

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Burnaby (City) v. Trans Mountain Pipeline ULC*,  
2014 BCSC 1820

Date: 20140926  
Docket: S146911  
Registry: Vancouver

Between:

**City of Burnaby**

Applicant

And

**Trans Mountain Pipeline ULC**

Respondent

And

**National Energy Board**

Respondent

Before: The Honourable Madam Justice B.J. Brown

## **Reasons for Judgment**

Counsel for the Applicant, City of Burnaby:

G.J. McDade, Q.C.  
M. Bradley

Counsel for the Respondent, Trans Mountain  
Pipeline ULC:

W. Kaplan, Q.C.  
M. Killoran, Q.C.  
M.P. Good

Counsel for the National Energy Board

P. Johnston

Place and Date of Hearing:

Vancouver, B.C.  
September 11, 2014

Place and Date of Decision:

Vancouver, B.C.  
September 17, 2014

Place and Date of Reasons:

Vancouver, B.C.  
September 26, 2014

**Introduction**

[1] On September 17, 2014, I gave the parties my decision in these matters, with reasons to follow. These are those reasons.

[2] The City of Burnaby (“Burnaby”) seeks an injunction pursuant to s. 274 of the *Community Charter*, S.B.C. 2003, c. 26 prohibiting Trans Mountain Pipeline ULC, its agents or employees (together “Trans Mountain”) from continuing to carry on works in the City of Burnaby in contravention of the City of Burnaby bylaws, including the City of Burnaby, by-law No. 7331, *Burnaby Parks Regulations Bylaw 1979* (“Burnaby Parks Regulation”) and the City of Burnaby, by-law No.4299, *Burnaby Street and Traffic Bylaw 1961* (“Burnaby Street and Traffic Bylaw”). Specifically, Burnaby seeks an injunction to prevent Trans Mountain from cutting down trees or damaging vegetation within the Burnaby Mountain Conservation Area; from transporting heavy machinery or drilling within the Burnaby Mountain Conservation Area; and from constructing, clearing an area for a helicopter landing pad or staging area within the Burnaby Mountain Conservation Area.

**The Position of the Applicant**

[3] Burnaby argues that because this is an application for a statutory injunction, it does not need to meet the normal three-stage test for an interlocutory injunction as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. Rather, it argues that the irreparable harm and balance of convenience aspects of the normal interlocutory injunction test are pre-emptively satisfied so that the municipality need only prove a breach of the statute in order to be entitled to an injunction, unless there are exceptional circumstances.

[4] Burnaby argues that its bylaws are presumptively valid unless a constitutional determination of inapplicability is made. It says that as of yet there is no constitutional issue raised by the defendants. It says that were the defendants to raise a constitutional issue, this would need to be determined by this court in due course. Otherwise, it says it is entitled to a permanent injunction.

[5] It argues that an interim injunction in this matter is necessary as the continued activities of Trans Mountain would constitute irreparable harm and the balance of convenience favours the public interest in protecting the Burnaby Mountain Conservation Area until trial. It says that the status quo is that Burnaby's bylaws are in force and that the conservation area, only partially damaged at this point in time, should be maintained intact until the constitutional issue is determined, should the defendants raise one.

[6] It argues that Trans Mountain has clearly breached Burnaby's bylaws and has stated its intention to continue to do so.

[7] Burnaby argues that the balance of convenience favours maintaining the status quo for a number of reasons, including:

- the Burnaby Mountain Conservation Area is an important public resource;
- the public has an interest in the enforcement of bylaws
- the National Energy Board (the "NEB") can extend the time for Trans Mountain to submit the required studies, once this court has determined the constitutionality of Burnaby's bylaws;
- there is urgency due to Trans Mountain's unilateral choice to change the route of its proposed pipeline;
- the route through Burnaby Mountain is not necessary for the NEB to proceed with the project as Trans Mountain can proceed with its original plans; and
- Trans Mountain's pipeline has not been approved and the NEB has not yet decided that approval would be in the national or public interest.

**The Position of the Respondent**

[8] Trans Mountain argues that the proper test to determine whether an injunction is appropriate in the circumstances is the three part test in *RJR-MacDonald* that assesses whether there is a serious question to be tried, whether

the applicant will suffer irreparable harm if the application is refused, and which party will suffer greater harm from the granting or refusal of the remedy pending a decision on the merits: *RJR-MacDonald* at 334, 349-354.

[9] Trans Mountain says that, in this case, there are two competing public interests, that is, the national public interest as represented by the NEB and the local public interest as represented by Burnaby. It says that it is not breaching the law in conducting the field studies required by the NEB because the *National Energy Board Act*, R.S.C. 1985, c. N-7 (the “*Act*”) gives Trans Mountain the right to conduct those studies. It says, accordingly, no statutory injunction can be issued and if Burnaby is to succeed it must do so according to the *RJR-MacDonald* standard.

[10] Trans Mountain argues that there is no serious question to be tried because Burnaby is attempting to use its bylaw enforcement power to achieve indirectly what it is unable to achieve directly by participation in the NEB process. Trans Mountain says that the NEB has jurisdiction to deal with the issues raised by this application as set out in s. 73 of the *Act*. The NEB has jurisdiction to determine constitutional issues that are relevant to the exercise of its authority. Trans Mountain says that the NEB has the exclusive jurisdiction to consider matters related to a variety of issues, including inter-Provincial pipelines. If the investigations required by the NEB are found to infringe Burnaby’s bylaws, the NEB has the jurisdiction to inquire into that issue, decide, and treat the bylaws as invalid if it determines that the s. 73 right overrides the bylaw. That decision will be subject to appeal to the Federal Court.

[11] Trans Mountain argues that the application before me constitutes a collateral attack on the decisions of the NEB.

[12] With respect to irreparable harm and balance of convenience, Trans Mountain argues that Burnaby cannot show irreparable harm. Indeed, it is Trans Mountain that will suffer irreparable harm and the balance of convenience favours rejecting the injunction.

[13] Trans Mountain says that the *Act* contemplates some waste when a party such as Trans Mountain enters into property of the Crown or a private entity to

conduct necessary studies. The *Act* requires that that harm be minimized and also requires that it be remediated. Trans Mountain says that it has removed six diseased trees and two dead trees. It proposes to remove one further tree. It says that the area is fully capable of remediation and, indeed, improvement. It says that it has authority pursuant to ss. 73(a) and 75 of the *Act* to enter into lands and to commit limited waste to the extent necessary for surveying activities, which would include tree removal and brush clearing. At the same time, it has a statutory obligation to compensate and remediate any impacts.

[14] By contrast, Trans Mountain says that it will suffer harm far exceeding that of Burnaby and the harm will include irreparable harm. It says that for every month the project is delayed it will incur direct costs of \$5,643,000. It says that because of the seasonality of the critical construction window, if the matter is delayed six months, it will effectively translate into a one year delay. The extended delay may jeopardize the preferred corridor which would result in irreparable harm to Trans Mountain and to third parties including the Province of British Columbia. It says that the project is expected to generate \$586,600,000 in Provincial Government revenue, over half of which would accrue to British Columbia, and that if the project does not proceed, those benefits will be lost.

[15] Finally, Trans Mountain says that it has agreed to halt work on the Burnaby lands pending determination of its s. 73 application by the NEB. It says that its submissions are due on September 15, 2014 and that the NEB will then rule on the issue. It says that at this time there is no risk of any impact to the Burnaby lands because work is stopped. If the NEB issues an order, Burnaby is entitled to appeal that order and pursue a stay or otherwise seek an injunction in the appropriate forum, which is the Federal Court.

### **Analysis and Conclusions**

[16] In my view, it is not appropriate to issue the injunction sought by Burnaby. The matter is properly before the NEB. Burnaby has the ability to pursue the relief that it seeks in that proceeding and, indeed, has done so. In the event that the NEB reaches conclusions that Burnaby considers to be in error, Burnaby may pursue an

appeal to the Federal Court and may seek an injunction or a stay at that Court. Accordingly, this Court need not grant an injunction.

[17] By way of background, as most of the public in British Columbia will be aware, Trans Mountain has applied to expand its existing pipeline running through Burnaby. On December 16, 2013, Trans Mountain applied to the NEB for permission to build and operate the project which includes a twinning or looping of the pipeline in Alberta and British Columbia with approximately 987 kilometers of new buried pipeline, new and modified facilities, and reactivation of 193 kilometers of existing pipeline. On April 2, 2014, the NEB issued a hearing order, OH-001-2014. This order included timelines and a process for the project hearing. It granted Burnaby intervener status.

[18] Trans Mountain's project initially contemplated routing the pipeline under certain streets and avenues in Burnaby before turning to a marine terminal. That route was over its existing right-of-way and would use conventional pipeline construction techniques. As an alternative, the project application contemplated more direct alternatives, using partial or total trenchless drilling (tunneling).

[19] At a series of open houses in the spring of 2014, members of the public indicated to Trans Mountain a preference for trenchless construction routing through Burnaby Mountain that would avoid traffic disruptions and neighbourhood impact.

[20] As a result, Trans Mountain advised the NEB that its preferred method of construction would be the tunneling method through Burnaby Mountain. This was in response to stakeholder feedback. That route requires Trans Mountain to undertake studies and assessments to meet the NEB's requirements. These include:

- (a) geotechnical investigations, including drilling four bore-holes at two sites;
- (b) soil surveys;
- (c) drilling a series of vertical walls to ascertain ground-water conditions;
- (d) vegetation surveys;

- (e) wildlife surveys;
- (f) archeological surveys; and
- (g) an update on the human occupancy and resource use element.

[21] On July 15, 2014, the NEB issued Procedural Direction No. 4 that defined time limits within which Trans Mountain was to complete the studies necessary for the preferred corridor. Trans Mountain is to file studies and information on its preferred route by December 1, 2014. To meet that deadline, Trans Mountain must secure data from Burnaby Mountain.

[22] Trans Mountain says that since May 2012, it has engaged with Burnaby in an attempt to obtain cooperation for the mandated field studies. Trans Mountain says that it was not able to obtain Burnaby's cooperation to access the Burnaby Mountain lands.

[23] Trans Mountain wrote to the NEB requesting confirmation of its interpretation of s. 73(a) of the *Act*. On August 5, 2014, Burnaby provided its written submissions and a Notice of Constitutional Question to the NEB. On August 19, 2014, the NEB issued a ruling that stated, in part:

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 land owners, 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.

It continued:

The Board is of the view that a company's power under s. 73(a) to "make surveys, examinations or other necessary arrangements on the land for fixing the site of a 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.

It concluded on the subject:

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.

[24] On August 20, 2014, Trans Mountain wrote to Burnaby and advised that Trans Mountain intended to commence its mandated field studies on August 22. Burnaby responded that Trans Mountain's s. 73 rights were subject to compliance with Burnaby bylaws and that parks department staff had been instructed to take necessary actions to prevent any contraventions of the Burnaby bylaws.

[25] Trans Mountain says that it identified trees for cutting on August 26, 2014. It says that, in total, it cut eight trees based on arborist's markings and nearby brush was also removed. It says that none of the trees removed were fully healthy and others were dead.

[26] Shortly afterwards, Burnaby presented Trans Mountain with two orders to cease bylaw contravention pursuant to the Burnaby Street and Traffic Bylaw and the Burnaby Parks Regulation. Burnaby advised Trans Mountain that it would be prevented from doing any further geotechnical or brush clearing work on its lands.

[27] On September 3, 2014, Trans Mountain filed a notice of motion with the NEB seeking an order directing Burnaby to comply with s. 73(a) of the *Act*. The NEB received the application and set a timetable for submissions. Burnaby's submission was due and was received on September 10, 2014. Trans Mountain's submissions were due September 15, 2014.

### **Which Injunction Test Applies?**

[28] Burnaby argues that it is seeking a statutory injunction and therefore should not be required to meet the traditional equitable injunction requirements as set out in *RJR-MacDonald*. In particular, it says that it should not be required to meet the irreparable harm or the balance of convenience requirements.

[29] I am not persuaded that this position is correct.

[30] In *Vancouver (City) v. O’Flynn-Magee*, 2011 BCSC 1647, Associate Chief Justice MacKenzie said:

[27] There is a difference in principle and rationale between an equitable interlocutory injunction and one that is based upon statutory authority. The rationale for not requiring the equitable injunction test where the party seeking the injunction is a municipality, or other elected body, is that when elected officials enact by-laws or other legislation, they are deemed to do so in the public interest at large (*Toronto v. Polai* (1969), 8 D.L.R. (3d) 689 (Ont. C.A.) at p. 697).

[28] Therefore, the irreparable harm and balance of convenience factors are pre-emptively satisfied in ensuring complying with law that is in the public interest (*Thompson-Nicola (Regional District) v. Galbraith*, [1998] B.C.J. No. 1436 [at] para. 2). To the extent that the appellants may suffer hardship from the imposition and enforcement of an injunction, that will not outweigh the public interest in having the law obeyed [*Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), *M.P.L.R.* (2d) 249 at para 9 (B.C.C.A.)].

[31] Here, we are not dealing with a private entity offending bylaws. Rather, the true dispute is between competing public interests. The *Act* confers on the NEB certain jurisdiction. That includes the right to determine whether it is in the public interest that the pipeline project proceed and that includes permitting certain investigations. The NEB has the right under the *Act* to control that process.

[32] Trans Mountain will conduct investigations as permitted by the NEB. As such, it is not flouting the law, rather, it is proceeding as directed by the NEB.

[33] Accordingly, in my view, Burnaby must meet the requirements for an equitable injunction. That is, the standard *RJR-MacDonald* test.

[34] That test is:

1. is there a serious question to be tried?
2. will there be irreparable harm?
3. does the balance of convenience favour the applicant?

***(1) Is There a Serious Question to be Tried?***

[35] I have doubt in this case that there is a serious question to be tried because there is another forum in which the matter before me can be determined. Indeed, as

I have set out above, Burnaby has already engaged that forum and can raise this very question before that forum.

[36] I recognize that the threshold for meeting this element of the test is a low one. In *RJR-MacDonald* at 337-338, Sopinka and Cory JJ. for the Court provided that:

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third test, even if --  
---of the opinion that the plaintiff is unlikely to succeed at trial.

[37] The NEB is given powers pursuant to its *Act* that include s. 11 that provides it is a court of record with all powers, rights and privileges as are vested in the Superior Court of Record. By s. 12 of the *Act*, it is given full and exclusive jurisdiction to inquire into, hear, and determine any matter, and has full jurisdiction to hear and determine all matters whether of law or fact.

[38] By s. 13 of the *Act*, the NEB is given the power to make mandatory orders.

[39] The NEB has jurisdiction to determine the constitutional issues that are relevant to the exercise of its authority: *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at para. 28; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 at para. 39; *Calgary (City) v. Canadian Natural Resources Limited*, 2010 ABQB 417 at paras. 80-86.

[40] In *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, the Supreme Court of Canada said that, while an administrative tribunal cannot issue a formal declaration of invalidity (assuming, for example, that the NEB determined that the Burnaby bylaws were invalid in this context), which is a remedy exercisable only by the Superior Courts, the tribunal may treat any impugned provision as invalid for the purposes of the matter before it. Therefore, although it could not issue a declaration that s. 73 of the *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.

[41] However, even if I were satisfied that there was a serious question to be tried before this court, I am not satisfied that Burnaby has met the other requirements for an injunction.

***(2) Will There Be Irreparable Harm?***

[42] The parties have filed conflicting evidence as to whether Burnaby will suffer irreparable harm through the activities undertaken by Trans Mountain. Burnaby says that Trans Mountain cleared an area of approximately half a hectare of vegetation and cut six live mature trees along with seven large wildlife trees. One-half a hectare is 5,000 square meters. Trans Mountain says that it cleared an area 20 meters by 20 meters (400 square meters). Trans Mountain says that the Burnaby Mountain Conservation Area is 67 hectares. By my calculation, that would be 134 times the area that Burnaby says Trans Mountain has cleared.

[43] Burnaby relies on an opinion from its arborist that the forest environment has been irreparably fractured, causing significant effects including reduced water absorption, lower oxygen levels in the soil, and lack of shade with consequent die-back of the surrounding forest. The arborist concluded that the area in question has been irreparably damaged by the actions undertaken. The arborist says that the trees are irreplaceable and the planting of new trees will not attain the level of importance to the area for 60 to 100 years, if ever.

[44] Trans Mountain relies on the opinions of its arborist and biologist that tree cover and ecosystems like the one under consideration will regenerate reasonably quickly and, without significant reclamation, could naturally regenerate within 20 to 40 years. It says there is still good ground cover in the area and it has not exposed soil, therefore, there is still significant opportunity for moisture retention by ferns and shrubs in the area. It says it has only altered one small patch by cutting the trees. It says that in the Burnaby Mountain Conservation Area there are many areas where the forest has tree canopy openings and ecological conditions similar to those in the disturbed area. It says that if no work is done the area will simply be similar to other open canopy areas in the Burnaby Mountain Conservation Area.

[45] Trans Mountain says that the removal of the eight trees at bore-hole 1 was justified and approved by its arborist. It says six trees and two dead stumps were identified by the arborist for removal. The live trees removed were red alder. Wildlife trees are dead trees or trees that are close to dead and are used by wildlife for burrowing and other habitat functions. Trans Mountain says that, without a wildlife study, one cannot determine whether any of the dead trees that were removed were being used in such a manner.

[46] Trans Mountain says that at bore-hole 2, its arborist only tagged one tree for removal. At that site, the tree canopy is quite open and there is no requirement for significant clearing. The tree tagged for removal was an alder that had fungal decay. There is no other removal work to be done with respect to bore-hole 2.

[47] Trans Mountain says that it will remediate the area, as it is required to do under the *Act* and, in fact, it will improve the area by planting better trees than the alder that it removed.

[48] Finally, Trans Mountain challenges the expertise of Burnaby's arborist to give the opinions which he gives on areas other than those within the expertise of an arborist.

[49] I am not persuaded that felling the limited number of trees that Trans Mountain has felled and proposes to fell within a relatively small area of the Burnaby Mountain Conservation Area would constitute irreparable harm. Moreover, as Trans Mountain submitted and the *Act* provides in s. 75, Trans Mountain is required to remediate any damage that it causes to the area. I am not satisfied that the investigations to be conducted by Trans Mountain constitute irreparable harm as contemplated in *RJR-MacDonald* as to warrant an injunction.

[50] The second manner in which Burnaby says that it is suffering irreparable harm is that it is not able to enforce its bylaws. First, as I have noted, the NEB can determine whether the bylaws are invalid for the purposes of the matter before it. Burnaby can advance its position and presumably has done so, in the decision now pending before the NEB. In the event that the NEB determines that the bylaw

provisions prevail, presumably the NEB will not issue the order sought by Trans Mountain. Second, Burnaby apparently has already issued orders enforcing its bylaws. Whether those orders are upheld by the courts remains to be seen. However, it cannot be said that Burnaby is not able to enforce its bylaws. In the event that the NEB determines that the bylaws are invalid for the purpose of the matter before it, it will grant the order sought by Trans Mountain. Burnaby will have its rights of appeal from that decision.

***(3) Does the Balance of Convenience Favour Burnaby?***

[51] In my view, the balance of convenience does not favour Burnaby's position. Were I to issue the order sought by Burnaby, it would enjoin further orders from the NEB, should those conflict with the Burnaby bylaws. As I have said, there is another forum with the jurisdiction to determine these matters. Burnaby and Trans Mountain are already participating in that forum. I cannot see that the balance of convenience favours Burnaby and requires an injunction from this court to pre-empt any decision that may be made by the NEB.

[52] I am satisfied that were this court to issue the order sought by Burnaby, there would be a delay, in all likelihood a significant delay, that would cause prejudice to Trans Mountain.

[53] The application is dismissed with costs to Trans Mountain.

"B. Brown, J."  
The Honourable Madam Justice B. Brown