

November 8, 2021

Canada Energy Regulator
Suite 210 -517 Tenth Avenue SW
Calgary, AB T2R 0A8

**Attention: M. Jean-Denis Charlesbois,
Secretary to the Commission**

Dear Sirs/Mesdames:

**Re: Trans Mountain Pipeline ULC (Trans Mountain)
Trans Mountain Expansion Project (Project) Certificate of Public Convenience and
Necessity (Certificate) OC-065 MH-003-2021
Notice of Motion and Constitutional Question dated 3 August 2021
Letter Decision and Orders AO-001-MO-002-2021 and MO-031-2021**

We write on behalf of the City of Burnaby.

In its decision of October 20, 2021, the Commission purports to make an Order granting Trans Mountain the power to cut any trees that Trans Mountain may determine to be reasonably necessary for the construction or operation of the Project. The Commission uses the term “Future Tree Clearing” to define that future hypothetical activity, without limits as to time, location or the conditions which Trans Mountain will apply.

We suggest that the Commission’s Order and Decision goes well beyond any jurisdiction to make an order based upon the materials that were before it. We also contend that the Commission could not have properly exercised this jurisdiction without better notice to the City of Burnaby and ask that the Commission reconsider its Order and amend it by excluding the references to “Future Tree Clearing”.

We note that the focus of the original Motion related to the exemption from an Access Permit and the cutting of 86 specific trees identified in a revised Tree Management Plan. These were known and identifiable activities.

On that basis, Burnaby chose not to participate in the Hearing, notified the Commission, and took no further part. Burnaby takes no position on the Commission’s ruling in relation to those specified activities.

However, the ruling in respect of an indeterminate number of trees, to be cut for indeterminate reasons at indeterminate locations (and at Trans Mountain's sole discretion) into the indefinite future is an improper use of the Commission's powers.

We note that Trans Mountain's Notice of Motion (C14328) did not use the term "Future Tree Clearing". That appears to be the Commission's own creation. The Motion sought to (pg 3):

- “(a) amend Order MO-002-2021 to include the Additional Tree Clearing identified in Trans Mountain's revised Tree Management Plan, dated July 16, 2021 and attached hereto as Appendix 12 (the "Revised TMP") and any additional tree clearing within Burnaby that Trans Mountain may determine to be reasonably necessary for the construction or operation of the Project;
- (b) grant relief pursuant to Certificate Condition 1 from Certificate Condition 2, insofar as it requires Trans Mountain to obtain an Access Permit under section 24(1) of the Access Bylaw to construct the North Road (South) Access;

In this context, the reference at paragraph (a) of additional tree clearing for future operations was surplusage or ancillary and not the focus of the motion.

This is made clear in the following paragraph of the Motion which sought only the following Orders:

- (c) issue an Order, a draft of which is included in Schedule "A" hereto, pursuant to sections 32, 34 and 313(i) of the CER Act declaring that:
 - (i) the constitutional question raised in this 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 **Additional Tree Clearing**;
 - (iii) Section 24(1) of the Access Bylaw is inoperative, invalid and/or does not apply with respect to North Road (South) Access;
 - (iv) Trans Mountain may proceed with the **Additional Tree Clearing** 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 **Additional Tree Clearing**; and
 - (v) Trans Mountain may proceed with the North Road (South) Access pursuant to the terms and conditions of the Certificate and related orders notwithstanding the fact that Burnaby has not issued the Access Permit under section 24(1) of the Access Bylaw for North Road (South) Access.

The definition of the bolded words "Additional Tree Clearing" was set out – by Trans Mountain – as specifically referring to the 86 trees – at paragraph 1 of their Motion:

“Since the issuance of the 2020 Motion Decision and the Original TMP, Trans Mountain has identified an additional 86 trees in Burnaby that need to be cleared for Project construction to proceed (the "Additional Tree Clearing").”

There is no mention of “Future Tree Clearing” in the request for relief at paragraph 3 of their Motion. There is no mention of the additional words “any additional tree clearing within Burnaby that Trans Mountain may determine to be reasonably necessary for the construction or operation of the Project”. The Orders being sought in the hearing extended only to the specific 86 trees defined as “Additional Tree Clearing”.

It was on that basis that Burnaby elected not to participate in the Hearing.

Further, and of significant legal relevance, there was no evidence presented from Trans Mountain in their Motion materials to identify any trees relating to future operations. Part E of their Motion (paragraphs 23 to 27) was the whole of the evidence relied upon by Trans Mountain. It was under the heading “Additional Tree Clearing Required for **Project Construction** in Burnaby” [emphasis added]. This dealt solely with Construction. There was no mention whatsoever of future *operations* or the circumstances under which tree cutting might be sought.

At paragraph 58 of the Motion Trans Mountain summarized their claim in respect of the Tree Bylaw as follows:

Instead, the most efficient and practical solution in these circumstances is for the Commission to amend the Order MO-002-2021 to include the **Additional Tree Clearing**. Trans Mountain is not aware of any objection from Burnaby to this approach.

As noted, Additional Tree Clearing was defined in their Motion as “an additional 86 trees in Burnaby that need to be cleared for Project construction to proceed.”

The statement that Trans Mountain was ‘not aware of any objection from Burnaby to this approach’ clearly related only to the known 86 trees – it could not possibly have related to unlimited future tree cutting.

Burnaby had no notice that the Commission would go beyond these clear limits of the intended Motion. If the Commission decided that it would proceed to determine hypothetical future applications – on no evidence and of unspecified situations – it was incumbent upon it to give notice to Burnaby.

To make findings of fact and law on the absence of notice, and the absence of pleadings clarifying the intended orders indicates jurisdictional error and is extraordinarily unfair to Burnaby.

Further, the absence of any evidence whatsoever relating to future *operational* decisions precludes the Commission from making findings of law or fact. It is entirely hypothetical. To make such findings in the absence of evidence is to act in excess of jurisdiction.

The constitutional principles relied upon by the majority decision in allowing the Additional Tree Cutting is based upon ‘frustration of purpose’ and ‘impairing (not just affecting) a vital part of the federal undertaking’. It is not possible for the Commission to reach those conclusions in

respect of future operational activities that are as yet undefined and that were not the subject of evidence from Trans Mountain.

Burnaby could not have responded to situations that have not been identified or described. The statement in the Letter Decision (at pg 7) that Burnaby 'did not offer any evidence to contradict' Trans Mountain's assertions cannot be made when there was no evidence presented of situations relating to future operations that the decision could apply to (especially where Burnaby was not a participant). There was simply no evidence offered of specific applications to contradict.

In the absence of sufficient notice or evidence of operational situations that would trigger the constitutional principles, Burnaby could not respond, nor can decisions be made.

Finally, to make an order that allows Trans Mountain itself, on its own initiative, to 'determine' what may be reasonably necessary -- in its future opinion -- is an abdication of the Commission's jurisdiction and an unlawful delegation of the power to determine that belongs solely to the Commission.

Burnaby asks that you reconsider the Commission order and reasons, and clarify that future unspecified operations were not properly within the matter to be determined, and that such matters should be left for future applications if necessary, and upon proper notice and an opportunity to be heard.

Yours truly,

RATCLIFF & COMPANY LLP



GREGORY J. MCDADE, Q.C.

Barrister and Solicitor*

GJM:kdk

*Gregory J. McDade Law Corporation