

CANADA ENERGY REGULATOR

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

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. (“**Trans Mountain**”), in respect of the Trans Mountain Expansion Project (“**Project**”).

AND IN THE MATTER OF the Notice of Motion and Constitutional Question filed by Trans Mountain on the 15th day of December, 2020.

File No. OF-Fac-Oil-T260-2013-03 03

**RESPONSE OF THE
CITY OF BURNABY**

January 28, 2021

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

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RESPONSE OF THE CITY OF BURNABY

1. The Constitutional Question as phrased by Trans Mountain does not arise on the facts underlying this application or the evidence presented in support of it.
2. Burnaby will respond to this Motion based on the evidence presented by Trans Mountain. There is no merit to the application.
3. The Trans Mountain Motion is based upon the NEB’s 2018 Ruling, which was premised on findings of unreasonable delay and frustration of the project. But the evidence discloses no delay here. The Tree Permit application was first made December 7, 2020 (Exhibit 11). This motion was brought days later, on December 15, 2020, following Burnaby’s letter advising that it could not process the application under the unilateral timeline conditions imposed by Trans Mountain.
4. The TM covering letter unilaterally demanded approval within 4 days -- by December 11, 2020, failing which Trans Mountain stated that it would seek approval from the CER – as it then did on December 15, 2020, without any further effort.
5. Four days is a grossly insufficient time, and not in good faith. Trans Mountain’s own evidence that a tree permit would normally take 3-4 weeks (see Affidavit of Alain Parise, para 45), which is a reasonable estimate for a normal application. This application was for 1189 trees in 18 different locations (Parise Affidavit para 50), and could and should have been reasonably expected to take more resources and more time.

6. Burnaby's response (Parise Affidavit Exhibit 12) provided only that if Trans Mountain was going to seek approval from the CER in any event, without accepting a reasonable time expectation for its legitimate process, and therefore without recognition of Burnaby's lawful role, then the application would not be processed under those unilateral conditions.
7. Burnaby is a busy municipality, with many citizens and extensive development, and therefore must deal with many permit applications. In fairness to all, applications are processed as they are received.
8. Trans Mountain did not respond by accepting a reasonable time for processing or Burnaby's role (in fact, it did not respond at all). Instead this application was filed (on December 15, 2020) – one week after the original permit application. Trans Mountain did not contest the City's understanding that an application to the CER was threatened. [In fact, the short timeline to filing indicates that Trans Mountain was preparing its application to the CER even before the tree permit was filed, and is consistent with an interpretation of Mr. Parise's unilateral demand letter that it was not made in good faith].
9. The chronology set out by Mr. Parise in paragraph 29 of his affidavit is quite misleading. Most of the steps set out in those sub-paragraphs relate to the July 23, 2020 application (see Parise Exhibit 5) for voluntary access through a small area of City land in one specific location. It is that 'Access' application process – for access to specific city land -- that is primarily described in most of the subparagraphs of paragraph 29 of the Affidavit [see: a, b, d, g, j, k, l, m and n]. That application was directed to the Engineering Department, and was primarily concerned with localized traffic access under the Traffic Control permitting process. The only tree issue in that application was in respect of 3 trees on City lands. The application letter for that approval (July 23 Parise Exhibit. 5) in fact does not mention trees or the Tree Bylaw.
10. The references to 'submission' of a draft Tree Management Plan are also misleading. Although Trans Mountain submitted a draft tree management plan in September, it was uninvited and not part of a permit application and not processed as such. The City awaited a formal application, and was expecting a revised Tree Management Plan once the application was formalized.
11. The suggestion by Trans Mountain that the Tree Plan was submitted under s. 5 of the Tree Bylaw is simply wrong. It was not done explicitly or implicitly under the bylaw or to the applicable department. Section 5(1) contemplates an Application and payment of fees. That application and those fees are required to trigger an assessment under the City's processes

and by the necessary departments. Trans Mountain's consultants were fully familiar with that process.

12. The necessary Application and fees were not provided until December 7, 2020.
13. The statement by a city staff member in November (TM Exhibit 7) that it had no comments on the tree management plan "at this time" was made in that context – there was no application before the City, and it had not been assessed. Trans Mountain was fully aware of that.
14. The Director of Planning has never assessed this application. It has not gone through the City's processes. There has been no delay whatsoever.

Matters of Legitimate Local Concern

15. The Board clearly found in the 2018 (Motion 1) Ruling (A5Z3V6) that the Tree Bylaw was not constitutionally inapplicable on its face, that there are legitimate municipal interests reflected in the Bylaw and there is a public interest in addressing those matters of local concern.

16. The Board stated in that ruling that:

“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), 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. [pg 23, A5Z3V6]

17. The Board also indicated that “it is not a municipal regulator and is not prepared to replace municipalities in terms of overseeing and enforcing very specific municipal requirements” (pg16, A5Z3V6)
18. The City has legitimate issues of local concern that would have arisen in the normal course of the Tree Bylaw application, and that city staff would likely have considered and assessed or potentially requested conditions, including:
 - a) Requirement of site-specific Environmental Plans for Holmes Creek, Lost Creek, Stoney Creek and Brunette River;

- b) Investigation of Significant Trees of high importance within temporary workspace areas or within the right of way that could be protected without interfering with construction or other necessary functions;
- c) Collaboration with city staff on reduction of tree removal within the workspace, where possible, with specific focus on the following sections:
 - i. BNSF Area (Brunette River Conservation Area);
 - ii. Stoney Creek;
 - iii. Eastlake Drive;
 - iv. Meadowood/Forest Hills buffer (between Broadway and Shellmont Streets)
- d) Provision for inspections and good faith efforts to resolve any specific issues that arose during tree removal;
- e) Tree Protection fencing for adjacent trees not requiring cutting
- f) Tree Removal practices, consistent with City standards
- g) Signage and public notification and engagement, and processes to respond to public inquiries
- h) Replacement trees or compensation in lieu as required by s. 13-15 of the Tree Bylaw**

19. Of particular note, the requirement in S. 13 of the Tree Bylaw that requires “one or more replacement trees” to be planted for every protected tree cut of a specified size cannot impair the core or vital function of the federal approval. Section 13 (5) also provides that where the Director of Planning is satisfied that it is not feasible to plant the replacement trees on the property in question, then payment in lieu (as determined in the Burnaby Planning and Building Fees Bylaw) would apply. In the normal course of an application, the Director of Planning would make that determination during the application.

20. There can be no valid constitutional basis to hold s. 13-15 constitutionally inapplicable and regardless of its view of the application of section 3, the CER should be careful to ensure that those sections should continue to apply.

21. As shown in the evidence by the City’s efforts to grant access at Government and North Roads, the continued ongoing discussions between the parties, and the numerous permits that have been granted [Parise Affidavit Exhibit 13, and see Exhibit 4] the City has been willing to work with Trans Mountain when approached reasonably and consistent with the City’s processes.

22. The Board’s direction in its Process Motion decision, also of January 2018 [[A5Z3U5](#)] that Trans Mountain should approach the City’s permitting processes in good faith, that the Board should not be used in a general supervisory role, and that the Board is not an appropriate forum to work through any difficulties in the permitting process is quite inconsistent with this

application – where Trans Mountain’s unilateral imposition of an unreasonable timeline and subsequent application has resulted in a process that has not been allowed to take place.

23. Further, the Board’s direction that “the generic process is not to be used as a negotiating tool” [A5Z3U5, pg 8) is inconsistent with the approach taken by the Parise letter of December 7, 2020 -- which clearly threatened to use the Board process if approval was not granted within 4 days.
24. The evidence presented on this Motion by Trans Mountain itself establishes that the City has been working in good faith and co-operatively with the proponent on numerous issues. Bad faith cannot be attributed to the City. It is clear that the failure here, if there was one, is Trans Mountain’s failure to apply in a timely manner.
25. The basis of the ruling in the 2018 Motion 1 Ruling (A5Z3V6) was the finding of fact that there had been lengthy and unreasonable delay. There is no basis on the evidence presented here to establish unreasonable delay as was found necessary by the Board to make the constitutional rulings it did in 2018.
26. As there has been no evidence establishing delay, and no reasonable time ever given for the City to process an application, the constitutional question does not arise.
27. The Motion should be dismissed, with full costs to the City.

All of which is respectfully submitted this 18th day of January, 2021 on behalf of the City of Burnaby.

Gregory J. McDade, Q.C.

Counsel for the City of Burnaby