 in support of the BTM Application states:

This report provides details on the removal of trees as part of the Trans Mountain plant modifications at the Burnaby Terminal.

Due to the area of tree removal required at the Burnaby Terminal for plant modifications (~4.39 hectares) it is not practicable to tag individual trees or to legally survey each tree location. An alternative approach for determining the quantity, size and species of trees that fall within the Burnaby Tree Bylaw permit compliance requirements is to carry out a timber cruise of the site. Timber cruising is the BC Ministry of Forests accepted methodology for determining forest composition. The statistical design of the cruise, accuracy of the field measurements and standard compilation procedures closely follow the BC Ministry of Forests 2014 Cruising Manual.

Based on the analysis of the timber cruise data, 1502 trees whose sizes fall within the City of Burnaby Bylaw specifications for requiring tree cutting bylaw compliance [i.e. protected trees] will be removed.⁵²

75. Trans Mountain proposed to use a timber cruise method to estimate the number of trees that were required to be removed to undertake the works approved by the NEB. The timber cruise method conducted by Trans Mountain's consultant estimated that 1502 protected trees would be removed. The NEB approved the use of the timber cruise method in relation to the BTM.⁵³

⁵² Davies Affidavit, Exhibit 36, page iii.

⁵³ Davies Affidavit, paras 92-93

76. Burnaby made Trans Mountain aware that the timber cruise method did not comply with the tree plan requirements of the Tree Bylaw. Trans Mountain subsequently sought an exemption, as permitted by the Bylaw, and also suggested reasonable conditions that could be attached to a tree cutting permit as outlined in the September 1, 2017 letter to Burnaby which it is committed to comply with if this order is granted.⁵⁴
77. In refusing Trans Mountain's request for the tree plan exemption, the Director of Planning emphasized that a tree plan, as defined by the Tree Bylaw, was required to provide "advance information needed to conduct a review of Trans Mountain's application to cut or damage specific protected trees".⁵⁵
78. The scheme of the Tree Bylaw reveals an operational conflict with the NEB's approval of the BTM including the associated clearing activities.
79. The approval of the BTM by the NEB in Orders Mo-021-2017 and XO –T260-003-2017 and section 73 of the NEB Act authorize the clearing of trees to undertake the approved works. However, the Tree Bylaw explicitly prevents the clearing of any of these trees if they are protected. In essence, one regulatory framework says "yes" to the tree clearing and the other regulatory framework says "no".
80. The Director of Planning has indicated that Burnaby requires the tree plan to review the "specific" protected trees that Trans Mountain proposes to remove. Given the purpose of the Tree Bylaw, this suggests that the Director will exercise his or her discretion with respect to which specific trees he or she will allow the removal of or require the protection of. Since the removal of trees is necessary to undertake the BTM work, a decision by Burnaby *not* to allow the removal of specific trees not only conflicts operationally, but would also frustrate the NEB's jurisdiction and final decision making authority over the location of interprovincial pipelines and their associated facilities. It is a decision not open to Burnaby to make.
81. Any decision of Burnaby to withhold a tree cutting permit, thus preventing the piping and utility relocation work or forcing Trans Mountain to relocate the piping and relocation work to areas that require the removal of fewer protected trees, impairs a vital element of a federal undertaking by essentially allowing Burnaby to dictate the location of infrastructure that is a vital and necessary part of the Project pursuant to its Tree Bylaw. In other words, Burnaby's Tree Bylaw would trump a federal undertaking found to be in the public interest and approved by cabinet.
82. As discussed further below in relation to the Constitutional Questions, Trans Mountain further submits that the scheme of the Tree Bylaw conflicts operationally with the NEB approval and also frustrates the purpose of the NEB's jurisdiction under the NEB Act. As such, Trans Mountain is of the view that the Tree Bylaw is constitutionally inoperative as a result of the doctrines of interjurisdictional immunity and federal paramountcy.

⁵⁴ Davies affidavit, Exhibit 53

⁵⁵ Davies Affidavit, Exhibit 55

83. The connection between the Tree Bylaw and the Zoning Bylaw is undeniable. Burnaby requires a tree management plan (or “tree plan” as it is referred to in the Tree Bylaw) showing protected and retained trees to be submitted as part of a PPA application. The Tree Bylaw states that every development application (which includes a PPA) must include a tree plan.
84. Burnaby, has taken the position that an approved tree plan is a necessary condition of approving and issuing a PPA. This logically follows since the approval of a PPA would also have the effect of approving a landscaping plan and the location of trees on this landscaping plan would necessarily impact where a proposed development could be approved on a property. The definition of “landscaping” in the Zoning Bylaw includes trees.
85. The fact is that the Tree Bylaw requirements are intertwined with the PPA application requirements. Burnaby’s conduct has demonstrated that one cannot be approved without the other. Trans Mountain submits that because (i) the Tree Bylaw is constitutionally inoperative; and (ii) the PPA regime under the Zoning Bylaw, including Burnaby’s implementation of same, relies heavily on the Tree Bylaw, a PPA which requires the approval of a tree management plan is also inoperative.

BTE Application

86. The scope of development proposed by the BTE Application was approved by the NEB in Order XO-T260-010-2016 and is more particularly described in the Davies Affidavit at paras 15-17.
87. The issue of tree removal for the BTE Application is identical to the circumstances of the BTM Application. Except in this case the Tree Management Plan submitted with the application materials estimated the removal of 2220 protected trees.⁵⁶
88. Trans Mountain submits that the arguments related to conflict and inoperability of the Tree Bylaw and PPA approval described at paras 73 through 84 above apply equally to the BTE Application and that the Tree Bylaw and PPA approval requirement of the Zoning Bylaw are constitutionally inoperative in respect of the BTE Application.
89. In addition to the above, the NEB approved additional storage tanks to be located on the Burnaby Terminal property as part of the overall approval for the Project⁵⁷ The approved location of these storage tanks and other works coincides with the area of lands identified as a SPEA by the Zoning Bylaw.⁵⁸ These works will also require the relocation and

⁵⁶ Davies Affidavit, Exhibit 34, Tree Management Plan, page ii.

⁵⁷ Davies Affidavit paras 15-17.

⁵⁸ See Davies Affidavit, Exhibit 37, 38 for the identified location of the SPEA setbacks; see also XO-T260-010-2016 for the approved location of the tanks and other works at Burnaby Terminal.

diversion of certain watercourse on the property which have been approved by British Columbia Oil & Gas Commission.⁵⁹

90. The Zoning Bylaw prohibits development within a SPEA and reveals an operational conflict with the NEB's approval of the works proposed by the BTE Application.
91. The approval by the NEB and section 73 of the NEB Act explicitly authorizes new storage tanks and other works to be located in the areas of the Burnaby Terminal property. However, the Zoning Bylaw explicitly prohibits development from occurring within a SPEA. One regulatory framework says "yes" to location of the tanks and other works and the other regulatory framework says "no".
92. The Director of Planning does have discretionary authority to vary the boundaries of the SPEA. There is no guarantee of approval. Further, the criteria used by the Director in assessing whether to grant the variance pursuant to section 6.23(3) of the Zoning Bylaw does not appear to consider giving effect to a federal approval. Since development within the SPEA is necessary to undertake the BTE work, a decision by Burnaby not to allow the variance would not only conflict operationally, but would also frustrate the NEB's jurisdiction and final decision making authority over the location of interprovincial pipelines and their associated facilities. It is a decision not open to Burnaby to make.
93. Trans Mountain submits that the SPEA provisions of the Zoning Bylaw conflicts operationally with the NEB approval and also frustrates the purpose of the NEBs jurisdiction under the NEB Act. As such, Trans Mountain is of the view that the Zoning Bylaw is constitutionally inoperative as a result of the doctrines of interjurisdictional immunity and federal paramountcy.

WMT Application

94. The scope of development proposed by the WMT Application was approved by the NEB via the Certificate and is more particularly described in the Davies Affidavit at paras 18-21.
95. The issue of tree removal for the WMT Application is identical to the circumstances of the BTM and BTE Applications, except in this case the Tree Management Plan submitted with the application materials estimated the removal of 275 protected trees.⁶⁰
96. Trans Mountain submits that the arguments related to conflict and inoperability of the Tree Bylaw and PPA approval described above apply equally to the WMT Application and that the Tree Bylaw and PPA approval requirement of the Zoning Bylaw are constitutionally inoperative in respect of the WMT Application.

⁵⁹ Davies Affidavit, Exhibit 18.

⁶⁰ Davies Affidavit, Tree Management Plan, page ii.

KB Application

97. The development proposed by the KB Application is intended to directly support the construction of the WMT. The KB Site at 7585 Barnet Highway has been included on the list of required temporary infrastructure sites provided to the Board pursuant to Condition 61. For the reasons set out in detail below, it is evident that the Zoning Bylaw does not contemplate the type of development and land use contemplated for the KB Site. In particular, it does not allow for approval of a standalone work site that is used solely on a temporary basis to support construction on a site located hundreds of meters away.
98. The scope of the development proposed by the KB Application is more particularly described in the affidavit of Mike Davies,⁶¹ and includes temporary buildings for construction offices, washrooms and security office. Further, areas of the property will be used for equipment and material storage and assembly areas, a parking lot for individuals working on the Westridge Terminal property and a shuttle bus service to bring works to and from the KB Site and the Westridge Marine Terminal property.
99. The Zoning Bylaw defines a temporary building as a building that is placed on a lot for a limited period of time.⁶²
100. The Zoning Bylaw requires that temporary building used for a construction office, or equipment or material storage may only be placed on the same lot undergoing development.⁶³ However, there is no development occurring on the KB Site and instead the temporary building is required to support development occurring off-site at the Westridge Marine Terminal property.
101. The Zoning Bylaw also requires close physical proximity for parking areas when a parking lot is shared by more than two buildings or uses. This is the case for the parking proposed on the KB Site, which will support not only the parking needs of the temporary construction offices located on-site but also the parking needs for the Westridge Marine Terminal construction activities. However, these shared parking facilities are located farther than 122 metres from the Westridge Marine Terminal property⁶⁴ and as such is not allowed by the Zoning Bylaw.⁶⁵
102. The rules related to temporary buildings and shared parking facilities in the Zoning Bylaw and reveals an operational conflict with the temporary infrastructure site authorized by the NEB Act and proposed by the KB Application.
103. The approval by the NEB and section 73 of the NEB Act authorize the use of temporary infrastructure sites. However, the Zoning Bylaw, in this instance prevents the temporary

⁶¹ Davies Affidavit, para 20

⁶² *Zoning Bylaw*, s 3.

⁶³ *Ibid*, s 6.7(1)(a).

⁶⁴ Davies Affidavit, Exhibit 1

⁶⁵ *Zoning Bylaw*, s 800.5(2).

building from being located on a site other than the site undergoing development and also prohibits a shared parking facility at this location because it is too far from the WMT property. One regulatory framework says “yes” to a temporary infrastructure site at the KB site and the other regulatory framework says “no”.

104. The Director of Planning has no discretion to vary the above cited provisions of the Zoning Bylaw. Since the KB Site is necessary to undertake construction of the WMT, any decision by Burnaby that the temporary buildings and parking areas are not allowed not only conflicts operationally, but would also frustrate the NEB’s jurisdiction and final decision making authority over the location of temporary infrastructure sites to support the NEB approved Project.
105. Trans Mountain submits that the impugned provisions of the Zoning Bylaw in this case conflict operationally with the NEB approval and also frustrates the purpose of the NEB’s jurisdiction under the NEB Act. As such, Trans Mountain is of the view that the impugned provisions of the Zoning Bylaw are constitutionally inoperative as a result of the doctrines of interjurisdictional immunity and federal paramountcy.

The Inapplicability and Inoperability of Burnaby’s Bylaws

106. ***The Division of Powers over Interprovincial Pipelines.*** Under the *Constitution Act, 1867* (the “**Constitution**”),⁶⁶ interprovincial trade and commerce and Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province,⁶⁷ are the exclusive jurisdiction of the federal government. This includes the entirety of the Project.⁶⁸ As stated in Burnaby BCSC, the “power over interprovincial pipelines rests with Parliament. The NEB Act is comprehensive legislation enacted to implement that power.”⁶⁹
107. In addition, Parliament has exclusive jurisdiction over (i) navigation and shipping; and (ii) sea coast and inland fisheries,⁷⁰ which is relevant with respect to the WMT. The WMT – including the WMT Expansion – therefore falls within the core of multiple heads of federal power.
108. In *Coastal First Nations v. British Columbia (Environment)*,⁷¹ the British Columbia Supreme Court confirmed that, although there may be some provincial/federal overlap in relation to the many regulatory aspects of an interprovincial pipeline, provincial

⁶⁶ *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3.

⁶⁷ *West Coast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 SCR 322, ¶ 43. [TAB 17]

⁶⁸ *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] SCR 207, ¶ 13 (“*Campbell-Bennett*”). [TAB 17]

⁶⁹ *Burnaby BCSC*, ¶ 60. [TAB 5]

⁷⁰ *Constitution*, ss. 91(10) and 91(12).

⁷¹ 2016 BCSC 34. [TAB 11]

governments cannot decline to issue provincially required permits that are required for a federal undertaking. Indeed, failing to do so is in direct conflict with a federal purpose.

109. Given that municipalities are creatures of provincial statute, the same principle applies to Burnaby. Accordingly, if Burnaby refused to issue any required municipal permits for the Project, such action “would ensure the conditions for a finding of *ultra vires*, or unconstitutionality would be plain.”⁷² Trans Mountain submits that an unreasonable delay – which could continue in perpetuity – amounts to an outright refusal, is *ultra vires* the municipality and unconstitutional.
110. ***Interjurisdictional Immunity Doctrine.*** First, pursuant to the doctrine of interjurisdictional immunity, it must be determined whether the provincial law trenches on the protected “core” of a federal competence. If it does, the second step is to determine whether the effect of the otherwise valid provincial law on the exercise of the protected federal power is sufficiently serious to invoke the doctrine of interjurisdictional immunity.⁷³ Where an intrusion “impairs” (a midpoint between sterilization and mere effects) the core of the federal power, the impugned provision is rendered inapplicable.
111. The Board considered and ruled on these matters in Ruling No. 40, where it stated the applicable test as follows:
- The doctrine of interjurisdictional immunity has evolved over the years and its usage has fallen out of favour to some degree; however, it is still an accepted doctrine for dealing with clashes between validly-enacted federal and provincial laws. ... [U]ndertakings falling within federal jurisdiction are immune from otherwise-valid provincial laws that would have the effect of impairing a core competence of Parliament or vital part of the federal undertaking. For the doctrine of interjurisdictional immunity to apply, there has to be a factual determination that the provincial law impairs (not just affects) a core competence of Parliament or a vital part of the federal undertaking.
112. In *Burnaby BCSC*, which was upheld on appeal, Mr. Justice Macintosh, relying on Supreme Court of Canada authority, reaffirmed that “[t]he law recognizes a protected core of exclusive federal jurisdiction. The doctrine of interjurisdictional immunity prevents provincial laws from improperly trenching on that protected core, even in the absence of conflicting federal legislation”.⁷⁴
113. In Ruling No. 40, the Board confirmed that interjurisdictional immunity applies where a bylaw impairs the NEB’s authority over the Project, which is an interprovincial undertaking. Justice Macintosh agreed with this decision in *Burnaby BCSC*, stating that “In my view, it is clear under both doctrines, paramountcy and interjurisdictional

⁷² *Ibid* at para 58.

⁷³ *COPA, infra*. [TAB 15]

⁷⁴ *Burnaby BCSC* ¶ 78 [TAB 5], citing *COPA* ¶ 26-27. [TAB 15]

immunity, that Burnaby is precluded from seeking to apply its bylaws so as to impede or block any steps Trans Mountain must take in order to safely prepare and locate the Expansion Project.”⁷⁵

114. The “core” of a constitutional head of power is characterised as is its “basic, minimum and unassailable content”; in other words, it is the authority that is necessary for Parliament “to achieve the purpose for which exclusive legislative jurisdiction was conferred”.⁷⁶
115. To achieve the purpose of the NEB Act (and, specifically as it relates to inter-provincial pipeline works and undertakings), Parliament determined under section 73 of the NEB Act, that it is necessary to enable a company, “for the purposes of its undertaking” to, *inter alia*:
 - (a) enter into and on any Crown land without previous licence therefor, or into or on the land of any person, lying in the intended route of its pipeline, and make surveys, examinations or other necessary arrangements on the land for fixing the site of the pipeline, and set out and ascertain such parts of the land as are necessary and proper for the pipeline;
 - (b) construct, lay, carry or place its pipeline across, on or under the land of any person on the located line of the pipeline;
 - (c) join its pipeline with the transmission facilities of any other person at any point on its route;
 - (d) construct, erect and maintain all necessary and convenient roads, buildings, houses, stations, depots, wharves, docks and other structures, and construct, purchase and acquire machinery and other apparatus necessary for the construction, maintenance and operation of its pipeline;
 - (e) construct, maintain and operate branch lines, and for that purpose exercise all the powers, privileges and authority necessary therefor, in as full and ample a manner as for a pipeline;
 - (f) alter, repair or discontinue the works mentioned in this section, or any of them, and substitute others in their stead;
 - (g) transmit hydrocarbons by pipeline and regulate the time and manner in which hydrocarbons shall be transmitted, and the tolls to be charged therefor; and,
 - (h) do all other acts necessary for the construction, maintenance and operation of its pipeline.

⁷⁵ *Burnaby BCSC* ¶81. [TAB 5]

⁷⁶ *Canadian Western Bank v. Alberta*, 2007 SCC 22 ¶ 33, 48, 50, 77 (“*Canadian Western Bank*”) [TAB 9]; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, ¶ 35, 44 (“*COPA*”). [TAB 15]

116. It is now settled that the doctrine of interjurisdictional immunity applies to the Project.⁷⁷ There is no need for concern that the doctrine in this case ought to be applied “with restraint”. The situation at hand is one that is, in the words of the Supreme Court of Canada, “already covered by precedent.”⁷⁸

117. Professor Hogg describes the impact of the doctrine on section 92(10)(a) and, specifically, interprovincial pipelines as follows:

It is now well settled that undertakings engaged in interprovincial or international transportation or communication, which come within federal jurisdiction under the exceptions to s. 92(10) of the Constitution Act, 1867, are immune from otherwise valid provincial laws which would have the effect of “sterilizing” the undertakings. On this basis, ... an interprovincial pipeline has been held to be immune from provincial mechanics liens legislation [*Campbell-Bennett*].⁷⁹

118. ***The Impugned Bylaws Impair a Core Federal Power over Interprovincial Pipelines.*** In Ruling No. 40, the NEB concluded that the routing of the Project is within the core of a federal power over interprovincial pipelines. Likewise, the construction of the Project, once approved by the NEB under the NEB Act, is within the “core” of Parliament’s power over interprovincial pipelines. The Supreme Court of Canada has consistently reaffirmed Parliament’s exclusive jurisdiction over interprovincial pipelines. When specifically addressing the Trans Mountain Pipeline in *Campbell-Bennett*, the Supreme Court of Canada stated:

the line here extends from a point in Alberta to Burnaby in British Columbia. That it is a work and undertaking within the exclusive jurisdiction of Parliament is now past controversy.⁸⁰

And as Chief Justice McLachlin recently stated, “[p]redictability, important to the proper functioning of the division of powers, requires recognition of previously established exclusive cores of power.”⁸¹

119. In *Quebec v. Canadian Owners and Pilot Association*,⁸² the Supreme Court of Canada applied the doctrine of interjurisdictional immunity to find that a provincial law (that designated areas for exclusive agricultural use) was “inapplicable to the extent that it prohibits aerodromes in agricultural zones”. The majority of the Supreme Court reasoned that the location of aerodromes was essential to the federal government’s power over

⁷⁷ *Canadian Western Bank*, *supra*. [TAB 9] ; *Burnaby BCSC* [TAB 5] (aff’d., *Burnaby BCCA* [TAB 6]); Peter Hogg, *Constitutional Law of Canada*, loose-leaf (Toronto: Carswell, 2013) ¶ 15.8(c) (“Hogg”)

⁷⁸ *Canadian Western Bank*, *supra*. [TAB 9]

⁷⁹ Peter Hogg, *Constitutional Law of Canada*, loose-leaf (Toronto: Carswell, 2013) ¶ 15.8(c) (“Hogg”).

⁸⁰ *Campbell-Bennett*, *supra* at 214. [TAB 7]

⁸¹ *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 ¶ 65. [TAB 8]

⁸² *COPA*. [TAB 15]

aeronautics. Accordingly, it fell within the “core” of the federal power and the provincial law impaired that core by purporting to prohibit the use of the land for aerodromes.⁸³

120. The construction of an approved interprovincial pipeline and associated facilities is likewise within the “core” of the federal power over interprovincial works and undertakings. In fact, it is difficult to conceive of a more fundamental aspect of Parliament’s jurisdiction over interprovincial pipelines than its authority to consider and approve the construction, location and operation of those pipelines and associated facilities. Any bylaw requirement, such as the Bylaws in question, that purports to prevent or delay the construction, or modify the location of an approved interprovincial pipeline project directly impairs this core federal competency.
121. In *Burnaby BCSC*, Justice Macintosh found that “Burnaby’s bylaws are constitutionally inapplicable to actions taken under s. 73 of the NEB Act in respect of a federally-regulated, interprovincial undertaking, by operation of the doctrine of interjurisdictional immunity.” In Trans Mountain’s view, the same conclusion applies with respect to the Zoning Bylaw and the Tree Bylaw in relation to the Terminal Work.
122. To hold otherwise gives provinces and municipalities the authority to delay or forestall the construction and operation of a federal undertaking. This authority would enable provinces (or, in this case, a municipality with bylaws enacted under provincial legislation) to stop the construction of an interprovincial pipeline by changing their zoning bylaws or substantially withholding or delaying the issuance of permits for the Terminal Work permitted under the NEB Act. A municipality cannot lawfully deny a permit application for a federal undertaking such as the Project. Allowing them to maneuver out of their duty to issue permits by imposing unreasonable requirements, and delays allows them to impair the core of the federal authority thereby doing indirectly what they cannot do directly.
123. To the extent Burnaby fails to recognize the constitutional limits of its regulatory authority and issue the applied-for permits within reasonable timeframes or to respond to Trans Mountain with reasonable information requests, Burnaby is improperly exercising control over whether and when the Project will proceed. The timing of the Project was clearly a part of the public interest determination (see below para 137 for example). This amounts to an unconstitutional exercise of its power.
124. ***The Impugned Bylaws.*** For the same reasons it was held that: (i) Burnaby’s bylaws were inoperative and inapplicable to Trans Mountain’s required field work pursuant to s. 73 of the NEB Act in Ruling No. 40 and *Burnaby BCSC*; and (ii) provincial mechanics liens legislation was inapplicable to the Trans Mountain pipeline in *Campbell-Bennett* the impugned Zoning Bylaw and Tree Bylaw are also inapplicable in relation to the Terminal Work. The Terminal Work must be conducted pursuant to Trans Mountain’s construction schedule as considered and approved by the Board and Cabinet in their public interest determination to ensure critical Project deadlines are met.⁸⁴

⁸³ *COPA, supra*, ¶ 4, 34, 44. [TAB 15]

⁸⁴ Davies Affidavit, paras 138-141

125. Where a work or undertaking falls under section 92(10)(a) of the *Constitution Act, 1867*, “it is removed from the provinces and exclusive jurisdiction lies with the federal Parliament”.⁸⁵
126. Any interference with the construction, location and operation of an interprovincial pipeline impairs a vital element of the undertaking, and engages protection from the doctrine of interjurisdictional immunity.⁸⁶ Requiring compliance with the Bylaws in this case will impair the construction, location and operation of the Project. As set forth above, Burnaby’s enforcement of the Bylaws has a direct, adverse effect on Trans Mountain’s ability to construct, locate and operate the Project in accordance with federal law.
127. Through the Bylaws, Burnaby is attempting to dictate the timing of Project construction. That is, Burnaby is attempting to prevent or delay Trans Mountain from conducting the Terminal Work, which the NEB has recognized as being necessary for the Project and in the public interest. This infringement on the federal head of power is sufficiently serious to invoke the doctrine of interjurisdictional immunity.
128. ***Federal Paramountcy.*** The doctrine of federal paramountcy provides that “when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility.”⁸⁷
129. In Ruling No. 40, the Board summarized the law on paramountcy as follows:
- The doctrine of paramountcy holds that where there are inconsistent or conflicting validly-enacted federal and provincial laws, the federal law prevails. Paramountcy renders the provincial law inoperative to the extent of the inconsistency or conflict. In order for paramountcy to apply, there must be an inconsistency or a conflict between the federal and the provincial law. A conflict or inconsistency can arise if there is an impossibility of dual compliance or a frustration of a federal purpose. Paramountcy applies where an application or operation of the provincial law would frustrate the purpose of the federal law. If it is possible to interpret the two laws in a manner to avoid conflict or inconsistency, that is preferable to an interpretation that results in a conflict or inconsistency [footnotes omitted].
130. In *Burnaby BCSC*, Justice MacIntosh agreed with this analysis and held that, “Where valid provincial laws conflict with valid federal laws in addressing interprovincial undertakings, paramountcy dictates that the federal legal regime will govern. The provincial law remains valid, but becomes inoperative where its application would frustrate the federal undertaking.”

⁸⁵ *Alberta Government Telephones v Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 SCR 225, at 257 [TAB 1]; *City of Montreal v Montreal Street Railway*, [1912] AC 333 (P.C.), at 342. [TAB 10]

⁸⁶ *Campbell-Bennett*, *supra*. [TAB 7]

⁸⁷ *Canadian Western Bank*, *supra*, ¶ 67. [TAB 9]

131. Regarding the frustration of federal purpose, in *Bank of Montreal v. Hall*, the Supreme Court of Canada said:

A showing that conflict can be avoided if a provincial Act is followed to the exclusion of a federal Act can hardly be determinative of the question whether the provincial and federal acts are in conflict, and, hence, repugnant. That conclusion, in my view, would simply beg the question. The focus of the inquiry, rather, must be on the broader question whether operation of the provincial Act is compatible with the federal legislative purpose. Absent this compatibility, dual compliance is impossible.⁸⁸

132. In other words, even where it may be possible to comply with both laws, if the provincial law is incompatible with the purpose of a federal law, the provincial law will be held invalid to the extent of the incompatibility.⁸⁹
133. In contrast, an operational conflict exists where one enactment says “yes” and the other says “no”; compliance with one is defiance of the other.⁹⁰
134. The Supreme Court of Canada considered the applicability of paramountcy in *British Columbia (Attorney General) v. Lafarge Canada Inc.*,⁹¹ in respect of a zoning bylaw and its applicability to a federal work and undertaking. The federal work in question was a cement plant proposed by Lafarge Canada Inc. (“**Lafarge**”) in the Port of Vancouver. The facility was directly regulated and approved by the Vancouver Port Authority, a federal entity, and the City of Vancouver declined to exercise its development permit jurisdiction over the project but approved the project in principle. A group of ratepayers opposed the project and brought an action seeking to have the project obtain a development permit from the City. The Supreme Court of Canada concluded that requiring municipal approvals for the facility would give rise to an “operational conflict” because the proposed facility would exceed the municipality’s 30-foot height restriction.⁹² The Court determined that even though there was a process for the City of Vancouver to waive the height limit up to 100 feet, that this “would impose the condition precedent of an exercise of a discretion by the City to approve a project that has already been approved by the VPA. This would create an operational conflict that would flout the federal purpose, by depriving the VPA of its final decisional authority on the development of the port, in respect of matters which fall within the legislative authority of Parliament.”⁹³
135. In *Law Society of British Columbia v. Mangat*⁹⁴, the Supreme Court of Canada considered whether a provincial prohibition against non-lawyers appearing before a tribunal for a fee

⁸⁸ *Bank of Montreal v Hall*, [1990] 1 SCR 121 at 154-155 (emphasis added). [TAB 2]

⁸⁹ *Hogg*, at 16.3(b).

⁹⁰ *Multiple Access v McCutcheon*, [1982] 2 SCR 161, ¶ 191. [TAB 14]

⁹¹ *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23 (“*Lafarge*”). [TAB 3]

⁹² *Ibid*, ¶ 81.

⁹³ *Ibid*, ¶ 75.

⁹⁴ *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 1 SCR 113, ¶ 23. [TAB 13]

would, if applied, frustrate Parliament's intention in expressly legislating that a party appearing before the Immigration and Refugee Board could be represented by a non-lawyer. A unanimous Supreme Court of Canada held that compliance with both statutes was impossible without frustrating Parliament's purpose behind allowing non-lawyers to represent individuals appearing before the Immigration and Refugee Board. Accordingly, federal paramountcy applied to render the provincial law inoperative to persons acting under the federal legislation.

136. ***The purported application of the Bylaws operationally conflicts with and frustrates a federal legislative purpose.*** In *Lafarge*, the majority was of the view that, in addition to an operational conflict between the municipal bylaws and federal legislation, federal paramountcy applied because the municipal bylaws at issue (if applied to the facility) would frustrate the federal legislative purpose behind authorizing the federal Board to make its decision on the project.⁹⁵ Similarly, compliance with the Bylaws in question would frustrate the purpose of the federal laws set out in the NEB Act, which give the NEB the authority to regulate the construction of interprovincial pipelines and associated facilities, including the Project and the Terminal Work.
137. Moreover, there is a clear federal purpose to ensure the timely consideration of Pipeline applications under the NEB Act. Section 52(4) of the NEB Act sets a 15 month maximum on the NEB's timeline for processing applications for Certificates of Public Convenience and Necessity under s. 52 of the NEB Act. This maximum timeline is subject only to specific limited exceptions. The timely development of Projects determined to be in the public interest and approved by the NEB is also an important federal purpose under the NEB Act, the Certificate and the Orders. The public interest determination includes the timing of the Project, designed to capture existing market opportunities. Due to the operational conflicts arising from the Zoning Bylaw and Tree Bylaw and the unreasonable delay caused by Burnaby's implementation of same, it is clear that the Zoning Bylaw and Tree Bylaw are currently frustrating, and will continue to frustrate, this central objective of the NEB Act, the Certificate and NEB Orders.
138. Trans Mountain also submits that the Bylaws create operational conflicts that prevent dual compliance since in some cases the Bylaws say "no", but the NEB says "yes". Even though a variance or an exercise of discretion on the part of Burnaby might cure the "no", it flouts the federal purpose by removing the final decision making authority from the hands of the NEB and puts the final decision in the hands of Burnaby. A situation that cannot possibly be constitutionally correct. Further, the Court in *Lafarge* specifically rejected the notion that a discretionary process, such as an exemption application process, under the municipal bylaw to potentially get around an express conflict in the bylaw, was not enough to displace the operational conflict.⁹⁶ Paramountcy still applies.
139. In other words, compliance with the Bylaws in question would frustrate the NEB's approval of the Project and Terminal Work. The Certificate and NEB Orders for the Terminal Work advance a valid federal purpose. The Tree and Zoning Bylaws frustrate the

⁹⁵ *Lafarge, supra*, ¶ 83-84. [TAB 3]

⁹⁶ *Lafarge, supra*, ¶ 75.

siting and location aspects of the facilities and works approved by the Certificate and NEB Orders. In addition, Burnaby's unreasonable delay in processing the PPA Applications also frustrates that purpose by unreasonably withholding municipal permits under the Bylaws.

140. The British Columbia Supreme Court held that Burnaby is precluded under both paramountcy and interjurisdictional immunity from applying its bylaws to impede Trans Mountain from preparing and locating the pipeline.

In my view, it is clear under both doctrines, paramountcy and interjurisdictional immunity, that Burnaby is precluded from seeking to apply its bylaws so as to impede or block any steps Trans Mountain must take in order to safely prepare and locate the Expansion Project.⁹⁷

141. Similarly, Trans Mountain submits that Burnaby is precluded from applying its bylaws in a way that impedes Trans Mountain's ability to perform the Terminal Work or use the KB Site, either by its action or failure to act.

142. Trans Mountain submits that, for so long as Burnaby withholds the PPAs in question, Trans Mountain cannot simultaneously comply with the Bylaws and complete the approved Project construction activities at the Burnaby Terminal. The circumstances are similar to those that gave rise to Ruling No. 40. In relation to that case, the British Columbia Court of Appeal stated, in dismissing leave to appeal Burnaby's injunction application:

Trans Mountain cannot simultaneously comply with the Bylaws and conduct the studies on Burnaby's lands mandated by the NEB under the Act. Some resolution of the competing interests expressed in these two legislative sources is necessary. Ruling No. 40 and its accompanying Order have addressed this issue. Burnaby's attempt to have this Court nullify or reverse that decision by dealing solely with the provincial legislation clearly represents a collateral attack and threatens the integrity of that proceeding.⁹⁸

143. The NEB's jurisdiction over interprovincial pipelines includes the regulation of infrastructure and assets which are both linear and non-linear. The Terminal Work represent the non-linear components which are necessary to support the construction and operation of an interprovincial pipeline. When the NEB exercises its jurisdiction over the non-linear components of an interprovincial pipeline it essentially acts as a land use approving authority for these sites. This land use approval forms part of the rights granted to a pipeline company by section 73 of the NEB Act. A municipal bylaw which does not allow infrastructure to be located in the same locations as approved by the NEB or which requires an uncertain discretionary approval process, impairs these lands use rights and attracts the application of interjurisdictional immunity and paramountcy since the operation of the Bylaw fundamentally frustrates exclusive federal jurisdiction over interprovincial pipelines.
144. As a result, Trans Mountain submits that the Bylaws have been rendered inoperative in the circumstances. Compliance with the Bylaws and the NEB Certificate and Orders (and by extension the federal law that empowers the Board to issue them) is not possible in a

⁹⁷ *Burnaby (City) v Trans Mountain Pipeline ULC*, *supra*, ¶ 81. [TAB 5]

⁹⁸ 2014 BCCA 465 at para 38. [TAB 4]

manner that upholds the public interest determination. Therefore, the federal law and the valid federal purpose (approval of the construction of an interprovincial pipeline and associated facilities) constitutionally trump the Bylaws.

145. ***Unilateral obstructionism is not cooperative federalism.*** In prior arguments before the NEB, Burnaby argued that the principle of cooperative federalism ought to apply in the circumstances to render the Burnaby's bylaws operative to Trans Mountain. However, given Burnaby's unreasonable delays in issuing the PPAs or appropriately exercising its municipal jurisdiction, Trans Mountain submits that Burnaby's conduct in refusing to fairly administer the Bylaws has given rise to an operational conflict and that their invocation of cooperative federalism is mere pretense. Moreover, Trans Mountain is not trying to escape its obligations, it has committed to compensation and replanting consistent with the Bylaws and the Board in making this Order can make that a condition of the order.
146. In *Reference re Securities Act*, the Supreme Court of Canada limited the scope of cooperative federalism, finding that flexibility and cooperation "cannot override or modify the separation of powers." That is:

[...] notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.⁹⁹

147. By purporting to apply the Bylaws to qualify Trans Mountain's right to construct the Project and conduct the Terminal Work pursuant to section 73 of the NEB Act, the Certificate and the applicable NEB Orders, Burnaby is seeking to sweep the designated federal power over interprovincial works and undertakings (including interprovincial pipelines) out to sea. This is the antithesis of cooperation. Effectively, Burnaby seeks to stop a federal undertaking through the administration of its Bylaws. Such efforts, if successful, would erode the constitutional balance that granted Parliament power over interprovincial works and undertakings and cannot persist.

CONCLUSION

148. Subject to fulfilling the NEB and other applicable federal requirements, Trans Mountain has the right to construct the Project and undertake the Terminal Work pursuant to section 73 of the NEB Act. In order for Trans Mountain to construct the Project in compliance with municipal bylaws, it must receive all applicable permits from the responsible municipal and provincial permitting agencies.
149. Burnaby has been clear in its opposition to the Project, the lengths it will go to stop the Project, and, in the past, has attempted to use its bylaws to obstruct the Project.¹⁰⁰

⁹⁹ *Reference re Securities Act*, 2011 SCC 66, ¶ 61-62 [emphasis added]. [TAB 16]

¹⁰⁰ Davies Affidavit, paras 38-49.

150. Trans Mountain submits that Burnaby is again using its bylaws/PPA process to frustrate the Project and oppose the Decision of Canada's Governor in Council that this Project is necessary and in the best interest of Canada.
151. Despite Trans Mountain's best efforts to obtain the necessary PPAs for the Terminal Work, Burnaby has unnecessarily and unreasonably delayed the issuance of the PPAs, contrary to the law and the prior determinations of the NEB and GIC.
152. On May 15, 2017, Trans Mountain filed a Project schedule ("**Schedule**") with the Board (Filing ID [A83596](#)) pursuant to Condition 62. As indicated in the Schedule, certain key aspects of the Project (i.e., those necessary to increase pipeline delivery capacity) have a planned in-service date of December 31, 2019, and most of the contemplated construction and commissioning activities must be complete by that time.
153. Adherence to the Schedule is an important and part of the public interest determination of this project. Failure to meet that schedule will impair the public interest benefit and could cause Trans Mountain and third parties to suffer substantial harm.¹⁰¹
154. In the NEB Report, the Board confirmed that the Project is in the public interest and that the economic benefit of the Project is significant:

On the whole, taking into account all of the evidence in this hearing, considering all relevant factors, and given that there are considerable benefits nationally, regionally and, to some degree, locally, the Board finds that the benefits of this Project outweigh the residual burdens. Accordingly, the Board concludes that the Project is in the present and future public convenience and necessity, and in the Canadian public interest [page 18].

The Board finds that increasing pipeline capacity for the purpose of accessing Pacific Basin markets is important to the Canadian economy and that this economic benefit of the Project is significant. As required by the legislation, the Board looks at the benefits and burdens of the Project before it and not the benefits or burdens of this Project compared to other Projects that may or may not be before the Board [page 309].

155. Trans Mountain submits that public interest includes the approved in service date which is designed to capture the material benefit to Canada, described above. Undue delay to the Project is contrary to that public interest.
156. Trans Mountain owns the lands required for the Terminal Work at issue and is negotiating a lease for the KB Site; no access to third party lands is required.
157. Trans Mountain seeks relief from the Burnaby Zoning Bylaw and Tree Bylaw so that Trans Mountain may proceed with approved construction activities (see the Certificate, section 73 of the NEB Act, and previous NEB Orders) subject to the NEB's conditions.
158. Trans Mountain has fulfilled the spirit and the intent of its commitment to obtain municipal permits in this case by pursuing, in good faith, the necessary PPAs and Tree Cutting Permits and responding diligently to all requests for information. It will live up to the

¹⁰¹ Davies Affidavit, paras 138-141

commitments it has made in its permit applications and requirements for compensation and replanting all of which the Board can make as part of this order.

159. Burnaby possesses all of the necessary information to issue the PPAs, but has failed to do so. Despite statements by Burnaby officials that a “complex PPA application” will take six to eight weeks,¹⁰² surely, the passage of more than 22 weeks since the June filing date is undisputed evidence of unreasonable delay.
160. The facts outlined in the Davies Affidavit and the legal precedent support the relief sought herein. The NEB Act vests an exclusive jurisdiction in the NEB to consider matters related to a variety of issues including interprovincial pipelines. The Project relates to the expansion of an interprovincial pipeline.
161. The NEB is charged by Parliament with regulating the construction and operation of the expanded pipeline, all of which is in the national public interest. For that reason, Parliament vested exclusive jurisdiction within the NEB for certain matters and a collateral jurisdiction regarding issues of law that arise as a necessary element of the exercise of its jurisdiction. In the circumstances, the NEB has the clear jurisdiction under sections 12, 13 and 73 of the NEB Act to make an Order relieving Trans Mountain of its obligation to obtain PPAs pursuant to Burnaby’s Bylaws in relation to the Terminal Work and ought to do so in this case.

RELIEF REQUESTED

162. Trans Mountain requests the issuance of an Order as outlined in the attached proposed draft Order (Schedule “A”) pursuant to sections 12, 13 and paragraphs 73(c), (e), (g) and (i) of the NEB Act, the substance of which appears as:

IT IS THEREFORE ORDERED THAT Section 7.3 of Burnaby’s Zoning Bylaw (Bylaw No. 4742) and Section 3 of Burnaby’s Tree Bylaw (Bylaw No. 10482) ceases to apply to Trans Mountain in relation to the Terminal Work and that Trans Mountain may commence the Terminal Work pursuant to the terms and conditions of the Certificate and Orders notwithstanding the fact that Trans Mountain does not hold Preliminary Plan Approvals under the Zoning Bylaw or a Tree Cutting Permit under the Tree Bylaw.

163. Trans Mountain further requests that the Board grant relief pursuant to Condition 1 from Condition 2 and Trans Mountain’s commitment to comply with Burnaby’s bylaws insofar as that commitment requires Trans Mountain to obtain PPAs and Tree Cutting Permits from Burnaby prior to commencing the Terminal Work.
164. Trans Mountain further requests that the Board establish an efficient, fair and timely process whereby Trans Mountain can effectively and efficiently bring similar issues to the Board in the future. In the event a provincial or municipal permitting agency refuses or unreasonably delays issuance of permits in relation to the Project, Trans Mountain submits that the following process would be efficient and fair to all parties:

¹⁰² July 6, 2017 TWG meeting between Trans Mountain and Burnaby officials.

- (a) Trans Mountain files a request for Board relief pursuant to Condition 1 and the NEB Act, including pertinent information in relation to the permit application in question;
 - (b) the permitting agency may file a reply within seven (7) days of Trans Mountain's request for relief;
 - (c) Trans Mountain may file a reply within four (4) days of the permitting agency's reply; and
 - (d) the Board will issue a decision on the basis of the written record and will endeavour to do so within seven (7) days of Trans Mountain's reply.
165. Trans Mountain's view is that, unless new constitutional issues are raised, a further notice of constitutional question is not required.
166. Trans Mountain also respectfully requests such further and other related relief not specifically requested herein as the Board may deem just and reasonable pursuant to section 20 of the NEB Act.
167. Trans Mountain respectfully requests that the Board exercises its authority under section 4 of the *National Energy Board Rules of Practice and Procedure, 1995* and s 57(2) of the *Federal Courts Act* to abridge the time required to review and respond to this Notice of Motion in the consideration of public interest and fairness. Given the critical timing of the Project construction Schedule, Trans Mountain would appreciate any further direction and a determination from the Board at its earliest convenience.

All of which is respectfully submitted this 26th day of October, 2017.

"Original signed by"

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SCHEDULE “A”

[DRAFT] TRANS MOUNTAIN PIPELINE ULC AND THE CITY OF BURNABY

ORDER _____

IN THE MATTER OF the *National Energy Board Act*, R.S.C. 1985, c. N-7, as amended, (“NEB Act”) and the Regulations made thereunder;

AND IN THE MATTER OF the Certificate of Public Convenience and Necessity OC-064 (“Certificate”) held by Trans Mountain Pipeline ULC as General Partner of Trans Mountain Pipeline L.P. (collectively “Trans Mountain”), in respect of the Trans Mountain Expansion Project (“Project”);

AND IN THE MATTER OF National Energy Board (“NEB” or “Board”) Orders XO-T260-003-2017, MO-021-2017 and XO-T260-010-2016 for Project-related work at the Burnaby Terminal;

AND IN THE MATTER OF a Notice of Motion and Notice of Constitutional Question filed by Trans Mountain, dated 26 October 2017, for an order pursuant to sections 12 and 13 of the NEB Act declaring certain City of Burnaby (“Burnaby”) bylaws inoperative or inapplicable in limited circumstances.

BEFORE the Board on _____, 2017.

WHEREAS paragraph 73(c) of the NEB Act authorizes the company to construct, lay, carry or place its pipeline across, on or under the land of any person on the located line of the pipeline;

AND WHEREAS paragraph 73(e) of the NEB Act authorizes the company to construct, erect and maintain all necessary and convenient roads, buildings, houses, stations, depots, wharves, docks and other structures, and construct, purchase and acquire machinery and other apparatus necessary for the construction, maintenance, operation and abandonment of its pipeline or the maintenance of its abandoned pipeline;

AND WHEREAS paragraph 73(g) of the NEB Act authorizes the company to alter, repair or discontinue the works mentioned in this section, or any of them, and substitute others in their stead;

AND WHEREAS paragraph 73(i) of the NEB Act authorizes the company to do all other acts necessary for the construction, maintenance, operation and abandonment of its pipeline or the maintenance of its abandoned pipeline;

AND WHEREAS Trans Mountain was issued a Certificate of Public Convenience and Necessity, Certificate-OC-064 (“Certificate”), pursuant to section 52 of the NEB Act and NEB Orders XO-T260-003-2017, MO-021-2017 and XO-T260-010-2016 (“Orders”), which authorize Trans

Mountain to undertake Project-related works at the Burnaby Terminal and the Westridge Marine Terminal (“Terminal Work”);

AND WHEREAS any powers exercised by Trans Mountain under section 73 are subject to section 75 of the NEB Act, which requires Trans Mountain and its representatives and agents to do as little damage as possible and to make full compensation to Burnaby for any damage;

AND WHEREAS Section 7.3 of the City of Burnaby’s (“Burnaby’s”) Zoning Bylaw (Bylaw No. 4742) requires Trans Mountain to obtain preliminary plan approvals (“PPAs”) from Burnaby prior to conducting the Terminal Work;

AND WHEREAS Burnaby has failed to issue the requisite PPAs for the Terminal Work despite requests from Trans Mountain for same;

AND WHEREAS sections 12 and 13 of the NEB Act authorize the Board to inquire into, hear and determine alleged contraventions of the NEB Act and to direct compliance therewith and to forbid the doing or continuing of any act contrary to the NEB Act;

AND WHEREAS Trans Mountain filed a Notice of Motion and a Notice of Constitutional Question on October 26, 2017 with the Board requesting that the Board issue an order granting declaratory relief pursuant to sections 12, 13, and paragraphs 73(c), (e), (g) and (i) of the NEB Act;

AND WHEREAS Trans Mountain served the Notice of Constitutional Question on the Attorneys-General of Canada and the provinces on October ●, 2017, pursuant to the *Federal Courts Act*;

AND WHEREAS the Board considered written submissions and evidence from Trans Mountain and Burnaby;

AND WHEREAS the Board determined that, to the extent that they conflict with or impair Trans Mountain’s exercise of its powers under section 73 of the NEB Act to construct the Project and conduct the Terminal Work, certain Burnaby Bylaws are either inoperative or inapplicable to Trans Mountain to that extent;

IT IS THEREFORE ORDERED THAT Section 7.3 of Burnaby’s Zoning Bylaw (Bylaw No. 4742) ceases to apply to Trans Mountain in relation to Project related work at the Terminal Work and that Trans Mountain may commence the Terminal Work pursuant to the terms and conditions of the Certificate and Orders notwithstanding the fact that Trans Mountain does not hold Preliminary Plan Approvals under the Bylaw.

NATIONAL ENERGY BOARD

Secretary of the Board