

National Energy
Board



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de l'énergie

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Dear Sirs:

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
Trans Mountain notice of motion and Notice of Constitutional Question, dated
26 September 2014
Ruling No. 40**

The National Energy Board (Board) is in receipt of a [notice of motion](#) (Motion) from Trans Mountain, including a Notice of Constitutional Question (NCQ), seeking an order pursuant to sections 12, 13, and paragraph 73(a) of the *National Energy Board Act* (NEB Act) that:

- directs the City of Burnaby (Burnaby) to comply with paragraph 73(a) of the NEB Act permitting temporary access to lands by Trans Mountain for the purposes of geotechnical surveys, examinations, and associated activity necessary for fixing the site of the pipeline; and
- forbids Burnaby from denying or obstructing Trans Mountain or its representatives and agents in gaining temporary access to their lands for the purpose of making surveys, examinations, or other necessary arrangements for fixing the site of the pipeline.

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Decision

The Board has decided that:

- 1) the Board has jurisdiction to determine that specific Burnaby bylaws are inoperative or inapplicable to the extent they conflict with or impair the exercise of Trans Mountain's powers under paragraph 73(a) of the NEB Act;
- 2) the doctrine of federal paramountcy, or alternatively, interjurisdictional immunity renders the Impugned Bylaws inapplicable or inoperative for the purposes of Trans Mountain's exercise of its powers under paragraph 73(a) of the NEB Act;
- 3) the Board has authority under subsection 13(b) of the NEB Act to issue an order against Burnaby; and
- 4) the facts necessitate the granting of such an order, and an order is attached.

Background

On 16 December 2013, Trans Mountain applied to the Board, pursuant to sections 52 and 58 of the NEB Act, for a certificate of public convenience and necessity and related orders approving the Project. The Project is an expansion of an existing pipeline and would involve 987 kilometres of new buried pipeline in British Columbia and Alberta as well as the reactivation of 193 kilometres of existing pipeline.

The Board determined on 2 April 2014 that the application was [complete](#), and issued a [Hearing Order](#) outlining the public hearing process by which it would assess Trans Mountain's application. Pursuant to the time limits established by the Board's Chairperson under sections 52 and 58 of the NEB Act, the Board stated that its report to the Governor in Council in relation to the Project would be submitted on or before 2 July 2015.

Part of Trans Mountain's Project application proposed the construction of two delivery lines to the Westridge marine terminal through the residential neighbourhood of Burnaby (Alternate Corridor). On 10 June 2014, in [response](#) to an Information Request from the Board, Trans Mountain indicated that its preferred corridor had been revised, and that the preferred routing of the two delivery lines to the marine terminal was now through Burnaby Mountain (Preferred Corridor). The Alternate Corridor continues to be an option before the Board but is not Trans Mountain's preferred option.

On 15 July 2014, the Board [stated](#) that geotechnical, engineering, socio-economic and environmental studies and related information (Corridor Studies) regarding the Preferred Corridor through Burnaby Mountain were required before it could make its recommendation to the Governor in Council. The Board also stated, with the Board Chairperson's approval, that the time required to prepare and file the Corridor Studies would be excluded from the calculation of the time limit for the Board's report, which is now due on 25 January 2016, based on a [revised schedule](#) in which Trans Mountain can file the Corridor Studies by 1 December 2014.

Trans Mountain [requested](#) on 25 July 2014 that the Board confirm the company's interpretation of its powers to access land for survey and examination purposes under section 73(a) of the NEB Act (Confirmation Request). The Confirmation Request enclosed a copy of [correspondence](#) sent to Burnaby on the same day, which included a request for Burnaby's consent to allow Trans Mountain to enter specific lands to perform specific activities in relation to the Corridor Studies. The request for consent included:

1. A Burnaby "[Encroachment Application and Permit Agreement](#)" form, and additional information. The information in the form and agreement included:
 - The requirement for boreholes and other geotechnical/environmental investigations, plans for restoration of land to previous conditions once work is completed, a 48-hour notice requirement, and information relating to traffic impacts such as lane closures;
 - A letter from BGC Engineering (a consultant retained by Trans Mountain) detailing the work to be performed including two 6-inch diameter boreholes and their locations, methods of moving equipment to sites, and the brush, vegetation, and tree removal that may be needed as well as restoration work planned including replanting;
2. A list of [Burnaby lands](#) impacted (Subject Lands);
3. Insurance certificates naming Burnaby as the beneficiary; and
4. Site-specific health and safety plans.

The Board issued [Ruling No. 28](#) on 19 August 2014. In this ruling, the Board confirmed that Trans Mountain had the power to enter onto Crown or privately owned lands, without needing the landowner's consent, to "make surveys, examinations or other necessary arrangements on the land for fixing the site of the pipeline". The Board found that it would not be in the public interest to make its recommendation on the Project without reviewing the Corridor Studies. The ruling stated that the power to enter lands to make surveys and examinations should not be read restrictively as long as what is done is necessary to fix the route of the pipeline and that the power is subject to the requirement of section 75 of the NEB Act to do as little damage as possible and to make full compensation for any damage caused. Finally, the Board determined that in its view Trans Mountain had the power to enter Burnaby land to perform surveys and examinations in the manner outlined in its detailed 25 July 2014 filing, and to do so without Burnaby's consent.

Extensive further correspondence between Trans Mountain and Burnaby¹ did not lead to a permit or agreement and on 28 August 2014, the company started work in Burnaby Mountain Conservation Area, a municipal park. In Burnaby's view, the work done violated the following provisions of its bylaws (collectively, the Impugned Bylaws):

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¹ Both parties have filed a large number of records regarding events after Ruling No. 28 was issued.

Burnaby Parks Regulation Bylaw 1979 (Parks Bylaw):

3. No person shall cut, break, injure, damage, deface, destroy, foul or pollute any park including, without limiting the generality of the foregoing, any building, structure, fence, sign, seat, bench, ornament or thing in or on any park.

5. No person shall cut, break, injure, damage, deface, destroy, foul or pollute any personal property or any tree, shrub, plant, turf or flower in or on any park.

Burnaby Street and Traffic Bylaw 1961 (Traffic Bylaw):

24. (1) No person shall excavate in, do or construct any works upon, cause a nuisance upon, encumber, obstruct, injure, foul, or damage any portion of a highway or other public place without written permission so to do from the Council and except under such terms and conditions as may be imposed by the Council in such permission.

(4) Except as otherwise provided herein no person shall use any highway for any purpose other than the passage thereon or ordinary and normal vehicular and pedestrian traffic.

On 2 September 2014, Burnaby staff issued an Order to Cease Bylaw Contraventions to a Trans Mountain employee in relation to the Impugned Bylaws' provisions above.

On 3 September 2014, Burnaby staff issued a bylaw notice to an employee of Trans Mountain, citing damage or destruction to a tree or plant. The bylaw notice stated this was contrary to the Parks Bylaw.

Trans Mountain filed a [motion](#) with the Board on 3 September 2014 requesting the same Order as in the present 26 September 2014 motion; however, the company did not serve the Attorneys-General with a NCQ at that time. The Board dismissed the motion in [Ruling No. 32](#) issued on 25 September 2014, without prejudice to the matter being raised again as the relief requested by Trans Mountain raised a constitutional question, requiring an NCQ to be served on the Attorneys-General under the *Federal Courts Act*. The Board also set out the four questions referenced below on which it expected parties to provide submissions should the matter be raised again. Accordingly Trans Mountain filed the present motion which was accompanied by an NCQ served on the Attorneys-General. No Attorneys-General chose to participate.

Written submissions and affidavit evidence² were filed by Trans Mountain and Burnaby. Oral argument also took place at the Board's offices on 9 October 2014.

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² In support of the Motion, an affidavit dated 26 September 2014 and reply affidavit dated 7 October 2014 from Carey Johannesson, Trans Mountain Project Lead for the Land and Right of Way (collectively the Johannesson Affidavits). Opposing the Motion, an affidavit from 6 October 2014 from Dipak Dattani, Acting Deputy Director of Engineering of Burnaby (Dattani Affidavit).

Question 1: Does the Board have the legal authority to determine that Burnaby's specific bylaws that Trans Mountain is alleged to have breached are inapplicable, invalid, or inoperative in the context of Trans Mountain's exercise of its powers under paragraph 73(a) of the NEB Act?

Trans Mountain's submissions include the following:

- The NEB has jurisdiction to determine that municipal bylaws of Burnaby are inapplicable or inoperative in the context of paragraph 73(a) of the NEB Act.
- It is the NEB Act, including sections 11, 12 and 13, that provides the Board with jurisdiction since the NEB is a court of record with full and exclusive jurisdiction to inquire into, hear, and determine any matter within its jurisdiction, whether a matter of law or of fact.
- Constitutional questions are the most fundamental questions of law and subsection 12(2) of the NEB Act provides clear authority to determine such a question.
- The Supreme Court of Canada has confirmed that if an administrative tribunal has jurisdiction over the parties, subject matter, and remedy, it may treat an impugned provision of legislation as invalid for the purposes of the matter before it.³
- The capacity of a tribunal to consider constitutional questions relating to its own jurisdiction has long been recognized.⁴
- It is settled that administrative tribunals that have the jurisdiction to determine questions of law can address division of powers questions, and courts will review those decisions on a standard of correctness.⁵
- The Board's jurisdiction to consider Question 1 was recently confirmed by the Supreme Court of British Columbia in an injunction application initiated by Burnaby. The Court, in providing reasons for not granting a temporary injunction against Trans Mountain, stated "although [the NEB] could not issue a declaration that s. 73 of the [NEB] Act or the Burnaby bylaws were invalid, nonetheless the NEB would be able to treat the impugned provision as invalid for the purposes of the matter before it."⁶

Burnaby's submissions include the following:

- The Board has no power or authority to make an order against Burnaby in relation to Burnaby's bylaws.
- Burnaby does not challenge the constitutionality of paragraph 73(a) of the NEB Act.

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³ *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 SCR 5, paragraph 13-14 (Cuddy Chicks)

⁴ Cuddy Chicks

⁵ For support, Trans Mountain cites *Cooper v Canada (Human Rights Commission)* [1996] 3 SCR 854, paragraph 64, and states that Supreme Court of Canada decisions confirm that administrative tribunals with the power to determine questions of law can adjudicate division of powers questions relating to their jurisdiction; *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, paragraph 58; *Westcoast Energy Inc. v Canada (National Energy Board)*, [1998] 1 SCR 322.

⁶ *City of Burnaby v Trans Mountain Pipeline ULC and National Energy Board*, (BC Supreme Court Ruling) 2014 BCSC 1820, paragraph 40

- Burnaby has accepted Ruling No. 28, and provided access to the Subject Lands.
- The Board only has power to determine legal and constitutional questions over its own enabling legislation and not provincial or municipal legislation. The Board cannot determine that Burnaby's bylaws are invalid, inapplicable, or inoperative.
- The Supreme Court in *Cooper*⁷ confirmed only that tribunals can consider constitutional questions of their own enabling legislation.
- The Supreme Court of Canada in cases such as *Nova Scotia (Workers' Compensation Board) v. Martin*⁸ has been clear that the principle that the power to decide legal questions must relate to the provision within the legislation that the tribunal is applying.
- Constitutional remedies available to tribunals are limited and, as stated in *Martin*, they do not include "general declarations of invalidity".
- Here, Trans Mountain is seeking an order directed at Burnaby's bylaws and Burnaby's enforcement of the bylaws. Burnaby bylaws are validly enacted provincial legislation.
- None of the cases cited by Trans Mountain support any inference that a grant of authority to a tribunal to adjudicate division of powers questions means that the tribunal can go outside its enabling statute. There are no judicial precedents for a tribunal issuing an order preventing a municipality from enforcing its own bylaws.
- The NEB must decline jurisdiction of this matter, which properly belongs before a provincial superior court.
- The BC Supreme Court, in its ruling, did not have a constitutional question before it and in any event that Court's decision is subject to a leave to appeal application by Burnaby.

Views of the Board

The answer to Question 1 is yes. The Board has legal authority to consider constitutional questions relating to its own jurisdiction and this is such a question. Preventing access to lands as needed for the completion of surveys and studies relating to pipeline routing (Corridor Study Access) is contrary to the NEB Act. The Board has the authority to determine that specific bylaws at issue are inapplicable or inoperable for the purpose of the matter before the Board.⁹

When the Board has an application before it requiring the Board to make a recommendation to Governor in Council as to whether a certificate should be issued for a pipeline, it is essential that the Board have before it relevant technical information about that proposed pipeline. The Board could not fulfill its statutory requirements, including the completion of an environmental assessment under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) if it did not have detailed technical information about engineering, environmental, geotechnical, archaeological, and other related matters.

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⁷ Paragraph 42

⁸ 2003 SCC 54, at paragraphs 3, 28, 31, 36, 37 and 40.

⁹ Cuddy Chicks, paragraph 17

In reaching its conclusion on Question 1, the Board considered its enabling legislation as well as the governing case law about a tribunal's jurisdiction to consider constitutional issues. With respect to the NEB Act, the Board took an interpretative approach that has been used by courts and tribunals for some time. That is,

Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.¹⁰

The NEB Act establishes that the NEB is a court of record¹¹ and states:

12. (1) The Board has full and exclusive jurisdiction to inquire into, hear and determine any matter

(a) where it appears to the Board that any person has failed to do any act, matter or thing required to be done by this Act or by any regulation, certificate, licence or permit, or any order or direction made by the Board, or that any person has done or is doing any act, matter or thing contrary to or in contravention of this Act, or any such regulation, certificate, licence, permit, order or direction; or

(b) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be done.

...

(2) For the purposes of this Act, the Board has full jurisdiction to hear and determine all matters, whether of law or of fact.

13. The Board may

...

(b) forbid the doing or continuing of any act, matter or thing that is contrary to this Act or any such regulation, certificate, licence, permit, order or direction.

While it is important to consider the NEB Act as a whole, it is subsection 12(2) of the NEB Act that is determinative of the Board's jurisdiction to consider constitutional questions. It states that for the purposes of the NEB Act, the Board has "full jurisdiction to hear and determine all matters, whether of law or of fact" (emphasis added). Constitutional questions are the most fundamental and essential questions of law.

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¹⁰ Driedger, E.A., *Construction of Statutes*, 2nd ed., 1983 at p. 87

¹¹ Section 11

The Supreme Court of Canada has also confirmed that tribunals with the authority to determine questions of law can adjudicate division of powers cases relating to their own jurisdiction.¹² It would be illogical to conclude, merely from the silence of the case law on the specific issue before the Board, that a tribunal can decide some division of powers issues, but not others. Burnaby provided no authority to support such a proposition.

As set out in *Cuddy Chicks*, if a tribunal has jurisdiction over the subject matter, parties and remedy, it may treat an impugned provision as invalid “for the purpose of the matter before it”.¹³ Here the Board has jurisdiction over the subject matter, which is an application for interprovincial pipeline and specifically, an application to order Corridor Study Access to the Subject Lands in relation to a proposed pipeline route. The Board has jurisdiction over the parties as it concerns Project routing and access to complete surveys. All aspects of this issue relate directly to the Board’s own jurisdiction. The Board also has jurisdiction over the remedy¹⁴, although as stated in *Cuddy Chicks*, the remedy is “limited in its applicability to the matter in which it arises.” The Board cannot issue a formal declaration of invalidity, inapplicability or inoperability, or grant any general relief as against municipal bylaws in general, and has not done so here.

The Board does not accept the submission of Burnaby that this matter must only be heard by a provincial superior court. Neither does the Board accept Burnaby’s argument that the Board has no jurisdiction to effect any remedy. It is worth noting that Justice Brown, in the BC Supreme Court Ruling, found that, “The matter is properly before the NEB”, and that the NEB would be able to provide a remedy.¹⁵ To hold otherwise would have the likely result of applications and proceedings before the Board being dealt with in a less than expeditious manner and leave the Board’s processes open to abuse and delay.

QUESTION 2: If so, on the facts before the Board, should the Board find that those bylaws are inapplicable, invalid, or inoperative?

Trans Mountain’s submissions include the following:

- Interprovincial works and undertakings (including pipelines) fall under the exclusive jurisdiction of the federal government.

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¹² Cooper, paragraph 64; *Dunsmuir*, paragraph 58; *Westcoast Energy Inc. v Canada (National Energy Board)*

¹³ Paragraphs 13 to 17

¹⁴ This is further described in Questions 2 to 4 below.

¹⁵ Paragraphs 16 and 40. The Board also in Ruling No. 32 rejected a request by Burnaby to adjourn a previous motion by Trans Mountain pending determination before the Supreme Court of British Columbia.

Federal Paramountcy:

- As stated in *Canadian Western Bank v Alberta*, the doctrine of federal paramountcy provides that “when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility.”¹⁶
- Federal paramountcy applies when it is impossible to comply with both a provincial and a federal law or an application of the provincial law would frustrate the purpose of the federal law.¹⁷
- The impact on the Subject Lands from completing the surveys is *de minimis*. Some trees need to be cut for safety reasons, and brush needs to be cleared and boring done beneath the surface of the ground.
- It is therefore impossible to comply with sections 3 and 5 of the Parks Bylaw, which state that “[n]o person shall cut, break, injure, damage, deface, destroy, foul or pollute” any park or thing in or on a park, or any “personal property or any tree, shrub, plant, turf or flower in or on any park,” respectively. Compliance with both this bylaw and the NEB requirement that it receive full information regarding the Preferred Corridor are not possible.
- It is also impossible to comply with the Traffic Bylaw.
- In addition to an operational conflict between federal and provincial legislation, a majority of the Court in *British Columbia (Attorney General) v Lafarge Canada Inc.* found that the municipal bylaw at issue in that case, if applied, would frustrate a federal legislative purpose.¹⁸ The same applies with respect to the Impugned Bylaws here. The federal purpose reflected in paragraph 73(a) of the NEB Act is to give a company the right to enter onto Crown or private land without the consent of the Crown or private landowners to gather information regarding potential pipeline routing. Burnaby says that permission is required and that makes dual compliance impossible. Therefore, federal paramountcy applies to render the Impugned Bylaws inoperative to the extent they purport to apply to Trans Mountain’s survey work.

Interjurisdictional Immunity

- In addition to paramountcy, this doctrine also applies. Under this doctrine, the first step is to determine whether the provincial law trenches on the protected core of a federal competence. If so, the second step is to determine whether the provincial law’s effect on the exercise of the protected federal power is sufficiently serious to invoke interjurisdictional immunity. It must “impair” the core federal power.

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¹⁶ 2007 SCC 22, paragraph 69 (*Canadian Western Bank*).

¹⁷ *Canadian Western Bank*, paragraph 26 and *Bank of Montreal v Hall*, [1990] 1 SCR 121 (*Bank of Montreal*), paragraphs 54-56

¹⁸ 2007 SCC 23, paragraphs 83 to 84

- Here, to achieve the purpose the NEB Act, a company must be able to exercise its powers under paragraph 73(a) of the NEB Act. Conducting surveys and examination for the purpose of informing the routing of an interprovincial pipeline is within the “core” of the federal power. The application of the Impugned Bylaws is impairing the federal power. To hold otherwise would give provinces the authority to determine an interprovincial pipeline route.
- The facts of this case at hand have already been covered by precedent in *Campbell-Bennett v Comstock Midwestern Ltd.*¹⁹ This is a proposed expansion of an existing interprovincial pipeline, which is indisputably a federal undertaking.

Burnaby’s submissions include the following:

Federal Paramountcy:

- The Supreme Court of Canada has established a strict test for determining whether there is sufficient incompatibility to trigger paramountcy.²⁰
- There is no impossibility of dual compliance in this case. Sections 3 and 5 of the Parks Bylaw do not forbid access to the park to carry out studies. Trans Mountain has not provided evidence that only by violating the Parks Bylaw will it be able to provide the necessary information for the Board.
- Care must be taken not to give too broad an application to paramountcy on the basis of frustration of the federal purpose. The fact that Parliament has legislated in an area does not preclude provincial legislation from operating in the same area.²¹
- Paragraph 73(a) of the NEB Act does not address park or traffic legislation. The Impugned Bylaws have an environmental and local purpose. This does not frustrate the federal purpose.

Interjurisdictional Immunity:

- The Supreme Court of Canada has cautioned about the use of this doctrine in recent years and it should be reserved for situations covered by precedent.²²
- This doctrine must not be used to undermine cooperative federalism.
- There is no precedent that covers the doctrine’s application to parks or traffic legislation in relation to the investigation of routes for a proposed interprovincial pipeline.
- In any event, Trans Mountain has not demonstrated that the Impugned Bylaws would “impair” the core of the federal power.
- Courts have consistently held that there is no vital or essential federal interest that would justify making pipeline companies immune from provincial environmental protection laws or rules of the road.

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¹⁹ [1954] SCR 207

²⁰ *Multiple Access Ltd. v McCutcheon*, [1982] 2 SCR 161. The Court speaks of an operational conflict where one enactment says “yes” and the other says “no”.

²¹ Canadian Western Bank, paragraph 74

²² Canadian Western Bank, paragraphs 67 and 77

- The NEB has not yet ruled that the Burnaby Mountain route is an acceptable route for the proposed pipeline.
- The Impugned Bylaws do not prevent Trans Mountain from accessing the Burnaby Mountain Conservation area or from carrying out studies.

Views of the Board

Federal paramountcy, or alternatively injurisdictional immunity, applies in the specific facts of this case.

Paramountcy

The doctrine of paramountcy holds that where there are inconsistent or conflicting validly-enacted federal and provincial laws, the federal law prevails. Paramountcy renders the provincial law inoperative to the extent of the inconsistency or conflict. In order for paramountcy to apply, there must be an inconsistency or a conflict between the federal and the provincial law.²³ 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.²⁴ 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.²⁵

In the present case, both the NEB Act and the Impugned Bylaws are validly enacted. However, there is an inconsistency or conflict with the Impugned Bylaws and paragraph 73(a) of the NEB Act, with respect to both its operation and its purpose. The purpose of paragraph 73(a) was described as follows by the Board in Ruling No. 28:

In order to provide 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.

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²³ Hogg, *Constitutional Law of Canada*, 5th Ed., p. 15-28

²⁴ *Bank of Montreal*, paragraph 63

²⁵ Hogg, p. 16-6 to 16-7

While Burnaby submits that there is insufficient evidence that Trans Mountain is required to break the Parks Bylaw to provide the required information to the Board, the Board found in Ruling No. 28 that to interpret paragraph 73(a) of the NEB Act as allowing only “superficial access” would not provide the Board with the information it needs and would go against the intent of the NEB Act. Paragraph 73(a) of the NEB Act uses the phrase “enter into and on” lands to “make surveys, examinations or other necessary arrangements”. The Board already stated in Ruling No. 28 that 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. In Trans Mountain’s letter to the Board of 25 July 2014, it included attachments which detailed that Trans Mountain would be conducting geophysical surveys and drilling two geotechnical bore holes. Brush clearing and tree cutting to complete the geophysical surveys, borehole drilling and access trails was expressly described in the 25 July 2014 attachment as was the requirement to slow traffic at times while this work was being undertaken. For Burnaby to claim that there was insufficient evidence to show a conflict with the Impugned Bylaws is not consistent with the information provided to the Board on 25 July 2014 and the Board’s findings in Ruling No. 28. The Board notes that Ruling No. 28 was not challenged by Burnaby.

In any event, Trans Mountain has provided affidavit evidence to support its current application. The Board accepts the affidavit evidence of Carey Johannesson that it is impossible to undertake the required surveys and examinations and still comply with the Impugned Bylaws. The Board accepts Mr. Johannesson’s evidence that in order to complete the work, in some cases Trans Mountain must disturb the Subject Lands, including land in the conservation area.

The Board also accepts the evidence in Mr. Johannesson’s reply affidavit that it is standard practice to determine geotechnical feasibility by drilling.²⁶ This is consistent with the Board’s understanding of geotechnical feasibility studies. In fact, geophysical and geotechnical evidence not obtained by drilling into the ground in the vicinity of the Burnaby Mountain route would not be acceptable to the Board for this Project.

In the Board’s view there is a clear conflict between the Parks Bylaw and paragraph 73(a) of the NEB Act. Section 5 of the Parks Bylaw states that “no person shall cut, break, injure, damage, deface, destroy, foul or pollute any personal property or any tree, shrub, plant, turf or flower in or on any park”. There is a clear prohibition against cutting any tree, clearing vegetation or boring into the ground, regardless of whether minimal tree clearing is necessary where the trees would create a safety risk for the drilling work that must occur. While the Board accepts that the Parks Bylaw has an environmental purpose, the application of the bylaws and the presence of Burnaby employees in the work safety zone had the effect of frustrating the federal purpose of the NEB Act to obtain necessary information for the Board to make a recommendation under section 52 of the NEB Act.

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²⁶ While Burnaby argued against consideration of some information in the reply affidavit that was hearsay evidence, the Board accepts this as proper reply evidence since this point was first challenged in Burnaby’s evidence. Burnaby also did not explain why a tribunal should not consider hearsay evidence or why the Board should not consider it unless it provided for cross examination. Hearsay evidence can be dealt with by weight, and in this case the Board gave it moderate weight. However, the necessity of drilling into the ground was already long established based on other evidence.

There is also an operational conflict with sections 24(1) and (4) of the Traffic Bylaw. While 24(1) does allow Burnaby Council to approve work along a highway or to impose conditions regarding such work, in this case the Board finds that Burnaby refused to consider Trans Mountain's request. The Board accepts the affidavit evidence of Mr. Johannesson that when doing survey work caution signs are normally placed on roadway in cooperation with the municipality. However, given the refusal of Burnaby to discuss the work, Trans Mountain undertook this work on its own. The Dattani Affidavit did not contest that Burnaby refused to discuss traffic issues that were raised by Trans Mountain.²⁷

In the Board's view, there is an operational conflict between the Impugned Bylaws and federal law. Based on the facts before the Board, dual compliance is impossible.

In conclusion, the Board finds that the doctrine of federal paramountcy applies to section 3 and 5 of the Parks Bylaw and subsections 24(1) and (4) of the Traffic Bylaw. Therefore, the Impugned Bylaws are inoperable to the extent that they prevent Trans Mountain from exercising its powers under paragraph 73(a) of the NEB Act.

This is not to suggest that a pipeline company can generally ignore provincial law or municipal bylaws. The opposite is true. Federally regulated pipelines are required, through operation of law and the imposition of conditions by the Board, to comply with a broad range of provincial laws and municipal bylaws.

Interjurisdictional Immunity

In the alternative, the Board also considered the application of the doctrine of interjurisdictional immunity.

The doctrine of interjurisdictional immunity has evolved over the years and its usage has fallen out of favour to some degree; however, it is still an accepted doctrine for dealing with clashes between validly-enacted federal and provincial laws. Generally, it is an argument that may be used in constitutional cases involving federal laws or undertakings to challenge or attack an otherwise valid provincial law. If the doctrine applies, the result is that the provincial law, while validly enacted and applicable to certain matters, is found to be inapplicable to matters falling outside of the jurisdiction of the enacting legislative body. In effect, the law is "read down" so as not to apply to the extra-jurisdictional matter.²⁸ For example, undertakings falling within federal jurisdiction are immune from otherwise-valid provincial laws that would have the effect of impairing a core competence of Parliament or vital part of the federal undertaking. For the doctrine of interjurisdictional immunity to apply, there has to be a factual determination that the provincial law impairs (not just affects) a core competence of Parliament or a vital part of the federal undertaking. If there is no finding of impairment, then the provincial law of general application may still apply to the federal undertaking, even if that provincial law affects the federal undertaking to some degree.

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²⁷ The Dattani Affidavit only stated that Trans Mountain had not obtained permission from Burnaby to obstruct traffic.

²⁸ Hogg, p. 15-28

The first step is to determine whether the provincial law trenches on the protected core of a federal competence. If so, step two is to determine whether the provincial law's effect on the exercise of the protected federal power is sufficiently serious to invoke interjurisdictional immunity.

The Board finds that the Impugned Bylaws impair a core competence of Parliament. This is based on the facts of this case, which are detailed above. As explained above under the federal paramountcy discussion, the routing of the interprovincial pipeline is within the core of a federal power over interprovincial pipelines. Actions taken by Burnaby with respect to enforcing the Impugned Bylaws impair the ability of the Board to consider the Project and make a recommendation regarding on the appropriate routing of the Project. The Board requires detailed information from surveys and examinations in order to make a recommendation to Governor in Council and to complete an environmental assessment. Similar to the location of aerodromes being essential to the federal government's power over aeronautics,²⁹ detailed technical information about pipeline routing is essential to the Board. The Supreme Court has held as follows with respect to the planning and approval of airport facilities:

To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern This is why decisions of this type are not subject to municipal regulation or permission The design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures, and other similar specifications are, from a legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect upon its operational qualities and therefore, upon its suitability for the purposes of aeronautics.³⁰

Similarly, the Board's inability to consider the technical and environmental aspects of a proposed pipeline route, effectively withdrawing such a route from its consideration, has significant and direct implications for the final structure of any undertaking that may be approved by the Board.

In addition to finding that the Impugned Bylaws are impairing a core competence of Parliament, the Board also concludes that their effect, on the facts before it, is sufficiently serious to warrant a finding of impairment and therefore invoke the doctrine of interjurisdictional immunity. In reaching this conclusion, the Board does not accept Burnaby's claim that the Impugned Bylaws do not prevent Trans Mountain from accessing the Burnaby Mountain Conservation. The facts support that Trans Mountain has not had Corridor Study Access to the Subject Lands; that is, not merely access, or access to complete superficial studies, but access to complete all studies required as detailed in Trans Mountain's 25 July 2014 filing. The powers of pipeline companies under paragraph 73(a) of the NEB Act go beyond just getting on the land. They also need to be

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²⁹ *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39, reasons of the majority of the Court

³⁰ *Quebec (Minimum Wage Commission) v. Construction Montcalm Inc.*, [1979] 1 S.C.R. 754, reasons of the majority of the Court

able to complete the required surveys and studies, including associated preliminary work. Burnaby's actions in enforcing the Impugned Bylaws, including the presence of Burnaby employees in the work safety zone, have directly impaired the ability of Trans Mountain to complete the required surveys and the need for the Board to receive the required information about the Burnaby Mountain route.

In conclusion, the Board finds in the alternative that the infringement on the federal power in paragraph 73(a) of the NEB Act is sufficiently serious to invoke the doctrine of interjurisdictional immunity. Therefore, the Impugned Bylaws are inapplicable to the extent they impair temporary access to the Subject Lands by Trans Mountain for the purposes set out in paragraph 73(a).

QUESTION 3: If the Board can and does make a finding that those bylaws are invalid, inapplicable, or inoperable in the particular case, does the NEB Act provide the Board, as a statutory tribunal, with the authority to forbid Burnaby from enforcing those or any other by-laws in the future (for example, what is the scope of the authority under section 13 of the NEB Act, and does it encompass the remedy sought against Burnaby)?

Trans Mountain's submissions include the following:

- The NEB has the authority under section 13 of the NEB Act to forbid Burnaby from enforcing the Impugned Bylaws in a manner that is contrary to Trans Mountain's rights under section paragraph 73(a) of the NEB Act. Paragraph 73(a) applies to both private and public lands. The NEB can forbid any act, matter, or thing that is contrary to the NEB Act. The NEB can forbid Burnaby from preventing Corridor Study Access to the Subject Lands.
- The remedy sought by Trans Mountain falls within the ambit of section 13 of the NEB Act.
- Burnaby is incorrect in its argument that section 13 does not include the power to issue an order against a municipality because the definition of "person" in the *Interpretation Act*³¹ is not exhaustive. If Burnaby were not a "person" under section 13(a) then it would also not meet the definition of any "person" under section 55.2 of the NEB Act. It would not be logical for Burnaby to be a "person" eligible to be an intervenor under section 55.2 but not a "person" under section 13.
- As per *Cuddy Chicks*, the Board has jurisdiction over both the subject matter and the remedy. To interpret otherwise would give no meaning to the paragraph 73(a) rights of Trans Mountain.

Burnaby's submissions include the following:

- The Board has no authority under section 13 of the NEB Act from preventing another level of government from enforcing its bylaws. Nowhere in the NEB Act does it say that enforcement of municipal bylaws is contrary to the NEB Act. Section 12 of the NEB Act also does not give the Board the power to prevent enforcement of municipal bylaws.

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³¹ RSC 1985, c I-21

- Burnaby in enforcing its bylaws is not failing to do something required by the NEB Act.
- The Board's power under section 13 of the NEB Act must be rationally connected to its purpose,³² including the preference for cooperative federalism. The purpose of the NEB Act is to regulate the construction and operation of interprovincial oil and gas pipelines.
- Section 13 does not include the power to issue orders to municipalities since the definition under the *Interpretation Act* does not include a municipality or government.
- Section 72 of the NEB Act specifically uses the word "municipality" therefore Parliament must have intended to not include a "municipality" in the definition of a "person" in section 13.

Views of the Board

If justified by a particular fact situation, the Board has the authority to issue an order to allow the NEB Act's statutory scheme to be carried out. That includes issuing an order under subsection 13(b) of the NEB Act that forbids the doing of any act, matter or thing that is contrary to the NEB Act or the Board's direction.

In this instance, where Trans Mountain has not had Corridor Study Access to the Subject Lands in order to obtain necessary technical information, the Board has the authority to issue an order to restrain actions that are blocking access. Blocking Corridor Study Access to complete surveys is contrary to the purpose of the NEB Act, including paragraph 73(a) and it is also contrary to the Board's direction in Ruling No. 28. The Board has already found above that the Impugned Bylaws are inoperable or inapplicable to the extent that they impede Trans Mountain's 73(a) powers to fully access the Subject Lands to complete the proposed surveys and examinations.

In deciding that the Board has authority to issue an order against Burnaby based on subsection 13(b) of the NEB Act, the Board took into consideration Driedger's principles of statutory interpretation cited earlier. In doing so the Board reached the following conclusions:

- A company's powers under paragraph 73(a) include the ability to enter both "Crown land" and the land of any person to make surveys, examinations or other arrangements. Since paragraph 73(a) covers both Crown and private land, it would not be logical under section 13 that the Board could not make an Order against a municipality that was preventing one of the purposes of the NEB Act from being carried out. Given the wording of subsection 13(b) of the NEB Act and the inclusion of paragraph 73(a), in the Board's view, Parliament intended that the Board have authority over both the subject matter (which is about temporary access to complete survey work for a federal undertaking) and the remedy.
- The argument about whether a municipality is included in the definition of a "person" under section 13 is largely irrelevant here because the Board is issuing an Order under subsection 13(b), which does not refer to "person" and does not restrict who the Board can issue an order against.

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³² *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4, paragraphs 74-75

- In any event, the definition of “person” in the *Interpretation Act* is not exhaustive and it would not be logical that Burnaby could be an intervenor as a “person” under section 55.2 of the NEB Act but not be a “person” under section 13. As already determined under Question 1 above, subsection 12(2) of the NEB Act provides the Board with full authority to determine constitutional questions, including those involving division of powers issues as is the case here. Given subsection 12(2), the Board can issue an order against Burnaby that to a limited extent forbids Burnaby from interfering and obstructing Trans Mountain from exercising its powers under paragraph 73(a) of the NEB Act.
- As concluded under Question 2 above, the Impugned Bylaws impair and obstruct a core competence of Parliament. The decision and order of the Board is limited to the interplay between the Impugned Bylaws and Trans Mountain’s powers under paragraph 73(a) as well as the Board’s requirement that it receive the necessary technical information. The Board is not preventing Burnaby from general enforcement of its bylaws.

QUESTION 4: If so, do the facts before the Board support granting such an order?

Trans Mountain’s submissions in support include the following:

- The facts as detailed in the Johannesson Affidavits support granting such an order.
- Trans Mountain cannot complete the information requirements for the Project without such an order. To argue that Trans Mountain already has access to the Subject Lands or to suggest as Burnaby has that the work is optional is patently inaccurate.

Burnaby submissions include the following:

- The facts do not support such an order. The NEB has only provided additional time for the collection of studies and has not mandated how the information is to be collected or the location of the studies required.
- Enforcing bylaws is not contrary to the NEB Act.
- The Board should not make such an order without considering the environmental harm the proposed work could cause.

Views of the Board

For the reasons already set out in the Board’s views in Questions 1 to 3 above, the Board finds that the facts before the Board in this case support granting an order against Burnaby.

The Johannesson Affidavits provide compelling and specific reasons justifying such an order. They describe how the required work cannot be completed unless there are minimal disturbances to the Subject Lands. The Johannesson Affidavits further describe how Trans Mountain has made numerous attempts to collaborate with Burnaby and Burnaby has made no attempt to cooperate. The Board accepts this to be the case.

After considering the affidavits from both parties,³³ the Board finds that Burnaby has impaired Trans Mountain's ability to undertake the surveys by maintaining a presence in the work safety zone. This creates a danger to Burnaby employees, as well as to others. This issue is addressed in the order.

Having considered all the evidence filed by parties, in the Board's view, Burnaby is attempting to use the Impugned Bylaws to block Corridor Study Access by Trans Mountain to prepare necessary information needed by the Board to make a recommendation about a federal undertaking, and to complete its environmental assessment. While Burnaby is well within its rights to oppose a proposed interprovincial pipeline expansion, in this case it is attempting to use the Impugned Bylaws to block the Board's information requirements.

The Board rejects Burnaby's argument that the Board has not mandated the information to be collected or the location of the studies. Ruling No. 28 stated that Trans Mountain specifically "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." That request included attachments providing details of Trans Mountain's methods and the location of the survey work to be performed. The geophysical and geotechnical studies necessitate boring into the ground. This work needs to be safely done and will therefore require a minimal number of trees to be removed with remediation where possible. The Board finds that minimal damage will occur. There will also be some vegetation clearing in preparation for drilling into the ground. A broad range of activities will need to be performed in order to complete the Board's information requirements. As detailed earlier, the Board's 15 July 2014 letter to Trans Mountain required the Corridor Studies to be completed before the Board could make its recommendation about the Project (which includes the Preferred Corridor) to Governor in Council. The survey work has therefore already been mandated by the Board.

The Board also rejects Burnaby's submission that it cannot issue such an order without considering the environmental harm that could be caused by Trans Mountain's proposed work. Burnaby provided no authority for this principle. The proposed survey work is not a designated project under CEAA 2012, and the Board is not persuaded that an environmental assessment is required before Trans Mountain can perform the Corridor Studies. However, the Board does need the Corridor Studies, in part, to inform the Project's environmental assessment as required under CEAA 2012.

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³³ The Dattani Affidavit details how Burnaby staff placed themselves in front of one of the trees and attempted to stop the chainsawing of a tree.

The attached order details some of the work to be done as part of the Corridor Studies, but in no way limits the authorized work to just the specific activities listed. Trans Mountain's powers under paragraph 73(a) of the NEB Act are subject to section 75 of the NEB Act, which requires the company to do "as little damage as possible". Compensation is available if there is damage that cannot be remediated.

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D. Hamilton
Presiding Member

A handwritten signature in black ink, appearing to read "P. Davies". The signature is cursive and somewhat stylized, with a large loop at the end.

P. Davies
Member

A handwritten signature in black ink, appearing to read "A. Scott". The signature is cursive and somewhat stylized, with a large loop at the end.

A. Scott
Member

c.c. All intervenors

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