



REASONS FOR DECISION

File OF-Fac-Oil-T260-2013-03 61
17 March 2022

To: All participants in the MH-005-2021 proceeding

**Trans Mountain Pipeline ULC (Trans Mountain)
Trans Mountain Expansion Project (Project)
Certificate of Public Convenience and Necessity OC-065 (Certificate)
and Orders XO-T260-003-2017, MO-066-2018, and XO-T260-010-2016
(Associated Orders)
MH-005-2021
Notice of Motion and Constitutional Question dated 2 December 2021
Order MO-010-2022 – Reasons for Decision**

A. ORDER MO-010-2022

On 25 February 2022, the Commission of the Canada Energy Regulator (**Commission**) issued its MH-005-2021 Letter Decision and associated Order MO-010-2022 ([C17897](#)) with respect to Trans Mountain's Notice of Motion and Constitutional Question filed with the Canada Energy Regulator (**CER**) on 2 December 2021 (**Motion**) [[C16404](#)].

These are the reasons for the Commission's decision (**Reasons**).

B. THE MOTION

The Motion concerns the continued applicability of the following City of Burnaby (**City**) bylaws:

- Bylaw No. 13658, *Burnaby Building Bylaw 2016* (1 January 2017) [**Building Bylaw**];
- Bylaw No. 11148, *Burnaby Plumbing Bylaw 2000* (2 October 2000) [**Plumbing Bylaw**]; and
- Bylaw No. 6494, *Burnaby Electrical Bylaw 1974* (15 October 1974) [**Electrical Bylaw**];

(collectively, the **Impugned Bylaws**)

in respect of all work related to buildings and structures at the Burnaby Terminal (**BT**) and Westridge Marine Terminal (**WMT**) authorized by the Certificate and Associated Orders (**Terminal Work**).

More specifically, Trans Mountain seeks relief in relation to 19 buildings and structures and associated sprinkler permits, electrical permits, and plumbing permits at the BT and WMT for which it brought applications to the City between September 2019 and April 2021.

Trans Mountain also seeks relief in respect of four additional prefabricated structures that are part of the Terminal Work and for which no building permit applications have been made to the City (**Additional Structures**).¹

Through the Motion, Trans Mountain raises a Constitutional Question as to whether certain provisions of the Impugned Bylaws are inapplicable, invalid, or inoperative in respect of the Terminal Work under the doctrines of interjurisdictional immunity and/or federal paramountcy.

Trans Mountain requested that the Commission issue an Order:

- a) granting relief pursuant to Condition 1 from Condition 2 of the Certificate and Associated Orders, insofar as it requires Trans Mountain to obtain from the City the permits, occupancy certificates, and other authorizations required by the Building Bylaw, Plumbing Bylaw, and Electrical Bylaw (collectively, the **Permits**) for the Terminal Work;
- b) declaring, pursuant to sections 32 and 34 and paragraph 313(i) of the *Canadian Energy Regulator Act (CER Act)*, that:
 - i) the Constitutional Question is answered in the affirmative;
 - ii) section 24; subsections 4(1), 7(1), 7(2), 7(3), 7(11), 7(12), 16(1), and 22(1); and paragraphs 8(1)(e), 8(1)(g), and 9(1)(a) of the Building Bylaw are inoperative, invalid, and/or inapplicable with respect to the Terminal Work;
 - iii) subsections 7(3), 7(4), and 8(1); and paragraphs 4(1)(a), 4(1)(b), 4(2)(a), and 6(4)(a) of the Plumbing Bylaw are inoperative, invalid, and/or inapplicable with respect to the Terminal Work;
 - iv) sections 14, 15, 16, and 19; and paragraphs 9(a), 9(b), 9(d), and 20(a) of the Electrical Bylaw are inoperative, invalid, and/or inapplicable with respect to the Terminal Work; and
 - v) Trans Mountain may proceed with the Terminal Work pursuant to the terms and conditions of the Certificate and Associated Orders, notwithstanding the fact that the City has not issued the Permits, conducted inspections, or taken any other actions specified under the relevant sections of the Impugned Bylaws.

Trans Mountain also requested that the Motion be adjudicated expeditiously and in accordance with the generic process set down by the National Energy Board² (**NEB or Board**) in Appendix 1 of its 18 January 2018 process decision (**Process Order**) [[A89357](#)].

C. THE COMMISSION'S DECISION

The Commission has decided to grant the relief requested by Trans Mountain. The Commission finds that, for the reasons set out below, the sections of the Impugned Bylaws from which Trans Mountain requested relief (described in **Section B** above) are inapplicable, invalid, or inoperative under the doctrines of federal paramountcy and/or interjurisdictional immunity.

¹ Air Quality Monitoring Building and Electrical Service Building 2A at the WMT, and Air Quality Monitoring Building and Security Trailer at the BT.

² On 28 August 2019, pursuant to the CER Act, the NEB was replaced with the Canada Energy Regulator. The NEB's adjudicative work has been transferred to the Commission of the Canada Energy Regulator.

The Commission has also determined that it is in the public interest to relieve Trans Mountain of the requirement under Condition 2 of the Certificate and Associated Orders, insofar as it requires Trans Mountain to obtain from the City the Permits for the Terminal Work.

As noted in these Reasons, the Commission fully expects the City to fulfil its role and meet its remaining municipal responsibilities to conduct inspections and enforce safety standards under the Impugned Bylaws in relation to the Terminal Work, over the life of the Project. However, in light of the City's evidence before the Commission in this proceeding, which gives rise to the prospect that the City may not fulfill such responsibilities in the future, the Commission has attached conditions to Order MO-010-2022 to ensure that there is third-party oversight of the Terminal Work, in the event that the City opts to abdicate its responsibilities over remaining matters of local concern in relation to the Terminal Work.

D. HISTORY OF TRANS MOUNTAIN'S NOTICES OF MOTION AND CONSTITUTIONAL QUESTIONS REGARDING PROJECT WORK IN BURNABY

The Motion is the latest in a series of disputes brought before the Commission and its predecessor, the NEB, which have arisen between Trans Mountain and the City with respect to compliance with the latter's municipal bylaws.

Trans Mountain first brought a Notice of Motion and Constitutional Question on 26 September 2014 ([A63063](#)). The City sought to prevent Trans Mountain from conducting surveys and studies related to pipeline routing on Burnaby Mountain in contravention of the *Burnaby Parks Regulation Bylaw 1979* and the *Burnaby Street and Traffic Bylaw 1961*. In its Ruling No. 40 of 23 October 2014 (**Ruling No. 40**) [[A63788](#)],³ the NEB found that it had the legal authority to determine that specific bylaws were inapplicable or inoperative to the exercise of Trans Mountain's powers to conduct surveys and studies to fix the Project route. The NEB also found that, on the facts before it, paramountcy and interjurisdictional immunity applied to render specific provisions of those bylaws inapplicable or inoperative.

On 26 October 2017, Trans Mountain filed a second Notice of Motion and Constitutional Question due to delays in obtaining tree cutting permits required by Bylaw No. 10482, *Burnaby Tree Bylaw* and Preliminary Plan Approvals (**PPAs**) required by Bylaw No. 4742, *Burnaby Zoning Bylaw* for the Terminal Work ([A87282](#)). On 6 December 2017, the NEB issued Order MO-057-2017 allowing Trans Mountain to proceed with the Terminal Work in the absence of obtaining tree cutting permits or Preliminary Plan Approvals.⁴ The NEB's 18 January 2018 MH-081-2017 Reasons for Decision ([A89360](#)) concluded that the City's process to review the applications for PPAs and associated tree cutting permits was not reasonable (**2018 Decision**).

On 14 November 2017, Trans Mountain brought a notice of motion requesting, among other things, that the NEB establish a generic process with timelines for determining Trans Mountain's compliance with, or variance from, Certificate Condition 2 in relation to provincial

³ On 12 December 2014, the Federal Court of Appeal denied the City's request for leave to appeal Ruling No. 40, without reasons. In *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2015 BCSC 2140 (**Burnaby 2015**), affirmed on appeal 2017 BCCA 132, the British Columbia Supreme Court (**BC Supreme Court**) declined jurisdiction on the basis that the NEB had jurisdiction to determine the Constitutional Questions before it in Ruling No. 40 and that the City's leave application was an abuse of process. In case an appeals court disagreed with these determinations, the Court undertook a constitutional analysis and upheld Ruling No. 40.

⁴ On 23 March 2018, the Federal Court of Appeal denied the City's request for leave to appeal Order MO-057-2017, without reasons and with costs.

or municipal laws ([A87760](#)). The Commission issued its decision, including the Process Order, on 18 January 2018.

Trans Mountain's third Notice of Motion and Constitutional Question was filed with the CER on 15 December 2020 and pertained exclusively to tree clearing within Burnaby ([C10426](#)). On 2 February 2021, the Commission issued Order MO-002-2021 substantially granting the relief requested by Trans Mountain. The Commission's MH-001-2021 Reasons for Decision ([C11674](#)), issued on 26 February 2021, found that the City's refusal to process Trans Mountain's tree cutting permit application represented a frustration of a federal purpose and a serious impairment of a core competence of Parliament.

On 3 August 2021, Trans Mountain brought a fourth Notice of Motion and Constitutional Question ([C14328](#)), this time with respect to tree clearing and construction of the North Road (South) access within Burnaby. The Commission issued Orders AO-001-MO-002-2021 and MO-031-2021 on 20 October 2021 ([C15556](#)), granting relief for tree clearing and access, respectively. On 9 November 2021, the City sought a review and variance of certain aspects of this Commission decision ([C16040](#)). In a ruling dated 3 February, 2022, the Commission denied the review application, finding that the City failed to raise a doubt as to the correctness of that decision ([C17567](#)).

E. THE MH-005-2021 PROCEEDING

Trans Mountain filed its fifth Notice of Motion and Constitutional Question pertaining to City bylaws on 2 December 2021. On 8 December 2021, the Commission issued a letter outlining the process by which it would consider the Motion ([C16618](#)), which included the submission of written evidence and argument, as well as a possible oral hearing day. The Commission directed Trans Mountain to serve the Motion and related process correspondence on the Attorneys General in accordance with section 57 of the *Federal Courts Act*. The Commission found Trans Mountain's service to be consistent with this direction.

On 13 December 2021, the City filed a notice of intent to participate, advising of its intention to adduce evidence and provide argument ([C16730](#)). The Attorney General of Alberta (**Alberta AG**) filed a notice of intent on 14 December 2021, reserving all rights to participate in accordance with any established schedule ([C16756](#)). No other notices of intent were received by the set deadline. On 15 December 2021, the Commission confirmed the City and the Alberta AG as the participants in the proceeding ([C16804](#)).

On 21 December 2021, Trans Mountain responded ([C16935](#)) to the Commission's Information Request (IR) No. 1 to Trans Mountain.

The Alberta AG filed written comments on 22 December 2021 ([C16916](#)).

On 23 December 2021, the City filed submissions and affidavit evidence in response to the Motion, as well as its response to the Commission's IR No. 1 to the City ([C16975](#)).

Trans Mountain filed its reply evidence on 5 January 2022 ([C17023](#)).

On 7 January 2022, the Commission issued a Procedural Direction ([C17053](#)) confirming that it would hold an oral hearing on 28 and 31 January 2022, following the participants' written argument submissions and responses to further IRs. The oral hearing was to include cross-examination by the participants, any rebuttal evidence from Trans Mountain, and participants' supplemental argument. The Commission directed the participants to file a letter on or before 24 January 2022 advising of the manner in which they intended to participate in the oral hearing.

The City ([C17161](#)) and Trans Mountain ([C17162](#)) filed written argument on 12 January 2022.

On 17 January 2022, the Commission asked IR No. 2 of each of the City ([C17246](#)) and Trans Mountain ([C17245](#)).

On 21 January 2022, the Alberta AG confirmed that it did not intend to cross-examine any witness panels and did not require an opportunity to provide oral argument ([C17315](#)).

Also on 21 January 2022, Burnaby Residents Opposing Kinder Morgan Expansion (**BROKE**) filed a letter with respect to the Motion. The process set out in the Commission's 8 December 2021 letter required interested parties to file a notice of intent to participate in the proceeding by 14 December 2021. It also required interested parties (other than the City and Attorneys General) to explain how their interest is relevant to the single Constitutional Question at issue in this proceeding. BROKE did not explain why it did not file a notice of intent by the 14 December 2021 deadline, nor did it explain its interest in the Constitutional Question. Accordingly, the Commission did not consider BROKE's letter.

The City filed a letter on 24 January 2022 advising that it would not respond to the Commission's IR No. 2, cross-examine Trans Mountain witnesses, or have the City's witnesses attend the oral hearing to give further evidence ([C17338](#)).

Trans Mountain filed responses to the Commission's IR No. 2 on 24 January 2022 ([C17342](#)). On the same day, Trans Mountain advised that it had intended to cross-examine the City's witnesses ([C17351](#)). Further, despite the City's non-participation, Trans Mountain remained willing to have its witnesses attend on 28 January 2022 to answer any Commission questions. Trans Mountain also requested that the Commission preserve the opportunity for Trans Mountain to present a brief oral argument.

On 26 January 2022, the Commission issued a letter postponing the oral hearing until 4 February 2022 to give the City a second opportunity to respond to IR No. 2 and to indicate an intention to participate in the oral hearing ([C17393](#)). The Commission repeated the caution provided in its 7 January 2022 Procedural Direction and its 17 January 2022 cover letter to IR No. 2 that the Commission may assign lesser weight to the City's evidence should it not allow for a full testing of that evidence by failing to make its affiants available for cross-examination. The Commission also advised that it may draw certain adverse inferences against the City as a result of its refusal to respond to IRs or present witnesses for cross-examination. In response to comments made by the City in its letter of 24 January 2022, the Commission further clarified that no additional notice would be provided and no new proceeding would be established to address the issues raised in the Motion.

On 28 January 2022, the City filed a letter confirming that it would not participate further in the proceeding ([C17456](#)).

The oral hearing was held on 4 February 2022 to hear Trans Mountain's supplemental argument, including its comments on the specific relief requested and potential conditions, as outlined in the Commission's 3 February 2022 Procedural Direction ([C17555](#)). A transcript of this supplemental argument was produced ([C17578](#)).

With the exception of BROKE's letter, the Commission carefully considered all submissions on the record of this proceeding in reaching its decision.

F. THE PROJECT, LAWS, AND REGULATORY REQUIREMENTS

i) The Project

The Project, and the NEB's recommendations and approvals with respect to it, are generally set out in the NEB's OH-001-2014 Report of May 2016 ([A77045](#)) and the MH-052-2018 Reconsideration Report of February 2019 ([A98021](#)).

Details surrounding the proposed design and construction of the BT and WMT were included in the initial application for the Project, filed in December of 2013. These details were before the NEB in the OH-001-2014 proceeding, which was the first federal regulatory process related to the Project. The City participated as an intervenor in this proceeding.

Following the OH-001-2014 and MH-052-2018 proceedings, the GIC approved the Project, which expressly includes the Terminal Work. The Certificate and Associated Orders (as amended) contain the conditions to which the Project is subject, including those specifically related to fire safety, as further detailed below.

The construction and operation of the Project, including the Terminal Work, was authorized, and is now proceeding in accordance with the Certificate and Associated Orders.

ii) Federal laws and regulatory requirements

Condition 2 of the Certificate and Associated Orders requires Trans Mountain to 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-052-2018 proceedings. One such commitment 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 CER) otherwise directs.

The Certificate and Associated Orders also imposed conditions specifically related to risk assessment, fire safety, and emergency response at the BT and WMT, taking into consideration the City's expressed concerns.

Prior to commencing construction, Trans Mountain was required to file, in respect of the BT, updated risk assessments pursuant to Condition 22, and a report demonstrating, among other things, the adequacy of the final design in mitigating the consequences of hydrocarbon ignition pursuant to Condition 24. Condition 89 also required Trans Mountain to file emergency response plans for Project construction.

Prior to commencing operations, Trans Mountain is required to file updated emergency responses plans for the BT and WMT pursuant to Conditions 125 and 126, respectively. Condition 118 requires Trans Mountain to file information regarding appropriate firefighting capacity at the BT and WMT. Prior to commencing operations at the BT and WMT, Trans Mountain is required by Condition 138 to file confirmation that appropriate firefighting capacity is in place.

Before applying for leave to open, Trans Mountain is required by Condition 127 to file an independent third-party report confirming the adequacy of the proposed fire protection and firefighting systems at the BT and WMT. Trans Mountain is also required by Condition 129 to file final risk assessments for its terminals, including the BT and WMT.

The Commission has already considered the pre-construction condition filings (i.e., Conditions 22, 24, and 89) and has either approved them or deemed them to be compliant

with condition requirements ([A92675](#), [C12142](#)). Trans Mountain must make, and the Commission will consider, filings for the remaining conditions before operations can commence.

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

iii) City bylaws and associated requirements

Excerpts from each of the Building Bylaw, Plumbing Bylaw, and Electrical Bylaw are attached as **Appendix 1** to these Reasons. Also relevant, and included in Appendix 1, is Bylaw No. 11860, *Fire Services Bylaw 2004* (6 December 2004) [**Fire Services Bylaw**] and the Fire Department New Construction Requirements Information made pursuant to the Fire Services Bylaw. This document is referred to as the Fire Truck Access Plans (**FTAP Requirement**).

G. COMMISSION ANALYSIS AND FINDINGS

i) Findings of fact

In considering the Motion, the Commission notes the general principle that the applicant – in this case, Trans Mountain – has the burden of proving entitlement to the relief sought. With specific reference to the constitutional doctrine of paramountcy, the Supreme Court of Canada similarly noted that the onus is on the party seeking to rely on the doctrine to raise the evidence necessary to demonstrate incompatibility.⁵

With this in mind, the Commission carefully considered all of the factual evidence and legal argument put forward by Trans Mountain and the City throughout this proceeding.

In weighing the evidence, the Commission has also taken into account the fact that the City did not allow for a full testing of its evidence, but rather ceased its participation part way through the proceeding. Throughout its factual findings, the Commission specifically notes where it has given lesser weight or made an adverse inference⁶ due to the City's failure to respond to the Commission's IRs or to present witnesses for cross-examination.

The Commission's findings of fact, which underlay its ultimate conclusions on the Motion, follow.

The Terminal Work is a necessary part of the Project

As generally noted above, the Project, including the Terminal Work, was considered by the NEB and the GIC, found to be in the public interest, and approved through the Certificate and Associated Orders.

The Commission accepts that the Terminal Work is necessary for the Project to proceed, as designed and approved.

⁵ *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3 (**Canadian Western 2007**), para 75.

⁶ While it would not displace the applicant's burden of making out its case, the failure of a party opposite to adduce evidence or call witnesses may give rise to an "adverse inference" in the absence of any credible explanation for the failure. An "adverse inference" is an implied admission that the evidence of the absent witnesses would be contrary to that party's case, or at least would not support it. See Macaulay & Sprague, *Practice and Procedure before Administrative Tribunals* (online) at §WP:23 and Sarah Blake, *Administrative Law in Canada* (online) at §6.471.

The Terminal Work at the BT and WMT includes the following:

BT	WMT
<ul style="list-style-type: none">• 14 new storage tanks• demolition of an existing tank• new containment areas• access roads• stormwater retention and drainage systems• a valve manifold• booster pumps• an expanded and enhanced fire protection system• 4 electrical services buildings• 1 variable frequency drive pump building• 1 foam building	<ul style="list-style-type: none">• an expanded foreshore area• 3 receiving traps• a valve manifold with interconnecting piping• custody transfer meters• 2 vapour recovery units• 1 vapour combustion unit• a nitrogen purge system• 1 pipeline pressure relief tank• a fire protection system, including a fire water pump house and a foam building

The City will not issue Permits for the Terminal Work absent strict compliance with the Fire Services Bylaw and FTAP Requirement

The Fire Services Bylaw stipulates, among other things, that fire lanes must not be less than 7.3 metres wide and must provide for a turning radius of not less than 13 metres.⁷ The FTAP Requirement repeats these standards and imposes additional fire access requirements, including in relation to clearance heights, turnaround facilities, setbacks, and fire department connections, which the City's Fire Chief asserts are necessary to assist with compliance and enforcement.

The City's evidence is that the Fire Services Bylaw and FTAP Requirement impose mandatory minimum requirements and that these requirements are consistently applied through established practices and policies.

Building Inspector Peter Kushnir, an affiant for the City, submits that it is standard practice to require a compliant FTAP prior to the approval of a building permit and associated trade permits. The City's interpretation of its Building Bylaw is that the Building Inspector cannot grant a permit unless compliance with the Fire Services Bylaw and FTAP Requirement has been established.⁸ This, in the City's view, is a question of legal compliance. Peter Kushnir's evidence is that he has no discretion to ignore the Fire Services Bylaw and FTAP Requirement in granting the Permits.

The City declined to respond to the Commission's IRs regarding whether the City has, in the past, interpreted its bylaws in a more flexible manner and issued building or other trade permits absent strict compliance with the Fire Services Bylaw and FTAP Requirement.

The City's written evidence noted above is consistent with Trans Mountain's submissions that the City will not issue Permits, absent the submission of an FTAP that is in strict compliance with the minimum requirements for fire truck access, as set out in the Fire Services Bylaw.

⁷ Section 49, Fire Services Bylaw.

⁸ The City specifically relies on sections 9(2)(h) and 16(2)(f) of the Building Bylaw in support of its position that strict compliance with the Fire Services Bylaw and FTAP Requirement are required in applications for a building permit.

As discussed in **Section G)ii)** below, the Commission does not agree with the City's restrictive interpretation of its bylaws. Nevertheless, the evidence on the manner in which the City interprets its bylaws is clear. The City is of the view that it cannot issue the Permits as long as there is a lack of strict compliance with the Fire Services Bylaw and FTAP Requirement. Based on this interpretation, and as confirmed through the City's evidence on established practices and policies, the Commission accepts that the City will not issue Permits in circumstances where site-wide fire access requirements are not satisfied.

Trans Mountain cannot strictly comply with the Fire Services Bylaw and FTAP Requirement at certain locations at the BT and the WMT pursuant to the designs approved through the Certificate and Associated Orders

Trans Mountain committed to modifying designs at the BT and WMT, where feasible, to comply with requirements of the Fire Services Bylaw and the FTAP Requirement, including in relation to fire hydrant placement and connections for standpipes or sprinkler systems. However, Trans Mountain maintained that some of the City's fire lane access requirements set out in the Fire Services Bylaw and the FTAP Requirement, related to road width and turning radii, cannot be implemented at the BT and WMT due to site constraints, including the need for grading and the location of pipe.

More specifically, Trans Mountain highlighted that the challenging topography and steep slopes at the BT resulted in a non-traditional and complex design of the secondary containment tank lot areas. The terminal design could not fully accommodate the requirements of the Fire Services Bylaw, given the location of the new fire truck access roads between the secondary containment shoring walls and the reinforced earthen berms. Trans Mountain stated that it is not possible to widen the fire truck access roads or increase building setbacks without negatively impacting the secondary containment shoring walls, the required secondary containment capacity, or the stability of the reinforced earthen berms.

Design changes at the WMT were similarly deemed infeasible, due to challenging topography, restricted available land, and the required location of the Air Quality Monitoring Building.

In support of its assertions, Trans Mountain provided three-dimensional model imagery illustrating the various site constraints at the BT and WMT. It also provided detailed drawings showing the locations in which compliance could and could not be achieved.

The City took varying positions with respect to whether Trans Mountain could comply with the City's fire access requirements. The City's Fire Chief stated that, based on his review of the FTAP submission drawings, he did not see any site constraints that would render fire lane widening, or other modification to meet City fire access standards, impracticable. The City also asserted that, if Trans Mountain failed to account for the Fire Services Bylaw and FTAP Requirement at the time of its initial designs, a redesign is feasible. However, in argument, the City said that it took no position on whether it is technically possible to meet the City's minimum fire safety standards, as this was outside of its role and expertise.

The City further argued that the Commission should require significant evidence that no redesign is possible before enforcing a constitutional override of the City's bylaws and that such evidence must be properly tested. However, the City declined to cross-examine Trans Mountain's witnesses at the oral hearing.

The Commission accepts that the constraints preventing strict adherence to the Fire Services Bylaw and FTAP Requirement at the locations highlighted by Trans Mountain are legitimate and significant. Trans Mountain has been consistent in its position that, despite its

ongoing efforts, compliance with the Fire Services Bylaw and FTAP Requirement is not feasible at every location at the BT and WMT, based on the approved terminal designs. Trans Mountain confirmed that it considered the specific requirements of the Fire Services Bylaw and the needs of the City Fire Department's equipment throughout the design process for the terminals, including at the initial design phase, as reflected in the Design Basis Memoranda for the terminals that were prepared in 2016. The Commission notes that letters addressed to the City in September 2021, which accompanied Trans Mountain's FTAP for the BT and WMT, demonstrate that Trans Mountain considered the Fire Services Bylaw and FTAP Requirement in its designs, while providing rationale where the City's requirements could not be satisfied.

The Commission concludes that the current terminal designs under the Certificate and Associated Orders cannot incorporate the fire lane access requirements. The only way that it *may* be possible for Trans Mountain to fulfill all requirements of the Fire Services Bylaw and FTAP Requirement would be to change the approved designs of the BT and WMT. In order for the approved terminal designs to be changed, the Commission (and potentially the GIC) would have to approve a variance to the Certificate and Associated Orders. The Commission is of the view that consideration of a redesign is not appropriate. This proceeding is not a review and variance of the Certificate and Associated Orders. Further, the constitutional doctrines do not contemplate federal authorizations giving way to municipal bylaws, yet that is what requiring a redesign of the BT and WMT would involve.

In any event, based on all of the evidence before it, the Commission is persuaded that, even if consideration of a redesign were appropriate, a redesign of the BT and WMT is infeasible. With respect to the BT, the Commission accepts Trans Mountain's explanation that accommodating a wider access road could only be achieved by negatively impacting other elements of the terminal design, including by decreasing the number of tanks, reducing secondary containment volumes, or compromising the stability of the supporting structures and secondary containment berms. The Project cannot operate as designed and approved with fewer than 14 storage tanks. Modifications to secondary containment volumes would increase spill-related risks while not (as discussed in the next section) materially reducing fire safety risks. Changes to supporting structures and berms would result in unacceptable resistance to seismic events. Constraints due to the challenging topography and lack of available lands exist at the WMT, making a redesign similarly infeasible.

Strict compliance with the Fire Services Bylaw and FTAP Requirement at all locations is not required for the safe operation of the BT and WMT

The Commission's top priority is the safe operation of the BT and WMT and the ability of Trans Mountain and other relevant emergency response agencies and organizations to mount an effective and timely response to an emergency situation. It is through this lens that the Commission has considered the extent to which strict compliance with the Fire Services Bylaw and FTAP Requirement could impact emergency response activities.

Trans Mountain argued that its plans for fire access and response at the terminals are reasonable and appropriate, notwithstanding non-compliance with the Fire Services Bylaw and FTAP Requirement. It also noted that the terminal designs were reviewed and approved by the NEB and the GIC and that Trans Mountain is subject to several conditions requiring Commission oversight of emergency response plans, including fire safety plans for the terminals.

Trans Mountain further advised that its terminal designs comply with the BC Building Code, which includes specific requirements for fire access roads, and that its design will provide safe deployment, access, and egress for the City's fire vehicles, as intended by the Fire

Services Bylaw. As part of the FTAP Requirement, Trans Mountain conducted an analysis of the road widths and turning radii within the terminal boundaries to determine potential impacts and limitations on emergency response vehicles. Trans Mountain concluded that the FTAP for the terminals identify sufficient traffic flow paths to ensure that the City Fire Department would have unimpeded access/egress during an emergency. Considering that the largest vehicle in the City's fire response fleet has a maximum driving width of 2.6 metres and a deployed width of 5.8 metres, there are no locations observed within the terminal sites where access or tactical deployment of that vehicle could not be established, according to Trans Mountain's analysis.

Trans Mountain stated its understanding that the City Fire Department will not respond to an incident within the boundaries of the BT or WMT and, therefore, Trans Mountain has resourced the terminals to effectively respond to various incidents without the City's support. Trans Mountain submitted that the City has also declined to consult with Trans Mountain regarding the City's evacuation plan, roles, responsibilities, and authorities in the case of an emergency. Consequently, Trans Mountain said that it was engaging with Emergency Management BC and the Fraser Health Authority as the entities with the authority to issue evacuation and shelter-in-place orders within the City, pursuant to Condition 123.

Trans Mountain outlined its emergency response capabilities at the terminals and said that it has the response capability, both in terms of response equipment and trained responders, to ensure that any credible or beyond credible fire event at the BT will be responded to efficiently and effectively. It noted that fire protection enhancements related to the Project include: a larger fire-water reservoir; new high-capacity fire-water pump and foam systems; dual early fire detection systems; remote-activated fire suppression systems; fixed full surface capacity on all new tanks; and an enhanced mobile firefighting system that includes a foam cannon and firefighting equipment to back up the fixed system. These fire protection and firefighting systems would be verified by an independent third party, as required by Condition 127, prior to commencing terminal operations.

Trans Mountain also discussed its emergency response capabilities for incidents other than fires, such as medical emergencies and motor vehicle accidents, and said that its response does not rely on the City Fire Department. It noted that the BC Ambulance Service and other mutual aid partners and third-party contractors would be available to assist in emergency response as required.

The City provided differing statements regarding its role in emergency events within the terminal boundaries. It said that the City Fire Department would likely be required to respond to any significant emergency fire event at the terminals, as well as other incidents within the fence line of the terminals, such as structure firefighting and medical emergencies. It also provided examples of incidents outside of the terminals to which the City Fire Department would likely be required to respond. The City stated that it has responsibility for fire response outside of the terminal boundaries, but that it has not determined whether it is required to respond to incidents inside the terminal boundaries. Further, the City said that Trans Mountain's plans should not assume assistance from City services but should provide for sufficient resources that enable Trans Mountain to accept full responsibility to fully respond to all public safety aspects of any incident, without reliance on City services or outside help.

The Commission's assessment of emergency response at the terminals is informed by the potential role of relevant first response agencies and organizations, including the City Fire Department, in emergency response activities at the terminals. In this case, however, evidence provided by the City regarding the City Fire Department's role in emergency response activities related to the terminals was not clear and, in fact, conflicting. The Commission sought to clarify what the City Fire Department's position is regarding its roles,

responsibilities, and legal obligations for responding to various incidents within and outside the terminals' boundaries. The City declined to answer the Commission's IRs.

The City raised concerns regarding fire truck access, and emergency response in general, at the terminals. It noted the need for sufficient fire lane width and appropriate fire truck turning radius requirements to facilitate safe firefighting response. It said that Trans Mountain's failure to comply with critical and mandatory fire access standards would place the efficacy of the City's response efforts, as well as the efforts of other first responders and contractors, at risk, thereby increasing the likelihood of harm to the public and to firefighting personnel, first responders, and facility staff. The City stated that there are multiple tank fire scenarios within the terminals that would be unextinguishable due to lack of safe firefighting positions. The City also stated that Trans Mountain's assessment of the adequacy of fire truck access lane width and turning radii was "substantially flawed."

The City submitted that the Commission should be cautious in overruling the very fire department that will have to respond to any public emergency related to the terminals. It said that the opinion of the City Fire Department – those individuals who know their own equipment and firefighting practices, and who must put their lives in jeopardy – must be accepted and that it would not be appropriate for the Commission to use a constitutional argument to reduce safety standards for the Project.

The Commission takes very seriously any suggestion that it would be compromising safety by allowing Trans Mountain to proceed with construction and operation of the BT and WMT without strict compliance to the Fire Services Bylaw and an approved FTAP. Thus, the Commission asked the City to explain why the Fire Services Bylaw fire lane requirements differ from those of the BC Building Code. The Commission also asked the City to discuss the differences and challenges associated with a potential response if fire lane requirements were in compliance with the BC Building Code, but not the Fire Services Bylaw. The City declined to provide a response.

The Commission also requested information on residual impacts on the City's firefighting response capabilities resulting from non-compliances with the FTAP Requirement and the Fire Services Bylaw, where compliance was not strictly possible considering the site constraints. This IR also sought information on the City's proposed changes to the FTAP to correct or mitigate non-compliances at each location. Again, the City declined to provide a response.

In light of the City's refusal to answer the Commission's questions seeking clarification on emergency response and fire truck access, the Commission has given the City's evidence lesser weight in these areas.

Further, the Commission draws an adverse inference regarding the impact that a lack of strict compliance with the Fire Services Bylaw and FTAP Requirement has on emergency response services at the terminals. The Commission is of the view that, if the City could have responded to the Commission's IRs in a manner that supported its case or challenged Trans Mountain's evidence on these points, it would have done so. This inference drawn by the Commission is further supported by the City's statement in its final letter in this proceeding indicating that it "has no interests at stake justifying further participation."

The CER's regulatory oversight of Trans Mountain's terminal designs and emergency management program has also informed the Commission's assessment of Trans Mountain's emergency management program. As acknowledged by the City, the Commission notes the extensive evidence related to emergency management and terminal design on the record of the OH-001-2014 proceeding and the concerns raised by the City throughout that process.

Evidence filed by all parties, including the City, was considered during the OH-001-2014 proceeding and informed the NEB's recommendation that the Project be approved subject to various conditions. These conditions address a number of subject areas, including fire risk and emergency response at the terminals, and continue to be assessed as part of the CER's condition compliance process.

The Commission also notes the CER's regulatory oversight of fire response at the BT since the Reconsideration Report was released and the government's subsequent approval. As part of an audit of Trans Mountain's emergency management program, the CER directed Trans Mountain to have fire response resources in place to respond to a full-surface crude oil tank fire at the BT within four hours. This response capability has been, and continues to be, exercised by Trans Mountain and was the subject of an unannounced exercise overseen by the CER in March 2021. The CER concluded that Trans Mountain's response time during that exercise was well within the four-hour window mandated by the CER and no non-compliances were observed.

Taking into consideration all of the evidence before it, the Commission cannot find any basis to conclude that safety and emergency response at the terminals will be compromised should strict adherence to the Fire Services Bylaw and related FTAP Requirement not be achieved. The evidence before the Commission indicates that Trans Mountain has a robust emergency management program that addresses a number of emergency response scenarios at the terminals, up to and including large hydrocarbon fires and spills, although the latter are not likely events. Currently, this emergency management program is structured under the assumption that the City Fire Department would not be responding to emergency events within the boundaries of the BT and WMT. The Commission also accepts Trans Mountain's evidence that road widths and turning radii within the terminals would not have a substantive impact on emergency vehicles transiting within terminal boundaries, including those of the type used by the City Fire Department.

ii) Constitutional Question

Through the Motion, the Commission is being asked to consider whether an impasse results from Trans Mountain having to comply with the municipal regulatory regime in relation to the federally approved Terminal Work. If the municipal regulatory regime is found to be incompatible with the federal Certificate and Associated Orders, the Commission is to determine the extent to which the relevant constitutional doctrines ought to be applied to resolve the conflict or incompatibility. In considering the constitutional doctrines, a restrained approach must be taken and due weight afforded to the principle of cooperative federalism. A harmonious interpretation where both laws or regimes can exist is to be preferred.⁹ It is with this general understanding that the Commission undertook its legal analysis in this matter.

Jurisdiction to consider the Constitutional Question raised in the Motion

It is a settled matter of law that the Commission has the authority to determine Constitutional Questions in relation to its regulated infrastructure. As more specifically noted by the BC Supreme Court, the Commission has the "constitutional power to direct or limit [the City] in the enforcement of its bylaws when the bylaws interfere with or block the [Commission] in its regulation of the Trans Mountain Pipeline and the Expansion Project."¹⁰

⁹ For a general summary of the constitutional doctrines, see: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, para 15-27; *Canadian Western 2007* at para 37.

¹⁰ *Burnaby 2015*, at para 83.

The Commission's legal authority to declare specific municipal bylaws inapplicable, invalid, or inoperative has also been affirmed and applied, through numerous decisions of the NEB and Commission, including Ruling No. 40 and the 2018 Decision, as described in **Section D** above.

In the 2018 Decision, at PDF page 21, the NEB specifically noted:

Project construction and operation, including the Terminal Work, has been lawfully approved by the Certificate and certain other Board orders issued under the [*National Energy Board Act* (NEB Act)]. As a result, and for the purposes of the Terminal Work, Trans Mountain has all of the powers set out in section 73 of the NEB Act [now section 313 of the CER Act], including the ability to take all actions necessary for the Project's construction and operation. The Board has the authority to consider whether Burnaby's application of the Zoning and Tree Bylaws is contrary to, or is in conflict with, section 73 of the NEB Act [now section 313 of the CER Act], the Certificate, and relevant Board orders.¹¹

The City did not challenge the Commission's general authority to consider Constitutional Questions. It did, however, submit that the Commission has no jurisdiction in this matter, as no constitutional issues have been raised. Rather, the City argued that the Motion raises questions on the interpretation of the City's Fire Services Bylaw and Building Bylaw, which are questions of municipal and administrative law that are properly before the BC Supreme Court.

The City further argued that Trans Mountain has not challenged the Fire Services Bylaw, and that the Impugned Bylaws themselves (absent consideration of the Fire Services Bylaw) do not raise an alleged conflict.

The Commission does not agree with this position, and finds the City's arguments on this point to be inconsistent and circular.

It is precisely the manner in which the City has interpreted the Impugned Bylaws to incorporate the Fire Services Bylaw – whether correctly or incorrectly – that has resulted in its refusal to issue the Permits. Trans Mountain is required to obtain the Permits in order to conduct the Terminal Work. Therefore, it is the City's interpretation of the Impugned Bylaws that has raised the potential conflict or inconsistency with the federal authorization. Viewed through this lens, the Motion, which seeks relief from the Impugned Bylaws, clearly invokes the constitutional principles raised.

It is worth noting that the Commission is not considering the reasonableness of the City's bylaws, or dictating how they ought to generally be interpreted. Rather, as affirmed by the BC Supreme Court in Burnaby 2015, the test is whether the application of the provincial or municipal law precludes the practical operation of the federal undertaking in its core function. This is a matter properly before the Commission.

Paramountcy

In Ruling No. 40, at PDF page 12, the NEB summarized the doctrine of federal paramountcy as follows:

¹¹ The Federal Court of Appeal denied leave to appeal both Ruling No. 40 and the 2018 Decision. Ruling No. 40 was also upheld by the BC Supreme Court in Burnaby 2015, which was affirmed on appeal to the BC Court of Appeal, 2017 BCCA 132.

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 City argued variously that dual compliance is possible if the terminals are designed properly, and that there is no frustration of a federal purpose when compliance is possible. Further, it argued that the evidence provided by Trans Mountain is insufficient to determine impossibility of dual compliance or frustration of a federal purpose, but it will leave that decision to the Commission.

Trans Mountain argued that the City's refusal to issue the Permits unless Trans Mountain strictly complies with the Fire Services Bylaw – which Trans Mountain cannot do – is creating an impossibility of dual compliance and is frustrating Trans Mountain's exercise of its authorizations under the Certificate and Associated Orders, as well as its powers under section 313 of the CER Act.

Is dual compliance with (a) the Impugned Bylaws and (b) the Certificate and Associated Orders impossible?

As discussed in **Section G)i)** above, the City interprets the Impugned Bylaws to require strict compliance with the Fire Services Bylaw and FTAP Requirement before Permits can be issued. In the City's view, it has no discretion in the matter. The City cites two provisions of the Building Bylaw in support of this interpretation.

First, the City references subsection 9(2) of the Building Bylaw, which stipulates at paragraph (h) that a permit application is required to contain information required "to establish substantial compliance with this Bylaw, the Building Code and any other applicable enactments relating to the building or structure."

Second, the City cites subsection 16(2) of the Building Bylaw, which sets out the circumstances under which the Building Inspector is required to issue a Permit, including at paragraph (f) when the "proposed work set out in the application conforms with the Building Code, this Bylaw and all other applicable bylaws and enactments."

The City interprets the Fire Services Bylaw and the FTAP Requirement to be "applicable bylaws and enactments." The City does not provide references to the Plumbing Bylaw or Electrical Bylaw to demonstrate where compliance with the Fire Services Bylaw or FTAP Requirement is made mandatory under those bylaws, but rather simply notes that a compliant FTAP is also required prior to the approval of "associated trade permits."

If the City's interpretation of the Impugned Bylaws is correct, the Commission is of the view that there would be an impossibility of dual compliance since the City cannot issue Permits absent strict compliance with the Fire Services Bylaw and FTAP Requirement, and Trans Mountain cannot strictly comply pursuant to the approved terminal designs.

The Commission is of the view, however, that the City's restrictive interpretation of the Impugned Bylaws is incorrect. The paragraph 9(2)(h) requirement for a permit application to

contain certain information does not dictate when a permit application must be refused. Further, that paragraph requires information to establish “*substantial compliance* with this Bylaw, the Building Code and any other applicable enactments relating to the building or structure” [emphasis added]. Substantial compliance is not strict compliance. In addition, the paragraph 16(2)(f) requirement for the Building Inspector to issue a permit when the work conforms with all applicable bylaws and enactments does not prohibit the Building Inspector from issuing a permit in cases when the work does not conform.

The Commission notes that subsections 9(4), 15(1), and 22(3) of the Building Bylaw stipulate when permits and occupancy certificates may not be granted. Subsections 9(4) and 15(1) state that the Building Inspector “may” refuse to issue a permit when the proposed construction will “contravene the requirements of the Building Code or the provisions of this or any other bylaw of the City.” Subsection 22(3) provides that the Building Inspector “may withhold an occupancy certificate until the building...complies with this Bylaw, the Building Code and any other applicable bylaws or enactments.” These provisions do not say that the Building Inspector “shall” refuse to issue a permit or withhold an occupancy certificate in these circumstances. The use of the term “may” is properly interpreted to mean that the Building Inspector retains discretion.¹²

Similarly, subsection 8(12) of the Plumbing Bylaw sets out when the Plumbing Inspector “may” refuse to issue a permit. Pursuant to this provision, the Plumbing Inspector can, but does not have to, refuse to issue a permit when the “information submitted in the application is incorrect or inadequate to determine compliance with the requirements of the Plumbing Code, this Bylaw or any other bylaw of the City.” Notably, the provision does not incorporate requirements beyond the (provincial) Plumbing Code or City bylaws.

The equivalent provision of the Electrical Bylaw is section 23(b), which provides that the Chief Building Inspector or Supervisor – Electrical Inspections may refuse to issue a permit where “the applicant has been notified of a violation of any part of this bylaw.” Again, the decision to issue the permit is discretionary and, in this case, the discretion only relates to a violation of the Electrical Bylaw, as opposed to all applicable or other City bylaws.

The City did not respond to questions asked by the Commission about how it may have, in the past, interpreted its bylaws in a less restrictive manner, nor did the City attend the oral hearing to answer questions through cross-examination or following oral supplemental argument.

In light of the foregoing, the Commission finds that it is possible to comply with the Impugned Bylaws on the one hand, and the Certificate and Associated Orders on the other. On the face of those instruments, Trans Mountain can conduct the Terminal Work pursuant to the approved designs and the City can issue the Permits notwithstanding the lack of strict compliance with the Fire Services Bylaw and FTAP Requirement.

Is there frustration of a federal purpose?

The Commission finds that the manner in which the City is interpreting the Impugned Bylaws – that is, to require strict compliance with the Fire Services Bylaw and FTAP Requirement on a site-wide basis before issuing Permits in respect of the Terminal Work – frustrates the purpose of the Certificate and Associated Orders, and the purpose of section 313 of the CER Act. The federal purpose is to permit the construction and operation of the Project, including the Terminal Work, which has been found to be in the public interest.

¹² The *British Columbia Interpretation Act*, similar to its federal counterpart, sets out that “may” is to be construed as permissive or empowering; “shall” is to be construed as an imperative.

The Commission has found that Trans Mountain cannot, pursuant to the approved terminal designs, achieve strict compliance with the Fire Services Bylaw and FTAP Requirement to obtain the Permits required to conduct the Terminal Work. It is the City's interpretation that it cannot issue the Permits absent this strict compliance that results in the conflict or inconsistency between the federal authorization and the municipal bylaws.

Interjurisdictional immunity

The NEB summarized the doctrine of interjurisdictional immunity in the 2018 Decision, 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.

(...)

The Board 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.¹³

In the case of the Motion, the Commission accepts that the matter of when and where the Project, as approved, can be carried out, and its orderly development, fall within the "core" of federal jurisdiction. The Commission further notes that the Terminal Work is a necessary part of the Project.

Trans Mountain stated that the impasse resulting from the City's refusal to issue Permits absent strict compliance with the Fire Services Bylaw and FTAP Requirement on a site-wide basis has already led to unreasonable delays in the Project schedule. The Commission is of the view, however, that the facts of this case go beyond potential delays to the Project's timing and speak to whether or not the Project, as designed and approved, can be carried out at all. This is a core competence of Parliament.

As acknowledged by the City, it cannot reject Permits if that has the effect of fundamentally impairing the Project.¹⁴

The Commission finds that the City's refusal to issue Permits is impairing a core competence of Parliament which is having a sufficiently serious effect on when, where, and, ultimately, if the Terminal Work can be carried out.

Accordingly, the Commission accepts that the doctrine of interjurisdictional immunity renders the Impugned Bylaws inapplicable to the extent that they impair the Terminal Work as authorized by the Certificate and Associated Orders.

¹³ 2018 Decision, at PDF pages 24-25.

¹⁴ See also *Coastal First Nations v. British Columbia (Environment)*, 2016 BCSC 34 (**Coastal 2016**) at para 55.

Relief for the Additional Structures

Trans Mountain sought to have any findings of the Commission on the Constitutional Question, and the related relief, applied to the Additional Structures, in addition to the 19 buildings and structures for which it brought applications to the City. Trans Mountain explained that the signed engineering drawings required to make building permit applications for the Additional Structures were not complete at the time the Motion was filed, at which point Trans Mountain ceased making Permit applications to the City. Trans Mountain submitted that the City's evidence that it will not issue Permits unless Trans Mountain complies with the Fire Services Bylaw and FTAP Requirement on a site-wide basis applies equally to the Additional Structures. Further, if the Commission does not grant the relief sought in relation to the Additional Structures, but rather, requires a further application (based on the same process and general facts), the overall Project will be delayed; the Additional Structures are also necessary components of the overall Project.

The City submitted that, absent an application, there can be no evidence that the City has delayed in any manner, nor that Trans Mountain has been frustrated in their progress related to, the Additional Structures. Therefore, the City submitted that it would not be appropriate to make any constitutional order in respect of the Additional Structures. The Commission is of the view, as referenced in prior decisions, that the constitutional doctrines require an actual, rather than a speculative or hypothetical, conflict or impairment. It would be premature to make a finding based on a hypothetical scenario.¹⁵

The Commission does not, however, consider making a finding with respect to the Additional Structures to be speculative or hypothetical in these circumstances. As discussed above, the City's own evidence is that it will not issue Permits absent strict compliance with the Fire Services Bylaw and FTAP Requirement on a site-wide basis. The City further submitted that these requirements are mandatory to ensure legal compliance, and they are consistently applied through established practices and policies. Therefore, the Commission accepts that the City would apply the same interpretation of the Impugned Bylaws to the Additional Structures as it did to the structures for which applications were made.

On the specific facts before it, the Commission is satisfied that it is appropriate to apply the constitutional doctrines and grant relief in relation to the Additional Structures. In making this finding, the Commission is simply considering how the City's interpretation of its bylaws and consistent approach to permitting will continue to frustrate a federal purpose and impair the orderly development of the Project.

Conclusion on constitutional principles

The Commission recognizes the legitimate right of a municipality to oversee matters of local concern and the importance of cooperative federalism. As noted in the 2018 Decision, at PDF page 22, and referenced by the City in its argument:

The Board agrees with British Columbia' [sic] submission that "[t]oday's constitutional landscape is painted with the brush of cooperative federalism." The Board accepts that the preferred approach is to allow provincial and federal laws to both function where possible. It is important, and in the interest of cooperative federalism, that validly enacted provincial and municipal laws are respected such

¹⁵ See, for example, *Council of Natural Medicine College of Canada v. College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia*, 2013 F.C. 287 at para. 65; and *Coastal* 2016 at para. 46-47.

that matters of local concern are understood and addressed where possible in relation to federal undertakings.

The Commission also recognizes, as noted by the Supreme Court of Canada in *Canadian Western 2007*, that validly enacted provincial laws (or, by extension, municipal bylaws) may add requirements that supplement those otherwise prescribed by federal laws.

In considering the Motion, the Commission has undertaken its constitutional analysis with due restraint. Throughout this proceeding, the Commission has carefully sought to understand and then consider the precise relief required, to ensure that any declaration that the Impugned Bylaws are inapplicable, invalid, or inoperative is limited to the extent necessary to allow the federally approved Terminal Work to proceed.

On that basis, and for the reasons detailed above, the Commission concludes that the specific provisions of the Impugned Bylaws from which relief was sought are inapplicable, invalid, or inoperative under the doctrines of federal paramountcy and interjurisdictional immunity.

iii) Relief from Condition 2

The Commission has determined that it is in the public interest to relieve Trans Mountain of the requirement under Condition 2 of the Certificate and Associated Orders to fulfill its commitment to obtain the Permits. In reaching this conclusion, the Commission considered fire safety and emergency response services at the BT and WMT. The Commission also considered the importance of municipal oversight of the Terminal Work.

Terminal safety

The City suggested that, by granting the constitutional relief Trans Mountain seeks, the Commission is accepting reduced safety standards for the Project. As detailed above, the Commission strongly disagrees with that characterization. Fire safety at the terminals was extensively canvassed in the regulatory proceedings leading up to the issuance of the Certificate and Associated Orders, and oversight has occurred and will continue through the Commission's condition compliance processes and beyond. Having considered all of the evidence in this proceeding, the Commission has concluded that safety and emergency response at the terminals will not be compromised absent strict adherence to the Fire Services Bylaw and related FTAP Requirement at all locations at the BT and WMT.

Municipal oversight

Through its evidence and argument in this proceeding, the City made submissions that it will have no role in regulating and enforcing construction activities and standards at the BT and WMT, and no subsequent oversight, compliance, or inspection obligations, should the Commission grant the relief requested by Trans Mountain. The City posited that a decision to make the Impugned Bylaws constitutionally inapplicable "eliminates" the City's ability to conduct future inspections or to enforce safety obligations and that it expects the Commission to fulfill this role.

Trans Mountain's initial request for relief was limited to bylaw provisions that include requirements to obtain Permits, but Trans Mountain expanded this request in its supplemental argument. Among other things, Trans Mountain explained that an exemption from bylaw provisions requiring the City to inspect before Trans Mountain can take certain

actions is necessary in light of the City's submission that it will not conduct inspections. For example:

- Building Bylaw, paragraph 8(1)(e) – authorizing the Building Inspector to require the owner to uncover any construction that has been covered without inspection;
- Plumbing Bylaw, subsections 7(3) and 7(4) – prohibiting a plumbing system from being covered or put into use until it has been inspected and approved by the Plumbing Inspector; and
- Electrical Bylaw, subsections 14 and 15 – prohibiting an electrical installation from being covered or operated until it has been inspected and approved by the Inspector.

As noted above, the Commission was cautious to only grant relief to the extent necessary to allow the Terminal Work to proceed, mindful that a provincial law (or municipal bylaw) can only be displaced to the extent that it conflicts or is inconsistent with, or encroaches upon, a federal law or undertaking. The Commission was also cautious to preserve the City's inspection and oversight powers. These powers are primarily found in section 21 of the Building Bylaw, sections 5 and 7 of the Plumbing Bylaw, and sections 5 and 13 of the Electrical Bylaw. Of these provisions, the Commission has only declared subsections 7(3) and 7(4) of the Plumbing Bylaw inapplicable, invalid, or inoperative as they require inspections before certain systems are covered or used. Had the City not taken the position that it did with respect to municipal oversight, the Commission would not have considered such relief to be necessary.

The Commission also did not grant relief in relation to other provisions that facilitate municipal oversight and would not interfere with the Terminal Work. For example:

- Building Bylaw, subsections 7(6) and 7(7) – prohibiting a person from obstructing the entry of the Building Inspector onto any land or into any building or structure and from submitting false or misleading information to the Building Inspector;
- Electrical Bylaw, section 7 – prohibiting a person from hindering or preventing the Inspector from entering into or inspecting any property; and
- Electrical Bylaw, paragraph 9(c) and section 18 – allowing the Inspector to order the correction of electrical work that is in an unsafe condition or is considered to be improperly done.

The Commission further notes that the inspection power provisions speak to inspections to bylaw requirements and other technical requirements (such as the Building Code and Plumbing Code), rather than to issued Permits.¹⁶

Considering the specific relief granted, the Commission can find no basis for the City's position that it will not carry out its oversight, compliance, and inspection obligations as a result of the Commission's decision. The City declined to provide such a basis when it refused to respond to the Commission's IR asking for an explanation as to how granting the relief requested "eliminates" the City's ability to act as a municipal regulator.

The Commission is of the view that the City's position amounts to an abdication of its responsibility to its citizens. The Commission cannot and will not assume the role of a municipal regulator and it expects the City to carry out this function. However, given the

¹⁶ See, for example, paragraph 21(3)(a) of the Building Bylaw, subsection 7(3) of the Plumbing Bylaw, and section 5 of the Electrical Bylaw.

City's evidence in this proceeding that it will not conduct inspections, the Commission has attached conditions to Order MO-010-2022 to ensure that there is third-party oversight of the Terminal Work.

Condition 1 affords the City another opportunity to inform the Commission, through Trans Mountain, that it will fulfill its municipal oversight responsibilities. In the event that Trans Mountain cannot provide confirmation from the City that it will carry out its oversight, compliance, and inspection obligations in respect of the Terminal Work, Condition 2 requires Trans Mountain to hire qualified independent third party(ies) to conduct independent compliance verifications to the technical codes administered by the Impugned Bylaws. Condition 3 requires Trans Mountain to file information with the Commission with respect to those compliance verifications.

The Commission has also attached Conditions 4 and 5 related to the Additional Structures. The City confirmed that there are no bylaw provisions (beyond the stated non-compliance with the Fire Services Bylaw and FTAP Requirement) impairing the issuance of the Permits in respect of the structures for which Trans Mountain brought an application. Since the City did not review the design of the Additional Structures for compliance, the conditions require Trans Mountain to obtain drawings signed by the engineer of record for each structure.¹⁷ The Commission notes that subsections 11(3) and 21(2) of the Building Bylaw contemplate City reliance on certification by registered professionals. The Commission also notes Trans Mountain's confirmation that the four structures are designed, and will be constructed, in accordance with the BC Building Code and BC Fire Code.

Conclusion on public interest

Taking into account the conditions attached to Order MO-010-2022, the Commission finds that the public interest in granting the relief requested, which will allow the Terminal Work (and, therefore, the Project) to proceed, outweighs the public interest in requiring compliance with the specific provisions of the Impugned Bylaws from which relief was sought.

Yours sincerely,

Signed by K. McAllister

for
Ramona Sladic
Secretary of the Commission

Attachment

c.c. Karl Perrin, Burnaby Residents Opposing Kinder Morgan Expansion,
Email perrink@shaw.ca

¹⁷ Signed drawings indicate that the design has been verified for compliance with applicable codes. Note that a condition was not attached in respect of the WMT Electrical Services Building 2A, given Trans Mountain's evidence that it has already obtained signed engineering drawings for that structure.

Appendix 1 Excerpts from City Bylaws and associated requirements

Building Bylaw

4. PERMIT CONDITIONS

- (1) A permit is required to undertake any work regulated under this Bylaw.

7. GENERAL PROHIBITIONS

- (1) No person shall commence or continue construction or change the occupancy of any building, structure or part thereof, unless the Building Inspector has issued a permit for the construction and that permit remains in force.
- (2) No building or structure shall be constructed except in conformity with the requirements of the Building Code and this Bylaw.
- (3) No person shall occupy or use any building, structure or part thereof unless a valid and subsisting occupancy certificate has been issued by the Building Inspector for the building, structure or part thereof, or contrary to the terms of any permit issued or any notice given by the Building Inspector.
- (6) No person shall obstruct the entry of the Building Inspector or other authorized employee of the City onto any land or into any building or structure in the administration of this Bylaw.
- (7) No person shall knowingly submit false or misleading information to the Building Inspector in relation to any permit application or construction undertaken pursuant to this Bylaw.
- (11) No person shall commence or continue any construction in respect of which a permit is required under any other bylaw unless a permit is obtained under that bylaw.
- (12) No person shall commence or continue any construction when that construction has been suspended by the Building Inspector, without first obtaining permission in writing from the Building Inspector to do so.

8. ROLE OF THE BUILDING INSPECTOR

- (1) The Building Inspector:
 - (e) may require the owner to uncover and replace at the owner's expense any construction that has been covered without inspection contrary to this Bylaw or an order issued by the Building Inspector;
 - (g) may order in writing the correction of any construction that is being or has been done in contravention of this Bylaw.

9. APPLICATION REQUIREMENTS

- (1) The owner shall apply for and obtain a permit:

- (a) prior to the construction of a building or structure, or part thereof;
- (2) An application for a permit shall:
 - (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;
- (4) An application for a permit may be refused when:
 - (a) any of the requirements of subsections (2) or (3) have not been satisfied;
 - (b) the proposed construction would contravene the requirements of the Building Code or the provisions of this or any other bylaw of the City;

11. PROFESSIONAL DESIGN AND FIELD REVIEW

- (3) Letters of assurance provided under subsection (2) will be relied upon by the City and the Building Inspector as certification that the design, plans and construction to which the letters of assurance relate comply with applicable requirements of the Building Code, this Bylaw and any other applicable enactments.

15. REFUSAL TO ISSUE PERMIT

- (1) The Building Inspector may refuse to issue a permit where:
 - (a) the proposed construction will contravene the requirements of the Building Code or the provisions of this or any other bylaw of the City.

16. ISSUANCE OF PERMIT

- (1) Each building, structure or part thereof constructed on a site requires a separate permit and shall be assessed a separate permit fee based on the value of that building, structure or part thereof.
- (2) The Building Inspector shall issue the permit for which the application is made when:
 - (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 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.

21. INSPECTIONS

- (1) In addition to field reviews required by subsection (2), the owner, or the owner's agent, shall give not less than 24 hours' notice to the City when requesting an inspection and shall obtain an inspection and receive acceptance of the Building Inspector of the following aspects of the construction prior to concealing it:...
- (2) When a registered professional provides letters of assurance under this Bylaw, the City will rely on field reviews undertaken by the registered professional and the letters of assurance submitted as certification that the construction conforms to the design, and that the construction complies with the Building Code, this Bylaw and any other applicable enactments.
- (3) Notwithstanding subsections (1) and (2), the Building Inspector may attend on site from time to time during the course of construction to ascertain whether:
 - (a) the provisions of the Building Code, this Bylaw, any other bylaws of the City and any other applicable enactments are being complied with; and
 - (b) the required field reviews are taking place, and to monitor the field reviews by the registered professional.

22. OCCUPANCY CERTIFICATES

- (1) Except as provided in subsection (5), no person shall occupy a building or structure or part thereof until an occupancy certificate has been issued by the Building Inspector in the form set out in Schedule "C" for:
 - (a) the first occupancy of a building or structure or part thereof after completion of construction; or
 - (b) any change in class of occupancy of any building or structure or part thereof.

- (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.

24. ORDERS AND NOTICES

- (1) The Building Inspector may issue such written notices or orders as the Building Inspector considers necessary to inform the owner of a contravention of this Bylaw.
- (2) A notice or order shall state the nature of the contravention and the date or phase of construction before which the contravention must be remedied.
- (3) A copy of the notice or order shall be sufficiently served if mailed to the owner at the address appearing on the records of the Assessment Authority of British Columbia for the parcel to which the notice or order relates.
- (4) The Building Inspector may order the suspension of any construction or work that is proceeding in contravention of the Building Code, this Bylaw or any other bylaw of the City by posting a "Notice of Suspension" in the form set out in Schedule "H".

Plumbing Bylaw

4. PROHIBITIONS

- (1) No person shall construct, install or otherwise commence or carry out any work on a plumbing system, hydronic heating system, or fire protection system:
 - (a) except in conformity with this Bylaw and the Plumbing Code;
 - (b) without a valid and subsisting permit.
- (2) No person shall
 - (a) cause, suffer or permit the disposal of sewage or other liquid waste in any place or manner except through and by means of a plumbing system conforming to the Plumbing Code and this Bylaw;

5. ADMINISTRATION

- (4) The Plumbing Inspector shall have authority to enforce this Bylaw, and may
 - (b) require the performance of, and attend, tests of any plumbing system, hydronic heating system or fire protection system and inspect or cause to be inspected any plumbing system, hydronic heating system or fire protection system during the course of installation, alteration, repair or after completion thereof; and

- (c) issue permits
- (5) The Plumbing Inspector may enter any lands, building or premises at any reasonable time for the purpose of administering or enforcing this Bylaw, or if he or she has any reason to believe that an unsafe condition exists.
- (6) The Plumbing Inspector may, in addition to any inspection provided for in this Bylaw, make additional inspections at any reasonable time deemed necessary to ensure that the provisions of this Bylaw and other bylaws of the City are being complied with

6. ORDERS AND NOTICES

- (4) The Plumbing Inspector may order the immediate suspension of any work on any plumbing system, hydronic heating system, or fire protection system by posting a notice or order to that effect on the premises where the work is being undertaken whenever:
 - (a) the work is not being performed in accordance with a permit or the requirements of this Bylaw, the Plumbing Code or any other bylaw of the City; or

7. INSPECTIONS AND TESTS

- (2) A new plumbing system and such portion of an existing plumbing system as may be affected by new work, or by any change, shall be tested in accordance with the requirements of the Plumbing Code.
- (3) When a plumbing system has been constructed, repaired, renewed or altered, such system shall not be put into use until it has been inspected by the Plumbing Inspector and found to conform with this Bylaw and the Plumbing Code.
- (4) No plumbing system or part thereof shall be covered until it has been inspected and approved by the Plumbing Inspector. If any plumbing system or part thereof is covered before being inspected or approved, it shall be uncovered to permit inspection.
- (5) The permit holder shall arrange for the inspection of any work by the Plumbing Inspector before it is covered and after it is completed and ready for inspection. A minimum twenty-four (24) hour advance request for inspection shall be given to the Plumbing Inspector.
- (6) All equipment, materials, power and labour necessary for testing shall be furnished by the permit holder and any test shall be conducted to the satisfaction of the Plumbing Inspector.
- (9) Work that is not approved must be retested and reinspected until it is approved.

8. PERMITS

- (1) A permit shall be obtained by the owner or his agent prior to the construction, extension, alteration, renewal, repair or maintenance of a plumbing system, individual residential hydronic heating system or fire protection system.
- (5) An application for a permit shall contain or be accompanied by such other information as is necessary to satisfy the Plumbing Inspector that the proposed work complies with this Bylaw, the Plumbing Code and all other bylaws of the City.
- (8) When the information contained in a permit application satisfies the requirements of this Bylaw, the Plumbing Inspector may issue a permit.
- (12) The Plumbing Inspector may refuse to issue a permit where:
 - (a) the applicant has demonstrated insufficient knowledge to undertake the work;
 - (b) information submitted in the application is incorrect or inadequate to determine compliance with the requirements of the Plumbing Code, this Bylaw or any other bylaw of the City;
 - (c) the issuance of a permit would result in any construction or facilitate any occupancy that would be prohibited by any bylaw of the City or other law.

Electrical Bylaw

5. The Inspector is authorized to enter at all reasonable times into and upon any property in the municipality in order to ascertain whether or not this bylaw or the regulations contained therein are being obeyed or to enforce and carry the same into effect.
7. No person shall hinder or prevent the Inspector from entering into or upon or inspecting any property in the municipality whenever necessary to secure compliance with or prevent a violation of the provisions of this bylaw or other lawful enactment.
9. The Inspector shall suspend or order the correction, or suspend and order the correction, of all or any portion of any electrical installation or electrical work, including any alteration or repair of same, by attaching a notice to that effect on the said electrical installation or said electrical work or on the premises where the said electrical installation or said electrical work is being done or has been done or by serving a notice to that effect on the owner, tenant or occupier of the said premises whenever the Inspector finds that all or any portion of such electrical installation or electrical work:
 - (a) is not being performed in accordance with this bylaw, or

- (b) has not been performed in accordance with this bylaw, or
 - (c) is in an unsafe condition, or
 - (d) is in contravention of this bylaw.
13. All new electrical installations or electrical works and such portions of existing electrical installations and electrical works as may be affected by new electrical installations or electrical works or by any changes shall be subject to inspection by the Inspector.
14. No electrical installation or electrical work which has been installed, altered, or repaired shall be used or operated until it has been inspected by the Inspector and found to conform to provisions of this bylaw.
15. No electrical installation or electrical work or part thereof shall be covered or concealed until it has been inspected and approved by the Inspector. If any electrical installation or electrical work or part thereof is covered or concealed before being inspected and approved, it shall be uncovered upon direction of the Inspector.
16. No person shall connect or reconnect or cause to be connected or reconnected any electrical installation or electrical work to any source or medium of electrical energy, without first obtaining the written approval of the Supervisor - Electrical Inspections.
18. A good standard of workmanship must be used in the installation of all electrical installations or electrical works, and the Electrical Inspector may order the correction of any electrical installation or electrical work which he considers is being or has been improperly done.
19. Before any person shall install, construct, alter or repair any electrical installation or electrical work in the municipality, or shall commence doing any construction work in relation to or in connection with any such electrical installation or electrical work, he shall obtain a permit for such electrical installation or electrical work from the Chief Building Inspector or Supervisor - Electrical Inspections, after first having made application in writing therefore.
20. (a) No person shall commence any electrical installation or electrical work for a commercial or industrial premise until he has submitted electrical plans and specifications for such electrical installation or electrical work to the Supervisor - Electrical Inspections and obtained from him approval of such plans and specifications.
23. The Chief Building Inspector or Supervisor - Electrical Inspections may refuse to issue a permit or an annual permit
- (a) for any addition, alteration or repairs or an extension to any wiring system, in, on, or through any building or place where the existing wiring is not in accordance with the provisions of the bylaw.
 - (b) where the applicant has been notified of a violation of any part of this bylaw in regard to the electrical installation or electrical work of another building or

place for which he has been responsible and such violation has not been remedied.

Fire Services Bylaw

9. 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;
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.);

Fire Department New Construction Requirements Information (FTAP Requirement)

Additional Requirements

3. Any designated fire truck access must be a minimum of 7.3 meters (24 feet) wide with no obstructions. Clearance heights must be 5 meters (16 feet, 5 inches vertically).
4. A turnaround facility must be provided for any dead-end portion of a fire truck access route exceeding 90 meters (295 feet).
5. Any road, street, or area that is a designated fire truck access must be located no further than 15 meters (49 feet, 3 inches) or closer than 3 meters (9 feet, 10 inches) from the face of a building.
6. Curves or off sets on access roads must conform with the B.C. Building Code (2006) Edition, and a centerline turning radius of 13 meters (42 feet, 8 inches) to accommodate aerial and ladder platforms. On cul-de-sac type turn arounds, where light standards protrude or dead end portions exceed 90 meters, we require a 15.3 radius.
11. Fire department connection must be as follows:
 - address side, fully visible and recognizable from the street or nearest point of fire department vehicle accessibility
 - within 45 meters (150 feet) of a hydrant

12. The fire department connection for a standpipe or automatic sprinkler system must be located so the distance from the fire department connection to a hydrant is not more than 45 meters (150 feet) and is unobstructed.
13. For a building not provided with a fire department connection, a fire department pumper vehicle can be located as that the length of the access route from a hydrant to the vehicle, plus the unobstructed path of travel for the firefighter from the vehicle, to the building is not more than 90 meters (300 feet) and the unobstructed path of travel for the firefighter from the vehicle to the building is not more than 45 meters (150 feet).