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TMX v Burnaby: When Do Delays by a Municipal (or Provincial) Permitting Authority Trigger Paramountcy and Interjurisdictional Immunity?

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Decision Commented On: National Energy Board, Reasons for Decision (18 January 2018) in support of Order MO-057-2017 (6 December 2017) re Trans Mountain Expansion Project
The National Energy Board (NEB) has now issued its reasons for decision for an Order that it issued in December 2017 allowing Trans Mountain to proceed with certain activities associated with the Trans Mountain Expansion Project (TMX) without having first complied with bylaw requirements of the City of Burnaby.

Background and Context

Trans Mountain applied to the National Energy Board (NEB) for approval of the TMX in December 2013.

> In brief, the Project—the capital cost of which is $7.4 billion—adds new pipeline, in part through new rights of way, thereby expanding the existing 1,150-kilometre pipeline that runs roughly from Edmonton, Alberta to Burnaby, British Columbia. The Project also entails the construction of new works such as pump stations and tanks and the expansion of an existing marine terminal. The immediate effect will be to increase capacity from 300,000 barrels per day to 890,000 barrels per day. (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 (CanLII) at para 3)

The project will also raise "the number of tanker calls from 5 per month to 34 per month, depending on market conditions" (*Tsleil-Waututh Nation v Canada (National Energy Board)*, 2016 FCA 219 (CanLII) at para 3.)

Following a hearing and report from the NEB, and following consideration of the *Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project,* Environment Canada's *Review of Related Upstream Greenhouse Gas Emissions Estimates*, and the *Report from the Ministerial Panel for the Trans Mountain Expansion Project*, the Governor in Council directed the NEB to issue a certificate of public convenience and necessity (CPCN) for the project under s 54 of the *National Energy Board Act*, RSC 1985, c N-7 (*NEBA*).

There are multiple outstanding applications for judicial review of the Order in Council and the resulting CPCN. These applications were heard by the Federal Court of Appeal in the fall of 2017.

The CPCN contains some 157 conditions. Conditions 1 and 2 are relevant here:

> 1. Condition compliance. Trans Mountain must comply with all of the Certificate conditions, unless the NEB otherwise directs.
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> 2. Compliance with commitments. Without limiting Conditions 3, 4, and 6, Trans Mountain must implement all of the commitments it made in its Project application or to which it otherwise committed on the record of the OH-001-2014 proceeding.

The "otherwise directs" language of the first condition is a standard clause in CPCNs. With respect to the second condition (at 4-5), "Trans Mountain committed to apply for, or seek variance from, provincial and municipal permits and authorizations that apply to the Project."

The public record amply demonstrates that the City of Burnaby was and is (at 11) "fundamentally opposed to the Project, and that it has been public, vocal, and consistent in its opposition." Furthermore, during the application process there had been a dispute between TM and Burnaby with respect to TM's ability to access city lands in order to prepare studies required by the Board. That led TM to apply to the Board for a ruling confirming that the NEB had the jurisdiction to authorize TM's activities, and, to the extent that Burnaby's by-laws were making it impossible for TM to carry out the necessary tests, a ruling that the by-laws were constitutionally inapplicable, or if not inapplicable, were in conflict with the provisions of the *National Energy Board Act* and therefore inoperative on the basis of the paramountcy doctrine. The Board provided that ruling in its well-reasoned Ruling No. 40 (discussed in the context of other pipeline proposals here). The Federal Court of Appeal denied leave without giving reasons and the courts of British Columbia effectively confirmed Ruling No. 40 when TM mounted a collateral attack in the BC Courts: see *Burnaby (City) v Trans Mountain Pipeline ULC*, 2015 BCSC 2140 (CanLII) aff'd 2017 BCCA 132 (CanLII) and a post on those decisions here.

By mid-2017 TM had started the process of acquiring the necessary permits and/or waivers and variances specifically with respect to elements of the project in and around the Burnaby terminal. Much of the detail of these efforts and the responses of the City of Burnaby are described in the affidavits filed by both TM and the City and in the Board's decision. We will not review them in detail. It seems that there was little material dispute with respect to the facts (Board decision at 7 and this is perhaps confirmed by the decision of both parties that they did not need to cross examine on the affidavits) but there were significant differences as to the interpretation of those facts.

We will not get into the weeds in this post. Suffice it to say that TM formed the view that Burnaby was not proceeding sufficiently expeditiously with the permitting process and accordingly filed a notice of motion with the NEB on October 26, 2017 in which it sought three forms of relief. First, it sought an order under sections 12 and 13 and paragraphs 73(c), (e), (g) and (i) of *NEBA* declaring that certain Burnaby bylaw provisions did not apply to elements of the TM project and that therefore TM could begin its work notwithstanding that it had not yet received the necessary approvals under these bylaws. Second, TM sought relief from Conditions 1 and 2 of the CPCN on the basis of Burnaby's delay. Third, TM asked the Board to establish

"an efficient, fair, and timely process for Trans Mountain to bring similar future matters to the Board for its determination in cases where municipal or provincial permitting agencies unreasonably delay or fail to issue permits or authorizations in relation to the Project."

The focus here is on the first two forms of relief. We will refer to the first form of relief as the constitutional argument and the second form of relief as the administrative law argument. The NEB deals with these two arguments in the reverse order. We think that this makes sense. After all, the effect of conditions 1 and 2 of the CPCN read together was effectively to referentially incorporate the permitting requirements of provincial law into the federal certificate. It was only if those requirements were relaxed as a matter of federal law that it would become necessary to consider if those requirements could continue to apply *ex proprio motu,* or if they were inoperative or inapplicable by virtue of the doctrines of paramountcy and/or interjurisdictional immunity.

The Administrative Law Argument

The Board had to resolve two questions. First, did the Board have the authority to relax the requirements of condition 2? Second, if it did, what was the test that it should apply to the facts to determine if TM was entitled to the variation?

The Board concluded that it had the power to relax the requirements of condition 2 and that it was not necessary for TM to proceed by way of an application under s 21 of *NEBA* which would have meant that any Board decision to vary the CPCN would not be effective without the approval of an Order in Council. The Board gave two related reasons for this conclusion. First, the proposed relief did not constitute (at 16) "a significant or substantial change to be made to the Project". Second, Condition 1 itself contemplated that the Board should have the authority not to require compliance with a particular condition and the Governor in Council had directed the NEB to issue the CPCN on those terms.

The Board did not articulate a test for when it would exercise its discretion to relax compliance but seems to have based itself on a standard of reasonableness that informed an overall public interest assessment of its understanding of the facts. The Board summarized its key assessment of the facts (the Section F conclusions) as follows (at 14)

- the review time was two to three times longer than Burnaby's original estimate of six to eight weeks for a more complex review;
- the responsibility for the majority of review time is attributable to Burnaby's actions, inactions, and process decisions;
- Burnaby's process made it very difficult for Trans Mountain to understand what the permitting requirements were and how they could be met;
- Burnaby repeatedly denied Trans Mountain's reasonable requests to aid in an efficient processing of the PPA [preliminary plan approval] applications;
- the review time is the cause of, or a contributing or exacerbating factor to, Project construction delay, and the prejudice associated with that delay; and,
- the overall trend does not indicate that Burnaby is getting closer to issuing PPAs or Tree Cutting Permits; rather, there is no clear indication of an imminent resolution.

Perhaps the crucial paragraph in terms of eliciting the test that the Board applied to these facts is as follows (at 15):

> The Board is of the view that it is in the public interest to grant Trans Mountain the requested relief from Certificate Condition 2. The Board has reached this conclusion on the basis of its conclusion in Section F that Burnaby's process to review the PPA applications and associated Tree Cutting Permits, and its execution of those processes, were not reasonable, resulting in unreasonable delay. This includes the fact that it is the cause of, or a significant contributing or exacerbating factor to, Project construction delay.
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> ….
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> What is reasonable is necessarily fact-specific and must be considered in light of all of the circumstances.

The Board acknowledged (at 16) that there was a competing public interest in "ongoing, collaborative engagement between Trans Mountain and municipalities, such that matters of local concern are understood and addressed where possible" but that in this case this interest was not outweighed by the public interest (at 17) in allowing TM to exercise its statutory powers under section 73 of *NEBA* and the CPCN. In reaching this conclusion, the Board noted that TM had made certain commitments to Burnaby including (at 17) "to pay compensation or replant in accordance with the Tree Bylaw" and further that TM remained bound by the general injunction of section 75 which requires the company to do as little damage as possible.

The test established by the NEB is therefore nuanced and the overall threshold of reasonableness is perhaps not that hard for TM to meet. But in weighing the adequacy of the test as a means of protecting other important public interests, one must keep sight of the consequences of satisfying the test. Satisfying the test does not, in and of itself, give TM a free pass. The only consequence of this part of the Order is that the municipal bylaws are no longer applicable to the project by virtue of federal law; they will still be applicable of their own force unless TM can meet the high threshold tests established by the doctrines of paramountcy and interjurisdictional immunity.

The Constitutional Law Argument

The relevant Burnaby bylaws were clearly valid. The constitutional issues therefore included the authority of the Board to decide the constitutional questions, the question of whether or not TM's application for a ruling was premature, and the issues of paramountcy and interjurisdictional immunity.

There seems little doubt about the power and authority of the NEB to consider constitutional questions relating to its own jurisdiction: *Westcoast Energy Inc. v Canada (National Energy Board)*, [1998] 1 SCR 322, 1998 CanLII 813 (SCC). Clearly, the British Columbia courts accepted that proposition as part of dismissing TM's collateral attack on Ruling # 40 (see above).

As for the issue of prematurity, the Board concluded (at 22) that the application was not premature. TM did not need to wait for a rejection before seeking relief. As noted by the Board (at 22):

> … it is only logical that delay in processing municipal permit applications can, in certain circumstances, be sufficient in and of itself to engage the doctrines of paramountcy and interjurisdictional immunity. To hold otherwise would allow a province or municipality to delay a federal undertaking indefinitely, in effect accomplishing indirectly what it is not permitted to do directly. It is not a hypothetical matter.

The Board concluded that there was no operational conflict between *NEBA* and the CPCN and the Burnaby bylaws on the face of it since the possibility exists to comply with both. However, Burnaby's application of its bylaws in this particular case "has frustrated a federal purpose". In the Board's view (at 24) that frustration arose from the fact that section 73 of *NEBA* provides TM with a grant of powers with respect to constructing, operating and maintaining the pipeline that "are in effect now". These powers are "vital to the Project's orderly development and efficient operation" and Burnaby's "action or inactions" in assessing TM's applications "in a timely or reasonable manner" was compromising the exercise of those powers.

As for the IJI arguments the Board agreed with TM that the matters of the *when* and *where* of the Project and its orderly development were all matters that fell within the core of federal competence with respect to interprovincial undertakings. The delay engendered by Burnaby's unreasonable behavior was (at 25) a "serious entrenchment on a protected federal power".

> This is not to say that any delay in provincial or municipal permitting processes will engage the doctrine of interjurisdictional immunity, a point British Columbia raised in attempting to distinguish this matter from the delay that precipitated such a finding in *Rogers Communications Inc. v. Chateauguay (City)*. The Board has made its findings in this case based on the specific facts before it. The evidence does not demonstrate that Burnaby's actions or inactions were a legitimate exercise of municipal laws, but rather, viewed as a whole, that the delay already incurred, and ongoing with no clear end in sight, constitutes a sufficiently serious entrenchment on a protected federal power.

Thus, much as in *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 (CanLII) (and for the ABlawg post comparing that telecoms example to pipelines see here), Burnaby's delay amounted to an impairment of the federal power. Consequently, the Board concluded that the bylaws in question were (at 25): "inapplicable to the extent that they impair the Terminal Work as authorized by paragraphs 73(c), (e), (g), and (i) of the NEB Act, and the Certificate and relevant Board orders issued under the NEB Act."

What's Next?

Burnaby has the right to seek leave to appeal this ruling to the Federal Court of Appeal (FCA): see *NEBA*, section 22. While that Court (unlike the Alberta Court of Appeal) does not generally

give reasons for granting or denying leave, the relevant considerations applied by appellate courts on a leave application include (in addition to establishing that there is a question of law or jurisdiction involved) the importance of the issue, the interlocutory or final nature of the issue, and whether or not the issue proposed for appeal has arguable merit.
In weighing the issue of arguable merit, the Court will inevitably focus attention on the standard of review. Clearly the more deferential the standard of review the more difficult it will be for Burnaby to convince the FCA that it should grant leave.

It seems likely that the standard of review with respect to what we have characterized as the administrative law argument (whether and on what basis the NEB may vary TM's CPCN) will be that of reasonableness with respect to both the test and the application of that test. We say this for the following reasons. The test involves the interpretation of the CPCN which is the NEB's own instrument (akin to its statute) and the NEB can be assumed to have special expertise in understanding both the background to the terms of the CPCN and the realities of pipeline construction, timelines and financing (i.e. the practical effect of the delays) (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 (CanLII) at para 33).

There is one caveat to the above in relation to the threshold question of whether the Board has the power to relax the condition rather than requiring TM to apply for a variation of the CPCN under s 21 of the *NEBA*. This is a pure point of law, but even then the point relates to the interpretation of the home statute and thus the standard of review is still likely reasonableness: (*Edmonton East (Capilano)*). But even on a correctness standard the point seems weak given that Condition 1 expressly vests the NEB with the power to "otherwise direct".

With respect to the constitutional law argument, the articulation of the relevant test would be reviewed on the standard of correctness. There may be some room to argue that there should be some deference to the Board's assessment of the effect and seriousness of the ongoing delay on the viability of the TM project (and thus the question of impairment) but this will be an issue to be explored on the merits should the Court grant leave. For the purposes of a leave application the matter is likely to be assessed under the standard of correctness. While the Court denied leave with respect to Ruling No. 40, that should not be taken as determinative. The present ruling does raise a novel (at least to the extent not already covered by *Châteauguay*) point of law, which is the circumstances under which delay can serve as a trigger to render a municipal or provincial regulatory requirement inoperative or inapplicable.

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