



File OF-Fac-Oil-T260-2013-03 03
6 November 2017

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Dear Ms. Killoran and Mr. Denstedt:

**Trans Mountain Pipeline ULC (Trans Mountain)
Trans Mountain Expansion Project (Project)
Notice of motion and notice of constitutional question (NCQ) dated
26 October 2017 – Process letter**

A. Notice of motion and NCQ details

On 26 October 2017, Trans Mountain filed a [notice of motion and NCQ](#) with the National Energy Board (Board) with respect to the Project.

In its notice of motion, Trans Mountain requests that the Board:

- a) issue an order pursuant to sections 12 and 13, and paragraphs 73(c), (e), (g), and (i) of the *National Energy Board Act* (NEB Act), declaring that:
 - i) section 7.3 of the City of Burnaby's (Burnaby's) Zoning Bylaw (Bylaw No. 4742) and section 3 of Burnaby's Tree Bylaw (Bylaw No. 10482) do not apply to Project-related work at the Burnaby Terminal and the Westridge Marine Terminal (Terminal Work), 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 Board certificate and orders, notwithstanding the fact that Burnaby has not issued preliminary plan approvals (PPAs) or tree cutting permits for the Terminal Work;
- b) grant relief (pursuant to certificate Condition 1) from certificate 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

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- 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.

In a subsequent [letter](#) filed 3 November 2017, Trans Mountain proposed that the items described in Paragraphs 1b) and c) of its notice of motion be bifurcated into separate motions. The Board notes that Trans Mountain has indicated it will file a separate notice of motion to this effect, but advises all parties to note the comments in Part C of this letter related to the Board's assignment of a Panel to deal with the 26 October 2017 notice of motion.

In its letter and notice of motion, Trans Mountain indicates that it 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 its Tree Bylaw prior to conducting the Terminal Work.

Trans Mountain further indicates that, in addressing the constitutional questions, it will also address the following related issues:

1. 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?
2. If so, on the facts before the Board, should the Board find that those bylaws are inapplicable, invalid, or inoperative?

B. Submissions received to date

On 31 October 2017, Burnaby filed a [letter](#) raising various concerns regarding Trans Mountain's notice of motion and NCQ.

Subsequently, the Board received a 1 November 2017 [letter of response](#) from Trans Mountain, as well as the 3 November 2017 letter referred to above.

Several attorneys general have also made submissions, and Trans Mountain has filed various correspondence it has received from other attorneys general.

The Board notes that it has received correspondence from the attorneys general of [Alberta](#), [Saskatchewan](#), and [British Columbia](#) indicating their intent to intervene in this proceeding, as well as correspondence from the Attorney General of [Canada](#) and the attorneys general of [Ontario](#), the [Northwest Territories](#), [New Brunswick](#), [Yukon](#), and Newfoundland & Labrador indicating that they do not.

C. Assigned Panel and mandate

The Chair of the Board has assigned a Panel to consider the notice of motion, including the constitutional questions raised therein, and to issue decision(s) with respect to the notice of motion, with the exception described below.

Regarding **Paragraph 1c)** of the notice of motion, the assigned Panel does **not** have the mandate to establish a process for Trans Mountain (or others) to bring similar future matters for determination. However, the assigned Panel has been authorized, pursuant to subsection 15(1) of the NEB Act, to report back to the Board and make recommendations for the Board's consideration.

D. Process steps and timeline

The Board notes the evidence filed by way of affidavit as part of Trans Mountain's submissions, and Trans Mountain's request for a process that provides for an expedient outcome, given the nature of the relief being sought. The Board further notes Burnaby's submission that consideration of the matters raised in the notice of motion will require the Board to engage in a detailed factual assessment, and that it expressed a desire to cross-examine on Trans Mountain's affidavit, and to prepare its own evidentiary filings.

The Board further notes the general requirement of subsection 57(2) of the *Federal Courts Act* with respect to providing 10 days' notice to attorneys general regarding the NCQ, as well as the comments pertaining to timelines received to date from the attorneys general of Saskatchewan and British Columbia.

The Board will use the following process steps and timeline to hear the notice of motion and NCQ. Please note where each step pertains to either the notice of motion, the NCQ, or both. **All deadlines for filings are noon, Calgary time, on the indicated date.**

Date or deadline (2017)	Event/step
8 November	Attorneys general who have not already indicated their intent to make submissions in response to the NCQ must indicate their intention to the Board in writing.
17 November	Burnaby must file its submissions regarding the notice of motion including any evidence upon which it intends to rely, by way of sworn affidavit.
22 November	Trans Mountain must file its reply evidence, if any, by way of sworn affidavit.
24 November	Burnaby, Trans Mountain, and any attorneys general who have indicated their intention to intervene in this matter must file written submissions in respect of the constitutional questions.

Date or deadline (2017)	Event/step
29 November	Burnaby and Trans Mountain must appear before the Panel, for the purposes of cross-examining each other's affiants, in the Board's hearing room in Calgary. The Board will provide up to two hours for each of these parties to cross-examine the others' affiants. At the conclusion of cross-examination the evidentiary record will be closed.
1 December	Supplementary written briefs of argument following cross-examination must be filed by any party that wishes to do so.
4 December	The Board will hear oral summary argument in its hearing room in Calgary. Trans Mountain will present its argument first, followed by all other parties , in an order to be determined. Trans Mountain will have a right of reply.

Should any process adjustments be required or made in future, the Board will communicate them.

For any questions about the process to hear Trans Mountain's notice of motion and NCQ, please contact the Board's legal counsel, Mark Watton, at 403-389-2069 (toll free 1-800-899-1265).

Yours truly,

Original signed by S. Young

Sheri Young
Secretary of the Board

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