

December 23, 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-005-2021
Response to Notice of Motion and Constitutional Question dated 2 December 2021**

OVERVIEW

We are pleased to submit this Response on behalf of the City of Burnaby to the Notice of Motion filed by Trans Mountain on December 2, 2021 seeking a Constitutional Declaration in respect of the City of Burnaby's Building, Electrical and Plumbing Bylaws [C16404-2]

This Response includes the evidence filed herein by Burnaby:

- a. Affidavit of Peter Kushnir (Deputy Chief Building Inspector)
- b. Affidavit of Chris Bowcock (Fire Chief)

The City is also filing today its Responses to the Commission's IR#1, which constitute part of the City's evidence on the Motion.

This is the initial Response to the Motion - pursuant to the Process Letter [C16618-1] the City intends to file its fuller Argument on the Motion on Jan 12, 2022.

RESPONSE

1. The City is prepared to grant the subject Building Permits (and Plumbing and Electrical Permits) if TM complies with the Bylaws and supplies the proper information. The sole

remaining issue of significance is compliance with the Fire Services Bylaw access and FTAP requirements.

2. Burnaby recognizes and accepts that the Terminals have federal approval, and that it may not reject permits if that has the effect of fundamentally impairing the project or there is an impossibility of compliance.
3. However, this Constitutional issue does not arise here. The City's bylaws are reasonable, constitutionally valid, and there is no frustration or impossibility of compliance.
4. It is Trans Mountain's failure to follow the *Fire Services Bylaw* and *Building Bylaw* that has prevented the issuance of permits, and it is Trans Mountain resistance to following these City obligations that has led to any time delays.
5. The Commission, unless it is satisfied that there is impossibility of compliance, has no role in re-examining the merits of the City bylaw or decisions. The Commission is not a municipal regulator.
6. This is also a matter of important public safety. The Commission should be cautious in exercising a constitutional prerogative or in over-ruling the very Fire Department that will have to respond to any public emergency.

a) Non -Compliance with the Fire Services Bylaw Requirements

7. The *Fire Services Bylaw*, in s. 49, requires:
 49. In addition to any requirements under any other statute or regulation, fire lanes shall:
 - (a) be posted with visible signage indicating that they are fire lanes;
 - (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.);
 - (d) be capable of supporting a vehicle of 36,288 kg (80,000 lbs.) G.V.W.
8. Further, s.9(a) of the *Fire Services Bylaw* provides:

“The Fire Chief may:

 - (a) take whatever measures or actions the Fire Chief considers appropriate or necessary for fire protection in the City, including the enforcement of the provisions of this Bylaw and the exercise of the powers and authority provided under the Fire Services Act;”

Fire Protection is a defined term as follows:

“fire protection” means all aspects of fire safety including, without limitation, fire prevention, fire suppression, fire safety planning, fire investigation, public education, the training and development of members, and providing information and advice to other organizations and to the public on matters related to fire;”

9. Pursuant to s. 9, the Fire Chief has issued the “Fire Department New Construction Requirements Information” document attached as Exhibit A to the Bowcock Affidavit (the “**FTAP Requirement**”).
10. The Building Bylaw (s. 9(2)(h)) requires the building inspector to be satisfied that the permit application contains “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”.
11. The Building Inspector has adopted the FTAP Requirement as “other information” required to establish substantial compliance with the Fire Services Act as “an applicable enactment”, which gives the FTAP Requirement the force of law under both the *Fire Services Bylaw* and the *Building Bylaw*.
12. The FTAP Requirement document creates an additional binding standard that must be followed and must guide the Building inspector in assessing the Building Permit, in addition to s. 49 of the *Fire Services Bylaw*.
13. The simple fact is that building permit applications submitted by Trans Mountain did not comply with s. 49, and did not comply with the FTAP Requirement.
14. The Building Inspector had no discretion to ignore the *Fire Services Bylaw* in administering the *Building Bylaw*, and no discretion to ignore the FTAP Requirement. This is not a question of delay or bad faith, but rather legal compliance.
15. The Building Inspector is obligated to take the provisions under the FTAP Requirement into account in the assessment of the Building Permit. Contrary to TM’s motion, this is not a decision “delegated” to the Fire Department; it is the Building Inspector’s own authority (although it is assisted by the Fire Departments review of any FTAP). Mr. Kushnir’s affidavit clarifies that: “Fire access is a Building Code compliance issue (though Burnaby’s Fire Services By-law establishes the relevant standard), and it is standard practice for the Building Department to review the FTAP as part of building permit application processing.”¹

¹ Affidavit of Peter Kushnir, para 16

16. The City's Planning processes under the *Fire Services Bylaw* and *Building Bylaw* are mandatory – the City is not exercising any discretion against Trans Mountain or singling it out for special treatment. It is entirely consistent with the City's bylaws and established practice and policy under its processes that proper access and a compliant FTAP is required.
17. The Building Inspector here properly considered the failure to file a compliant FTAP and the failure to meet s. 49 Fire Lane access as a requirement that prevented him from approving the permits, until compliance was established.
18. The *Fire Services Bylaw* requires suitable access for fire fighters and equipment. Even if it were a discretionary matter – but it is not -- the most qualified persons best placed to assess that requirement would be the Burnaby Fire Department at the Fire Protection Office.
19. The s. 49 Fire Lane access and the FTAP Requirement are the minimum standards applicable throughout Burnaby on less dangerous projects. It would not be appropriate for the CER to use a constitutional argument to reduce safety standards for this project.

The PPA exemption does not affect the Building Permit obligations

20. In its Motion, the applicant misunderstands the purpose of a Preliminary Planning Approval (“PPA”), and therefore misunderstands the impact of the 2018 NEB decision. The PPA is a Burnaby process that is not designed as an independent bylaw approval, but rather a “Preliminary” assessment of the issues that will arise on a major application where multiple bylaws apply and multiple permits will be required. It is designed to identify issues early, for the benefit of the applicant, but in the absence of a PPA those obligations are dealt with in the permitting process.
21. In *exempting* the company from the PPA process, the Board did not provide the actual PPA approval, nor did the Board provide the approvals from the downstream bylaws and departments. The NEB decision explicitly provided that approvals under the actual bylaws would continue to be necessary.
22. The obligation to submit a PPA before a building permit arises under Zoning Bylaw 7.3. However, even under a rezoning application, the PPA itself is clear in continuing to require all other approvals, and in particular building permits:

“7.3 (4) The approval of plans or drawings shall not in any way relieve the applicant from full responsibility for the carrying out of the development in accordance with the provisions of this Bylaw.

(5) The granting of preliminary plan approval shall not absolve the applicant from compliance with all relevant municipal Bylaws.”

b) Constitutional Matter does not arise here

23. What is at issue here is not an outright refusal by the City to issue building and other permits, but rather a disagreement as to:

- a) Whether the *Fire Services Bylaw* and the requirement for a compliant Fire Truck Access Plan (FTAP) is relevant to the City's processes leading up to grants of Building Permits (and associated electrical and plumbing permits) -- This is a *legal disagreement* of administrative law or municipal law, and not one requiring a constitutional remedy.
- b) Whether the FTAP submitted by Trans Mountain complies with the Fire Department's requirements. This would be a *disagreement of fact*. The City's Fire Department says it does not, Trans Mountain contends that it does so 'substantially', or that it is unnecessary, and files an affidavit from a retired chief of another unrelated fire department addressing only the factual issues.

24. The question of the interpretation of the City's *Fire Services Bylaw* and *Building Bylaw* is not a constitutional question. It is an administrative law matter that can be determined in a BCSC application.

25. Further, Trans Mountain has not challenged the *Fire Services Bylaw* in this Motion. Rather, it seeks a remedy against "Sections 4, 7, 9, 16 and 22 of the Building Bylaw", "Section 8 of the Plumbing Bylaw" and "Section 19 of the Electrical Bylaw". None of these sections offend the constitutional principles, and to declare them constitutionally inapplicable is both too broad, and unjustified as any alleged conflict does not arise within those bylaws.

c) Not Delay or Lack of Responsiveness

26. The evidence does not establish that this is an issue of delay or non-responsiveness. Burnaby has not delayed. Rather Trans Mountain has refused to accept that the City's requirement for a FTAP is binding. Trans Mountain has refused to comply with the Fire Department requirements, and has failed to make necessary changes to its site design.

27. Burnaby has been clear throughout as to what is required to comply, and Trans Mountain has consistently failed to provide the necessary documentation, or to accept the advice it has been given by both the Fire Department and the City's Building department.

28. The Affidavits explain the pattern of events, and only allow one conclusion – that Trans Mountain consistently refused to accept the *Fire Services Bylaw* and the FTAP Requirement.

- c) The *Fire Services Bylaw* and the FTAP Requirement are public documents, available on the Burnaby website, and well-known as standard obligations by any planning professionals in Burnaby;
- d) Trans Mountain has been aware of the *Fire Services Bylaw* and the FTAP Requirement since the origin of the project, and certainly prior to its design process;
- e) TM was clearly aware of the *Fire Services Bylaw* and the FTAP Requirement when submitting its Building Permit applications;
- f) The City advised Trans Mountain on numerous occasions of the obligations, and assisted in identifying inadequacies, as opposed to rejecting the permit applications;²
- g) Trans Mountain did not submit its most recent FTAP document until September 17, 2021, still non-compliant;
- h) Following review of the FTAP submission, the company was advised in a timely manner – on October 8, 2021- of the issues of non-compliance of their FTAP;
- i) The Fire Protection Office confirmed non-compliance in its response of Nov. 19, 2021, and invited a further submission;
- j) No subsequent re-submission in response has been provided.

29. Burnaby has acted in good faith, and consistent with its standard practices for major projects.

30. As discussed in the evidence of P. Kushnir³, the City has worked closely with the company on many of these permits, assisting them in fixing deficiencies, rather than rejecting the permits.

31. The previous CER applications were each based on individual circumstances and do not raise a pattern of conduct sufficient to draw adverse conclusions.⁴ Burnaby has also demonstrated its good faith and has issued many permits to Trans Mountain over the last two years.⁵

32. The allegation in the Motion in respect of the “typical” time for building permits is simply wrong in fact. There are significantly longer approval times on major projects.⁶

33. Accordingly, what can be at issue here is only either the legal application of the FTAP Requirement (s.9) and compliance with *Fire Services Bylaw* (s. 49), or the factual determination of whether the submitted FTAP complies.

d) CER is not the regulator of municipal and local concerns

² Affidavits of P. Kushnir and C. Bowcock

³ Affidavit of Peter Kushnir, para 9.

⁴ The 2020 tree application was refused because it was presented with a unilateral 4 day demand, the 2021 south access approval related to a situation where the City has already granted earlier access (without CER involvement)

⁵ Affidavit of Peter Kushnir, Para 12, Exh C.

⁶ Affidavit of Peter Kushnir, para 7.

34. The Board found in the 2018 (Motion 1) Ruling ([A5Z3V6](#)) that the Tree Bylaw was not constitutionally inapplicable on its face, that there are clearly legitimate municipal interests reflected in the Bylaw and that there is a public interest in addressing those matters of local concern.
35. The Board stated in that ruling that:
- “The Board accepts that Burnaby cannot deny necessary municipal permits or variances thereto for the Project; however, this does not render the entire municipal permitting process inoperable. As was the case in *Coastal First Nations v. British Columbia (Environment)*, on its face, there are no obvious problems with the imposition of Burnaby’s Zoning and/or Tree Bylaws on the Board-regulated Project. In the Board’s view, concluding otherwise would be an overreach and inconsistent with the principles of cooperative federalism, which require that where regulatory authority might overlap between federal and provincial (in this case, delegated to the municipal level) jurisdictions, validly enacted legislative provisions should be applied harmoniously to the extent possible. [pg 23, ([A5Z3V6](#))]
36. The Board determined that **“it is not a municipal regulator and is not prepared to replace municipalities in terms of overseeing and enforcing very specific municipal requirements”** (pg16, A5Z3V6)
37. The Affidavit of Len Garis filed by Trans Mountain is not helpful or relevant. At best, it indicates only a difference of opinion on the adequacy of access. This is a decision for the actual regulator -- on the factual assessment of the adequacy of the fire access. The Burnaby Fire Department is the relevant regulator of these matters in Burnaby and the Building Department must follow that advice.
38. Further, if there were a discretionary balance to be considered, the opinion of the Burnaby Fire Department – by those individuals who know their own equipment and fire fighting practices, and who must put their lives in jeopardy – is the opinion that must be accepted.
39. If the Commission is to inquire into these disputes on the facts, it would require that it replace its opinion for that of the Burnaby Fire Department, and do what it has said it will not – ie. replace the “municipal regulator” in terms of overseeing and enforcing municipal requirements.

e) Not impossible to comply

40. Trans Mountain has not submitted sufficient evidence in their Motion to support any claim that it cannot meet the Fire Department’s reasonable requirements.

41. A claim of “impossibility” or “frustration” should require significant evidence and must invite detailed scrutiny from the Commission. That evidence is uniquely in the possession of the company, and without more, it is not reasonable to draw a conclusion of impossibility on mere assertions. The standard on constitutional matters is high, and mere added expense or inconvenience is not sufficient.
42. There is no presumption to be drawn from any assertion that the present design would make compliance difficult – even if that were the evidence. The design presented to the NEB and CER was on the assumption that it followed all bylaw and safety requirements, which has now been shown to be false. At the time of design, the company knew about s. 49 of the *Fire Services Bylaw* and the FTAP Requirement, and if it failed to account for it at that point, a re-design is feasible. The Commission should require significant evidence that no redesign is possible before enforcing a constitutional over-ride on Burnaby’s bylaws –the same bylaws the previous NEB and CER decisions directed the company to follow.
43. If the Commission were to accept evidence, through IRs or subsequently, of the impossibility of adapting the design, it is critical that this evidence be properly tested. Burnaby does not accept simple assertions of difficulty in designing compliant access roads, let alone impossibility. The burden is on the applicant to bring forward this evidence.

f) Implications of a Constitutional Decision of Inapplicability

44. A decision to make the Building Bylaw, Plumbing Bylaw and Electrical Permit Bylaw constitutionally inapplicable also eliminates Burnaby’s ability to conduct future inspections or to enforce safety obligations, as the permit and bylaws are the source of those powers.
45. If Burnaby will not be conducting future inspections, the Commission must substitute its own processes for doing so, and must accept any liability for potential future issues in fire safety, plumbing and electrical matters. This is not an appropriate role for the Commission.
46. Further, a decision to strike down the obligations for safe fire-fighting under Burnaby’s bylaws will eliminate future fire department assistance on-site, and permanently exclude any role for Burnaby. This will create additional liabilities for the company and for the Commission.

g) The Additional Four Buildings and Other Potential Applications

47. The Motion seeks to exempt 4 additional buildings from the oversight and permitting obligations of the City – for which no building permits have even been applied for!

48. In those circumstances, there can be no evidence or assertion that Burnaby has delayed in any manner, nor that the company has been frustrated in their progress on construction. There has been no application at all.
49. It would not be appropriate to make any constitutional order in respect of those buildings.
50. If an order were to be made in respect of those buildings, they would then be constructed without any process or oversight. In that event, it would be incumbent on the Commission to ensure the building plans were reviewed for all of the other numerous public interest matters addressed by the Building Code and the City Building Bylaw.
51. Further, there may be other sites, outside of the Terminal boundaries where Trans Mountain seeks approvals, which sites may raise entirely different public safety issues and the ability to comply more readily available.
52. The Commission should ensure that any Order it makes is strictly limited to the buildings and structures that have been the subject of applications to Burnaby, and subject to evidence on this Motion.

Yours truly

A handwritten signature in blue ink, appearing to read 'G. McDade', with a large, sweeping flourish extending to the right.

Gregory J. McDade Q.C.
Ratcliff LLP
Legal Counsel, City of Burnaby