File OF-Fac-Oil-T260-2013-03 03
18 January 2018

To: All parties to the MH-081-2017 proceeding

Trans Mountain Pipeline ULC (Trans Mountain)
Trans Mountain Expansion Project (Project)
Hearing Order MH-081-2017
Notice of motion, including a notice of constitutional question (NCQ), dated 26 October 2017 (Motion)
Reasons for Decision – National Energy Board (NEB or Board) Order MO-057-2017 dated 6 December 2017

On 26 October 2017, Trans Mountain filed the above-referenced Motion. On 6 December 2017, the Board decided to grant the relief sought in Paragraphs 1a) and b) of the Motion, as more particularly set out in Order MO-057-2017. The Board indicated that written reasons for its decision would follow. These are the Board's reasons.

A. DEFINITIONS

The following defined terms are used in these reasons:

Certificate	Certificate of Public Convenience and Necessity OC-064, held by Trans Mountain as General Partner of Trans Mountain Pipeline L.P., in respect of the Project
BTE	The Burnaby Terminal Expansion, as generally described in Paragraph 8 of the Motion, and as approved by Board Order XO-T260-010-2016 and the Certificate
BTM	The Burnaby Terminal Modifications, as generally described in Paragraph 9 of the Motion, and as approved by Board Orders XO-T260-003-2017 and MO-021-2017
KB Site	The Kask Brothers Temporary Infrastructure Site, as generally described in Paragraph 11 of the Motion, and the use of which was approved by Board Order XO-T260-007-2016 and the Certificate

…/2

WMT	The Westridge Marine Terminal expansion, as generally described in Paragraph 10 of the Motion, and as approved by the Certificate
Terminal Work	Comprises all of the BTM, BTE, KB Site, and WMT
Zoning Bylaw	City of Burnaby Bylaw No. 4742
PPA	Preliminary Plan Approval, as referred to in section 7.3 of the Zoning Bylaw
Tree Bylaw	City of Burnaby Bylaw No. 10482
Tree Cutting Permit	Tree cutting permit, as referred to in section 3 of the Tree Bylaw

B. THE MH-081-2017 PROCEEDING

The Board established the MH-081-2017 proceeding to consider the relief sought in Paragraphs 1a) and b) of the Motion.[1]

Consistent with the general requirement of subsection 57(2) of the *Federal Courts Act*, after the Motion was received, the Board provided additional notice of its own to the Attorney General of Canada and the provincial attorneys general in its 3 November 2017 process letter. It set a deadline of 8 November 2017 for the attorneys general to advise if they intended to make submissions regarding the NCQ.

The parties that participated in the MH-081-2017 proceeding were Trans Mountain, the City of Burnaby (Burnaby), the Attorney General of Alberta (Alberta), the Attorney General of British Columbia (British Columbia), and the Attorney General of Saskatchewan (Saskatchewan).

In accordance with the process set out by the Board, Burnaby filed its responding submissions and evidence on 17 November 2017, and Trans Mountain filed reply evidence on 22 November 2017.

The Board set 29 November 2017 as a hearing date for Trans Mountain and Burnaby to cross-examine each other's affiants. In a letter of 31 October 2017, Burnaby had requested an opportunity to cross-examine. However, in a subsequent letter of 23 November 2017, the Board

[1] The Motion included an additional request at Paragraph 1 c), asking the Board to establish a process (and a standing panel) for Trans Mountain to bring similar future municipal or provincial permitting matters to the Board for determination. On 14 November 2017, Trans Mountain filed a separate notice of motion to this effect, which subsumed the previous Paragraph 1 c). On 15 November 2017, the Board decided to consider the two motions separately. All filings related to the process request, including the Board's decision, can be found here.

was advised that Trans Mountain and Burnaby had agreed that cross-examination on the filed affidavits was unnecessary. The Board maintained the 29 November 2017 oral hearing date for its own questioning of Trans Mountain affiants Mr. Michael Davies and Mr. Paul Wearmouth, and Burnaby affiant Mr. Lou Pelletier.

All parties filed written submissions on the constitutional questions by 24 November 2017. The Board heard oral summary argument from all parties on 4 December 2017.

C. BOARD ORDER MO-057-2017

In granting the relief sought in Paragraphs 1a) and b) of the Motion, the Board specifically ordered that:

1. Pursuant to Condition 1 of the Certificate, Trans Mountain is relieved of the requirement of Condition 2 of the Certificate, insofar as it requires Trans Mountain to obtain, with respect to the BTE, KB Site, and WMT, Preliminary Plan Approvals under section 7.3 of the City of Burnaby's Bylaw No. 4742 (Zoning Bylaw) and Tree Cutting Permits under section 3 of the City of Burnaby's Bylaw No. 10482 (Tree Bylaw).

2. Pursuant to sections 12 and 13 and paragraphs 73(c), (e), (g), and (i) of the *National Energy Board Act*:

    a) The constitutional questions raised in the Motion are answered in the affirmative.

    b) Section 7.3 of the Zoning Bylaw and section 3 of the Tree Bylaw do not apply to the Terminal Work.

    c) Trans Mountain may proceed with the Terminal Work in the absence of the City of Burnaby having issued Preliminary Plan Approvals under section 7.3 of the Zoning Bylaw or Tree Cutting Permits under section 3 of the Tree Bylaw for the Terminal Work. The foregoing does not relieve Trans Mountain of any other applicable legal and regulatory requirements.

    d) For greater certainty, the above relief does not absolve Trans Mountain from compliance with other relevant City of Burnaby Bylaws.

D. FEDERAL LAWS AND REGULATORY REQUIREMENTS

i) Regulatory review of the Project

The Project includes a twinning (or looping) of the existing Trans Mountain pipeline system (which was originally commissioned in 1953) in Alberta and British Columbia with approximately 987 kilometres of new pipeline. It also includes new and modified facilities, such as pump stations and tanks, and three new tanker berths at the WMT in Burnaby.

The entirety of the Project constitutes a "pipeline" under the NEB Act. Pursuant to the NEB Act, the Project was determined by the Board and the Governor in Council (GIC) to be in the Canadian public interest. Its construction and operation was authorized by the Certificate, along

with certain other Board orders. The Project is subject to 157 conditions relating to a range of matters, including safety, environment, consultation, and financial responsibility.

Trans Mountain submitted its application for the Project on 16 December 2013. The federal decision to authorize the Project (culminating in the issuance of the Certificate on 16 December 2016) was made after a lengthy Board hearing (OH-001-2014). Burnaby was an active participant in the hearing. It was, and is, strongly and vocally opposed to the Project. During the course of the hearing, Burnaby posed hundreds of information requests to, filed written evidence and written argument, and provided oral argument. Burnaby also brought various motions.

In 2014, Trans Mountain and Burnaby had a dispute over Burnaby municipal permitting in relation to Trans Mountain accessing city lands to conduct certain studies requested by the Board in relation to its review of the Project. In what is referred to as "Ruling No. 40," the Board found that Burnaby was attempting to use certain of its bylaws to block access by Trans Mountain to conduct the studies at issue.[2] On constitutional grounds, the Board ordered Burnaby to allow Trans Mountain temporary access to city lands to conduct its studies. The issues considered in Ruling No. 40 were also the subject of litigation in the British Columbia Supreme Court[3] and British Columbia Court of Appeal.[4]

ii) Trans Mountain's Commitment to apply for municipal permits

The BTE, KB Site, and WMT are subject to the Certificate. Certificate Conditions 1 and 2 read as follows:

1. **Condition compliance**

   Trans Mountain must comply with all of the Certificate conditions, unless the NEB otherwise directs.

2. **Compliance with commitments**

   Without limiting Conditions 3, 4, and 6, Trans Mountain must 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.

In the course of the OH-001-2014 proceeding, Trans Mountain committed to apply for, or seek variance from, provincial and municipal permits and authorizations that apply to the Project. The Board summarized this commitment, which falls within the purview of Certificate Condition 2, at Page 251 of its Report, as follows:

> 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

[2] *Application for Trans Mountain Expansion Project (OH-001-2014)*, Board Ruling No. 40.
[3] *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2015 BCSC 2140 (BCSC).
[4] *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2017 BCCA 132 (BCCA).

municipalities to understand the applicability of bylaws and standards related to the construction and operation of the Project.

Also during the OH-001-2014 proceeding, Trans Mountain committed to continued engagement with affected municipalities through the formation of technical working groups (TWGs), with the stated goal being to build trust and good relationships. Certificate Condition 14 requires Trans Mountain to file with the Board, prior to commencing construction, terms of reference for established TWGs. It also requires these terms of reference to be developed in consultation with participating municipalities.

The BTM is not subject to the Certificate. This work, which proposes to modify the Burnaby Terminal to accommodate the Project, and specifically the BTE, was the subject of a subsequent application to the Board by Trans Mountain. It is authorized by Board Orders MO-021-2017 and XO-T260-003-2017, issued on 20 April 2017.

iii) Section 73 of the NEB Act

For the purposes of the Terminal Work, Trans Mountain has all of the powers set out in section 73 of the NEB Act. These include the power to:

> **(c)** construct, lay, carry or place its pipeline across, on or under the land of any person on the located line of the pipeline;
> ….
> **(e)** 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;
> …
> **(g)** alter, repair or discontinue the works mentioned in this section, or any of them, and substitute others in their stead;
> …..
> **(i)** do all other acts necessary for the construction, maintenance, operation and abandonment of its pipeline or the maintenance of its abandoned pipeline.

E. BURNABY BYLAWS

i) Zoning Bylaw

As described in further detail in Section F below, Trans Mountain sought PPAs under section 7.3 of the Zoning Bylaw for the Terminal Work. It sought separate PPAs for the KB Site, the BTM, the WMT, and the BTE.

Subsection 7.3(1) of the Zoning Bylaw states that "any person wishing to undertake a development shall apply for and receive preliminary plan approval from the Director of Planning before the issuance of a building permit or a business license…" Subsection 7.3(2) sets out the information that must accompany a PPA application, including particulars about the lot, the

applicant and/or owner, fees, the purpose of the proposed development and estimated commencement date, a preliminary plan showing a series of zoning details, and "…such further or additional land use information as the Director of Planning may require."

Pursuant to subsection 7.3(3), the Director of Planning must issue a PPA when the application conforms to the provisions of the Zoning Bylaw and does not contravene any approved land use or road plan. Subsection 7.3(5) states that "[t]he granting of preliminary plan approval shall not absolve the applicant from compliance with all relevant municipal Bylaws."

The Zoning Bylaw requires that development be set back between 5 and 30 metres from a streamside protection and enhancement area (SPEA), which is determined through an analysis of the fish-bearing status of a stream and areas near the stream containing existing vegetation or the potential for vegetation. Subsection 6.23(4) of the Zoning Bylaw prohibits developments on land within a SPEA. Subsection 6.23(3) allows for the Director Planning and Building to, with the approval of the Department of Fisheries and Oceans, vary the boundaries of a SPEA. The Zoning Bylaw's SPEA provisions are relevant to the BTE, as the Project's storage tanks and other works at the BTE coincide with a SPEA.

Subsection 6.7(1) of the Zoning Bylaw allows for temporary buildings to be erected or placed on land for construction office and construction equipment or material storage purposes, on a lot undergoing development for a period not exceeding the duration of such construction. Subsection 800.5(2) of Schedule VIII of the Zoning Bylaw requires that off-street parking that is to be shared by two or more buildings or uses be located not more than 122 metres from any building or use to be served. Subsection 6.7(3) provides that the Director Planning may grant minor variances to the siting and off-street parking requirements for a temporary building. These Zoning Bylaw provisions are relevant to the KB Site, which is a temporary infrastructure site that is further than 122 metres from the WMT, which it will support.

Pursuant to the British Columbia *Local Government Act*, Burnaby has established a Board of Variance, which may approve a variance to the Zoning Bylaw if compliance with respect to the required siting, size, or dimensions of a building or other structure would cause a person hardship.[5]

ii) Tree Bylaw

As described in further detail in Section F below, section 3 of Burnaby's Tree Bylaw requires Trans Mountain to obtain Tree Cutting Permits for each of the BTE, BTM, and WMT.

Section 3 of the Tree Bylaw states that "[e]xcept 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." Section 5 sets out the items that must accompany an application for a Tree Cutting Permit, including a "tree plan." Section 6 sets out the circumstances under which the Director Planning may issue a Tree Cutting Permit, including if "retention of the protected tree or trees would have the effect of preventing all uses of the land permitted."

[5] *Local Government Act*, RSBC 2015, c 1, Part 14, Division 15.

Subsection 11(1) of the Tree Bylaw provides that every development application (which includes a PPA application) must be accompanied by a tree plan. Under paragraph 12(b), the Director of Planning may exempt a person from the tree plan requirement where he/she is "satisfied that such trees can be readily identified on the site from other information provided by the applicant."

F. ZONING BYLAW AND TREE BYLAW PERMITTING PROCESSES

The facts relevant to the Zoning Bylaw and Tree Bylaw permitting processes for the Terminal Work can be drawn from the significant amount of emails, correspondence, and meeting minutes that Trans Mountain and Burnaby filed as evidence. While there is little material dispute between Trans Mountain and Burnaby with respect to the facts of these events, the parties differ greatly as to how the Board should interpret these events, and what inferences or conclusions the Board should draw from them.

After considering the entire record, including the affidavits of Mr. Michael Davies and Mr. Paul Wearmouth for Trans Mountain, and the affidavits of Mr. Lou Pelletier and Ms. Robyn Allan for Burnaby, the Board makes the following findings of fact with respect to the Zoning Bylaw and Tree Bylaw permitting processes for the Terminal Work.

i) TWG meetings

As noted above, Certificate Condition 14 requires Trans Mountain to file with the Board, prior to commencing construction, terms of reference for established TWGs. As contemplated by that condition, Trans Mountain initiated a TWG with Burnaby. The parties held eight TWG meetings between 15 December 2016 and 18 October 2017. Burnaby objected to these meetings even being referred to as "TWG" meetings until such time as the terms of reference for the TWG were formalized (which did not occur until September 2017). For the sake of the discussion that follows, the Board assumes all eight meetings between Trans Mountain and Burnaby to have been TWG meetings, and refers to them as such throughout these reasons.

The first TWG meeting was relatively exploratory and high-level in nature. The TWG's terms of reference were still under development, and there appears to have been a lack of a concerted effort on the part of both Trans Mountain and Burnaby to meaningfully engage or make any significant progress in late 2016, which carried over to early 2017.

The TWG meetings became more regular (roughly once a month) and detailed starting in April 2017. Both the written record and the *viva voce* testimony of Trans Mountain's witnesses make it clear that Trans Mountain expected the TWG process to be used to, among other things, work through issues related to Burnaby permitting matters. More precisely, it appears that Trans Mountain believed the TWG would be the primary forum in which its permitting applications would be reviewed and guidance would be given.

Although Burnaby made some statements to the effect that the TWG could be used to work through permitting issues, there was no clear commitment on Burnaby's part that this would be the case. Very little progress was made in TWG meetings to advance Trans Mountain's PPA applications. This is despite the fact that Burnaby regularly had senior staff attend the TWG

meetings. The process and status of permitting matters was discussed at TWG meetings, and occasionally specific issues were discussed; however, the record demonstrates that Burnaby's position was that the PPA applications would ultimately be dealt with outside the TWG, through Burnaby's formal permitting process.

The record shows some early reluctance on Trans Mountain's part to commit to going through the formal municipal permitting process, initially suggesting that it would file "packages" demonstrating compliance with applicable municipal bylaws. However, as per Burnaby's requirements, Trans Mountain did ultimately formally file its four PPA applications. From that point on (June 2017), Trans Mountain appeared committed to complying with the formal application review process. At the same time, Trans Mountain continued to attempt to make the TWG an effective forum for working through permitting issues.

Ultimately, in the Board's view, the evidence demonstrates that Trans Mountain was unable to rely on the TWG as a meaningful or effective forum for resolving or clarifying outstanding issues related to the PPA applications and Tree Cutting Permits, and that Burnaby did not use the TWG as a means of making its approval process more efficient or accessible to Trans Mountain.

ii) The PPA application process

There is some dispute between Trans Mountain and Burnaby regarding when the four PPA applications were formally filed with Burnaby, and specifically whether this occurred in late May 2017, when certain initial filings were made, or later in June 2017, when some filings were re-submitted with additional information required by Burnaby.

Regardless, once the PPA applications had in fact been filed as required in June 2017, Trans Mountain repeatedly asked for Burnaby's expected timing to complete its processing of them. Burnaby was non-committal in its responses. For example, in July 2017, it informed Trans Mountain that its timeline for processing PPA applications was three to four weeks for a simple application and six to eight weeks for a more complex review, although the "Tank Farm application" would take a bit longer. However, Burnaby later suggested that there were no standard timelines. Burnaby also indicated that Trans Mountain's PPA applications would take longer due to project complexity, and the fact that the Burnaby Terminal was "different."

Burnaby was also not clear with Trans Mountain about which of the four PPA applications was under review at any given time, and when any review officially started. It is unclear whether Burnaby's review started when the PPA applications were initially filed, or at some later date when Burnaby considered the PPA applications to be sufficiently complete and/or were formally accepted by Burnaby. The parties proceeded on the basis that the BTM was the priority PPA application; however, it was unclear whether or not the other three PPAs were also under review. At times, Burnaby indicated that it was also reviewing the other three PPA applications and that all four had been referred to several Burnaby departments for review. Burnaby also indicated that it did not have the resources to process all PPA applications simultaneously.

Burnaby stated that its preferred process for reviewing PPA applications is to send all comments to the applicant as a single package. Indeed, in July 2017, Burnaby told Trans Mountain that it

did not want to send out piecemeal comments, and intended to bring together a compilation of comments on the BTM PPA application within two weeks so that Trans Mountain would have a complete package. However, this is not what occurred.

On more than one occasion, Burnaby told Trans Mountain to expect comments on its PPA applications in a matter of weeks, or in the near future. Either these comments did not materialize on the indicated timeline, and/or they were provided in a partial or piecemeal fashion, without clear direction or context as to where they fit in the overall permitting process. As an example of the latter, separate comments from different Burnaby departments in relation to various PPA applications were provided to Trans Mountain on 9 and 14 August; 6, 8, 14, 18, and 28 September; and 19 October 2017.

It was also not always clear if comments provided to Trans Mountain related to the Zoning Bylaw or to another Burnaby bylaw. In response to Board questions, Burnaby clarified during the course of this hearing that some of the additional information it requested from Trans Mountain – related to traffic and sediment control – fell under other Burnaby bylaws.

In the Board's view, Trans Mountain made reasonable efforts to respond to Burnaby's comments and requests for additional information and has, in fact, provided the bulk of this information to Burnaby. While some information that Burnaby requested in relation to the PPA applications is outstanding, the Board accepts that Trans Mountain was not in a position to practically or efficiently provide this information in the absence of additional guidance from Burnaby. This is particularly the case as it related to zoning matters (comments on the WMT and BTE remain outstanding; comments for the BTM and KB Site were not received until 9 August and 26 October 2017, respectively). Burnaby was also not clear with Trans Mountain (prior to the Motion being heard) about what specific information was outstanding. Other information requested by Burnaby – such as ecological assessment reports – was not anticipated by Trans Mountain in the context of a Zoning Bylaw review. These requests came from Burnaby late in the process, and required considerable work to prepare.

The Board is not persuaded that the evidence supports Burnaby's argument that Trans Mountain never tried to comply with its PPA application process and was setting it up for failure. On the contrary, the Board finds that Trans Mountain's reasonable requests to allow it to reach PPA application compliance in an efficient manner were continually rebuffed by Burnaby.

Despite Trans Mountain's multiple requests, Burnaby would not facilitate a meeting between Trans Mountain and the technical staff reviewing the PPA applications. Burnaby initially indicated that meetings could be set up with staff for clarification of the PPA process or for processing PPA applications. However, in September 2017, when Trans Mountain specifically requested that such meetings be set up on a regular basis, Burnaby's Deputy Director of Engineering responded to Trans Mountain in writing, advising that there is no such "permit review team," and that direct contact with individual employees can only lead to delays. Trans Mountain was told that it must work through the PPA application coordinator for the Project and that it has access to senior staff through the TWG. The Board finds this position taken by Burnaby to be disingenuous. Burnaby did not use the TWG as a means of making its approval process more efficient or accessible to Trans Mountain. At the same time, Burnaby

made its technical staff reviewing the permitting applications largely inaccessible to the company.

Trans Mountain made several clearly worded requests to Burnaby in an attempt to clarify the PPA application process. These included requests for a list of Burnaby departments reviewing the PPA applications, how many departments had completed reviews, the likely timeline for comments on each application, the likely timeline for the full process, any additional information that was required, and what Trans Mountain could do to facilitate a more efficient process. These questions were not clearly or consistently answered and, in some cases, were not answered at all.

In oral final argument, Burnaby took the position that the cause of delay in processing the PPA applications was due largely to Trans Mountain's incompetence or ineptness in submitting its applications. The Board finds that the evidence does not support this argument. The Board accepts that Trans Mountain's initial PPA applications lacked some necessary information; however, the applications were re-submitted in June 2017. After that point, Burnaby did, at times, indicate that PPA application completeness was still a concern. However, at other times, Burnaby cites the Project's complexity or the fact that Burnaby has many other PPA applications under review as being reasons for the delay. Even if it were true that significant material was still lacking after June 2017, there was no clear, consistent, or meaningful effort on Burnaby's part to make it known to Trans Mountain what was specifically required to complete its applications.

Regarding Burnaby's project complexity argument, there is no doubt that the Project as a whole is complex. However, based on the evidence on the record, the Board is not persuaded that the four specific PPA applications at issue were comparatively or materially more complex than other PPA applications Burnaby has considered (in one 18 September 2017 letter from Burnaby, it responded to Trans Mountain's questions about delay by referring to its many applications, including from "larger" projects). Burnaby also has a significant degree of familiarity with the Project, owing to its previous participation in the Board's OH-001-2014 proceeding. Each of the BTM, BTE, and WMT are expansions or modifications of existing facilities, the operation of which are known to Burnaby. Trans Mountain led evidence to the effect that the PPA applications were relatively straightforward. The Board also notes the preliminary nature of a PPA, and that the Zoning Bylaw is clear that the issuance of a PPA does not absolve the applicant of compliance with all other Burnaby bylaw requirements.

As of the date that the Motion was filed, Burnaby had not made a decision on any of Trans Mountain's four PPA applications. On 21 November 2017, Burnaby informed Trans Mountain that it would not continue to process the PPA applications while the Motion was before the Board.

iii) The Tree Cutting Permit process

The Tree Cutting Permit process is closely intertwined with the PPA application process. Trans Mountain included Tree Management Plans in support of its PPA applications for the BTM, BTE, and WMT. Those plans proposed to use a "timber cruise method" to estimate the number of trees to be removed. On 9 August 2017, Burnaby indicated to Trans Mountain that the timber cruise method was not acceptable under the Tree Bylaw because it is not a survey plan showing the location and diameter of each protected tree to be removed, it does not include the

location of all replacement trees, and each protected tree is not proposed to be tagged with an identification number.

On 1 September 2017 (for the BTM) and 6 October 2017 (for the WMT and BTE), Trans Mountain requested that the Director of Planning grant an exemption pursuant to paragraph 12(b) of the Tree Bylaw to allow for the use of the timber cruise method, which would then subsequently be validated by having a qualified environmental professional on site to count all trees removed. Trans Mountain submitted that the area of tree coverage makes it impractical to survey each protected tree location or to tag individual trees. It argued that the timber cruise method is commonly used in the forest industry and may provide a reasonably accurate estimate of the number of trees to be removed. It indicated that it would comply with any reasonable conditions attached to a Tree Cutting Permit, including related to the provision of security for the cost of replacement trees.

In its evidence, Trans Mountain estimated that 1502, 2220, and 275 protected trees would be removed from the BTM, BTE, and WMT, respectively. During questioning, Trans Mountain's witness, Mr. Wearmouth, indicated that, at each of these sites, all of the trees would be cleared from the areas in question.

On 10 October 2017, the Director of Planning refused Trans Mountain's exemption request, stating that he did not find a supportable basis for the variance. No other reasons were provided. Burnaby has not yet issued Tree Cutting Permits for the BTE, BTM, or WMT.

On 14 November 2017, Trans Mountain submitted a complete Tree Management Plan for the BTM that does not rely on the timber cruise methodology.

iv) Political interference and intent to delay

When it filed the Motion, Trans Mountain led evidence that, it argued, demonstrated an intent on Burnaby's behalf to "do everything it can to frustrate the Project." Trans Mountain went so far as to allege that Burnaby's Mayor believed that the permitting process was a legitimate method of slowing down the Project. Burnaby strongly objected to Trans Mountain's assertions of improper motives on Burnaby's behalf and led evidence to the effect that there was no political interference in its permitting processes.

In the Board's view, the issue of alleged political interference or improper motives may be relevant, but is not particularly material to its consideration of this Motion. Establishment of mal intent or bad faith is not, in the Board's view, a prerequisite to granting the relief sought. Regardless, the Board discusses it here as it was debated at some length between the parties.

The Board accepts that Burnaby is fundamentally opposed to the Project, and that it has been public, vocal, and consistent in its opposition. This was and is well within Burnaby's rights as an affected landowner, municipality, and as a hearing participant. However (and as was ultimately conceded by Trans Mountain), there is no direct evidence on the record that there has been political interference in the PPA application and Tree Cutting Permit processes, or that Burnaby, as a regulator, intentionally used those processes as a means to improperly delay the Project.

Burnaby told Trans Mountain on several occasions that ongoing litigation between the parties, and Burnaby's opposition to the Project, would not interfere with the technical permitting process. The Board accepts this to generally be the case.

That being said, the record shows that the relationship between Trans Mountain and Burnaby is acrimonious and, at times, litigious. The tone of some of the written correspondence between the parties during the course of the permitting process is one of adversaries or litigants, as opposed to that of regulator and regulated company. This is of concern to the Board, particularly on Burnaby's part, which is a regulator in this context. In the Board's view, the parties' negative relationship, and the overall climate of Burnaby's public opposition to the Project, may have had a general chilling effect on Burnaby's ability or willingness to work efficiently and cooperatively with Trans Mountain. This is despite the fact that there was no direct political interference. The Board notes that the review timeline has been much longer than Burnaby's initial estimate of six to eight weeks for a more complex application. Comments on the PPA applications were also provided in a partial or piecemeal fashion, which is inconsistent with Burnaby's preferred practice of providing consolidated comments. However, this evidence does not rise to the level of establishing bad faith on behalf of Burnaby. Further, as the Board indicates above, it does not find the issue of alleged political interference or improper motives to be particularly material to its consideration of this Motion in this particular case.

v) Project delay, prejudice, and the public interest

Trans Mountain's construction schedule (filed with the Board on 1 November 2017) identifies an unmitigated Project in-service date of September 2020. Trans Mountain has indicated that the relief sought in this Motion is one mitigation measure to enable the timely completion of the Project.

At the time Board Order MO-057-2017 was issued, the outstanding PPA and Tree Cutting Permit for the BTM were all that prevented Trans Mountain from commencing that work. While the PPA for the KB Site, and the PPA and Tree Cutting Permits for the BTE and WMT, may not have been the only things preventing Trans Mountain from commencing those works, the Board accepts that the outstanding PPAs and Tree Cutting Permits are a direct, contributing, and exacerbating factor to construction delay. The Board accepts Trans Mountain's evidence that these are the only outstanding applicable regulatory requirements for which it is unable to reasonably foresee a completion date.

The Board also accepts that there will be serious prejudice to Trans Mountain if the Project is delayed to or beyond its current unmitigated in-service date, including the direct financial harm cited by Trans Mountain in the range of $30-35 million per month. The Board accepts Trans Mountain's evidence that a delay of an indeterminate nature could result in cancellation of the Project as a whole.

In the Board's view, certain evidence on the record, and particularly portions of the affidavit of Ms. Robyn Allan, appeared to constitute an attempt to revisit issues related to the benefits of the Project. In its May 2016 Report, the Board conducted an extensive review of the Project's benefits, including considerable benefits associated with market diversification, jobs,

competition among pipelines, and government revenues. The Board's recommendation in this regard was accepted by GIC, who directed the Board to issue the Certificate. The Board is not prepared to debate and revisit those findings in the context of this Motion, nor would it be appropriate to do so. It is a fact that the Project has been found by the Board and GIC to be in the Canadian public interest under the NEB Act, with the overall benefits of the Project outweighing the residual burdens. To the extent Ms. Allan's evidence spoke to the reasons for Project delay and the potential harm, or lack thereof, associated with Project delay, the Board did not find it persuasive.

vi) Summary of the Board's views on the permitting processes

In considering this Motion, including the underlying facts, the Board did not engage in an exercise of assessing whether each and every detail and action on Burnaby's part was justified. In this regard, it is not the Board's role to dictate to Burnaby the specifics of the process it must use for its own municipal permitting. The Board also agrees with Burnaby that reasonable regulatory processes should not be characterized as "delay." Rather, the Board has assessed the facts on this Motion only with a relatively limited view to considering the relief sought related to Certificate Condition 2 and the constitution. With that general premise stated, the Board draws the following conclusions.

The Project has been lawfully approved to proceed and has already undergone extensive federal review. In this overall context, the Board would have expected to see, in general, reasonable efforts on Burnaby's part to work efficiently and cooperatively with Trans Mountain in order to help ensure that when (not if) the Project proceeds, matters of local concern that are reflected in Burnaby's bylaw requirements are understood and addressed to the extent possible. In the Board's view, this, for the most part, did not occur.

The Board finds that the majority of the delay incurred since Trans Mountain filed its PPA applications is attributable to Burnaby's actions or inaction. Viewed as a whole, Burnaby's review process was unclear, inefficient, and uncoordinated. Burnaby gave inconsistent direction to Trans Mountain, and its words were often inconsistent with its actions, giving rise to confusion. While there was certainly no lack of correspondence and activity between Trans Mountain and Burnaby, the parties often seemed to be talking past each other. While there was an earnest effort on Trans Mountain's part to resolve matters, the Board is of the view that a similar effort was largely absent on Burnaby's part.

While Burnaby is not legally required to use the TWG to deal with municipal permitting matters, had Burnaby put it to more productive use, the TWG could have operated as a collaborative and flexible forum to efficiently resolve issues. Overall, the permitting process to which Trans Mountain was subject was confusing, and made it very difficult for Trans Mountain to discern or receive simple guidance about what the permitting requirements were and how they could be met, which the Board finds to have contributed to unreasonable delay.

The Board concludes that Burnaby's process to review the PPA applications and associated Tree Cutting Permits was not reasonable. The Board has reached this conclusion within the

context of the fact that the Project has been federally approved to proceed, after a lengthy review, and it is not open to Burnaby to stop it (as discussed further in Section H below). The Board has considered all of the circumstances, not just the length of the delay alone. These circumstances are described above and can be summarized as:

- the review time was two to three times longer than Burnaby's original estimate of six to eight weeks for a more complex review;
- the responsibility for the majority of review time is attributable to Burnaby's actions, inactions, and process decisions;
- Burnaby's process made it very difficult for Trans Mountain to understand what the permitting requirements were and how they could be met;
- Burnaby repeatedly denied Trans Mountain's reasonable requests to aid in an efficient processing of the PPA applications;
- the review time is the cause of, or a contributing or exacerbating factor to, Project construction delay, and the prejudice associated with that delay; and,
- the overall trend does not indicate that Burnaby is getting closer to issuing PPAs or Tree Cutting Permits; rather, there is no clear indication of an imminent resolution.

With respect to the last bullet above, it ultimately remains unclear to the Board what additional steps (informational and process-related) are or would be required or added by Burnaby to complete its permitting processes. When Board counsel asked Burnaby's witness, Mr. Lou Pelletier, to identify the remaining PPA application deficiencies, Burnaby's counsel objected.

The Board has reached the above conclusions about the reasonableness of Burnaby's process, regardless of the fact that there was no direct evidence of political interference.

G. RELIEF FROM CERTIFICATE CONDITION 2

By virtue of Certificate Condition 2, it is currently a federal regulatory requirement that Trans Mountain obtain – with respect to the BTE, KB Site, and WMT – PPAs under section 7.3 of the Zoning Bylaw and Tree Cutting Permits under section 3 of the Tree Bylaw. Trans Mountain has asked that the Board relieve it from these requirements pursuant to Certificate Condition 1.

i) Trans Mountain's submissions

Trans Mountain noted that Certificate Condition 1 requires compliance with all conditions "unless the Board otherwise directs." Trans Mountain argued that this gives the Board flexibility in enforcing condition requirements, and that use of Condition 1 does not constitute a variance of the Certificate that would require GIC approval under section 21 of the NEB Act.

Trans Mountain argued that relief from Certificate Condition 2 is justified on the basis that it has made best efforts to obtain permits related to the Terminal Work, that Burnaby has not offered any reasonable basis for the permitting delay, and that Burnaby is using its municipal bylaws to stop a federal work and undertaking.

ii) Burnaby's submissions

Burnaby submitted that Trans Mountain is required to obtain PPAs and Tree Cutting Permits as a matter of federal law, pursuant to Certificate Condition 2, and that the GIC approved the Project on the basis that Trans Mountain would comply with all of the conditions. Burnaby also noted Trans Mountain's direct commitment to the City that it would comply with Burnaby's permitting processes.

Burnaby submitted that undertaking a Project of such magnitude in a densely populated municipality requires municipal regulation. It submitted that Trans Mountain now seeks to avoid its obligations under the Certificate, but to still take the benefit of the Project. Burnaby argued that Trans Mountain is effectively seeking relief from going through the permitting process that applies to all other project proponents within Burnaby, and that the Board should not condone this behavior.

iii) Attorneys general submissions

Alberta supported Trans Mountain's request for relief from Certificate Condition 2, and agreed with Trans Mountain that the Board has jurisdiction to grant the relief under Certificate Condition 1. Alberta submitted that, should the Board make a finding of unacceptable delay, regardless of reason, the Board can and should grant the relief sought.

British Columbia did not comment specifically on this issue.

Saskatchewan did not make any submissions on the merits of this issue; however, it did note that Condition 2 currently has the effect of incorporating the municipal requirements into the Certificate under federal law.

iv) Views of the Board

The Board is of the view that it is in the public interest to grant Trans Mountain the requested relief from Certificate Condition 2. The Board has reached this conclusion on the basis of its conclusion in Section F that Burnaby's process to review the PPA applications and associated Tree Cutting Permits, and its execution of those processes, were not reasonable, resulting in unreasonable delay. This includes the fact that it is the cause of, or a significant contributing or exacerbating factor to, Project construction delay.

The Board accepts that there is public interest in ongoing, collaborative engagement between Trans Mountain and municipalities, such that matters of local concern are understood and addressed where possible. This includes complying with lawful municipal permitting processes. The Board also accepts that municipal permitting processes do not happen overnight, and will reasonably take time to complete. What is reasonable is necessarily fact-specific and must be considered in light of all of the circumstances.

In this specific case, the Board finds that the public interest in granting the relief sought outweighs any public interest in requiring Trans Mountain to continue with the Burnaby PPA

application and Tree Cutting Permit processes. The Board finds the PPA and Tree Cutting Permit processes to have been unreasonable and that there is no clear indication of an imminent solution, which are having the effect of conflicting with Trans Mountain's statutory powers under section 73 of the NEB Act, as well as the Certificate and other Board orders authorizing the Project (as discussed in more detail in Section H). The Board also notes the preliminary nature of a PPA, and that the relief sought is limited in nature in that it does not absolve Trans Mountain from complying with all other applicable Burnaby bylaws.

In addition, the Board notes that Trans Mountain has made certain commitments in the course of this Motion, for example, to pay compensation or replant in accordance with the Tree Bylaw.

Further, all of Trans Mountain's actions are subject to section 75 of the NEB Act, which requires the company to do "as little damage as possible" in exercising its powers under section 73 of the NEB Act. Compensation for damage is available under the NEB Act.

The Board grants this relief pursuant to Certificate Condition 1, which does not require GIC approval. The Board described the intent of Condition 1 at Page 118 of its Report on the Project:

> 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 [GIC] 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 [GIC]. 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 [GIC].

In this case, no changes are required to the Certificate itself. The Board disagrees with Burnaby that this relief will allow a significant or substantial change to be made to the Project. The Board notes that the GIC directed the issuance of the Certificate for the Project, including the phrase "unless the Board otherwise directs."

Trans Mountain suggested that the Board impose three conditions in granting the requested relief. The suggested conditions were detailed and would have had the effect of substituting the Board for the municipal regulator. For example, Trans Mountain proposed to provide the Board with development drawings and Tree Management Plans, similar to what the Zoning and Tree Bylaws require. The Board is of the view that this is inappropriate. The Board is not a municipal regulator and is not prepared to replace municipalities in terms of overseeing and enforcing very specific municipal requirements.

H. CONSTITUTIONAL QUESTIONS

The Motion raises the following constitutional 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 Cutting 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 the requirement for municipal approvals under section 7.3 of Burnaby's Zoning Bylaw and section 3 of the Tree Bylaw prior to conducting the Terminal Work are inapplicable, invalid, or inoperative under the doctrines of interjurisdictional immunity and/or federal paramountcy?

In Order MO-057-2017, the Board answered both of these questions in the affirmative.

i) Trans Mountain's submissions

Regarding the first constitutional question, Trans Mountain relied on the Board's previous Ruling No. 40, made in the course of the OH-001-2014 proceeding (which was confirmed in *Burnaby (City) v. Trans Mountain Pipeline ULC* where Macintosh J. determined that the Board had jurisdiction to address such questions).[6]

Trans Mountain argued that the Project is a federal undertaking and that the province and, by extension, municipalities cannot decline to issue permits required for the Project. Trans Mountain submitted that unreasonable delay, which could continue into perpetuity, amounts to an outright refusal and is unconstitutional.

Trans Mountain submitted that Burnaby's delay triggers interjurisdictional immunity. It stated that Burnaby's delay substantially impairs the core of the federal government's exclusive power over the matters of when and where the Project is built, and the Project's orderly development and efficient operation. Trans Mountain submitted that, if left unchecked, Burnaby's inaction may prevent the construction of the Project entirely.

Trans Mountain submitted that paramountcy also applies. It argued that there is a clear federal purpose that interprovincial projects that have been determined to be in the Canadian public interest be assessed and approved on a timely basis. Trans Mountain argued that the Project's timing was a part of the public interest determination, and that Burnaby's inaction flouts the federal purpose.

Trans Mountain submitted that delay on its own, regardless of motive, is sufficient to trigger both interjurisdictional immunity and paramountcy. It also argued that it would be illogical to require Trans Mountain to wait for a denial of a permit from Burnaby before seeking constitutional relief.

Further, or in the alternative, Trans Mountain argued that there is a conflict on the face of the Zoning and Tree Bylaws, and the federal Project approvals. With respect to the BTM, BTE, and WMT, Trans Mountain argued that the Tree Bylaw requires the Director of Planning to exercise

[6] *Burnaby (City) v. Trans Mountain Pipeline, supra* notes 3 and 4.

discretion to grant a Tree Cutting Permit, and that the possibility of a negative decision creates an operational conflict.

With respect to the BTE, Trans Mountain argued that the Board-approved location of storage tanks and related works coincides with a SPEA, which is prohibited under the Zoning Bylaw. It stated that the criteria to be used to assess whether a variance to the SPEA should be granted does not appear to consider giving effect to a federal approval.

With respect to the KB Site, Trans Mountain argued that the Board-approved temporary infrastructure site, which consists of a standalone worksite to be used solely on a temporary basis and which includes parking facilities more than 122 metres from the WMT, is not permitted under the Zoning Bylaw. Trans Mountain submitted that it is not clear whether its circumstances qualify as "hardship" that would justify a Burnaby Board of Variance decision to vary the Zoning Bylaw requirements.

Trans Mountain submitted that, under both doctrines of interjurisdictional immunity and paramountcy, Burnaby is precluded from seeking to apply its bylaws so as to impede or block any steps that Trans Mountain must take in order to prepare and locate the Project.

Trans Mountain argued that the principle of cooperative federalism does not apply in this case as a ground to deny the constitutional relief sought, given Burnaby's failure to fairly and efficiently administer its bylaws. Trans Mountain submitted that it is not seeking to escape its obligations – it has engaged in the Burnaby process in good faith and has fulfilled the spirit and intent of its commitment to obtain municipal permits. It argued that frustrating a federal undertaking through the administration of municipal bylaws is the antithesis of cooperative federalism.

ii) Burnaby's submissions

Burnaby submitted that there is no provincial/federal conflict or constitutional question that arises unless and until there is a variance to Certificate Condition 2. It argued that, if a variance were to occur, a constitutional issue of conflict would not exist unless Burnaby issues a negative decision on either the Zoning or Tree Bylaw that impairs the core of a federal undertaking, and Burnaby attempts to enforce its bylaws directly in a manner that impedes construction or operation of the interprovincial undertaking or otherwise conflicts with the NEB Act. Burnaby argued that both of these steps have not happened in this case, and may never happen. It asserted that the Board should not rule now on what is a hypothetical issue.

In terms of the Board's authority to decide the constitutional questions raised in the Motion, Burnaby cited *Windsor (City) v. Canadian Transit Co.*,[7] which it says stands for the proposition that, just because a dispute involves a federal undertaking, does not mean that the jurisdiction of a Federal Court is engaged. Burnaby submitted that this case is different from the Board's decision in Ruling No. 40, in that Burnaby has yet to make a determination with respect to bylaw compliance and has not blocked Trans Mountain from undertaking Project work. It argued that,

[7] *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54.

in simply assessing a permit application and applying bylaws, it is not doing or continuing any act contrary to the NEB Act or the Certificate.

Burnaby submitted that provincial law has a role to play in regulating the Project and that, in furtherance of cooperative federalism, the operation of the laws of both levels of government should be favored where possible. Burnaby argued that, while a provincial authority cannot refuse to allow a federal undertaking to proceed, it does have the jurisdiction to impose conditions. It submitted that granting the relief sought would leave local matters unprotected and would effectively require the Board to interpose itself as a municipal regulator.

It is Burnaby's position that paramountcy is not engaged. It argued that a mere overlap or duplication of regulation does not amount to a conflict, even if the provincial law is more restrictive than the federal law. Burnaby submitted that there is no impossibility of dual compliance. The Tree Bylaw provides for the ability to remove trees in circumstances that could reasonably be interpreted to apply to the PPA applications. Similarly, Trans Mountain could apply for a variance of the SPEA under the Zoning Bylaw. In terms of the KB Site, Burnaby submitted that minor variances to the siting and off-street parking requirements can be granted, but stated that Trans Mountain has provided no evidence that the only available site is the KB Site. Burnaby also argued that its bylaws do not frustrate the federal approval or purpose, as that approval expressly contemplated that Trans Mountain would work cooperatively with municipalities and comply with their bylaws.

Burnaby submitted that interjurisdictional immunity is similarly not engaged, and cautioned that its use should be limited and restricted to situations covered by precedent, noting that the trend of constitutional interpretation does not favour its use in an era of cooperative federalism. Burnaby argued that it cannot be said that conditions that require replacement or compensation for lost trees or streams, or obligations to meet fencing and parking rules, go to the "core" of a federal undertaking.

Burnaby submitted that it is not enough to establish that potential decisions under its bylaws could impact aspects of the Project. It stated that Trans Mountain's arguments are purely hypothetical. Burnaby submitted that, without any decision under the bylaws, there is no factual basis to determine whether a vital aspect of the undertaking is impaired.

iii) Attorneys general submissions

a) Alberta

Alberta supported the constitutional relief sought by Trans Mountain. It argued that abuse of discretion or unreasonable delay can be a serious obstacle to Project completion; it is not a hypothetical question.

Alberta agreed with Trans Mountain's submissions on paramountcy, arguing that the existence of a discretionary process, such as an exemption application process to potentially get around an express conflict in the bylaws, is not enough to displace an operational conflict. Alberta also

argued that the bylaws frustrate the siting and location aspects of the Project, and that Burnaby's unreasonable delay also frustrates that purpose.

Alberta also agreed with Trans Mountain's submissions on interjurisdictional immunity, although it submitted that this doctrine should only be considered if the Board has not found a conflict under the paramountcy doctrine. Alberta argued that allowing a province or municipality to impose unreasonable requirements or to delay issuing permits allows it to impair the core of a federal authority. It argued that Burnaby is improperly exercising control over whether and when the Project will proceed.

b) British Columbia

British Columbia submitted that the Board is empowered to decide constitutional questions, but should only do so when the question arises squarely on the facts established by the evidence. It argued that, if the Board is not satisfied, as a matter of fact, that Burnaby is deliberately attempting to thwart the Terminal Work through permitting processes under municipal bylaws, then it is not necessary to proceed with the constitutional analysis.

British Columbia submitted that, if the Board does decide to carry out the analysis, it should undertake it within the context of cooperative federalism. It noted that, if provincial and federal laws can generally function without operational conflict, they should be permitted to do so.

In terms of interjurisdictional immunity, British Columbia noted that the doctrine operates to protect the "essential and vital" elements of a federal undertaking, or those elements which are "absolutely indispensable or necessary" to it. It noted that "impairment" of an undertaking is a midpoint between sterilization and mere effects. British Columbia submitted that the doctrine should be applied with restraint.

British Columbia argued that no authority has been presented for the proposition that the regulation of tree removal, or stream mitigation measures, have been recognized as falling within the core of the federal legislative jurisdiction over interprovincial pipelines. It similarly argued that there was no authority for the proposition that construction of the facilities associated with an interprovincial pipeline lie within the core of the federal jurisdiction, either.

In terms of paramountcy, British Columbia submitted that the standard is high, and the doctrine should be applied with restraint. British Columbia argued that it is premature to make a finding of paramountcy because there is no operational conflict between the NEB Act and the bylaws before Burnaby makes a decision, or rejects the permitting applications; a position that was similarly argued by Burnaby.

c) Saskatchewan

Saskatchewan submitted that the doctrine of paramountcy is engaged because the Zoning and Tree Bylaws conflict operationally with the Certificate, and they also frustrate the purpose of the federal law.

With respect to the former, Saskatchewan argued that an operational conflict is created because the authority from the Board becomes subject to alteration and negation by the operation of the bylaws. With respect to the latter, Saskatchewan submitted that the Board and Cabinet have determined that the Project is in the broader public interest, and if the application of the bylaws to the Project would instead substitute the views of Burnaby, this would frustrate the conclusions of the Board and Cabinet.

Saskatchewan submitted that the Motion is not premature. It argued that a discretionary delay in issuing permits can itself be an operational conflict and frustration of a federal purpose.

In Saskatchewan's view, it is not necessary to consider interjurisdictional immunity given the conclusions on paramountcy.

iv) Views of the Board

a) Authority of the Board to decide the constitutional questions

The Board has the authority to consider constitutional questions relating to its own jurisdiction and this Motion raises such a question.[8] Project construction and operation, including the Terminal Work, has been lawfully approved by the Certificate and certain other Board orders issued under the NEB Act. As a result, and for the purposes of the Terminal Work, Trans Mountain has all of the powers set out in section 73 of the NEB Act, including the ability to take all actions necessary for the Project's construction and operation. The Board has the authority to consider whether Burnaby's application of the Zoning and Tree Bylaws is contrary to, or is in conflict with, section 73 of the NEB Act, the Certificate, and relevant Board orders.

The NEB Act provides that the Board is a court of record. Under sections 12 and 13, the Board has broad discretion to inquire into, hear, and determine matters, and to provide a remedy, where it appears to the Board that any person has or is doing something contrary to the NEB Act. Subsection 12(2) of the NEB Act expressly gives the Board "full jurisdiction to hear and determine all matters, whether of law or fact."

The BTE, WMT, and KB Site are subject to the Certificate. In the Board's view, where provincial or municipal permitting has been incorporated into a federal approval (as is the case in Certificate Condition 2), there can be no federal/provincial conflict or constitutional question to be addressed with respect to that permitting. However, given that the Board has decided in Section G that relief should be granted from Condition 2 in this specific case, the constitutional questions raised in the Motion are rightly before the Board for consideration.

[8] *Cooper v. Canada (Human Rights Commission*), [1996] 3 S.C.R. 854; and *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; and Ruling No. 40, *supra* note 2 discussed in *Burnaby (City) v. Trans Mountain Pipeline ULC*, *supra* notes 3 and 4.

b) General validity of the Zoning and Tree Bylaws

The Board is of the view, and notes that there is no dispute, that the Zoning and Tree Bylaws are validly enacted pursuant to provincial legislation falling within the constitutional legislative authority of British Columbia. These bylaws are of general application within Burnaby, and apply to the Terminal Work unless it is found that the doctrines of paramountcy and/or interjurisdictional immunity apply.

c) Cooperative federalism

The Board agrees with British Columbia' submission that "[t]oday's constitutional landscape is painted with the brush of cooperative federalism." The Board accepts that the preferred approach is to allow provincial and federal laws to both function where possible. It is important, and in the interest of cooperative federalism, that validly enacted provincial and municipal laws are respected such that matters of local concern are understood and addressed where possible in relation to federal undertakings.

However, it must also be said that the Project, as an interprovincial undertaking of which the Terminal Work is part, has been held to be in the overall Canadian public interest under the federal NEB Act. The public interest that was assessed is inclusive of *all* Canadians, with national, regional, and local benefits and burdens all having been considered. The Board agrees with Saskatchewan's submission that it would be contrary to a basic principle of federalism (that the federal jurisdiction takes into account the interests of all Canadians) if one province, or a single municipality of one province, could frustrate the construction of an interprovincial pipeline.

In light of the above, the Board has undertaken the constitutional analysis with due restraint, while also recognizing that there is an appropriate place for the doctrines of paramountcy and interjurisdictional immunity to apply where necessary.

d) Prematurity

The Board rejects the arguments of Burnaby and of British Columbia that the Motion is premature. The Board does not agree that Trans Mountain must necessarily wait to seek constitutional relief until such time that Burnaby rejects a permitting application, or imposes an inappropriately onerous condition, or takes formal steps to enforce its bylaws.

The issue of whether there is an operational conflict (or impossibility of dual compliance) on the face of the provincial and federal enactments can be assessed now.

Further, it is only logical that delay in processing municipal permit applications can, in certain circumstances, be sufficient in and of itself to engage the doctrines of paramountcy and interjurisdictional immunity. To hold otherwise would allow a province or municipality to delay a federal undertaking indefinitely, in effect accomplishing indirectly what it is not permitted to do directly. It is not a hypothetical matter. Accordingly, the Board has considered whether the

process undertaken by Burnaby under the Zoning and Tree Bylaws, including, but not limited to, the time elapsed, engages the doctrines of paramountcy or interjurisdictional immunity in light of all of the circumstances.

e) Paramountcy

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.[9] Consistent with the Supreme Court of Canada's finding in *Lafarge,*[10] the Board finds that Trans Mountain has established the existence of valid federal and provincial laws and the impossibility of their simultaneous application by reason of an operational conflict or because such application would frustrate the purpose of the federal enactment.

Operational conflict

The Board is not persuaded that there is an impossibility of dual compliance *on the face* of the NEB Act, Certificate, and relevant Board orders on the one hand, and the Zoning or Tree Bylaws on the other. In other words, there is no operational conflict, and compliance with both is theoretically possible. This differs from the situation in *Lafarge*, in which it was not possible for the facility in question (in that instance an integrated cement facility situated in the Port of Vancouver) to comply with both the Vancouver Port Authority's approval of the development and the municipal requirement for a certain fence height.

In the Board's view, the fact that Burnaby's bylaws confer some discretion on decision-makers in terms of whether to grant a permit, or the fact that a discretionary variance of a bylaw may be required, is not in and of itself enough, in this case, to establish an operational conflict. The Board is not persuaded that the criteria for granting the necessary variances under the bylaws cannot accommodate the Terminal Work. The Board accepts that Burnaby cannot deny necessary municipal permits or variances thereto for the Project; however, this does not render the entire municipal permitting process inoperable. As was the case in *Coastal First Nations v. British Columbia (Environment),*[11] on its face, there are no obvious problems with the imposition of Burnaby's Zoning and/or Tree Bylaws on the Board-regulated Project. In the Board's view, concluding otherwise would be an overreach and inconsistent with the principles of cooperative federalism, which require that where regulatory authority might overlap between federal and provincial (in this case, delegated to the municipal level) jurisdictions, validly enacted legislative provisions should be applied harmoniously to the extent possible. The *possibility* exists to apply both the federal legislative scheme and the municipal bylaws to the Project components at issue in this Motion, as demonstrated by both Trans Mountain's commitment during the regulatory hearing to adhere to such bylaws, and the Board's inclusion of adherence to that commitment as a condition on the Certificate.

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[9] *Canadian Western Bank v. Alberta*, 2007 SCC 22.
[10] *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, at para 77.
[11] *Coastal First Nations v. British Columbia (Environment),* 2016 BCSC 34 [*Coastal First Nations*].

Frustration of federal purpose

The Board is of the view; however, that Burnaby's application of section 7.3 of the Zoning Bylaw and section 3 of the Tree Bylaw, in this specific instance, has frustrated a federal purpose.

All pipelines authorized under Part III of the NEB Act, including the Project, have been held to be in the Canadian public interest. Trans Mountain was granted the Certificate (and related Board orders) in respect of the Project after a thorough regulatory review by the Board and ultimate approval from the GIC. Trans Mountain, in respect of the Project of which the Terminal Work is part, is granted all of the powers in section 73 of the NEB Act.

The purpose of section 73 of the NEB Act is to facilitate the carrying out of interprovincial and international pipelines, and specifically their construction, maintenance, operation, and abandonment. There are no timeline restrictions in section 73. The section grants powers to Trans Mountain that are in effect now. The Certificate and related Board orders grant Trans Mountain the authorization to construct, operate, and maintain the Project's components. Trans Mountain's authority to act pursuant to section 73 of the NEB Act, and the authorizations granted in the Certificate and Board orders, are vital to the Project's orderly development and efficient operation, as they would be for all pipelines under the Board's regulatory jurisdiction. As was the case in *Rogers*, this orderly development and efficient operation is being compromised.[12] In this instance, it is by Burnaby's actions, or inaction, in not assessing Trans Mountain's PPA applications in a timely and reasonable manner.

As discussed in Section F above, the Board has concluded that Burnaby's processes to review the PPA applications and its consideration of associated Tree Cutting Permits, including the overall time elapsed, was not reasonable. This includes the fact that the review time is the cause of, or is a significant contributing or exacerbating factor to, delay to Terminal Work construction, and the prejudice associated with that delay. There is no indication of an imminent resolution. The Board finds that Burnaby's unreasonable process and delay is frustrating Trans Mountain's exercise of its authorizations under the Certificate and other Board orders, and its powers under paragraphs 73(c), (e), (g), and (i) of the NEB Act. This is the case regardless of the nature of Burnaby's motives or intentions in applying its bylaws. Accordingly, the doctrine of paramountcy applies such as to render section 7.3 of the Zoning Bylaw and section 3 of the Tree Bylaw inoperable to the extent that they prevent the Terminal Work.

f) Interjurisdictional immunity

Under the doctrine of interjurisdictional immunity, undertakings falling within federal jurisdiction, such as the Project, are immune from otherwise valid provincial laws (and by extension municipal bylaws) that would have the effect of impairing (not just affecting) a core competence of Parliament or vital part of the federal undertaking. First, it must be determined if the provincial law trenches on the protected core of a federal competence. If so, it must be determined if the provincial law's effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine of interjurisdictional immunity.[13]

[12] *Rogers Communications Inc. v. Chateauguay (City)*, 2016 SCC 23 at para 66, [*Rogers*].
[13] Ruling No. 40, *supra* note 2

Based on the facts of this case, the Board finds that Burnaby's unreasonable process and delay in considering the PPA applications under section 7.3 of the Zoning Bylaw, and the Tree Cutting Permits under section 3 of the Tree Bylaw, impair a core competence of Parliament.

Even viewed with restraint, the unreasonable amount of time it has taken Burnaby to process the PPA applications and Tree Cutting Permits is having a sufficiently serious effect on *when* the Terminal Work, which is part of the Project, can be carried out. The Board agrees with Trans Mountain that the matters of *when and where* the Project can be carried out, and its orderly development, fall within the "core" of federal jurisdiction over interprovincial undertakings, and are vital to the Project. The Board has found that the Burnaby permitting process is the cause of, or a contributing or exacerbating factor to, construction delays. The process has had a significant and direct implication on Project timing.

Further, it is not just a matter of timing alone. Unreasonable or indefinite delays to the Project's timing or orderly development could in fact effect whether or not the Project is carried out at all (as Trans Mountain's evidence demonstrates). Clearly, the matter of *if* the Project is carried out falls within the core of federal jurisdiction. In this respect, the Board finds *Coastal First Nations v. British Columbia (Environment)*[14] to be persuasive, as it is beyond Burnaby's jurisdiction to ultimately refuse the Project. In this case, the Board has found that the evidence on the whole does not support a conclusion that Burnaby is getting closer to issuing PPAs or Tree Cutting Permits. Rather, there is no indication of an imminent resolution.

This is not to say that any delay in provincial or municipal permitting processes will engage the doctrine of interjurisdictional immunity, a point British Columbia raised in attempting to distinguish this matter from the delay that precipitated such a finding in *Rogers Communications Inc.* v. *Chateauguay (City)*.[15] The Board has made its findings in this case based on the specific facts before it. The evidence does not demonstrate that Burnaby's actions or inactions were a legitimate exercise of municipal laws, but rather, viewed as a whole, that the delay already incurred, and ongoing with no clear end in sight, constitutes a sufficiently serious entrenchment on a protected federal power. The Supreme Court of Canada held in *Rogers* that the siting of component antenna systems are part of the core federal power over radio-communication. The Board similarly finds that the Project components at issue in this instance are of a similar nature. Just as the delay in *Rogers* prevented the company from constructing its federally approved network to the point of impairment, the Board finds a similar situation to exist here.

In conclusion, the Board finds that the doctrine of interjurisdictional immunity renders section 7.3 of the Zoning Bylaw and section 3 of the Tree Bylaw inapplicable to the extent that they impair the Terminal Work as authorized by paragraphs 73(c), (e), (g), and (i) of the NEB Act, and the Certificate and relevant Board orders issued under the NEB Act.

[14] *Coastal First Nations, supra* note 11, at para 55.
[15] *Rogers, supra* note 10.

I. CONCLUSION

The Board has determined that it is in the public interest to relieve Trans Mountain of the requirement of Certificate Condition 2, insofar as it requires Trans Mountain to obtain – with respect to the BTE, KB Site, and WMT – PPAs under section 7.3 of the Zoning Bylaw and Tree Cutting Permits under section 3 of the Tree Bylaw. This relief is granted pursuant to Certificate Condition 1 and does not require GIC approval.

The Board has the jurisdiction to decide the constitutional questions raised in the Motion and to grant the related relief sought. The doctrines of federal paramountcy and/or interjurisdictional immunity render section 7.3 of the Zoning Bylaw and section 3 of the Tree Bylaw inapplicable or inoperative to the Terminal Work. To be clear, this relief does not absolve Trans Mountain from compliance with any other relevant Burnaby bylaws.

All of the above constitute the Board's reasons for the issuance of Order MO-057-2017 on 6 December 2017.

D. Hamilton
Presiding Member

P. Davies
Member

A. Scott
Member

Calgary, Alberta
January 2018