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CASE SUMMARY: APPLICATION BY CITY OF BURNABY FOR DECLARATORY RELIEF IN RELATION TO CONSTITUTIONAL QUESTIONS REGARDING THE JURISDICTION OF THE NATIONAL ENERGY BOARD OVER THE TRANS MOUNTAIN PIPELINE

Administrative law – Decisions of administrative tribunals – Municipalities – By-laws; Legislation – Constitutional issues – Abuse of process; Judicial review – Compliance with legislation – Jurisdiction; Remedies – Declaratory relief

Burnaby (City) v. Trans Mountain Pipeline ULC

The applicant City of Burnaby is a municipality in which the existing Trans Mountain Pipeline, travelling from Sherwood Park, Alberta, to terminals and refineries in central British Columbia, the Lower Mainland, Puget Sound, and other points, has a right of way. The respondent Trans Mountain Pipeline ULC is the proponent of the Trans Mountain Expansion Project intended to expand the existing Trans Mountain Pipeline.

[2015] B.C.J. No. 2503

2015 BCSC 2140

British Columbia Supreme Court

November 5, 2014

G.K. Macintosh J.

The Trans Mountain Pipeline is an interprovincial undertaking as contemplated in sections 91(29) and 92(10)(a) of the Constitution Act, 1867. The Trans Mountain Pipeline is situated, constructed, and operated under the exclusive jurisdiction of the National Energy Board, acting pursuant to the National Energy Board Act, R.S.C. 1985, c. N-7.

Burnaby opposes the Trans Mountain Expansion Project. Burnaby participated as an intervenor at hearings before the National Energy Board on the Trans Mountain Expansion Project.

Burnaby lawfully enacted bylaws which it says give it powers over the Trans Mountain Expansion Project, including controlling the routing of the Trans Mountain Expansion Project and the engineering studies needed to determine the route. Trans Mountain's position is the routing of an interprovincial pipeline, including engineering studies necessary for determining the route, are within the exclusive jurisdiction of the National Energy Board.

Burnaby applied for declaratory relief in relation to constitutional questions regarding the jurisdiction of the National Energy Board over the Trans Mountain Expansion Project. Burnaby sought a declaration the National Board does not have constitutional jurisdiction to issue an order that directs or limits Burnaby in the enforcement of its bylaws and asked the Court to rule on the constitutional questions between the parties generally. Trans Mountain argued the Court should decline jurisdiction over the constitutional issues on the basis Burnaby's application was an abuse of process, as the constitutional questions were determined by the National Energy Board (with leave to appeal to the Federal Court of Appeal denied).

The Court held that as a general proposition, it should be reluctant to decline addressing constitutional questions where the applicant is a municipality asking for guidance as to its legal capacity to enforce its validly-enacted bylaws; however, the Court concluded this was a rare case where the ends of justice were better met by the Court leaving the constitutional questions alone. The National Energy Board had the jurisdiction to address the constitutional questions in the face of Burnaby's attempted enforcement of its bylaws. Burnaby was unsuccessful at the hearing before the National Energy Board and when it sought leave to appeal the National Energy Board's ruling to the Federal Court of Appeal. The Court concluded Burnaby was seeking declaratory relief because it was unsuccessful elsewhere. The Court held it was an abuse of process, as that phrase is used in this context, for Burnaby to seek relief it failed to obtain at the National Energy Board and in the Federal Court of Appeal. On that basis, the Court declined to address the constitutional questions.

In the event the Court's decision on jurisdiction was overturned, the Court considered the constitutional questions. The Court concluded that Burnaby's bylaws can have no application so as to impede or block the location of the Trans Mountain Pipeline or to determine the engineering studies required to determine the Trans Mountain Pipeline's location. The Court held the National Energy Board has the constitutional power to direct or limit Burnaby in the enforcement of its bylaws when the bylaws interfere with or block the National Energy Board in its regulation of the Trans Mountain Pipeline and the Trans Mountain Expansion Project.

This case was digested by [Joel A. Morris](#) of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact him directly at jmorris@harpergrey.com or review his biography at <http://www.harpergrey.com>.