NATIONAL ENERGY BOARD
OFFICE NATIONAL DE L'ÉNERGIE

Hearing Order OH-001-2014
Ordonnance d'audience OH-001-2014

Trans Mountain Pipeline ULC
Trans Mountain Expansion Project

Trans Mountain Pipeline ULC
Projet d'agrandissement du réseau de Trans Mountain

VOLUME 5

Hearing held at
L'audience tenue à

National Energy Board
517 - 10th Avenue S.W.
Calgary, Alberta

October 9, 2014
Le 9 octobre 2014

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OH-001-2014

IN THE MATTER OF Trans Mountain Pipeline ULC
Application for the Trans Mountain Expansion Project

HEARING LOCATION/LIEU DE L'AUDIENCE

Hearing held in Calgary (Alberta), Thursday, October 9, 2014
Audience tenue à Calgary (Alberta), jeudi, le 9 octobre 2014

BOARD PANEL/COMITÉ D'AUDIENCE DE L'OFFICE

D. Hamilton	Chairman/Président
P. Davies	Member/Membre
A. Scott	Member/Membre

APPEARANCES/COMPARUTIONS

APPLICANTS/DEMANDEURS

Trans Mountain Pipeline ULC
- Ms. Maureen Killoran, Q.C.
- Mr. Jeremy Barretto
- Ms. Heather Roberstson

INTERVENORS/INTERVENANTS

City of Burnaby
- Mr. Gregory McDade, Q.C.

National Energy Board/Office national de l'énergie
- Mr. Asad Chaudhary
- Ms. Paul Johnston

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No.	Description	Paragraph No./No. de paragraphe

UNDERTAKINGS/ENGAGEMENTS

No.	Description	Paragraph No./No. de paragraphe

--- Upon commencing at 9:01 a.m./L'audience débute à 9h01

1422. **THE CHAIRMAN:** Good morning and welcome to today's session, which is part of the National Energy Board's hearing regarding the Trans Mountain Expansion Project.

1423. This sitting is to hear oral argument on Trans Mountain's motion filed on the 26th of September 2014.

1424. My name is David Hamilton and I am chairing the Panel. With me, to my left, is Ms. Alison Scott and to my right is Mr. Phil Davies and together, we are the Panel assessing the Trans Mountain Expansion Project Application.

1425. As the NEB and holding a proceeding here is still fairly new to this building, I will just take a few moments to review some housekeeping items. In the event that we hear the building evacuation tone, the procedure will be to exit the hearing room using the entrance we came in. Once in the hallway, there are two evacuation stairwells; the first is at the end of the hallway to the right of the hearing room entrance doors, and a second stairwell is in the elevator lobby.

1426. Once outside the building, we will proceed to the Central Memorial Park, which is two blocks south of the building.

1427. Also, another important issue, men and ladies' washrooms can be found through the elevator lobby, turning left along the north hallway. There's a sign posted just past the elevators.

1428. There are a number of NEB staff members who are in attendance today. You will be able to identify them because they're each wearing the gold name tag. These are the people who work with us, the Panel, to deliver a transparent, fair, and respectful process.

1429. At this time though, I will identify a few of our staff by name. First of all, to my far right, is our hearing manager, Margaret Barber. Next to Margaret is Asad Chaudhary, one of our legal counsel; Paul Johnston, also our legal counsel. And sitting behind the screens here is Danielle Comte, who is our Regulatory Officer if you need any assistance in that regard for any documents.

1430. Today's hearing is being transcribed and you can get copies of the transcript later today on our website. The session today is also being broadcast

live on the Panel's website, which is again our normal practice associated with these hearings.

1431. We plan to hear from Trans Mountain this morning, resuming in the afternoon with the City of Burnaby. This schedule is flexible depending on the time of argument, questions from the Panel, and breaks.

1432. The parties' combined time estimate was 4.5 hours, so we expect to conclude the hearing today.

1433. Perhaps for the record, I would ask Trans Mountain and the City of Burnaby if they would introduce themselves and indicate who is with us today. And also perhaps if you have -- we understand that we had a flurry of correspondence yesterday and today on an issue, which we'll probably deal with as a preliminary matter. But if you have any other preliminary matters you wish to raise, you can indicate that at the same time and we'll take them in the order that you -- that we will proceed that way.

1434. **MS. KILLORAN:** My name is Maureen Killoran, representing Trans Mountain. With me today are Heather Robertson and Jeremy Barretto. And also attending on behalf of Trans Mountain is Carey Johannesson, who is the affiant in this matter.

1435. We have no preliminary matters, but I'll turn it over to my friend, Mr. McDade, who I believe does.

1436. **THE CHAIRMAN:** Thank you, Ms. Killoran.

1437. **MR. McDADE:** Thank you. Good morning. My name is Gregory McDade. I'm counsel for the City of Burnaby in British Columbia.

1438. I have no preliminary matters to raise. Thank you.

1439. **THE CHAIRMAN:** Perhaps then, how would you like us, Mr. McDade, to proceed with the flurry of letters? Would you want to regard that as a preliminary matter that I think we need to deal with this morning or if you…

1440. **MR. McDADE:** If we're dealing with the question of the sur-reply and whether that's admissible, I can just deal with that in my response and make

those points as part of my usual submission.

1441. **THE CHAIRMAN:** That's fine. Thank you.

1442. Then with being no other preliminary matters, I believe then we can get underway with the -- on the 26 September motion by Trans Mountain.

1443. The Panel has reviewed both parties' written submissions, including Trans Mountain's reply submissions filed Tuesday and would caution both parties against repetition.

1444. Ms. Killoran, this is your motion, so the Panel will hear from you first and then -- so this will be your opportunity to highlight key portions of your argument and then we will hear from Mr. McDade after that as well.

1445. So Ms. Killoran.

--- ARGUMENT BY/REPRÉSENTATION PAR MS. KILLORAN:

1446. **MS. KILLORAN:** Thank you, Chairman.

1447. As a matter of housekeeping first, given the flurry of letters and materials, if I can confirm that the materials filed by Trans Mountain so far, a September 26th, 2014 affidavit of Cary Johannesson along with the reply affidavit dated October 7th, a Notice of Constitutional Question in response to NEB Ruling No. 32, a Notice of Motion as well, and a consolidated book of legal authorities.

1448. Mr. McDade and I were chatting before the Panel entered the room. We are traditional litigators and we tend to look at a Book of Authorities and refer you to the cases within them. So if you have Trans Mountain's consolidated index, that will be the easiest reference for us. Having said that, we can also deal with exhibit numbers if need be.

1449. **THE CHAIRMAN:** That's fine and we have a very competent Regulatory Officer who will be able to get things if you do require them.

1450. **MS. KILLORAN:** Perfect.

1451. Contrary to what my learned friend will argue on behalf of the City of Burnaby, Trans Mountain's position is that the law is settled in relation to the four

questions that are before the Panel today. And the law is not just settled by any court. The law has been settled by the Supreme Court of Canada. Unfortunately, in some of the most cumbersome decisions that we've seen so I will, as a matter of my presentation, take you through some of those decisions, so that we can highlight the points that are of importance to the Panel.

1452. Trans Mountain says not only does the Board have the jurisdiction to do what Trans Mountain is asking it to do, it has an obligation to do so.

1453. So the Board asked us to consider four questions, the answer to which is "yes" to each on behalf of Trans Mountain. Let me provide a quick summary, a quick overview of our position in relation to all four of the questions.

1454. First, does the Board have a legal authority to determine that Burnaby's specific bylaw that Trans Mountain is alleged to have breached are inapplicable, invalid or inoperative in the context of Trans Mountain's exercise of its powers under section 73, the answer is yes.

1455. First, the NEB has been expressly granted jurisdiction under its governing Act, to hear and determine all matters, whether of law or of fact, and this is unique. We'll see some of the Supreme Court of Canada cases dealing with administrative tribunals where the authority is not so clear.

1456. And according to the Supreme Court of Canada, when tribunals have been given such express authority, that jurisdiction includes constitutional issues and it includes division of powers issues, which is what is at issue here today.

1457. And if given such a clear grant of authority in the legislation, a party wishes to argue that a panel such as this or the National Energy Board in this case, cannot exercise certain jurisdiction, they had better be able to point out specifically within the legislation where they are excluded from doing so. And it's our submission that there's no such exclusion.

1458. So in answer to that first question, in dealing with the legal issue which in this case is a constitutional law issue, a division of powers issue, the NEB does have the legal authority to determine that the bylaws are inoperative for the specific purpose of the matters at issue here; the section 73 access and the section 73 studies.

1459. So to be clear, this is not a motion to strike down bylaws as

unconstitutional or otherwise. We're not asking the NEB to do that and the NEB doesn't have the power to do it.

1460. Briefly now to the second question, if the Board does have the legal authority and the answer to the first question is yes, on the facts before the Board, should the Board find that the bylaws are inapplicable, invalid or inoperative, and again Trans Mountain says yes, the law is well settled that pipelines, and specifically the Trans Mountain pipeline -- we have a Supreme Court of Canada case that addresses that pipeline in particular -- pipelines are an extension of the federal undertaking and are within the exclusive jurisdiction of the federal Parliament.

1461. So principles of interjurisdictional immunity and federal paramountcy render the bylaws inoperative, again, for the specifics of a section 73 access and testing that we're talking about.

1462. We'll talk a little bit about interjurisdictional immunity and paramountcy. Interjurisdictional immunity especially is a test that is complicated and quite frankly the courts don't like it.

1463. And I'll walk you through some of the case law to show you how our Supreme Court of Canada, in particular, has responded to the test; when they apply it, when they do not. It is still alive and well but it is, Trans Mountain admits, a principle that the courts do not like to apply.

1464. But in any event, even on the very pure application of the test, Trans Mountain submits that interjurisdictional immunity does apply in this case. And the second principle, that of federal paramountcy applies as well.

1465. Question three, if the bylaws are inoperable does the NEB Act provide the Board with the authority to forbid Burnaby from enforcing its bylaws. And the answer to that is yes, the authority is clear under section 13 of the NEB Act. And we'll discuss that more particularly as well with reference to case law.

1466. The fourth question, if so do the facts before the Board support the granting of such an order. Again, yes.

1467. You will hear evidence -- and I won't walk you through the history of this proceeding and I won't walk you through all of the affidavit of Carey Johannesson but I would like to highlight a few points within those affidavits to

look at the steps that Trans Mountain has taken to attempt to cooperate with Burnaby, to look at the steps that are required in order to comply with section 73 in order to comply with the directives of the Board.

1468. And you'll see that Burnaby's actions and responses are such that there's no other conclusion to be drawn. That then, without such an order, section 73 obligations cannot be achieved by Trans Mountain.

1469. I'll take you through some of the evidence in Mr. Johannesson's affidavit, including some of the press releases from the City of Burnaby. They are inflammatory, to say the least. They are political. It is absolutely clear they are opposed to the pipeline. And it's our submission that this is not a bonafide attempt to apply bylaws.

1470. This is about a grand purpose of attempting to stop the pipeline and attempting to stop it at this very early stage, when the Proponent is attempting to do environmental assessment work, and work to facilitate the Board process.

1471. The Board's job and the Board's role is one that requires it to keep in mind the national interest. And while balancing the national interest, it is the role of the Board to obviously consider the interests of communities, of people, of stakeholders and of anyone who's going to be affected by the project.

1472. But it is submitted that in this case, the actions of Burnaby amount to a collateral attack on not just the pipeline but on the Board's mandate as well.

1473. Last night I reviewed, on the Board website, the mandate of the Board and it was a helpful thing to do. And I'd like to set the tone, in terms of what the Board's role is today, and that balancing act with reference to that.

> *"The NEB's purpose is to promote safety and security, environmental protection and efficient energy infrastructure and markets in the Canadian public interest within the mandate set by Parliament in the regulation of pipelines, energy development and trade.*
>
> *The NEB's main responsibilities include regulating the construction and operation of interprovincial and international oil and gas pipelines…"*

1474. It goes on to say that:

> *"Under the NEB Act, the NEB is required to consider matters of public interest as they may be affected by the granting of an application. The NEB has assumed a mandate for environmental protection as a component of that public interest and conducts environmental assessments as appropriate for each application. […] CEAA 2012, provides an additional mechanism to ensure that projects receive appropriate levels of assessment before they proceed."*

1475. And then when discussing environmental protection and safety, the website has this to say:

> *"The NEB's environmental responsibility includes ensuring environmental protection during the planning, construction, operation and abandonment of energy projects within its jurisdiction."*

1476. So it's important to note that the NEB doesn't just regulate pipelines once they're completed; the NEB ensures that environmental protection during the planning, construction, operation and abandonment of energy projects is taken care of.

1477. The mandate is broad and the mandate necessarily requires a balancing of the national interests, of the interests of individuals and ultimately a decision as to whether the pipeline is in the best interest of Canadians, not of the City of Burnaby. Not to say that their concerns and their interests ought not to be before the Board but what the City of Burnaby is seeking to do is to veto the location and some of the planning that's going into this pipeline.

1478. So that's a summary of the questions and what Trans Mountain's answers to those questions will be.

1479. However, I'd like to take you through the analysis that leads to the conclusions that I've suggested. And I'd also like to briefly outline some of the facts from Carey Johannesson's affidavit.

1480. So I'll break my presentation down this way: One, a review of the facts, and two, I've broken it into four issues which I think mirror the four

constitutional questions but they're the four legal issues that need to be addressed and decided by the Panel today.

1481. First of all, the jurisdiction of the Tribunal; secondly, what's the test for a federal undertaking and do we have one here; thirdly, the interjurisdictional immunity test; what is it, are the courts still applying it and does it apply here, and fourthly, the test for federal paramountcy.

1482. In Mr. Johannesson's affidavit he speaks about the project, the Burnaby routing and what we call at Trans Mountain "the preferred corridor". I believe the Panel is well familiar with all of these issues. So I will not review them.

1483. But I will remind the Panel that pursuant to Procedural Direction No. 4 there is a subsidiary process to assess the impacts of the preferred corridor, and by this I mean the corridor that sees the horizontal drilling of a pipeline through the mountain in Burnaby. And it is this corridor that requires environmental testing, geophysical testing, soil sampling and engineering testing frankly to determine whether the route is viable to determine what kind of an impact this route will have.

1484. And information must be submitted to the Board by the 1st of December 2014, and Trans Mountain is working very hard towards that deadline but is clearly compromised at this stage because of the delays that this process has introduced.

1485. At paragraph 33 of Mr. Johannesson's affidavit, he sets out what is required for the preferred corridor, the studies, the work that's required to inform the Board, and frankly to inform Trans Mountain as to what the alternative entails, geotechnical investigations, including drilling of bore holes, surficial mapping of outcrops and the use of geophysics to interpret the geology and subsurface condition along the preferred corridor, soil surveys, drilling of vertical walls to ascertain groundwater conditions for the horizontal drilling, vegetation surveys focusing on the entry and exit points of the preferred corridor, wildlife surveys focusing on the entry and exit points of the preferred corridor, archaeological surveys to assist in the development of site-specific mitigation and an update on the human occupancy and resource use element in consideration of the second corridor.

1486. So we call that -- both in our legal submissions and in the affidavit we

call it the mandated fieldwork, so I may just use that defined term if that's more convenient.

1487. In order to conduct this mandated field work Burnaby -- because Burnaby Mountain is land owned by Burnaby or controlled by Burnaby, Trans Mountain reached out to Burnaby early in the process in order not just to get access but to alert them to the types of tests that had to be conducted. And obviously as an intervenor in this process Burnaby is well aware, through the NEB process as well, what the tests involve.

1488. And you'll see at paragraphs 41 and beyond of Mr. Johannesson's affidavit he goes into great lengths about the efforts that are made to engage Burnaby. And at Exhibit N to his affidavit is a consultation record. And I won't go through it in great detail, but it does set out the number of opportunities attempted to be created by Trans Mountain to meet with the City of Burnaby, to meet with the mayor of Burnaby, who's been quite vocal in his opposition to the pipeline, and the silence is deafening.

1489. Again, in both Mr. Johannesson's initial affidavit and his reply affidavit he speaks about the Burnaby Planning Department telling Trans Mountain that it wouldn't approve the mandated fieldwork under any circumstances.

1490. And at the end of the day these facts may not be all that relevant to the Board's legal analysis of the issues, but I think they're important in one respect, in that Burnaby argues that cooperation is the ideal; that when faced with two laws that appear to contradict each other the parties ought to cooperate and where possible dovetail and see if the provincial and the federal powers can't coexist. It's a principle called cooperative federalism and we'll talk about it a little bit later on.

1491. But in order for cooperative federalism to even be discussed today there needs to be cooperation and there has been none. So what this is is a clear contrast between what Trans Mountain views its rights are and its obligations are under both directives of the Board and section 73 of the *National Energy Board Act* and what Burnaby sees as its ability to stop waste on the land at issue through its bylaws.

1492. At Exhibit Z to Mr. Johannesson's affidavit is a lengthy letter dated October 12th, 2014. I won't take you to it but it is in the record and it is yet

another example of Trans Mountain setting out all of the particular type of work that needs to be done.

1493. And there's no question about it, much of the work required for the mandated field studies involves disruption to the land. In our view it's minimal disruption. In some cases it's the removal of brush and saplings so that equipment can be brought in. In other cases it's actually the drilling of bore holes. So there is disruption, there is waste, and it is going to happen, and it is waste and disruption that is clearly offensive to the Burnaby bylaws.

1494. At paragraph 62 and beyond of Mr. Johannesson's affidavit he sets out what happens when Trans Mountain arrives on site, arrives at the Burnaby lands in order to conduct the mandatory field work.

1495. And you'll see prior to that there's some toing and froing between the city and Trans Mountain as to whose rights trump whose. And in particular at Exhibit DD to the affidavit of Mr. Johannesson is a letter from the City of Burnaby Legal and Lands Department saying that:

> *"It is the City's position that constitutionally, whatever rights are created by s.73 of the National Energy Board Act, the exercise of those rights are still subject to compliance with [the] City Bylaws."*

1496. And then the city goes through -- and this is before any work is done. So the city goes through and foreshadows all the bylaws that Trans Mountain is going to break.

1497. In particular, without limitation, we would point out the following provisions of the Burnaby Parks Regulation Bylaw:

> *"3. No person shall cut, break, injure, damage, deface, destroy, foul or pollute any park including, without limiting the generality of the foregoing, any building, structure, fence, sign, seat bench, ornament or thing in any park."*

1498. Pretty broad.

> *"4. No person shall molest, disturb, frighten, injure, trap or snare any bird or animal, or fish in any lake or stream in any*

park without the special permission of the Administrator.

5. No person shall cut, break, injure, damage, deface, destroy, foul or pollute any personal property or any tree, shrub, plant, turf or flower in any park.

22. No person shall violate any bylaw, rule, regulation, or notice of the Corporation.

40. No person shall obstruct or cause to be obstructed, any official employee, agent or contractor of the Corporation in the exercise of his lawful duties.

41. No person shall ride, drive or lead any horse or other animal or drive or propel any vehicle in or on any park in such a manner as to disturb the enjoyment therefore by any person, or to cause injury or damage to any person, animal, or property.

44. No person shall ride, drive, or lead any horse, or drive, ride or park any vehicle, or bicycle in or on any park or portion thereof; unless the park or portion thereof has been specifically designated for such use."

1499. And then 24 they set out a traffic bylaw as well:

"No person shall excavate in, do or construct any works upon, cause a nuisance upon, encumber, obstruct, injure…"

1500. I won't go on. It goes on at length, such that even slowing traffic down in the area is a traffic offence.

1501. So after receiving this letter Trans Mountain made it clear that in their view section 73 gave them the right to do the mandatory work. They attended Barnet Marine Park. And one of the contractors we had clearing some brush was a company by the name of Davey Tree Expert. Long story short, they were told by the city that their acts were -- their brush clearing acts were contrary to the bylaws.

1502. They were also told by the city that if they didn't step away, future

contracts with the city would be compromised. So we heard fairly quickly from the contractor that they could no longer work for Trans Mountain on the project.

1503. At paragraph 73 and beyond, Mr. Johannesson speaks of the events of September 2nd. He speaks in particular about some of the work that was being done and they put some traffic cones out just to highlight for safety reasons a particular area where some work was being conducted and they had a Trans Mountain employee just advising motorists as they went by to slow down. He's not aware that there was any stoppage of traffic or, for that matter, that any of the motorists complained about the safety note, essentially, that was being given to them by Trans Mountain.

1504. In any event, because of the brush clearing, the traffic issues, the tree issues and all of those matters that were foreshadowed by the City of Burnaby in its letter before we even showed up to do the work, Trans Mountain was presented with orders to cease bylaw contravention under the Burnaby Street and Traffic Bylaw, section 24, and Burnaby Parks Regulations Bylaws, sections 3 and 5. And those are both attached as Exhibit JJ to the affidavit of Mr. Johannesson.

1505. Mr. Johannesson also goes on about creating a safety zone around some particular work that was being done. The employees from the city came and stood within the safety zone, refused to leave, blocked the work from being done. When asked why, why they were doing it, they advised that they had been told by the city to do this.

1506. So long story short, after a number of encounters, many of which are set out or all of which are set out in the affidavit of Mr. Johannesson, Trans Mountain made the decision to stand down and not complete the work until these issues could be resolved.

1507. So the presumption on the basis of the lack of communication with the City of Burnaby, the actual acts, what happened when Trans Mountain arrived on the land to do the work -- we were served with bylaw infractions; we were served with notices of cease to work -- and because of some of the comments even made in the inflammatory press releases by the City of Burnaby, comments where the Mayor says, "Pipeline is not coming through here. We're going to stop it". That's the general tone of the communications with the City of Burnaby. Because of those things, Trans Mountain has concluded it is impossible to fulfil its obligations to the Board. It is impossible to complete the mandated field studies pursuant to section 73 of the NEB and comply with the Bylaws of the City of

Burnaby.

1508. So let's move to the issues.

1509. First, let's talk about the jurisdiction of the Tribunal. And before we take a look at the case law respecting the jurisdiction of administrative tribunals, it's important to determine what the powers of this Tribunal are. And in that regard, I'd like to refer you to the NEB Act itself.

1510. Section 11 of the NEB Act is quite clear. It begins with:

> *"The Board is a court of record."*

1511. Section 12:

> *"The Board has full and exclusive jurisdiction to inquire into, hear and determine any matter*
>
> *"(a) where it appears to the Board that any person has failed to do any act, matter or thing required to be done by this Act or by any regulation, certificate,..."*

1512. Et cetera, et cetera:

> *"(b) where it appears to the Board that the circumstances may require the Board, in the public interest,..."*

1513. Again, that weighing and balancing, that obligation that the Board has to weigh the national public interest or:

> *"...to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be done."*

1514. And section 12(2) says:

> *"For the purposes of this Act, the Board has full jurisdiction to hear and determine all matters, whether of law or of fact."*

1515. And this is key. That's really important. Many of the Supreme Court of Canada cases dealing with administrative tribunals are dealing with legislation where this power has not been given, the ability to deal with law in particular. This Board has it.

1516. And some of the cases that we'll reference, the Supreme Court of Canada cases on the jurisdiction of tribunals, are only relevant to us for certain principles that they state within because they are completely irrelevant when they apply to administrative tribunals that don't have the kind of powers that this Board has. And just in case there was any doubt, we look also to section 22:

> *"An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court."*

1517. You can't seek leave to appeal on a question of law or jurisdiction if the Board doesn't have the jurisdiction to deal with issues of law or jurisdiction. It's obvious.

1518. Section 52, a section with which I'm sure this panel is well aware, sets out the obligations of the Board, what they need to do, that balancing exercise that we reference, how they need to assemble and acquire all of the information necessary in order to make decisions, make recommendations and consider the issues that the federal government has asked this Board to consider.

1519. Section 73, this allows the Board to give a company, in this case the Proponent, the ability to:

> *"...enter into and on any Crown land without previous licence [...] or into or on the land of any person, lying in the intended route of its pipeline..."*

1520. So it deals directly with rights that are given, obligations that the Board has even in determining the route of a pipeline; making:

> *"...surveys, examinations or other necessary arrangements on the land for fixing the site of the pipeline, and set[ting] out and ascertain[ing] such parts of the land as are necessary and proper for the pipeline;"*

1521. So this read in conjunction with section 52 which tells the Board what it has to do, what kind of report it has to put together, the information that it has to compile, the recommendations, the balancing act that it needs to achieve, is only operational when you've got a section 73 that allows you also to engage the proponent, tell the proponent they have to go out and acquire this information for the Board's purposes. And section 73 is the authority that the Proponent has to say, "You know what? I normally wouldn't be allowed on your land. It would be trespassing, but section 73 lets me on the land."

1522. And also, significantly, if we go through all of the subsections in section 73, it's very broad. It's the planning of the pipeline. It's considering the route of a pipeline. It's making and conducting surveys, constructing, laying, carrying and placing its pipeline across, joining pipeline. It is repairing the pipeline, transmitting hydrocarbons and all other acts necessary for the construction, maintenance and operation of a pipeline.

1523. And just in case you weren't clear on exactly what rights are being given to a proponent under section 73, section 75 presumes waste. And by that I mean section 73 allows a proponent to go onto land where it would otherwise be trespass. Section 75 allows them to do damage on that land where it otherwise might be actionable. Section 75 says they must do as little damage as possible and, if damage is done, they must compensate and remediate.

1524. In many respects the question should end here. Does the Board have authority?

1525. The Board has such clear authority in the NEB Act that it's arguable that it's not necessary to actually go to case law. And what you'll find in the case law is the analysis starts this way. Let's take a look at the Act. Do they have authority?

1526. And if they don't have authority or the authority isn't obvious, the case law will say, "Well, is there some way to say the authority is implied?" And I would submit that in the *National Energy Board Act* there's no need to go to the second stage. The authority, the power, is all set out quite plainly within the Act.

1527. But I'm going to take you to a couple of cases anyway just to let you see what the case law has to say, what the Supreme Court of Canada has had to say when it comes to administrative tribunals and their rights and powers, both

under their own Act and those that are implied.

1528. The first case I'd like to draw to your attention is *Cuddy Chicks v. Ontario (Labour Relations Board)*. And Trans Mountain filed a Table of Contents of its authorities, and this is listed at Tab 13, to the extent you have that level of organization up there. But in any event, let me take this opportunity to tell you a little bit about the case. It's a Labour Relations Board case, and the Labour Relations Board actually does have a fair amount of authority.

1529. *Cuddy Chicks* disputed the jurisdiction of the Labour Relations Board subject to its enabling statute, and there the issue was could the Labour Relations Board assess Charter issues? And I'll take you to paragraph 13 of the case and beyond where the Supreme Court of Canada sets out this process that I've talked about. And at paragraph 13 they say:

> *"It first must be determined whether the Board has jurisdiction over the whole of the matter before it. It is clear that it has jurisdiction over the employer and the union. The issue here centres on its jurisdiction over the subject matter and remedy. The subject matter before the Board cannot be characterized simply as an application for certification, which would certainly fall within the authority of the Board. This is an application which requires the Board to subject s. 2(b) of the Act to Charter scrutiny in order to determine whether the application for certification is properly before it."*

1530. In paragraph 14:

> *"Section 106(1) of the Labour Relations Act stipulates that the Board has exclusive jurisdiction "to determine all questions of fact or law that arise in any matter before it ...."*

1531. So there's that wording that I highlighted earlier. It's the same wording that's in the NEB Act.

1532. The Court goes on to say:

> *"The legislature expressly, and without reservation, conferred authority on the Board to decide points of law. In addition, the Act confers powers on the Board to determine questions of law*

> *and fact relating to its own jurisdiction. Section 124, for example, gives it authority to decide if a matter is arbitrable. The issue, then, is whether this authority with respect to questions of law can encompass the question of whether a law violates the Charter."*

1533. So it's interesting, if you go through these cases, they often ask the question not just can you look at your own statute and determine whether certain portions of it are constitutional, but can you take a look at Charter issues in the context of your analysis?

1534. And what seems to be settled very early on in the case law is that you can absolutely look at division of power issues, which is what we have here. Some of these cases talk about Charter issues and is there an exception there, and ultimately *Cuddy Chicks* finds that there is not. The Constitution, the Charter, that's all up for grabs with an administrative tribunal that has the kind of powers that the Labour Relations Board has and the kind of powers that the National Energy Board has.

1535. But they go on and they say:

> *"It is clear to me that a Charter issue must constitute a question of law; indeed, the Charter is part of the supreme law of Canada [the Constitution]. This comports with the view expressed in Douglas College that the statutory authority of the arbitrator in that case to interpret any "Act" must include the authority to interpret the Charter. In the result, the Board has the authority to apply the Charter and to rule on the constitutionality of s. 2(b) of its enabling statute, in the course of the [...] application..."*

1536. And if you go down just above paragraph 17, you'll see a sentence in the middle of that paragraph that begins:

> *"The informed view of the Board, as manifested in a sensitivity to relevant facts [...] is of invaluable assistance. This is evidenced clearly by the weight which the judiciary has given the factual record provided by labour boards in division of powers cases;..."*

1537. So that goes to what I was saying earlier. The division of power cases seem to have been established a little bit earlier than the Charter cases, and no big surprise, it's because the Charter came later than the division of powers section of the Constitution.

1538. But this is what's really important, paragraph 17 of this decision:

> *"That having been said, the jurisdiction of the Board is limited in at least one crucial respect: it can expect no curial deference with respect to constitutional decisions."*

1539. So what the Supreme Court of Canada is saying is administrative tribunals, with this kind of language and their enabling statute, with this kind of power, have the ability to hear Charter issues, have the ability to hear division of power issues, but whatever they decide has no precedential value. There's no curial deference. The courts don't have to follow it. The NEB doesn't have to follow it again. It is a decision that is made in the course of a particular hearing with a particular set of facts and a particular party.

1540. Paragraph 17 goes on:

> *"Furthermore, a formal declaration of invalidity is not a remedy which is available to the Board."*

1541. And that's what we were talking about earlier, is you can't declare the Bylaws invalid for the purposes of -- you know, from here to eternity, but can address them in the context of your own power and your own statute. They say:

> *"Instead, the Board simply treats any impugned provision as invalid for the purposes of the matter before it."*

1542. So that's what I was just saying.

> *"Given that this is not tantamount to a formal declaration of invalidity, a remedy exercisable only by the superior courts, the ruling of the Board on [Charter issues or, for that matter, on constitutional issues] does not constitute a binding legal precedent, but is limited in its applicability to the matter in which it arises."*

1543. I would like briefly now to turn to Tab 7 of Trans Mountain's authorities and, in particular, the very recent case of *Burnaby v. Trans Mountain* which was heard in the B.C. Supreme Court in September of this year. There, Madam Justice Brown was asked essentially to seize the matter to provide Burnaby with an injunction to stop Trans Mountain from doing the mandated fieldwork, and she declined to do so. And at paragraph 16 she says:

> *"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 [...] 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.*

1544. So another part of the analysis -- and you'll see this in some of the other Supreme Court of Canada cases, which I won't drag you through -- it's also important to note not only does the Board have no curial deference -- so if you make a decision on these constitutional issues, nobody has to follow it -- equally important is that there is a further remedy. If Burnaby is unhappy with the result, they seek leave to appeal on a question of law or jurisdiction to the Federal Court of Appeal.

1545. Paragraph 35 of Madam Justice Brown's decision, she says:

> *"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."*

1546. At paragraph 37 through to 40, she goes through the analysis that I just went through:

> *"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."*

1547. You were the equivalent of a court.

> *"By section 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 [of] fact."*

1548. Thirty-eight (38), she says:

> *"By s. 13 of the Act, the NEB is given the power to make mandatory orders."*

1549. The order to force someone to do something.

1550. Paragraph 39, she says:

> *"The NEB has [the] jurisdiction to determine the constitutional issues that are relevant to the exercise of its authority."*

1551. She quotes the Supreme Court of Canada case in *Martin*; Supreme Court of Canada case in *Paul*. The Supreme Court of Canada case in *Cuddy Chicks* she references in the next paragraph. And she also takes a look at *Calgary v. Canadian Natural Resources*, which is a case that actually dealt with bylaws.

1552. And she says in *Cuddy Chicks*:

> *"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 [only] exercisable only by the Superior Courts…"*

1553. So in other words, she is saying if you're going to try to strike down Burnaby's bylaws forever as being unconstitutional, there's a problem with that. Only a Superior Court can do that.

1554. But if, for the specific purposes of this project and of the hearing that this Panel is organizing, then that you have the authority to do.

1555. So she says:

> *"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 section 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."*

1556. And finally, she concludes:

> *"Were I to issue the order…" that Burnaby seeks, "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."*

1557. The remaining cases that have been cited by Trans Mountain are supportive of the two that I've just drawn your attention to. Many of them deal with administrative tribunals that do not have the kind of power given to them by their enabling legislation, but they are, one, supportive and, two, compelling sometimes for various quotations, most of which have been highlighted in the materials that we've submitted. So I won't drag you through them all.

1558. But the one case I would like to highlight is *Cooper v. Canada*, and that's a 1996 Supreme Court of Canada case. And Justice La Forest, who wrote for the majority in that case said:

> *"It is well accepted that a tribunal has the power to address questions on the constitutional division of powers."*

--- (A short pause/Courte pause)

1559. **MS. KILLORAN:** So in Trans Mountain's submissions, the analysis of the power of the NEB is really an answer to question number 1, does the Board have a legal authority to determine that Burnaby's specific bylaws are inapplicable, invalid or inoperable?

1560. Yes, you have the authority.

1561. Then we'll go on to look at what you do.

1562. **THE CHAIRMAN:** Perhaps, Ms. Killoran, just to check -- Mr. Davies?

1563. **MEMBER DAVIES:** I realize that it's a fairly short case, but could you give us the reference in *Cooper* that supports the points you last made?

1564. **MS. KILLORAN:** I can. I think it's paragraph 64. So Cooper is at Tab 12 of the Trans Mountain Authorities, and it's paragraph 64 of the Majority Judgment, where La Forest says:

> *"It is well accepted that a tribunal has the power to address questions on the constitutional division of powers."*

1565. Thank you.

1566. So the next constitutional question is should the Board find that the bylaws are inapplicable, invalid or inoperative. And in order to address this question, we have to look at a couple of things. The first is, are we dealing with a federal undertaking and then secondly, how do you deal with a bylaw that is in contradiction to the federal undertaking. And those are the issues of interjurisdictional immunity and paramountcy.

1567. But first, just by way of review, the *Constitution Act* creates a division of powers between provinces and the federal governments in Canada. And matters that are listed in section 91 of the Constitution, including interprovincial trade and commerce, have long been held to be the exclusive jurisdiction of the federal government.

1568. So as a result of section 91(29) and 92(10)(a), the federal Parliament has exclusive jurisdiction over:

> *"Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of [a] Province;"*

1569. Pipelines have long been held to be interprovincial works and undertakings that fall under the exclusive jurisdiction of the federal government. And this was confirmed by the Supreme Court of Canada back when the Trans Mountain Pipeline first started in the early fifties and you will find that in the

Campbell-Bennett v. Comstock Midwestern case.

1570. And that is at Tab 8 of Trans Mountain's Authorities. And at paragraph 13 -- and again, this is another Supreme Court of Canada case. It is 1954, and the majority of the Supreme Court of Canada writing says -- and this is frankly quite incidental to the case. In paragraph 13, about two sentences or three sentences in:

> *"It is clear that the work or undertaking of Trans Mountain is a work or undertaking 'connecting the Province with any other or others of the Provinces' and therefore within the exclusive authority of Parliament by virtue of section 91, head 29 of the British North America Act, 1867, when read in conjunction with section 92, head 10A, just as much as the work or undertaking of the Telephone Company in Corporation of the City of Toronto v. Bell Telephone Company."*

1571. So they're referencing an earlier Supreme Court of Canada decision.

1572. So not only does this decision establish that a pipeline, an interprovincial pipeline is a federal work or an undertaking, this pipeline is the specific topic of discussion by the Supreme Court of Canada. So it is well settled that this is a federal work or undertaking.

1573. And interestingly enough, this case is an interjurisdictional immunity case as well. So this is a case where some work was done on the pipeline. A lien was attached to the pipeline for non-payment of a bill, and it was a provincial Act that allowed the lien to be applied. And in this case, the Supreme Court of Canada said, no, that's a provincial law. It attacks the core of the federal undertaking and it cannot survive along with the federal undertaking.

1574. So essentially, this was a case of interjurisdictional immunity where the lien law, the province was found to be suspended or not applied to the pipeline.

1575. And I should also say that *Campbell-Bennett* was affirmed by the Supreme Court of Canada in 1998 in the *Westcoast* case, which is at Tab 24 of Trans Mountain's authorities.

1576. So we've also included some other authorities and some more modern

authorities on the principle of federal undertakings but, frankly, it's our submission that when you get a judgment from the Supreme Court of Canada that the very pipeline that you're here to argue about is a federal undertaking, you should probably leave it at that.

1577. So there are other cases that you can look at for further support on that issue, but I think it's clear to say that that is completely settled.

1578. The only other case in the federal undertaking category that I would like to reference is found at Tab 2 of the Trans Mountain authorities, and it's the *Alberta Government Telephones v. Canadian Radio-Television and Telecommunication Commission (1989).* And there's nothing particularly novel about the case, but what is interesting is they pronounce that in considering whether there was a federal undertaking they say:

> *"The case law clearly establishes that if a work or undertaking falls within s. 92(10) it is removed from the jurisdiction of the provinces…"*

1579. So getting back to that original Trans Mountain case, that's why the provincial *Lien Act* couldn't apply. It's removed from the jurisdiction of the provinces.

1580. Next I'm going to go to the concept of interjurisdictional immunity. And it's not my job to deceive you into thinking that there is an easy read of an interjurisdictional immunity case; there's isn't. The easiest one is probably the Trans Mountain case in 1956, I think was the date on it.

1581. But the law has actually gone through quite a bit of transformation and it's actually quite frustrating when you read the various Supreme Court of Canada cases because various judges struggle with it all the way through and sometimes they'll decide a case warrants interjurisdictional immunity and then the next time -- in fact, there's even one case where Justice Lamer says "You know how I decided two cases ago, I wish I hadn't decided that way. I think I should have considered this instead." So you go through these judgments and there's not an awful lot of guidance that you can take from them.

1582. And the best I can say is that there is some guidance in some of the cases, and I will direct your attention to a few of them, where they say it should not be the remedy of first choice. So it's essentially deciding that the federal

undertaking is immune to the provincial law.

1583. And my read on it is it's for those circumstances where, unlike here, you may not have two pieces of legislation that are banging heads together, where they're clearly in conflict, but maybe you have a federal undertaking without the legislation and a provincial law and it allows you to look at the core competency of the federal undertaking and determine whether it should still be subject to the provincial laws or, in this case, municipal laws under provincial law.

1584. It's my submission that if you look at the tests of both interjurisdictional immunity and federal paramountcy, we pass both. But I want to alert you to the fact that the Supreme Court of Canada is struggling with interjurisdictional immunity these days.

1585. I think my friend alerted you to one of the First Nation's cases, the *Tsilhqot'in* case. And I believe his suggestion is it doesn't exist anymore because of *Tsilhqot'in*. That's not the case. It does not apply in Aboriginal cases, but we've got lots of Supreme Court of Canada authority that says it's still a live -- it's still a live concept. It's just one that we want to apply with some caution.

1586. So let's talk a little bit about the interjurisdictional immunity doctrine and the step. The beauty of these constitutional cases is they always give you a test, and this is not an exception.

1587. So the first step is to determine whether the provincial law -- in this case the municipal bylaws -- trench on a protected core of federal competence. And if the answer to that question is yes, the second step is to determine whether the provincial laws' effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine of interjurisdictional immunity or, in other words, that the provincial law just does not apply.

1588. So the doctrine says that laws that are enacted by a province can't intrude into the core of the head of a federal power under the *Constitution Act*. They say that where the intrusion impairs -- and the case law -- again, there are many cases that go through a discussion -- is it does it affect or does it impair? And I think the Supreme Court of Canada is settled that the test is it must impair, not just minimally affect, but the intrusion by the province or the provincial legislation must impair the core of a federal power.

1589. So the doctrine of interjurisdictional immunity then is pulled out to

render that impugned provision inapplicable. And this can be done even absent a conflicting law in the area.

1590. And for the purposes of applying this test -- and you're asked to look at the core of the head of power that we're dealing with -- it is the basic content. So in this case it is the planning, the building of pipelines. It is everything that's set out in the mandate that we discussed earlier. It's the authority that's necessary for Parliament to achieve the purpose for which exclusive legislation -- exclusive legislative jurisdiction was conferred.

1591. So I would say that when looking at this case, Parliament determined that under section 73 of the NEB Act it was necessary to enable a company, for the purposes of its undertaking, to enter onto land where it might otherwise be trespass without previous licence. And it's not just for the laying of the pipe, but it's also for determining the intended route of the pipe, to make surveys, examinations and other necessary arrangements.

1592. And you see the language, and in this kind of constitutional analysis, we are bound to really look at the language of our enabling statute. The statute itself in section 73 itself talks about the necessary arrangements. So while it allows the proponent to enter the land, contained within section 73 is a declaration that what the proponent is doing while they're there is necessary, necessary for the NEB to do its job.

1593. So I said there's a lot of confusion in the interjurisdictional immunity law, and one way that the Supreme Court has tried to deal with it and, frankly, tried to limit its application is to say, "Well, don't apply it unless in really restricted circumstances or if we've done it before." So the good news is they've done it before.

1594. Interjurisdictional immunity was a principle that was applied in the Trans Mountain case by the Supreme Court of Canada in 1956. So we have that precedent and that analysis it's submitted does not need to be as restrictive.

1595. Furthermore, Professor Hogg -- for those of us who remember constitutional law in university -- was the guru of constitutional law, and he speaks in particular about section 92(10)(a) and specifically about interprovincial pipelines in the authority that we've attached to our brief and he says as follows:

"It is now well settled that undertakings engaged in

> *interprovincial or international transportation or communication, which come within federal jurisdiction under the exceptions to s. 92(10) of the Constitution Act, […] are immune from otherwise valid provincial laws which would have the effect of 'sterilizing' the undertakings. On this basis, ... an interprovincial pipeline has been held to be immune from provincial mechanics liens legislation."*

1596. And that is the case of the *Trans Mountain* case of 1956 that we've referenced.

1597. More recently the Supreme Court of Canada took a look at the doctrine of interjurisdictional immunity to find that a provincial law that designated areas for exclusive agriculture use was inapplicable to the extent that it prohibited aerodromes for agricultural zones.

1598. The majority of the Supreme Court of Canada, in a case by the name of *Laferrière* -- it's actually called *Quebec v. Canadian Owners and Pilot Association* but it is referenced as *Laferrière*.

> *"The majority of the Supreme Court reasoned that the location of aerodromes was essential to the federal government's power over aeronautics. Accordingly, it fell within the "core" of the federal power…"*

1599. So this is getting back to that what is the core of the federal power when it comes to the pipeline that we're talking about.

1600. And I think this case is quite analogous because, obviously, airports are a federal undertaking but what's interesting is it was actually the location of an aerodrome was determined to be a federal -- the core of the federal power for aeronautics.

1601. So not just the building of one but also, if there's a provincial law that says well you can't build one here, that penetrates the core of the power of the federal undertaking.

1602. So I don't think it's any different than what we're dealing with here today. We have a pipeline route. Part of the job of the NEB is to determine which routes are available, which ones are the best for national purposes, which

ones are best for Canada. And the location is part of your core power, determining the location of a pipeline.

1603. If we have a party that is preventing us from even assessing the location, that penetrates the core of the NEB power.

1604. **THE CHAIRMAN:** One second, Ms. Killoran.

1605. **MEMBER DAVIES:** Is the *Laferrière* case in your Authorities and if so where?

1606. **MS. KILLORAN:** It is. Tab 21 of the Authorities.

1607. Now a contrary case which I think my friend will likely reference is one called *Burrardview Neighbourhood Association v. Vancouver,* and that one is known as *Lafarge*.

1608. And that was a case where both the federal and the provincial authorities had a compelling interest. So it was difficult to actually determine who had the greater interest. But what is interesting about the case, and again I feel it's my obligation to tell you about some of the minefields in these cases as well, is in the *Lafarge* case they cited Justice Dickson in an earlier case.

1609. And they say:

> *"...the arguments for interjurisdictional immunity [are] not particularly compelling, and [...] they [run] contrary to the 'dominant tide' of Canadian constitutional jurisprudence."*

1610. So you'll see there is that -- there is that unease but, as I say, when it comes to the Burnaby Trans Mountain issue, when you've already got a precedent that a pipeline has been found to be immune to provincial legislation, you've already crossed that hurdle.

1611. But what's interesting about the *Lafarge* case is that they failed to find interjurisdictional immunity on the basis that they couldn't see -- they found both the province and the feds had an interest but there was -- it was -- the building of a cement plant, I believe, they couldn't say that that actual part of it was -- was a head or a foundation for the federal power. So they didn't invoke the doctrine of interjurisdictional immunity but they did invoke federal paramountcy.

1612. So what was happening there is there was a municipal bylaw that said that the construction of the -- of the plant couldn't exceed 30 metres or something. And obviously that was impossible if they were going to achieve what they were going to achieve. And the Court said that's a case where the federal legislation and the provincial, in this case, municipal bylaw, came head to head and they couldn't coexist.

1613. And the *Lafarge* case is at Tab 6 of Trans Mountain's Authorities.

--- (A short pause/Courte pause)

1614. **MS. KILLORAN:** And if you look to the case law for an answer to the question what's the difference between interjurisdictional immunity and paramountcy -- whether this is helpful or not I don't know. But the courts say that:

> *"...interjurisdictional immunity, [...] is concerned with the scope of the federal power [and whether that scope of power is being entrenched upon]. Paramountcy is relevant where there is conflicting federal and provincial [pieces of] legislation."*

1615. So the effect of interjurisdictional immunity is to negate inconsistencies between federal and provincial legislation by rendering the provincial legislation inapplicable to the extent that it impairs the core of a federal power.

1616. So in our respectful submission, you have exactly that, you have a provincial legislation that impairs the core of a federal power. The core being the NEB's obligation to ensure that surveys and information is gathered so that they can fill their obligations under section 52.

1617. Now, I can tell you that I'm going to finish in my two hours but I also notice we're 40 minutes away from that. If the Panel would like a break now's a good time.

1618. **THE CHAIRMAN:** Perhaps before the break then, maybe could I ask you are you arguing that both interjurisdictional immunity and paramountcy apply or are these alternate arguments?

1619. **MS. KILLORAN:** I'm arguing they both apply and we are in the lucky position of actually having a precedent where interjurisdictional immunity has been found in relation to this very pipeline, which the Supreme Court of Canada said is important.

1620. But more importantly, the reason interjurisdictional immunity analysis often fails is that the provincial law doesn't attack the core of the federal power. And in this case it is our submission that the core of the NEB's federal power, the federal power itself, of the undertaking, is attacked by the provincial law.

1621. So yes, to interjurisdictional immunity, but it is a harder hurdle to clear; always is. But I'm going to take you after the break to federal paramountcy and show you why that may even be an easier analysis.

1622. **THE CHAIRMAN:** Again before the break we'll -- Ms. Scott?

1623. **MEMBER SCOTT:** Can you just remind me the case name of the precedent you're describing that suggests that interjurisdictional immunity -- if it's been found before that that's an important consideration and the specific paragraph number in that case?

1624. **MS. KILLORAN:** I will. Can I give you that reference after the break?

1625. **MEMBER SCOTT:** Certainly.

1626. **MS. KILLORAN:** Thank you.

1627. **THE CHAIRMAN:** With that then we'll take a 15-minute break and return at 10:35.

1628. **MS. KILLORAN:** Thank you.

--- Upon recessing at 10:18 a.m./L'audience est suspendue à 10h18
--- Upon resuming at 10:36 a.m./L'audience est reprise à 10h36

1629. **THE CHAIRMAN:** Thank you.

1630. Ms. Killoran?

--- ARGUMENT BY/REPRÉSENTATION PAR MS. KILLORAN:
(Continued/Suite)

1631. **MS. KILLORAN:** How does that happen? I get turned off every time I go to speak. Sorry.

1632. Member Scott, you asked prior to the break if I could give you a case reference and a paragraph reference for the precedent principle. It is *Canadian Western Bank v. Alberta*, and that's at Tab 10 of Trans Mountain's authorities. It's a Supreme Court of Canada case from 2007.

1633. And at paragraph 77, the majority says -- and they talk about, you know, exactly some of the issues I've tried to highlight for you. It's this toing and froing over the interjurisdictional immunity question, and they say:

> *"...we do not think it appropriate to always begin by considering the doctrine of interjurisdictional immunity. To do so could mire the Court in a rather abstract discussion of 'cores' and 'vital and essential' parts to little practical effect. As we have already noted, interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent."*

1634. And they go on and say:

> *"This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole..."*

1635. Okay. So now I'm going to take you to federal paramountcy, which is easier. The test is, at the very least, a little more obvious. And the test is this.

1636. Is there -- you have to have, first of all, the existence of a valid and applicable federal law, which we do here. The existence of a valid and applicable provincial law. Again, we've got that. And then you ask yourself, are the two

valid laws capable of simultaneous enforcement.

1637. And the Supreme Court of Canada gives us two sub-questions to ask in answering that main question. First, is there an operational conflict or, in other words, is it impossible to comply with both laws or -- and this is an "or", by the way -- or is there frustration of a federal legislative purpose. So does applying the provincial law frustrate the purpose of the federal law?

1638. And you'll see from some of the cases that I'll direct to your attention, it doesn't matter if you can find a way to comply with both, it's still a compromise of the federal power if you show that they are in conflict.

1639. So the doctrine -- and this is from *Canadian Western Bank* as well -- provides that when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incapability.

1640. So again, you'll see even with federal paramountcy, much like interjurisdictional immunity, we're not talking about striking down bylaws. We're talking about the effect of them not being operable as it pertains to the federal power that we're here to discuss.

1641. And there's a case called the *Bank of Montreal v. Hall*, a 1990 Supreme Court of Canada case, and it's at Tab 4 of the Trans Mountain materials. And that stands for the proposition that I alluded to earlier, and I'll quote it for you. It's at 154 to 155:

> *"A showing that conflict can be avoided if a provincial Act is followed to the exclusion of[the] federal Act can hardly be determinative of the question whether the provincial and federal acts are in conflict and, hence, repugnant. That conclusion, in my view, would simply beg the question. The focus of the inquiry, rather, must be on the broader question whether operation of the provincial Act is compatible with the federal legislative purpose. Absent this compatibility, dual compliance is impossible."*

1642. So we're not here to say is there some way that we can, you know, do some studies on the Burnaby lands and comply with this particular bylaw, no, that analysis is not required.

1643. The analysis that's required is, given what 73 tells us to do, given what the Board has asked us to do, given what the Board requires in terms of information to fulfil its mandate, is it compatible with the bylaws that say you can't damage a flower, you can't cut brush, you can't impede traffic of any kind and so on and so on.

1644. And I referred you earlier in the context of the interjurisdictional immunity case to the *Lafarge* case, and that's the B.C. cement plant case. And that's one where they said no to interjurisdictional immunity, but yes to federal paramountcy.

1645. And the facility was directly regulated by the Vancouver Port Authority, which was a federal entity. The City of Vancouver and seven other municipalities asserted regulatory authority under provincial law to enact zoning bylaws and to require land use approvals for the project.

1646. So this isn't a case where the court dug deep and said, "Well, let's take a look at those land use requirements" or "Let's take a look at those by-laws. Is there some way to comply with them?" Instead, the Supreme Court of Canada said that requiring municipal approvals for the facility would give rise to an operational conflict.

1647. So you'll remember that's the first prong of the paramountcy test because the proposed facility will exceed the municipality's 30-foot height restriction, which raised the potential impossibility of dual compliance. So it's the potential impossibility of dual compliance.

1648. And it's been articulated in other cases as an operational conflict exists when the enactment says yes and another says no that compliance with one is defiance of another. So in the case at hand, it's impossible for Trans Mountain to comply with the bylaws and NEB Procedural Direction No. 4.

1649. The mandated fieldwork advances a valid federal purpose. It permits the NEB to comply with section 52 of the NEB Act and CEAA 2012, but if Trans Mountain acts in furtherance of that valid federal purpose, it will be in defiance of the Burnaby bylaws.

1650. And unlike the *Lafarge* case, we don't even have to talk about the potential for defiance. We know. We went on the land to conduct the

examinations and the studies, and what happened? We were served with bylaw infractions and stop work orders. Before we even arrived, we had a letter from the city foreshadowing all the bylaws it planned to invoke to stop us from doing our work.

1651. So we don't have to worry about potential impossibility of dual compliance we already have evidence of real impossibility.

1652. So in our view, your analysis can stop here at the operational level. There's operational conflict. But we'll go to that second prong anyway. And you don't have to satisfy both prongs, one of them will do. But we say we satisfy the second as well, that the application of the bylaw frustrates the federal legislative purpose.

1653. So in *Lafarge*, they did the same thing. They said we've got an operational conflict here. The bylaw can't be complied with in light of the federal undertaking.

1654. But they went and did the second analysis too, and they said that, in addition to an operational conflict between the municipal bylaws and the federal legislation, federal paramountcy applied because the municipal bylaws at issue, if they were actually applied, would frustrate the federal legislative purpose behind authorizing the federal Board to make its decision on the project.

1655. So this is the case where the federal Board, already made a decision that the project would go ahead, and the municipality comes in and says, well, we have this height restriction. And so not only was there this operational issue, the conflict as between the two laws, but there was also the frustration of a federal purpose. And it's submitted that we have the same thing here. The federal purpose, as I've said already many times, cannot be achieved in light of the bylaws that Burnaby has imposed.

1656. The other case that's quite interesting, because I think my friend will likely talk about the double aspect or the ability of both laws to survive to find a way to accomplish both objectives, and there's a case called *Mangat* at 15, Tab 15 of Trans Mountain's authorities and this is the one that essentially says even if there is a way you can root around and achieve both purposes, that doesn't avoid the conflict. And they say that -- and they are talking about this double aspect theory, if a subject matter falls within both the provincial and federal jurisdictions. So they say:

> *"Statutes of both levels of government will coexist insofar as they do not conflict, but where there is a conflict the federal statute prevails."*

1657. So you don't have to compromise. You don't have to find a way to make the two survive.

1658. And that was a case where there were two -- there was a provincial law and a federal law. One said that non-lawyers could appear before a certain Board and be charged a fee and the other one said you couldn't be a non-lawyer, but you could -- I can't remember how it worked, but there was a way to comply with both statutes, but there the Court said, "You don't need to. The provincial statute has to stand down and the federal statute is paramount."

1659. The other argument I anticipate my friend making is an argument for cooperative federalism. And I think I said in my opening statement cooperative federalism works when there is cooperation, but even sometimes when there is cooperation it doesn't work. So the principle of cooperative federalism doesn't apply here.

1660. And I'll refer you in particular to the reference re: *The Securities Act* which is at Tab 23 of our materials. And that's another Supreme Court of Canada case. It's actually quite useful for its discussion on division of powers. So if you haven't heard enough on that, it's a good decision to revisit. But more importantly, it stands for the proposition that cooperative federalism does not always override the constitutional boundaries that underlie the division of powers. Flexibility and cooperation are important, but they can't override or modify the separation of powers.

1661. And in fact, at paragraph 61 to 62 the majority says:

> *"Notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state."*

1662. And it's our submission that what Burnaby is suggesting is the

opposite of cooperative federalism. First of all, there's no cooperation. What they are suggesting is that municipal bylaws take paramountcy over federal undertakings, and there is absolutely no precedent in law or elsewhere for this.

1663. So that was a very long answer to Question number 2: Should the Board find that the bylaws are inapplicable, invalid or inoperative? Trans Mountain says, yes, there are two ways you can do it, one through interjurisdictional immunity, and you have strong precedent from the Supreme Court of Canada to do so, and the second is through paramountcy.

1664. That takes me to Question 3: If the Board does make a finding that the bylaws are inapplicable, invalid or inoperable in a particular case, does the *NEB Act* provide the Board, as a statutory tribunal, with the authority to forbid Burnaby from enforcing those or any other bylaws in the future, for example, what's the scope of the authority under section 13?

1665. So our answer is, yes, you are not declaring the bylaws invalid generally. You are saying that federal paramountcy or interjurisdictional immunity means that they do not apply for the circumstances of this project. And it's the Board's discretion to get as particular as they choose to get.

1666. So section 73 is what we're here talking about today and it's a very broad section. It speaks not just to the preliminary studies that need to be done and the gathering of soil samples and then drilling of boreholes. It's also the laying of pipe ultimately if the project is approved.

1667. So it would be my submission that we're not looking for a general declaration of invalidity. We're not even looking for a declaration of invalidity as it relates to anything NEB. We're saying in relation to this particular project, given the facts that you've heard, given the work that needs to be done, they do not apply to the Board's mandate and, in particular, to section 73 and section 52.

1668. And I'd like to remind you of the Board's decision in *Alliance Pipeline v. Spirit River* where the Board talked about statutory interpretation and how it ought to apply. We've spent some time already going through section 13 of the Act, and it is a very powerful section. It gives the Board the authority to mandate whatever it needs to accomplish its mandate.

1669. But in *Alliance Pipeline* the Board talked about approaching statutory interpretation of its own sections and they say:

> "*Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."*

1670. So again, this is my big picture message. Section 13 prescribes very strong and deliberate powers to the Board. But in looking at section 13 you look well beyond that. You look at the mandate of the Board. You look at your obligation to the Canadian public to weigh and to balance and to make the best decision that you can and to acquire as much information as you possibly can in assessing this project. So you can't look at section 13 as powerful and as, frankly, as determinative as it is without looking at your broader cause as well.

1671. So let's remind ourselves of the words of section 13 because, as I say, even without that broader analysis they do the trick:

> "*(a) The Board may order and require any person to do, forthwith, or within or at any specified time and in any manner prescribed by the Board, any act, matter or thing that such person is or may be required to do under this Act, or any regulation, certificate, licence or permit, or any order or direction made or given under this Act;..."*

1672. And (b), just in case that wasn't broad enough for you:

> *"...forbid the doing or continuing of any act, matter or thing that is contrary to this Act or any such regulation, certificate, licence, permit, order or direction."*

1673. So when we spoke earlier this morning about the jurisdiction of the Board and your powers and how you look first to the Act to determine what those powers are, I said that -- and the courts are very clear -- if the Act gives you strong powers for a party to suggest that that Act ought to be interpreted restrictively to exclude powers that otherwise seem to be included, it better say so in the Act. It better be explicit. It better say, oh, but by the way, you can't issue an Order against a municipality or a province. And it doesn't say that.

1674. In fact, the general language is so broad as to give you complete power

to mandate the cooperation of persons, homeowners, stakeholders who need to be engaged in this process, and you're given that power for a reason.

1675. **THE CHAIRMAN:** Ms. Killoran, Ms. Scott's got a question.

1676. **MEMBER SCOTT:** I just wonder if you would walk us through section 13 and how you actually see it applying in this case, the actual wording in the Act?

1677. **MS. KILLORAN:** Meaning ---

1678. **MEMBER SCOTT:** Well ---

1679. **MS. KILLORAN:** --- how do you issue an Order ---

1680. **MEMBER SCOTT:** No, no. Just the -- under a), I'm not sure that we're dealing with a question under a), or is it b)?

1681. **MS. KILLORAN:** I think it could be both.

1682. **MEMBER SCOTT:** Explain how you think it could be a).

1683. **MS. KILLORAN:** I think it could be a) in that you can require any person to do -- I mean, look how broad and non-specific that is. To me, that's your catchall, that any person, which includes municipalities, governments, et cetera, to do something within a specified time.

1684. Now, in the specific facts of the case at hand, we're not really asking Burnaby to do anything, are we? We're asking them to refrain from doing something.

1685. So in that respect, b) is the one that allows you to mandate or forbid the doing of a continuing act.

1686. Did that answer your question?

1687. **MEMBER SCOTT:** Do you attach any significance to the words "matter or thing that is contrary to the Act"?

1688. **MS. KILLORAN:** I think that's broadly interpreted, that anything

that is contrary to the Act is anything that prevents the Board from accomplishing what it needs to accomplish under section 52. And anything that's contrary to the Act or also orders that are issued by the Board, so the Board has the ability to issue an Order. If someone doesn't follow it, that's contrary to the Act.

1689. But also, you have the ability to allow proponents to conduct testing where their conduct would otherwise be trespass on the land. You allow them to cause damage where it would otherwise be waste and actionable. And so if someone is preventing that from happening, preventing the trespass -- the authorized trespass from occurring, I think you can take a look at b) and say, "You have to stop because section 73 allows this. That's contrary to the Act."

1690. **MEMBER SCOTT:** So do you attach any significance to the fact that, in the first part, subsection (a) is directed -- the Board is given authority to order and require any person, which could include a municipality, perhaps, to do certain things and then, in the second part, it says, forbid the doing or continuing of any act. And it's not specific about ---

1691. **MS. KILLORAN:** Whether it's a person.

1692. **MEMBER SCOTT:** --- whose act.

1693. **MS. KILLORAN:** Right. Right.

1694. I had not noticed that, but it is interesting. And the law of statutory interpretation tells us that if words are missing, it probably is missing for a reason and it's meant to be more broad even than the first paragraph.

1695. But again, I think when you look at section 13, you have to look at your broader mandate. And as the legislature is giving the power to the Board, they're trying to guess at how you might use this power and when you might need it. So they're trying to give you language that is as broad as it can possibly be so that when you get these real factual issues that come up, they will fit in here.

1696. And I would say that this is among the most broadly-worded power I've seen in legislation, and there's a reason for it.

1697. So your comment that b) doesn't even speak about a person, to me, says it's even a broader application for section b).

--- (A short pause/Courte pause)

1698. **MS. KILLORAN:** In our reply brief, we spent some time addressing some of the arguments that were made by my learned friend in his brief, the suggestion that the pipeline, because it's an extension and because it hasn't yet been built, isn't really a federal undertaking.

1699. I'm not going to address that argument. I believe that my submissions on federal undertaking have already addressed that.

1700. There's also an argument that because "person" is the wording of section 13, that it doesn't include a municipality, and I think we address at great length in our brief the *Interpretation Act* and how one is to interpret the word "person". And I also bring to the Board's attention that the municipality certainly sought to qualify as a person for intervenor status. So it seems a bit incongruous to suggest that they're a person in order to get intervenor status but not a person when it comes to the application of section 13 of the Board's Act.

1701. It's the submissions of Trans Mountain that it is clear in law, settled by the Supreme Court of Canada, that not just interjurisdictional pipelines, but this particular pipeline, is a federal work and undertaking. It is a federal work and undertaking that has already attracted interjurisdictional immunity when a province attempted to apply its law to the pipeline, and it's our submission that that precedent and that previous assessment of interjurisdictional immunity should be maintained.

1702. Alternatively, it is clear that the municipal bylaws in question are in conflict with the acts that are required to be taken out by Trans Mountain, by the obligations of the Board as set out in sections 73 and 52, and that those two things are simply not compatible. And that even in -- and alternatively, the federal undertaking that is represented by the legislation that we're here to address is being imposed upon in this case by provincial laws.

1703. And in both of those instances, interjurisdictional immunity says that for the purposes of this matter, provincial laws do not apply. Paramountcy says if we have a conflict, as I believe we do in this case, between the two laws, the federal legislation presides and the provincial must step aside.

1704. With respect, my friend will argue that it's not mandated that Trans Mountain builds a pipeline or that it takes a particular route. Therefore, it is

permissive that Trans Mountain has to do these studies.

1705. And with respect, there's no authority for that position and, more importantly, the very mandate of the NEB gives authority to this process such that the investigations that need to be conducted under section 73 are not mandated. They're required for -- are not optional. They're required for this process.

1706. So I will -- unless there are other questions, I will hand the floor to my friend and save any additional comments for reply.

--- (A short pause/Courte pause)

1707. **THE CHAIRMAN:** The Board do have some questions of clarification.

1708. You quote a large number of Supreme Court decisions in your case but are you aware of any instances where the federal government or any other federal tribunal has declared a provincial or a municipal law invalid, inapplicable or inoperative or has ordered, restrained or otherwise forbidden a provincial or municipal entity from enforcing its bylaws?

1709. **MS. KILLORAN:** The only case that we have found that deals with an administrative board determining that a bylaw was inapplicable is the *Calgary v. CNRL -- Canadian Natural Resources* case.

1710. But with respect to the Board, it is not of the -- it's not of the ilk that will give you any guidance. It was a case where a municipal board found a bylaw not to apply and then the court reversed it, but they did address bylaws at the administrative level.

1711. They upheld it; pardon me. It's at Tab 9.

1712. **THE CHAIRMAN:** Tab 9. Thank you.

1713. **MS. KILLORAN:** And the court didn't reverse it; they upheld it.

1714. **THE CHAIRMAN:** Yes, okay. Thank you for that clarification.

1715. In Trans Mountain's view, which bylaws should be found inapplicable, invalid or inoperable in this context, is it only the specific park

bylaws that have been referenced in your application before the Board or is it also the traffic bylaws that at times have also been referenced or is it something broader you mean when you refer to the impugned bylaws?

1716. **MS. KILLORAN:** It's a difficult question because I think the one letter that I referenced from the city in August of 2014, prior to Trans Mountain doing the work, certainly foreshadowed all of the bylaws that they intended to pull out. And in fact, it's a good list of those that seemed to directly come in contrast with the work that Trans Mountain is attempting to do under section 73. So that's a good list.

1717. Having said that, I am not an expert in city bylaws. If there are other ones sneaking around over there that may be pulled out, we wouldn't want to be in a position where the Board said, you know, bylaws X to Y, as set out in the August 2014 letter of the City of Burnaby, including the traffic bylaws that were also set out, do not apply. But there are others that we don't know about that can be used.

1718. And be clear, there are scores and scores of bylaws so I think it is with specific reference to those bylaws, because they've been highlighted by the City of Burnaby, with a note that says ultimately, here's the spirit of the ruling. Burnaby must allow this work to be completed and if there are bylaws beyond the ones that have been listed here that would apply to prevent that work from being completed, then they too are inoperative for the purposes of this matter.

1719. **THE CHAIRMAN:** Okay. And that kind of takes me into some of our questions regarding the draft form of the order that's been requested by Trans Mountain.

1720. What is the reference to any occupants in the draft order?

1721. **MS. KILLORAN:** I've just consulted with my regulatory colleague. The view I think in adding those words was that there is an acknowledgement that the city -- the city landholdings are substantial. Some of the lands are leased to others. We don't know today whether there are occupants but wish to cover that factor off in the event that there are occupants on city lands.

1722. **THE CHAIRMAN:** I appreciate that clarification. But if the Board were to issue an order, should the order have any specific reference to the enforcement of bylaws or specific bylaws that cannot be enforced while

undertaking the surveys and examination?

1723. **MS. KILLORAN:** Just so I understand your question, should the order reference the specific bylaws and say they ought not to be enforced during this period of time?

1724. **THE CHAIRMAN:** Of the bylaws that cannot be enforced while undertaking them. Yes.

1725. **MS. KILLORAN:** Yes, so and maybe I'm misunderstanding you because my answer is not that much different than the first answer I gave you.

1726. **THE CHAIRMAN:** Yeah.

1727. **MS. KILLORAN:** And I would say that I think we have to follow the spirit of the order.

1728. So we know which bylaws Burnaby has suggested we will offend. Let's list those and then say they do not apply for the purposes of this matter. However, if there are other bylaws not included but in the same spirit as this list that would otherwise apply against Burnaby doing the work that has been very specifically set out, then those ought not to apply either.

1729. **THE CHAIRMAN:** Perhaps, short -- yes, I appreciate that. Thank you.

1730. But short of finding the bylaws inapplicable or forbidding Burnaby from enforcing its bylaws, is there any order the Board could issue that would provide the desired level of certainty so that Trans Mountain can conduct the surveys?

1731. I'm sort of trying to get to, is it this or nothing?

1732. **MS. KILLORAN:** Good question and I think -- and it's one that we've struggled with, quite candidly.

1733. We don't take issue with the bylaws. We don't -- they are not in and of themselves invalid. Trans Mountain just wants to get the work done. And if we were actually dealing with a *bona fide* application of bylaws, I think the answer to your question might be different.

1734. And I said in my opening statement that this is a collateral attack by Burnaby on the process, and that's why I'm struggling. I don't know where the next attack might come from. I don't know how creative they'll get with bylaws of which we are unaware, despite the fact that we've researched all the bylaws.

1735. So do we list all of the bylaws individually and say that they don't apply or is it more of a mandate that says Trans Mountain has the authority to do this, regardless of what authority Burnaby might have to stop them.

1736. Maybe it's as simple as stating it in the positive as opposed to the negative.

1737. **MEMBER DAVIES:** Related to that, we'll be asking counsel for Burnaby a similar question as to whether or not it's this order or nothing, if we do get to the point of issuing the order.

1738. And we would really appreciate guidance from counsel on both sides as to what specifically the order needs to do in order to both address this immediate conflict and to the extent there can be discussions between the two of you as to what it might also do in terms of, as you say, addressing the spirit of what you're asking for.

1739. **MS. KILLORAN:** I understand what you're getting at now. I think that's very helpful. And so the answer to your question is it this order or nothing, absolutely not. First, the Board has discretion to hear what it's heard today and come up with whatever order it thinks is justified.

1740. Having said that, I appreciate your struggle, and I think if you'd give us the liberty of some time, we'll spend some time thinking about how that wording might better affect the solution that we are hoping to effect.

1741. **THE CHAIRMAN:** We are prepared to give you some time to do that.

1742. **MS. KILLORAN:** Thank you.

1743. **THE CHAIRMAN:** Well, that's the Board's questions at present on this matter. Perhaps if you'd just give us a few seconds here to consider something else.

--- (A short pause/Courte pause)

1744. **MEMBER SCOTT:** Perhaps when you're giving consideration to the scope of the bylaws that you want to capture, in the event that we were disposed to grant the order, if you could give some consideration to the principle of enforcement.

1745. And we wouldn't mind hearing something about that now so that Mr. McDade may respond to it, how you envisage a general description of bylaws being actually how we would enforce our order regarding those bylaws.

1746. **MS. KILLORAN:** And it's really just another prong of the same problem, right; how do we -- how do we articulate what we're trying to achieve in a positive way and make it so that it's enforceable, and I think we'll have to give some thought to that as well.

1747. I mean normally an order of the National Energy Board becomes an order of the Federal Court of Canada. We go, we register it, and it's enforceable as a Federal Court Order, and that then becomes something that the RCMP can use to guide them if there are blockades -- you know, if the City of Burnaby, for instance, blocks or fails to comply with the order.

1748. But I hear what you're saying that the wording has to be specific in order to one, achieve our purpose, but two, if we have an order that ultimately we struggle to enforce because nobody understands it or because it's impossible to enforce then this has all been for naught.

1749. So I would say I will take some time to think about that as well if that's all right.

1750. **THE CHAIRMAN:** Yeah, that will be fine.

1751. I note -- Mr. McDade, I note the time, and I didn't know if we really wanted to get you started and then have a break for lunch. So we are -- we're in your hands but we're quite prepared to break for lunch now and come back just right after. What would be your choice?

1752. **MR. McDADE:** Well I'm really open to the Panel's preference. But

I'm ready to start. I think if we have 40 minutes there might somewhere near there come a natural break. None of us mind finishing early in the afternoon.

1753. **THE CHAIRMAN:** The Panel are happy to allow you to go for your -- and we'll find the time for a natural break. And you can tell us what would be a good time for a natural break. Perhaps that might be better.

1754. **MR. McDADE:** Yes, thank you. Let's see how much of the first question that we cover.

--- ARGUMENT BY/REPRÉSENTATION PAR MR. McDADE:

1755. **MR. McDADE:** So thank you for hearing us.

1756. My friend says, quite fairly, that Canadian constitutional law is somewhat complex and esoteric, and when we're dealing with questions of paramountcy and interjurisdictional immunity I think we're at the dancing on the head of a pin end of matters.

1757. The interesting thing in this case is that we're largely relying on more or less the same cases to reach diametrically opposed conclusions. And so although I'll be taking you to a few of the cases, I -- sometimes in a complicated matter like this the real problem is not expressing at the front end exactly what it is we're doing. And I hope that if we get a clear picture of what it is that's being requested of you, that helps to answer the question about whether or not that's in your jurisdiction.

1758. So I think you reach a different conclusion, and I'll try to help you with that in whatever value I can -- my submissions provide.

1759. If one looks at this as a question of how much jurisdiction do you have to decide constitutional issues under section 73 or section 12 or 13 you may get one answer. If you look at this as to whether you have the constitutional jurisdiction to tell Burnaby how to enforce its bylaws and whether certain bylaws are valid or invalid, in my submission, you get a different answer.

1760. So I think it's of some importance at the front end to set out exactly what Burnaby is and isn't asking for here and what Trans Mountain is and isn't asking for.

1761. And for that purpose -- now, I did file a two-page letter as a sur-reply. I'd like to put it in simply as a response at this time to add to my written argument, because I think that that -- the first part of that goes to the question that I want. I could read it into the record as argument or I could just submit it to you.

1762. **MS. KILLORAN:** I have no objections.

1763. **THE CHAIRMAN:** You have no objections to ---

1764. **MS. KILLORAN:** I don't.

1765. **THE CHAIRMAN:** Thank you.

1766. **MR. McDADE:** So I have -- well, I've provide copies. Would that be sufficient or would you like hardcopies now?

1767. **THE CHAIRMAN:** We have the copies necessary.

1768. **MR. McDADE:** Thank you.

1769. So I think it's important to distinguish this application from the application that was made in August that resulted in Ruling No. 28.

1770. And to note that Burnaby has not come to you to ask you to declare ---

1771. **THE CHAIRMAN:** Sorry, just our reg officer -- and to ensure that we have the exhibit that we're talking about. So we have an exhibit number for it. It has an exhibit number already so it is in the record now.

1772. **MR. McDADE:** Okay. Thank you.

1773. In Ruling No. 28 this Panel correctly described the failure to -- you will recall that Burnaby had filed a notice of constitutional question. Burnaby's main point was that you shouldn't make the order, but Burnaby filed a notice of constitutional question under the concern that an order could potentially go too far. This Panel correctly found that the notice of constitutional question wasn't required because you weren't being asked to go down the path that we were concerned about. Burnaby hasn't contested that order.

1774. The view that section 73 provides access to Burnaby's lands as a

landowner is fully accepted and Burnaby has provided access to its lands for Trans Mountain to do a wide range of studies on a wide number of its lands. Those have been done.

1775. The controversy arises here over the last specific piece, which was the clear-cutting of a section of a conservation area contrary to the bylaws. That matter was not determined by this Panel in Ruling No. 28, quite correctly, because as you pointed out in that ruling Trans Mountain had not requested an access order at the time.

1776. Now Trans Mountain has come and done that. And were that the limit of what they were asking for there would be no objections, but they've gone further and they've asked for an order directed specifically at Burnaby to prevent it from enforcing its bylaw and protecting its conservation area. And they have asked to do that; that you determine that the bylaw is constitutionally inapplicable, and they have filed a notice of constitutional question.

1777. So that notice of constitutional question is only required insofar as they are asking you to make a declaration -- let me not use that term -- to make a determination that the bylaws are in valid. And they're asking you to make a determination about what activities Burnaby can and cannot do under its own bylaws, which have nothing to do, in Burnaby's submission, with section 73.

1778. We have not come to you in this application and asked you to find whether or not these bylaws have been breached. Clearly they have. I think that's admitted. But that's not our request. We don't look to the NEB to protect our bylaws. That's a matter between Burnaby and its enforcement powers under provincial legislation.

1779. So the question -- the request before you is very clearly not connected to section 73 and section 12 or 13. The question is, really, do you have the powers under section 12 and 13 to reach outside of the *NEB Act* and regulate a municipality in its activities under its own bylaws.

1780. And keeping in mind that submission, I think you have to look at the case law and what it is and how it's developed.

1781. My friend says, I think, the authority is so clear in the legislation that you almost don't need case law. And I note in my submission, at the end of my submission, I'll be saying to you they have to make that submission because they

have no case law. All the case law is against them on that point.

1782. There is no clear power within section 12 or 13 or anywhere else in the *NEB Act* to say that you can declare or determine that municipal bylaws are invalid. Perhaps you can infer it under the wide terms of section 13, but it's certainly not there.

1783. There is nothing in section 73 that speaks to the right to go in and contravene bylaws or provincial laws, nothing at all. In fact, this Board ruled in the *Dawn Gateway* matter that the purpose of section 73 was to effect the law -- the common law of trespass in respect of landowners. And to that extent, we have no quarrel with it whatsoever.

1784. The Applicant here says to you, it's obvious on the terms of that that you -- that they have the power not only to walk in and ignore landowner rights, but they have the power to walk in and ignore bylaws and provincial laws of any type, shape or kind. They say they have complete immunity. I don't see that in the legislation, but that's really a question for you as to how you interpret that power.

1785. So I think the first question -- it'll be my submission that the first question that you asked or that is asked in the Notice of Constitutional Question is the most important one; that is, does this Board have the power that's set out there to determine that bylaws are inapplicable, invalid or inoperative?

1786. But I want you to -- I'm asking you to decide that question with the clear awareness that Burnaby is not putting the constitutionality of any of the NEB provisions to the test. We're putting to the test -- we think -- it's our submission that that question should be answered no.

1787. The situation would be different, in my submission, if Burnaby was coming to you and asking for some relief in relation to its bylaws. In that case, the question of the validity of that bylaw might well be at issue for you in respect of that relief.

1788. The *Paul* decision, which was the Aboriginal rights and forestry situation, has a clear statement to that effect, that the problem there -- or the situation there arose because the defendant brought forward the defence of Aboriginal rights. The Court points out that the province could never bring that defence forward.

1789. Here, we are in the reverse situation. It is not the municipality that brings before you the question of the validity of its by-laws. It is Trans Mountain.

1790. And they say the case law from the Supreme Court of Canada is clear on that power. And so I just want to turn to three of those cases, the cases, really, that they rely upon and look at it.

1791. So the first of those is the *Cuddy Chicks* decision. And I do apologize. I don't have case references either, but if we could turn to that?

1792. Do you have a reference for that?

1793. **MS. KILLORAN:** That's at Tab 13 of Trans Mountain's authorities.

1794. **MR. McDADE:** And I want to start at paragraph 11 of that decision. Towards the bottom of that paragraph, you'll see that the Court articulates what they say is the basic principle. This is the principle that my friends must rely upon:

> *"... the basic principle that an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid."*

1795. We don't quarrel in this case with your powers to make interpretations of jurisdiction or even constitutional determinations in respect of the NEB statute. So we have common ground on that. The question is, how far does that constitutional jurisdiction go?

1796. If you go over the page to the next paragraph, to paragraph 12, I note in the middle of that paragraph, the:

> *"... fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus, a tribunal prepared to address a Charter issue must already have jurisdiction over the whole of the matter before it, namely, the parties, [the] subject matter and [the] remedy sought."*

1797. And further down, a couple of sentences further:

> *"An administrative tribunal need not meet the definition of a court ... in order to have the necessary authority to subject its enabling statute to Charter scrutiny."*

1798. So again, we have common ground with my friend that you have the power to address both Charter and division of powers questions, but it -- these are questions that arise in relation to your own statute. When challenges are brought to your own statute, the principles behind this principle are that you shouldn't be applying your own laws in a way that is unconstitutional.

1799. That point, that qualification, to subject its own enabling statute to Charter scrutiny appeared not only in this case but every single time the Court in the Supreme Court of Canada decisions that it relied upon take place.

1800. Over the next paragraph, it must be determined whether the Board has jurisdiction over the whole of the matter. So there's no question that you have jurisdiction over Trans Mountain and its pipeline, but in our submission, you do not have jurisdiction over Burnaby and its bylaws. You don't have jurisdiction over the whole of the matter.

1801. But again, at the bottom of paragraph 14 -- and my friend read this sentence to you, but I highlight it differently. The last sentence in paragraph 14, which is the key conclusion of the Court:

> *"In the result, the Board has the authority to apply the Charter and to rule on the constitutionality of s. 2(b) of its enabling statute, in the course of the ... application for certification."*

1802. So if the question here was the constitutionality of section 73, I would completely agree with your jurisdiction. But Trans Mountain brings to you an entirely different premise; that is, can you declare a municipal bylaw invalid?

1803. And when I use the term "declare", my friend, quite fairly, has said you can't make a formal declaration of invalidity, but you can determine, for the purposes of your statute, whether you treat it as valid or not. But what I say to you in this application is they want more than that.

1804. The order that's sought forbidding Burnaby from enforcing its by-laws can only be made if you attempt to make an order that is binding on Burnaby

about the validity of its own bylaws and I say you don't have that jurisdiction. Over the -- now, next my friends refer to the *Cooper* case and I'd just like to briefly address that.

1805. **MS. KILLORAN:** That's at Tab 12 of Trans Mountain's Authorities.

1806. **MR. McDADE:** Now, in my argument, I cite to you paragraph 5 which again sets out the basic principle, which is that *Douglas College* and *Cuddy Chicks*, the two Supreme Court of Canada cases:

> *"...articulated the basic principle that an administrative tribunal which has been conferred the power to interpret law holds [the] power to determine whether that law is constitutionally valid."*

1807. Well, I'll take you forward to paragraph 45 and 46. Again the Court restates the principle from the trilogy of cases, *Douglas College*, *Cuddy Chicks* and *Tétreault-Gadoury*. And you'll see in the first sentence of paragraph 45:

> *"This Court has had the opportunity to address the principles underlying an administrative tribunal's jurisdiction to consider the constitutionality of its enabling statute."*

1808. This is the Court itself limiting or expressing that the principle that gives tribunals the power to make constitutional determinations is limited to its enabling statute.

1809. At paragraph 46 you'll see the same limitation.

> *"If a tribunal does have power to consider questions of law, then it follows by operation of Section 52(1), that it must be able to address constitutional issues, including the constitutional validity of its enabling statute."*

1810. And at paragraph 64 -- you recall, my friend answered a question from the Panel that that was the reference that was being relied upon. That the tribunals have powers to address the constitutional division of powers but I think that's only half the sentence.

1811. So if I could go to paragraph 64. In the middle of that -- in the middle

of that paragraph, you'll see the sentence starting -- the one that my friend relied upon:

> *"In particular, it is well accepted that a tribunal has the power to address questions on the constitutional division of powers…"*

1812. And then the rest of the sentence says:

> *"…on the validity of a ground of discrimination under the Act…"*

1813. So this is a Charter challenge so it's a little bit more difficult to translate. But what they were saying is a Charter challenge in relation to the specific section of their Act could arise. It's not a general power at large to decide every constitutional question that is brought before you.

1814. And then the third case I'd like to address is the *Martin* -- *Nova Scotia and Martin* case. Yes, we have that on the screen.

1815. And -- so let me start at paragraph 3 of that case. And again the Court here -- now *Martin* and *Paul* were both decided at the same time as companion cases. And I think it's fair to say a tantamount overruled *Cooper*.

1816. So at section 3 -- at paragraph 3 it sets out the three cases that have -- that have always been relied upon as the leading cases, *Douglas College*, *Cuddy Chicks* and *Tétreault-Gadoury*. And the Court says:

> *"…ought to be reappraised and restated as a clear set of guidelines."*

1817. Here's how the Court sets it:

> *"Administrative tribunals which have the jurisdiction, whether [expressed] 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."*

1818. So if you're acting under section 73 or section 12 or section 13, there's

no question; the Court says you have the power to determine the constitutionality of that provision but not municipal bylaws.

1819. And my friend said to you, I think, that this turns on the degree of expressed power that the tribunal is given. Well, in both those previous cases there's express power of the same, the equivalent, to what you have in your statute.

1820. And if you've turned to paragraph 49 of this case you'll see what the power is in the -- in the *Martin* statute and it's the same or tantamount to the same.

> *"Exclusive jurisdiction to enquire into, hear and determine all questions of fact and law arising pursuant to that Part."*

1821. So it's still the same wide and explicit jurisdiction. But if I could turn to paragraph 27 where the Court discusses the basic policy, you'll see the first sentence:

> *"[The] Court has examined the jurisdiction of administrative tribunals to consider the constitutional validity of a provision of their enabling statute in Douglas College, […] Cuddy Chicks, […] and Tétreault-Gadoury."*

1822. And it says in the next paragraph that for reasons of principle the administrative tribunals are allowed to make such determinations and to:

> *"…refuse to apply a challenged provision found to violate the constitution."*

1823. And the next paragraph, again it says the same thing. You'll see in the two sentences at the bottom of that paragraph:

> *"If, however, she is endowed with the power to consider questions of law relating to a provision, that power will normally extend to assessing the constitutional validity of that provision."*

1824. At paragraph 31, in the middle of that paragraph:

> *"A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the Charter is not binding on future decision-makers within or without or outside the tribunal's administrative scheme.*
>
> *Only by obtaining a formal declaration of invalidity by a Court can a litigant establish the general invalidity of the legislative provisions for all future cases."*

1825. This point about inside and outside is something that I'll come back to. So inside the NEB statute, you have the power to determine constitutionality of NEB provisions and your actions. But whether you have the constitutional power to determine the validity of other statutes simply because the Applicant brings those statutes before you on a motion is the very question here.

1826. The fact of bringing it to you doesn't put it within your jurisdiction, that jurisdiction had to pre-exist.

1827. At paragraph 33:

> *"In view of the policy considerations outlined above, [the] Court […] adopted a general approach [where] a […] tribunal or [an] agency can decline to apply a provision of its enabling statute…"*

1828. And there's two points there. Again, the focus is on the enabling statute which is the NEB Act but your remedy is that you can decline to apply that section.

1829. So the remedies on constitutional division of powers arguments, in my submission, for a tribunal are these: You can look at your own statute and if somebody challenges the applicability of one of those sections you can decide that it's valid and apply it or you can decide that it's not valid and not apply it.

1830. But it doesn't give you the power to go outside and make such determinations for other statutes.

1831. Again, halfway through that sentence the point's repeated again, after the reference to *Cuddy Chicks*.

> *"When a case brought before an administrative tribunal involves a challenge to the constitutionality of a provision, of its enabling statute, the tribunal is asked to interpret the relevant Charter right."*

1832. So again at paragraph 34 you'll see the indented quote from *Cooper*. The Court focuses on the constitutional validity of its enabling statute.

1833. And a point I want to make from paragraph 35, that I'll repeat I think again later, is the Court here says -- and this is of some assistance to you, that the question is -- in the second sentence, the:

> *"...question is one of legislative intent. It's crucial to the relevant intent we clearly defined."*

1834. So one of the questions that you'll have to face in this application is as a matter of legislative intent is there some clear reference in the NEB Act that says that Parliament intended you -- to give you the power to strike down or make declarations about municipal bylaws as opposed to making orders around pipelines and energy and all of the things that are so clearly within your mandate.

1835. Again, at paragraph 36 the Court says in the fourth line:

> *"...an administrative tribunal that has the power to decide questions of law arising under a particular legislative provision will be presumed to have the power to determine the constitutional validity of that provision."*

1836. So the question becomes, in my submission, without questioning your power to decide questions of law in respect of the NEB Act, does that Act -- no one would suggest that that Act gives you the right to decide questions of law arising under municipal bylaws. You are the experts on energy. You are not the experts on municipal bylaws and the questions of law arising under particular legislative provision is the phrase I rely on.

1837. Does -- has Parliament given you the power to decide questions of law arising under the City of Burnaby's parks bylaw? If so, and I say that it's clear you do not have that power but only if so will you be presumed to have the power to determine the constitutional validity of that provision. And that's what paragraph 36 says.

1838. And, finally, at paragraph 40 that:

> *"In cases where the empowering legislation contains an express grant of jurisdiction [...] there is no need to go beyond the language... An express grant of authority to consider or decide questions of law arising under a legislative provision is presumed to extend to determining the constitutional validity of that provision."*

1839. So in my respectful submission, the question is not whether you have been given the power to make questions of law under the NEB Act, it's the question is whether that section is presumed to give you the power to make -- to decide questions of law arising under a municipal statute.

1840. And the case law is rock solid. Every single case that deals with this matter is looking at its own statute. This case has been considered dozens and dozens of time.

1841. Now, the Panel did ask the question of my friend and I thank you for that, where in Canadian law and Canadian history has a federal tribunal ever attempted to seize the power to decide a municipal bylaw and, surely there would be at least one Tribunal decision, at least one court decision on that if that power existed. And yet, every decision that's discussed is determining the power under the enabling statute. That's no accident. That's where the principle comes from.

1842. It would be an extraordinary constitutional leap for the federal government to give an explicit power to you even if they had done it in explicitly in the section that you have the power to declare municipal bylaws invalid. I'm not sure that would pass constitutional muster but it's certainly not here. And there are certainly no reason to believe that you should change Canadian constitutional law to add that power in.

1843. **THE CHAIRMAN:** Mr. McDade, Ms. Scott has got a question for you.

1844. **MR. McDADE:** Yes.

1845. **MEMBER SCOTT:** Yeah, it's -- I wonder if you can just help me here. I think I heard counsel from Trans Mountain saying that they don't believe

that necessarily the Board has the ability to issue declarations about the constitutional validity of laws per se. We're not a superior court with inherent supervising jurisdiction. You seem to be saying the same thing. But I heard you say that we have jurisdiction under section 73 to issue an order about access to land and you don't seem to have any question about that.

1846. I wonder if you could help me understanding this whole idea of the ability of the Board's ability to interpret its own law. Section 13 seems to talk -- well, it allows us to apparently at least enforce orders or directions that we've given.

1847. Is it possible in your view to read section 13 in a way that -- or to consider that section 13 allows us to consider the rules of constitutional interpretation in interpreting our own power under section 13 so that what we maybe consider doing is scoping the power of our jurisdiction under section 13 as opposed to ruling on the validity or invalidity of your bylaw?

1848. **MR. McDADE:** I think the answer to that is, to some extent, yes. In my view, and this has developed over the last couple of months through various legal mechanisms. But in my view, the Board has the power to order access. And if you order access and Burnaby attempts to stop it in some fashion through an enforcement action under its bylaw, the relevant solution for that is for Trans Mountain to seek the assistance of a B.C. Court who has jurisdiction over Burnaby and its bylaws to have those bylaws declared in conflict with your order. But that's not what they're doing here.

1849. I'm responding -- in fact, if they had only asked for an order for access we wouldn't be here. If they had only asked for an order for access they wouldn't be contravening or they wouldn't be asking you to step outside of your legitimate power into deciding a case that really isn't.

1850. If there -- and the other answer to your question may be this, to point out that previous paragraph that talked about your remedy being to decline to apply your own statute. They're asking you to decline -- they're asking you to do more than ignore Burnaby's bylaws, they're actually asking you for an order preventing Burnaby from enforcing its bylaws. That's where they go way too far.

1851. We wouldn't -- we're not here asking you to take the bylaw into account, right. So if the answer is ignore the bylaw, you shouldn't go -- you shouldn't go to the constitutional issue on that because, in my submission, that's

not within your power. But it is within your power to ignore the bylaw and issue an order that you can issue.

1852. But they're asking you -- they've asked you in the Notice of Motion and in the constitutional question and this question, as phrased, specifically refers to a declaration or a determination of inoperability or inapplicability. So your question is not the question that's asked in the Notice of Constitutional Question but I -- because I think the answer to the Notice of Constitutional Question has to be no, you don't have that power but do you have another power; perhaps, yes.

1853. **MEMBER SCOTT:** Could we focus a little bit on our power under section 13 and whether or not -- how we might interpret it? It strikes me to the case law -- it seems to say that when we are interpreting our own legislation we're entitled to consider the Charter and our jurisdiction in light of the Charter. Is it possible that we're also entitled to consider the principles of division of powers in interpreting our power under section 13?

1854. **MR. McDADE:** Well, I don't, in my submission, make any distinction between Charter and division of powers. I think the case law and the principles are very similar.

1855. But again, even if this were a Charter issue, I say your Charter jurisdiction applies to your statute. It doesn't empower you to decide whether Burnaby has unjustly infringed some freedom of some Burnaby citizen even if Trans Mountain brings that application before you.

1856. There's no Charter challenge or, sorry, there's no division of powers challenged here to section 73. The division of powers challenge is to the bylaw.

1857. **MEMBER SCOTT:** Can we stay with section 13?

1858. **MR. McDADE:** Yes, okay.

1859. So section 13, I do have a submission later in my argument in respect, I think, of the question as to whether section 13 actually speaks to this situation. And ---

1860. **MEMBER SCOTT:** If you prefer to wait, that's fine.

1861. **MR. McDADE:** No, I -- let me deal with this now.

1862. Firstly, (a) aside from the question of whether a municipality is intended to be included in that Order, it allows you to require any person to do an act or matter or thing that such person is required to do under the Act.

1863. Now, I don't think that applies. Burnaby has no obligations under the Act, at least at this stage.

1864. And (b) forbid the continuing of any act that is contrary to the Act. I don't think we can leave those words aside.

1865. So what I've said in our submission, and I think it's factually correct, is Burnaby's activities are not directed to the section 73 rights of the company at all. Burnaby's activities are directed to Burnaby's bylaw.

1866. They're not doing something that's required by the Act or breaching something that's not required by the Act. They're simply operating completely away from the Act. They're operating under provincial jurisdiction, doing provincial things.

1867. So section 13, just on its face, in my view, does not speak to Burnaby's activities at all.

1868. **MEMBER SCOTT:** I wasn't suggesting that it does. I'm asking you if you think that it speaks to ours and our ability to interpret questions of law in section 13 and whether or not, in doing that, we're within the parameters, as you would see it, of the restrictions on the Board as a non-supervising superior court.

1869. One way of looking at this might be that in reading section 13, we are entitled to interpret our jurisdiction under that in light of the principles of either interjurisdictional immunity or paramountcy with respect to the division of powers.

1870. Would you have a problem with that concept?

1871. **MR. McDADE:** Yes, I do. I think that you -- there's no question that you have the powers to decide questions of law in respect of section 13. I concede that. But you don't have a generalized power to consider all questions of law that might be interesting. It's questions of law that arise under section 13.

1872. And I suggest that that's an important limit, and that it -- if you look at the case law that backs that presumption, all of it, it focused on your power to decide section 13, and there's no constitutional challenge here to that.

1873. So the question is, do you have powers to decide questions of law arising under provincial law? And if that's the question, my answer is no. There's nothing in that Act -- there's nothing in that section that speaks to your powers to decide questions of provincial law. What it speaks to in both (a) and (b), it's limited to things in (a) that may be required to be done under the Act and in (b) of forbidding things that are contrary to the Act.

1874. It's not a power to decide questions of law unlimited, so this might -- well, if there are further questions, I can deal with that. But other than that, this might be an appropriate time to break.

1875. **THE CHAIRMAN:** I was going to suggest that, Mr. McDade.

1876. So we'll adjourn and return at 1:30. Thank you.

--- Upon recessing at 12:00 p.m./L'audience est suspendue à 12h00
--- Upon resuming at 1:29 p.m./L'audience est reprise à 13h29

1877. **THE CHAIRMAN:** Good afternoon. Mr. McDade, we'll allow you to continue.

1878. **MR. McDADE:** Thank you. Thank you.

--- ARGUMENT BY/REPRÉSENTATION PAR MR. McDADE: (Continued/Suite)

1879. **MR. McDADE:** I'm basically finished with the point I was making there, but there is one more matter I wanted to be sure I address because it came up in the response -- or in the reply argument, and that is the *Calgary and CNLR* case that my friends relied upon as the only case they were being -- they were going to interpret.

1880. I don't need to take you to the case, I think. My point is this. It was a municipal case by a municipal Board deciding on the validity of a municipal bylaw which their Act specifically gave them the power to decide upon. There was zero constitutional issues there. There was no division of powers issue. So it simply isn't -- it isn't of any assistance, in my submission, to the question that's

before us as to whether a federal tribunal of one level of government can determine invalidity of another level of government's laws.

1881. I do want to say, though, and I'll come back to this, is ---

1882. **THE CHAIRMAN:** Mr. McDade, sorry. I'm saying you didn't find any ---

1883. **MR. McDADE:** Yes.

1884. **THE CHAIRMAN:** --- question -- the same question I would have asked Ms. Killoran, you didn't find any other federal government or any other federal institute that had done the bylaws as we ---

1885. **MR. McDADE:** No, I didn't. And it's always an awkward position as counsel to say there's no such thing because to prove a negative is very difficult, but I can tell you that I had associates work on this for a number of days and note up every case in which *Cooper* or *Cuddy Chicks* was considered, looking for that elusive example, and I wasn't able to find one. So I did the best I could.

1886. Now, the other aspect, though, of this question of -- in question number one is what's the applicability of it? If you did make an order, which I say you shouldn't, but if you were to venture into that territory and make some order in respect of the validity of the bylaws, who does it apply to?

1887. Now, my friend was quite generous, I think, in accepting that it obviously -- because the case law is quite clear on that. It doesn't apply in any other situation. It doesn't apply to any other tribunal.

1888. If I might have the *Cuddy Chicks* decision up at paragraph 17, which is a paragraph my friend did address you to, so the confusion here is the last part of that or the last sentence in that paragraph:

> *"Given that this is not tantamount to a formal declaration of invalidity, a remedy exercisable only by the superior courts,..."*

1889. Which I might say, parenthetically, my client attempted to do. A binding declaration on this one way or the other can, in our view, only be made by the B.C. Supreme Court, and we're in the process of trying to have that matter determined. But my learned friends were successful in convincing a judge that

you should get first chance to address that question.

1890. But it's clear among both parties that a binding declaration can only be made by that court.

> *"...the ruling of the board on a Charter issue does not constitute a binding legal precedent, but is limited in its applicability to the matter in which it arises."*

1891. And then if I could go to the *Nova Scotia v. Martin* case, and back to paragraph 31, which I referred you to this morning.

1892. At paragraph 31, *Nova Scotia v. Martin* -- I'll wait for it to come up.

1893. Thank you.

1894. I must say, this is remarkable technology. It sure would be nice to argue these cases in other appellate courts with this.

1895. Paragraph 31 in the middle -- the middle sentence:

> *"A determination by a tribunal that a provision of its enabling statute is invalid... is not binding on future decision makers within or outside the tribunal's administrative scheme."*

1896. And as you'll remember, in paragraph 33, the limits of its applicability are that the tribunal can decline to apply it or disregard it. Those are the terms used in paragraph 33.

1897. So the question I ask is in terms of other decision makers, Burnaby, the city itself is a decision maker in this. The city itself has powers under the bylaw. The city is able to come to its own legal determination of what its powers are under the bylaw. And any decision of this tribunal under this rule will not apply to the city.

1898. So in some senses it's simply -- it's going to be unsuccessful in accomplishing the purpose that my friends choose. So it may be binding in the sense that it's binding under the NEB Act but it's not going to be binding in respect of Burnaby and its bylaws. And so it doesn't accomplish the purpose for which it's apparently being asked. It's futile, in other words.

1899. Whereas a clear declaration that we say this Court -- or sorry, this Tribunal does have the power to do, which is to determine access, is something that we have and will respect, and the question of where the conflict arises is something that has to be resolved in another place.

1900. **MEMBER SCOTT:** Mr. McDade --

1901. **MR. McDADE:** Yes.

1902. **MEMBER SCOTT:** -- before you leave -- are you finished with your submission on that point?

1903. **MR. McDADE:** Yes.

1904. **MEMBER SCOTT:** All right. Before you leave *Martin* can you turn to *Burnaby v. Trans Mountain*, the decision of Justice Brown?

1905. **MR. McDADE:** Yes, I have that somewhere else.

1906. **MEMBER SCOTT:** And I'm looking at paragraphs 35 through to 39 inclusive.

1907. **MR. McDADE:** Yes.

1908. **MEMBER SCOTT:** It seems Justice Brown concluded that there was no serious issue to be tried in the injunction application and found in paragraph 39 that the NEB has jurisdiction to determine the constitutional areas that are relevant to the exercise of its authority and cites *Martin* and the passages that you just cited. Can you resolve -- do you see any conflict in that?

1909. **MR. McDADE:** Well, yes, obviously. The only point I can make there is that those points were not fully argued before that Court. We were dealing with the injunction application.

1910. And at paragraph 73 and 74 of Mr. Dattani's affidavit, if you haven't had a chance to read it, he addresses what happened at that -- perhaps I could have that up, the exhibit -- Dattani affidavit.

1911. **MEMBER SCOTT:** Before we get to that, perhaps you can help me

a little bit here. You were seeking an injunction in that case.

1912. **MR. McDADE:** Yes.

1913. **MEMBER SCOTT:** And the first question on the injunction application was whether there was a serious issue to be tried.

1914. **MR. McDADE:** Well, the way in which the argument played out in the injunction case was Burnaby was relying on the body of case law that says where you have a statutory injunction it's sufficient to simply deal with the -- show a breach of the bylaw and that you're then entitled to an injunction.

1915. It was my friend's argument that said given that the NEB also had some jurisdiction here you have to turn to the second, the more common *RJR McDonald* test and look at those questions and in that test the serious question to be tried.

1916. But you'll note the judge says she doubts there's a serious question to be tried. She's not making that finding. That's the key issue in that case that's still to be heard. This was a preliminary determination.

1917. So the point -- and the other point is there was no notice of constitutional question before her. And, in fact, my friend -- the legal counsel for Trans Mountain -- who is not my friend here today -- advised the Court that there was no notice of constitutional question being presented to this body.

1918. So the judge was in the position in the B.C. Supreme Court of being told there was no notice of constitutional question that was required or that was going to be had, because as you'll recall her judgment came out before you issued Ruling No. 32. And you came to the opposite conclusion that she did, which is that a notice of constitutional question was required.

1919. So that's all I really can say about that case.

1920. The other point is the question of the denial of the injunction is on appeal to the B.C. Court of Appeal.

1921. So to rely on this precedent as deciding that question would be problematic because it's a bit circular. If she says she's not deciding the question because you have the jurisdiction, and if you say you're not deciding the question

because you're accepting her findings on it, then, you know, nobody has really determined the question.

1922. I see there was a follow-up question. I'm sorry.

1923. **THE CHAIRMAN:** Mr. Davies?

1924. **MEMBER DAVIES:** I notice in your submission you extensively addressed 73 -- section 73 of the Act, as well as sections 12 and 13. Noticeable by its omission was section 11. And yet, section 11 seems to be pretty close to the point of how far this Board's reach is in the matters of constitutional law if you're going to frame the question of something for a Superior Court of record to deal with, which I believe is in part of your argument.

1925. It would seem to me, as it did to the justice who was deciding the matter before B.C. Supreme Court that section 11 makes a fairly plain statement on that regard. Any comments on that?

1926. **MR. McDADE:** Well, what I -- section 11 does not make this a section 96 court under the constitution. I think that's fairly obvious.

1927. And I can't put my hands on it, we haven't argued that point, there's a body of case law to that effect.

1928. So when I -- when the case law that I'm referring to speaks of a court of superior jurisdiction my interpretation of that is we're speaking about a section 96 Court that does have the power to make decisions as between federal and provincial division of powers that are binding. In my submission, section 11 does not give you that power.

1929. **MEMBER DAVIES:** Okay. It found some persuasive effect on the justice before the B.C. Supreme Court.

1930. While I understand that there has been an application for leave to appeal, I don't think the matter is properly said to be on appeal until leave is granted. Would you disagree with that?

1931. **MR. McDADE:** I suppose that's a fair statement.

1932. **MEMBER DAVIES:** Okay. Thank you.

1933. And also, I'd ask you, if you would, to reconcile some of the statements that are in your argument with the affidavit references that you've made in this respect. Mr. Dattani's affidavit in section -- or paragraph 73 makes references to the fact that counsel for Trans Mountain did not intend to file a notice of constitutional question and yet I don't have the reference in front of me but I do recall noting in the argument that the statement was made in your argument that he had undertaken not to file.

1934. I would hope that that difference is resolved as just a typographical error, but if otherwise I'd like to hear how you arrived at the conclusion in your argument.

1935. **MR. McDADE:** Well if that's what I said in my argument I was wrong. Let me look at it.

1936. Do you have a paragraph reference?

1937. **MEMBER DAVIES:** I'll look for it while you do. I'm sorry; I should have had it in front of me.

1938. **MR. McDADE:** I'm sorry.

1939. **MEMBER DAVIES:** I have it and it's on the screen from the affidavit in paragraph ---

1940. **MR. McDADE:** No, I didn't mean the affidavit I meant the reference in my argument.

1941. **MEMBER DAVIS:** That's what I'll have to look for. I'm sorry; I should have had that in front of me.

1942. **MR. McDADE:** I mean the affidavit is accurate. If I've misstated it in the argument, I apologize for that.

1943. **MEMBER DAVIES:** That's fine. I think that alone resolves it.

1944. **MR. McDADE:** The accurate statement is that it was intended, not ---

1945. **MEMBER DAVIES:** That alone resolves it. Thank you very much.

1946. That's all I had.

1947. **MR. McDADE:** All right. Before leaving Question 1, however, I want to make some comments -- the next point is I'd like to make some comments about the breadth of the Order sought here.

1948. First of all, obviously, the question about "and other occupants", I mean, it doesn't really involve the City of Burnaby, but I don't understand how an order could be made against others without notice to them. And so in fact, this panel has been fairly precise in not permitting other intervenors to make applications here, and that included one group of -- one residents' group that might have had something to say about that.

1949. So in any event, I just think that's over-reaching.

1950. But from the City of Burnaby's perspective, my friend's suggestion that not only should she deal with the parks bylaw here, which prohibits the cutting of trees, but all of the bylaws that were mentioned and then all of the other bylaws that aren't mentioned, which I'm sure she didn't intend this, but she called the "sneaky bylaws", that would be an extraordinarily wide order to deal with bylaws that we hadn't even had notice of.

1951. And when I come to the arguments on paramountcy, my friend has focused on the park bylaw which prohibits the cutting of trees. She hasn't really, in that context, talked about the traffic bylaw, which requires some sort of adjustment. And so I really urge caution in terms of that kind of breadth.

1952. If you look at this, say, in the terms of traffic, does the NEB really want to be in the position of saying to pipeline companies, "You can go ahead and interrupt traffic in whatever way you want in the municipality without dealing with -- without organizing that with the municipality." If you choose to shut down a major intersection because you want to do something, the idea that you could do so without notice, without discussion, without -- according to those bylaws, would have some very significant ramifications.

1953. It's the breadth of this kind of submission that led Vancouver and Metro Vancouver and Langley and Abbottsford to all ask for intervenor status here.

1954. That would be, in my submission, a very negative step for the Board to take.

1955. On the other hand -- and I may have more to say about this as we deal with interjurisdictional immunity -- there's no question that the parks bylaw -- the conflict here is with regard to a parks bylaw that is fairly strong in its prohibition. It doesn't allow for permission to break that. It's unlike the traffic bylaw, which requires some sort of discussion. But it protects a conservancy, the Burnaby Mountain Conservation Area. It's ecological protection legislation.

1956. My friends seek an order that not only gives them access to that area, but permits the very -- they're now asking the Board to sanction or to support the very activities they wish to undertake, that is, the cutting and destruction of a portion of the conservation area.

1957. Now, there's a reasonable debate on the facts as to how severe that environmental damage is. We take a position that it's quite severe. They take a position that it's somewhat less transitory. But there's no question there's destruction in the conservation area.

1958. And the question I have for the Board that I ask you to ask yourself is, have -- are you willing to take that step? Have you done the necessary involvement in determining that?

1959. Now, my friends call what they -- they take your Order No. 4 which, in my submission, it was a timing Order that says when you had to deliver your materials. And they say that results in these being -- they're defining them as mandated field studies.

1960. But in my reading of the record, this panel has never looked at those field studies and the damage that would result and approved that damage.

1961. Another point in the same regard, my friends refer to section 75, saying, “Well, because section 75 talks about compensation for damage done under section 73, it must mean that damage is contemplated.” But that's quite a different thing from saying that damage is approved.

1962. My friends refer to your environmental mandate. They say that, above all, the NEB has an obligation and, even through the CEAA legislation now, an obligation to consider environmental issues in advance.

1963. Under section 73, you're not called upon to rule on that. That is, the company has the right to enter by operation of law, and that was your Ruling No. 28.

1964. But if you make a ruling in this Order that says you can go in and cut those trees and clear that brush and drill those holes, when did you do the CEAA assessment of that environmental harm? If the federal government is going to make an order permitting somebody to do that precise harm, that environmental damage, normally, an environmental assessment would be done.

1965. If the panel is prepared to accept that sections 73 and 75 override municipal and provincial environmental legislation and that the right of access in section 73 means that you can go in and commit environmental harm of whatever magnitude that you, the company, think obliged without doing any kind of advance environmental assessment or environmental studies, that would be quite an unusual order.

1966. And I note that section 73, if you go to (a) through whatever number of subsections, from (b) on, it contemplates a process where the NEB would have heard the evidence already about the various environmental impacts and made a decision about those. But (a), if it's read in the full magnitude that my friends read it, which is not only a power to enter but a power to cause damage and a power to override environmental legislation, then there's a very serious problem here in that the Board would be approving -- not only approving -- mandating environmental damage, having never assessed the consequences of that.

1967. The municipality was doing that. That is exactly what the municipality proposed to do, is to look at the environmental impacts of these things and to go through the kind of statutory assessment that a municipality would do.

1968. So if you interpret that legislation in that way and grant an Order that not only grants access in the terms of section 73 but actually specifically requires or approves a particular set of environmental damage, I say there's a serious question about when did you engage in your environmental mandate? And I think that, not us, but it may be that others would consider that that breaches a number of other federal laws in that regard.

1969. And I just -- in my submission, it's not necessary. It's over broad, and

it requires you, as a panel, to look at the damage that's going to result and specifically approve it if you're going to make an order that other levels of government stand aside and let it happen.

1970. And if you take that same principle and apply it to the traffic bylaws, are you also prepared to say that those roads should be closed at certain times or to give the company the power to make that decision, contrary to all the safety provisions that the municipality would normally consider in a traffic matter.

1971. In my submission, that's asking you to go too far on the body of evidence that you have in front of you.

1972. So again, in terms of the breadth of the order, my submission is it should not be specific about what damage you're approving or not approving; at least, not until you've gone through that evidentiary step of determining whether that environmental harm and the cost benefit of it -- or the traffic safety, and it should not be specific about Burnaby.

1973. So those are my submissions on Question No. 1.

1974. **THE CHAIRMAN:** Perhaps, Mr. McDade, on your last point on -- you indicated earlier and throughout that Burnaby has no problem with allowing access to undertake the surveys and the examinations. And I get your argument, as you've just again raised it to an environmental level standard, which I may question, but if Trans Mountain -- would Burnaby take a position, if Trans Mountain were to go, allow you access to their survey and their examinations and they were to go on it and not break any of the bylaws, then can I assume that Burnaby would be okay with that since they've allowed access, provided they do not breach any of the bylaws or find a way of mitigating that in consultation with Burnaby?

1975. **MR. McDADE:** Yes, sir, they would.

1976. **MEMBER SCOTT:** Can you point me to the section in your argument where you make reference to CEAA and the other environmental standards?

1977. **MR. McDADE:** No, I'm sorry. It's not in my written argument. It's a response to my friend's suggestion that you have an environmental mandate and the suggestion that the order could be made to do this damage under section 73

and section 75.

1978. But it's a very important point.

1979. **MEMBER SCOTT:** And what's your view about the limitation in section 75 that exists by statute that damage done is to be minimal?

1980. **MR. McDADE:** Well, it's -- first of all, that's not much help after the damage is done. That's the whole point of your environmental assessment mandate; it's to determine those questions before it is done.

1981. Secondly, it's in the mind of the company, not the mind of the Board. If there was an appropriate statutory adjustment to this question of provincial environmental laws and municipal environmental laws, and your environmental mandate, one would expect to see some advance application to you or some obligation to do that.

1982. Now, what I say is when we come to IJI and paramountcy, that the comments in various court cases that you can't have a legislative vacuum are pretty helpful to us in this regard.

1983. So here we have municipal and provincial rules about environmental protection, and to simply override those because of an interpretation of section 73 and 75 would be over broad.

1984. **MEMBER SCOTT:** And the comments by Justice Brown that the damage in this particular case, in her view, was minimal, you don't think that that's of any relevance to our consideration either?

1985. **MR. McDADE:** Well, minimal is in the eye of the beholder. You have the evidence in front of you. They clear cut 13 trees in the middle of a conservation area. Minimal to Justice Brown is not no environmental harm; it's severe environmental harm in the eyes of the citizens of Burnaby.

1986. If you want to make a determination about that, that's one thing. But I don't think you can simply rely on that offhand comment from hers in terms of the injunction application. She was weighing that against what Trans Mountain said would be millions of dollars of harm to them from not being able to pursue that. So she wasn't weighing it in the injunction standard.

1987. But it's not no environmental harm. It's obvious environmental harm and would never be approved in the normal course under federal law without some advanced assessment. But my friends say you should interpret section 73 and 75 as meaning you can go ahead and do environmental harm.

1988. **THE CHAIRMAN:** Mr. Davies.

1989. **MEMBER DAVIES:** I guess what I want to do -- and I apologize for bringing this up, but you know we're really trying to reconcile two difficult positions here, which involves necessarily the occasional challenge of counsel. And so please, I apologize for asking, you know, quite direct questions. To the extent I do so, it's with respect.

1990. But I do take issue with the allegation that the Board did not give specific consideration to the work that was being contemplated. It was, in fact, specifically considered by the Board in the context of issuing Ruling 28. And the specific wording of the Ruling made clear reference to a submission that was before us then on the 25th of July that was submitted by Trans Mountain to the City of Burnaby that date, which clearly articulates the scope of the work to be done.

1991. So it's something I wish you to consider when you address whether or not we were -- without regard to the scope of the work and the potential consequences.

1992. The other point I would make is that each of the tests that seemed to be applied by the B.C. Supreme Court in an application for an interim injunction, each of the three tests, in a sense, are before us today.

1993. And so I would like counsel, both of you, to help us come to grips with the fact that some of these issues have been adjudicated by another tribunal, a tribunal which you, Mr. McDade, would submit is seized with jurisdiction to deal with them. And Justice Brown, in that case, was quite clear in her remarks under the heading of "Irreparable Harm" that the harm was neither reparable nor significant, and we're hearing otherwise from you today.

1994. So it's something which, to the extent you're asking us to find favour in your argument that to rule the Burnaby statute, the bylaws in this case can't be ignored, at least not with further look at the environmental consequences of the work that's being contemplated deals with neither the specific work that was

contemplated and was addressed by this Board nor the words of Justice Brown, who had custody of the matter at least for the purposes of an injunction.

1995. So I wanted to put those things out there. Whether you deal with them now or in the course of your argument elsewhere, there is a challenge we have to overcome and I would ask counsel for both sides of this argument to help us reconcile those points so that we find ourselves with the law as the primary issue. Because it would seem to me the facts are not really in dispute.

1996. Thank you.

1997. **MR. McDADE:** All right. Well, let me say a couple of things about that.

1998. Firstly, the question of what level of environmental harm is in the evidence before you. Whether you consider that minimal or a lot is a subjective judgment that I have to leave with you. In my view, it's significant.

1999. But the matter of the harm is clear. The question of whether or how the panel makes a determination that that's acceptable environmental harm -- and I understand your comments in terms of Ruling No. 28 -- my comments are addressed to the interpretation of section 73, which you'll see is -- the company's position is they can do that harm without coming to you, right, that they have that right as of the statute and that that entitles you to override a municipal bylaw.

2000. And the other point is not a question of what you ultimately decide about the environmental harm, but whether there's a process to assess that that goes forward, as there is with every other aspect of the decisions you make. You require environmental evidence to be -- and assessment of those impacts to be put in front of you, and this process doesn't contemplate that or at least the interpretation my friends put on this wouldn't provide a place for that. And that's what I -- what I say is it's really a more general comment then this specific application.

2001. Which is that in -- section 73 and 75 should not be seen to override municipal and provincial environmental law, unless this Panel is prepared to substitute a process where they'd fulfill their environmental mandate in advance of that damage.

2002. And on the specific facts here, I ask you to consider that this a

conservation area in which the ecology has special protection and what the company believes is minimal and is repairable. And whether it's repairable over 40 years or 60 years, which was the difference in the evidence before Madam Justice Brown, is really of no consequence in terms of whether it's the kind of environmental damage that federal law requires someone to consider.

2003. Those are the comments I have on that.

2004. **THE CHAIRMAN:** And just to be clear, your suggestion that the Panel should must consider the environmental harm if we are to go that way in permitting the survey work, is your argument that the survey work is just a designated project under CEAA? And what authority do you suggest that -- an EA is required, if we were to go that way?

2005. **MR. McDADE:** I must apologize. I haven't looked at the definition under CEAA as to whether this comes in or outside of a designated product. So I won't -- I won't answer that question.

2006. But on the general point, if the interpretation that my friend puts on this is correct, it doesn't matter because as long as they can say whatever survey work they're doing is required in their view for -- to determine a possible route for a possible pipeline, that damage is doable and it overrides any provincial and municipal legislation and that's got to be wrong.

2007. **MEMBER SCOTT:** So you don't think we have any jurisdiction to look at what Burnaby has done and if we believe it's excessive, require damages, or what other statutory tools we might have available to us, that we might apply those?

2008. Yes, Trans Mountain?

2009. **MR. McDADE:** Sorry, that confused me.

2010. **MEMBER SCOTT:** If Trans Mountain committed damage beyond what you considered reasonable and -- or what we considered reasonable, you're suggesting we don't have any authority to deal with that?

2011. **MR. McDADE:** I think section 12 and 13 are, in combination with section 75, are probably wide enough in theory to constitute some sort of remedy but I think this is a hypothetical and my problem is with the timing of it.

2012. Your remedy in that situation could only come after the damage was done. And what I say, that's not the issue. The issue is whether you, as a Board, should be granting an order with only the section 75 as your platform, that authorizes a specific set of activities in contravention of municipal or provincial environmental law in advance. And -- so ---

2013. **MEMBER SCOTT:** I take your point on that.

2014. **MR. McDADE:** Yes.

2015. **MEMBER SCOTT:** I understand what you're saying but what I'm curious about -- you've described this situation under section 75 as -- or 73, as being completely within the scope of determination by Trans Mountain. But I think what I heard you say was you do think we have some superintending jurisdiction under 12 and 13?

2016. **MR. McDADE:** If they did excessive damage you probably do but the damage will have been done and it won't be fixable.

2017. Section 75 is clear that whatever amount of damage is done compensation has to be paid. I don't know what other remedy would be available. The idea of environmental assessment is to prevent the harm before it occurs.

2018. I think my simple point, and it applies both to the environmental damage and to the traffic aspect and to the certain unnamed bylaws, is that you shouldn't, in my respectful submission, make an order phrase in a positive way that mandates or allows a certain type of damage to occur without considering the -- that that is in effect a federal order permitting that damage and the consequences of that flow.

2019. And so on the traffic side, you should have evidence before you as to what the appropriate traffic safety mechanisms are. On the environmental side, you should have evidence before you as to what the consequences are. And I make nothing more of it than that.

2020. So let me deal with the second question. I'll try and cover -- I cover this in more depth in my written argument. I won't be repetitious.

2021. My friends concede that the bylaws are validly enacted provincial legislation so then I won't cover that portion of my -- and on a paramountcy test, I won't take you through the case law but I do want to make a few comments about this.

2022. The first point is this, if you assess Burnaby's bylaw, whether this is on paramountcy or interjurisdictional immunity, it's pretty clear that it is a bylaw to protect the park. It's about trees. It has no aspect to it that is about pipelines.

2023. It does not -- it's not like insurance law that covers banks. It's not like municipal bylaws in terms of aeronautics places. It's not a statutory structure that on -- that at any level attempts to regulate pipelines in any way, it catches -- it potentially catches it but in the most incidental of ways.

2024. So if you characterize the Burnaby legislation, and this is important for both the interjurisdictional immunity and the paramountcy argument, it is quite clear that this is not legislation that trenches in any way on federal jurisdiction. And it is -- it's not a double aspect, it's a single aspect. It's only about parks and it's entirely -- it's entirely appropriate legislation.

2025. And so when you read the case law that my friends have cited, you have to keep that in mind because the kinds of legislation that they're dealing with are different.

2026. I had the good fortune, a couple of days ago, to be at a conference with Professor Brian Slatery who's the noted constitutional expert, and coincidences of all coincidences he discussed interjurisdictional immunity.

2027. And he made, I thought, a pretty helpful analogy, which is to say he says that when two pieces of a legislation overlap, federal and provincial, that it's really the parts in which they go into the core of the other's jurisdiction that is problematic.

2028. The stuff in the middle is paramountcy but in this legislation I say there's no piece of it that walks into the cuffs or the core of federal legislation. It affects it only in this regard, in the current situations.

2029. And again, this is not a question of whether you can build a pipeline through the conservancy. A question that you would only get to after this Board had heard evidence of all of the impacts, of all the benefits, and made the decision

under section 52 to give a Certificate of Public Convenience and Necessity, then the building of the pipeline would be different.

2030. This is not about -- this is about gathering of scientific evidence in advance of even a decision as to whether they -- so that the overlap is so minimal that it should -- we shouldn't even be in a discussion about interjurisdictional immunity.

2031. And on the paramountcy test, the conflict is minor. But fundamentally the starting point is the pith and substance, the fundamental nature of the Burnaby legislation.

2032. The second point I want to make, and it's the quote in *Tsilhquot'in* at paragraph 90 of my argument. If -- maybe we can just bring up the *Tsilhquot'in* case, paragraphs 148.

2033. Now, as my friend fairly says, interjurisdictional immunity is a very, very dated principle of law. And in my submission, this case shouldn't be decided on that. If anything, you should decide it on paramountcy. Interjurisdictional immunity it just leaves appellate courts in a place where they're going to have differing views.

2034. But the reasons why the Courts have consistently, over the past seven years, been negative on that project -- there are a number of quotes. We chose the best one here, but they're very similar. There's four or five quotes in the various Supreme Court of Canada cases.

> *"...[It's] premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments [and it's] at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. The two levels of government possess differing tools, capacities, and expertise, and the more flexible double aspect and paramountcy doctrines are alive to this reality."*

2035. I want to stop there. That's the only part of the quote I'll read. There's a longer one in my argument.

2036. But the concept of interlocking jurisdictions is one that I recommend

strongly to this Board.

2037. There is a place for municipal governments in the pipeline world. No one -- you've heard that Burnaby is opposed to this pipeline, and that's true. But they don't claim the right to make that decision. They understand that that decision belongs to the National Energy Board.

2038. But the question of what interference with traffic that you should get involved in when you're constructing these things, whether the route should go through conservation areas or residential backyards, some of those questions are much more appropriately municipal or provincial level decisions.

2039. To suggest, as my friend does -- and I think she -- with respect, I think she overstates it when she says interjurisdictional immunity is sufficient to take you right outside the provincial sphere, that you have complete immunity, is at odds with the law and way too far and, really, just not good public policy at all.

2040. There's got to be a way to find a role for municipal governments.

2041. Now, my friend says -- she attempts to make an issue that Burnaby's not been very cooperative. We haven't dragged ourselves down to that level. We could make the same arguments in respect to the company. But that's not the issue.

2042. Federal/provincial -- or cooperative federalism talks about the interaction of regulatory schemes. It's a cooperation between the NEB and the provincial regulators. It's not how many times you meet with the company. It's whether there's a role for two levels of government to make regulatory rules.

2043. And this law, a parks law, is clearly on a very local level involving a very specific conservancy site, is either one that ought -- that ought to have the power to it or one that this Panel ought to give significant credence to.

2044. My friend says it doesn't matter how inconvenient it is and that we don't have to inquire whether there are other ways to gather this geotechnical information. My submission, that's wrong. That's bad public policy, too.

2045. If there are other ways to do this, they ought to be done. And we've not yet, in this hearing, before this -- at this stage in the Board even made a decision about the route. But certainly the ways in which geotechnical

information could be gathered, if there's a way in which the municipal bylaw can live with the federal suggestion that this pipeline has to go, there should be some role for that. And that's cooperative federalism, and that's what the Supreme Court of Canada has said in four or five judgments now in a very clear way.

2046. At paragraph 91 of my argument, then, I make the point that says -- and this is a quote from *Canada Western Bank* in the Supreme Court of Canada, that says you have to proceed in this area of the law on a case by case basis, you have to proceed with caution, and that you should avoid draining the provincial jurisdiction if you can.

2047. And it -- and the point I want to make that's made in that paragraph of my argument is that Parliament can always, if it sees fit to do so, make its legislation sufficiently precise to leave those subject to it with no doubt as to the residual or incidental application of provincial legislation. That's at paragraphs 43 to 46 of *Canada Western Bank*.

2048. And I would point out that in other federal legislation, for instance, telecommunications legislation, there are sections of that Act that deal with municipalities and with conflicts with municipalities and that set up a process for resolving not bylaw conflicts, but conflicts between municipal property. And it -- and there, Parliament has seen fit to legislate.

2049. The fact that they have not done so here is something that I think you should take into account.

2050. Then the next point I wanted to make about my friend's argument is really -- forward a couple of pages, at para 103 of my argument. And I would like to deal with the *Campbell-Bennett* case.

2051. So if I could have the *Campbell-Bennett* case upon the screen.

2052. Now, this is the case that my friend says is sufficiently direct precedent that it's binding on you in terms of interjurisdictional immunity despite the Court's various suggestions. There's no question that case dealt with a pipeline and, in fact, with the Trans Mountain pipeline Line 1, not this expansion application that's before you. But that's not what Madam Justice McLaughlin had -- that's not what the Chief Justice had in mind when she said apply it to its precedent. It's the nature of the law that was -- the nature of the conflict that was involved.

2053. So that, as my friend said, was a Mechanics' Lien case. And if I could go to paragraph 46.

2054. So here, the Court was dealing with the question of could provincial Mechanics' Liens legislation apply to a pipeline which would mean that, on a Mechanics' Lien, you'd take ownership and sell a piece of the pipeline. At the bottom of page 46, the test, quoting from the Privy Council:

> *"...legislation will be invalid if a dominion company is sterilised in all its functions and activities or its status and essential capacities are impaired in a substantial degree."*

2055. And over to paragraph 53, the Court says -- it found a Mechanics' Lien legislation would:

> *"…if effective, […] attach to the pipe line and its enforcement would, as already stated, substantially destroy the purpose for which the company was incorporated…"*

2056. The test there was sterilize or substantially destroy. Its application here is to an attempt to be able to drill a hole so that one gets some additional geotechnical information so that they can make a decision about a route for the pipeline.

2057. It would be a gross overstatement to say that that would substantially destroy or sterilize the pipeline in all of its functions.

2058. And the next case that I wanted to look at is the *Ontario and Canadian Pacific Limited* case. Can I have that up on the screen? Do you have a cite for it?

2059. **THE CHAIRMAN:** We'll try and get it in a second here. We can get the right reference from our Regulatory Officer.

--- (A short pause/Courte pause)

2060. **MEMBER SCOTT:** Could you repeat the name of the case, please?

2061. **MR. McDADE:** Sorry. It's the *Queen in Right of Ontario v. Canadian Pacific Limited*. Sorry, I don't have a reference for it.

--- (A short pause/Courte pause)

2062. **MR. McDADE:** The *Canadian Pacific* case is referenced at paragraph 109 of my argument. It's a Supreme Court of Canada case. It's cited as *Ontario v. Canadian Pacific*. This case was the railway case involving the application of Ontario's provincial legislation to a railway.

2063. **THE CHAIRMAN:** I think we found it now.

2064. **MR. McDADE:** Okay. Thank you.

2065. So you'll see at the second paragraph -- or sorry, do we have paragraph numbers? Apparently not. Page 7, the third paragraph. Yes, thank you.

2066. So the argument here -- there was no question here that the railway was accepted to be a federal or an interprovincial undertaking subject to federal jurisdiction. But here the question of controlled burning, it was found, was not essential to right-of-way maintenance. But the arguments made -- third paragraph from the bottom of that -- third sentence from the -- or third line from the bottom:

> *"...the EPA as a whole is inapplicable to the appellant because it is a federal undertaking."*

2067. That's not dissimilar to the argument being made here.

2068. And you'll see the test is set out again at the bottom of that page. The question is whether it sterilizes the federal undertaking or interferes with the essential functions to a substantial degree.

2069. And over the page, on the top of page 8, the finding of the Court here -- this is Ontario Court of Appeal:

> *"The provincial legislation has not been enacted to regulate undertakings 'qua federal organizations' or to regulate interprovincial carriers in 'some primary federal aspect:...'"*

2070. Which is true of the legislation here. It doesn't impair the basic functioning of the pipeline in any specific way.

2071. You'll see at the very bottom of that quote, which is two-thirds of the way down the page:

> *"That there can be legislation dealing with different aspects... is not disputed. The legislation... is clearly not legislation 'in relation to' interprovincial undertakings. That it may directly impinge in some small measure on an interprovincial undertaking does not alter its essential quality or purpose."*

2072. And I suggest that to you is the test here in terms of the parks bylaw and its effects on being able to go in and do geotechnical investigations. It is a small measure that doesn't interfere with essential quality or purpose.

2073. And if I could skip ahead to page 10, the very top of the page:

> *"...the rule of Canadian constitutional law is that undertakings within the exclusive jurisdiction or Parliament usually are subject to provincial statutes of general application."*

2074. That's the basic principle. The only exception is when the statute taken as a whole bears essentially upon the management and control of the undertaking to which the provisions of the statute are directed.

2075. So this case where they upheld the provincial legislation, environmental legislation, clearly holds in at least three places -- I won't take you to the others -- that provincial statutes of general application do apply to federal undertakings except where they impair them to a substantial degree or sterilize them.

2076. The laws that are set out in my -- or the various cases set out in my written arguments dealing with banks are to the same effect. Banks have long been held to be a federal undertaking subject to that exclusive immunity. But there's a series of laws that have been upheld.

2077. So the question here is not whether this is a federal undertaking or not. The question is whether or not this is a bylaw that interferes, or sterilizes or impairs to a significant degree. And in my submission it does not, and there is really no place for this any further.

2078. And most recently, just a few weeks ago, the Supreme Court of Canada decided the *Morguard* case -- which I won't take you to, but I'll refer to you paragraph 62 to 64 where the Court said clearly in respect of banking, even though the provincial consumer legislation regulated credit card fees, that that degree of intrusion was also not sufficient to trigger the doctrine of interjurisdictional immunity and the court there said there's no precedent for the doctrine's application to credit card activities of banks.

2079. So the precedent we're talking about that Madam Justice McLachlin was referring to in *Canadian Western Bank* is not the precedent of the undertaking; it's the precedent of the legislation that is deemed to be contradicting it.

2080. I wonder if this might not be a good time for a break, or is this too early? I have about another 40 minutes or so to go, I think.

2081. **THE CHAIRMAN:** The panel are happy to take a break. So we'll come back at 2:45. We'll take just short of 15 minutes.

--- Upon recessing at 2:30 p.m./L'audience est suspendue à 14h30
--- Upon resuming at 2:47 p.m./L'audience est reprise à 14h47

2082. **THE CHAIRMAN:** Mr. McDade, thank you.

2083. **MR. McDADE:** Thank you. I appreciate the break.

--- ARGUMENT BY/REPRÉSENTATION PAR MR. McDADE: (Continued/Suite)

2084. **MR. McDADE:** Can I have *Canadian Western Bank* up on the screen?

2085. So I'd like to move into my paramountcy argument, and I've made half of it already in terms of, I think, the key question is looking at what the nature of the law is and what the degree of impairment or conflict is.

2086. If I could ask to turn to paragraph 74 of that judgment?

2087. And I'm going to skip ahead to an argument that I made in my written argument that starts at paragraph 134. The modern constitutional scholars on the issue of paramountcy have been evaluating the ways in which the court has dealt

with this question of conflict, and some of the recent articles have suggested that the real issue is a question of legislative intention.

2088. There's a helpful passage in *Canadian Western Bank* that I think all of that discussion starts from, which I quote at 134 of my argument.

2089. After dealing with *Bank of Montreal* and *Mangat*, both of which are cases that my friend referred to this morning, and *Rothmans*, the Supreme Court in this passage at paragraph 74 says this:

> *"…care must be taken not to give too broad a scope to…[those cases]..."*

2090. The Court never intended:

> *"…to reverse its previous decisions and adopt the 'occupied field' test […]. The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject."*

2091. So the mere fact, in my submission, that section 73 provides a right of access does not lead to the presumption that in so doing, the federal Parliament intended to rule out any municipal and provincial laws that applied to lands in which that access is.

2092. The Court goes on to say at the start of paragraph 75:

> *"An incompatible federal legislative intent must be established by the party relying on it, and the courts must never lose sight of the fundamental rule of constitutional interpretation that, 'when a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.'"*

2093. So the clear message of our Supreme Court is that the party asserting that the legislative intent to overrule provincial and municipal jurisdiction, the onus must be established by the person relying upon it. And I say that has not been done here.

2094. There's no indication in section 73 or the Act as a whole that the access rules in 73 which, as I noted before, can be triggered without even a ruling by the Board; it's just automatic. There should be no suggestion that that intention was to overrule -- Parliament's intention was to, at the same time as giving access to the company, was intending to give the company immunity from municipal and provincial legislation. And that is as a matter of federal legislative intent.

2095. And this Board, in the *Dawn Gateway* decision, which is cited by both my friend and I, ruled that the intent of section 73 was to modify the law of trespass by removing the common law requirement of consent to an owner to enter lands. That's a perfectly valid interpretation of section 73.

2096. Now, you didn't exclude in that decision some intent to give immunity from municipal and provincial laws, but I do think it's helpful to point out that the Board has already suggested clearly what its interpretation of the intent of section 73 is.

2097. And our previous discussion before the break, I hope I've been successful in pointing out some of the ramifications of reading section 73 as having a legislative intent that's different from that or that's wider than that, given that no application to the Board needs to be made before that access is taken.

2098. And then, of course, the other point that I've already made in terms of paramountcy, but I'd like to make sure I underline it, is the question of conflict has to be decided not just between the parks bylaw but also the traffic bylaw and any other bylaw that my friends seek. And those conflicts are even less clear that those bylaws should be ruled out because of some sort of inevitable or inoperable conflict.

2099. This panel -- or sorry, the Board, in my respectful submission, really should not be engaged in traffic matters at all, at least at this stage of the pipeline proceeding when we're still talking about planning and it's still -- it's still a matter that has not yet been determined in the public interest.

2100. Then, the next point in my argument deals with Question No. 3, and this is the discussion of the meaning of section 13 that I had earlier this morning with Ms. Scott. I believe and I submit that the whole of the phrases in section 13(a) and section 13(b) have to be carefully read so that we have to ask the

question, in applying section (a) before that applies, what is it that Burnaby is required to do under the Act that they've not done?

2101. And under (b), what are they said to have done contrary to the Act that they're to be forbidden from doing?

2102. And in my submission, in terms of acting under their bylaw, they can't be said to have done either of those things.

2103. The point that I make at -- the second argument I make under section 3 deals with the question of interpretation. And I wonder, is it possible to have section 72 of the *NEB Act* up on the screen?

2104. My friend and I both make written arguments as to the meaning of the word "person" in section 13. It doesn't really appear in section 73 because, at least in my submission, section 73 is addressed to the company, not to external parties.

2105. I'll just wait for section 72.

2106. So immediately -- the section immediately prior to section 72, which is cited at paragraph 148 of my argument, provides that the company may be required or directed to provide access or:

> *"...to provide facilities for the junction of its pipeline with any facilities of, and sell gas to, any person or municipality engaged or legally authorized…"*

2107. Now, I believe that's the only time in the Act that the word "municipality" appears, but it appears in conjunction with the word "person or municipality". Clearly, under the principles of statutory interpretation, those are two different things. The fact that it refers specifically to "person or municipality" and in section 13 that is not present suggests, in my submission, that it -- municipality -- orders against municipality were not in the contemplation of Parliament.

2108. And in fact, when one goes to the *Railway Act* and the *Telecommunications Act*, cited at paragraph 150 of my argument, the definitions in those statutes clearly do address governments or municipalities. And this is an important statutory interpretation issue that you ought to consider.

2109. And of course at the end of the day, the real question is not just do you have powers to issue orders against municipalities, but do you have the power to issue orders against municipalities in respect of the enforcement of their bylaws? And you have my submissions for that.

2110. Now, finally, in terms of Question No. 4, do the facts before the Board support granting the order?

2111. So under this section of the argument, if we assume that you've made the decision that you do have the power to declare or to determine that the bylaw is invalid and that you do have the power, under section 13, to make orders against the municipality, should you so wish, that doesn't necessarily mean that you should. It means that you can.

2112. And in our submission, that's not a question you should immediately jump to. In our submission, you should take into account the fact that this is a conservation area and the fact that there's a very significant or strong public interest expressed by the citizens in Burnaby to protect that area. You should take into account that this is only -- this damage or proposed damage to the conservation area is being done solely to get information for a possible route that may never proceed for other reasons but that damage will have been done.

2113. You should weigh the need for that evidence gathered in that way against other possible alternatives and, in my submission, you don't have a body of evidence before you sufficient to make that determination in terms of what possible alternatives there are.

2114. You should take into account the fact that in Procedural Direction No. 4 the Board said to Trans Mountain, "You've told us the studies you think you need. You have to get them before a certain date" but nowhere has there been really a determination as to whether other possible studies might achieve the same ends or achieve the same public interest.

2115. You have before you the competing evidence of Mr. Datanni, the deputy engineer at Burnaby who says there are other ways to do this and that of Mr. Johannesson who says, "No, I think it's impossible". And you have my submissions to do that, that if that's going to be the way in which this case is determined you should hold an evidentiary hearing and we should have the right to hear evidence.

2116. Now, that takes me to the conclusion, the last two paragraphs of my argument which is as a statutory Tribunal you hold in your hand not just the national interest but the public interest. This is a very unusual application, I want to suggest. Because of the historical fact that in the 1950s a pipeline and tank farm and rain facility were built in an area of the Lower Mainland now the company has come to you and asked to expand those. In any rational planning exercise this is probably the last place that one would think to put a pipeline through a very, very congested municipal area.

2117. My friend has suggested that Burnaby is being unreasonable or she used stronger language which doesn't come to me right now. But I ask you to consider if this project was happening in Calgary, even among its citizenries that supports the oil industry, if there was an oil loading facility to be built on the banks of the Bow River or if someone came along and asked to put a tank farm up to 5,000 -- 5 million litres of the magnitude of this tank farm in the middle of the city perhaps on the slopes below McMahon Stadium or somewhere close to the university as this one is close to the university, how would city council -- would react to that? How would the citizens of Calgary react to that?

2118. And if a company came along and said, "We'd like to clear cut a piece of Prince's Island" how would those citizens who are concerned about those other things react to that? And then ask yourself whether the city is being unreasonable in that matter.

2119. And I also ask you to consider what if the decisions on that matter were being made by a Commission that sat in Toronto. How would the citizens of Calgary feel about that?

2120. And to suggest that it is not every application that the company makes that needs to be granted, that the credibility of the NEB as a national institution is an important part of our Canadian heritage and it's issuing some restraint in this application, regardless of the issues on the constitutional piece is something that my client asked me to come before you and request and I hope that you will consider.

2121. So those are my submissions. Thank you.

--- (A short pause/Courte pause)

2122. **THE CHAIRMAN:** Thank you, Mr. McDade.

2123. The Panel have no further questions at this time.

2124. With that then, we'll go to Ms. Killoran who is going to provide us with her reply and perhaps answer the challenge or the questions that the Panel gave her on the breadth of an order.

2125. **MS. KILLORAN:** Again, I will certainly provide a reply. With respect to the wording of the order what I would like to do is go away, give it some thought, see if I can find some precedents and prepare, and within 24 hours provide a letter to the Panel indicating suggested wording. Is that -- and perhaps I should ask my friend. That would also give Trans Mountain the opportunity to actually work with counsel for Burnaby to see if we could come up with something together.

2126. **THE CHAIRMAN:** That would require the collaboration of Mr. McDade and the City of Burnaby so I would -- well, I put it back to him if he's willing to respond to that in any way or provide -- if you were to provide a written response and then he can provide further. I'll leave that open to Mr. McDade to consider.

2127. **MS. KILLORAN:** And I'm not guaranteeing we'll agree but it at least is some progress and I've heard you today speak about your reservations. I understand but I would like to give it more thought and rather than just come up with something off the cuff that I expect would not satisfy your concerns, I think that's a better approach.

2128. Does that work for you, Mr. McDade?

2129. **MR. McDADE:** Well, my friend and I get along like a house on fire so, yes, of course. I'll do what I can. But there are significant issues here to be resolved.

2130. **THE CHAIRMAN:** I don't know if we want to say this will be a hill to die on but ---

2131. **MS. KILLORAN:** Just going to drill through that hill.

2132. **THE CHAIRMAN:** Yeah. And we will accept that as an undertaking and we'll expect we'll hear from you once you have been able to have that discussion.

2133. Thank you.

2134. **MS. KILLORAN:** Okay.

2135. **THE CHAIRMAN:** We'll have probably your reply argument now.

--- REPLY ARGUMENT BY/RÉPLIQUE PAR MS. KILLORAN:

2136. **MS. KILLORAN:** My reply will be very brief. It will be a true reply but first Member Davies asked a question about the British Columbia Supreme Court and I will address that first, quickly, and then go to reply.

2137. And I think what she said is there's a tripartite test for an injunction. As most know, the first portion is, is there a serious issue to be tried. The second is will there be irreparable harm and the third then, is a question for the Court, what does the balance of convenience favour?

2138. And Justice Brown, obviously, took a look at all three of these questions. Most of us who do litigation for a living give up on the first prong of the test: Is there a serious question to be tried. That's usually one that the Court almost always says, "Well, there is always a serious issue to be tried". What is remarkable about Justice Brown's decision is she says there is not. And this paragraph has been brought to your attention before but at paragraph 35 of her judgment:

2139. "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."

2140. That is Justice Brown saying "I have jurisdiction but so does the NEB and that process is engaged. The NEB has jurisdiction here". So I think that is a very strong message that the Panel and, indeed, the Board should hear when they read this decision.

2141. Secondly, will there be irreparable harm? You've seen the evidence in Burnaby's affiant's affidavit. Trans Mountain has different evidence. The trial judge saw exactly the same evidence and here's what she found:

> *"I am not persuaded that [the] felling -- that felling the limited 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 by RJR MacDonald."*

2142. Then finally she's asked to balance -- to weigh Trans Mountain's loss and damage against that of Burnaby, and she says:

> *"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."*

2143. So again showing respect for your jurisdiction saying:

> *"The NEB process is engaged. If I enjoin Trans Mountain at this stage, I will be enjoining the NEB from issuing further orders."*

2144. So she refuses to do that.

2145. And just finishing the sentence:

> *"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."*

2146. So rarely do you see a court so obviously decline to take jurisdiction and hand jurisdiction to the administrative panel.

2147. And so you have a better sense of some of the evidence that Madam Justice Brown considered.

2148. At paragraph 82 of Mr. Johannesson's affidavit when he speaks about Trans Mountain stopping work on Burnaby lands on September 2nd, he says:

> *"During our two days of work, to the best of my information, we removed a number of trees marked by the arborist for removal,..."*

2149. And the evidence also was that the trees were dead or diseased and the brush was removed. Most of the removals were for safety reasons. So nine of the trees were:

> *"...dead, rotten or dangerous trees; two healthy trees; one very small diameter 'tree'; and, one dead tree that was co-dominant to another.*
>
> *The area cleared by Trans Mountain was approximately 20 metres by 20 metres..."*

2150. Which is 0.04 hectares, not .05 of a hectare, as I think has shown up in some of Burnaby's evidence. The size of Burnaby's conservation area is 67 hectares. So we're talking about a very small piece.

2151. Mr. Johannesson then says:

> *"We left the Burnaby Lands before completing the remainder of our work. It is my understanding that, in order to complete the geophysical program, we must perform another day of brush clearing... Additionally [there's] one tree at bore hole 2 [that] must be removed in order to... erect a drill mast."*

2152. So that's the brush and tree clearing that remains. And then obviously when it comes to the bore holes themselves and the sampling there will be some other damage, but relatively insignificant and can be remediated.

2153. So we're not talking about a situation where irreparable harm has occurred. In fact, we have a finding from a court that says it hasn't been irreparable harm. And the large majority of the harm in terms of brush clearing and tree clearing has already occurred. And we have one tree and some brush, left and if it wasn't irreparable harm when two- thirds of it was done, the last one-third isn't going to be irreparable either.

2154. We don't have a situation where Trans Mountain is disrespectfully running silly through Burnaby's land and causing harm. We are respectful in what we need to accomplish and we are also bound by section 75 of the legislation that says do as little damage as possible.

2155. And with great respect to the engineer for the City of Burnaby, telling us where we ought to drill bore holes in order to complete our investigations is not particularly helpful and I believe beyond his area of expertise.

2156. What we are trying to assess is not just environmental impacts of the second route or the preferred corridor. We're also trying to determine the stability of it. So when an engineer and when the many experts we've hired to assist us with these inquiries have given us the advice that the very best information we can get is going to be by drilling a hole at precisely the point where the pipe is going to go, because that's the most reliable information -- if I were a citizen of Burnaby or a citizen of Calgary, if the same facts held true, I'd want the most reliable engineering information. I wouldn't want to be told, "Well, go over there a couple miles because it's less significant to us and the data's probably just as good." The data isn't as good. And that is why we're doing the investigations where we are and how we're doing them.

2157. Does that answer your question?

2158. **MEMBER DAVIES:** The other part of it was to what extent should we consider ourselves bound by or persuaded by those findings? Do they have any precedential strength to this Tribunal?

2159. **MS. KILLORAN:** I'll answer that question in kind of a backwards way. My friend seems to suggest that there's no precedential value because he has sought leave to appeal, and that's wrong.

2160. The precedent is one of the B.C. Supreme Court, the lowest rung of the court. They have shown deference to your jurisdiction. And from that perspective, it is of some value, but it is not of the type of value that you should be 100 percent persuaded by it. But what you do have is a court that does have jurisdiction to hear the injunction matter. It does have the jurisdiction to hear issues about the constitutionality of a bylaw, if we were to bring such a challenge, which we haven't, and that court is saying we share this jurisdiction with the NEB and it's theirs right now.

2161. So I think that is the comfort that you can take from it.

2162. I have a couple of points to make, and I will not repeat submissions that I've made in my main submissions. But by way of clarification, my friend spent a significant amount of time arguing that there is no constitutional challenge here to the National Energy Board legislation. And it was as though there had to be a challenge to the Act to seek to strike down a portion of that Act, and that's simply not the case.

2163. There is a notice of constitutional question and a question can be: what is the interplay? How does section 13, or 12, or 52 or 73 interplay with another piece of legislation, in this case provincial? So we don't have to seek to strike down part of the *NEB Act* for there to be a constitutional question.

2164. And that leads to the next point that Mr. McDade made with which I take issue. He says that an administrative body has the jurisdiction to examine the constitutionality of its own statute only. And he then took you to a number of cases, and he said, "Well, these are Charter cases, but it doesn't matter. Charter, division of powers, it doesn't make a difference." It does.

2165. So the Charter is part of the Constitution, and if one is going to assess the Charter, they are going to assess it in relation to their home statute. They are going to apply the Charter to their home statute. And those are the types of cases that he was referring you to.

2166. What this is, and what I'm talking about is division of power. Division of power, by its very nature, involves another statute, another statute from a different level of government. That's what the division of power is.

2167. So the NEB will take a look at its home statute, obviously, the *NEB Act*, along with a provincial stature, and in this case the provincial legislation or the legislation at issue is a bylaw.

2168. Mr. McDade is trying to narrow the jurisdiction of the NEB, trying to narrow the very obvious power that is inherent in the legislation. And in dealing with the Constitution, Mr. McDade tries to convince you that you don't belong there. You're only allowed to look at the constitutionality of your own legislation. And I believe Member Scott said, "Well, isn't that what we're doing? We're looking at our own legislation and we're saying how does it apply?"

That's exactly right.

2169. But more importantly, you are a federal board and the supreme law of Canada is found in our Constitution. If there is an issue, a constitutional issue as there is here, a division of powers issue, it is not just something you can choose to do or not choose to do. It is the supreme law of the country. You are obliged to do it.

2170. So where there is a conflict as between one piece of legislation at a different level and the *NEB Act*, you are obliged to resolve that conflict as you see fit obviously.

2171. The third point I'd like to make is with respect to the Calgary and CNRL case at Tab 9. I wasn't going to spend much time on this case and I was very candid with you in saying that it is "some" authority.

2172. I think the question you had asked me is, are there cases out there where someone has struck down a bylaw. And I've said -- I said there was some authority for that but it is a municipal board.

2173. Mr. McDade said that they were legislated to do exactly what they did, to strike down a bylaw and that's simply not the case.

2174. So if you turn to Tab 9 of the authorities of Trans Mountain, you'll find the Calgary and CNRL case. And at paragraph 79 -- so what happened here, I'll give you a little bit of background.

2175. It's not a particularly interesting case but there's a city business tax bylaw and there were certain businesses in town that objected to it and appealed their assessments to the ARB, which is the Appeal Review Board, I believe.

2176. They failed at the Appeal Review Board level. So it's an administrative tribunal and their next point of appeal was to the Municipal Government Board, the MGB.

2177. And they appealed to the MGB and they were successful, and the MGB issued orders that had the effect essentially of invalidating the bylaws.

2178. At paragraph 79 you'll see:

> *"The impugned MGB Orders […] were made in respect of the 2005 and 2006 taxation years. Thus, the authority of the MGB to determine questions of law that arise in the course of its proceedings by virtue of Section 8, sub 2, of ACAR applies.*
>
> *Having found that the MGB has the implied authority to decide necessary questions of law…"*

2179. So here's a situation where the analysis is exactly the same as the one I'm encouraging you to take. Look at the legislation, does it give you the ability to make a legal decision.

2180. They then say the next issue is whether the authority extends to municipal bylaws. Paragraph 81:

> *"Municipal by-laws are considered subordinate legislation because municipalities, like the City of Calgary, are creatures of provincial legislation. Therefore, by-laws must be within the Constitutional jurisdiction of the Province. Under the doctrine of ultra vires, municipal by-laws are restricted to areas the legislature has validly delegated to municipalities."*

2181. Paragraph 82:

> *"The Supreme Court of Canada favored a presumption that administrative bodies may go beyond their empowering statute to determine questions of law. That is, provided they have the authority to decide the question of law. In Martin and Nova Scotia […], Gonthier held [as follows]:*
>
> *'An administrative body will normally either have or not have the power to decide questions of law. As stated above, administrative bodies that do have the power 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 the case properly before them, subject to judicial review on the appropriate standard'."*

2182. Paragraph 83:

"The validity of municipal by-laws arose in both MGB orders […]. The validity of the by-laws is directly related to the MGA."

2183. That's the Municipal Government Act.

"…the enabling statute for the MGB."

2184. That's the admin body.

"Specifically the by-laws define NARV…"

2185. Which is the taxation issue. But anyway, that's a long way of saying they actually had to take a look at the statute and say what are you -- what are you unable to do? Can you address an issue of law and does that issue of law extend to a bylaw? Beyond your home statute are you able to determine that a bylaw is valid or invalid?

2186. So not 100 percent on all fours with the question that you've asked but that is as close as I've come.

2187. And I believe one of the reasons that it is difficult to find cases where municipalities have found themselves in the position that Burnaby currently finds itself in, is that it is -- it is fairly basic that when it comes to the paramountcy of laws, municipal bylaws do not trump federal legislation.

2188. And in that regard, I'd like to refer you to Exhibit TT, to the affidavit of Mr. Johannesson. And if you go five pages in, five full pages in -- sorry, the pages aren't numbered. But this is a press release from the City of Burnaby, and about three paragraphs in:

"Today, in [their] response, […] the National Energy Board offered an interpretation of the applicable section of the Act…"

2189. The Act being the *National Energy Board Act*.

"…but failed to grant Kinder Morgan an access order, leaving Burnaby able to continue to enforce its by-laws.

2190. Quote:

> *"'We launched our constitutional challenge' says Mayor Derek Corrigan. 'Because we absolutely believe that our by-laws trump the Act […].'*

2191. The Act being the NEB Act in this case.

> *'We continue to believe this to be true and nothing the Board said today changes that fact'."*

2192. So the approach that Burnaby has taken is one of municipal paramountcy and there is no such concept at law which is why we are having difficulty finding cases on point.

2193. Mr. McDade spoke briefly about the traffic bylaw and the infraction that Trans Mountain encountered when trying to manage traffic at the site of the work. And again I'd like to refer you to Mr. Johannesson's affidavit at paragraph 74:

> *"And frankly I think it's disingenuous to say well how can we relieve Trans Mountain of any effect of the bylaws, like the traffic bylaws, when we haven't a clue what they're going to do. Are they going to stop traffic?"* (As read)

2194. And if you look to paragraph 74 of Mr. Johannesson's affidavit -- and he speaks in particular about the events of September 2nd. And that's the day that we were served with a notice to cease our activities.

> *"To ensure safe traffic flow on September 2nd, 2014, 3 traffic caution signs were placed along side and adjacent to the roadway, on the shoulder of Centennial Way. Normally, that measure would have been taken in cooperation with the municipality but, given Burnaby's refusal to participate in discussions concerning the work and safety precautions associated with the Mandated Field Work, Trans Mountain undertook the task on its own. Traffic pylons connected to one another with attached safety ribbon were erected in the parking area at bore hole location 2. They were intended to cordon off a safety area beneath a tree that required removal.*

Trans Mountain representatives requested that drivers slowdown in the area where crews were working, but I neither observed nor was informed of any traffic stoppage."

2195. So that's all it took to get a citation from the City of Burnaby from their -- on their traffic bylaw.

2196. There were certainly many attempts made by Trans Mountain to work with Burnaby and there will be more attempts made by Trans Mountain to work with Burnaby.

2197. We are not proposing that we show up and stop traffic or that we impose on the people of Burnaby. We would like the municipal government to work with us, to ensure the safety not just of our own workers on site but the safety of those who travel on the roads and travel in the park.

2198. And at this point I will hand it over to my colleague, Mr. Barretto, who is our regulatory lawyer. He has two factual submissions and then we're complete.

--- REPLY ARGUMENT BY/RÉPLIQUE PAR MR. BARRETTO:

2199. **MR. BARRETTO:** Good afternoon Members, Board staff, and to my friend. I actually have only one matter to discuss for reply so I'll be very brief.

2200. My colleague Ms. Killoran already touched on the contacts regarding the 0.04 hectares of trees that were affected in the conservation area.

2201. What I'd like to address by way of reply with regards to environmental and regulatory matters is Member Mills' (sic) question with regards to the NEB's power to deal with any environmental damage that may arise as a result of the studies and investigations that occur on Burnaby Mountain.

2202. In my friend's argument, there were some discussion of whether these studies would undergo any environmental review and whether they'd be subject to review under CEAA 2012.

2203. So briefly, I'd just like to clarify for the record that the project itself, as a whole, is undergoing an extensive EA as a designated project under CEAA 2012. And Madam Officer, you don't need to bring it up, but the letter

confirming this from the Board is Exhibit A13-1.

2204. In addition to this, all of the proposed studies and investigations that Trans Mountain would like to conduct, is trying to conduct on City of Burnaby lands are described in detail in materials that are on the record for the Board's review and these are just for your reference in Exhibit B243.

2205. At the same time as filing these materials on the Board's record on July 25th, 2014, Trans Mountain provided these same materials to the City of Burnaby in a voluntary access request. And this formed part of an extensive consultation effort between Trans Mountain and the City of Burnaby that is described in the affidavit of Mr. Johannesson. And in Mr. Johannesson's affidavit, this is Exhibit 267-2, the consultation is described at Exhibit N, and paragraphs 41 and 42 or the attempts at consultation by Trans Mountain.

2206. An important point I think to note with regard to the specific studies that have been the focus of the hearing today is that the Board has the ability to impose conditions on any section 73 order that has been granted and the Board has, in fact, imposed conditions on previous orders that have been granted.

2207. I believe the orders for the Dawn Gateway Pipeline, which have been referred to a few times, included a reference to section 75 of the Act, which requires the Proponent to minimize any damage as a result of the studies and also to compensate fully.

2208. Trans Mountain's draft order before you also recognizes section 75 that provides additional insurance that any damage would be minimized and compensated for.

2209. And my final point is that all this taken together shows that the NEB has a rigorous environmental oversight about the project and the studies that are contemplated on Burnaby Mountain, and this just goes as part of the Board's normal mandate for environmental protection of NEB-regulated facilities.

2210. That concludes my submissions. I'll turn back to Ms. Killoran unless you have any questions.

2211. **THE CHAIRMAN:** Thank you, Mr. Barretto.

2212. **MS. KILLORAN:** Those conclude our submissions, unless the Panel

has further questions.

2213. **THE CHAIRMAN:** Mr. Davies?

2214. **MEMBER DAVIES:** Thank you. I'll try to be brief. I've been accused before of making a mountain out of a borehole.

--- (Laughter/Rires)

2215. **MEMBER DAVIES:** I'll try not to in this case.

2216. You all heard my questions I have of Mr. McDade concerning what implication section 11 of the NEB Act might have on this matter. It, in my mind, has some significance here, and I don't believe, in your rebuttal, that I heard you specifically address section 11. If you have any remarks, I'd be pleased to hear them.

2217. **MS. KILLORAN:** The only remarks I have are it is consistent with the broad authority and broad powers that have been given to the NEB by Parliament. So to actually have a statement in the enacting legislation that says, "The Board is a Court of Record" is significant.

2218. It means that you have all the powers of a court. It is why we go to the Federal Court of Appeal with an appeal, as opposed to the Federal Court. And it is why the NEB, when they issue an order, it turns it into a Federal Court order.

2219. So this, again, is an example of I think the breadth and the strength of the power that has been granted by Parliament to this body.

2220. **MEMBER DAVIES:** Thank you.

2221. **THE CHAIRMAN:** Mr. McDade?

2222. **MR. McDADE:** Just one brief matter; I was accused to being disingenuous. I get to respond to that.

2223. In any -- I just want to point out that the statute in that case said, I quote:

"If there's an inconsistency between a bylaw and this or

another enactment, the bylaw is of no effect to the extent of the inconsistency."

2224. That's what I meant by statutory authority.

2225. **THE CHAIRMAN:** Thank you, Mr. McDade.

2226. With that, I would also on behalf of the Board like to acknowledge Ms. Killoran on behalf of Trans Mountain, and Mr. McDade on behalf of the City of Burnaby for your attendance today and your arguments.

2227. And the Panel will issue its decision in writing in due course.

2228. With that, we are adjourned.

--- Upon adjourning at 3:35 p.m./L'audience est ajournée à 15h35