COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Burnaby (City) v. Trans Mountain Pipeline ULC,*
2014 BCCA 465

Date: 20141127
Docket: CA042220

Between:

City of Burnaby

Appellant
(Plaintiff)

And

Trans Mountain Pipeline ULC

Respondent
(Defendant)

And

The National Energy Board

Respondent
(Defendant)

Before: The Honourable Madam Justice Neilson
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated September 26, 2014 (*Burnaby (City) v. Trans Mountain Pipeline ULC*, 2014 BCSC 1820, Vancouver Docket No. S146911).

Counsel for the Appellant:	G.J. McDade, Q.C., M.L. Bradley
Counsel for the Respondent Trans Mountain Pipeline ULC:	W.C. Kaplan, Q.C., M.P. Good
Place and Date of Hearing:	Vancouver, British Columbia November 19, 2014
Place and Date of Judgment:	Vancouver, British Columbia November 27, 2014

Written Reasons by:
The Honourable Madam Justice Neilson

Summary:

The City of Burnaby seeks leave to appeal the dismissal of its application to enjoin Trans Mountain from violating Burnaby's bylaws while conducting surveys on Burnaby Mountain as part of an application to expand a pipeline, currently under consideration by the National Energy Board ("NEB"). Between the hearing of Burnaby's injunction application and this application for leave to appeal, the NEB has ruled that the bylaws are inoperative and/or inapplicable to the extent that they impair Trans Mountain's ability to conduct the requisite surveys. Burnaby has applied for leave to appeal the NEB's ruling to the Federal Court of Appeal.

Held: Application dismissed. Burnaby's application for leave to appeal is a collateral attack on the ruling of the NEB and, potentially, on an order of the Federal Court of Appeal. The issues raised by Burnaby have been dealt with by a binding and conclusive order of the NEB, and any attempt to set that order aside must be made before the Federal Court of Appeal.

Reasons for Judgment of the Honourable Madam Justice Neilson:

[1] The City of Burnaby seeks leave to appeal the order of a Supreme Court judge, pronounced September 17, 2014, denying its application to enjoin the employees and agents of Trans Mountain Pipeline ULC from carrying on work in Burnaby that contravenes the bylaws of the City.

[2] For the following reasons, the application for leave to appeal is dismissed.

Background

[3] Trans Mountain moves petroleum products through Alberta and British Columbia by means of a pipeline that is routed through Burnaby. On December 16, 2013, it applied to the National Energy Board ("NEB") pursuant to s. 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 ("the Act"), for permission to expand its operations by "twinning" its pipeline to its terminal in Burnaby. On April 2, 2014, the NEB issued hearing order OH-001-2014 setting timelines and a process for the project hearing. Burnaby was granted intervenor status in the proceeding.

[4] Trans Mountain has identified a "preferred corridor" for the new pipeline that involves tunnelling on municipal land through Burnaby Mountain. To assess this option it requires access to the Burnaby Mountain Conservation Area and other

locations in Burnaby to carry out studies mandated by the NEB. On July 15, 2014, the NEB issued Procedural Direction #4 requiring Trans Mountain to file the results of these studies by December 1, 2014.

[5] The project is controversial due to environmental concerns. The mandated studies require Trans Mountain to cut down trees, clear vegetation, drill boreholes and operate heavy machinery in the Burnaby Mountain Conservation Area. It is undisputed that these activities contravene several bylaws of the City of Burnaby, including by-law. No. 7331, *Burnaby Parks Regulations Bylaw 1979*, and by-law No. 4299, *Burnaby Street and Traffic Bylaw 1961* (the "Bylaws"). Trans Mountain was unsuccessful in obtaining Burnaby's consent to enter City lands to carry out its investigations. As a result, a dispute developed over whether Burnaby could enforce its Bylaws in a manner that obstructed a federally-regulated pipeline project overseen by the NEB under the Act.

[6] On July 25, 2014 Trans Mountain applied to the NEB for a ruling on the interpretation of s. 73(a) of the Act, and whether this provision allowed it access to Burnaby's lands without the City's consent. Section 73(a) states:

> **73.** 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;

[7] Burnaby provided written submissions to the NEB in response, and filed a Notice of Constitutional Question challenging the "constitutional implications" of s. 73(a) on these grounds:

- 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.
- In so far as s. 73(a) of the Act purports to empower a company to enter land, s. 73(a) does not override municipal jurisdiction or by-laws enacted pursuant to the *Community Charter*, S.B.C. 2003, c. 26 and the *Municipal Act*, S.B.C. 1958, c. 32, as amended. Further, or in the

> alternative, to the extent that they are able, s. 73(a) of the Act and by-laws enacted pursuant to the *Community Charter* and the *Municipal Act*, as amended, must operate concurrently.
>
> ...
>
> The following is the legal basis for the constitutional question:
>
> 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*.
>
> …

[8] On August 19, 2014, the NEB issued Ruling No. 28. This held that s. 73(a) gave Trans Mountain the power to enter on to Crown or privately owned land that lay in the intended route of its pipeline to make surveys and examinations. It found this interpretation was supported by the importance of ensuring that the NEB had all relevant information before recommending approval or denial of a project, based on both the public interest and the intent of the Act. Thus, Trans Mountain could enter Burnaby's land without Burnaby's agreement. The NEB found Trans Mountain's request for an interpretation of s. 73(a) did not engage any constitutional issues as it had not applied for an access order, and so declined to consider Burnaby's constitutional arguments.

[9] Burnaby continued to resist Trans Mountain's efforts to carry out its investigations on City lands, and on September 2, 2014 some of its employees stationed themselves at Trans Mountain's worksite on Burnaby Mountain, creating safety concerns and forcing Trans Mountain to suspend its work. Later that day Burnaby served Trans Mountain with two Orders to Cease Bylaw Contravention, and Trans Mountain stopped all work on Burnaby lands.

[10] On September 3, 2014, Trans Mountain applied to the NEB for an order pursuant to ss. 12, 13, and 73(a) of the Act, directing that Burnaby permit Trans Mountain employees temporary access to City lands to complete the investigations related to the pipeline. Burnaby stated its intention to respond to the motion, and the NEB directed that the parties' submissions be filed by September 15, 2014.

[11] On September 8, 2014, Burnaby filed a notice of civil claim in the Supreme Court of British Columbia naming Trans Mountain and the NEB as defendants, and seeking the following relief:

> 1. An interim and permanent Injunction to restrain Trans Mountain Pipeline ULC from continuing to carry on works on City of Burnaby owned land in contravention of the City of Burnaby's Bylaws.
> 2. A Declaration that the Ruling 28 of August 19, 2014 of the National Energy Board does not have the effect of overriding or declaring inapplicable the City of Burnaby's Bylaws.
> 3. A Declaration that the National Energy Board does not have the constitutional jurisdiction to issue an order to the City of Burnaby that directs or limits the City in the enforcement of its Bylaws.

[12] Trans Mountain responded by agreeing to stand down and cease work on Burnaby lands until the NEB provided a ruling on its application. Burnaby nevertheless chose to proceed with its application for an injunction in the Supreme Court, pursuant to s. 274 of the *Community Charter*, S.B.C. 2003, c. 26, which permits a municipality to apply to that Court for an order to enforce, prevent, or restrain the contravention of its bylaws.

[13] The day before its injunction application, Burnaby filed its written argument with the NEB in response to Trans Mountain's application. This contended that the NEB's constitutional jurisdiction was limited to making determinations with respect to its own enabling statute, and did not extend to issuing orders aimed at the City's enforcement powers. Burnaby argued that its Bylaws applied to Trans Mountain unless and until they were ruled invalid by a court of competent jurisdiction. Its argument included this statement:

> Burnaby advises that the issue of Burnaby's regulatory jurisdiction under its Bylaws, as well as the constitutional jurisdiction of the NEB to issue the Orders sought, is now before the BC Supreme Court in *City of Burnaby v. Trans Mountain Pipeline ULC and The National Energy Board*, British Columbia Supreme Court File No: S-146911, filed on September 8, 2014. The City of Burnaby respectfully requests the NEB to adjourn the Notice of Motion filed by Trans Mountain pending the determination of the BC Supreme Court.
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> [Emphasis in original.]

[14] The NEB did not adjourn Trans Mountain's application. Burnaby's injunction application was heard by a Supreme Court judge, sitting in chambers, on September 11, 2014. Neither party filed a Notice of Constitutional Question on this motion, and the constitutional issues set out in Burnaby's pleadings and in its written argument to the NEB were not raised before the chambers judge.

[15] The judge dismissed the motion for an injunction on September 17, 2014, and provided written reasons for her decision on September 26, 2014. She rejected Burnaby's argument that it was seeking a statutory injunction and therefore did not have to satisfy the three-pronged test for an equitable injunction set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. It was her view that this was not a dispute between a municipality and a private entity in breach of bylaws, but a conflict between the competing public interests represented by Burnaby and the NEB. The equitable test therefore applied.

[16] In applying the *RJR-MacDonald* test, the chambers judge decided Burnaby had not established a serious question to be tried before the Supreme Court because the NEB provided another forum to determine the matter before her, and Burnaby had already engaged that forum to determine the question of Trans Mountain's right to access its property for the studies related to the proposed pipeline. While the judge recognized that the NEB did not have jurisdiction to declare s. 73(a) of the Act or Burnaby's Bylaws invalid, she was satisfied it was able to decide the constitutional issues relevant to the exercise of its authority. Relying on the line of authorities emanating from *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, she found that although the NEB could not issue a declaration that s. 73 or the Bylaws were invalid, it "would be able to treat the impugned provision as invalid for the purposes of the matter before it".

[17] The chambers judge found the limited work done and proposed by Trans Mountain on Burnaby's lands did not constitute irreparable harm, noting that Trans Mountain had a duty under s. 75 of the Act to remediate any damage it caused.

[18] She found the balance of convenience did not favour ordering an injunction as this might interfere with the ongoing proceedings before the NEB and cause significant delay, thereby prejudicing Trans Mountain.

[19] She stated her conclusion at para. 16 of her decision:

> 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.

[20] On September 25, 2014, the NEB issued Ruling No. 32, in which it took the view that the order sought by Trans Mountain may raise constitutional questions as to the enforceability of Burnaby's Bylaws, but observed that neither party had filed a Notice of Constitutional Question. It therefore dismissed the motion without prejudice to Trans Mountain's right to file and serve such a Notice and renew its application. The Ruling also set out questions for the parties to address on the constitutional issues if Trans Mountain proceeded.

[21] On September 26, 2014, Trans Mountain filed a Notice of Constitutional Question and renewed its application before the NEB for an order under s. 73(a) permitting it entry to Burnaby's lands to conduct its pipeline investigations. Both parties submitted argument on the constitutional issues identified by the NEB.

[22] On October 2, 2014, Burnaby filed this application for leave to appeal the decision of the chambers judge.

[23] On October 23, 2014 the NEB issued Ruling No. 40. In lengthy reasons, it decided:

> 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; ...

[24] With Ruling No. 40, the NEB issued Order MO-122-2014, which included these terms:

> 3. Burnaby, its staff, representatives, contractors, and agents are forbidden from interfering and obstructing Trans Mountain and its staff, representatives, contractors, or agents from exercising Trans Mountain's powers under paragraph 73(a) of the NEB Act to enter into and on the Subject Lands and complete the Surveys and Examinations. ...
>
> 4. Burnaby is prohibited from interfering or obstructing Trans Mountain by ordering or authorizing the presence of Burnaby's staff, representatives, contractors, or agents in any safety zone established by Trans Mountain for completing the Surveys and Examinations on the Subject Lands. ...

[25] On October 27, 2014, Order MO-122-2014 was filed in the Federal Court for the purpose of enforcement, pursuant to s. 17 of the Act.

[26] On October 29, 2014, Burnaby filed an application for leave to appeal Ruling No. 40 to the Federal Court of Appeal, pursuant to s. 22(1) of the Act and s. 28(1) of the *Federal Court of Appeal Act*, R.S.C. 1985, c. F-7. Burnaby has asked that Court for an expedited hearing of its application, and has indicated it intends to apply for a stay of Ruling No. 40 if it obtains leave. Its memorandum of argument on the leave application contends the NEB erred:

> (a) in holding that the NEB had the jurisdiction to determine the constitutional applicability or operability of Burnaby's by-laws;
>
> (b) in holding that the NEB has the jurisdiction under s. 13 of the NEB Act to forbid or direct Burnaby from enforcing its by-laws;
>
> (c) in holding that paragraph 73(a) of the NEB Act allows a company to commit environmental damage contrary to municipal laws;
>
> (d) in holding that paragraph 73(a) of the NEB Act empowers the Board to make rulings in respect of the applicability or operability of Burnaby's by-laws; and
>
> (e) in improperly considering the statutory interpretation of paragraph 73(a) and improperly applying the doctrines of paramountcy and interjurisdictional immunity within that statutory context to by-laws.

Proposed Grounds of Appeal on this Application for Leave to Appeal

[27] Burnaby seeks leave to appeal the decision of the chambers judge on the basis that she erred:

a) in determining the test to be applied for an injunction to stop the breach of Burnaby's by-laws;

b) in deferring to the NEB the constitutional jurisdiction to determine the validity, applicability and/or operability of Burnaby's by-laws;

c) in holding that there was no serious question to be tried on the facts before it, in part because the NEB had jurisdiction to make that constitutional determination;

d) in further holding that Burnaby had not shown irreparable harm; and

e) in refusing to grant a statutory injunction where there was a clear and admitted breach of the by-laws of Burnaby by Trans Mountain.

Discussion

[28] The traditional criteria for leave to appeal are well-known. This Court must consider whether the appeal would be of significance to the practice, whether it is of significance to the action itself, whether the appeal is *prima facie* meritorious or frivolous, and whether it will unduly hinder the progress of the action. The overarching concern is whether it is in the interests of justice to grant leave: *Movassaghi v. Aghtai*, 2010 BCCA 175 at para. 22.

[29] Here, there is a preliminary issue to consider before addressing these factors. Trans Mountain contends that leave to appeal cannot be granted because the proposed appeal constitutes a collateral attack on Ruling No. 40 of the NEB and, potentially, the anticipated decision of the Federal Court of Appeal on Burnaby's leave application to that Court.

[30] The rule against collateral attack was articulated by the Supreme Court of Canada in *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599, and has been affirmed by that Court more recently in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at paras. 71-72, and *Canada (Attorney General) v. TeleZone*, 2010 SCC 62 at paras. 60-62. It stipulates that an order made by a court or tribunal is binding and conclusive until it is set aside on appeal or lawfully quashed, and cannot be attacked

in proceedings other than those whose specific object is its reversal, variation, or nullification. If a proceeding calls into question the validity of an order made in another independent proceeding, the former proceeding must be struck as an abuse of process.

[31] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 51, the Court outlined the policies that support the prohibition against relitigation:

> 51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[32] Trans Mountain submits that granting leave to appeal the decision of the chambers judge would effectively place this Court in the position of sitting on an appeal of the NEB order arising from Ruling No. 40 and wrongly pre-empt the authority of the Federal Court of Appeal. It says permitting dual proceedings in these circumstances would be an abuse of process and inimical to the interests of justice.

[33] The first step in considering this argument is to decide whether the specific object of Burnaby's proposed appeal to this Court is the reversal or nullification of Ruling No. 40 of the NEB, which permits Trans Mountain's representatives to access Burnaby's lands in breach of the Bylaws. To assess this, it is necessary to examine Burnaby's proposed grounds of appeal. In my view, these may be reframed as two central questions: first, did the chambers judge err in deferring the issue of the enforceability of the Bylaws to the NEB and, second, did she err in applying the test for an equitable injunction instead of the test for a statutory injunction?

[34] With respect to the first question, Burnaby argues that the chambers judge erred in deferring to the NEB because that tribunal does not have jurisdiction to rule

on the constitutional operability or applicability of validly-enacted municipal bylaws, or to grant exemptions from such bylaws. While s. 12(2) of the Act gives the NEB full jurisdiction to determine matters of law, Burnaby says that, as a statutory tribunal, its constitutional jurisdiction is limited to ruling on the constitutional validity of its enabling statute. In support, Burnaby cites the line of authority stemming from the trilogy of Supreme Court decisions in *Cuddy Chicks Ltd.* at 16; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 at 591; and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at 31-32. Burnaby says these cases clearly demonstrate that Ruling No. 40 and Order MO-122-2014 are invalid and must be set aside, as they go beyond the jurisdiction of the NEB and wrongly interfere with a municipality's power to enforce its bylaws in British Columbia. Only a provincial superior court has jurisdiction to pronounce on the constitutional validity of those bylaws.

[35] Trans Mountain replies that Burnaby interprets the law established by the trilogy too narrowly. While it agrees that a general declaration of constitutional invalidity can only be made by a provincial superior court, it says these authorities support the view that the NEB, as a statutory tribunal empowered to decide questions of law, has jurisdiction to decide if another piece of legislation is inapplicable or inoperable if such a finding is required in applying its own statute. Trans Mountain maintains this is what the NEB has done in holding the Bylaws inapplicable and inoperable to the extent that they conflict with Trans Mountain's right of access under s. 73(a) of its enabling Act.

[36] It is not necessary or appropriate for me to assess the merits of these arguments, as the issue of the NEB's jurisdiction to pronounce Ruling No. 40 and Order MO-122-2014 is squarely before the Federal Court of Appeal. Burnaby's attempt to raise the same issue on an appeal to this Court is clearly directed at nullifying or reversing the NEB's decision. It thus constitutes a collateral attack on Ruling No. 40 and the associated Order and, potentially, on an order of the Federal Court of Appeal. I am satisfied that to grant leave to appeal on this issue would

threaten the integrity of that ongoing adjudicative process and represent an abuse of process.

[37] With respect to the second proposed ground of appeal, the chambers judge's choice of the equitable test for an injunction, Burnaby says she was wrong to characterize this dispute as a conflict between two public interests, when it is clear the primary motivation for Trans Mountain's unlawful entry on Burnaby's lands is its private commercial interests. Burnaby maintains this is a meritorious issue independent of the jurisdictional question before the Federal Court of Appeal. It says that if the judge's error is corrected by this Court, the enforcement powers under s. 274 of the *Community Charter* and Trans Mountain's undisputed breaches of the Bylaws will clearly result in a statutory injunction, imposed under provincial laws without the intrusion of constitutional concerns.

[38] I cannot agree that the enforceability of the Bylaws can be dealt with independently by this Court, without addressing the role and scope of s. 73(a) of the Act. Trans Mountain cannot simultaneously comply with the Bylaws and conduct the studies on Burnaby's lands mandated by the NEB under the Act. Some resolution of the competing interests expressed in these two legislative sources is necessary. Ruling No. 40 and its accompanying Order have addressed this issue. Burnaby's attempt to have this Court nullify or reverse that decision by dealing solely with the provincial legislation clearly represents a collateral attack and threatens the integrity of that proceeding.

[39] Burnaby argues it is unfair to determine this application for leave by reference to events that have occurred since the decision of the chambers judge. I am unable to agree. The constitutional issue raised by the conflict between the Bylaws and s. 73(a) of the Act has been apparent to the parties since the summer. In fact, Burnaby filed the first Notice of Constitutional Question with respect to this issue in August during the NEB's proceedings that led to Ruling No. 28. While Burnaby's notice of civil claim seeks declaratory constitutional relief, it did not raise this issue before the chambers judge. Instead, the parties have addressed the interrelationship

of the Bylaws and the Act in the NEB proceeding. Burnaby has fully participated in that proceeding, and is now pursuing its remedies before the Federal Court of Appeal. It is not possible or appropriate for me to consider this application for leave in isolation of those events.

[40] To return to the traditional criteria for granting leave to appeal, there is no question that the issues raised by this proposed appeal are of significant importance to the parties, to the citizens of Burnaby, and to the public generally, see for example *Trans Mountain Pipeline ULC v. Gold*, 2014 BCSC 2133. The rule against collateral attack, however, forecloses consideration of the merits of an appeal to this Court as the issues in question have been dealt with by a binding and conclusive order of the NEB. Only the Federal Court of Appeal may nullify or reverse that order. To permit Burnaby to bring an appeal in this Court would unquestionably and unjustifiably intrude on that proceeding and constitute an abuse of process.

[41] I conclude it is not in the interests of justice to grant leave to appeal. Burnaby's application for leave is accordingly dismissed.

"The Honourable Madam Justice Neilson"