

CANADA ENERGY REGULATOR

IN THE MATTER OF the *Canadian Energy Regulator Act*, SC 2019, c 28, s 10 (“**CER Act**”) and the Regulations thereunder;

AND IN THE MATTER OF the Certificate of Public Convenience and Necessity OC-065 (“**Certificate**”) and related orders held by Trans Mountain Pipeline ULC as General Partner of Trans Mountain Pipeline L.P., in respect of the Trans Mountain Expansion Project (“**Project**”).

AFFIDAVIT OF ALAIN PARISÉ

December 15, 2020

To: The Secretary
Canada Energy Regulator
Suite 210, 517 – 10th Avenue S.W.
Calgary, AB T2R 0A8

AFFIDAVIT OF ALAIN PARISÉ

I, Alain Parisé, of Calgary, Alberta SOLEMNLY AFFIRM AND DECLARE AS FOLLOWS:

1. I am Director, Land for Trans Mountain and am authorized by Trans Mountain to affirm this affidavit (“**Affidavit**”).
2. I have personal knowledge of the matters in this Affidavit, except where stated to be based on information and belief, in which case I believe the same to be true.
3. Trans Mountain Pipeline ULC is general partner of Trans Mountain Pipeline L.P. (collectively, “**TM**”), which together are the proponents of the Project.
4. I affirm this Affidavit in support of TM’s Notice of Motion and Constitutional Question (“**Motion**”) (which I have read) requesting an order from the Commission of the Canada Energy Regulator (“**Commission**”) in relation to Condition 2 of the Certificate. Specifically, TM requests that the Commission grant relief (pursuant to Condition 1) from Condition 2, insofar as it requires TM to obtain tree cutting permits under section 3 of the City of Burnaby’s (“**Burnaby**”) Bylaw No. 10482 (“**Tree Bylaw**”) for all Project-related tree clearing within Burnaby (“**Tree Clearing**”).
5. By way of overview, this Affidavit describes:
 - (a) the Project and its regulatory history;
 - (b) the National Energy Board’s (“**NEB**” or “**Board**”) OH-001-2014 report (“**Original Report**”), Order in Council P.C. 2016-1069 (“**Original OIC**”), and Certificate of Public Convenience and Necessity OC-064 (“**Original Certificate**”);
 - (c) the Board’s MH-052-2018 report (“**Reconsideration Report**”) and Order in Council P.C. 2019-0820 (“**Reconsideration OIC**”);
 - (d) the Certificate, related orders and relevant conditions for the Project;
 - (e) TM’s 2017 motions seeking relief from Condition 2 insofar as it required TM to obtain permits from Burnaby for specific Project works;

- (f) TM's application to Burnaby for permits under the Tree Bylaw;
- (g) a description of the Tree Clearing work at issue; and
- (h) the urgent need for the relief sought in the Motion.

6. Throughout this Affidavit, reference will be made to documents that were filed with the Board on the electronic registry ("**Registry**"), now located on the CER's website (<https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2392873>). Individual documents on the Registry are identified in this Affidavit by the filing ID in square brackets. Documents referenced in this Affidavit that were not previously posted on the Registry are appended hereto as exhibits.

A. The Project and the Application

7. Generally, the Project involves expanding the existing TM pipeline system ("**Pipeline**") capacity. It was developed in response to requests for service from Western Canadian oil producers and West Coast refiners for increased Pipeline capacity, in support of growing oil production and desired access to West Coast and offshore markets.

8. The Project includes the following components:

- (a) pipeline segments that complete a twinning (or looping) of the Pipeline in Alberta and BC with about 987 km of new buried pipeline;
- (b) new and modified facilities, including pump stations and tanks; and
- (c) new berths at the Westridge Marine Terminal ("**WMT**").

9. TM submitted a facilities application for the Project ("**Application**") with the NEB on December 16, 2013. In its Application, Trans Mountain sought approval for the Project pursuant to section 52 of the *National Energy Board Act* ("**NEB Act**"). Volume 1 [A3S0Q7] of the Application summarizes the Application's contents.

10. TM provided the following information with respect to its plans for vegetation clearing to facilitate Project construction in Volume 5A [A3S1L3] of the Application:

Vegetation (trees, stumps, brush, grasses, crops and other vegetation) and snow will be cleared or mowed from the construction right-of-way and temporary workspace. Equipment used during clearing activities may include chainsaws, rotary grinders, feller-bunchers, hydro-axes or other tree-clearing and brushing equipment, as well as skidders, bulldozers and excavators. A stump mulcher will be utilized rather than grubbing on areas where topsoil or root zone material salvage and grading is not necessary [section 2.2.1].

B. The Original Report, Original OIC and Original Certificate

11. On May 19, 2016, the Board issued the Original Report [**A77045-1**]. Among other things, the Original Report concluded that:

- (a) the Project is in the public interest (p. xi); and
- (b) the Board is satisfied with TM's commitments related to forest health and urban trees (p. 196).

12. The Board recommended the Governor in Council ("GIC") approve the Project, subject to 157 conditions.

13. On November 29, 2016, the GIC issued the Original OIC, directing the Board to issue a Certificate of Public Convenience and Necessity subject to the 157 conditions in the Original Report. The Original OIC was published in the *Canada Gazette, Part I* on December 10, 2016, along with an Explanatory Note [**A87282-4, PDF 132**].

14. On December 1, 2016, the Board issued the Original Certificate and Amending Orders AO-003-OC-2 and AO-002-OC-49, which allowed TM to construct and operate the Project, subject to the 157 conditions in the Original Report [**A80871-3**].

15. Orders under sections 44 and 58 of the NEB Act were also required for the construction and operation of the Project and were issued by the Board on June 6, 2016, subject to the GIC's approval of the Project. A copy of the Board's cover letter [**A5C4Y8**] and the sections 44 and 58 Orders [**A5C4Y8, A5C4Z0, A5C4Z2, A5C4Z4, A5C4Z6, A5C4Z8**] are on the Registry.

C. The Reconsideration Report and the Reconsideration OIC

16. On August 30, 2018, the Federal Court of Appeal set aside the Original OIC, in part because, in the Court's view, the Board unjustifiably excluded Project-related marine shipping

from the scope of the “designated project” reviewed under the *Canadian Environmental Assessment Act, 2012*.

17. On September 20, 2018, the GIC issued Order in Council P.C. 2018-1177, directing the Board to conduct a reconsideration (“**Reconsideration**”) taking into account the environmental effects of Project-related marine shipping and the adverse effects of Project-related marine shipping on species at risk.

18. In carrying out the Reconsideration, the Board held a hearing and, on February 22, 2019, issued the Reconsideration Report [A98021-1]. As directed by the GIC, the Reconsideration and associated Reconsideration Report focused on Project-related marine shipping and any necessary changes or additions to the Original Report in light of the inclusion of Project-related marine shipping within the scope of the Project assessment.

19. Like the Original Report, the Reconsideration Report concluded, among other things, that:

- (a) the Project is in the public interest (p. 1); and
- (b) the Board is satisfied with TM’s commitments related to forest health and urban trees (p. 246).

20. The Reconsideration Report recommended that the GIC approve the Project, subject to 156 conditions that apply to the Project (which were largely unchanged from the Original Report).

21. On June 18, 2019, the GIC issued the Reconsideration OIC. The Reconsideration OIC was published in the *Canada Gazette, Part I* on June 22, 2019, along with an Explanatory Note [C00219-3]. The Reconsideration OIC accepted the Board’s views that the Project is required by the present and future public convenience and necessity and is in the Canadian public interest, and directed the Board to issue the Certificate subject to the conditions in the Reconsideration Report, as amended by the GIC (“**Conditions**”).

D. The Certificate, Related Orders and Relevant Conditions

22. On June 21, 2019, the Board issued the Certificate and Amending Orders AO-005-OC-2 and AO-004-OC-49, which allow TM to construct and operate the Project, subject to the

Conditions [C00061-3]. With their issuance, the sections 44 and 58 Orders remained in effect, subject to the Conditions. Copies of the updated conditions of the sections 44 and 58 Orders are on the Registry [A6W1Y1, A6W1Y3, A6W1Y5, A6W1Y7, A6W1Y9].

23. The Conditions are largely unchanged from the Original Certificate and address many issues, including:

- (a) safety and integrity of the Pipeline;
- (b) emergency preparedness and response;
- (c) protection of the environment;
- (d) ongoing consultation with those affected, including municipalities;
- (e) socio-economic matters;
- (f) affirmation of commercial support for the Project prior to construction; and
- (g) financial responsibility.

24. Condition 1 states that “Trans Mountain must comply with all of the [certificate/order] conditions, unless the NEB otherwise directs.”

25. Condition 2 stipulates that TM is to comply with commitments made in the Application. It states:

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, as well as the MH-052-2018 proceeding.

26. The wording of both Condition 1 and Condition 2 of the Certificate and related orders remains largely unchanged from the Original Certificate.

27. One of the commitments that TM made was to apply for, or seek variance from, provincial and municipal permits and authorizations that apply to the Project. This commitment was

summarized in both the Original Report and the Reconsideration Report. In the Reconsideration Report, it was summarized 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 municipalities to understand the applicability of bylaws and standards related to the construction and operation of the Project [page 297].

28. Other relevant Conditions require TM to:

- (a) form Technical Working Groups (“TWGs”) with willing municipalities in order to address specific technical and construction issues with affected municipalities through the development of TWG terms of reference in consultation with the municipalities, and regularly report on: (i) all TWG activities; (ii) issues or concerns raised or addressed during TWG activities; and, (iii) outcomes or measures that were or will be implemented to address issues or concerns raised through the TWGs (Conditions 14, 49);
- (b) file an updated Project-specific Pipeline Environmental Protection Plan for the construction of the pipeline for approval, at least three months prior to commencing construction (Condition 72); and
- (c) prepare post-construction environmental monitoring reports in consultation with appropriate government authorities for periodic filing, where such reports must include information on monitoring results and TM’s management of Project-related impacts to soils, weeds, watercourse crossings, riparian vegetation, wetlands, rare plants, municipal tree replacement, wildlife and wildlife habitat, fish and fish habitat, marine mammals, marine birds and species at risk (Condition 151).

29. Each Condition contains a list of more specific parameters and obligations with which TM is required (and fully intends to) comply during construction and operation of the Project.

E. TM’s 2017 Motions on Burnaby Permitting Issues

30. This section discusses a prior motion submitted by TM to the Board, which I had no personal involvement with. As such, statements in this section reflect my understanding and belief, which is based on my review of the relevant records.

31. In furtherance of TM's commitment to comply with municipal bylaws, TM applied for various permits from Burnaby in 2017, including: (i) Preliminary Plan Approvals (“**PPAs**”) required under Burnaby Bylaw No. 4742 (the “**Zoning Bylaw**”); and, (ii) tree cutting permits required under the Tree Bylaw. The PPAs and tree cutting permits were required to complete certain work in and around the Burnaby Terminal, a temporary construction laydown area referred to as the Kask Bros Laydown Site (“**KB Site**”), and the WMT (collectively, the “**Terminal Work**”).

32. TM experienced significant delay and uncertainty in its attempts to obtain PPAs and tree cutting permits from Burnaby, as described in: (i) the Affidavit of Michael Davies sworn October 26, 2017 [**A5W7A7**]; (ii) the Reply Affidavit of Michael Davies sworn November 22, 2017 [**A5X4Q1**]; and, (iii) the Affidavit of Paul Wearmouth sworn November 22, 2017 [**A5X4Q2, A5X4Q3, A5X4Q4**]

33. On October 26, 2017, TM filed a motion with the Board [**A87282**] (the “**2017 Motion**”), requesting that the Board:

- (a) issue an Order pursuant to sections 12, 13 and paragraphs 73(c), (e), (g), and (i) of the NEB Act declaring that: (i) section 7.3 of the Zoning Bylaw and section 3 of the Tree Bylaw did not apply to the Terminal Work; and, (ii) that TM could commence the Terminal Work and use the KB Site pursuant to the terms and conditions of the Certificate and related orders notwithstanding the fact that Burnaby had not issued PPAs or tree cutting permits for the Terminal Work;
- (b) grant relief (pursuant to Condition 1) from Condition 2 and TM's commitment to comply with Burnaby's bylaws, insofar as that commitment required TM to obtain the necessary PPAs and other municipal permits from Burnaby prior to commencing the Terminal Work and using the KB Site, subject to its commitments made to Burnaby in the permit application process; and,
- (c) establish an efficient, fair and timely process for TM 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.

34. The 2017 Motion also included a Notice of Constitutional Question. TM indicated that it intended to seek a determination from the Board on whether the doctrines of interjurisdictional immunity and/or paramountcy applied to relieve TM from the obligation to obtain municipal approval under section 7.3 of the Zoning Bylaw and section 3 of the Tree Bylaw prior to conducting the Terminal Work.

35. On November 14, 2017, TM filed a second motion with the Board [A87760] (the “**Process Motion**”), in which it requested that: (i) a standing panel of the Board be struck to determine TM’s compliance with, or variance from, Condition 2 of the Certificate as it relates to TM’s commitment in respect of provincial and municipal permits and authorizations; and, (ii) timelines for determining compliance with, or variance from, Condition 2 be set. The Process Motion subsumed a portion of the relief sought in the 2017 Motion (specifically, the relief set out in paragraph **33(c) above**).

36. On December 6, 2017, the Board issued Order MO-057-2017 [A88474], in which it granted the relief sought in the 2017 Motion (the “**2017 Order**”), save for the relief that was subsumed within the Process Motion. The relief included that, pursuant to Condition 1, TM was relieved of the requirement of Condition 2, insofar as it required TM to obtain tree cutting permits under section 3 of the Tree Bylaw for the Terminal Work.

37. The Board issued its reasons for the 2017 Order on January 18, 2018 [A89360]. The Board included the following summary of its views on Burnaby’s permitting process:

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.

38. The Board ultimately concluded that:

- (a) Burnaby's unreasonable process and delay was frustrating TM'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. Accordingly, the doctrine of paramountcy applied 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 (p. 24).

- (b) Burnaby's permitting process prevented TM from constructing the federally approved Project to the point of impairment. Therefore, the doctrine of interjurisdictional immunity applied, rendering section 7.3 of the Zoning Bylaw and section 3 of the Tree Bylaw inapplicable to the extent that they impaired 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 (p. 25).

39. Also on January 18, 2018, the Board released its decision in respect of the Process Motion [A89357] (the "**Process Order**"). The Board granted TM's Process Motion, in part. The Process Order set down a generic process that the Board will use to consider any future motions with respect to TM's compliance with Condition 2, insofar as it relates to TM's application for, or variance from, a provincial or municipal authorization or permit for the Project. The Board also stated as follows:

The Board expects [TM] and all relevant authorities to approach any permitting processes in good faith. While the Project has been determined to be in the public interest, that does not in and of itself relieve [TM] from compliance with applicable provincial and municipal laws. The Board recognizes the importance of provincial and municipal permitting processes, which can allow for ongoing and collaborative consultation on the Project and matters of local concern. The Board expects [TM] to exercise good Project planning and allow sufficient time to properly engage provinces and municipalities. This includes working through the issues via [TWGs], as was committed to by [TM] during the regulatory hearing for the Project, and which the Board addressed in various Certificate conditions.

40. Burnaby sought leave to appeal the 2017 Order pursuant to section 22 of the NEB Act (**Exhibit 1**). Neither Burnaby nor any other party sought leave to appeal the Process Order.

41. On March 23, 2018, the Federal Court of Appeal dismissed the motion for leave to appeal the Burnaby Order filed by Burnaby, with costs (**Exhibit 2**).

F. Burnaby's Recent Refusal to Consider TM's Application for Tree Cutting Permits

42. Section 3 of the Tree Bylaw states:

Except as permitted by this Bylaw, no person shall damage a protected tree and no person shall cut down a protected tree unless that person holds a valid tree cutting permit.

43. I understand that a "protected tree" in the context of the Project includes any tree in Burnaby with a diameter greater than 20.3 cm (8 inches).

44. Paragraph 5(1)(c) of the Tree Bylaw requires an applicant to submit a "tree plan" for every tree cutting permit application. This requirement includes providing information on the location and diameter of each protected tree to be removed, and identifying which trees are to be removed. A copy of the Tree Bylaw is enclosed with this affidavit (**Exhibit 3**).

45. I have been informed about Burnaby's typical processing time for a tree cutting application by TM's Manager of Forestry & Access, Matthew McTavish, and based on that information I understand that for a project of this size and the number of properties in question, the typical processing time would be 3 to 4 weeks.

46. The chronology of the engagement with Burnaby on the Tree Clearing and associated application process is as follows:

- (a) On July 7, 2020, TM sent an email to Burnaby indicating that an application for access points from Burnaby to undertake required tree removal on lands owned by BNSF Railway Company in Burnaby (PID 024-440-051, 024-440-132 and 024-440-094, collectively the "**BNSF Lands**") was being prepared by Kiewit-Ledcor TMEP Partnership ("**KLTP**") and was expected to be submitted the following week (**Exhibit 4**).
- (b) On July 23, 2020, KLTP submitted permit applications to Burnaby for works at the North Road and Government Street access points to the BNSF Lands (**Exhibit 5**).
- (c) On September 8, 2020, pursuant to paragraph 5(1)(c) of the Tree Bylaw, TM submitted a tree plan for the Tree Clearing, which was prepared by McTavish

Resource & Management Consultants Ltd. (“**Tree Management Plan**”), to Burnaby for review (**Exhibit 6**).

- (d) On or around September 16, 2020, representatives of KLTP and Burnaby visited the site to verify requirements for the works at the Government Street access point to the BNSF Lands.
- (e) On October 14, 2020, a representative of Burnaby requested a breakdown of the number of trees identified in the Tree Management Plan that are on private lands and the number that are on municipal lands (**Exhibit 7**).
- (f) On October 26, 2020, a representative of McTavish Resource & Management Consultants Ltd. (“**McTavish**”) provided the breakdown of the trees identified in the Tree Management Plan that are on private lands and the number that are on municipal lands, as requested by Burnaby (**Exhibit 7**).
- (g) On October 27, 2020, KLTP submitted a revised permit application to Burnaby for works at the Government Street access point to the BNSF Lands based on the site visit from September 2020 (**Exhibit 8**).
- (h) On November 3, 2020, a representative of McTavish sent an email to inquire whether Burnaby had any other comments on the Tree Management Plan following the provision of the breakdown of the numbers of trees on private lands and municipal lands (**Exhibit 7**).
- (i) On November 4, 2020, a representative of Burnaby responded that Burnaby had no other comments on the Tree Management Plan at that time (**Exhibit 7**).
- (j) On November 20, 2020, Burnaby sent an email to KLTP requesting more details based on a review of the drawings submitted as part of the revised BNSF Lands access permit application on October 27, 2020 (**Exhibit 8**).
- (k) On November 23, 2020, Burnaby sent a letter dated November 16, 2020 to TM in response to TM’s request for access to the BNSF Lands over municipal lands. It stated that Burnaby “now understand[s] that the requested access would also require

removal of trees on City lands and the access points”. Burnaby stated that it opposes the removal of trees on municipal lands at the proposed access points (**Exhibit 9**).

- (l) On November 25, 2020, representatives of KLTP, TM and Burnaby held a conference call to review and address requirements for the North Road and Government Street access points to the BNSF Lands, during which the need to remove trees on Government Street was discussed.
- (m) On December 1, 2020, a representative of Burnaby requested a site visit with representatives of KLTP and TM to view the trees at the Government Street access to the BNSF Lands (**Exhibit 10**).
- (n) On December 3, 2020, a representative of KLTP provided updated drawings for the North Road and Government Street access points to the BNSF Lands and noted that KLTP would follow up on Burnaby’s proposed site visit to view the trees at the Government Street access (**Exhibit 10**).
- (o) On December 7, 2020, TM submitted an application for tree cutting permits to Burnaby pursuant to section 3 of the Tree Bylaw in respect of the Tree Clearing (“**Tree Clearing Application**”). The Tree Clearing Application identified the private and municipal lands on which trees will be cleared and the extent of Tree Clearing applied for. It also included TM’s responses to additional details requested by Burnaby regarding tree management (**Exhibit 11**). TM requested a decision on or before December 11, 2020.
- (p) On December 9, 2020, Burnaby provided a letter to TM stating that Burnaby is not prepared to consider the Tree Clearing Application (“**Rejection Letter**”) (**Exhibit 12**).

47. The Rejection Letter asserts that TM “does not accept [Burnaby’s] jurisdiction and intends to make an application to the CER.” This statement is incorrect. TM accepts Burnaby’s jurisdiction to administer its bylaws and, indeed, TM has consistently endeavoured to satisfy Burnaby’s permitting requirements in relation to the Project. For instance:

- (a) TM engaged in open discussions with Burnaby regarding the Tree Clearing, the applicable permitting requirements under the Tree Bylaw, the permitting process and Burnaby’s informational requirements to support a permit application for the Tree Clearing, all of which TM adhered to when it submitted the Tree Clearing Application.
- (b) Over the past 2.5 years, TM has submitted dozens of permit applications to Burnaby for Project construction activities, many of which were approved by Burnaby (albeit in some cases after significant delay). A list of permit applications submitted to Burnaby since April 2018, including the processing times, is included as **Exhibit 13**.

48. Given the history of permitting delays and disputes in Burnaby, TM has, in some discussions with Burnaby, referred to its intention to seek relief from the CER *if* (and only if) Burnaby failed to implement its regime in a reasonable manner consistent with federal Project approvals. Prior to submitting the Motion, TM had not required any such relief from the CER since it filed the 2017 Motion.

G. The Tree Clearing Work

49. The Tree Clearing entails the removal of trees on municipal and private lands within Burnaby as necessary to accommodate Project construction, including the Project right of way and temporary workspace (“TWS”). Trees that fall within the Project right of way and TWS in Burnaby must be removed, while all trees adjacent thereto will be protected to the extent practical and safe.

50. The Tree Clearing is anticipated to require the removal of approximately 1189 trees greater than 20 centimetres in diameter: 735 on private lands and 454 on municipal lands. The number and locations of these trees on private (**Table 1**) and municipal (**Table 2**) lands within Burnaby are summarized below:

Table 1: Summary of Trees to be Removed on Private Lands

PID	Address	Land Ownership	Number of Trees to be Removed \geq 20 cm DBH
------------	----------------	-----------------------	--

2641780	3100 Production Way	Private	6
2890933	3121 Production Way	Private	3
3077446	2365 Underhill Ave	Private	213
3407632	3131 Thunderbird Cres	Private	4
24440051*	No address available	Private	366
24440094*	No address available	Private	31
24440108	No address available	Private	15
24440132*	9286 Trans Canada Hwy	Private	97
Total			735

*BNSF Lands

Table 2: Summary of Trees to be Removed on Municipal Lands

PID	Address	Land Ownership	Number of Trees to be Removed \geq 20 cm DBH
6619690	8700 Eastlake Drive	Municipal	51
6848681	8450 Eastlake Drive	Municipal	79
6848737	8250 Eastlake Drive	Municipal	2
9006206	8787 Government Street	Municipal	59
11928956	8876 Lougheed Hwy	Municipal	10
ADJ9006206	No address available	Municipal	98
BROADWAY	No address available	Municipal	25
EASTLAKE DRIVE	No address available	Municipal	4
GAGLARDI WAY	No address available	Municipal	21
PARK 9	8920 Government Street	Municipal	105
Total			454

51. Maps of the Project right of way in Burnaby and of the locations of the trees that are anticipated to require removal – as well as a more detailed description of the Tree Clearing – are provided in the Tree Management Plan (**Exhibit 6**). The above figures reflect some minor route adjustments that TM recently made on PID 003-077-446, which have reduced the anticipated number of trees that must be removed compared to the Tree Management Plan and Tree Clearing Application. Updated maps showing the locations of the trees that are anticipated to require removal for this parcel are included as **Exhibit 14**.

52. As discussed in the Tree Clearing Application, for any tree not identified for removal in the Tree Management Plan that is likely to be severely impacted by root damage, such that it will

inevitably decline following construction and is recommended for removal, TM has committed to providing a consultation report to Burnaby. Burnaby will then be provided with a minimum two-day consultation period to respond. For any tree that is deemed to have been rendered unstable or otherwise hazardous on the basis of root impact, the tree may be removed immediately to preserve the safety of staff and the public. Burnaby will be advised of such tree removal (**Exhibit 11, Attachment 3**).

53. Care will be taken to avoid or minimize impacts from the Tree Clearing. All tree clearing will follow the mitigation measures outlined in section 6.0 of the Tree Management Plan, as well as in section 8.0 of the Pipeline-Environmental Protection Plan [**C01961**] (filed pursuant to Condition 72 and approved by the Commission). There will also be regular monitoring during construction (as outlined in section 9.0 of the Tree Management Plan) and reclamation of cleared areas in accordance with TM's Reclamation Management Plan [**A85826-10**], and a Post-Construction Environmental Management program will be conducted to confirm successful reclamation and revegetation, as required by Condition 151.

54. As discussed in the Tree Management Plan, engagement with landowners has been underway since the initial phases of the Project as a requirement of the comprehensive regulatory review process for the Project and has included discussions on tree removal and mitigation. Trans Mountain will continue to engage with stakeholders, including private landowners and Burnaby, as required for all aspects of the Project including tree management. In addition, Trans Mountain has agreed to meet with Burnaby to discuss the site-specific tree removal along Eastlake Drive.

55. As noted, the majority of the Tree Clearing will occur on private lands. TM has secured the necessary land rights to conduct the Tree Clearing for many of these parcels, including the BNSF Lands, as summarized below (**Table 3**).

Table 3: Summary of Land Acquisition Status for Private Parcels in Burnaby

PID	Address	Land Agreement Status
2641780	3100 Production Way	Agreement in place.
2890933	3121 Production Way	Agreement in place.
3077446	2365 Underhill Ave	Owner was served with a notice under s. 324 notice of the CER Act on December 2,

		2020 and TM plans to file an application for a right of entry (“ROE”) order in January 2021.
3407632	3131 Thunderbird Cres	Land interests not yet acquired.
24440051*	No address available	Agreement in place.
24440094*	No address available	Agreement in place.
24440108	No address available	Agreement in place.
24440132*	9286 Trans Canada Hwy	Agreement in place.

*BNSF Lands

56. Burnaby has not granted land rights for the Project in relation to municipal lands. TM intends to commence the ROE process under section 324 of the CER Act in relation to municipal parcels within Burnaby by providing the required notices to Burnaby in January 2021. TM will file applications for ROE orders for these parcels following service of these notices.

57. Other than the requirements imposed by the Tree Bylaw, TM has all necessary regulatory approvals and has satisfied all pre-construction conditions required to commence the Tree Clearing. This includes approvals of all plan, profile and book of reference sheets for the detailed route of the Project through Burnaby pursuant to section 203 of the CER Act.

H. Urgency of the Relief Request

58. The potential direct financial harm to TM and third parties from delays in the Project construction schedule is enormous. These and other impacts of Project delay were most recently described in the Affidavit of Ian Anderson, TM’s President and Chief Executive Officer, dated May 11, 2020 and filed with the CER [A7F5R1]. As stated in that affidavit, to TM alone, each month of delay to the Project in-service date results in lost earnings of approximately 100 million dollars and millions of dollars in excess capital costs (para. 6).

59. The remainder of this section discusses details regarding TM’s construction schedule, of which I am generally familiar but do not have personal knowledge of all details. The details included herein are based on information from Dean Palin, Senior Project Manager for TM, and I believe them to be true.

60. To maintain the Project construction schedule, the Tree Clearing schedule (**Exhibit 15**) requires that Tree Clearing begin in January 2021. The commencement of Tree Clearing is of particular urgency on the BNSF Lands.

61. I understand this timing requirement is based on:

- (a) the overall Project construction schedule, including the planned Project in-service date of December 2022;
- (b) timing considerations arising from least-risk biological windows related to tree clearing and watercourse crossings;
- (c) the complexity and timelines associated with Project construction through Burnaby; and
- (d) possible construction delays on the BNSF Lands arising from protestor activity.

62. Specifically, to meet the planned Project in-service date of December 2022, hydrotesting and valve installation in the Burnaby area should commence no later than the summer of 2022. This, in turn, requires that crossings of four fish-bearing watercourses within Burnaby be completed prior to the summer of 2022. They are:

- (a) BC-783b Holmes Creek within PID 024-440-051 (BNSF Lands)
- (b) BC-784a Austin Creek within PID 024-440-051 (BNSF Lands)
- (c) BC-784b Unnamed Channel (crossing within a non fish-bearing reach within PID 024-440-094 (BNSF Lands)
- (d) BC-785 Stoney Creek (crossing within Government Street, no instream works proposed)

63. TM endeavours to complete all such crossings within the least-risk instream work window, which, in the Burnaby area, is August 1 to September 15 (“**Instream Window**”). TM’s provincial permits for these crossings require that they be constructed during the Instream Window.

64. There is thus one available Instream Window available for Project construction within Burnaby that enables TM to meet Project timelines: August 1 to September 15, 2021. Although instream construction work in fish-bearing watercourses can be done outside of the Instream Window, such work is likely to have a greater environmental impact, requires additional regulatory review and may be subject to additional regulatory approvals (such as under the *Fisheries Act*), which may not be granted. While instream works within the non fish-bearing reaches could occur outside of the least risk window, Trans Mountain has committed to provincial and municipal regulators to complete the instream works at these specific watercourses within the least risk window as an added precaution.

65. To achieve this timing, the Tree Clearing should be completed as soon as possible in 2021 to allow access to the four fish-bearing watercourse crossings in Burnaby. For the watercourse crossings on the BNSF Lands, 2.5 hectares of trees in a densely forested area must first be cleared. This tree clearing, in addition to all of the Tree Clearing in Burnaby, should be performed outside of the migratory bird nesting window, which, for the Burnaby area, is March 26 to August 16, with the potential for raptors extending this restricted activity period to as early as February 5 and as late as September 6 (“**Nesting Window**”).

66. Construction outside of the Nesting Window minimizes potential impacts to nesting birds and the likelihood of finding active nests. Where the Tree Clearing requires cutting trees in areas of dense forest (such as on the BNSF Lands), the likelihood of finding nesting birds during the Nesting Window is high.

67. Construction within the Nesting Window can only occur if additional measures (such as nest sweeps) are completed, and construction must be halted or adjusted if any active nests are identified. Constructing within the Nesting Window therefore (i) takes significantly longer and is more expensive than constructing outside the Nesting Window; and (ii) introduces additional risks and delays if active nests are present.

68. In addition, Tree Clearing on PID 024-440-051 (part of the BNSF Lands) should begin in January 2021 based on the required trenchless guided horizontal auger bore (“**GHAB**”) crossings on that parcel, the Project schedule and the number of crossings and crews of workers involved. To meet the planned Project in-service date, the twenty-two (22) GHAB crossings in Spread 7B

(which includes Burnaby) require three (3) crews to work throughout 2021. If Tree Clearing in this area is not complete prior to the beginning of the 2021 Nesting Window, it may reduce TM's ability to maintain continuous GHAB work through 2021 for the three (3) crews, and may ultimately delay the Project schedule.

69. Moreover, there are particular Project schedule and safety concerns associated with one of the trees that must be removed to install the pipeline on the BNSF Lands. A group of individuals opposed to the Project has constructed a platform on a tree in this area (PID 024-440-051 between KP 1175 and KP 1174.9), in the middle of the Project right of way, that is suitable for constant occupation. The occupation of this tree platform – or of other trees in the area – presents a high risk of Project construction delay, as it would prevent tree clearing and other work in the area from safely commencing. As noted, the clearing of this and other trees in the area should be complete prior to the 2021 Nesting Window.

70. Therefore, to meet to Project construction timelines and the in-service date, the Tree Clearing should commence in January 2021 to be complete prior to the Nesting Window and, where applicable, the Instream Window, and to reasonably mitigate risks to Project construction delays.

I. Conclusion

71. I affirm this Affidavit in support of TM's Motion.

AFFIRMED BEFORE ME at Calgary, Alberta,)
on the 15 of December, 2020.)


_____)

A Commissioner for taking Affidavits for the
Province of Alberta


_____)

Alain Parisé

MAEVE H. O'NEILL SANGER
Student-at-Law