



File OF-Fac-Oil-T260-2013-03 61
26 February 2021

To: All Parties to the MH-001-2021 proceeding

**Trans Mountain Pipeline ULC (Trans Mountain)
Trans Mountain Expansion Project (Project)
Hearing Order MH-001-2021
Notice of Motion and Notice of Constitutional Question
Dated 15 December 2020 (Motion)
Reasons for Decision
Commission of the Canada Energy Regulator (Commission)
Order MO-002-2021**

On 15 December 2020, Trans Mountain filed the above-captioned Motion [[C10426](#)]. On 2 February 2021, the Commission granted, in substantial form, the relief sought in paragraphs 1 a) and b) of the Motion, as more particularly set out in Order MO-002-2021 [[C11404](#)] (the Order). In the Order, the Commission answered the constitutional question raised in paragraph 3 of the Motion in the affirmative and declared Section 3 of the Tree Bylaw to be inapplicable and inoperative to the Tree Clearing. The Commission indicated that written reasons for its decision would follow.

These are the Commission's reasons. In essence, Burnaby's refusal to process the Application represents a frustration of a federal purpose and serious impairment of a core competence of Parliament and federal undertaking.

A. DEFINITIONS

Unless otherwise defined, capitalized terms in these reasons have the meaning ascribed to them as follows:

Application	Tree Cutting Permit application filed on 7 December 2020
Certificate	Certificate of Public Convenience and Necessity OC-065, held by Trans Mountain as General Partner of Trans Mountain Pipeline L.P., in respect of the Project
Process Order	The generic process set down by the National Energy Board (NEB) in its 18 January 2018 Decision on the 17 November 2017 Notice of Motion regarding future NEB process for permitting matters relating to compliance with Certificate Condition 2 and Trans Mountain's commitment to apply for, or seek variance from, all provincial and municipal permits and authorizations that are required by law [A89357]
Tree Bylaw	City of Burnaby Bylaw No. 10482

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Tree Cutting Permit	Tree cutting permit, as referred to in section 3 of the Tree Bylaw
Tree Clearing	Project-related tree clearing within the City of Burnaby that is the subject of Trans Mountain's 7 December 2020 application for a Tree Cutting Permit, as amended on 18 December 2020

B. THE MH-001-2021 PROCEEDING

On 15 December 2020, Trans Mountain filed the Motion [[C10426](#)] with the Canada Energy Regulator. In its Motion, Trans Mountain requested that the Commission:

- a) Grant relief pursuant to Certificate Condition 1 from Certificate Condition 2, insofar as it requires Trans Mountain 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 (defined in the Motion as Tree Clearing);
- b) Issue an Order pursuant to sections 32, 34 and paragraph 313(i) of the *Canadian Energy Regulator Act* (CER Act) declaring that:
 - i. The constitutional question raised in the Motion is answered in the affirmative;
 - ii. Section 3 of the Tree Bylaw is inoperative, invalid and/or does not apply with respect to the Tree Clearing; and
 - iii. Trans Mountain may proceed with the Tree Clearing all Project-related tree clearing within Burnaby pursuant to the terms and conditions of the Certificate and related orders notwithstanding the fact that Burnaby has not issued tree cutting permits under section 3 of the Tree Bylaw for the Tree Clearing; and
- c) Adjudicate the Motion expeditiously and in accordance with the generic process set down by the Process Order.

On 22 December 2020, the Commission established the process by which the Commission would review and decide the Motion [[C10592](#)], pursuant to which the Commission directed Trans Mountain to serve the Motion on Indigenous peoples who have rights and interests that overlap with the City of Burnaby (Burnaby or the City) and on landowners of privately held lands described in the Motion. Burnaby, the federal, provincial and territorial Attorneys General and potentially interested parties were given until 12 January 2021 to file notices of intent to participate.

By 6 January 2021, Trans Mountain had served the Motion on all Attorneys General and potentially interested parties.

Burnaby, the Attorney General of Alberta (Alberta) and Alberta Department of Energy (ADOE) filed notices of intent to participate. An organization, Burnaby Residents Opposing Kinder Morgan Expansion, filed a notice of intent to participate but was denied participation on the basis that it had failed to justify how its interest in the proceeding was relevant to the

constitutional question at issue. No Indigenous peoples or specific landowners filed notices of intent to participate.

Once parties were confirmed, the following hearing steps took place:

- On 18 January 2021, Burnaby, Alberta and ADOE filed responses (Responses) to the Motion;
- On 20 January 2021, the Commission issued an Oral Hearing Details and Guidance for the MH-001-2021 Hearing;
- On 21 January 2021, the Commission issued Information Requests to Trans Mountain and Burnaby and requested responses by 26 January 2021. Both Trans Mountain and Burnaby filed responses in answer to the Information Requests on 25 January 2021;
- On 26 January 2021, Trans Mountain filed a reply to Burnaby's Response dated 18 January 2021, including supporting affidavits;
- The Commission heard oral argument from Trans Mountain and Burnaby on 29 January 2021;
- On 29 January 2021, the Commission reserved its decision; and
- On 2 February 2021, the Commission issued the Order granting, in substantial form, the relief sought in paragraphs 1 a) and b) of the Motion [[C11404](#)].

C. PROJECT, FEDERAL LAWS AND REGULATORY REQUIREMENTS

Project

The description of the Project and the NEB's reasons and recommendations will not be repeated here and can be found in the OH-001-2014 NEB Report dated 19 May 2016 and the MH-052-2018 NEB Reconsideration Report dated February 2019. The reconsideration Report led to the issuance of the Certificate with 156 conditions of approval [[C00061](#)].

Federal Laws and Regulatory Requirements

Condition 2 of the Certificate states that Trans Mountain must implement all of the commitments it made in its Project application or to which it otherwise committed on the records of the OH-001-2014 and MH-053-2018 proceedings. One such commitment made by Trans Mountain was to "apply for, or seek variance from, all permits and authorizations that are required by law". Condition 1 requires Trans Mountain to comply with all conditions unless the NEB (now the Commission) otherwise directs.

For the purpose of carrying out the Project, Trans Mountain has all of the powers set forth in section 313 of the CER Act. This includes the power in paragraph i) to do all acts necessary for the construction of the Project.

D. THE CITY OF BURNABY TREE BYLAW

Section 3 of Burnaby's Tree Bylaw requires Trans Mountain to obtain Tree Cutting Permits for all Project-related clearing of certain protected trees within Burnaby:

[3] 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.

Section 5 sets out the requirements for a Tree Cutting Permit application, including payment of a permit fee and submission of a tree plan.

E. TREE BYLAW PERMITTING BACKGROUND AND MOTION

The facts relevant to the Tree Bylaw permitting process can be drawn from the four sworn affidavits filed by Trans Mountain,¹ the written submissions of the parties and the responses of Trans Mountain and Burnaby to the Commission's Information Requests. Burnaby elected not to file any affidavits and indicated that it would rely on the evidence as filed by Trans Mountain.

While there is little material dispute between Trans Mountain and Burnaby with respect to the facts surrounding the permitting process, the parties differ greatly as to how the Commission should interpret them and what inferences or conclusions the Commission should draw from them. After considering the entire record, the Commission makes the following findings of fact with respect to the Tree Bylaw permitting process.

The Tree Clearing involves removing trees on municipal and private lands within Burnaby. Clearing is necessary to accommodate Project construction; trees that fall within the Project right-of-way and temporary workspace must be removed.

Trans Mountain and Burnaby have been engaged in tree-related issues since at least 2017, through technical working group meetings, a tree survey and tree-related correspondences, as well as through detailed route hearing processes. Following changes to the Project route in 2019, and following a 2019 settlement between Trans Mountain and Burnaby, Trans Mountain submitted a tree plan (Tree Management Plan) for the Tree Clearing to Burnaby on 8 September 2020. Trans Mountain stated that this Tree Management Plan was submitted in advance of a formal tree cutting permit application in pursuit of a collaborative approach to addressing any concerns Burnaby may have with the Tree Management Plan.²

In 2018, Trans Mountain submitted two applications to remove trees outside the Burnaby Terminal that were classified as "danger trees" under British Columbia's *Occupational Health and Safety Regulation* and which posed a hazard to construction workers. Burnaby initially agreed to have them removed but later refused. Trans Mountain quoted Burnaby's explanation that the political climate regarding the Project was "too hot" for the City to endorse the removal of the danger trees. In March 2020, City staff attended on site and removed the trees.

On 7 December 2020, Trans Mountain submitted an application to Burnaby for a permit to conduct tree clearing on private and municipal lands (the Application) and sought a decision by 11 December 2020. Trans Mountain indicated in the covering letter to the Application that "[s]hould a decision not be forthcoming by this date, Trans Mountain will take steps to secure necessary approvals to complete this work."

The Application was submitted after Trans Mountain had formed the view in late

¹ The affidavits of Alain Parisé dated 15 December 2020, Lexa Hobenshield dated 26 January 2021, Matthew McTavish dated 26 January 2021 and Tylor Hynd dated 26 January 2021.

² The parties disagree on how to interpret the engagements that preceded the complete 7 December 2020 Tree Cutting Permit application filed by Trans Mountain and their effect on the permitting process. As these differing interpretations are not material to the Commission's decision, they are not addressed in detail in these reasons.

November 2020 that Burnaby may not approve any of the Tree Clearing and to account for a possible adjudication by the Commission.

There is no dispute as to whether Trans Mountain's Application and fee were provided as required on 7 December 2020; Burnaby confirms in its Response that the "necessary Application and fees" were provided as of 7 December 2020.

On 9 December 2020, Burnaby responded to Trans Mountain's Application in a letter:

This is further to your 2020 December 07 letter regarding tree removal permits for construction of Trans Mountain Expansion Project in Burnaby. At this time, the City is not prepared to consider the application given that Trans Mountain does not accept the City's jurisdiction and intends to make an application to the CER.

Burnaby submitted that its response "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."

On 15 December 2020, Trans Mountain filed the Motion for which this hearing has been convened.

On 18 December 2020, Trans Mountain, through its consultant, submitted a revised version of the Tree Management Plan to Burnaby. The revision was made to reflect the reduced workspace on a property located in Burnaby.

When asked by the Commission to describe the extent to which Burnaby has conducted any work to process Trans Mountain's Application since its submission on 7 December 2020, Burnaby answered that it had conducted no work on processing the Application. Burnaby not considering the Application was re-affirmed in final argument. Despite Burnaby's concession during final argument that there is nothing in the Tree Bylaw or relevant legislation that speaks to whether the City had the power not to assess the Tree Cutting Permit application, the fact remains that Burnaby was not prepared to consider the Application when it was filed on 7 December 2020 and still had not considered it as of the closing of the record of this hearing.

When asked by the Commission to provide an estimate of the time Burnaby would need to assess Trans Mountain's Application, Burnaby stated that they were unable to provide one.

Although Burnaby indicated that it has issued multiple permits for the Project, it has not issued a single tree cutting permit to date under the Tree Bylaw for the Project, including for danger trees.

F. PROJECT TIMING AND POTENTIAL PREJUDICE TO THE PARTIES

i. Trans Mountain

Trans Mountain has provided evidence regarding Project timing and, particularly, the potential prejudice if Tree Clearing and the Project as a whole is delayed.

The Project's proposed in-service date is December 2022. Trans Mountain states that Tree Clearing must begin in January 2021 to maintain the Project construction schedule and to avoid work during environmentally sensitive fish and raptor nesting windows. While it is possible for Trans Mountain to conduct tree clearing and construction during these windows, Trans Mountain states that the work would take significantly longer, cost more and is likely to have a greater environmental impact requiring additional regulatory review.

Trans Mountain also indicates that tree clearing must begin due to the complexity and timelines associated with Project construction through Burnaby and possible delays arising from protestor activity on BNSF Railroad Company lands.

According to Mr. Ian Anderson, Trans Mountain's President and Chief Executive Officer,³ each month of delay to the Project in-service date will result in lost earnings of approximately \$100 million and millions of dollars in excess capital costs. The Commission notes that Mr. Anderson also states that a delay to the Project in-service date will negatively impact employment opportunities, local and government revenues, shippers, Canadian oil producers, construction contractors and Indigenous peoples who have invested in the Project and who have signed agreements providing for financial benefits totaling hundreds of millions of dollars.

ii. Burnaby

Burnaby argues that there is no suggestion that its actions have slowed the Project.

Burnaby further submits that the evidence does not support Trans Mountain's argument about the losses to the Project that would be incurred if the Tree Cutting Permit is not granted in January 2021. It states that the Project has been delayed by a whole range of other matters; however, Burnaby has not presented any evidence, sworn or unsworn, to this effect.

In addition, Burnaby states that the Tree Clearing involves destruction of many healthy trees in sensitive areas, including parks and areas designated as conservancies, and that there are legitimate issues of local concern that would arise in the normal course of a tree bylaw application, for which its staff would likely have considered and assessed or potentially requested conditions.

G. CONSTITUTIONAL QUESTION

The Motion raises the following constitutional issue:

Whether, on the facts before it, the Commission should find that the requirement for municipal approval under section 3 of the Tree Bylaw prior to conducting the Tree Clearing is inapplicable, invalid, or inoperative under the doctrines of interjurisdictional immunity and/or federal paramountcy.

The Commission notes the parties' agreement on several threshold matters:

³ Trans Mountain's relies on the Affidavit of Ian Anderson dated 11 May 2020 [C06242-3], filed in the MH-027-2020 Detailed Route Hearing.

- a) There is no dispute that the Commission has the authority to decide the constitutional question;
- b) There is no dispute that the Tree Bylaw is a properly enacted and valid exercise of provincial authority; and
- c) There is no dispute about the constitutional law governing interjurisdictional immunity and paramountcy. The dispute between the parties pertains to whether these constitutional doctrines apply on the facts.

Since the Commission's decision on the constitutional question is largely based on what took place after Trans Mountain's 7 December 2020 Application, the summary of the parties' submissions is mostly limited to the arguments relevant to these events and those that are material to the Commission's decision.

i. Trans Mountain Submissions

Trans Mountain argues that paramountcy and interjurisdictional immunity apply in the circumstances, as follows:

- a) Burnaby's refusal to issue the Tree Cutting Permit frustrates the federal purpose of the CER Act and associated Project approvals and creates a direct operational conflict. As such, the doctrine of paramountcy applies; and
- b) Burnaby's refusal to process the Application represents a serious trench on the core federal power to regulate and approve interprovincial pipelines. This infringement on a core federal head of power, in this case the orderly development of the Project, is sufficiently serious to invoke the doctrine of interjurisdictional immunity.

Trans Mountain submits that the doctrines of paramountcy and interjurisdictional immunity can apply in the absence of unreasonable delay if Burnaby's permitting processes have the effect of frustrating and obstructing the federal competencies and purposes associated with the Project and its orderly development. Trans Mountain argues that by refusing to process the Tree Clearing Application, and now acknowledging that any approval of the Application in the future is unlikely, Burnaby has seriously trenched on the core federal power to regulate and approve interprovincial pipelines.

Trans Mountain argues that whether intentional or not, Burnaby's permitting process has interfered with the efficient and orderly development of the Project in a manner that puts Trans Mountain's schedule at serious risk. Parliament's core competence, the orderly development of the Project, has now been impaired and the doctrine of interjurisdictional immunity must be applied. The same is true for federal paramountcy, Trans Mountain submitted.

Trans Mountain argues that it has made efforts to satisfy Burnaby's requirements under the Tree Bylaw, thereby simultaneously complying with both municipal and federal regimes, but argues that Burnaby has refused to issue the necessary permits to enable Project construction.

Trans Mountain argues that a direct operational conflict has arisen; the federal regime has said "yes" and the municipal regime has said "no". The doctrine of paramountcy therefore applies to the extent of the inconsistency, such that the Tree Bylaw must be rendered

inoperable to the extent it prevents Trans Mountain from conducting the Tree Clearing.

ii. Burnaby Submissions

Burnaby submits that the constitutional question as phrased by Trans Mountain does not arise on the facts.

Burnaby argues that Trans Mountain's Motion is premised on unreasonable delay and frustration of the Project. According to Burnaby, there has been no delay. Burnaby states that Trans Mountain submitted the Application on 7 December 2020 and filed the Motion 8 days after Burnaby advised that it could not process the Application under the unilateral 4 day timeline imposed by Trans Mountain, which Burnaby submits was grossly insufficient. Burnaby further submits that the regulatory department of Burnaby has not had a reasonable opportunity to consider the matter.

Burnaby argues that Exhibit 13 of Mr. Parisé's affidavit (C10426-11) show a spreadsheet that lays out of all the permit applications that have been submitted to Burnaby and approved or are pending approval. Burnaby argues that this does not show an unreasonable approach by Burnaby.

iii. Attorney General of Alberta and Alberta Department of Energy Submissions

Alberta and ADOE support the position taken by Trans Mountain in its Motion, which they submit is not premature. Both parties argue that the evidence is clear that unreasonable delay is and will continue to frustrate the timely development of the Project, determined to be in the public interest, until the dispute is resolved.

iv. Views of the Commission

The Commission finds, on the facts before it, that section 3 of the Tree Bylaw is inapplicable and inoperative under the doctrines of interjurisdictional immunity and federal paramountcy. The Commission has reached this conclusion on the basis that Burnaby's refusal to process the Application represents a frustration of a federal purpose and serious impairment of a core competence of Parliament and federal undertaking.

Paramountcy

In its 23 October 2014 Ruling No. 40 [A097], affirmed by the British Columbia Supreme Court in *Burnaby (City) v Trans Mountain Pipeline ULC*, 2015 BCSC 2140, the NEB summarized the doctrine of federal paramountcy as follows at page 12:

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. In order for paramountcy to apply, there must be an inconsistency or a conflict between federal and the provincial law. A conflict or inconsistency can arise if there is an impossibility of dual compliance or a frustration of a federal purpose. Paramountcy applies where an application or operation of the provincial law would frustrate the purpose of the federal law. If it is possible

to interpret the two laws in a manner to avoid conflict or inconsistency, that is preferable to an interpretation that results in a conflict or inconsistency.

The Commission is not persuaded that there is an impossibility of dual compliance on the face of the CER Act, Certificate, and relevant NEB and Commission orders on one hand, and the Tree Bylaw on the other. Burnaby has not denied the Application and compliance with both is theoretically possible: see the National Energy Board Reasons for Decision dated 18 January 2018 in the MH-081-2017 proceeding for the Notice of Motion dated 26 October 2017, at page 23 [[A89360](#)] (hereinafter, the 2018 Decision).

However, in the Commission's view, the facts of this case establish that the City's refusal to process the Application since 7 December 2020, without legislative authority on which it relies upon to do so, has the effect of frustrating a federal purpose in this specific instance:

- a) The Project has been held to be in the Canadian public interest and Trans Mountain has broad powers to carry out its construction under section 313 of the CER Act. Moreover, Burnaby has already reached an agreement with Trans Mountain on the detailed route and methods of construction for the Project;
- b) The Tree Clearing is necessary to proceed with the Project and Trans Mountain should have been able to begin Tree Clearing in January 2021 to maintain the Project construction schedule and avoid environmentally sensitive windows, as described above;
- c) Burnaby has never issued a Tree Cutting Permit for Trans Mountain's Project even in the circumstances of danger trees needing removal;
- d) In its 9 December 2020 letter, Burnaby refused to process the Application. While the City qualified the refusal being "at this time", the City was unable to provide an estimate of the time it would need to process the Application;
- e) Burnaby confirmed that since its 9 December 2020 refusal letter, it had not taken any steps to process the Application. This, despite an amended Tree Management Plan being filed on 18 December 2020 indicating that Trans Mountain continued to pursue the permitting process and despite weeks lapsing between 7 December 2020 (the day the Tree Cutting Permit Application was filled with the prerequisite fees) and argument being heard on the Motion on 29 January 2021;
- f) Burnaby confirmed that it was reasonable to assume that the Tree Cutting Permit Application is unlikely to be approved as filed; and
- g) Burnaby's refusal to process the Tree Cutting Permit Application since it has been validly filed on 7 December 2020 through to the time of the closing of the record for the hearing on 29 January 2021, has caused, or is a significant contributing or exacerbating factor to, delay with the Tree Clearing and there is no indication on the record of this case of an imminent resolution or any resolution at all. Trans Mountain has obtained all regulatory approvals including plan, profile and book of reference approval, and has satisfied the pre-construction conditions required to conduct the Tree Clearing, except for the Tree Cutting Permit at issue.

Based on the above, the Commission finds that Burnaby's refusal to process the Application is frustrating Trans Mountain's exercise of its authorizations under the Certificate and other NEB / Commission orders, and its powers under section 313 of the CER Act. Accordingly the doctrine of paramountcy applies to render section 3 of the Tree Bylaw inoperable to the extent that it frustrates Trans Mountain's ability to proceed with the Project which was found to be in the Canadian public interest.

Interjurisdictional Immunity

In its 2018 Decision, the NEB also summarized the doctrine of interjurisdictional immunity at page 24, as follows:

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.

At page 25, the NEB wrote:

The [NEB] 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 Commission maintains that 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. Accordingly the Commission is satisfied that Burnaby's refusal to process the Application trenches into a core competence of Parliament and vital part of a federal undertaking. The Commission also finds that Burnaby's refusal to process the Application, intentional or not, and the Commission makes no finding of intent, is the cause of, or a contributing or exacerbating factor to, delay in Tree Clearing, which has a significant and direct implication on Project timing and construction. In the Commission's view, Burnaby's refusal is sufficiently serious in the circumstances to invoke the doctrine of interjurisdictional immunity, rendering section 3 of the Tree Bylaw inapplicable to the extent that it impairs Trans Mountain's ability to perform the Tree Clearing.

For the Commission to arrive at the foregoing conclusions, it was not necessary to opine on whether the parties acted reasonably or in good faith. The Commission finds that the constitutional doctrines apply due to the delay occasioned by Burnaby's inaction and its refusal to process the Tree Cutting Permit Application, regardless of the nature of Trans Mountain and Burnaby's motives or intentions.

H. RELIEF FROM CERTIFICATE CONDITION 2

i. Trans Mountain Submissions

Trans Mountain states that it has the onus of demonstrating to the Commission that granting relief from Certificate Condition 2 is in the public interest.

Trans Mountain submits that while Burnaby's conduct may be a factor in the analysis, the primary considerations should be whether Trans Mountain acted reasonably in seeking to comply with its commitments pursuant to Condition 2 and the impacts of granting the requested relief relative to maintaining the status quo. Trans Mountain states that the imminence of a resolution (or lack thereof) to the permitting dispute and the impact of not having a timely resolution are relevant considerations, relying on the NEB's Reasons for Decision dated 18 January 2018 with respect to its previous Notice of Constitutional Question (the 2018 Reasons) [[A89360](#)].⁴

Trans Mountain submits that it acted reasonably in seeking the Tree Cutting Permit, citing the Burnaby's agreement on Project route and construction methods and its familiarity with the Tree Clearing and Tree Management Plan that culminated in the Application.

Trans Mountain argues that given that Burnaby has never issued a tree clearing permit for the Project, it needed clarification from Burnaby on whether it was willing to issue Tree Cutting Permits or not. Trans Mountain argues that it was coming up on tight deadlines, that it needed this clarification soon and that this is why Trans Mountain filed its application in the form that it did on 7 December 2020 - requesting that the City respond in a timely manner. Trans Mountain argued that it was seeking clarity to move forward.

Trans Mountain submits that Burnaby's 9 December 2020 letter provided an unconditional refusal. Trans Mountain states that Burnaby told Trans Mountain that it would not process the application when it responded: "At this time, the City is not prepared to consider the application given Trans Mountain does not accept the City's jurisdiction and intends to make an application to the CER". Trans Mountain asserts that the refusal was not conditional and did not invite further input from Trans Mountain.

Trans Mountain further argues that Burnaby confirmed, in answer to the Commission's Information Request, that the Application likely would not be approved as filed. Trans Mountain argues that Burnaby has not and is not showing any willingness to approve Tree Cutting Permits for the Project.

Trans Mountain states that other than the requirements imposed by the Tree Bylaw, it has all necessary regulatory approvals and has satisfied all pre-construction conditions required to commence the Tree Clearing, which 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.

Trans Mountain submits that it will remain committed to the representations made to Burnaby in the Tree Cutting Permit Application and on the record of this hearing regarding mitigation, monitoring and replacement or compensation for trees.

⁴ At page 24.

Trans Mountain argues that, on this basis, Burnaby will not be prejudiced if the Motion is granted because Trans Mountain will be bound by essentially the same obligations that it would have been if Tree Cutting Permits were issued.

In reviewing the record, the Commission notes that if the Motion is granted, Trans Mountain will remain subject to various representations, commitments and conditions including, without limitation:

- a) The representations and commitments made in the Tree Cutting Permit Application, Tree Management Plan and Clarifications to City Questions and Concerns dated 7 December 2020;
- b) The representations and commitments made in the Mr. Parisé's Affidavit dated 15 December 2020, including those contained at paragraphs 52-54 with respect to the Tree Clearing;
- c) The representations and commitments made in Ms. Hobenshield's Affidavit dated 26 January 2021, including those contained at paragraphs 17 pertaining to tree replacement or payment in lieu thereof under the Tree Bylaw;
- d) The representations and commitments made in Trans Mountain's Reply dated 26 January 2021 at paragraph 47 with respect to the application of sections 13-15 of the Tree Bylaw;
- e) The obligations arising from the agreement between Trans Mountain and Burnaby which formed the basis of Burnaby's withdrawal of its opposition to the detailed route and methods of construction for the Project, as more particularly listed in Schedule A and B of Burnaby's letter dated 22 October 2019 [\[C02346-2\]](#); and
- f) All relevant Certificate conditions, including those pertaining to reclamation and revegetation (Certificate OC-065 Condition 151).

Trans Mountain argues that the facts demonstrate that Trans Mountain has acted reasonably to satisfy the requirements of the Tree Bylaw and that the balance of convenience weighs strongly in favour of granting Trans Mountain's requested relief. Trans Mountain argues that preserving the status quo would cause the Project significant and indefinite delay, with the company, its owners and Canadian taxpayers suffering serious financial harm.

ii. Burnaby Submissions

Burnaby argues that the Motion has no merit.

While Burnaby did not make specific submissions with respect to exempting Trans Mountain from Condition 2, Burnaby argues that there are legitimate municipal interests reflected in the Tree Bylaw and that there is a public interest in addressing those matters of local concern. These issues include potential site-specific environmental plans, investigation of significant trees, provision for inspections and public notification and engagement. In particular, Burnaby submits that there are no constitutional reasons to find sections 13 to 15 of the Tree Bylaw, relating to the replacement of trees or payments in lieu, as inapplicable and that the Canada Energy Regulator ought to ensure that these should continue to apply.

Burnaby argues that Trans Mountain's Application was not made in a timely manner, was not submitted in good faith, that the company did not recognize Burnaby's lawful role and that the Commission's process should not be used as a negotiating tool. It argues that a "gun to your head" deadline is unreasonable.

During final argument, Burnaby emphasized that it is not city council who approves the permits and that it is the Director of Planning and staff who look at these matters and approve them on their merits, regardless of whether the City is opposed to the Project or not. Burnaby submits that the City staff are a professional group that take their regulatory responsibilities seriously.

Burnaby also submits that there has been no delay on its part and that it has been willing to work with Trans Mountain.

iii. Attorney General of Alberta and Alberta Department of Energy Submissions

Alberta and ADOE support the position taken by Trans Mountain. Both parties argue that unreasonable delay is frustrating the timely development of the Project, determined to be in the public interest, and will continue to do so until resolved. Both parties also submit that the Commission should grant the relief sought by Trans Mountain if it finds that there has been unreasonable or unacceptable delay.

ADOE further notes that the Project is of significant national importance and, as such, should not be delayed further. It also submits that the Commission should place strong consideration on overall construction efficiency.

iv. Views of the Commission

The Commission has determined that it is in the public interest to relieve Trans Mountain of the requirement under Certificate Condition 2 to obtain a Tree Cutting Permit under section 3 of the Tree Bylaw with respect to the Tree Clearing.⁵ The Commission has reached this conclusion on the basis that there has been delay caused by the City's refusal to process the Application: Trans Mountain's Application has been held in abeyance by Burnaby since 7 December 2020 with no indication of imminent resolution and, given the urgency of the Tree Clearing and likely negative effects of delaying Project construction on Trans Mountain, third parties and the environment, the public interest in granting the exemption outweighs the public interest in requiring Trans Mountain to continue with the Tree Cutting Permit process.

The Commission is persuaded that the Tree Clearing must begin as soon as possible to avoid work during sensitive environmental windows and to preserve the Project construction schedule which, if not maintained, may jeopardize the Project in-service date.

The Commission accepts that Trans Mountain submitted the necessary Application and fees for the Tree Cutting Permit on 7 December 2020. Regardless of the *bona fides* of Trans Mountain's request for a quick decision and whether it was reasonable for Trans Mountain to expect a decision by 11 December 2020, and with no need for the Commission to make any finding with respect to the professionalism of Burnaby staff, the Commission ultimately finds that Burnaby's refusal to process the Application since it was submitted on 7 December 2020 through to the close of the record of this hearing has led to delay in the permitting process.

⁵ For clarity, this exemption is limited to Project-related tree clearing that is the subject of Trans Mountain's Application, as amended on 18 December 2020.

The delay is indefinite, with no indication of imminent resolution. Despite the Commission's request, Burnaby did not provide an approximate processing timeline to assess the Application if, and when, it were to start. Adding to this uncertainty is Burnaby's assertion that Trans Mountain's Application is unlikely to be approved as submitted which, though entirely possible in the ordinary course of a permitting process, would likely lead to further delays.

The Commission is persuaded that if the Condition 2 exemption is not granted, the delay described above, which can only be made more significant by the passage of time, will likely cause significant prejudice to Trans Mountain, third parties and the environment. The Commission notes Mr. Anderson's submission that each month of delay to the Project in-service date will result in significant lost earnings and millions of dollars in excess capital costs and that such a delay will result in lost earnings and lost opportunities. The Commission is satisfied that without the requested exemption, the time required by Burnaby to process the Application and issue a permit will likely jeopardize Trans Mountain's construction schedule and may cause serious economic harm to Trans Mountain and third parties such as shippers, construction contractors and Indigenous peoples. Burnaby argues that Project delays are caused by other matters but has provided no supporting evidence. And while the Commission also finds that Burnaby will be impacted if the exemption is granted – in that Trans Mountain's Tree Clearing will no longer be subject to its permitting process which pertains to the City's oversight over legitimate matters of local concern – it is persuaded that the impact is mitigated, to a significant degree, by the representations, commitments and conditions that will continue to bind Trans Mountain's Tree Clearing activities.

On the basis of the above, the Commission finds that granting an exemption with respect to Certificate Condition 2 is in the public interest.

I. CONCLUSIONS

The constitutional question raised in paragraph 3 of the Motion is answered in the affirmative. The Commission finds that the doctrines of federal paramountcy and interjurisdictional immunity render section 3 of the Tree Bylaw inapplicable and inoperative to the Tree Clearing.

The Commission has also determined that it is in the public interest to relieve Trans Mountain of the requirement of Certificate Condition 2, insofar that it requires Trans Mountain to obtain a Tree Cutting Permit for the Tree Clearing.

However, and as stated in Order MO-002-2021, to which these reasons attach, Trans Mountain is not relieved of any other applicable legal and regulatory requirements and Trans Mountain is not absolved from compliance with Condition 2 insofar as that condition requires compliance with other relevant City of Burnaby bylaws, including any section of the Tree Bylaw that otherwise remains applicable and operative.

Commitments made

In addition, the Commission expects Trans Mountain to follow through on all the representations and commitments it made on the record of this Motion and described in these reasons in Section H above.

Cooperative Federalism

In closing, the Commission wishes to re-affirm cooperative federalism.

It is important 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. It is noteworthy that Burnaby and Trans Mountain have been able to work together in obtaining numerous municipal permits required for the Project, though none of them pertained to Tree Clearing, and that in those cases not involving Tree Clearing, the City does not refuse to process permit applications. Declaring section 3 of the Tree Bylaw inapplicable and inoperative, while in the Commission's authority to do and within Trans Mountain's ability to apply for, is still, in the Commission's view, an exceptional remedy.

This explains in part the Commission's efforts in this Motion to require Trans Mountain to comply with any other section of the Tree Bylaw that remains otherwise applicable and to question Trans Mountain on what else it commits to, for which Trans Mountain stated that it will be bound by essentially the same obligations that it would have been if Tree Cutting Permits had been issued.

It is the Commission's expectation that, with respect to permits, including Tree Cutting Permits, that may be required in the future by Trans Mountain for the Project, both parties will work together such that Burnaby's bylaws and Trans Mountain's powers under the CER Act can operate together harmoniously.

In the 2018 Reasons⁶, the NEB explained that it was not persuaded that there is an impossibility of dual compliance *on the face* of the NEB Act, Certificate, and relevant National Energy Board orders on the one hand, and the Tree Bylaw on the other. Burnaby and Trans Mountain conceded this again in this Hearing during argument.

In this case, the Commission again finds that on its face, the Tree Bylaw itself does not create an outright conflict with Trans Mountain's exercise of its authorizations under the Certificate and related Orders, and its powers under section 313 of the CER Act – rather, it is the City's *refusal* to consider the Application that creates this conflict.

On one hand, the Commission would expect Trans Mountain to come to Burnaby for Tree Cutting Permits as early as practicable and in a manner that affords the City reasonable time to assess it. The Commission's decision should not be interpreted as condoning Trans Mountain's action in this case to make an application and request a response in 4 days, merely to prompt a clarification on whether a permit would be issued, which appears to have been the case here. On the other hand, the Commission would conversely expect Burnaby not to refuse to process a Tree Cutting Permit application that is otherwise complete. By Burnaby's own assertion, it cannot find any legal authority to refuse to process the Tree Permit Application.

While the Project has been approved and found to be in the Canadian public interest, and making it possible for the constitutional doctrines discussed herein to be invoked, the Commission does recognize the City's legitimate right to oversee matters or local concerns which may be best addressed by the City, and not by the Commission. The Commission would therefore expect the parties to work through any and all difficulties or disagreements

⁶ At page 23.

encountered during existing and future permitting process and find a resolution on how required permits may be obtained with some certainty and in a timely manner.

Yours sincerely,

Signed by

Jean-Denis Charlebois
Secretary of the Commission