

COURT OF APPEAL

BETWEEN:

CITY OF BURNABY

APPELLANT/MOVING PARTY

AND:

TRANS MOUNTAIN PIPELINE ULC

RESPONDENT

AND:

THE NATIONAL ENERGY BOARD

RESPONDENT

MEMORANDUM OF ARGUMENT OF THE MOVING PARTY
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RESPONDENT NATIONAL ENERGY
BOARD

PART 1 – STATEMENT OF FACTS

1. This is an application pursuant to s. 7 of the *Court of Appeal Act*, R.S.B.C. 1996, C. 77 for leave to appeal the decision of the British Columbia Supreme Court (BCSC) pronounced September 17, 2014 (the “Decision”), with reasons given September 26, 2014, refusing to grant an interlocutory injunction to the City of Burnaby (“Burnaby”) to prevent the ongoing violation of Burnaby’s by-laws by the Respondent, Trans Mountain Pipeline ULC (“Trans Mountain”).
2. Burnaby is a municipality under the *Community Charter*, S.B.C. 2003, c. 26 and sought the injunction pursuant to s. 274 of that Act to restrain the contravention of its by-laws.
3. Trans Mountain is a company that applied to the National Energy Board (NEB or the “Board”) for a Certificate of Public Convenience and Necessity pursuant to s. 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (the “NEB Act”) authorizing it to construct an oil pipeline known as the Trans Mountain Expansion Project (the “Project”), which terminates in Burnaby. It has not yet received that approval.

Breach of Burnaby By-laws

4. On September 2, 2014, Trans Mountain and its agents entered into the Burnaby Mountain Conservation Area (the “Conservation Area”), which is dedicated park land, and its workers commenced to damage the park, clear bush and cut down trees in order to carry out studies for a proposed alternate route for the Project through Burnaby Mountain.

Reference: Affidavit # 1 of Dipak Dattani, para. 6

5. The cutting of trees, and damage to the park is a clear contravention of the Burnaby Parks Regulation Bylaw, 1979 (the “Parks By-law”), ss. 3 and 5.

Reference: Affidavit # 1 of Dipak Dattani, para. 8, Ex. A

6. On September 2, 2014, Burnaby City staff observed Trans Mountain workers obstructing Burnaby roads and diverting traffic, without prior approval, in contravention of s. 24 of the Burnaby Street and Traffic By-law, 1961 (the “Traffic By-law”).

Reference: Affidavit # 1 of Dipak Dattani, paras. 15- 16, Ex. H.
Affidavit # 1 of John Callaghan, paras. 3-11, Ex. A.

7. Trans Mountain has caused, and proposes to cause, irreparable damage to the protected forest and ecosystem of the Conservation Area in undertaking its work in contravention

of the Parks By-law. Trans Mountain has cleared approximately half a hectare of vegetation and cut six live mature trees (59 to 65 years old), along with seven large wildlife trees.

Reference: Affidavit # 1 of Dipak Dattani, paras. 25 -27.

8. An arborist's report was before the Court establishing the damage to the Conservancy, including damage to the ecosystem and adjoining forest. The arborist concluded that the "area in question has been irreparably damaged and the ecological community that existed destroyed by the actions undertaken" and that the "trees are irreplaceable the planting of new trees will not attain the level of importance to the area for 60 to 100 years, if ever."

Reference: Affidavit # 1 of Dipak Dattani, paras. 25-26, Ex. K and Ex. L.

9. On September 2, 2014, Burnaby issued Orders to Cease By-law Contraventions to Mr. Carey Johannesson, Project Lead, Land and Right of Way for Trans Mountain, in relation to the contraventions of ss. 3 and 5 of the Parks By-law and s. 24 of the Traffic By-law.

Reference: Affidavit # 1 of Dipak Dattani, para. 11, 17, Ex. D, I

10. Trans Mountain ignored the Orders, and continued to carry out work in the Conservation Area. Trans Mountain employed several security guards that blocked the access of Burnaby City staff to the work areas. Trans Mountain communicated to Burnaby City staff that it planned to continue with the work pursuant to its rights under s. 73 of the NEB Act. Trans Mountain returned on September 3, but was stopped by parks staff.

Reference: Affidavit # 1 of Dipak Dattani, paras. 9, 10, 14, Ex. M

11. Trans Mountain has indicated that it intends to do further work, including the cutting of trees, drilling of boreholes, and construction of pads within the park. The carrying out of the proposed work in the Conservation Area is contrary to the Parks By-law and will cause further irreparable harm to the Conservation Area.

Reference: Affidavit # 1 of Dipak Dattani, para. 28.
Affidavit # 1 of John Callaghan, para. 12,13, Ex. D.

National Energy Board Applications and Rulings

12. On July 25, 2014, Trans Mountain applied to the NEB for an interpretation of paragraph 73(a) of the NEB Act that would allow access to Burnaby's lands without their consent.

Reference: Affidavit # 1 of Dipak Dattani, para. 42, Ex. Q.

13. On August 19, 2014, the NEB issued Ruling No. 28 interpreting paragraph 73(a) as allowing access to Burnaby lands without Burnaby's consent, but declining to rule on the applicability or operability of Burnaby's by-laws or issue an access order. Following Ruling 28, Burnaby granted access to its lands, but subject to compliance with the bylaws. Trans Mountain did not comply with the by-laws.

Reference: Affidavit # 1 of Dipak Dattani, Ex. T.

14. On September 3, 2014, following the events of Sept. 2 and 3, Trans Mountain applied to the NEB for an access order and orders directing or forbidding Burnaby from enforcing its by-laws. Burnaby in its response submitted that an order prohibiting Burnaby from enforcing its by-laws would require a constitutional determination, and contesting the jurisdiction of the NEB to make such a constitutional determination in respect of municipal or provincial laws.

Reference: Affidavit # 1 of Dipak Dattani para. 57, Ex. CC
Affidavit #1 of Chelsea Craighead, para. 2, Ex. A

15. It was that NEB application that was referenced in the Chambers Judgment below as pending. Trans Mountain advised the Chambers Judge that no Notice of Constitutional Question would be filed with the NEB, and that their position was that a constitutional question did not arise. This was the basis of Brown J.'s Decision. On that basis, the constitutional arguments were not further made before her.
16. Subsequent to the Decision of the BCSC, on September 25, 2014, the NEB issued Ruling No. 32 dismissing Trans Mountain's application on the basis that a Notice of Constitutional Question was required.
17. On September 26, 2014, Trans Mountain applied for the same orders and issued a Notice of Constitutional Question.
18. In Ruling No. 40, the NEB decided it had the jurisdiction to determine the constitutional applicability of municipal bylaws, decided that Burnaby's bylaws were "inoperative or inapplicable", and made the orders directed at Burnaby's enforcement of its by-laws. The NEB referenced the Decision of the Chambers Judge below as supporting its jurisdiction.

Burnaby contends that the Decision was wrong, and the NEB decision was accordingly also wrong, and it is this Court that must determine the matter.

19. Burnaby has applied for leave to appeal Ruling No. 40 to the Federal Court of Appeal, on the basis that the NEB did not have the constitutional jurisdiction to make such a determination, and that the proper authority to do so is the BC superior courts.
20. Leave to Appeal is required to have this important matter determined by this court.

PART 2 - POINTS IN ISSUE

21. Should leave be granted on the following errors of the Court below:
 - 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.

PART 3 - ARGUMENT ON LEAVE APPLICATION

A. Importance of the Proposed Appeal to Burnaby and the General Public

22. Burnaby has enacted by-laws in the public interest for the protection and benefit of its citizens. Burnaby has a duty to enforce those by-laws and Burnaby citizens are entitled to look to Burnaby to do so.
23. Burnaby's by-laws remain validly enacted under provincial legislation, until declared by a court of competent jurisdiction to be invalid, inoperable or inapplicable. There is a public interest in the enforcement of by-laws, which is recognized by the abbreviated test for a statutory injunction.
24. In refusing to grant the injunction, and deferring to the jurisdiction of the NEB, the result of the decision in the Court below is that Burnaby is unable to enforce its by-laws or

perform its important environmental regulatory function in respect of Trans Mountain's work in the Conservation Area before the hearing of the claim on its merits. If no injunction is granted, the damage will be done before the matter can be determined.

25. The claim raises the jurisdiction of the NEB to make rulings on the constitutional status of, and exemption from, municipal by-laws – a power which has never previously been found to exist in any federal tribunal, and never previously claimed or exercised by the NEB. The claim also raises, for the first time, the ability of pipeline companies to be granted exemption from municipal or provincial law prior to approval of a project under the *Canadian Environmental Assessment Act*, S.C. 2012, c. 19, s. 52 or the NEB Act.
26. The BC Supreme Court, and this honorable Court, as s. 96 courts of superior jurisdiction, are the only courts under the Constitution of Canada with the proper authority to determine these novel and important questions. The issue is the enforcement of municipal by-laws, not the constitutionality of a federal enactment, thus a federal tribunal, and the Federal Courts, do not have jurisdiction.

Reference: *ITO v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at 766; *Chief Joe Hall v. Canada (Attorney General)*, 2007 BCCA 133, paras. 34 and 40

27. The issues of the application and enforceability of municipal by-laws through injunctive relief, and the power of the NEB to itself determine such by-laws to be inapplicable or inoperable, are of importance to all municipalities facing a pipeline application or federal undertakings. This is an important issue of law, but also of great practical importance. The Project, if approved, will go directly through the municipalities of Burnaby, Coquitlam, New Westminster, Surrey, Langley, Abbotsford and others, and the role of municipal jurisdiction and municipal laws will be squarely raised.
28. If s.73 of the NEB Act is interpreted to allow municipal laws to be ignored wherever they conflict with the company's plans, Trans Mountain is able to enter the Conservation Area and cause environmental harm contrary to Burnaby by-laws without any approval or prior assessment by any level of government and without a prior determination of the applicability or operability of Burnaby by-laws by a court of competent jurisdiction.

Without entitlement to the enforcement powers of the *Community Charter*, municipalities will be powerless to apply their laws to any aspect of the pipeline.

29. Further, in regard to the specific issue herein, the Conservation Area is an important public resource and is valued by the whole of the public of Burnaby. Damage that is caused to the Conservation Area by the proposed work of Trans Mountain cannot be undone. If leave to appeal is not granted, this damage will be done prior to the hearing of the matter on its merits, rendering the claim moot.
30. In Burnaby's submission, the public interest in the enforcement of valid by-laws, the novelty and importance of the jurisdictional issues raised in the claim, and the significance of the Conservation Area to the general public and the immediate threat to it posed by the Proposed Work, support that leave must be granted in this case.

B. Utility of Proposed Appeal

31. If leave to appeal is granted, the Conservation Area could still be protected pending the determination of the claim.
32. By deferring to the NEB in relation to the enforcement of municipal by-laws, the Court below acted in a way not supported by previous jurisprudence. If this approach is to apply to future decisions of the BCSC, and to municipalities faced with pipeline companies acting in contravention of by-laws, it should only do so after scrutiny by this Court. Guidance from this Court will be of clear benefit to the parties and to future municipalities seeking relief in respect of pipeline companies contravening by-laws.

C. Prospect of Success of the Proposed Appeal

33. The question for granting leave to appeal is not whether the appeal will succeed, but whether the points raised are arguable and not frivolous.

Reference: *Richard v. British Columbia*, 2003 BCCA 589 at para. 20

Test for an Injunction to Stop the Breach of By-laws

34. The Court below erred in determining that Burnaby must meet the requirements for an equitable injunction.

35. The BC Court of Appeal has found that where a municipality, or other elected body, is seeking a statutory injunction to force compliance with an enactment, the irreparable harm and balance of convenience aspects of the test may be 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.

Reference: *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 162 D.L.R. (4th) 203 (B.C.C.A.), *Vancouver (City) v. Maurice*, 2005 BCCA 37, paras. 34-35 and *City of Toronto v. Polai* (1970), 8 D.L.R. (3d) 689 at 696-697. (Ont. C.A.), aff'd [1973] S.C.R. 38.

36. This abbreviated test recognizes the public interest in allowing municipalities to enforce their by-laws and the duty of municipalities to their inhabitants to do so.

Reference: *City of Toronto v. Polai*, supra, at 696-697.

37. The Court below determined that, in respect of the application of Burnaby's by-laws to Trans Mountain, it was not dealing with a "private entity offending bylaws", but rather a "dispute...between competing public interests." As a result, it determined that the test for an equitable injunction must apply.

Reference: Reasons for Judgment, para. 31

38. Burnaby submits that the work undertaken by the Trans Mountain cannot be considered in the "public interest", as the Project has not yet been reviewed by the NEB or been issued a Certificate of Public Convenience and Necessity under the NEB Act, or approval under CEAA. It cannot be that merely because a company proposes a project whatever actions it unilaterally decides to take in furtherance of that project prior to approval are in the public interest.

39. As a result, Trans Mountain was and is a "private entity offending by-laws" and the Court below erred in the test to be applied to Burnaby in seeking injunctive relief and refusing to grant an interlocutory injunction where there was a clear breach of by-laws.

Serious question to be tried

40. The Court below erred in determining that there was doubt that there was a serious question to be tried, given that the claim could be determined by the NEB.

Reference: Reasons for Judgment, para. 35

41. Establishing that there is a serious question to be tried is a low threshold. An applicant merely needs to satisfy the court that the claim is neither vexatious nor frivolous.

Reference: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 337-338

42. There is a serious question of whether the NEB has the jurisdiction to determine the constitutional validity, applicability or operability of Burnaby's by-laws.
43. It should be noted that the constitutional jurisdiction of the NEB was not fully argued before the Court below, as Trans Mountain denied that they were raising a constitutional issue before the NEB, and denied the need to file a Notice of Constitutional Question.
44. The Chambers Judge, therefore, did not address or determine the constitutional validity of the by-laws; rather she deferred the entire question to the NEB.
45. However, the power in s. 12 of the NEB Act does not include the power to determine the constitutionality of provisions, at large, outside of its enabling statute.
46. This limitation of a tribunal's jurisdiction to decide constitutional matters only in relation to its enabling statute has been the basis of the law ever since the trilogy of Supreme Court of Canada (SCC) cases in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, *Cuddy Chicks Ltd. v. Ontario*, [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, and in all subsequent cases decided under that principle.
47. The leading SCC case of *Nova Scotia (Workers' Compensation Board) v. Martin* confirmed that:

Administrative tribunals which have jurisdiction -- whether explicit or implied -- to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. [Emphasis added]

Reference: *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at para. 3, see also paras. 28, 31, 33, 36, 37 and 40

48. In *Tranchemontagne v. Ontario (Director, Disability Support Program)*, the SCC held that the distinction in *Martin* between questions of law and statutory interpretation – where a tribunal may properly consider ordinary questions of law outside the enabling

statute – and constitutional determinations – which must be limited to the tribunal’s enabling statute was “deliberate”:

24 In *Martin*, this Court repeated the principle that administrative bodies empowered to decide questions of law "may presumptively go beyond the bounds of their enabling statute and decide issues of common law or statutory interpretation that arise in the course of a case properly before them, subject to judicial review on the appropriate standard": see para. 45... This can be contrasted with the power to subject a statutory provision to Charter scrutiny, which will only be found where the tribunal has jurisdiction to decide questions of law relating to that specific provision: see *Martin*, at para. 3.

25 I must conclude that the contrast in the wording of *Martin* is deliberate. Where a specific provision is being declared invalid, it is necessary to ensure that the tribunal is empowered to scrutinize it. Power to scrutinize other provisions is not sufficient, because the constitutional analysis is targeting one specific provision. [Emphasis added]

Reference: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 at paras. 24 and 25

49. These matters were not argued before the Chambers Judge because of the view she took in terms of the NEB jurisdiction, and the Respondents assertion that a Notice of Constitutional Question was not required.
50. In support of its doubt that there was a serious question, the Court below assumed that the NEB has jurisdiction to determine constitutional issues that are “relevant to the exercise of its authority”, and corresponding authority to “treat the impugned provision [Burnaby bylaws] as invalid for the purposes of the matter before it”. However, none of the authorities relied upon go so far as to make constitutional determinations in relation to legislation outside the enabling statute of the tribunal.

Reference: *Reasons for Judgment*, paras. 39-40

51. The NEB is a statutory tribunal without the inherent constitutional jurisdiction of a s. 96 Court, which have the unique role as interpreters of the Constitution, particularly in relation to provincial matters.
52. The NEB has not previously in its history ruled on the constitutional validity, applicability or operability of a municipal by-law. Such an unusual order, which substantially extends the jurisdiction of the NEB, demands clear precedent before it is determined that such jurisdiction is available, so as to deprive an applicant of relief in the BCSC and to make a claim before the BCSC vexatious or frivolous.

53. The Court below, thus, erred in assuming that the NEB had jurisdiction over the matter and that as a result there was not a serious question to be tried before the BCSC.

Irreparable harm

54. The Court below was not convinced that the “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.”

Reference: Reasons for Judgment, para 49.

55. The Court below erred in coming to this conclusion by solely considering the magnitude of the harm, as opposed to the nature of the harm.
56. The felling of mature trees and the consequent impacts on the surrounding ecosystem, is not reparable by an award of damages and cannot be “remediated” simply by the planting of new trees. The Court below also failed to take into account the harm of the proposed drilling activities of Trans Mountain.
57. The case law is clear that in assessing irreparable harm as a result of the felling of trees their age and cultural, community and environmental value are relevant considerations.

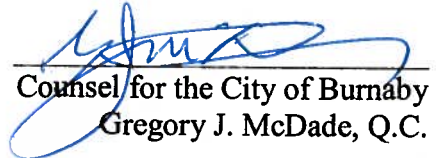
Reference: *Regional District of Nanaimo v. Buck*, 2012 BCSC 572 at para. 48

58. The forest and ecosystems of the Conservation Area are protected for public use and enjoyment and it was an error to assess the damage to them by Trans Mountain as reparable.
59. Further, given that the Court’s conclusion that Burnaby would not suffer irreparable harm to the ability to enforce its by-laws was based on the finding that Burnaby could enforce those by-laws in the NEB application, for the reasons above, the Court below also erred.

PART 4 - ORDER SOUGHT

60. Burnaby seeks an order granting it leave to appeal the decision of the BCSC pronounced on September 17, 2014.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of October, 2014.


Counsel for the City of Burnaby
Gregory J. McDade, Q.C.

PART 5 - TABLE OF AUTHORITIES

Case Law

- Chief Joe Hall v. Canada (Attorney General)*, 2007 BCCA 133
- City of Toronto v. Polai* (1970), 8 D.L.R. (3d) 689 aff'd [1973] S.C.R. 38.
- Cuddy Chicks Ltd. v. Ontario*, [1991] 2 S.C.R. 5
- Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570
- ITO v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752
- Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 162 D.L.R. (4th) 203 (B.C.C.A.)
- Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54
- Regional District of Nanaimo v. Buck*, 2012 BCSC 572
- Richard v. British Columbia*, 2003 BCCA 589
- RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311
- Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22
- Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14
- Vancouver (City) v. Maurice*, 2005 BCCA 37

Statutory Authorities

- Community Charter*, S.B.C. 2003, c. 26
- National Energy Board Act*, R.S.C. 1985, c. N-7
- Burnaby Parks Regulation By-law*, 1979
- Burnaby Street and Traffic By-law*, 1961