

National Energy
Board



Office national
de l'énergie

File OF-Fac-Oil-T260-2013-03-02
25 September 2014

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Dear Mr. Denstedt, Mr. Stoness, Mr. Dattani, and Mr. McDade:

**Hearing Order OH-001-2014
Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project
Trans Mountain request, dated 3 September 2014, for an order against the
City of Burnaby (Burnaby) permitting temporary access to Burnaby lands
Ruling No. 32**

The Board received a [notice of motion](#) (Motion) and supporting materials from Trans Mountain dated 3 September 2014. The Motion requests the Board issue an order against Burnaby, pursuant to sections 12, 13, and paragraph 73(a) of the *National Energy Board Act* (NEB Act), permitting temporary access to specified Burnaby lands. Trans Mountain submits that Burnaby has not allowed full access to the subject lands for the purpose of completing surveys and examinations required by the Board.

The Board set up a process to receive comments on the Motion and Burnaby filed its [comments](#) on 10 September 2014. Burnaby submits that the Board does not have constitutional jurisdiction to issue an order to Burnaby aimed at the city's by-law enforcement powers. Burnaby also requests the Board adjourn the Motion pending determination of Burnaby's application before the Supreme Court of British Columbia.

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Trans Mountain [replied](#) on 12 September 2014. It takes the position that the Board should not adjourn the Motion as the Board has exclusive jurisdiction to determine whether an order should be issued. Trans Mountain submits that it is not raising a constitutional argument and states that, “[w]hile Burnaby suggests there is a constitutional question to be addressed, they have not raised one.”

The Board received further responses from both Burnaby and Trans Mountain after the deadline for filing comments. Trans Mountain requested that Burnaby’s comments be struck from the Board’s record.

Views of the Board

Preliminary Matters

The Board is not persuaded to adjourn the Motion pending determination of an application filed in the Supreme Court of British Columbia. Burnaby did not provide any specific legal authority to support its request for adjournment. As well, given the disposition of the Motion by the Board, it is unnecessary at this time to consider the adjournment request further.

With respect to further filings received after the Board’s deadline for comments, the Board will not consider any of the additional comments on the Motion provided by either party. These comments were received after the Board’s filing deadline. Burnaby has not justified why it is necessary that the Board consider a new decision from the Supreme Court of Canada which upholds previous decisions of that Court. Burnaby’s late filing also refers to other cases that it could have referenced in its 10 September 2014 filing, but did not do so.

Decision on the Motion

The Board has decided to dismiss this Motion without prejudice to Trans Mountain filing a Notice of Constitutional Question and providing further specific legal authority and facts to support the relief it requested.

In its Motion, Trans Mountain states that, while it did not require a Board order for temporary access previously, it now requires such an order from the Board. The reason given by Trans Mountain for requesting a Board order is because “recent steps taken by the City of Burnaby physically ... and under its by-laws ... prevent Trans Mountain’s access” to the subject lands. This is said to prevent Trans Mountain from effectively enforcing its NEB Act section 73 rights. In the Board’s view, the Motion filed by Trans Mountain raises a constitutional question about the applicability of Burnaby’s by-laws to Trans Mountain and whether, on the facts, Trans Mountain is prevented or impaired from exercising the powers granted under paragraph 73(a) of the NEB Act.

The Board accepts that it has the authority to consider constitutional questions as they relate to its enabling legislation, pursuant to section 12. The Board can refuse to apply provisions within its enabling legislation if the Board determines that those provisions are contrary to constitutional law. However, this is not the relief requested by Trans Mountain from the Board, nor has Burnaby argued in this instance that the provisions of the NEB Act are unconstitutional.

While the draft order proposed by Trans Mountain does not specifically request that the Board order Burnaby to stop enforcing its by-laws, it is clear from the above quote that this is the desired effect of such an order. This may require the Board to find, either directly or indirectly, that, on the facts before it, legislation or by-laws enacted by another level of government are inapplicable to Trans Mountain and that, consequently, that government should be forbidden by the Board to take any actions to enforce those laws. In the Board's view, this clearly raises a constitutional question.

While both Trans Mountain and Burnaby refer to section 57 of the *Federal Courts Act*, neither party has provided formal notice to the attorneys general of a Notice of Constitutional Question. The Board cannot consider the merits of the Motion unless such notice is filed by at least one of the parties. In the Board's view, as Trans Mountain is requesting the relief, that notice should be served by Trans Mountain.

In any Motion and documents filed in support, the Board expects the parties to clearly address the following questions:

1. Does the Board have the legal authority to determine that Burnaby's specific by-laws that Trans Mountain is alleged to have breached are inapplicable, invalid, or inoperative in the context of Trans Mountain's exercise of its powers under paragraph 73(a) of the NEB Act?
2. If so, on the facts before the Board, should the Board find that those by-laws are inapplicable, invalid, or inoperative?
3. If the Board can and does make a finding that those by-laws are inapplicable, invalid, or inoperative in the particular case, does the NEB Act provide the Board, as a statutory tribunal, with the authority to forbid Burnaby from enforcing those or any other by-laws in the future (for example, what is the scope of the authority under section 13 of the NEB Act, and does it encompass the remedy sought against Burnaby?)
4. If so, do the facts before the Board support granting such an order?

The Board expects the parties to support their positions with relevant legal authority and sufficient facts. The Board notes that the Board's previous temporary access orders issued against landowners, upon which Trans Mountain relies on in its current Motion, may not provide sufficient precedent in the circumstances where different levels of government and other legislation are involved. Those previous circumstances concerned the interaction between the common law rights of landowners in relation to the statutory powers of companies under the NEB Act, and did not raise constitutional issues, as the case now before the Board does. The Board also notes that Burnaby has not yet provided any clear legal authority to suggest that the Board cannot issue the order requested by Trans Mountain.

This ruling regarding the Motion in no way limits or minimizes the Board's interpretation in [Ruling No. 28](#). Trans Mountain continues to have the power stated under paragraph 73(a) of the NEB Act to enter into and on the subject lands and complete the surveys and examinations. As the Board stated, it is not in the public interest that the Board be required to recommend approval or denial of a project without all the necessary information before it. The Board's consideration in this hearing process of Trans Mountain's new preferred corridor requires that the company complete its surveys and examinations as expeditiously as possible.

Should Trans Mountain proceed with a further motion for an order against Burnaby and file a Notice of Constitutional Question, the Board would hear the matter on an expedited basis. This could include scheduling an oral hearing to hear argument on short notice.

Yours truly,

Original signed by L. George for

Sheri Young
Secretary of the Board

c.c. All intervenors