



File OF-Fac-Oil-T260-2013-03 02  
19 August 2014

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Dear Mr. Denstedt, Mr. Stoness, Mr. Dattani, and Mr. McDade:

**Hearing Order OH-001-2014  
Trans Mountain Pipeline ULC (Trans Mountain)  
Application for the Trans Mountain Expansion Project (Project)  
8 August 2014 letter from Trans Mountain regarding paragraph 73(a) of the  
National Energy Board Act (NEB Act) and 5 August 2014 Notice of Constitutional  
Question from the City of Burnaby (Burnaby)  
Ruling No. 28**

On 25 July 2014, the National Energy Board (Board) received a [request](#) from Trans Mountain for the Board to confirm Trans Mountain's rights under paragraph 73(a) of the NEB Act with respect to accessing City of Burnaby (Burnaby) lands for survey and examination purposes. The request concerns Trans Mountain's 3-kilometre-long new preferred corridor through Burnaby Mountain (subject lands).

On 29 July 2014, the Board [established](#) a written comment process to hear from Burnaby and receive reply comments from Trans Mountain. On 30 July 2014, Burnaby [requested](#) additional time to respond. The Board [provided](#) a brief extension and reasons for doing so on 1 August 2014.

### Views of Trans Mountain and Burnaby

Trans Mountain's request includes the following submissions:

- It must have access to Burnaby lands in order to satisfy the Board's information requirements. This includes engineering, geotechnical, environmental, and archaeological studies and surveys.

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- It has attempted to engage with Burnaby since May 2012 and, on 9 July 2014, sent a letter to Burnaby requesting voluntary access to the subject lands by 25 July 2014. Subsequent correspondence ensued between Burnaby and Trans Mountain.
- Paragraph 73(a) of the NEB Act establishes its rights to make surveys and other examinations, while section 75 of the NEB Act requires it to do as little damage as possible in conducting surveys and to make full compensation if there is any damage sustained.
- Relevant to this request is the Board's decision in the Dawn Gateway Pipeline<sup>1</sup> process, where the Board stated that "the purpose of section 73 is to modify the law of trespass by removing the common-law requirement of consent of an owner to enter lands."
- The Board has held that a company need not apply for an order where the company has obtained the necessary legal interests and rights in land.<sup>2</sup>

In response, Burnaby filed a [reply](#) to Trans Mountain on 5 August 2014 and a [Notice of Constitutional Question](#) on 6 August 2014.

Burnaby's response includes the following submissions:

- The Board refused to allow it a fair time to respond to Trans Mountain and this appears to favour Trans Mountain.
- This revised 3-kilometre-long new preferred corridor was not contained in Trans Mountain's original Project application.
- Trans Mountain has been aware of the need for access since at least March 2014 but has delayed making its access application to Burnaby.
- The application for interpretation is premature since Burnaby has not had full information from Trans Mountain and Burnaby has not had a chance to consider Trans Mountain's formal request and make a determination.
- Part of the land to which Trans Mountain requests access is park land, and activities allowed to be carried out on park lands are extremely restrictive. Permitted uses do not include drilling bore holes and constructing a helicopter staging area. This would be contrary to applicable by-laws, and the provincial laws under which they were enacted.
- Paragraph 73(a) of the NEB Act does not provide for the making of applications to the Board or provide the Board with jurisdiction to issue orders pursuant to that paragraph.
- Paragraph 73(a) should be interpreted as allowing superficial access to the lands only.
- The fact that Trans Mountain is applying for access to lands owned by a municipality distinguishes this case from the previous decisions of the Board cited by Trans Mountain.
- The Supreme Court of Canada has emphasized the need to interpret legislation to promote cooperative federalism.

Burnaby's Notice of Constitutional Question includes the following submissions:

- Paragraph 73(a) of the NEB Act does not empower the Board to make orders that override provincial and municipal jurisdiction.
- Paragraph 73(a) of the NEB Act, to the extent that it purports to empower a company to enter lands, does not override municipal jurisdiction or by-laws.
- Paragraph 73(a) of the NEB Act should operate concurrently to facilitate co-operative federalism.
- The surveys are without Burnaby's permission and entry onto Burnaby lands would be contrary to a number of referenced Burnaby by-laws.
- Burnaby has not yet made a determination about Trans Mountain's 9 July 2014 formal request for access.

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<sup>1</sup> Board [letter](#) to Dawn Gateway Pipeline General Partner Inc., dated 21 October 2009.

<sup>2</sup> Board [letter](#) to Lambrecht and Mitchell re Spectra Energy Transmission BC Pipeline, dated 31 January 2014.

Trans Mountain [replied](#) on 8 August 2014, and had the following submissions:

- Voluntary access attempts are irrelevant to a paragraph 73(a) determination, as the Board has the right to interpret its own statute.
- Burnaby mischaracterizes Trans Mountain's 25 July 2014 request to the Board. Trans Mountain did not apply for a Board order to access lands.
- The NEB Act permits the proposed studies and should not be read restrictively.
- There are no constitutional issues engaged by Trans Mountain's request. Paragraph 73(a) does not require a Board order because Parliament has exercised its authority to authorize a company to enter any Crown or non-Crown land to make surveys for intended pipelines. Trans Mountain has not requested that the Board override or read down provincial or municipal legislation.

On 12 August 2014, the Board received a filing from Trans Mountain where the Board was copied on correspondence between Burnaby and Trans Mountain. The Board removed this filing from the online public registry and did not consider it. The Board generally does not accept filings copied to it.

### *Views of the Board*

#### Preliminary fairness issue raised by Burnaby

The Board is not persuaded that the timeframe given to Burnaby to respond to Trans Mountain's request was unfair.

The Board has authority to extend or abridge time where considerations of public interest and fairness so require.<sup>3</sup> In the Board's letter of 1 August 2014, it provided reasons why it was not persuaded to grant Burnaby a lengthy extension. However, Burnaby was granted a short extension. Burnaby has not alleged any error with respect to the reasons the Board previously provided. Extensions are considered based on the reasons provided and how much extra time, if any, the Board is able to accommodate. The Board also considers any prejudice to others that may reasonably result to other parties from granting an extension. In the Board's view, the revised deadlines provided to Burnaby, as well as to Trans Mountain, were fair. As Burnaby noted in its submissions, the dispute about access to Burnaby lands has existed for several months.

#### Interpretation of section 73 of the NEB Act

Section 73 of the NEB Act states:

A company may, for the purposes of its undertaking, subject to this Act and to any Special Act applicable to it,

- (a) enter into and on any Crown land without previous licence therefor, or into or on the land of any person, lying in the intended route of its pipeline, and make surveys, examinations or other necessary arrangements on the land for fixing the site of the pipeline, and set out and ascertain such parts of the land as are necessary and proper for the pipeline;

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<sup>3</sup> [National Energy Board Rules of Practice and Procedure, 1995](#), section 4.

Section 75 of the NEB Act states:

A company shall, in the exercise of the powers granted by this Act or a Special Act, do as little damage as possible, and shall make full compensation in the manner provided in this Act and in a Special Act, to all persons interested, for all damage sustained by them by reason of the exercise of those powers.

Throughout its submissions, including its Notice of Constitutional Question, Burnaby mischaracterizes the nature of Trans Mountain's request. For example, Burnaby states that "Section 73(a) of the [NEB] Act does not empower the National Energy Board to make orders that override provincial and municipal jurisdiction...". As the Board has previously noted, Trans Mountain's request for confirmation of its interpretation of paragraph 73(a) of the NEB Act is not an application for the Board to issue a temporary access order. While such a request was made in the Dawn Gateway Pipeline process, it was not made here.

The Board accepts Trans Mountain's submission that the Board has authority to interpret its own legislation.<sup>4</sup> While the Board agrees with Burnaby that Trans Mountain could have made a formal request to Burnaby sooner than it did, this fact provides no assistance in interpreting paragraph 73(a) of the NEB Act, nor is the fact that Burnaby has not made a final decision about the formal access request relevant to an interpretation of paragraph 73(a).

A plain reading of the language used in paragraph 73(a) provides Trans Mountain with the power to enter any Crown (federal or provincial) or privately owned land which lies in the intended route of its pipeline to make surveys and examinations. There is no requirement in paragraph 73(a) for companies to reach agreement with landowners, the Crown, or otherwise, before exercising the right to access land. The provision does not restrict the powers conferred on companies to enter into and on lands that were part of an original application.

In order to make a recommendation under section 52 of the NEB Act, the Board requires companies to provide detailed information about engineering, environmental, geotechnical, archaeological, and other matters. As the Board noted previously in the Dawn Gateway Pipeline process, it would not be logical that the Board be required to recommend approval or denial of a project without all the necessary information before it. This would not be in the public interest.

The Board is of the view that a company's power under paragraph 73(a) to "make surveys, examinations or other necessary arrangements on the land for fixing the site of the pipeline" should not be read restrictively as long as what is done is necessary for fixing the routing of the pipeline and submitting necessary information to the Board. To interpret the survey power as Burnaby has submitted to allow only "superficial access" would not provide the Board with the information it needs and would go against the intent of the legislation.

The powers provided to a company in paragraph 73(a) are not unlimited, as is made clear in section 75. A company must do as little damage as possible and make full compensation as provided under the NEB Act for any damage sustained.

In summary, the Board is of the view that Trans Mountain has the power stated by Parliament in paragraph 73(a) of the NEB Act. Specifically, Trans Mountain has the power to enter into and on Burnaby land without Burnaby's agreement in the manner outlined in Trans Mountain's 25 July 2014 request. Trans Mountain does not require a Board order for temporary access, nor has it requested a Board order.

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<sup>4</sup> [NEB Act](#), section 12

### Notice of Constitutional Question

Burnaby filed its Notice of Constitutional Question as a response to Trans Mountain's request for interpretation of paragraph 73(a). Burnaby's filing indicates that it was served on the Attorneys General. Section 57 of the *Federal Courts Act* is relevant to Burnaby's Notice of Constitutional Question. Section 57 states:

57.(1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the National Defence Act, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

For the reasons that follow, the Board finds that no constitutional issues are engaged by Trans Mountain's request. The Board is not judging any legislation to be invalid, inapplicable, or inoperable.

The Board has carefully reviewed Burnaby's Notice of Constitutional Question. The only section of Canada's Constitution contained in Burnaby's Notice is section 92(8) of the *Constitution Act, 1867*. Section 92 provides:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

8. Municipal Institutions in the Province.

In its Notice of Constitutional Question, Burnaby states that it:

...intends to challenge the constitutional implications of s. 73(a) of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (the "Act") generally, and as applied in the circumstances of this hearing, and raise that:

- Section 73(a) of the Act does not empower the National Energy Board to make orders that override provincial and municipal jurisdiction pursuant to s. 92(8) of the *Constitution Act, 1867*.

Burnaby describes the legal basis for its challenge in its notice as follows:

1. The Respondent asserts that s. 73(a) of the Act does not empower the National Energy Board to make an order with constitutional priority, which overrides the Respondent's jurisdiction and the By-laws. The Respondent, therefore, asserts that any order or right pursuant to s. 73(a) of the Act is subject to the By-laws, validly enacted by the Respondent under the *Community Charter* or the *Municipal Act*.
2. The Respondent asserts, to the extent possible, s. 73(a) of the Act and the By-laws must operate concurrently to facilitate co-operative federalism.

As stated earlier, Burnaby's Notice of Constitutional Question mischaracterizes Trans Mountain's request. Trans Mountain has not applied to the Board for a temporary access order. The Board considers it telling that the legal basis so described lacks any reference to a violation of the Constitution. Nowhere in the Notice of Constitutional Question does Burnaby allege that

Parliament lacked the legislative jurisdiction to enact paragraph 73(a), or otherwise challenge Parliament's competence to do so. Rather, Burnaby urges an interpretation of section 73, assuming the provision is validly enacted. Unfortunately for Burnaby, this flies in the face of the clear language of the provision.

Burnaby has argued that the concept of co-operative federalism should influence the interpretation of paragraph 73(a) of the NEB Act. The Board is not persuaded that the concept is applicable in interpreting this clear provision, nor does the argument raise a valid constitutional question impugning the power of Parliament to enact section 73.

Yours truly,

*Original signed by L. George for*

Sheri Young  
Secretary of the Board

c.c. All intervenors

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