

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

**NOTICE OF MOTION AND CONSTITUTIONAL QUESTION
OF TRANS MOUNTAIN**

December 2, 2021

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

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I. INTRODUCTION AND RELIEF SOUGHT

1. Trans Mountain brings this Motion in response to the City of Burnaby (“**Burnaby**”) continuing to use its bylaws to delay the Project and encroach on the constitutional powers of the federal government. This Motion follows the series of orders made by the Commission and its predecessor, the National Energy Board (“**NEB**” or “**Board**”), which relieved Trans Mountain from compliance with Burnaby bylaws in such circumstances.
2. The Project as previously approved includes work at the sites of the Burnaby Terminal and the Westridge Marine Terminal (“**WMT**”) in Burnaby (“**Terminal Work**”). The Terminal Work requires permits and occupancy certificates under Burnaby Bylaw No. 13658, *Burnaby Building Bylaw 2016* (“**Building Bylaw**”), as well as and permits under Burnaby Bylaw No. 6494, *Burnaby Electrical Bylaw 1974* (“**Electrical Bylaw**”) and Burnaby Bylaw No. 11148, *Burnaby Plumbing Bylaw, 2000* (“**Plumbing Bylaw**”). These bylaws are referred to collectively as the “**Bylaws**”, and permits or occupancy certificates required under them for the Terminal Work are referred to collectively as the “**Permits**”.
3. Burnaby has subjected Trans Mountain to a process for obtaining the Permits that has been unreasonable, resulted in unreasonable delays, and frustrated Trans Mountain’s ability to proceed with the Project which was found to be in the Canadian public interest. Burnaby has subjected Trans Mountain to this process despite the NEB’s previous order to allow the Terminal Work to proceed.¹ Burnaby’s process frustrates a federal purpose and seriously impairs a core competence of Parliament. Accordingly, Trans Mountain requests that the Commission:
 - (a) grant relief pursuant to Certificate Condition 1 from Certificate Condition 2, insofar as it requires Trans Mountain to obtain the Permits;
 - (b) issue an Order,² pursuant to sections 32, 34 and 313(i) of the CER Act, that:
 - (i) the constitutional question raised in this Motion is answered in the affirmative;
 - (ii) Sections 4, 7, 9, 16 and 22 of the Building Bylaw are inoperative, invalid and/or inapplicable with respect to the Terminal Work;
 - (iii) Section 8 of the Plumbing Bylaw is inoperative, invalid and/or inapplicable with respect to the Terminal Work;
 - (iv) Section 19 of the Electrical Bylaw is inoperative, invalid and/or inapplicable with respect to the Terminal Work; and

¹ Order MO-057-2017 ([A88474](#)).

² A draft of the requested Order is included in Schedule “A”.

- (v) Trans Mountain may proceed with the Terminal Work pursuant to the terms and conditions of the Certificate and related orders, notwithstanding the fact that Burnaby has not issued the Permits; and
- (c) adjudicate this Motion expeditiously and in accordance with the generic process set down by the NEB in Appendix 1 of its January 18, 2018 process decision (“**Process Order**”) [[A89357](#)].³

II. NOTICE OF CONSTITUTIONAL QUESTION

- 4. Take notice that this Motion raises a constitutional question regarding the applicability, validity, and operability of the Bylaws.
- 5. Trans Mountain seeks a determination from the Commission, based on the facts before it, that the requirement for Trans Mountain to acquire permits or occupancy certificates under the Building Bylaw, Plumbing Bylaw and Electrical Bylaw for the Terminal Work is inapplicable, invalid, or inoperative under the doctrines of interjurisdictional immunity and/or federal paramountcy.

III. SUPPORTING MATERIALS

- 6. Trans Mountain files with and in support of this Motion:
 - (a) a draft of the requested Order included in Schedule “A”;
 - (b) the Affidavit of Dean Palin, affirmed November 26, 2021 (“**Palin Affidavit**”);
 - (c) the Affidavit of Osama Moin, affirmed November 26, 2021, including Exhibits 1-10 attached to it (“**Moin Affidavit**”);
 - (d) the Affidavit of Len Garis, affirmed November 26, 2021 (“**Garis Affidavit**”); and
 - (e) a copy of the Process Order attached as Appendix 1.

IV. STATEMENT OF FACTS

A. Certificate and Relevant Conditions

- 7. The Governor in Council approved the Project, which led to the issuance of the Certificate to Trans Mountain. Trans Mountain also holds related orders for the Project.⁴
- 8. Certificate Condition 2 requires Trans Mountain to implement all of the commitments it made in the Project application or to which it otherwise committed on the records of the

³ The Process Order set down a generic process for adjudicating motions seeking relief from Certificate Condition 2 with respect to provincial or municipal permitting requirements.

⁴ Palin Affidavit, paras 13, 20-21.

OH-001-2014 and MH-052-2018 proceedings. One such commitment was to “apply for, or seek variance from, all permits and authorizations that are required by law.”⁵

9. Condition 1 requires Trans Mountain to comply with all conditions unless the NEB (now, the Commission) otherwise directs.
10. As the holder of the Certificate for the Project, Trans Mountain has all of the powers set out in section 313 of the CER Act, including the power to do all acts necessary for construction of the Project.

B. Previous Applications of Interjurisdictional Immunity and Federal Paramountcy to Burnaby Bylaw Provisions

11. For over 7 years, Burnaby has consistently used approval processes under its bylaws to delay the Project. To proceed with the Project, it has been necessary at each stage for Trans Mountain to seek orders from the NEB or Commission exempting Trans Mountain from Burnaby’s bylaw requirements:
 - (a) In 2014, Trans Mountain sought an order because Burnaby sought to prevent it from conducting surveys and studies relating to pipeline routing, relying on its Parks Regulation Bylaw and its Street and Traffic Bylaw ([A63063](#)). The requested order was granted in the NEB’s Ruling No. 40 ([A63788](#)).
 - (b) In 2017, Trans Mountain sought an order because Burnaby delayed issuing Zoning Bylaw approvals and Tree Bylaw permits required for the Terminal Work ([A87282](#)). The requested order was granted in the NEB’s Reasons for Decision dated January 18, 2018 (“**2017 Motion Decision**”) [[A89360](#)].
 - (c) In 2020, Trans Mountain sought an order because Burnaby delayed issuing Tree Bylaw permits required for other tree clearing in Burnaby ([C10426](#)). The requested order was granted in the Commission’s Reasons for Decision dated February 26, 2021 (“**2020 Motion Decision**”) [[C11674](#)].
 - (d) In August 2021, Trans Mountain sought an order in part because Burnaby delayed issuing Access Bylaw approvals required for an access off a municipal road to support Project construction in Burnaby ([C14328](#)). The requested order was granted in the Commission’s Reasons for Decision dated October 20, 2021 (“**2021 Motion Decision**”) [[C15556](#)].
12. In each case, the NEB or Commission determined that the doctrines of federal paramountcy and/or interjurisdictional immunity rendered the relevant Burnaby bylaw sections inapplicable and/or inoperative. In each case, Trans Mountain was then allowed to proceed without the otherwise-required Burnaby approvals and/or permits.⁶

⁵ This commitment is stated in the NEB’s MH-052-2018 Reconsideration Report of February 2019 (“**Reconsideration Report**”) [[A98021](#)] at 297.

⁶ See Palin Affidavit, paras 46-47, 49-51, 55-62.

C. The Federally Approved Terminal Work

13. The purpose of the Project is to increase the Trans Mountain Pipeline system capacity. Operation of the Project, as designed and approved, cannot occur without the Terminal Work.⁷ The Terminal Work is a necessary component of the Project.
14. The Certificate authorizes the Terminal Work at the Burnaby Terminal and the WMT, which are described in more detail below. The Terminal Work at the Burnaby Terminal is also authorized by:
 - (a) Order XO-T260-003-2017, as amended;
 - (b) Order MO-066-2018, as amended; and
 - (c) Order XO-T260-010-2016, as amended.
15. The Terminal Work at Burnaby Terminal includes: 14 new storage tanks; demolishing one existing tank; new containment areas; access roads; storm-water retention and drainage systems; a valve manifold; booster pumps; an expanded and enhanced fire protection system; four electrical services buildings; one variable frequency drive pump building; and one foam building.⁸
16. The Terminal Work at the WMT consists of dock facilities and foreshore facilities. The foreshore facilities include: an expanded foreshore area; three receiving traps; a valve manifold with interconnecting piping; custody transfer meters; two vapour recovery units; one vapour combustion unit; a nitrogen purge system; one pipeline pressure relief tank; and a fire protection system, including a fire water pump house and a foam building.⁹
17. The designs for the Terminal Work were reviewed and approved by the NEB during its assessment of the Project, and are also the subject of several Certificate condition filings that have either already been approved (in the case of conditions requiring approval prior to construction), or must be approved by the Commission before the Project can commence operations. At all stages of the NEB/Commission process, Burnaby has the ability to participate and provide comments to the NEB/Commission (and, in fact, it has done so throughout the Project's review process).¹⁰
18. The Terminal Work will be conducted in accordance with Environmental Protection Plan ("EPP") including the Facilities ([C06991](#)) the Temporary Construction Lands & Infrastructure EPP ([C05815](#)) and the WMT EPP ([C08265](#)), which were prepared pursuant to Certificate Conditions 78 and 81. The EPPs are comprehensive sets of documents and plans that set out the environmental mitigation measures that will be implemented during

⁷ Palin Affidavit, paras 7-8.

⁸ Palin Affidavit, para 23.

⁹ Palin Affidavit, para 25.

¹⁰ Palin Affidavit, paras 22, 36-42.

pre-construction, construction and post-construction activities to ensure Project effects are minimized to the extent feasible.

D. Relevant Burnaby Bylaws

(i) Zoning Bylaw

19. Burnaby Bylaw No. 4742, *Burnaby Zoning Bylaw*¹¹ (“**Zoning Bylaw**”) is primarily authorized by section 479 of the *Local Government Act*,¹² which is found in Part 14 [Planning and Land Use Management]. Section 479 authorizes a municipal council to, among other things, regulate the use of land, buildings and other structures, and the siting, size and dimensions of buildings and other structures.
20. Subsection 7.3(1) of the Zoning Bylaw requires developers to obtain a Preliminary Plan Approval (“**PPA**”) from the Director of Planning and Building before applying for building permits for specific structures. Subsection 7.3(2) sets out the requirements for most districts, and section 407.2 sets out a more particular list for the applicable Marine District 2 (M7a). Both show that it is PPAs that approve vehicular access:

[7.3(2)] Every application for development shall be accompanied by the following: ... (d) A preliminary plan showing the dimensions of the lot or lots; location, plans, profiles, elevations and height of all buildings and structures including signs, setbacks, parking areas, access, open spaces and landscaping, screen fences, surrounding land uses and such further or additional land use information as the Director of Planning may require.

[407.2](1) Every application for development shall be accompanied by a preliminary plan showing the dimensions of the land and water areas of the lot or lots; location, plans, profiles and elevations, and height of all buildings and structures including signs, setbacks, parking areas, access, open spaces, landscaping and screening; facilities related to the mooring, handling and storage of boats; surrounding land and water uses; details of any proposed reclamation of the water area of the lot or lots, and such further information as the Director of Planning may required [*sic*].

21. Prior to approving a PPA, the Director of Planning and Building incorporates Burnaby’s standards and seeks input from various Burnaby departments, including the Fire Department. Once a development application conforms to the Zoning Bylaw and does not contravene any approved land use or road plan, subsection 7.3(3) requires the Director of Planning and Building to issue the PPA.
22. In 2017, the NEB exempted Trans Mountain from the PPA requirement.¹³ The Zoning Bylaw required Burnaby to resolve the matter of vehicular access in the PPA. Burnaby chose not to promptly process and approve PPAs, forcing Trans Mountain to seek an exemption. In the 2017 Motion Decision that provided that exemption, the NEB concluded

¹¹ Moin Affidavit, Exhibit 5.

¹² RSBC 2015, c 1.

¹³ Palin Affidavit, para 49.

that Burnaby's application review process was not reasonable, citing the following considerations:¹⁴

- (a) the review time was 2 to 3 times longer than Burnaby's original estimate of 6 to 8 weeks for a more complex review;
- (b) the responsibility for the majority of review time was attributable to Burnaby's actions, inactions, and process decisions;
- (c) Burnaby's process made it very difficult for Trans Mountain to understand what the permitting requirements were and how they could be met;
- (d) Burnaby repeatedly denied Trans Mountain's reasonable requests to aid in an efficient processing of the PPA applications;
- (e) the review time was the cause of, or a contributing or exacerbating factor to, Project construction delay, and the prejudice associated with that delay; and
- (f) the overall trend did not indicate that Burnaby was getting closer to issuing the requested approvals; rather, there was no clear indication of an imminent resolution.

(ii) Building Bylaw

- 23. Unlike the PPAs that are approved under the Zoning Bylaw and deal with site access, permits under the Building Bylaw¹⁵ do not apply to extensive development sites or to collections of buildings or structures. Section 2 of the Building Bylaw states that it applies to the design, construction and occupancy of buildings and structures.¹⁶ Section 16 requires a separate permit for "[e]ach building, structure, or part thereof constructed on a site".
- 24. The Building Bylaw is both authorized and limited by the *Community Charter*¹⁷. Subsection 8(3) enables a municipal council to regulate, prohibit and impose requirements in relation to "buildings and other structures", and section 15 enables council to provide for a system of licences, permits, or approvals. Paragraph 8(7)(c) states that the power to regulate buildings and other structures "may not be used to do anything that a council is specifically authorized to do under Part 14 [Planning and Land Use Management] ... of the *Local Government Act*."
- 25. Section 4 of the Building Bylaw requires a permit to undertake any work regulated under the Building Bylaw. Section 9 requires the permit to be obtained "prior to the construction of a building or structure, or part thereof."

¹⁴ Palin Affidavit, para 50.

¹⁵ Moin Affidavit, Exhibit 1.

¹⁶ Building Bylaw, s 2.

¹⁷ SBC 2003, c 26, s 8(3).

26. Subsection 9(2) of the Building Bylaw requires permit applications to:

- (a) be made in the form as prescribed by the Building Inspector;
- (b) be accompanied by the fee for a permit application specified in the Burnaby Planning and Building Fees Bylaw; (BYLAW 13791)
- (c) be signed by the owner or agent, or a signing officer if the owner or agent is a corporation;
- (d) include plans bearing the name and address of the designer of the building or structure;
- (e) state the intended use or uses of the building or structure, or part thereof;
- (f) when required by the Building Inspector, include a minimum of two complete sets of plans conforming to requirements set out in the Building Code, drawn to scale, and include supporting documents for the building, structure, or part thereof, to be constructed and shall indicate the nature and extent of the work or proposed construction;
- (g) be accompanied by the owner's acknowledgement of responsibility and undertaking in the form set out in Schedule "F" signed by the owner, or a signing officer if the owner is a corporation;
- (h) contain other information required by the Building Inspector or the Building Code to establish substantial compliance with this Bylaw, the Building Code and any other applicable enactments relating to the building or structure;

...

27. The Building Bylaw delegates permit approval to the Building Inspector, who must consider the subsection 9(2) application requirements. The Building Inspector may also require the following documentation, per subsection 9(3): a copy of a Land Title Office search of the land made within 30 days; a current posting and topographic survey of the land prepared by a registered land surveyor; or a statutory declaration outlining the purpose of the building or structure.

28. The Building Inspector may refuse a permit in certain limited circumstances, including if required documentation has not been provided or the proposed construction would contravene the *British Columbia Building Code*¹⁸ ("**Building Code**") or a Burnaby bylaw.¹⁹ However, subsection 16(2) sets out when the Building Inspector shall issue a permit:

- (2) The Building Inspector shall issue the permit for which the application is made when:

¹⁸ Established by the British Columbia Building Code Order, Ministerial Order No. BA 2018 1, as amended.

¹⁹ Building Bylaw, ss 9(4), 15.

- (a) a completed application in compliance with this Bylaw, including all required supporting documentation, has been submitted;
- (b) the owner or the owner's agent has his paid all of the required fees;
- (c) the owner or the owner's agent has paid all charges and met all applicable requirements imposed by any other applicable bylaw;
- (d) the owner has deposited a cash damage deposit in the sum specified in the Burnaby Planning and Building Fees Bylaw to guarantee payment to the City for all damage to City property unless the deposit is reduced or waived by the Building Inspector in his or her sole discretion; (BYLAW 13791)
- (e) the owner has paid the public works or property damage inspection fee specified in the Burnaby Planning and Building Fees Bylaw; (BYLAW 13791)
- (f) the proposed work set out in the application conforms with the Building Code, this Bylaw and all other applicable bylaws and enactments; and
- (g) no enactment or covenant or agreement in favour of the City authorizes or requires the permit to be withheld.

29. Finally, section 22 of the Building Bylaw requires an occupancy certificate from the Building Inspector before a building or structure, or part thereof may be occupied, and sets out the application requirements as follows:

(2) An occupancy certificate shall only be issued when:

- (a) all letters of assurance have been submitted when required under the Building Code or this Bylaw; and
- (b) all aspects of the work requiring inspection and an acceptance pursuant to section 21 have both been inspected and accepted.

(3) The Building Inspector may withhold an occupancy certificate until the building, structure or part thereof complies with this Bylaw, the Building Code and any other applicable bylaws or enactments.

(iii) *Subtrade Permit Bylaws*

30. The Bylaws also require separate subtrade permits for new buildings and structures:

- (a) Section 8 of the Plumbing Bylaw²⁰ requires that a permit be obtained “prior to the construction, extension, alteration, renewal, repair or maintenance of a plumbing system, individual residential hydronic heating system or fire protection system.”

²⁰ Moin Affidavit, Exhibit 2.

- (b) Section 9 of the Electrical Bylaw²¹ requires that a permit be obtained “before any person shall install, construct, alter or repair any electrical installation or electrical work in the municipality.”

(iv) Fire Services Bylaw

31. Burnaby Bylaw No. 11860, *Burnaby Fire Services Bylaw, 2004*²² (“**Fire Services Bylaw**”) sets out fire access route standards. These standards are not relevant to the building permits for individual buildings and structures, or to subtrade permits. Instead, fire access route standards are applied by the Director of Planning and Building in the PPAs that approve development sites’ vehicular access.

32. The Fire Services Bylaw is primarily authorized by the *Fire Services Act*.²³ However, the *Building Act*²⁴ authorizes section 49 of the Fire Services Bylaw, which sets out the fire lane access requirements. Subsection 5(3) of the *Building Act* provides that the Building Code applies without municipal alteration. Subsection 5(4) provides an exemption that allows a municipality to alter provisions for “unrestricted matters”. Section 2(b) of the *Building Act General Regulation*²⁵ makes the design of access routes for fire department vehicles an unrestricted matter:

(b) the following matters as they relate to the design of access routes for fire department vehicles:

(i) the width of an access route;

(ii) the centreline radius of an access route;

...

33. Section 49 of the Fire Services Bylaw provides substitute standards for those set out in the Building Code, including a 6 metre road width and a 12 metre centre-line radius:

FIRE LANES

49. In addition to any requirements under any other statute or regulation, fire lanes shall:

...

(b) be not less than 7.3 m (24 ft.) wide;

(c) provide for a turning radius of not less than 13 m (42.65 ft.);

²¹ Moin Affidavit, Exhibit 3.

²² Moin Affidavit, Exhibit 4.

²³ RSBC 1996, c 144.

²⁴ SBC 2015, c 2.

²⁵ BC Reg 131/2016.

34. The Fire Services Bylaw provides the Fire Chief no jurisdiction over building and structure permit approvals. The Fire Chief is involved in such permits only where the Building Inspector calls on the Fire Chief to inspect and confirm bylaw compliance following the disconnection of utilities in a building due to a hazardous situation.²⁶

E. Burnaby's Unreasonable Process for Obtaining the Permits

35. Between September 2019 and April 2021, Trans Mountain applied to Burnaby for numerous Permits for buildings and structures at the Burnaby Terminal and the WMT (collectively, the “**Permit Applications**”). A small number of additional permit applications remain to be submitted.²⁷
36. To Trans Mountain's knowledge, it has satisfied all technical requirements under the Bylaws for the Permit Applications.²⁸
37. Yet Burnaby will not issue the Permits applied for. Burnaby has, for months, been seeking a Fire Truck Access Plan (“**FTAP**”) for the sites prior to issuance of these building-specific Permits.²⁹ Access is a matter that would have been addressed as part of the PPAs had Burnaby chosen to approve PPAs for the sites – as that access was within the approving authority of the Director of Planning and Building.³⁰
38. Trans Mountain has sought to satisfy Burnaby. It has provided an FTAP, and repeatedly amended it per Burnaby's requests. It has communicated that some of Burnaby's requests cannot be implemented at the WMT and Burnaby Terminal due to site constraints, including grading and pipe location.³¹
39. Burnaby remains steadfast, stating that the FTAPs – which the Director of Planning and Building no longer has the power to approve – are deficient, including regarding road width and turning radii.³² This is despite Trans Mountain's FTAPs being substantially compliant with the Building Code and allowing access for Burnaby's largest fire vehicle.³³
40. Burnaby's rejection of Trans Mountain's FTAPs, without assessing the details of the Terminal Work or discussing the plans with Trans Mountain,³⁴ is patently unreasonable.

²⁶ Fire Services Bylaw, s 26(1)(b).

²⁷ Moin Affidavit, para 10.

²⁸ Moin Affidavit, paras 15, 20, 23, 28.

²⁹ Moin Affidavit, paras 14-15, Exhibit 7.

³⁰ Zoning Bylaw, s 7.3(2).

³¹ Moin Affidavit, paras 15, 20, 23, Exhibit 7.

³² Moin Affidavit, para 29, Exhibit 9.

³³ Garis Affidavit, paras 8-10.

³⁴ Moin Affidavit, paras 23-26, 29-30.

41. Burnaby has repeatedly indicated to Trans Mountain representatives that the Building Inspector will not issue any permits without first receiving sign-off from the Fire Prevention Office (“FPO”).³⁵ The Bylaws provide the Fire Chief no role regarding the approval of Permits, nor do they provide the FPO such a role. While Trans Mountain has made numerous requests to meet, the FPO has become almost completely non-responsive to Trans Mountain’s requests to discuss the FPO’s outstanding concerns and site constraints at the Burnaby Terminal that prevent strict technical adherence to the FPO’s requirements for new structures.³⁶ The FPO declined Trans Mountain’s invitation to a site visit to the Burnaby Terminal to appreciate the site constraints.³⁷
42. Rather than making permitting decisions based on the factors enumerated in the Building Bylaw, for many months the Building Inspector has improperly delegated its decision-making authority to the FPO. Burnaby is thus delaying issuance of permits for the Terminal Work based on fire safety concerns, despite:
 - (a) fire safety concerns related to road access being a matter beyond the scope of these permit applications;³⁸
 - (b) Burnaby not being responsible for responding to fires at the Burnaby Terminal or WMT;³⁹
 - (c) Trans Mountain’s FTAPs being substantially compliant with the Building Code and allowing access for Burnaby’s largest fire vehicle;⁴⁰ and
 - (d) the NEB having considered fire safety concerns when recommending the Project for approval and imposing conditions (in response to Burnaby’s concerns) regarding Trans Mountain’s development of appropriate firefighting capacity, facilities and equipment to ensure a safe, timely, and effective response at the Burnaby Terminal and WMT.⁴¹
43. In failing to issue the applicable permits, the Building Inspector has failed to follow the mandatory language of the Building Bylaw: upon fulfilling the listed requirements, the “Building Inspector shall issue the permit”.⁴² Trans Mountain has fulfilled the permit requirements. Therefore, the Building Inspector is obligated to issue the permits.

³⁵ Moin Affidavit, para 21, Exhibit 7.

³⁶ Moin Affidavit, paras 26-30.

³⁷ Moin Affidavit, para 24.

³⁸ Moin Affidavit, para 15.

³⁹ Palin Affidavit, para 30.

⁴⁰ Garis Affidavit, paras 8-10.

⁴¹ Reconsideration Report at 208.

⁴² Building Bylaw, s 16(2).

F. Burnaby's Unreasonable Delay in Issuing Permits

44. Burnaby typically issues a building permit within 6-8 weeks of application. However, in this case, Burnaby has not issued any of the Permits to Trans Mountain, notwithstanding that these applications were submitted between 7 and 13 months ago (i.e., roughly 30 to 56 weeks ago, over four times longer than Burnaby's typical processing times).⁴³
45. Given the FPO's and Burnaby's refusal to meaningfully engage with Trans Mountain in relation to the outstanding Permit Applications, and the FPO's unresponsiveness to subsequent meeting requests, there is no indication that Burnaby will issue the Permits in the foreseeable future.⁴⁴

G. Urgency of Request

46. The Project construction schedules at the Burnaby Terminal and WMT have been repeatedly adjusted for over a year due to accommodate Burnaby's ongoing refusal to issue permits. Further permitting delays for the Terminal Work will imperil the Project construction schedule.⁴⁵
47. To maintain the Project construction schedule and achieve the planned Project in-service date of December 2022, Trans Mountain requires the Permits, or relief from the Commission, no later than January 17, 2022.⁴⁶

H. Generic Process for Motions Requesting Relief from Municipal Permitting Requirements

48. In response to Burnaby's earlier use of its bylaws to delay the Project, Trans Mountain filed a motion in 2017 requesting that the NEB establish a generic process to adjudicate motions seeking relief from Certificate Condition 2 in relation to provincial or municipal laws ([A87760](#)).
49. In its decision on that motion, the NEB issued the Process Order. Appendix 1 of the Process Order establishes the following generic process:
- (a) Trans Mountain files and serves a notice of motion and constitutional question, including supporting evidence and a copy of the Process Order;
 - (b) the respondent and attorneys general may file and serve a response to the motion within fourteen (14) calendar days after the motion is filed;

⁴³ Moin Affidavit, paras 12-13.

⁴⁴ Moin Affidavit, para 17.

⁴⁵ Moin Affidavit, para 31.

⁴⁶ Moin Affidavit, para 33.

- (c) Trans Mountain may file and serve a reply within four (4) calendar days after the filing of the response(s) from the attorney(s) general and/or the permitting agency;
- (d) all participants may file and serve written argument on the constitutional question raised within three (3) calendar days after Trans Mountain's reply is filed; and
- (e) the NEB (now, the Commission) will issue a decision within one (1) to fourteen (14) calendar days.

V. APPLICABLE LEGAL PRINCIPLES

A. The Commission has the Authority to Decide the Constitutional Question and Grant the Relief Sought

50. It is settled law that the Commission has the authority to decide the constitutional question and grant the constitutional relief sought in this Motion. In the recent 2021 Motion Decision, the Commission summarized prior decisions:

As described in Section C above, the NEB concluded in Ruling No. 40 that it (and, by extension, the Commission) has the legal authority to declare specific municipal bylaws inapplicable, invalid, or inoperative. The NEB and the Commission reached the same conclusion in their [2017 Motion] and [2020 Motion] Decisions. The Federal Court of Appeal denied leave to appeal both Ruling No. 40 and the [2017 Motion] Decision. Ruling No. 40 was upheld by the BC Court of Appeal.⁴⁷

51. The Commission's authority to grant relief from Certificate Condition 2 and the requirement to obtain permits under Burnaby bylaws is also settled. In the 2017 Motion Decision (leave to appeal to the Federal Court of Appeal denied⁴⁸), the NEB granted such relief, pursuant to Certificate Condition 1, noting that intent of its phrase "unless the NEB otherwise directs" is "to provide the Board [now, the Commission] with some flexibility to vary conditions in a timely manner, if needed, without requiring [Governor in Council] approval." The NEB and Commission have now granted relief from Burnaby bylaws four times – twice in 2021 alone.

B. Interjurisdictional Immunity as Applied to the Project

52. In the 2017 Motion Decision, the NEB confirmed that "[u]nder 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."⁴⁹

⁴⁷ For further discussion of these authorities, refer to the motion filed by Trans Mountain in August 2021 ([C14328](#)) at 14-15.

⁴⁸ Palin Affidavit, para 53.

⁴⁹ 2017 Motion Decision ([A89360](#)) at 24, cited in the 2021 Motion Decision ([C15556](#)) at 9.

53. The following two-part test must be satisfied for the doctrine of interjurisdictional immunity to apply:
- (a) First, it must be determined if the provincial law trenches on the protected core of a federal competence; and
 - (b) If it does, 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.⁵⁰
54. The protected "core" of federal jurisdiction over interprovincial undertakings includes the matters of *when and where* the Project can be carried out, and its orderly development, which are vital to the Project.⁵¹
55. In the 2017 Motion Decision, the NEB found that a core competence of Parliament was impaired by Burnaby's unreasonable process and delay in considering applications for certain permits and approvals for the Terminal Work. The effect on Project timing (a core competence of Parliament) caused by the unreasonable amount of time it took Burnaby to process applications under the Zoning Bylaw was sufficiently serious to invoke interjurisdictional immunity because it was "the cause of, or a contributing or exacerbating factor to, construction delays", which had a significant and direct implication on Project timing. NEB also noted that there was no indication of an imminent resolution, and that "[u]nreasonable or indefinite delays" to the Project's timing or orderly development could affect Parliament's core competence over whether the Project is carried out at all.⁵²

C. Federal Paramountcy as Applied to the Project

56. In NEB Ruling No. 40 (leave to appeal to the Federal Court of Appeal denied), the NEB summarized the doctrine of federal paramountcy as follows:

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 the 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.⁵³

57. In the 2017 Motion Decision, the NEB found that the application of the impugned bylaw provisions frustrated a federal purpose because Burnaby's unreasonable process and delay

⁵⁰ 2017 Motion Decision ([A89360](#)) at 24, cited in the 2021 Motion Decision ([C15556](#)) at 9.

⁵¹ 2017 Motion Decision ([A89360](#)) at 25, cited in the 2021 Motion Decision ([C15556](#)) at 9.

⁵² 2017 Motion Decision ([A89360](#)) at 25. See also 2020 Motion Decision ([C11674](#)) at 10.

⁵³ Ruling No. 40 ([A63788](#)) at 11, leave to appeal to Fed CA denied, cited in the 2021 Motion Decision ([C15556](#)) at 9.

was frustrating Trans Mountain's exercise of its Board authorizations and its statutory powers. Accordingly, the NEB held that the doctrine of paramountcy applied such as to render section 7.3 of the Zoning Bylaw and section 3 of the Tree Bylaw inoperative to the extent that they prevented the Terminal Work. In making that determination, the NEB found that:

... Burnaby's processes to review the PPA applications and its consideration of associated Tree Cutting Permits, including the overall time elapsed, was not reasonable. This includes the fact that the review time is the cause of, or is a significant contributing or exacerbating factor to, delay to Terminal Work construction, and the prejudice associated with that delay. There is no indication of an imminent resolution... This is the case regardless of the nature of Burnaby's motives or intentions in applying its bylaws...⁵⁴

VI. APPLICATION OF LEGAL PRINCIPLES

A. Burnaby's Unreasonable Permitting Process has Impaired a Core Competence of Parliament

58. The facts of this case establish that Burnaby's unreasonable process and delay in considering the Permit Applications has impaired a core competence of Parliament. 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, Burnaby's unreasonable process and delay in considering the Permit Applications trenches into a core competence of Parliament and vital part of a federal undertaking.

59. Burnaby's unreasonable process and delay is the cause of, or a contributing or exacerbating factor to, construction delays, which has had a significant and direct implication on Project timing. The delay already incurred, and ongoing with no clear end in sight,⁵⁵ is sufficiently serious in the circumstances to invoke the doctrine of interjurisdictional immunity, rendering sections 4, 7, 9, 16 and 22 of the Building Bylaw, section 8 of the Plumbing Bylaw and section 19 of the Electrical Bylaw inoperable to the extent that they impair Trans Mountain's ability to perform the Terminal Work.

B. Burnaby's Unreasonable Permitting Process has Frustrated a Federal Purpose

60. The facts of this case establish that Burnaby's unreasonable process and delay in considering the Permit Applications has also frustrated a federal purpose:

- (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;
- (b) It is uncontested that the Terminal Work is a necessary component of the approved Project;

⁵⁴ 2017 Motion Decision ([A89360](#)) at 24.

⁵⁵ See Moin Affidavit, paras 12-17.

- (c) Burnaby's review time has been more than four times longer than its typical processing times;
 - (d) The majority of the review time is attributable to Burnaby's actions, inactions, and process decisions;
 - (e) Burnaby's process has made it difficult for Trans Mountain to understand how it could meet the permitting requirements;
 - (f) Burnaby has not been responsive to Trans Mountain's reasonable requests to meet and try to resolve the matter;
 - (g) The review time is the cause of, or a contributing or exacerbating factor to, construction delay, and the prejudice associated with that delay; and
 - (h) There is no indication of an imminent resolution.
61. Based on the above, Burnaby's unreasonable process and delay 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 sections 4, 7, 9, 16 and 22 of the Building Bylaw, section 8 of the Plumbing Bylaw and section 19 of the Electrical Bylaw inoperable, invalid and/or inapplicable to the extent that they frustrate Trans Mountain's ability to proceed with the Terminal Work.

VII. PROCESS TO CONSIDER THE MOTION

A. Timely Relief is Needed

62. Trans Mountain requires timely relief to maintain the overall Project construction schedule. All construction must be completed by September 30, 2022 to achieve the planned in-service date of December 31, 2022, making it crucial for the Terminal Work to proceed by mid-January 2022. The construction schedule has already been subjected to adjustments for over a year to accommodate Burnaby's failure to issue permits. Further delays could lead to the Terminal Work becoming critical path items for the Project schedule.⁵⁶
63. Project schedule delays would bring further direct financial harm to Trans Mountain and third parties. The potential harm caused by delays is enormous. To Trans Mountain alone, each month of delay to the Project in-service date results in lost earnings of approximately \$100 million and millions of dollars in excess capital costs.⁵⁷ As the Project has already been determined to be in the public interest, there is no justification for further harm as a result of additional unnecessary and unreasonable permitting delays.

⁵⁶ Moin Affidavit, paras 31-32.

⁵⁷ Palin Affidavit, para 64.

B. The Generic Process for such Motions should be Applied

64. Trans Mountain requests that the Commission apply the Generic Process. In the Process Order, the NEB decided that it was in the public interest to set down the generic process “to hear any future motions related to Certificate Condition 2, insofar as it relates to provincial and municipal permitting issues.”⁵⁸ The NEB held that this was in line with its (now, the Commission’s) requirement to process applications “as expeditiously as the circumstances and considerations of fairness permit”, and that the generic process is not “too expedited.”⁵⁹
65. The NEB also found that the generic process would provide a measure of certainty regarding the regulatory tools available to resolve future permitting disputes or disagreements.
66. In this case, Trans Mountain has again been unable to procure permits from Burnaby despite having satisfied bylaw requirements, leading to this dispute. For months, Trans Mountain has worked in good faith with Burnaby regarding the Permit Applications and has attempted to do so collaboratively, to no avail. Trans Mountain’s only remaining recourse is to seek relief from the Commission, via a motion, which the Generic Process was set down to hear.
67. For these reasons, and because Trans Mountain requests constitutional relief, Trans Mountain submits that the Generic Process is the appropriate process for adjudicating this Motion.

VIII. CONCLUSION

68. Trans Mountain has the right to construct the Project, including the necessary Terminal Work, pursuant to section 313 of the CER Act and existing Project approvals, subject to compliance with certain requirements. One of those requirements is to obtain permits under Burnaby bylaws. Trans Mountain has sought to obtain the Permits in good faith, as reflected in its history of engagement with Burnaby on these matters.⁶⁰ On four occasions, the NEB and Commission have found that Burnaby’s failure to issue permits triggers the doctrines of interjurisdictional immunity and paramountcy, and have rendered its bylaw provisions inoperative and inapplicable to the Project. Burnaby’s failure to issue the permits now required for the Terminal Work is similarly unconstitutional.
69. Burnaby has ignored the direction from the NEB and Commission, and the courts, and is again using its bylaws to delay Project construction. This situation requires the Commission’s prompt intervention, and it is in the public interest to grant the relief sought.
70. Concerns associated with constructing and operating the Project were considered in the lengthy regulatory reviews that led to its approval and subsequent compliance filing

⁵⁸ Process Order ([A89357](#)) at 8 [emphasis added].

⁵⁹ Process Order ([A89357](#)) at 8-9.

⁶⁰ See Moin Affidavit, paras 16-32 and Exhibit 7.

proceedings.⁶¹ Trans Mountain is bound by a multitude of conditions and commitments intended to address these concerns and subject to Commission oversight, including the requirement for it to file updated fire safety plans, information about appropriate firefighting capacity and a third-party report confirming the adequacy of fire protection and firefighting systems, for both the Burnaby Terminal and the WMT.⁶² Based on these conditions and commitments, the Project has been found to be in the public interest and there is no justification for further permitting delays.

71. Trans Mountain requests that the Commission engage the Generic Process set out in the Process Order immediately and grant the relief sought at paragraph 3 of this Motion.
72. All of which is respectfully submitted this 2nd day of December, 2021.



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⁶¹ Palin Affidavit, paras 28, 39-40.

⁶² Palin Affidavit, para 36.

SCHEDULE “A”

[DRAFT] TRANS MOUNTAIN PIPELINE ULC AND THE CITY OF BURNABY

ORDER _____

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. (collectively, Trans Mountain), in respect of the Trans Mountain Expansion Project (Project) and related orders;

AND IN THE MATTER OF a 2 December 2021 notice of motion and notice of constitutional question (Motion) filed by Trans Mountain, which requests relief pursuant to sections 32 and 34 and paragraph 313(i) of the CER Act, and pursuant to Condition 1 of the Certificate.

BEFORE the Commission on _____, 2021.

WHEREAS Trans Mountain filed the Motion on 2 December 2021;

AND WHEREAS the Commission has considered the Motion;

AND WHEREAS the Commission has decided to grant the relief sought in Paragraph 3 of the Motion, as more particularly set out in this Order;

IT IS ORDERED THAT:

1. Pursuant to Condition 1 of the Certificate, Trans Mountain is relieved of the requirement of Condition 2 of the Certificate, insofar as it requires Trans Mountain to obtain permits or occupancy certificates under Sections 4, 7, 9, 16 or 22 of Bylaw No. 13658 (Building Bylaw), Section 8 of Bylaw No. 11148 (Plumbing Bylaw) and Section 19 of Bylaw No. 6494 (Electrical Bylaw) for buildings and structures at the Burnaby Terminal and Westridge Marine Terminal.
2. Pursuant sections 32 and 34 and paragraph 313(i) of the CER Act:
 - a) The constitutional question raised in the Motion is answered in the affirmative;
 - b) Sections 4, 7, 9, 16 and 22 of the Building Bylaw, Section 8 of the Plumbing Bylaw, and Section 19 of the Electrical Bylaw do not apply

to buildings and structures at the Burnaby Terminal and Westridge Marine Terminal;

- c) Trans Mountain may proceed with work at the sites of the Burnaby Terminal and the Westridge Marine Terminal in the absence of the City of Burnaby having issued permits or occupancy certificates under Sections 4, 7, 9, 16 or 22 of the Building Bylaw, Section 8 of the Plumbing Bylaw, or Section 19 of the Electrical Bylaw. The foregoing does not relieve Trans Mountain of any other applicable legal and regulatory requirements; and
- d) For greater certainty, the above relief does not absolve Trans Mountain from compliance with Condition 2 insofar as that condition requires compliance with other relevant City of Burnaby bylaws.

COMMISSION OF THE CANADA ENERGY REGULATOR

Secretary of the Commission