CITY OF SURREY

the future lives here.

Legal Services

CRAIG MacFARLANE, City Solicitor
MAUREEN ST. CYR, Assistant City Solicitor
KELLY RAYTER, Assistant City Solicitor
ANTHONY CAPUCCINELLO, Assistant City Solicitor
PHILIP C.M. HUYNH, Assistant City Solicitor
BENJIE LEE, Assistant City Solicitor
HUGH CAMPBELL, Assistant City Solicitor
WASSAN AUJLA, Assistant City Solicitor

Our File: 5500-16
Direct Line: (604) 591-4188

VIA COURIER & EMAIL

July 21, 2017

The Honourable Jim Carr
Minister of Natural Resources Canada
Government of Canada
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Minister Carr:

Re: Environmental and Regulatory Reviews, Discussion Paper, June 2017

This letter is being submitted in response to the Government of Canada's invitation to comment on the Ministry of Natural Resource's Discussion Paper entitled "*Environmental and Regulatory Reviews, Discussion Paper*" (the "Discussion Paper") dated June 2017.

From a review of the *Proposed Program and Legislative Changes* section related to Modern Energy Regulation and from the discussion of the aim to modernize the National Energy Board (the "NEB"), it is apparent that the Discussion Paper fails to address the significant issues raised by municipalities, particularly in the context of required legislative change. Despite detailed submissions supported and echoed by numerous municipalities across Canada including Surrey, Edmonton, Burnaby, Coquitlam, Township of Langley and the City of Montréal, the legislative changes contemplated by the Discussion Paper completely ignore the legislative amendments sought by municipalities and supported by both the Federation of Canadian Municipalities and the Union of British Columbia Municipalities. These requested legislative amendments were most recently brought to the attention of the Ministry of Natural Resources in our letter of June 7, 2017.

In light of the above, we are resubmitting our letter of June 7, 2017, including all its appendices, for the Minister's review and incorporation into the final version of the Minister's *Proposed Program and Legislative Changes* initiative.

We trust the Ministry will recognize the significance of the legislative amendments sought by the above-mentioned municipalities and supported by the Federation of Canadian Municipalities and the Union of British Columbia Municipalities, and will ensure that they are given the attention and consideration they deserve.

Yours truly,

ANTHONY CAPUCCINELLO
Assistant City Solicitor

AC:kls
Enclosures

c.c. National Energy Board Modernization Secretariat, Natural Resources Canada
National Energy Board, c/o Sylvain Bédard
National Energy Board, c/o Brian Martin

City of Edmonton, c/o Steven Ho
City of Burnaby, c/o Dipak Dittani
City of Coquitlam, c/o Dana Soong
Township of Langley, c/o Roeland Zwaag
City of Montreal, c/o Andrés Bayona

Federation of Canadian Municipalities, c/o Matt Gemmell
Union of British Columbia Municipalities, c/o Marie Crawford

City of Surrey, Scott Neuman, Manager, Design & Construction Division
City of Surrey, Ted Uhrich, Manager, Park Planning, Research & Design

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CITY OF SURREY

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Our File: 5500-16
Direct Line: (604) 591-4188

June 7, 2017

The Honourable Jim Carr
Minister of Natural Resources Canada
Government of Canada
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Minister Carr:

Re: Report of the Expert Panel on the Modernization of the National Energy Board

This letter is being submitted in response to the Government of Canada's invitation to comment on the report of the National Energy Board (NEB) Modernization Expert Panel entitled "*FORWARD, TOGETHER, Enabling Canada's Clean, Safe, and Secure Energy Future*" (the "Panel's Report") submitted to the Honourable Jim Carr, Minister of Natural Resources, and dated May 2017.

What is abundantly clear from the Panel's Report is the complete failure to address the significant issues raised by municipalities, particularly in the context of required legislative change. Despite detailed submissions supported and echoed by numerous municipalities across Canada including Surrey, Edmonton, Burnaby, Coquitlam, Township of Langley and the City of Montréal, the Panel's recommended amendments to legislation completely ignore the amendments sought by municipalities and supported by both the Federation of Canadian Municipalities and the Union of British Columbia Municipalities. In fact, the Panel does not even acknowledge these requested amendments. This suggests that the Panel did not review the submissions made or did not appreciate their significance and simply chose to ignore them. Either way, an acknowledgement in the Public Participation section of the Panel's Report that municipalities are stakeholders who bear costs and as such "*may in the past, have been under serviced*" (at p.68 of the Panel's Report) does nothing to address the detailed legislative deficiencies identified; deficiencies which only legislative change will remedy.

The many issues raised, that were completely ignored by the Panel, are described in the City of Surrey's submissions to the Panel attached as **Appendix 3** to this letter. These include, but are not limited to, the imperative to amend the current s.112 *NEB Act* process so that municipal and provincial highway and infrastructure projects are not delayed, and so that federal and provincial

funds contributed to pay for these multi-million dollar projects are spent on these projects as intended, and are not instead diverted to pipeline companies. Because of the deficiencies in the s.112 of the *NEB Act* process, pipeline companies have been able to leverage their position and impose payment demands and terms which, unless complied with, have the effect of delaying these projects and exposing municipalities to third party delay claims. A recent 2017 decision of the NEB which highlights the deficiencies in the s.112 *NEB Act* process was released earlier this year and is attached as **Appendix 2** to this letter. What is astonishing is that a simple application made under s.112 of the *NEB Act* for the construction of a sidewalk that did not conflict with the pipeline in question and which raised no safety or technical concerns, **took over 9 months to adjudicate**. Now imagine the multi-million dollar highway and infrastructure projects of the nature described in pages 64 to 117 of Appendix "B" of **Appendix 3** and imagine the inevitable contractor delay claims that undoubtedly would be quantified in the hundreds of thousands of dollars. Under current legislation, these delay claims can only be avoided by capitulating to the demands of the pipeline companies. In effect, municipalities have no choice but to agree to pay all their costs and agree to all their other onerous and unfavourable terms. This occurs because the current legislation allows pipeline companies to leverage their position and hold government authorities to ransom, even when their pipelines are located in municipally or provincially owned highways. Surely, the Panel should have recognized that federal, provincial and municipal infrastructure funding should be used for the purposes it was intended, and should not be used to pay pipeline companies in order to avoid otherwise inevitable project delays and third party contractor delay claims. The Panel's failure to address or even acknowledge the deficiencies of the s.112 *NEB Act* process, and its failure to recommend the establishment of legislated cost allocation formula similar to that legislated by the Province of British Columbia in the *Pipeline Crossing Regulation*, B.C. Reg. 147/2012 referred to in **Appendix 3**, are just some of the many shortcomings of the Panel's Report.

As another example, the Panel also did not acknowledge the need for legislative amendments which would expressly provide that the NEB has jurisdiction to recommend that conditions may be imposed on a pipeline expansion project (such as the Trans Mountain Pipeline Expansion Project) that require that portions of an existing pipeline system be abandoned, decommissioned and removed as a condition of expansion approval, particularly where pipeline twinning options or upsizing options are available. Such a condition could have been imposed as a condition of approval of the Trans Mountain Pipeline Expansion Project and wasn't because the NEB wrongly held that it did not have jurisdiction to impose such a condition, despite submissions that such a restricted view of its jurisdiction would lead to absurdities. Under the NEB's restricted view of its jurisdiction, the NEB would not be able to impose safety conditions specific to an existing pipeline, but only to the expanded portion of a pipeline system. This point was also raised by the City of Surrey in its letter to Cabinet dated November 23, 2016 attached as **Appendix 1** to this letter.

In light of the above, we request the Minister to task the Panel to revise its recommendations, particularly those related to recommended legislative amendments, so that the legislative amendments sought by the above-mentioned municipalities and supported by the Federation of Canadian Municipalities and the Union of British Columbia Municipalities, are given the attention and consideration they deserve.

To assist in this request for revision, we have appended the written submissions made by the City of Surrey to the Panel dated February 8, 2017, including all appendices.

Yours truly,

ANTHONY CAPUCCINELLO
Assistant City Solicitor

AC:kls
Enclosures

c.c. National Energy Board Modernization Secretariat, Natural Resources Canada
National Energy Board, c/o Sylvain Bédard
National Energy Board, c/o Brian Martin

City of Edmonton, c/o Steven Ho
City of Burnaby, c/o Dipak Dittani
City of Coquitlam, c/o Dana Soong
Township of Langley, c/o Roeland Zwaag
City of Montreal, c/o Andrés Bayona

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City of Surrey, Scott Neuman, Manager, Design & Construction Division
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CITY OF SURREY

OFFICE OF THE MAYOR

November 23, 2016

File: 2430-20-591

VIA FACSIMILE & EMAIL

The Right Honourable Justin Trudeau, P.C., M.P.
Prime Minister of Canada
Langevin Block
Ottawa, Ontario
K1A 0A2

Governor in Council and Cabinet
Privy Council Office
Room 1000
85 Sparks Street
Ottawa, Ontario
K1A 0A3

Dear Prime Minster and Members of Cabinet:

Re: Request that Governor in Council make an Order to Reconsider - National Energy Board ("NEB") Decision on Kinder Morgan's Trans Mountain Pipeline Expansion Project (the "Project")

On behalf of the City of Surrey, this letter serves to formally request that the Governor in Council make an Order to Reconsider pursuant to s.53 of the *National Energy Board Act*. In making this request the City of Surrey wishes to express its position that in principle it does not support any expansion of the Trans Mountain pipeline system through the City of Surrey that negatively impacts the City of Surrey.

It is the City of Surrey's view that the NEB process was unfair and offended principles of natural justice and procedural fairness and did not give adequate regard or consideration to addressing the issues and negative impacts of the Project identified by the City of Surrey, including the request that Surrey Bend Regional Park be avoided and that Trans Mountain be required to abandon, decommission and remove that portion of the existing pipeline in Surrey that runs through densely populated areas of the City of Surrey.

SURREY
CITY OF PARKS

P 604 591 4126 MAYOR@SURREY.CA
13450-104 AVENUE SURREY BRITISH COLUMBIA CANADA V3T 1V8

WWW.SURREY.CA

At the NEB hearing the City of Surrey requested that certain terms and conditions be imposed on any approval of the Project. These included the Joint Municipal Conditions and Additional Conditions of the City of Surrey set out in Appendix "I" of this letter.

(A) The Joint Municipal Conditions

Surrey's Joint Municipal Conditions were formally adopted by the Township of Langley and the City of Abbotsford and were relied upon and/or referred to by the City of Coquitlam and the City of Burnaby.

The Joint Municipal Conditions were sought to address the negative impacts to Surrey and to other municipalities and related to the following:

- Present and future costs arising as a consequence of the pipeline occupying or crossing highways and impacting utilities;
- Necessary consent from Trans Mountain and other interest holders in Trans Mountain's statutory right of way/easement to enable municipalities and the Province to dedicate required land for highway/road;
- Fixed timing of pipeline work to be performed by Trans Mountain to accommodate highway, utility, infrastructure and improvement projects so as not to delay municipal projects;
- Inconsistent Terms contained in Pipeline Permits issued by Trans Mountain;
- Release and Indemnification in favour of Affected Municipalities;
- Requirement to Enter into Agreements with Affected Municipalities Prior to Construction; and
- Conditions Apply to Entire Expanded Pipeline System: To Both Existing and Proposed Pipelines.

Despite overwhelming evidence of the extraordinary burden placed on municipalities by the Project (financial and otherwise), the NEB disregarded the evidence and found that the Project may pose only a modest burden on municipalities. While acknowledging the concerns expressed by the City of Surrey and other municipalities that adopted Surrey's written argument, the NEB wrongly and unfairly declined to impose any of the Joint Municipal Conditions.

(B) Additional Conditions of the City of Surrey

With respect to the additional conditions of the City of Surrey identified as conditions 10 to 15 in Appendix "I" of this letter, the NEB again ignored the evidence and wrongly and unfairly declined to impose any of these conditions. In so doing it also erred in finding that it did not have jurisdiction to impose conditions related to the abandonment, decommissioning and removal of a portion of the existing Trans Mountain pipeline that runs through densely populated areas of the City of Surrey. That finding is unacceptable and contrary to any reasonable interpretation of the applicable sections of the *National Energy Board Act* given that the hearing before the NEB related to the expansion of Trans Mountain's pipeline system; a system that includes both the existing pipeline and the proposed pipeline.

The additional conditions of the City of Surrey related to the following:

- Relocation to Alternative Corridor Approximately between AK 1160 and AK 1166;
- Abandonment, Decommissioning and Removal of Portion of Existing Pipeline in the City of Surrey;
- Inadequate Emergency Response Plan;
- Reimbursement of Emergency Event/Incident Costs; and
- Conditions Apply to Entire Expanded Pipeline System: To Both Existing and Proposed Pipelines.

In light of the above, the City of Surrey hereby requests, pursuant to s.53 of the *National Energy Board Act,* that the Governor in Council make an Order referring back to the NEB for reconsideration, the NEB's recommendation and the terms and conditions the NEB considered necessary if the Project is approved, with direction from the Governor in Council that factors to be taken into account shall include the negative impacts identified by the City of Surrey which were intended to be addressed by the Joint Municipal Conditions and the Additional Conditions of the City of Surrey set out in Appendix "I" of this letter.

Sincerely,

Linda Hepner
Mayor
City of Surrey

Enclosure: Appendix "I" – Joint Municipal Conditions and Additional Conditions of the City of Surrey

c.c. City Manager
Attorney General of Canada

JOINT MUNICIPAL CONDITIONS

Present and future costs arising as a consequence of the pipeline occupying or crossing highways and impacting utilities

1. Trans Mountain shall be responsible for all present and future costs that will be incurred by the Municipality or others undertaking work in connection with a Municipality approved project or development (the "Approval Holder"), that the Municipality or Approval Holder would not have incurred but for the location, installation, construction and/or operation of the pipeline across, under, over or within the highway or in proximity to a municipal utility including, but not limited to:

   (i) costs to realign, raise or lower the pipeline;

   (ii) costs to excavate material from around the pipeline;

   (iii) costs to add casing or other appurtenances for the protection of the pipeline; and

   (iv) costs to accommodate future construction projects including, but not limited to, the construction, upgrading, maintenance, renewal, widening and/or replacement of any improvements, infrastructure, utilities and/or highway that occurs across, under, over or in proximity to the pipeline.

Necessary consent from Trans Mountain and other interest holders in Trans Mountain's statutory right of way/easement to enable municipalities and the Province to dedicate required land for highway/road.

2. Trans Mountain shall in respect of future widenings, expansions or improvements of the highway:

   (i) consent (without conditions and without compensation) to the extinguishment of any statutory right of way or easement in favour of Trans Mountain over those portions of land required by the Municipality or the Province to be dedicated as highway or road in order that those portions of land may be incorporated into and form part of the existing highway that is occupied by the pipeline;

   (ii) obtain the consent (without conditions and without compensation) of any mortgagee or other person having an interest in the statutory right of way or easement to be extinguished over that portion of land to be dedicated as highway or road in order that those portions of land may be incorporated into and form part of the existing highway that is occupied by the pipeline.

3. Trans Mountain shall in respect of creation of future dedicated highways and roads over the pipeline that are approved or required by a municipality or imposed as a condition of

development approval (whether as a condition of subdivision approval, rezoning, or other land development project approval and whether related to a land development project initiated by a private developer or by the municipality):

(i) consent (without conditions and without compensation) to the extinguishment of any statutory right of way or easement in favour of Trans Mountain over that portion of land that is to be dedicated as highway or road;

(ii) obtain the consent (without conditions and without compensation) of any mortgagee or other person having an interest in the statutory right of way or easement to be extinguished over that portion of land that is to be dedicated as highway or road.

Fixed timing of pipeline work to be performed by Trans Mountain to accommodate highway, utility, infrastructure and improvement projects so as not to delay municipal projects

4. Trans Mountain shall perform all necessary pipeline related work within **90 days of being notified by the Municipality**, or within such period of time mutually agreed upon between the Municipality and Trans Mountain, or within such other time period as may be varied by Order of the Board so as not to delay any future highway, utility, infrastructure or improvement project that occurs across or in vicinity of the pipeline which might disturb the pipeline or which necessitates realigning, raising or lowering the pipeline or excavating material from, over or around it, or adding casings or other appurtenances deemed necessary by Trans Mountain for the protection of the pipeline.

Inconsistent Terms contained in Permits are Void

5. Unless otherwise ordered by the Board any permit issued by Trans Mountain pursuant to s. 112 of the *National Energy Board Act* or the *National Energy Board Pipeline Crossing Regulations (Part 1 and Part 2)* shall be consistent with the terms of this Order and to the extent of any inconsistency such inconsistent terms are void.

Release and Indemnification in favour of Municipality

6. Trans Mountain shall indemnify and save the Municipality harmless from any and all liabilities, damages, claims, suits and actions arising out of Trans Mountain's operations and/or the construction, installation or placement of its infrastructure, including but not limited to, the pipeline, across, under, over or within the highway or in proximity to municipal utilities other than liabilities, damages, claims, suits and actions resulting the gross negligence or wilful misconduct of the Municipality.

7. Notwithstanding anything else in this Order, the Municipality shall not be liable to any person in any way for special, incidental, indirect, consequential, exemplary or punitive

damages, including damages for pure economic loss or for failure to realize expected profits, howsoever caused or contributed to.

Requirement to Enter into Agreements with Affected Municipalities Prior to Construction

8. A Condition(s) requiring Trans Mountain to enter into a Highway Licence and Crossing Agreement(s) related to impacted utilities including highway occupation and crossings with each affected municipality and affected Provincial highway authorities prior to construction, failing which terms shall be imposed by the NEB.

Conditions Apply to Entire Expanded Pipeline System: To Both Existing and Proposed Pipelines

9. The above conditions 1 to 8 inclusive shall apply to the entire expanded pipeline system being both the existing and proposed pipelines.

ADDITIONAL CONDITIONS OF THE CITY OF SURREY

Relocation to Alternative Corridor Approximately between AK 1160 and AK 1166

10. That the proposed pipeline be located outside of Surrey Bend Regional Park to an immediately adjacent corridor made up of the South Fraser Perimeter Road Corridor, the Golden Ears Connector Corridor and the CN Rail Corridor.
11. That the proposed pipeline corridor commencing just east of AK 1160 and ending at AK 1166 in the City of Surrey be relocated to the corridor identified as Option B, or alternatively to the corridor identified as Option A in Exhibit C76-10-9 (A4Q0Q6) filed by the City of Surrey in this proceeding.

Abandonment, Decommissioning and Removed of Portion of Existing Pipeline in the City of Surrey

12. The portion of the existing Trans Mountain pipeline in the City of Surrey identified in Exhibit C76-10-9 (A4Q0Q6) shall be abandoned, decommissioned and removed and be replaced either with a twinning of the proposed pipeline or with a pipeline incrementally increased in size/diameter such that the said twinning or increase could accommodate a total flow capacity equivalent to or greater than the flow capacity of that portion of the existing Trans Mountain pipeline that runs through the City of Surrey. The said twinning or increase shall be located within the alternative corridor identified as Option B, or alternatively within the corridor identified as Option A in Exhibit C76-10-9 (A4Q0Q6).

Emergency Response Plan

13. Trans Mountain shall implement an emergency response plan that is consistent with and satisfies the recommended best practices contained within the report entitled "*HMCRP Report 14: Guide for Communicating Emergency Response Information for Natural Gas and Hazardous Liquids Pipelines*" filed the by the City of Surrey and contained in Exhibits C76-9-3 (A4L9S6), C76-9-4 (A4L9S7) and C76-9-5 (A4L9S8).

Reimbursement of Emergency Event/Incident Costs

14. Trans Mountain shall reimburse the provinces and municipalities for all costs incurred in responding to emergency response events/incidents related to Trans Mountain's operations and/or pipeline.

Conditions Apply to Entire Expanded Pipeline System: To Both Existing and Proposed Pipelines

15. Conditions 13 and 14 above shall apply to the entire expanded pipeline system being both the existing and proposed pipelines.

All of which is respectfully submitted this 12th day of January 2016.

Anthony Capuccinello
Assistant City Solicitor

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National Energy Board | Office national de l'énergie

File OF-Surv-CA-T260 -01 01
2 March 2017

Mr. Dennis Martini
President
Martini Construction Ltd.
Unit A – 5740 Production Way
Langley, BC V3A 4N4
Facsimile 604-534-6215

Mr. Nathan Zaseybida
Assistant General Counsel
Kinder Morgan Canada Inc.
Suite 2700, 300 5th Avenue SW
Calgary, AB T2P 5J2
Facsimile 403-514-6622

Dear Mr. Martini and Mr. Zaseybida:

Application pursuant to Section 112(1) of the *National Energy Board Act* (Act) by Martini Construction for the installation of a sidewalk across Trans Mountain Pipeline ULC at 19151 95A Avenue, Surrey, BC

On 24 May 2016, the National Energy Board (Board) received an application submitted by Martini Construction Ltd. (Martini) pursuant to Section 112(1) of the Act, for excavation and installation of a sidewalk at the above-noted address. The Board subsequently received a reply submission from Kinder Morgan Canada Inc. (KMC) and a further response from Martini on 5 July 2016 and 20 July 2016, respectively.

Shortly after receiving Martini's application, the *Damage Prevention Regulations (Authorizations)* (DPR(A)) and *Damage Prevention Regulations (Obligations of Pipeline Companies)* (DPR(O)) came into effect on 19 June 2016. They replaced the *Pipeline Crossing Regulations, Parts I and II* (PCR) which were in place at the time the application was received. As none of the Transitional Provisions contained in the DPR(A) apply, the Board has assessed this application pursuant to section 112(1) of the Act and the DPR(A).

The Board notes the efforts of both Martini and KMC to reach a crossing agreement. The Board further notes KMC's submission that in its view it is the City of Surrey which should have applied for the requested leave, rather than Martini. However, the Board has determined that Martini meets the definition of a person who may file such an application for the purposes of section 14(1)(a) of the DPR(A).

.../2

On review of the documentation submitted by both Martini and KMC, the Board has decided to grant the leave requested by Martini for the excavation and installation of the sidewalk as described in the Martini application, and in the drawing attached as "Schedule A" to its Application and similarly appended as "Schedule A" to Order MO-012-2017 which is attached to this letter.

The Board reminds both parties of the obligations of the owner of a facility that is constructed across a pipeline, including those set out in section 8 of the DPR(A), and directs Martini to provide a copy of this letter and Order to the City of Surrey.

Should you have any further questions in regard to this matter please contact Kent Rowden, Operations Inspector, at 403-554-0395 or via email at kent.rowden@neb-one.gc.ca.

Yours truly,

Sheri Young
Secretary of the Board

Attachments

National Energy Board | Office national de l'énergie

ORDER MO-012-2017

IN THE MATTER OF the *National Energy Board Act* (Act) and the regulations made thereunder; and

IN THE MATTER OF an application made by Martini Construction Ltd. (Martini) pursuant to subsection 112(1) of the Act, filed with the National Energy Board (the Board) under File OF-Surv-CA-T260-01.

BEFORE THE Board on 2 March 2017.

WHEREAS Martini is the developer of a property at 19151 95A Avenue, Surrey, BC (the Lands);

AND WHEREAS Kinder Morgan Canada Inc. (KMC) operates the Trans-Mountain Pipeline (Pipeline) within the right-of-way through the Lands at 19151 95A Avenue, Surrey, B.C.;

AND WHEREAS Martini filed an application dated 24 May 2016, pursuant to subsection 112(1) of the Act, requesting that the Board grant leave to install a sidewalk, consisting of the removal of 8 inches of material, approximately 5 feet wide, then installation of 4 inches of roadbase, and 4 inches of concrete over the Pipeline and within the 30 metre prescribed area on the Lands, (the Work) as illustrated in the diagram identified as "Schedule A" to Martini's application and appended to this Order as "Schedule A";

AND WHEREAS on 19 June 2016, the *National Energy Board Damage Prevention Regulations Authorizations* and *Damage Prevention Regulations – Obligations of Pipeline Companies* ("DPR") came into force and the *National Energy Board Pipeline Crossing Regulations, Parts I and II* ("PCR") were repealed;

AND WHEREAS the Board received written submissions from KMC on 5 July 2016 and from Martini on 20 July 2016 regarding this application;

AND WHEREAS the Board has examined the application and considered the submissions of Martini and KMC received in this matter and determined it to be in the public interest to grant the leave requested;

.../2

IT IS ORDERED THAT, pursuant to subsection 112(5) of the Act, leave is granted to Martini to undertake the Work to excavate 8 inches of material, 5 feet in width and install 4 inches of roadbase and 4 inches of concrete for a sidewalk as contained in its application and as illustrated in "Schedule A" subject to the following conditions:

(a) The term of this Order and the leave granted herein shall commence on 2 March 2017. This Order remains in effect until the earlier of the completion of the Work, or 2 March 2019 at which point this Order will expire unless the Board directs otherwise;

(b) The Work must be conducted in accordance with all applicable provisions of the Act and all regulations made thereunder;

(c) Martini must restore the original depth of cover over the pipeline after construction;

(d) All precautions must be taken to maintain proper drainage over the right of way and to ensure no erosion occurs adversely affecting the depth of cover over the pipeline;

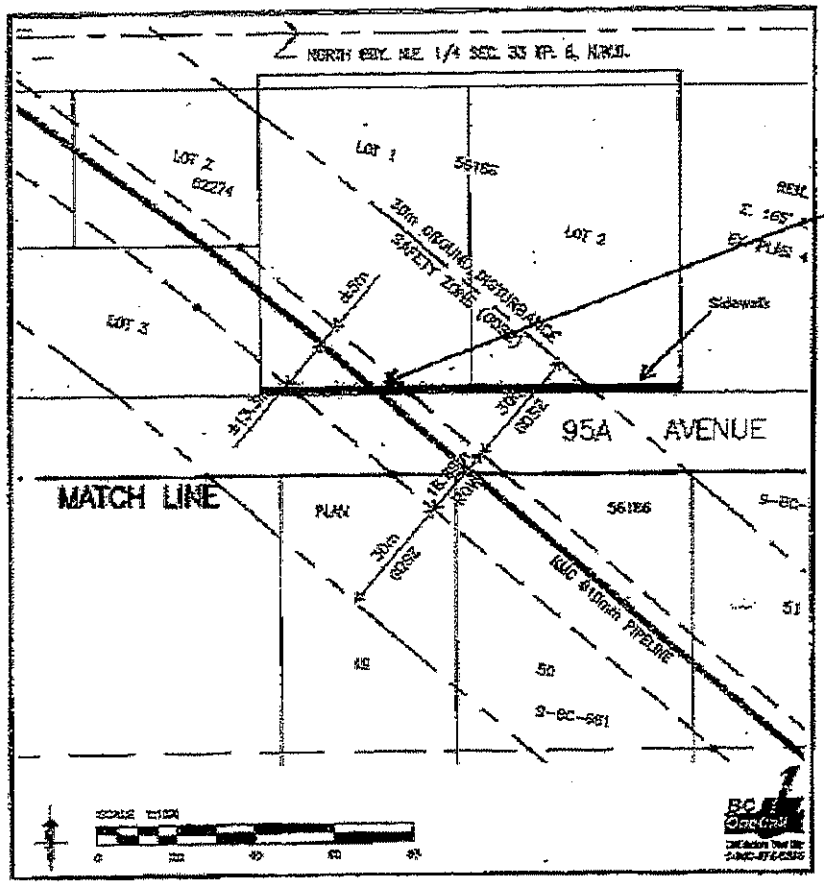
(e) Prior to the commencement of the Work, Martini is to have the Pipeline located, marked and staked by a KMC representative, and the Work is to be conducted under the supervision of a KMC representative;

(f) No vehicles or equipment may be parked or stored over the Pipeline; and

(g) The Work must be completed in accordance with the drawings provided by Martini in support of the Application, attached as 'Schedule A" to, and forming part of this Order.

NATIONAL ENERGY BOARD

Sheri Young
Secretary of the Board



KINDER MORGAN CANADA

KPPMF: GD-123.764

SIDEWALK

SCHEDULE A

KINDER MORGAN PIPELINE DATA

GRADE: 359 MPa

OUTSIDE DIA: 610mm

WALL THICKNESS: 6.35mm

THIS PIPELINE IS UNDER CATHODIC PROTECTION

THE PIPELINE FACILITIES DEPICTED ON THIS DRAWING ILLUSTRATE THE GENERAL LOCATION OF THE PIPELINE. THIS MAP CANNOT BE RELIED UPON TO DETERMINE THE PRECISE LOCATION OF THE PIPELINE. THE ONLY RELIABLE METHOD TO DETERMINE THE PRECISE LOCATION OF THE UNDERGROUND PIPELINE IS BY MEANS OF A PHYSICAL LOCATE AND MARKING OF THE PIPELINE BY QUALIFIED PERSONNEL. FIELD VERIFICATION BY A KMC PIPELINE INSPECTOR PRIOR TO ANY WORKS WITHIN 30 METERS OF THE PIPELINE IS MANDATORY.

PERMIT ORG	DATE
TECH	
EOP	

NOTIFY KINDER MORGAN CANADA PIPELINE PROTECTION DEPARTMENT 3 WORKING DAYS BEFORE ANY OF THE WORKS COMMENCE AT 1-877-717-7171

ALL INFORMATION IS SUBJECT TO FIELD VERIFICATION BY A KINDER MORGAN CANADA INSPECTOR

KINDER MORGAN CANADA APPROVED

DEC 14 20

TH-15-174

DWG. REF: GD-123.764

SHEET: 1 OF 1

REVISION: 4

DATE: 19-SEP-2016

SCALE: AS NOTED

Schedule A to MO-012-2017

APPENDIX 3

WRITTEN SUBMISSIONS OF THE CITY OF SURREY

FEBRUARY 8, 2017

To: NEB Modernization Expert Panel
David Besner, Wendy Grant-John, Brenda Kenny, Hélène Lauzon and Gary Merasty

From: Anthony Capuccinello
Assistant City Solicitor
City of Surrey
c/o Legal Services Division
13450 - 104th Avenue
Surrey BC V3T 1V8
(604) 591-4124

SUBMISSIONS OF THE CITY OF SURREY

A. Purpose, Mandate and Scope of Review of the Expert Panel

1. The Expert Panel's **mandate** is to, among other things, "*...prepare a report that includes...recommendations to modernize the NEB, **which would include potential legislative amendments**...*".

2. The Expert Panel's **Scope of Review**, among other things, expressly states that "*...NEB Modernization will involve engaging Canadians **on reforms to the NEB Act** to position the Board to serve the interests of Canadians into the future...*".

3. The Government's **mandate letter to the Minister of Natural Resources** asks to "*...ensure the Board's composition is diverse and has sufficient expertise in relevant fields such as environmental science, **community development**, and indigenous traditional knowledge...*"

B. The Existing Legislation is Deficient and the Board and Advisors of the Board Must Have the Necessary Expertise to Understand and Appreciate the Deficiencies

4. In addition to the obvious shortcomings in the legislation and in the rules of practice and procedure of the NEB which, among other things:

   (a) do not provide cross-examinations **as of right** of experts relied upon by Applicants seeking Project approval;

   (b) do not expressly require consideration of alternative pipeline routes and alignments; and

   (c) do not expressly state that the NEB has jurisdiction within the scope of an application for expansion of a system (such as the Trans Mountain Expansion Project) to recommend that conditions be imposed related to the original system. Conditions such as the abandonment of all or part of the original system, similar to the following condition which Surrey requested be imposed during the Trans Mountain Expansion Project NEB Hearing and which the Board determined was beyond its jurisdiction:

> "...that the portion of the existing Trans Mountain pipeline in Surrey, that was installed in approximately 1953, is abandoned, decommissioned and removed and that it is replaced either with a twinning of the proposed pipeline or with a pipeline incrementally increased in size/diameter such that the said twinning or increase could accommodate a total flow capacity equivalent to or greater than the flow capacity of that portion of the existing Trans Mountain pipeline that runs through Surrey."

(Note: the Existing pipeline runs through densely populated residential areas and being over 60 years old will soon have to be replaced. Twinning or incrementally increasing size of the proposed pipeline will avoid these replacement costs, which will inevitably have to be incurred by Trans Mountain, and will lessen Surrey's exposure to present and future costs arising as a consequence of the Existing Pipeline occupying or crossing highways and impacting utilities);

there are also other significant legislative deficiencies in the existing legislation which have been given less attention and which the public interest demands be addressed.

5. A glaring deficiency of the existing legislation is that it does not address the pipeline crossing issues raised by the City of Surrey and other municipalities (including the City of Coquitlam, the City of Abbotsford, the Township of Langley and the City of Edmonton) in the recent National Energy Board Hearing related to Kinder Morgan's Trans Mountain Pipeline Expansion Project (Board File: OF-Fac-Oil-T260-2013-03 02). The imperative to impose a cost allocation formula and provisions related to the issues and necessary requirements captured in the *Joint Municipal Conditions* (which are set out on p.180 to p.182 of the Written Argument submitted by Surrey at the Trans Mountain Pipeline Expansion Project NEB Hearing and which are attached as **Appendix "A"** to these submissions) have been ignored by the legislative drafters. Also ignored is the fact that pipeline companies do not compensate municipalities for their pipelines occupying and crossing municipal highways and that municipalities incur extraordinary present and future costs as a consequence of such occupation and crossings.

6. The City of Surrey and other municipalities requested that these "*Joint Municipal Conditions*" be imposed because, in part, the following issues and necessary requirements they address are not dealt with in legislation and continue to remain unaddressed in legislation:

   - The allocation of present and future costs to the pipeline company arising as a consequence of the pipeline occupying or crossing highways and impacting utilities including, but not limited to:

     (i) costs to realign, raise or lower the pipeline;
     (ii) costs to excavate material from around the pipeline;
     (iii) costs to add casing or other appurtenances for the protection of the pipeline; and
     (iv) costs to accommodate future construction projects including, but not limited to, the construction, upgrading, maintenance, renewal, widening and/or replacement of any improvements, infrastructure, utilities and/or highway that occurs across, under, over or in proximity to the pipeline;

> *"The Associated Engineering Cost Impacts Report concluded that the projected additional costs that the subject municipalities will incur as a result of the proposed pipeline projected over 50 years exceeds* ***$93,000,000 (NINETY-THREE MILLION DOLLARS).*** *This is summarized on p. i in the Executive Summary and in Table 1-2 on p. iv of the report."* (see p. 10 of Surrey's Written Argument filed with NEB at the Trans Mountain Pipeline Expansion Hearing)

- The obligation of the pipeline company to provide necessary consent and obtain necessary consent from other interest holders in the pipeline company's statutory right of way/easement to enable municipalities and the Province to dedicate required land for highway/road;

- Fixed timing of pipeline work to be performed by the pipeline company to accommodate highway, utility, infrastructure and improvement projects so as not to delay municipal projects;

- Prohibiting the pipeline company from including certain terms in its consents or permits such as terms requiring municipalities to release and indemnify the pipeline company and assume liabilities and pay costs;

- Requiring the pipeline company to release and indemnify municipalities from any and all liabilities, damages, claims, suits and actions arising out of the pipeline company's operations and/or arising out of the construction, installation or placement of the pipeline company's infrastructure (including but not limited to, the pipeline), across, under, over or within the highway or in proximity to municipal utilities, other than liabilities, damages, claims, suits and actions resulting the gross negligence or willful misconduct of the municipality (**Note: the legislation does not extend the indemnification provisions enjoyed by landowners under s.86 of the *National Energy Board Act* to municipalities as the owners of highways**); and

- Requiring the pipeline company to enter into agreements related to impacted utilities including highway occupation and crossings with each affected municipality and affected Provincial highway authorities prior to construction, failing which terms shall be imposed by the NEB.

7. The legal basis, need, rationale and evidence relied upon for the inclusion of provisions addressing these issues and necessary requirements is set out in section 2.0 of the Written Argument (p.2 to 117) submitted by Surrey at the Trans Mountain Pipeline Expansion Project NEB Hearing and which is attached as **Appendix "B"** to these submissions. We also suggest that you listen to the City of Surrey's presentation to the NEB in order to appreciate their significance. The presentation can be viewed using the following link: http://neb.isilive.net/TMPULC/2016-01-19/video-english.html.

8. The recently enacted *National Energy Board Damage Prevention Regulations* and the recently enacted *Pipeline Safety Act* compound these deficiencies by unfairly shifting burdens, obligations, costs and liabilities to municipalities and continue to frustrate and delay the ability of municipalities to undertake even the most routine services. Among other things:

   (i) the introduction of the concept of **joint and several liability** set out in s.16 of the *Pipeline Safety Act* exposes municipalities to extraordinary liabilities and costs;

   (ii) the legislation fails to expand the indemnification provisions enjoyed by landowners under s.86 of the *National Energy Board Act* to municipalities as the owners of highways; and

   (iii) the imposition of obligations on municipalities (**such as the duty to inform**) through the Regulations further increase municipal liability and costs.

9. These and other deficiencies were described in detail in the City of Surrey's letter dated April 12, 2016 submitted in response to the then proposed Regulations (attached as **Appendix "C"** to these submissions) and were echoed by others in similar letters attached collectively as **Appendix "D"** to these submissions, including:

   (a) the Federation of Canadian Municipalities;
   (b) the City of Edmonton;
   (c) the City of Montreal;
   (d) the Township of Langley;
   (e) the City of Coquitlam; and
   (f) the City of Burnaby

C. Relief Sought

10. The City of Surrey respectfully submits that this Expert Panel under its purposes, mandate and scope of review recommend legislative change to address the existing deficiencies in legislation described in these submissions.

All of which is respectfully submitted this 8th day of February, 2017.

Anthony Capuccinello
Assistant City Solicitor

c.c. Federation of Canadian Municipalities

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APPENDIX "A"

JOINT MUNICIPAL CONDITIONS

Present and future costs arising as a consequence of the pipeline occupying or crossing highways and impacting utilities

1. Trans Mountain shall be responsible for all present and future costs that will be incurred by the Municipality or others undertaking work in connection with a Municipality approved project or development (the "Approval Holder"), that the Municipality or Approval Holder would not have incurred but for the location, installation, construction and/or operation of the pipeline across, under, over or within the highway or in proximity to a municipal utility including, but not limited to:

   (i) costs to realign, raise or lower the pipeline;

   (ii) costs to excavate material from around the pipeline;

   (iii) costs to add casing or other appurtenances for the protection of the pipeline; and

   (iv) costs to accommodate future construction projects including, but not limited to, the construction, upgrading, maintenance, renewal, widening and/or replacement of any improvements, infrastructure, utilities and/or highway that occurs across, under, over or in proximity to the pipeline.

Necessary consent from Trans Mountain and other interest holders in Trans Mountain's statutory right of way/easement to enable municipalities and the Province to dedicate required land for highway/road.

2. Trans Mountain shall in respect of future widenings, expansions or improvements of the highway:

   (i) consent (without conditions and without compensation) to the extinguishment of any statutory right of way or easement in favour of Trans Mountain over those portions of land required by the Municipality or the Province to be dedicated as highway or road in order that those portions of land may be incorporated into and form part of the existing highway that is occupied by the pipeline;

   (ii) obtain the consent (without conditions and without compensation) of any mortgagee or other person having an interest in the statutory right of way or easement to be extinguished over that portion of land to be dedicated as highway or road in order that those portions of land may be incorporated into and form part of the existing highway that is occupied by the pipeline.

3. Trans Mountain shall in respect of creation of future dedicated highways and roads over the pipeline that are approved or required by a municipality or imposed as a condition of

development approval (whether as a condition of subdivision approval, rezoning, or other land development project approval and whether related to a land development project initiated by a private developer or by the municipality):

(i) consent (without conditions and without compensation) to the extinguishment of any statutory right of way or easement in favour of Trans Mountain over that portion of land that is to be dedicated as highway or road;

(ii) obtain the consent (without conditions and without compensation) of any mortgagee or other person having an interest in the statutory right of way or easement to be extinguished over that portion of land that is to be dedicated as highway or road.

Fixed timing of pipeline work to be performed by Trans Mountain to accommodate highway, utility, infrastructure and improvement projects so as not to delay municipal projects

4. Trans Mountain shall perform all necessary pipeline related work within **90 days of being notified by the Municipality**, or within such period of time mutually agreed upon between the Municipality and Trans Mountain, or within such other time period as may be varied by Order of the Board so as not to delay any future highway, utility, infrastructure or improvement project that occurs across or in vicinity of the pipeline which might disturb the pipeline or which necessitates realigning, raising or lowering the pipeline or excavating material from, over or around it, or adding casings or other appurtenances deemed necessary by Trans Mountain for the protection of the pipeline.

Inconsistent Terms contained in Permits are Void

5. Unless otherwise ordered by the Board any permit issued by Trans Mountain pursuant to s. 112 of the *National Energy Board Act* or the *National Energy Board Pipeline Crossing Regulations (Part 1 and Part 2)* shall be consistent with the terms of this Order and to the extent of any inconsistency such inconsistent terms are void.

Release and Indemnification in favour of Municipality

6. Trans Mountain shall indemnify and save the Municipality harmless from any and all liabilities, damages, claims, suits and actions arising out of Trans Mountain's operations and/or the construction, installation or placement of its infrastructure, including but not limited to, the pipeline, across, under, over or within the highway or in proximity to municipal utilities other than liabilities, damages, claims, suits and actions resulting the gross negligence or wilful misconduct of the Municipality.

7. Notwithstanding anything else in this Order, the Municipality shall not be liable to any person in any way for special, incidental, indirect, consequential, exemplary or punitive

damages, including damages for pure economic loss or for failure to realize expected profits, howsoever caused or contributed to.

Requirement to Enter into Agreements with Affected Municipalities Prior to Construction

8. A Condition(s) requiring Trans Mountain to enter into a Highway Licence and Crossing Agreement(s) related to impacted utilities including highway occupation and crossings with each affected municipality and affected Provincial highway authorities prior to construction, failing which terms shall be imposed by the NEB.

Conditions Apply to Entire Expanded Pipeline System: To Both Existing and Proposed Pipelines

9. The above conditions 1 to 8 inclusive shall apply to the entire expanded pipeline system being both the existing and proposed pipelines.

APPENDIX "B"

Hearing Order OH-001-2014
Board File: OF-Fac-Oil-T260-2013-03 02

IN THE MATTER OF the *National Energy Board Act*, RSC 1985, c. N-7, as amended, and the regulations made thereunder;

AND IN THE MATTER OF THE *Canadian Environmental Assessment Act*, 2012, S.C., c. 19, s. 52, as amended, and the Regulations made thereunder;

AND IN THE MATTER OF an application by Trans Mountain Pipeline ULC as General Partner of Trans Mountain Pipeline L.P. (collectively "Trans Mountain") for a Certificate of Public Convenience and Necessity and other related approvals pursuant to Part III of the *National Energy Board Act*.

WRITTEN ARGUMENT-IN-CHIEF

OF THE CITY OF SURREY

JANUARY 12, 2016

To: The Secretary
National Energy Board
517 Tenth Avenue SW
Calgary Alberta T2R 0A8

From: Anthony Capuccinello
Assistant City Solicitor
City of Surrey
c/o Legal Services Division
13450 - 104th Avenue
Surrey BC V3T 1V8

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WRITTEN ARGUMENT-IN-CHIEF OF THE CITY OF SURREY

1.0 Resolutions Adopted by the Council of the City of Surrey

The Council of the City of Surrey has resolved that:

(i) The City of Surrey in principle does not support any expansion of Kinder Morgan's Trans Mountain pipeline system through the City of Surrey that negatively impacts the City of Surrey;

(ii) Legal counsel and staff representing the City of Surrey at the NEB Hearing request the NEB to impose terms and conditions on any approval of Trans Mountain's Expansion Project that it may grant that require Kinder Morgan/Trans Mountain to eliminate, or minimize and mitigate the negative impacts of the Project on the City of Surrey; and

(iii) Legal counsel and staff representing the City of Surrey at the NEB Hearing request the NEB to require Kinder Morgan/Trans Mountain to decommission and remove that portion of the existing pipeline in Surrey as a condition of any approval it may grant.

2.0 Utility Impact Issues including Highway Occupation and Highway Crossing Issues

Evidence Relied Upon:

Affidavits and Reports

(i) Exhibits C76-9-14 (A4L9T7), C76-9-15 (A4L9T8), C76-9-16 (A4L9T9) and C76-9-17 (A4L9U0), Affidavit of Larry Martin sworn May 25, 2015 including all exhibits thereto;

(ii) Exhibits C76-10-6 (A4Q0Q0), C76-10-7 (A4Q0Q1) and C76-10-8 (A4Q0Q3), Report entitled "*Cost Impacts of the TransMountain Expansion on Lower Mainland Municipalities*" dated May 2015 and prepared by Larry Martin, P. Eng.;

(iii) Exhibits C76-9-23 (A4L9U6) and C76-9-24 (A4L9U7) Affidavit of Kenneth D. Zondervan sworn May 26, 2015 including all exhibits thereto;

(iv) Exhibit C76-16-2 (A4W0I1) Affidavit #3 of Kenneth D. Zondervan sworn December 1, 2015;

(v) Exhibit C76-14-5 (A4S3C6) – Affidavit #3 of Larry Martin sworn on July 29, 2015;

(vi) Exhibit C76-14-3 (A4S3C4) - Affidavit of Kenneth D. Zondervan sworn July 27, 2015;

Information Requests and Responses to Information Requests

(vii) Exhibit C76-11-1 (A3W6E6-A4Q0V5) City of Surrey Information Request No. 1 filed May 7, 2014 (previously filed as C76-1-1);

(viii) Exhibit C76-11-2 (A3X6A5_-_A4Q0V6) Trans Mountain Response to City of Surrey Information Request No. 1 filed June 4, 2014 (previously filed as B52-1 by Trans Mountain);

(ix) Exhibit C76-11-3 (A3Z4S8_-_A4Q0V7) Trans Mountain Follow up Response to City of Surrey Information Request No. 1 filed July 21, 2014 (previously filed as B239-2);

(x) Exhibit C76-11-4 (A4D3G2(2) - A4Q0V8) Trans Mountain Follow up Response to National Energy Board Ruling 33 filed October 17, 2014, pages 178 to 181 with respect to City of Surrey Information Requests (previously filed as B280-3);

(xi) Exhibit C76-11-5 (A4G5L6_-_A4Q0V9) City of Surrey Information Request No. 2 filed January 15, 2015 (previously filed as C76-6-2);

(xii) Exhibit C76-11-6 (A4H8I8_-_A4Q0W0) Trans Mountain Response to City of Surrey Information Request No. 2 filed February 18, 2015 (previously filed as B314-45).

2.1 Jurisdiction of NEB to Impose Conditions related to Utilities including Highway Occupation and Highway Crossing Issues

1. The jurisdiction of the NEB to impose conditions related to impacted utilities including highway occupation and highway crossing issues is set out in s. 108 of the *National Energy Board Act*, RSC 1985, c. N-7. This is in addition to the broad and plenary jurisdiction set out in s. 52 of the *National Energy Board Act*:

> *Section 108*
>
> *Construction - utility*
>
> *108. (1) Subject to subsection (4),* ***no company shall construct a pipeline that passes on, over, along or under a utility*** *unless a certificate has been issued, or an order has been made under section 58, in respect of the pipeline,* ***and***
>
> *(a)* ***the certificate or order contains a term or condition relating to that utility****;*
>
> *(b) the company has been granted leave under subsection (2); or*
>
> *(c) the company is constructing the pipeline in circumstances specified in an order or regulation made under subsection (4).*
>
> *Authority to grant leave*
>
> *(2) The Board may, by order, on application, grant a company leave to construct a pipeline that passes on, over, along or under a utility. It may require from the applicant any plans, profiles and other information that it considers necessary to deal with the application.*
>
> *Terms and conditions*
>
> *(3)* ***The leave may be granted in whole or in part and be subject to terms and conditions****.*
>
> *Circumstances*
>
> *(4) The Board may make orders or regulations specifying circumstances for the purposes of para-graph (1)(c).*

Leave in emergency cases

(5) The Board may grant leave under subsection (2) after construction of the proposed work has commenced if is satisfied that the work was urgently required and, before the commencement of construction, it was notified of the company's intention to proceed with the proposed work.

Definition of "utility"

*(6) In this section, **"utility" means a highway**, an irrigation ditch, a publicly owned or operated drainage system, sewer or dike, an underground telegraph or telephone line or a line for the trans-mission of hydrocarbons, electricity or any other substance.*

Book of Authorities, Tab 6

2.2 Leave of NEB is required to construct facilities across pipelines whether located in highway or not

2. Except in those limited circumstances prescribed in the *National Energy Board Pipeline Crossing Regulations*, Part I (SOR/88-528), after a pipeline has been constructed on, over, along or across a utility which includes a highway, leave must be obtained from the NEB pursuant to s. 112 of the *National Energy Board Act* prior to constructing a facility across a pipeline. The process for seeking leave is set out in the *National Energy Board Pipeline Crossing Regulations*, Part I (SOR/88-528) and in the *National Energy Board Pipeline Crossing Regulations*, Part II (SOR/88-529).

Construction of facilities across pipelines

*112. (1) Subject to subsection (5), **no person shall, unless leave is first obtained from the Board, construct a facility across, on, along or under a pipeline or excavate using power-operated equipment or explosives within thirty metres of a pipeline.***

Use of vehicles and mobile equipment

(2) Subject to subsection (5), no person shall operate a vehicle or mobile equipment across a pipeline unless leave is first obtained from the company or the vehicle or mobile equipment is operated within the travelled portion of a highway or public road.

Terms and conditions

(3) The Board may, on granting an application for leave under this section, impose such terms and conditions as it considers proper.

Directions

(4) The Board may direct the owner of a facility constructed across, on, along or under a pipeline in contravention of this Act or the Board's orders or regulations to do such things as the Board considers necessary for the safety or security of the pipeline and may, if the Board considers that the facility may impair the safety or security of the operation of the pipeline, direct the owner to reconstruct, alter or remove the facility.

Exception

(5) The Board may make orders or regulations governing

(a) the design, construction, operation and abandonment of facilities constructed across, on, along or under pipelines;

(b) the measures to be taken by any person in relation to

(i) the construction of facilities across, on, along or under pipelines,

(ii) the construction of pipelines across, on, along or under facilities, other than railways, and

(iii) excavations within thirty metres of a pipeline; and

(c) the circumstances in which or conditions under which leave under subsection (1) or (2) is not necessary.

Temporary prohibition on excavating

(5.1) Without limiting the generality of paragraph (5)(c), orders or regulations made under that paragraph may provide for the prohibiting of excavations in an area situated in the vicinity of a pipe-line, which area may extend beyond thirty metres of the pipeline, during the period that starts when a request is made to a pipeline company to locate its pipeline and ends

(a) at the end of the third working day after the day on which the request is made; or

(b) at any later time that is agreed to between the pipeline company and the person making the request.

Exemptions

(6) The Board may, by order made on any terms and conditions that the Board considers appropriate, exempt any person from the application of an order or regulation made under subsection (5).

Inspection officers

(7) The provisions of sections 49 to 51.3 relating to inspection officers apply for the purpose of ensuring compliance with orders and regulations made under subsection (5).

Offence

(8) Every person who contravenes subsection (1) or (2), a direction made under subsection (4) or an order or regulation made under subsection (5) is guilty of an offence and liable

(a) on summary conviction, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year or to both; or

(b) on conviction on indictment, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding five years or to both.

Application of subsections 121(2) to (5)

(9) Subsections 121(2) to (5) apply, with any modifications that the circumstances require, to an of-fence under subsection (8).

Book of Authorities, Tab 6

3. For the purposes of s. 112 of the *National Energy Board Act* and the associated National Energy Board Pipeline Crossing Regulations, Part I and Part II, "facility" is defined in the *National Energy Board Pipeline Crossing Regulations,* Part I (SOR/88-528)*:*

"facility" means

(*a*) any structure that is constructed or placed on the right-of-way of a pipeline, and
(*b*) any highway, private road, railway, irrigation ditch, drain, drainage system, sewer, dike, telegraph, telephone line or line for the transmission of hydrocarbons, power or any other substance that is or is to be carried across, along, upon or under any pipeline;

Book of Authorities, Tab 7

2.3 Limited prescribed circumstances where leave of the NEB is not required under s. 112 of the Act prior to construction of a facility

4. The *National Energy Board Pipeline Crossing Regulations,* Part I (SOR/88-528) provides that leave is not required under certain limited circumstances. These limited circumstances are set out in s. 3, 4, 5, 6 and 7 of said Regulation and, except in cases involving "*overhead lines*", require either **written permission or consent of the pipeline company and acceptance of the pipeline company's terms including compliance with instructions** (s. 4(b), s.6(b)) and s.7), or involve activities (other than the construction or installation of a "*facility"*) that disturbs less than three tenths of a meter of ground below the initial grade and do not reduce the total cover over the pipe (s. 3(b)).

> "overhead line" means an above-ground telephone, telegraph, telecommunication or electric power line or any combination thereof;
>
> **4.** Leave of the Board is not required for any construction or installation of a facility, other than the installation of an overhead line referred to in section 5, if
>
> (*b*) the facility owner obtains written permission from the pipeline company prior to the construction or installation of the facility and accepts any conditions set out in the permission;
>
> **6.** Leave of the Board is not required for an excavation, other than an excavation referred to in section 7, if
>
> (*b*) the excavator obtains written permission from the pipeline company prior to the excavation and accepts any conditions set out in the permission;
>
> **7.** Leave of the Board is not required for an excavation required for the maintenance of an existing facility if the circumstances and conditions set out in paragraphs 6(*f*) to (*p*) are met.

Book of Authorities, Tab 7

2.4 Non-Interference with utilities which include highways

5. In addition to the jurisdiction to approve pipelines being constructed within or across highways and the provisions in the Regulations related to crossing pipelines, s. 22 of the

National Energy Board Onshore Pipeline Regulations (SOR/99-294) also provides that when a pipeline is constructed across a utility (which includes a highway) the pipeline company shall ensure that there is no undue interference with the use of the utility.

> CROSSING A UTILITY OR PRIVATE ROAD
>
> **22.** When a pipeline is constructed across a utility or private road, **the company constructing the pipeline shall ensure that there is no undue interference with the use of the utility** or road during construction.

Book of Authorities, Tab 8

2.5 Make No Mistake - Municipalities and others whose utilities are impacted and who have jurisdiction over highways will incur present and future costs as a consequence of the proposed pipeline impacting their utilities and as a consequence of the proposed pipeline occupying or crossing highways

6. Municipalities and others having jurisdiction over highways will incur present and future costs as a consequence of the proposed pipeline impacting their utilities and as a consequence of the proposed pipeline occupying or crossing highways.

2.5.1 These costs are substantial and have been quantified by an expert jointly retained by several municipalities in the Lower Mainland of British Columbia;

7. These costs are substantial and have been quantified in a report prepared by Larry Martin, Professional Engineer and Senior Engineer at Associated Engineering (B.C.) Ltd. who was jointly retained by several municipalities in the Lower Mainland of British Columbia.

8. The participating municipalities include **the City of Surrey, the City of Burnaby, the City of Abbotsford, the City of Coquitlam and the Township of Langley**, all of which are intervenors in this proceeding.

9. The report is entitled "*Cost Impacts of the TransMountain Expansion on Lower Mainland Municipalities*" dated May 2015 and for the purposes of this Argument is referred to as the "Associated Engineering Cost Impacts Report".

10. The Associated Engineering Cost Impacts Report was separately filed as evidence by the City of Surrey as Exhibit Nos. C76-10-6 (A4Q0Q0), C76-10-7 (A4Q0Q1) and C76-10-8 (A4Q0Q3) and has been filed as evidence by each of the participating municipalities. The Associated Engineering Cost Impacts Report also forms part of the Affidavit of Larry Martin sworn May 25, 2015 which was filed as Exhibits C76-9-14 (A4L9T7), C76-9-15 (A4L9T8), C76-9-16 (A4L9T9) and C76-9-17 (A4L9U0).

11. The objective and terms of reference of the Associated Engineering Cost Impacts Report are set out on p. 1-1 of the report:

> **1 Introduction**
>
> The Trans Mountain Pipeline (TMP), owned and operated by Kinder Morgan (KM), carries petrochemicals from Alberta to the Pacific west coast. In 2013, KM applied to the National Energy Board (NEB) for approval to construct an expansion to the Trans Mountain Pipeline system.
>
> The existing TMP was constructed in the early 1950's, and the communities along its route have grown and developed around it. The proposed expansion includes the installation of a 900 mm diameter pipeline, the Trans Mountain Expansion (TMX). The pipeline path will follow the existing pipeline for approximately 70% of its length however, in more urban areas, KM has generally proposed a new route for the expansion due to the urbanization around the TMP.
>
> While KM has acknowledged that there will be a disruption to municipal infrastructure during construction of the proposed TMX pipeline, there has not yet been acknowledgement of the long term cost impacts to municipalities for operation, maintenance and construction of municipal infrastructure around the proposed expansion.
>
> **1.1 STUDY OBJECTIVE**
>
> In October 2014, the cities of Surrey, Burnaby, Coquitlam, Abbotsford and the Township of Langley retained Associated Engineering to complete an assessment of additional costs incurred by each municipality to operate, maintain and construct municipal infrastructure impacted by KM's TMP and TMX. The

objective of the work was to:

1. Identify whether or not municipalities will incur additional costs to develop, maintain and construct their own municipal infrastructure as a direct and/or indirect result of the proposed TMX.

2. Quantify the present and estimated future additional costs that each subject municipality would incur as a result of the proposed pipeline operating within the vicinity of existing and future municipal infrastructure.

3. Suggest mitigation opportunities KM could undertake in respect of the proposed TMX to reduce future costs that would otherwise be incurred by the subject municipalities.

(Exhibits C76-9-14 (A4L9T7), C76-9-15 (A4L9T8), C76-9-16 (A4L9T9) and C76-9-17 (A4L9U0), Affidavit of Larry Martin sworn May 25th, 2015 including all exhibits thereto)

(Exhibits C76-10-6 (A4Q0Q0), C76-10-7 (A4Q0Q1) and C76-10-8 (A4Q0Q3), Report entitled "*Cost Impacts of the TransMountain Expansion on Lower Mainland Municipalities*" dated May 2015 and prepared by Larry Martin, P. Eng.)

12. The Associated Engineering Cost Impacts Report concluded that the projected additional costs that the subject municipalities will incur as a result of the proposed pipeline projected over 50 years exceeds **$93,000,000 (NINETY-THREE MILLION DOLLARS).** This is summarized on p. i in the Executive Summary and in Table 1-2 on p. iv of the report.

Executive Summary

In October 2014, the cities of Surrey, Burnaby, Coquitlam, Abbotsford and the Township of Langley retained Associated Engineering to complete an assessment of additional costs incurred by each municipality to operate, maintain and construct municipal infrastructure impacted by Kinder Morgan's (KM) existing and proposed TransMountain Pipelines (TMP and TMX, respectively). The objective of the work was to:

1. Identify whether or not municipalities will incur additional costs to develop, maintain and construct their own municipal infrastructure as a direct and/or indirect result of the proposed TMX.

2. Quantify the present and estimated future additional costs that each subject municipality would incur as a result of the proposed pipeline operating within the

vicinity of existing and future municipal infrastructure.

3. Suggest mitigation opportunities KM could undertake in respect of the proposed TMX to reduce future costs that would otherwise be incurred by the subject municipalities.

The projected additional costs that the subject municipalities will incur as a result of the proposed TMX projected over 50 years exceeds $93,000,000 as set out in Table 1-2.

Table 1-2
Summary of Additional Costs to be incurred by the Municipalities over 50 years

Municipality	TMX	Future Expected Projects	Totals
Burnaby	$11,700,000	$5,900,000	$17,600,000
Coquitlam	$21,600,000	$6,900,000	$28,500,000
Surrey	$16,000,000	$1,100,000	$17,100,000
Township of Langley	$12,800,000	N/A	$12,800,000
Abbotsford	$16,800,000	$200,000	$17,000,000
Totals	**$78,900,000**	**$14,100,000**	**$93,000,000**

(Exhibits C76-9-14 (A4L9T7), C76-9-15 (A4L9T8), C76-9-16 (A4L9T9) and C76-9-17 (A4L9U0), Affidavit of Larry Martin sworn May 25th, 2015 including all exhibits thereto)

(Exhibits C76-10-6 (A4Q0Q0), C76-10-7 (A4Q0Q1) and C76-10-8 (A4Q0Q3), Report entitled "*Cost Impacts of the TransMountain Expansion on Lower Mainland Municipalities*" dated May 2015 and prepared by Larry Martin, P. Eng.)

13. The Associated Engineering Cost Impacts Report in Table 1-3 on p. v provides a summary of some of the likely future sources of additional costs.

Table 1-3
Estimated Additional Cost for Future Construction Projects

Proposed Project	Estimated Total Additional Cost
Small Water Main in Urban Setting • perpendicular crossing of TMX • TMX does not require relocation	$41,000
Small Water Main in Urban Setting • perpendicular crossing of TMX • TMX must be raised/lowered due to water main alignment, for a length of 20 m	$ 371,000
Storm Trunk Main in Urban Setting • perpendicular crossing of TMX • TMX does not require relocation	$ 53,000
Storm Trunk Main in Urban Setting • perpendicular crossing of TMX • additional infrastructure required to modify storm trunk alignment (pump house, retention pond, etc.	$ 4,917,000
2 Lane Road Widening (to 4 lane) in Urban Setting • perpendicular crossing of TMX • TMX does not require relocation	$ 112,000
2 Lane Road Widening (to 4 lane) in Urban Setting • perpendicular crossing of TMX • TMX requires lowering	$ 706,000
2 Lane Road Widening (to 4 lane) in Urban Setting • TMX runs parallel to existing road and will be covered by road surface • TMX requires lowering and re-bedding for 1000 m of pipe	$ 4,349,000
Underpass/Overpass Construction in Urban Setting • perpendicular crossing of TMX • TMX requires lowering	$ 1,490,000

(Exhibits C76-9-14 (A4L9T7), C76-9-15 (A4L9T8), C76-9-16 (A4L9T9) and C76-9-17 (A4L9U0), Affidavit of Larry Martin sworn May 25th, 2015 including all exhibits thereto)

(Exhibits C76-10-6 (A4Q0Q0), C76-10-7 (A4Q0Q1) and C76-10-8 (A4Q0Q3), Report entitled "*Cost Impacts of the TransMountain Expansion on Lower Mainland Municipalities*" dated May 2015 and prepared by Larry Martin, P. Eng.)

14. On p. vi of the Associated Engineering Cost Impacts Report the report describes the results as demonstrating the following:

> The results in Tables 1-1 through 1-3 demonstrate:
>
> - The presence of the existing TransMountain Pipeline (TMP) results in $5.0M annually of additional costs to the five Lower Mainland municipalities to operate, maintain and replace infrastructure they already have in place:
>
> - $577K (including administration costs and contingencies) of this are additional costs for simple routine maintenance and repair work;
>
> - $4.4M of additional funds are spent annually replacing of rehabilitating municipal assets to KM permit standards.
>
> - In the next 50 years, the subject Lower Mainland municipalities will spend an estimated $221M in additional costs when replacing their infrastructure at the end of its useful life as a result of the TMP
>
> - The presence of the future TransMountain Expansion Pipeline (TMX) will result in $1.6M of additional annual costs to the five Lower Mainland municipalities to operate, maintain and replace existing infrastructure;
>
> - $350K (including Administration and contingencies) of this are additional costs for routine maintenance and repair work around the TMP;
>
> - $1.3M of additional funds will be needed to replace or rehabilitate aging municipal assets.
>
> - In the next 50 years, the subject Lower Mainland municipalities will spend an estimated $61.4M in additional costs to replace their infrastructure at the end of its useful life as a result of the TMX.
>
> - Costs to municipalities will increase as new infrastructure is constructed around the TMX.
>
> The subject Lower Mainland municipalities will inevitably expand as population grows over the next 50 years. These municipalities will require new and higher capacity infrastructure to meet these needs. Municipalities are already considering projects that either move or avoid the existing TMP, and these costs will be significant. The municipalities do not have 50 year plans, and therefore we have estimated that each municipality will need to spend money to move or accommodate the proposed TMX into the future. These future cost impacts are derived using values in Table 1-3 and summarized by municipality in Table 1-2.

(Exhibits C76-9-14 (A4L9T7), C76-9-15 (A4L9T8), C76-9-16 (A4L9T9) and C76-9-17 (A4L9U0), Affidavit of Larry Martin sworn May 25th, 2015 including all exhibits thereto)

(Exhibits C76-10-6 (A4Q0Q0), C76-10-7 (A4Q0Q1) and C76-10-8 (A4Q0Q3), Report entitled "*Cost Impacts of the TransMountain Expansion on Lower Mainland Municipalities*" dated May 2015 and prepared by Larry Martin, P. Eng.)

2.5.2 Surrey has first-hand experience of these costs and has filed evidence of such through Exhibits C76-9-23 (A4L9U6) and C76-9-24 (A4L9U7) being the Affidavit of Kenneth D. Zondervan

15. In further support of the findings of the Associated Engineering Cost Impacts Report, the City of Surrey has filed affidavit evidence (through the Affidavits of Kenneth D. Zondervan sworn May 26, 2015 and filed as Exhibits C76-9-23 and C76-9-24 providing evidence of recent examples of actual projects in the City of Surrey where the City of Surrey incurred substantial costs as a result of Kinder Morgan's/Trans Mountain's existing pipeline which traverses Surrey.

16. These additional costs related to the 156 Street Underpass of Highway 1 Project, the Trans Mountain Support Structure Reinforcement Project and the South Fraser Perimeter Road Project and were substantial ranging in magnitude from **$387,120.42 to $1,767,682.59**.

2.5.3 While acknowledging that municipalities will incur present and future costs, Kinder Morgan/Trans Mountain refuses to reimburse or indemnify municipalities for these costs

17. While acknowledging that municipalities will incur present and future costs, Kinder Morgan/Trans Mountain refuses to reimburse or indemnify municipalities for these costs. This was confirmed by Trans Mountain in its response to the City of Surrey's Information Requests No. 1 filed as evidence in this proceeding.

Request:

Present and future costs arising as a consequence of the pipeline occupying or crossing highways/roads

a) Please confirm whether or not Trans Mountain will agree to pay all present and future costs that will be incurred by the City of Surrey, other municipalities and the Province as a result of the location of: (i) the proposed Line 2 pipeline in highways or roads under their respective jurisdiction, or (ii) as a result of any future highway/road construction, widening or improvement project that occurs over or in the vicinity of the pipeline that might disturb the pipeline and that occurs within the existing or future boundaries of said highway/road, including, but not limited to:

(i) costs to realign, raise or lower the pipeline;

(ii) costs to excavate material from around the pipeline;

(iii) costs to add casing or other appurtenances for the protection of the pipeline;

(iv) costs of all pipeline work required as a result of the construction, widening or carrying of highway or road across the pipeline which might disturb the pipeline or which necessitates realigning, raising or lowering the pipeline or excavating material from, over or around it, or adding casings or other appurtenances deemed necessary by Trans Mountain for the protection of the pipeline; and

(v) costs necessary to accommodate any future widening or improvement of the highway or road that occurs over or in the vicinity of the pipeline;

b) if Trans Mountain is not prepared to agree to pay all or some of the present and future costs described in paragraph a) above, then please identify which costs Trans Mountain is not prepared to pay and explain in detail why not. Please also identify and describe in detail which of the present and future costs described in paragraph a) Trans Mountain is prepared to agree to pay and under what circumstances it would agree to pay them;

c) having regard to section 108 of the *National Energy Board Act* and the jurisdiction of the NEB, please confirm whether or not Trans Mountain is prepared to consent to including as a condition or term of any certificate or CPCN issued approving Trans Mountain's Application that Trans Mountain shall pay all or some of the costs described in paragraph (a) above, and if not, please provide a detailed explanation as to why not;

Response:

a) Trans Mountain believes that historical practice provides a reasonable approach respecting cost sharing and cost recovery for past, current and future infrastructure development. In general, Trans Mountain believes it is reasonable for the project to reimburse municipalities for any modifications to their existing infrastructure required to accommodate the Project. In the planning and design of the Project, Trans Mountain is willing to work with municipalities to accommodate reasonably foreseeable plans for municipal infrastructure including roads and utilities in the design and placement of the pipeline. **Once the Project is in operation, any subsequent design and development of municipal infrastructure would be completed with the pipeline in place and should modifications or relocations of the pipeline be required to accommodate new municipal infrastructure, Trans Mountain would look to the municipality for reimbursement.**

Trans Mountain is committed to working cooperatively with municipalities in the development of the Project. More specifically, Trans Mountain is prepared to:

- work with municipalities in the planning and engineering, and detailed design to accommodate future growth and minimize potential future impacts to existing infrastructure;
- pay for reasonable costs to inspect, relocate if needed, and protect their infrastructure during pipeline construction;
- work with the municipalities to fulfill federal requirements for pipeline protection including ground disturbance measures imbedded in the NEB crossing regulations; and
- construct the Project, and operate it and the existing pipeline in accordance with practices and procedures that are consistent with all other utility service and development infrastructure.

There are established rules and protocols that must be met for the protection of the pipeline and municipal infrastructure, including formalized crossing agreements between infrastructure owners. TMPL expects these rules and protocols will not be different than the processes currently used for the protection of the existing operating pipeline and for municipal development in proximity and directly over/under the pipeline.

With the installation of the proposed pipeline, all reasonable costs associated with construction and associated infrastructure changes would be borne by the project, but costs for operations following installation would be in accordance with currently accepted practice and formalized in crossing agreements between infrastructure owners.

b) Please see response to City Surrey IR No. 1.3a.

c) Trans Mountain believes that any agreement between the City of Surrey and the company are private contractual arrangements and not the subject of a condition to the CPCN.

(Exhibit C76-11-1 (A3W6E6-A4Q0V5)- City of Surrey Information Request No. 1 filed May 7, 2014 (previously filed as C76-1-1)**)**

(Exhibit C76-11-2 (A3X6A5_-_A4Q0V6) - Response to City of Surrey Information Request No. 1 filed June 4, 2014 (previously filed as B52-1))

18. In addition to the evidence set out in Trans Mountain's Response to the City of Surrey's Information Request No. 1, the Affidavits of Kenneth D. Zondervan filed by the City of Surrey as Exhibits C76-9-23, C76-9-24 and C76-16-2, provides further supporting evidence.

19. As a Professional Engineer and as the former Manager of the Design & Construction Section of the City of Surrey, Mr. Kenneth D. Zondervan's sworn evidence not only deposes to the significant costs, but also to the fact that Kinder Morgan/Trans Mountain refuses to undertake pipeline work or grant permission to cross its pipeline unless the City agrees in advance to pay all these costs.

The 156 Street Underpass of Highway 1 Project

9. The 156 Street Underpass of Highway 1 Project required and involved lowering of Kinder Morgan Canada Inc.'s existing Trans Mountain pipeline which crosses 156 Street in Surrey and which in these proceedings before the National Energy Board has been referred to as the existing Trans Mountain Pipeline or "TMP".

10. The existing Trans Mountain pipeline crosses 156th Street on the north side of Highway No. 1. Attached as Exhibit "1 " to this my Affidavit is a copy of a map which shows the location of the existing Trans Mountain pipeline crossing of 156th Street in Surrey.

11. Construction of the 156th Street underpass of Highway No. 1 required that the existing Trans Mountain pipeline be lowered across 156 Street to allow 156 Street to pass under Highway No. 1.

12. ***Unless Surrey agreed to the terms of Kinder Morgan Canada Inc.'s Facility Crossing Agreement, Kinder Morgan Canada Inc. would not undertake the required pipeline lowering to accommodate the 156 Street Underpass of Highway 1 Project.***

13. ***Kinder Morgan Canada Inc. would only agree to lower the affected portion of the existing Trans Mountain pipeline if Surrey agreed to pay all associated costs as set out in the Facility Crossing Agreement.*** *Attached as Exhibit "2" to this my Affidavit is a copy of the Facility Crossing Agreement dated April 02, 2007 that Kinder Morgan Canada Inc. required the City of Surrey to sign before Surrey proceeded with the 156 Street Underpass of Highway 1 Project.*

14. ***The actual costs that Kinder Morgan Canada Inc. invoiced Surrey and that Surrey paid totaled $1,767,682.59.*** *Attached collectively as Exhibit "3" to this my Affidavit are copies of the Kinder Morgan Canada Inc. invoices that were paid by the City of Surrey.*

The Trans Mountain Support Structure Reinforcement Project

15. The existing Trans Mountain pipeline crossing under King Road, near 139th Street in Surrey is a suspended-form timber piled support structure. The structure was constructed by the City of Surrey when King Road was established, to minimize pipe settlement, as there was an existing Metro Vancouver concrete sanitary sewer siphon located below the existing Trans Mountain pipeline and adjacent to King Road. Attached collectively as Exhibit "4" to this my Affidavit are copies of extracts from a report prepared by Associated Engineering Ltd. in August 2012 which identify the structure.

16. In or about 2011, significant settlement was observed of the existing Trans Mountain pipeline resulting from the failure of several support structure brackets. ***Kinder Morgan Canada Inc. required that Surrey pay all costs associated with reinstating the existing support structure totaling approximately $387,120.42. These additional costs could have been avoided if the existing Trans Mountain pipeline had been designed to accommodate a future road above it and future utilities in proximity to it.*** *Attached collectively as Exhibit "5" to this my Affidavit are invoices related to reinstating the existing Trans Mountain support structure that were paid by the City of Surrey.*

The South Fraser Perimeter Road Project

17. During design discussions of the South Fraser Perimeter Road in Surrey, ***the City of Surrey was advised by the design engineering consultant that the existing Trans Mountain pipeline crossing of the South Fraser Perimeter Road***

required the construction of a bridge structure over the pipeline and approximately an additional one million dollars ($1,000,000.00) of lightweight fill and associated design costs to avoid settlement on the pipe.

(Exhibits C76-9-23 (A4L9U6) and C76-9-24 (A4L9U7) - Affidavit of Kenneth D. Zondervan sworn May 26, 2015)

20. Attached to Exhibits C76-9-23 and C76-9-24 being the Affidavit of Kenneth D. Zondervan sworn May 26, 2015, are letters and agreements from Kinder Morgan/Trans Mountain in respect of the projects in the City of Surrey setting out these demands and other demands which are described elsewhere in these submissions. These letters and agreements appear as Exhibits 2, 8, 14, 20, 24 and 28 to Kenneth D. Zondervan's Affidavit.

21. Having regard to the reality of highway infrastructure projects and the potential costs of delay which include claims from third parties, municipalities are left with no option but to agree to these terms.

22. The Affidavit of Kenneth D. Zondervan provides direct uncontested evidence of this.

20. Unless Surrey agrees to pay all pipeline related costs that would be incurred to accommodate a highway infrastructure project, then Surrey projects would be delayed and Surrey would not be able to proceed with its projects without incurring costs of litigation and without facing potential delay claims by third party contractors.

21. In the case of significant highway infrastructure projects, it is not unusual for delay claims resulting from the delay of third party utility works being altered and/or relocated, to be quantified in the millions of dollars.

(Exhibits C76-9-23 (A4L9U6) and C76-9-24 (A4L9U7) - Affidavit of Kenneth D. Zondervan sworn May 26, 2015)

2.5.4 Kinder Morgan/Trans Mountain does not have agreements in place related to impacted utilities or highway occupation and crossings for its existing pipeline

23. Trans Mountain in its Application has stated that it would enter into agreements with municipalities either in the form of permits or licence agreements. This is set out in document A3S0R0, Volume 2 – Project Overview, Economics and General Information, Section 5.0 Land

Relations, Rights and Acquisitions, Section 5.3 Land Rights, Section 5.4 Lands Acquisition Process, Section 5.4.1 Process, Section 5.5 Land Acquisition Agreements (PDF pages 2-59 to 2-62, PDF pages 2-64 to 2-70).

24. This was additionally confirmed in Trans Mountain's Response to Information Request No. 1 of the City of Surrey filed as Exhibit C76-11-2 .

Request:

Terms of licence agreements and permits existing and contemplated in the City of Surrey

a) please provide a copy(ies) of the proposed form(s) of licence agreement(s) that Trans Mountain contemplates entering into with the Province and with the City of Surrey and with other municipalities in BC related to the proposed Line 2 pipeline occupying highways or roads or occupying the South Fraser Perimeter Road corridor or occupying the Golden Ears Connector corridor;

b) please confirm whether or not Trans Mountain has existing agreements and permits in relation to existing highway or road crossings in the City of Surrey by the existing Trans Mountain pipeline (whether those highways or roads are under the jurisdiction of City of Surrey or the Province). If so, please provide copies of all such agreements and permits and please also identify the dates of each;

c) please provide a copy(ies) of the proposed licence agreement(s) and permits that Trans Mountain contemplates entering into with the Province and with the City of Surrey and with other municipalities in relation to proposed highway and road crossings by the proposed Line 2 pipeline in the City of Surrey;

d) having regard to s. 112 of the National Energy Board Act and the jurisdiction of the NEB, please provide a copy of the form of permit that Trans Mountain contemplates the City of Surrey and other municipalities in BC would require to obtain from Trans Mountain before performing any work in existing highway or road to be occupied by the proposed Line 2 pipeline;

e) please confirm whether or not Trans Mountain is prepared to pay the City of Surrey and other municipalities in BC compensation in the form of an annual fee for crossing and occupying highways or roads under municipal jurisdiction and if so, an explanation of how the compensation would be determined and if not, an explanation as to why not;

f) please provide a detailed summary of the consultations made and the

findings regarding the statutory process Trans Mountain expects to follow in attempting to acquire land tenure in dedicated park. Please also provide an explanation of how compensation payable to the authority having ownership of the dedicated park will be determined;

Response:

a) **Currently, Trans Mountain has no licenses or other permits with municipalities for the existing federally regulated Trans Mountain Pipeline system.** However, Trans Mountain is aware that the City of Surrey and other municipalities are interested in negotiating such agreements, and has begun working on a form of protocol agreement to reasonably address any issues of concern to the municipalities. There has been one informal meeting held to date on May 16, 2014 between Trans Mountain and the City of Surrey to discuss this issue. Trans Mountain would welcome the opportunity to discuss this issue further with the City of Surrey and work towards a mutually acceptable protocol agreement.

b) Please see response to City Surrey IR No. 1.30.

c) Please see response to City Surrey IR No. 1.30.

d) Please see the response to City Surrey IR No. 1.30. Trans Mountain anticipates the form of permit for crossings of the pipeline would be a point of discussion during engagement around development of overall crossing agreements.

e) Trans Mountain does not anticipate annual fees for the Project. Trans Mountain anticipates that discussion regarding compensation would be included within the overall discussion of crossing agreements.

Trans Mountain believes that historical practice provides a reasonable approach respecting cost sharing and cost recovery for past, current and future infrastructure development. In general, Trans Mountain believes it is reasonable for the project to reimburse municipalities for any modifications to their existing infrastructure required to accommodate the Project. In the planning and design of the Project, Trans Mountain is willing to work with municipalities to accommodate reasonably foreseeable plans for municipal infrastructure including roads and utilities in the design and placement of the pipeline. Once the Project is in place, any subsequent design and development of municipal infrastructure would be completed with the pipeline in place and should modifications or relocations of the pipeline be required to accommodate new municipal infrastructure, Trans Mountain would look to the municipality for reimbursement.

Trans Mountain is committed to working cooperatively with municipalities in the development of the Project. More specifically, Trans Mountain is prepared to:

- work with municipalities in the planning and engineering, and detailed design to accommodate future growth and minimize potential future impacts to existing infrastructure;
- pay for reasonable costs to inspect, relocate if needed, and protect their infrastructure during pipeline construction;
- work with the municipalities to fulfill federal requirements for pipeline protection including ground disturbance measures imbedded in the NEB crossing regulations; and
- construct the Project, and operate it and the existing pipeline in accordance with practices and procedures that are consistent with all other utility service and development infrastructure.
- There are established rules and protocols that must be met for the protection of the pipeline and municipal infrastructure, including formalized crossing agreements between infrastructure owners. Trans Mountain expects these rules and protocols will not be different than the processes currently used for the protection of the existing operating pipeline and for municipal development in proximity and directly over/under the pipeline.

With the installation of the proposed pipeline, all reasonable costs associated with construction and associated infrastructure changes would be borne by the Project, but costs for operations following installation would be in accordance with currently accepted practice and formalized in crossing agreements between infrastructure owner.

f) Legislative requirements respecting land acquisition for the Trans Mountain Expansion Project are set out within the NEB Act. Those provisions of the NEB Act apply specifically to directly affected parties and include:

- Under NEB Act, Section 75, "A company shall, in the exercise of the powers granted by this Act or a Special Act, do as little damage as possible, and shall make full compensation in the manner provided in this Act and in a Special Act, to all persons interested, for all damage sustained by them by reason of the exercise of those powers."
- Under the NEB Act Section 86, when a company acquires lands for its operations, they are responsible for any damages directly related to and caused by the acquisition of lands, construction of the pipeline, and inspection, maintenance or repair of the pipeline. Under that Section, compensation related to the installation of a pipeline includes compensation for the acquisition of lands, compensation for damages, and indemnification of land owners from all liabilities related to the company's operations. These requirements would apply to the Trans Mountain Expansion Project.

- Under Section 97, factors an arbitration committee would consider in a determination of compensation include the market value of the lands taken both for permanent easement and temporary working space, loss of use of the lands by the owner, damages caused by construction and, noise and inconvenience that can reasonably be expected to arise from the construction. Trans Mountain is incorporating these factors in the compensation framework being developed for the Trans Mountain Expansion Project. Additional information respecting Trans Mountain Expansion Project compensation framework for directly affected landowners can be found in responses to NEB IR No. 1.29 and CGLAP IR No. 1.7b.

Trans Mountain anticipates it will negotiate agreements with each municipality where it is proposing to place the pipeline within roadways or on other municipal lands, including Parks, in accordance with these NEB Act requirements.

(Exhibit C76-11-1 - (A3W6E6-A4Q0V5) City of Surrey Information Request No. 1 filed May 7, 2014 (previously filed as C76-1-1)**)**

(Exhibit C76-11-2 - (A3X6A5_-_A4Q0V6) Response to City of Surrey Information Request No. 1 filed June 4, 2014 (previously filed as B52-1))

25. Unless ordered by the NEB there is no prospect of such agreements being entered into with respect to the proposed pipeline. Kinder Morgan/Trans Mountain has no incentive to do so. In the absence of agreements with affected municipalities and as set out in the evidence filed by the City of Surrey, Kinder Morgan/Trans Mountain has been able to leverage its position and make the demands it has when municipalities wish to cross its pipeline.

26. Contrary to what Trans Mountain would have the NEB believe, the evidence of Trans Mountain is that it does not in fact have any agreements with municipalities related to its existing pipeline. This is set out in Tran Mountain's Response to Information Requests No. 1 of the City of Surrey filed as evidence as Exhibit C76-11-2:

Request:

Terms of licence agreements and permits existing and contemplated in the City of Surrey

g) please provide a copy(ies) of the proposed form(s) of licence agreement(s) that Trans Mountain contemplates entering into with the Province and with the City of Surrey and with other municipalities in BC related to the proposed Line 2 pipeline occupying highways or roads or occupying the South Fraser Perimeter Road corridor or occupying the Golden Ears Connector corridor;

h) please confirm whether or not Trans Mountain has existing agreements and permits in relation to existing highway or road crossings in the City of Surrey by the existing Trans Mountain pipeline (whether those highways or roads are under the jurisdiction of City of Surrey or the Province). If so, please provide copies of all such agreements and permits and please also identify the dates of each;

i) please provide a copy(ies) of the proposed licence agreement(s) and permits that Trans Mountain contemplates entering into with the Province and with the City of Surrey and with other municipalities in relation to proposed highway and road crossings by the proposed Line 2 pipeline in the City of Surrey;

j) having regard to s. 112 of the National Energy Board Act and the jurisdiction of the NEB, please provide a copy of the form of permit that Trans Mountain contemplates the City of Surrey and other municipalities in BC would require to obtain from Trans Mountain before performing any work in existing highway or road to be occupied by the proposed Line 2 pipeline;

k) please confirm whether or not Trans Mountain is prepared to pay the City of Surrey and other municipalities in BC compensation in the form of an annual fee for crossing and occupying highways or roads under municipal jurisdiction and if so, an explanation of how the compensation would be determined and if not, an explanation as to why not;

l) please provide a detailed summary of the consultations made and the findings regarding the statutory process Trans Mountain expects to follow in attempting to acquire land tenure in dedicated park. Please also provide an explanation of how compensation payable to the authority having ownership of the dedicated park will be determined;

Response:

g) **Currently, Trans Mountain has no licenses or other permits with municipalities for the existing federally regulated Trans Mountain Pipeline system.** However, Trans Mountain is aware that the City of Surrey and other municipalities are interested in negotiating such agreements, and has begun working on a form of protocol agreement to reasonably address any issues of

concern to the municipalities. There has been one informal meeting held to date on May 16, 2014 between Trans Mountain and the City of Surrey to discuss this issue. Trans Mountain would welcome the opportunity to discuss this issue further with the City of Surrey and work towards a mutually acceptable protocol agreement.

h) Please see response to City Surrey IR No. 1.30.

i) Please see response to City Surrey IR No. 1.30.

j) Please see the response to City Surrey IR No. 1.30. Trans Mountain anticipates the form of permit for crossings of the pipeline would be a point of discussion during engagement around development of overall crossing agreements.

k) Trans Mountain does not anticipate annual fees for the Project. Trans Mountain anticipates that discussion regarding compensation would be included within the overall discussion of crossing agreements.

Trans Mountain believes that historical practice provides a reasonable approach respecting cost sharing and cost recovery for past, current and future infrastructure development. In general, Trans Mountain believes it is reasonable for the project to reimburse municipalities for any modifications to their existing infrastructure required to accommodate the Project. In the planning and design of the Project, Trans Mountain is willing to work with municipalities to accommodate reasonably foreseeable plans for municipal infrastructure including roads and utilities in the design and placement of the pipeline. Once the Project is in place, any subsequent design and development of municipal infrastructure would be completed with the pipeline in place and should modifications or relocations of the pipeline be required to accommodate new municipal infrastructure, Trans Mountain would look to the municipality for reimbursement.

Trans Mountain is committed to working cooperatively with municipalities in the development of the Project. More specifically, Trans Mountain is prepared to:

- work with municipalities in the planning and engineering, and detailed design to accommodate future growth and minimize potential future impacts to existing infrastructure;
- pay for reasonable costs to inspect, relocate if needed, and protect their infrastructure during pipeline construction;
- work with the municipalities to fulfill federal requirements for pipeline protection including ground disturbance measures imbedded in the NEB crossing regulations; and
- construct the Project, and operate it and the existing pipeline in accordance with practices and procedures that are consistent with all other utility

service and development infrastructure.

- There are established rules and protocols that must be met for the protection of the pipeline and municipal infrastructure, including formalized crossing agreements between infrastructure owners. Trans Mountain expects these rules and protocols will not be different than the processes currently used for the protection of the existing operating pipeline and for municipal development in proximity and directly over/under the pipeline.

With the installation of the proposed pipeline, all reasonable costs associated with construction and associated infrastructure changes would be borne by the Project, but costs for operations following installation would be in accordance with currently accepted practice and formalized in crossing agreements between infrastructure owner.

l) Legislative requirements respecting land acquisition for the Trans Mountain Expansion Project are set out within the NEB Act. Those provisions of the NEB Act apply specifically to directly affected parties and include:

- Under NEB Act, Section 75, "A company shall, in the exercise of the powers granted by this Act or a Special Act, do as little damage as possible, and shall make full compensation in the manner provided in this Act and in a Special Act, to all persons interested, for all damage sustained by them by reason of the exercise of those powers."
- Under the NEB Act Section 86, when a company acquires lands for its operations, they are responsible for any damages directly related to and caused by the acquisition of lands, construction of the pipeline, and inspection, maintenance or repair of the pipeline. Under that Section, compensation related to the installation of a pipeline includes compensation for the acquisition of lands, compensation for damages, and indemnification of land owners from all liabilities related to the company's operations. These requirements would apply to the Trans Mountain Expansion Project.
- Under Section 97, factors an arbitration committee would consider in a determination of compensation include the market value of the lands taken both for permanent easement and temporary working space, loss of use of the lands by the owner, damages caused by construction and, noise and inconvenience that can reasonably be expected to arise from the construction. Trans Mountain is incorporating these factors in the compensation framework being developed for the Trans Mountain Expansion Project. Additional information respecting Trans Mountain Expansion Project compensation framework for directly affected landowners can be found in responses to NEB IR No. 1.29 and CGLAP IR No. 1.7b.

Trans Mountain anticipates it will negotiate agreements with each municipality where it is proposing to place the pipeline within roadways or on other municipal lands, including Parks, in accordance with these NEB Act requirements.

(Exhibit C76-11-1 - (A3W6E6-A4Q0V5) City of Surrey Information Request No. 1 filed May 7, 2014 (previously filed as C76-1-1)**)**

(Exhibit C76-11-2 - (A3X6A5_-_A4Q0V6) Response to City of Surrey Information Request No. 1 filed June 4, 2014 (previously filed as B52-1))

27. The City of Surrey in the Affidavit of Kenneth D. Zondervan has provided additional evidence that the City of Surrey has no agreement in place related to the existing Trans Mountain pipeline.

Neither Kinder Morgan nor Trans Mountain Have An Agreement with Surrey for the Existing Trans Mountain Pipeline Occupying and/or Crossing Surrey Highways

18. The City of Surrey does not have an agreement with any entity establishing terms of occupation and/or crossing of highways under the jurisdiction of the City of Surrey for the existing Trans Mountain pipeline.

19. None of Kinder Morgan Canada Inc., Trans Mountain Pipeline ULC, Trans Mountain Pipeline L.P., Trans Mountain Pipe Line Company Ltd. or Trans Mountain Pipeline Inc. has an agreement with Surrey for the existing Trans Mountain pipeline which traverses Surrey and which occupies and/or crosses highways under the jurisdiction of Surrey.

(Exhibits C76-9-23 (A4L9U6) and C76-9-24 (A4L9U7) - Affidavit of Kenneth D. Zondervan sworn May 26, 2015)

2.6 Municipalities have jurisdiction over highways in BC

28. In 2003, by virtue of legislative change with the introduction of the *Community Charter*, S.B.C. 2003, c. 26, as amended, the soil and freehold of highways within a municipality are vested in the municipality. A municipality's jurisdiction over highways changed from having a right of possession to a right of ownership.

Division 5 - Highways

Ownership and possession of highways

35 (1) Subject to this section,

(a) **the soil and freehold of every highway in a municipality is vested in the municipality**, and

(b) in the case of a highway in a municipality that is not vested under paragraph (a), the right of possession of the highway is vested in the municipality.

(2) Subsection (1) (a) does not apply to the following:

(a) Provincial arterial highways, including the intersection between a Provincial arterial highway and another highway and any interchange between a Provincial arterial highway and another highway;

(b) highways referred to in section 23 (1) of the *South Coast British Columbia Transportation Authority Act*;

(c) highways in a park, conservancy, recreation area or ecological reserve established under the *Park Act*, the *Ecological Reserve Act* or the *Protected Areas of British Columbia Act* or an area to which an order under section 7 (1) of the *Environment and Land Use Act* applies;

(d) highways in a regional park;

(e) a regional trail, other than a regional trail that is part of the road system regularly used by vehicle traffic;

(f) land, including the improvements on it, on which Provincial works such as ferry terminals, gravel pits, weigh scales and maintenance yards are located;

(g) roads referred to in section 24 of the *Forest and Range Practices Act* that have not been declared to be public highways;

(h) highways vested in the federal government;

(i) in relation to a reserve as defined in the *Indian Act* (Canada), highways in the reserve or that pass through the reserve;

(j) public rights of way on private land.

(3) Subsection (1) (b) does not apply to highways referred to in subsection (2) (a) to (h).

(4) The vesting under subsection (1) (a) and the right of possession under subsection (1) (b)

(a) are not adversely affected or derogated from by prescription in favour of any other occupier, and

(b) are subject to any rights reserved by the persons who laid out the highway.

(5) The vesting under subsection (1) (a) includes the vesting of all statutory rights of way and other easements owned by the Provincial government solely for purposes relating to the drainage of a highway that is vested under that subsection, and the interest of the Provincial government under those easements is transferred to the municipality and the municipality assumes the rights and obligations of the Provincial government in relation to those easements.

(6) The minister responsible for the *Transportation Act* may file with the land title office an application satisfactory to the registrar of land titles that identifies an easement referred to in subsection (5) and, on filing, the registrar must register ownership of the easement in the name of the municipality.

(7) The vesting under subsection (1) (a) is subject to the following:

(a) the right of resumption under subsection (8);

(b) the limits referred to in section 23 (2) of the *Land Title Act*;

(c) the exceptions described in section 50 (1) (a) (ii) to (iv) and (b) of the *Land Act*, as if the vesting were made by Crown grant under that Act;

(d) the exceptions described in section 107 (1) (d) of the *Land Title Act*, as if the vesting were under that section.

(8) The Provincial government may, by order of the Lieutenant Governor in Council, resume the property or interest vested in a municipality under subsection (1) (a), if the Lieutenant Governor in Council considers that this is required

(a) for the purpose of or in relation to a Provincial arterial highway,

(b) for any other transportation purpose, or

(c) for the purpose of or in relation to a park, conservancy, recreation area or ecological reserve established or proposed to be established under the *Park Act*, the *Ecological Reserve Act* or the *Protected Areas of British Columbia Act* or an area to which an order under section 7 (1) of the *Environment and Land Use Act* applies.

(9) An order under subsection (8) (a) or (b) may only be made on the recommendation of the minister responsible for the *Transportation Act*, and an order under subsection (8) (c) may only be made on the recommendation of the minister responsible for the applicable Act referred to in that subsection.

(10) The minister responsible for the *Transportation Act*, after consultation with the minister responsible for this Act, may

(a) by order, cancel the Provincial government's right of resumption under subsection (8) in relation to a specified highway or in relation to highways within a specified area, or

(b) by regulation, specify circumstances in which the Provincial government's right of resumption is cancelled without a specific order.

(11) For certainty, a council may grant a licence of occupation or an easement, or permit an encroachment, in respect of a highway that is vested in the municipality under subsection (1) (a).

(12) This section does not apply to a highway for which the municipality has purchased or taken the land and for which title is registered in the name of the municipality.

Book of Authorities, Tab 2

29. With the enactment of the *Community Charter* came the authority to grant others a licence of occupation of highway that is vested in the municipality under s. 35(11) of the *Community Charter*. Prior to s. 35 of the Charter a municipality could not grant a licence of occupation as the holder of the "soil and freehold" of highways. Such a licence would have had to be granted by the Provincial Crown and would have taken the form of a permit under the *Transportation Act,* SBC 2004, c 44, previously under the *Highway Act*, RSBC 1996, c 188.

Division 5 - Highways

Ownership and possession of highways

35 (11) For certainty, a council may grant a licence of occupation or an easement, or permit an encroachment, in respect of a highway that is vested in the municipality under subsection (1) (a).

30. The British Columbia Court of Appeal in *MacDougall v. Lake Country* (District) 2012 Carswell BC 3171, 2012 BCCA 408, 4 M.P.L.R. (5th) 10, 38 B.C.L.R. (5th) 235, also confirmed that by virtue of s. 29 and s. 35 of the *Community Charter,* municipalities are the successor in title to the Crown in respect of any highway or park.

Groberman J.A. (orally):

1 In this action, the MacDougall plaintiffs seek a declaration that they hold title to a strip of land lying between Okanagan Lake and certain surveyed lots created by subdivision of a tract of land in 1914.

2 This is not the first time that title to this strip of land has come before the courts. In 1963, the MacDougalls' predecessor in title sought a declaration under the Quieting Titles Act, R.S.B.C. 1960, c. 282 that the strip formed part of her lands. The judge who heard the application found that it did not, holding that the filing of the subdivision plan in the land registry resulted in the dedication of the strip of land for public purposes. Accordingly, he found that the land belonged to the Provincial Crown.

3 In light of that earlier litigation, the trial judge in this action found that the doctrine of res judicata applied, and dismissed the present action. The plaintiffs appeal, arguing that the doctrine of res judicata is inapplicable on the facts of this case. In the alternative, they argue that applying the doctrine would work an injustice, and that the court ought therefore to have exercised its discretion to refuse to apply it.

4 For reasons that follow, I agree with the trial judge's determination that this case falls squarely within the doctrine of res judicata. The Supreme Court's 1963 judgment unequivocally held that the land in question was not within the applicant's title. The parties to this proceeding are privies of the parties to the 1963 proceedings — the MacDougalls are successors in title to the applicant in the 1963 proceedings, and ***the District of Lake Country is, by virtue of ss. 29 and 35 of the Community Charter, S.B.C. 2003, c. 26, the successor in title to the Crown in respect of any park or highway*** *that has been dedicated through the deposit of a subdivision plan. No appeal was taken from the 1963 judgment, and there is no basis for finding that it would be unjust to refuse to re-open the matter.*

Book of Authorities, Tab 28

2.7 It is the norm, not the exception, that terms related to the occupation and crossing of highways and other public property such as parks, including the allocation of present and future costs are established prior to construction. This is borne out in both Provincial legislation and in Federal legislation that contemplates infrastructure occupying or crossing highways and other public property.

31. It is the norm, not the exception, that terms related to the occupation and crossing of highways and other public property such as parks, including the allocation of present and future costs are **established prior to construction**. This is borne out in both Provincial legislation and in Federal legislation that contemplates infrastructure occupying or crossing highways and other public property. This is apparent from a review of the *Oil and Gas Activities Act,* SBC 2008, Chapter 36, the *Utilities Commission Act,* RSBC 1996, Chapter 473 and the federal *Telecommunications Act* SC 1993, c. 38.

2.7.1 Provincially Regulated Pipelines under the *Oil and Gas Activities Act* (the "OGAA") and previously under the now repealed *Pipeline Act,* RSBC 1996, c 364

32. In the case of Provincially regulated natural gas pipelines, the British Columbia Legislature has legislated a cost allocation formula which was first introduced in the 1950s with the introduction of natural gas in the Province of British Columbia.

33. The cost allocation formula is set out in the *Pipeline Crossings Regulation,* B.C. Reg.. 147/2012 discussed below.

34. The OGAA also requires the pipeline company to perform required pipeline work to accommodate pipeline crossings and provides that a pipeline company must not prevent access or use of a highway.

35. In order to construct a pipeline in or across a highway, the *OGAA* in s. 34(2)(b) also requires the pipeline company to obtain the authorization of the municipality or authority having jurisdiction over the highway.

Required ownership, interest or authorization

34 (1) In this section:

"entry agreement" means an agreement

(a) that is between

(i) a specified permit holder, and

(ii) a land owner of an area of land, and

(b) that authorizes the specified permit holder to enter, occupy or use the land owner's area of land for the purposes of constructing and operating a pipeline other than a flow line;

"specified permit holder" means a pipeline permit holder who holds a permit respecting a pipeline other than a flow line.

(2) Subject to sections 23 and 39 and subsection (3) of this section, **a permit holder must not begin or carry out an oil and gas activity on or under an area of land unless the permit holder**,

(a) if the area of land is not a highway, either is the owner in fee simple of the area of land or has acquired the area of land or the necessary interests in the area of land in accordance with

(i) the *Land Act*,
(ii) Part 16 or 17 of the *Petroleum and Natural Gas Act*, or
(iii) subsection (3) of this section, or

(b) if the area of land is a highway, has obtained an authorization required under an enactment to enter, occupy or use the area of land.

(3) Subject to subsection (4), if a specified permit holder has failed to obtain an entry agreement, the specified permit holder may expropriate, in accordance with the *Expropriation Act*, as much of the land or interests in it of any person as may be necessary for constructing and operating the pipeline authorized by the permit.

(4) The land that may be expropriated under subsection (3) must not exceed 18 m in breadth.

(5) On application by a specified permit holder, the commission may authorize, on any conditions the commission considers appropriate, an expropriation, in accordance with the *Expropriation Act*, that exceeds the breadth specified in subsection (4).

Book of Authorities, Tab 12

36. For the purposes of s. 34(2)(b) an authorization under an *enactment* includes a permit/authorization under a municipal by-law or a licence of occupation granted under s. 35(11) of the *Community Charter*.

Division 5 - Highways

Ownership and possession of highways

35 (11) For certainty, a council may grant a licence of occupation or an easement, or permit an encroachment, in respect of a highway that is vested in the municipality under subsection (1) (a).

Book of Authorities, Tab 2

37. Under s. 34 of the OGAA, "enactment" includes the *Community Charter* as well as municipal by-laws.

Under s. 1 of the *Interpretation Act*:

"enactment" means an Act or a regulation or a portion of an Act or regulation;

"regulation" means a regulation, order, rule, form, tariff of costs or fees, proclamation, letters patent, commission, warrant, bylaw or other instrument enacted

(a) in execution of a power conferred under an Act, or

(b) by or under the authority of the Lieutenant Governor in Council,

but does not include an order of a court made in the course of an action or an order made by a public officer or administrative tribunal in a dispute between 2 or more persons;

Book of Authorities, Tab 3B

38. In the case of *Comox (Town) v. Newson*, [1987] B.C.J. No. 1442 at page 4, it was confirmed that "enactment" includes municipal by-laws.

It was the conclusion of my brother Cashman J.C.C., in R. v. Lum [1982] 3 W.W.R. 694 that the definition of "regulation" includes a municipal bylaw and so the Interpretation Act applies. I concur with that reasoning and find the provisions of S. 8 of the Interpretation Act apply to municipal bylaws. The definition of "enactment" to include "bylaw it was first included in that legislation in the

Interpretation Act of 1974, and which fortifies the conclusion reached by Drake C.C.J. in Re Township of Esquimalt and Wood (supra)

Book of Authorities, Tab 26

39. Moreover, the imperative of not to interfere with municipal and provincial highways is underscored by s. 35(2) of OGAA.

Obligations in carrying out oil and gas activities

35 (1) In carrying out oil and gas activities and related activities, a permit holder or a person entering land under section 23 must minimize

(a) damage and disturbance to the sites of those activities, and

(b) waste.

(2) A pipeline permit holder must make reasonable efforts to ensure that its oil and gas activities do not prevent access to or use of a highway, road, railway or public place.

(3) A pipeline permit holder, as soon as reasonably possible after constructing a pipeline, must restore, in accordance with the regulations, if any, the land and surface disturbed by the construction.

Book of Authorities, Tab 12

(a) Obligations in respect of Pipeline Costs and Pipeline Work and Non-Interference with highways under the *Oil and Gas Activities Act*

40. As the NEB is aware, FortisBC Energy Inc. ("Fortis") is the natural gas provider in British Columbia.

41. The legal framework and statutory scheme dictate the rights and obligations of the parties including the allocation of pipeline costs and obligations related to the performance of pipeline work.

42. Compliance with the *OGAA* and formerly the *Pipeline Act* and their Regulations is a required precondition to Fortis' operation of its pipelines.

43. Under the *Oil and Gas Activities Act* and its Regulations, the statutory obligations regarding the allocation of the pipeline costs and the performance of the pipeline work are clear.

44. Similarly, under the now repealed *Pipeline Act* and *Pipeline Regulation*, the statutory obligations regarding the allocation of the pipeline costs and the performance of the pipeline work were also equally clear.

(i) The Legal Framework and Statutory Scheme from <u>October 4, 2010 to Present:</u> Fortis' Statutory Obligations Under the *Oil and Gas Activities Act* and the Pipeline Crossings Regulation

45. Section 21 of the *Oil and Gas Activities Act* mandates that Fortis comply with the Act and its Regulations. These Regulations include the provisions with respect to cost allocation set out in s. 3 of the *Pipeline Crossing Regulation 147/2012* and immediately prior to B.C. Reg.. 147/2012 in s. 12 of the *Oil and Gas Activities Act General Regulation*.

46. Section 21 of the *OGAA* reads as follows:

> **Permit required**
>
> **21** Subject to section 23, a person **must not** carry out **an oil and gas activity** unless
>
> (a) either
>
> (i) the person holds a permit that gives the person permission to carry out that oil and gas activity, or
>
> (ii) the person is required to carry out that oil and gas activity by an order issued under section 49, **<u>and</u>**
>
> (b) <u>the person carries out the oil and gas activity **in compliance with**</u>
>
> **<u>(i) this Act and the regulations,</u>**
>
> (ii) a permit issued to the person, if any, and
>
> (iii) an order issued to the person, if any.

47. An "oil and gas activity" is defined in s.1 of the *OGAA* to include the operation of the Pipeline:

"oil and gas activity" means

(a) geophysical exploration,

(b) the exploration for and development of petroleum, natural gas or both,

(c) the production, gathering, processing, storage or disposal of petroleum, natural gas or both,

(d) the operation or use of a storage reservoir,

(e) the construction or operation of a pipeline,

(f) the construction, use or operation of a prescribed road, and

(g) the activities prescribed by regulation;

Book of Authorities, Tab 12

Pipeline Crossings: s. 76 of *Oil and Gas Activities Act*

48. Under the current legislation the starting point for understanding the allocation of pipeline costs incurred as a result of construction being undertaken "along, over or under or within a prescribed distance of a pipeline" in highways or elsewhere is s. 76 of the *Oil and Gas Activities Act*.

49. Section 76 of the *Oil and Gas Activities Act*, as amended by the *Energy and Mines Statutes Amendment Act*, 2012, reads as follows (emphasis added):

Pipeline crossings

76 (1) Subject to subsection (3), a person must not

(a) construct

(i) a highway, road or railway,

(ii) an underground communication or power line, or

(iii) any other prescribed work, or

(b) carry out a prescribed activity

along, over or under a pipeline or within a prescribed distance of a pipeline unless

(c) the pipeline permit holder agrees in writing to the construction or the carrying out of the prescribed activity, either specifically or by reference to a class of construction projects or activities,

(d) the commission, by order issued under subsection (2), approves the construction or the carrying out of the prescribed activity, either specifically or by reference to a class of construction projects or activities, or

(e) the construction or prescribed activity is carried out in accordance with the regulations.

(2) The commission, on application by a person referred to in subsection (1), may issue an order for the purposes of subsection (1) (d) and in doing so may impose any conditions that the commission considers necessary to protect the pipeline.

(3) The commission **must approve**

(a) the construction referred to in subsection (1) (a), and
(b) the carrying out of a prescribed activity under subsection (1) (b)

by the government **or a municipality, but** may impose conditions referred to in subsection (2) in the order issued under that subsection.

(4) The commission, for the purposes of deciding whether to issue an order under subsection (1) or impose conditions under subsection (2), may require a pipeline permit holder to submit information regarding the pipeline permit holder's pipeline.

(5) The commission may order a pipeline permit holder whose pipeline is the subject of an order issued under subsection (2) to do one or both of the following:

(a) with the approval of the Lieutenant Governor in Council, relocate the pipeline to facilitate the construction or prescribed activity approved by the order issued under subsection (2);

(b) take the actions specified in the order that the commission considers necessary to protect the pipeline.

(6) In relation to an order of the commission referred to in subsection (5), the Lieutenant Governor in Council

(a) may order that a person other than the pipeline permit holder must pay the costs, or a portion of the costs, incurred in carrying out the commission's order, or

(b) may approve the payment of any of those costs from the consolidated revenue fund.

(7) If there is an inconsistency between an order or an approval made under subsection (6) and a regulation made under section 99 (1)(m.1), the order or approval prevails to the extent of the inconsistency.

Book of Authorities, Tab 12

Pipeline Costs Under the *Oil and Gas Activities Act* and its *Pipeline Crossings Regulation,* B.C. Reg. 147/2012

50. The allocation of pipeline costs is governed by the *Pipeline Crossings Regulation* B.C. Reg. 147/2012.

PIPELINE CROSSINGS REGULATION

Definitions

1. In this regulation:

"**Act**" means the *Oil and Gas Activities Act*;

"**enabled action**" means the construction or activity that may be carried out by an enabled person;

"**enabled person**" means a person who, under Section 76 (1) (c), (d) or (e) of the Act, may do anything referred to in subsection (1) (a) or (b) of that section;

"**ground activity**" means any work, operation or activity that results in a disturbance of the earth, including a mining activity as defined in section 1 of the Mines Act, but not including:

(a) cultivation to a depth of less than 45 cm below the surface of the ground, or

(b) a disturbance, other than cultivation referred to in paragraph (a), of the earth to a depth of less than 30 cm;

"**specified enabled person**" means an enabled person that is the government, a municipality or the British Columbia Railway Company.

Cost allocation for pipeline crossings

3 (1) Subject to subsections (3) to (5), an enabled person is responsible for all costs incurred by the enabled person in carrying out an enabled action.

(2) Subject to subsections (3) to (6), an enabled person is responsible for any costs incurred by a pipeline permit holder as a result of the enabled person's carrying out of an enabled action, including, without limitation, costs:

(a) to realign, raise or lower the pipeline,

(b) to excavate material from around the pipeline, and

(c) to add casing or other appurtenances that an official considers necessary for the protection of the pipeline.

(3) Subject to an order issued under section 76 (6) of the Act and to subsections (4) to (6) of this section, **a specified enabled person is <u>not responsible for any costs</u> incurred by a pipeline permit holder as a result of the carrying out of an enabled action**.

(4) **<u>The costs referred to in subsection (3) must be shared equally</u>** between the specified enabled person and the pipeline permit holder **<u>if</u>**:

(a) the specified enabled person is a municipality, and

(b) the enabled action is the construction of a new highway within the boundaries of that municipality on either an existing right of way or a newly dedicated right of way.

(5) The costs incurred by a pipeline permit holder as the result of the carrying out of an enabled action must be shared equally between the enabled person and the pipeline permit holder if the enabled action is the construction of a new road for a subdivision within a municipality.

(6) The cost allocation rules set out in subsections (2) to (5) may be varied by agreement between the parties.

Book of Authorities, Tab 14

51. Immediately before the making of *Pipeline Crossings Regulation*, B.C. Reg. 147/2012, the allocation of costs for pipeline work was set out in s. 12 of the *Oil and Gas Activities Act General Regulation*, specifically s. 12(4), which reads as follows:

Cost allocation for pipeline crossings

12 (1) In this section:

"approval holder" means a person to whom an approval under section 76 (1) (d) of the Act has been given;

"approved action" means the construction or activity approved by an order issued under section 76 (1) (d) of the Act;

"specified approval holder" means an approval holder that is the government, a municipality, or the British Columbia Railway Company.

(2) Subject to subsections (4) to (6), an approval holder is responsible for all costs incurred by the approval holder in carrying out an approved action.

(3) Subject to subsections (4) to (6), an approval holder is responsible for any costs incurred by a pipeline permit holder as a result of the approval holder's carrying out of an approved action, including, without limitation, costs

(a) to realign, raise or lower the pipeline;

(b) to excavate material from around the pipeline, and

(c) to add casing or other appurtenances that an official considers necessary for the protection of the pipeline.

(4) Subject to an order issued under section 76 (6) of the Act and to subsection (5) of this section, **a specified approval holder is not responsible for any costs incurred by a pipeline permit holder as a result of the carrying out of an approved action.**

(5) **The costs referred to in subsection (4) must be shared equally between the specified approval holder and the pipeline permit holder if**

(a) the specified approval holder is a municipality, and

(b) the approved action is the construction of a new highway within the boundaries of that municipality on either an existing right of way or on a newly dedicated right of way.

(6) The costs incurred by a pipeline permit holder as the result of the carrying out of an approved action must be shared equally between the approval holder and the pipeline permit holder if the approved action is the construction of a new road for a subdivision within a municipality.

Pipeline Work Under the *Oil and Gas Activities Act* and its *Regulations*

52. The requirement to perform necessary pipeline work to accommodate a highway or utility crossing a pipeline is also set out in the Regulations under the *Oil and Gas Activities Act*. These include ss. 3 and 6 of the *Pipeline and Liquefied Natural Gas Facility Regulation*, B.C. Reg. 281/2010.

53. This was confirmed in a decision and order of the Oil and Gas Commission dated February 4, 2011 involving a pipeline crossing application in Surrey:

> The Commission notes that Terasen is obligated through regulation to ensure that their pipeline is designed, constructed, operated and maintained in a manner which assures its continued safe and environmentally responsible operation. Such requirements are found within sections 3 and 6 of the *Pipeline and Liquefied Natural Gas Facility Regulations* (PLNGFR). Section 3 of the PLNGFR requires Terasen to adhere to *CSA Z662 Oil and Gas Pipeline Systems* (CSA Z662) in the design, construction, operation and maintenance of their pipeline. Clause 10.7.2 of CSA Z662 requires that Terasen undertake necessary upgrades to accommodate the work proposed by Surrey or to perform a detailed engineering assessment to determine what (if any) upgrades are required for the protection of the pipeline in light of the work proposed by Surrey.
>
> The Commission further notes that section 6 of the PLNGFR requires Terasen to take all reasonable steps so as not to endanger public safety or the environment when a pipeline is being constructed across, along, over or under a highway or public place.

Book of Authorities, Tab 23

Standards

> 3 (1) Subject to subsection (2), a pipeline permit holder must not design, construct, operate or maintain any of the following except in accordance with CSA Z662:
>
> (a) the pipeline that is the subject of the permit; (b) a pumping station or compressor station associated with the pipeline; (c) an oil storage tank associated with the pipeline.
>
> (2) A pipeline permit holder who constructs a pipeline under agricultural land must ensure the pipeline has a minimum cover of 0.8 metres.

(3) A LNG facility permit holder must not design, construct, operate or maintain a liquefied natural gas facility except in accordance with CSA Z276, unless otherwise specified in this regulation.

Pipeline crossings

6 (1) If a pipeline is being or has been constructed across, along, over or under a public place or the right of way of a highway, road, railway, underground communication or power line or other pipeline, the pipeline permit holder must

(a) take all reasonable steps so as not to endanger public safety or the environment, and (b) restore, to the extent reasonable in the circumstances, any infrastructure damaged or removed during the construction of the pipeline.

(2) A pipeline permit holder must give notice in accordance with subsection (3) before beginning any work of construction, maintenance or repair of a pipeline along, over or under a public place or the right of way of a highway, road, railway, underground communication or power line or other pipeline.

(3) A notice under subsection (2) must

(a) be given to the owner of or authority responsible for the public place, highway, road, railway, underground communication line, power line or pipeline, and (b) subjection to subsection (4), be given at least 5 days before beginning the work, unless the pipeline permit holder and the owner or authority have agreed that the notice is to be provided by another time, in which case the notice must be provided by that other time.

(4) In the case of emergency, work referred to in subsection (1) may be begun immediately after giving notice under subsection (2).

Book of Authorities, Tab 15

Non-Interference with highways

54. It is also noteworthy that s. 35 of the *Oil and Gas Activities Act* stipulates that the pipeline company must not prevent access to or use of a highway.

Obligations in carrying out oil and gas activities

35 (1) In carrying out oil and gas activities and related activities, a permit holder or a person entering land under section 23 must minimize

(a) damage and disturbance to the sites of those activities, and

(b) waste.

(2) A pipeline permit holder must make reasonable efforts to ensure that its oil and gas activities do not prevent access to or use of a highway, road, railway or public place.

(3) A pipeline permit holder, as soon as reasonably possible after constructing a pipeline, must restore, in accordance with the regulations, if any, the land and surface disturbed by the construction.

Book of Authorities, Tab 12

(ii) The Legal Framework and Statutory Scheme Immediately Prior to October 4, 2010: Fortis' Statutory Obligations Under the Now Repealed *Pipeline Act* and the Pipeline Regulation 360/98

Pipeline Costs Under the now repealed *Pipeline Regulation*

55. Subsection 9(c) of the *Pipeline Regulation*, B.C. Reg. 360/98 immediately before its repeal read as follows:

Pipeline crossings

9(c) subject to the approval of the commission with respect to the crossing of a pipeline by a railway or a highway, **in no case will** the Province of British Columbia, a **municipality** within the Province, nor the British Columbia Railway be liable for any costs incurred in the actual installation, removal, realigning, strengthening, casing, raising or lowering of a pipe and appurtenances thereto, except that when a new highway is built within a municipality by the municipality on an existing right of way or on a newly dedicated right of way, the costs must be shared equally by the municipality and the pipeline company; [emphasis added]

Book of Authorities, Tab 16

56. Also, under ss. 8(f) and (g) of the now repealed *Pipeline Regulation*, Fortis was obligated to perform all work in connection with the construction, maintenance, renewal and repair of its pipelines and was responsible for maintaining its pipelines so they did not interfere with the full use and enjoyment of a highway, utility line or other pipeline, all at its cost.

Pipeline and highway crossings

8 The following provisions apply to the crossing by a pipeline of any highway, utility line or other pipeline:

(f) all work in connection with the construction, maintenance, renewal and repair of the pipeline, and the continued supervision of it, must be performed by the pipeline company and, unless the renewal or repair is made necessary by reason of the negligence of others, all costs and expenses of such work must be borne and paid by the pipeline company and no work at any time will be done in such a manner as to unduly obstruct, delay or interfere with the operation of any highway, utility line or other pipeline;

(g) the pipeline company at all times is responsible for maintaining the pipeline in good working order and conditions, so that at no time will there be

(i) damage to,

(ii) impairment of the usefulness or safety of, or

(iii) interference with the full use and enjoyment of

any highway, utility line or other pipeline;

Book of Authorities, Tab 16

Pipeline Work Under the now repealed *Pipeline Regulation*

57. Immediately prior to the repeal of the *Pipeline Regulation*, Fortis was similarly statutorily obligated to perform the pipeline work. This statutory obligation is set out in section 9 of the *Pipeline Regulation*, B.C. Reg. 360/98, in particular subsections 9(b) and 9(g) and is triggered by the leave granted to a municipality under s. 31 of the *Pipeline Act*:

9. The following provisions of the *Pipeline Act* and the *Pipeline Regulation* apply to the crossing of pipelines by any highway, private road, railway, utility line, drain or other company pipeline: ...

(b) no work will at any time be done in such a manner as to unduly obstruct, delay or interfere with the operation of the pipeline, but all work which might disturb the pipe and which necessitates realigning, raising or lowering the pipe or excavating material from over or around it, or the additions of casing or other appurtenances thereto deemed necessary by the pipeline company for the protection of the pipeline being crossed, must be performed by the pipeline company whose line is being crossed, ...

(g) before any work of construction, maintenance, renewal or repair of any crossing of a pipeline is begun, the authority having control over such crossing or the party making, owning or operating such crossing, as the case may be, must give to the pipeline company at least 48 hours notice in writing, to enable the pipeline company to appoint an inspector to see that the work is performed in such a manner as will in all respects comply with this regulation; and in cases of emergency the pipeline company must be notified immediately; .....

Book of Authorities, Tab 16

58. Section 31 of the now repealed *Pipeline Act* read as follows:

Crossing pipeline

31 (1) A highway, private road, railway, irrigation ditch, drain, telegraph, telephone or electric power line or a pipeline may, by leave of the commission, be carried across a pipeline, and for that purpose may be constructed on, along or under or across the pipeline.

(2) On application for leave, the commission may grant the application in whole or in part, or on the terms considered appropriate.

Book of Authorities, Tab 13

59. Subsection 9(b) obligated Fortis to perform the pipeline work. This pipeline work had to occur in advance of a municipality entering the lands after providing Fortis 48 hours' notice in accordance with subsection 9(g) and pursuant to the leave granted under s. 31 of the *Pipeline Act*.

60. Moreover, under ss. 8(f) and (g) of the *Pipeline Regulation*, Fortis was further obligated to perform the pipeline work. Fortis was obligated to perform all work in connection with the construction, maintenance, renewal and repair of its pipelines and is responsible for maintaining its pipelines so they do not interfere with the full use and enjoyment of a highway, all at its cost:

Pipeline and highway crossings

8 The following provisions apply to the crossing by a pipeline of any highway, utility line or other pipeline:

(f) all work in connection with the construction, maintenance, renewal and repair of the pipeline, and the continued supervision of it, must be performed by the pipeline company and, unless the renewal or repair is made necessary by reason of the negligence of others, all costs and expenses of such work must be borne and paid by the pipeline company and no work at any time will be done in such a manner as to unduly obstruct, delay or interfere with the operation of any highway, utility line or other pipeline;

(g) the pipeline company at all times is responsible for maintaining the pipeline in good working order and conditions, so that at no time will there be

(i) damage to,

(ii) impairment of the usefulness or safety of, or

(iii) interference with the full use and enjoyment of

any highway, utility line or other pipeline;

Book of Authorities, Tab 16

(iii) In addition to the Legal Framework and Statutory Scheme, the Decisions of the Court and of the Oil and Gas Commission confirmed the obligations of the pipeline company to perform pipeline work

61. Justice Crawford held that the Commission made it clear that Terasen (now renamed FortisBC Energy Inc.) would be obliged to commence the work once it was given 48 hours' notice that the municipality intended to proceed with highway construction:

> … Terasen took the position it was not ordered to perform the work or be found liable for the cost of preserving the integrity of the pipelines. In my view that is an incorrect reading. The Commission has made it plain that Terasen would be obliged to commence the work once it was given 48 hours notice that the municipality intended to proceed with the highway construction and that, if given, should trigger the construction. … [emphasis added]
>
> *Reasons for Judgment of the Honourable Mr. Justice Crawford dated April 4, 2008, para. 38*
> Book of Authorities, Tab 25

62. Justice Crawford also held that the Commission also made it clear that if Terasen failed to abide by the spirit of the decision, the Commission would be obliged to take action:

[27] I should note there is a letter of the Commission's of February 8, 2008, where the Commission made it clear that if Terasen failed to abide by the spirit of the decision, the Commission would then be obliged to take action. If I may say so, the Commission is expecting two large statutory bodies to behave in a sensible and cooperative fashion. [Emphasis added]

Reasons for Judgment of the Honourable Mr. Justice Crawford dated April 4, 2008, para. 27
Book of Authorities, Tab 25

Decision letter of the Commission dated February 8, 2008
Book of Authorities, Tab 32

63. It has been made clear in past decisions made by the Commission in respect of the Fraser Highway Widening Project in Surrey, that Fortis is obligated to perform the pipeline work:

…Section 9 of the Pipeline Regulation requires the work must be performed by the pipeline company whose line is being crossed. The Commission will not be directing the Pipeline Owner to perform the necessary pipeline work; it is an obligation of the Pipeline Owner to ensure the integrity of the pipeline. The Commission will be informing the Pipeline Owner of their obligation in this matter...

Decision letter of the Commission dated January 14, 2008
Book of Authorities, Tab 31

...Section 9 of the Pipeline Regulation requires the company responsible for the pipeline to perform any necessary work to be undertaken to ensure the integrity of the pipeline being crossed: …

Decision letter of the Commission dated January 14, 2008
Book of Authorities, Tab 31

.....Section 9 of the Pipeline Regulation requires the work must be performed by the pipeline company whose line is being crossed.

The Commission fully expects that the Pipeline Owner will work with the Applicant to ensure that any work related to the pipeline affected by the Applicant's leave to construct is undertaken in a manner that ensures the integrity and safety of the pipeline.

The Commission will establish an inspection program for this project, consistent with the Applicant and Pipeline Owner's construction schedules, and will provide it to both the Applicant and Pipeline Owner.

Further, in the meeting of August 29th, 2007, in which legal and engineering representatives of both the Applicant and Pipeline Owner attended, the Pipeline Owner stated they were prepared to perform the necessary work.

The Commission will not be directing the Pipeline Owner to perform the necessary pipeline work. It is an obligation of the Pipeline Owner to ensure the integrity of the pipeline.

Decision letter of the Commission dated January 14, 2008
Book of Authorities, Tab 31

Regarding the issue of ordering the Pipeline Owner to perform the work; neither the *Pipeline Act* nor the Pipeline Regulation gives the Commission the authority to direct the Pipeline Owner to perform the necessary work. Section 9 of the Pipeline Regulation requires the work must be performed by the pipeline company whose line is being crossed. The Commission will not be directing the Pipeline Owner to perform the necessary pipeline work. It is an obligation of the Pipeline Owner to ensure the integrity of the pipeline.

Decision letter of the Commission dated January 14, 2008
Book of Authorities, Tab 31

It is incumbent upon the Pipeline Owner to ensure the safety, maintenance, and integrity of their pipeline prior, during, and post crossing construction. Given the minimum requirements for the Applicant to notify the Pipeline Owner of the crossing construction schedule as per regulation 9(g) below, the Commission fully expects the Pipeline Owner to ensure the integrity of the pipeline as per all applicable Acts, regulations, standards and codes, at the time of the crossing.

Pipeline Regulation 9 (g):

(g) before any work of construction, maintenance, renewal or repair of any crossing of a pipeline is begun, the authority having control over such crossing or the party making, owning or operating such crossing, as the case may be, must give to the pipeline company at least 48 hours' notice in writing, to enable the pipeline company to appoint an inspector to see that the work is performed in such a manner as will in all respects comply with this regulation; and in cases of emergency the pipeline company must be notified immediately;

The Commission fully expects the Pipeline Owner to perform the necessary pipeline improvements as per the technical information provided to the Applicant

by the Pipeline Owner and subsequently submitted to the Commission September 11th, 2007. It is up to the Applicant and Pipeline Owner to resolve any outstanding issues related to cost allocations.

Decision letter of the Commission dated January 14, 2008
Book of Authorities, Tab 31

64. The Commission reaffirmed that it is Terasen's statutory obligation to perform the pipeline work and that issues of pipeline safety would be monitored by the Commission through the process established by the Commission:

Pursuant to s. 31 of the *Pipeline Act*, the Commission granted leave to the City of Surrey ("Surrey") to cross Terasen's pipe. The Commission takes no position regarding the construction schedule that has been put forward by Surrey in its notice of construction. The timing of that schedule is something that only Surrey can determine for its own purposes. Under section 9 of the Pipeline Regulation, Surrey is obliged to give Terasen 48 hours notice before commencing work that may affect the pipeline; Surrey has done so. Terasen is the only party that has the authority to do any work involving its pipeline.

As Surrey has given notice that it intends to place preload over the pipeline on July 1, 2008, and the Terasen pipeline upgrade has yet to be done, the Commission intends to be on site on July 1, 2008 to monitor the situation. In the event that Surrey's work on this project results in a condition that the Commission determines to be dangerous to the safety of workers or the public, the Commission is obligated to order Terasen's pipeline out of service under section 19 of the Pipeline Regulation. [Emphasis added]

Decision letter of the Commission dated June 27, 2008
Book of Authorities, Tab 34

65. The Commission repeatedly made it clear that if Terasen did not perform the work the pipeline would be ordered out of service:

I am writing further to the judgment of the Honourable Mr. Justice Crawford on April 4, 2008 with respect to the dispute between Terasen Gas Inc. (Terasen) and the City of Surrey (Surrey) over the widening of the Fraser Highway.

Surrey has indicated that it plans to commence activities affecting Terasen's pipeline on July 1, 2008. As you are aware, under section 9 of the Pipeline Regulation and further to the judgment of the court, Surrey is required to give Terasen 48 hours notice before commencing any work affecting the pipeline and

Terasen is required to perform any work that affects the pipeline. It is the Commission's hope that Surrey and Terasen will be able to resolve any issues between them that are affecting this project and that the two parties will work together in order to get the required work completed in accordance with the applicable legislation and Commission orders.

The Commission's primary concern is ensuring the integrity of the pipeline and public safety. Should work on this project result in a condition that the Commission considers is dangerous to the safety of workers or the public, the Commission is obligated to order the pipeline out of service under section 19 of the Pipeline Regulation. Hopefully such an order will not be necessary if Terasen is involved in performing the work relating to the pipeline as required by the Regulation.

We look forward to hearing that the parties have reached a satisfactory agreement with respect to the work required by each of them in relation to this project. [Emphasis added]

Decision letter of the Commission dated May 16, 2008
Book of Authorities, Tab 33

Pursuant to s. 31 of the *Pipeline Act*, the Commission granted leave to the City of Surrey ("Surrey") to cross Terasen's pipe. The Commission takes no position regarding the construction schedule that has been put forward by Surrey in its notice of construction. The timing of that schedule is something that only Surrey can determine for its own purposes. Under section 9 of the Pipeline Regulation, Surrey is obliged to give Terasen 48 hours notice before commencing work that may affect the pipeline; Surrey has done so. Terasen is the only party that has the authority to do any work involving its pipeline.

As Surrey has given notice that it intends to place preload over the pipeline on July 1, 2008, and the Terasen pipeline upgrade has yet to be done, the Commission intends to be on site on July 1, 2008 to monitor the situation. In the event that Surrey's work on this project results in a condition that the Commission determines to be dangerous to the safety of workers or the public, the Commission is obligated to order Terasen's pipeline out of service under section 19 of the Pipeline Regulation. [Emphasis added]

Decision letter of the Commission dated June 27, 2008
Book of Authorities, Tab 34

(iv) Origins of the Cost Allocation Formula

66. The cost allocation formula dates back to the introduction of natural gas in British Columbia in the 1950s. Provisions related to the allocation of pipeline costs and obligations to indemnify were first introduced in 1959 with the enactment of *B.C. Reg. 451/59* which read:

> *9. The following regulations shall apply to the crossing of pipe-lines by any highway, private road, railway, utility line, drain, or other company pipe-line:*
>
> *(a) Except as hereunder provided, all work in connection with the construction, maintenance, renewal, and repair of any crossing of a pipe-line by any highway, private road, railway, utility line, drain, or other pipe-line, and the continued supervision of the same, shall be performed by the authority having control over such highway, railway, utility line, drain, or other pipe-line, or the owner of such private road, railway, utility line, drain, or other pipe-line, as the case may be, at its own cost and expense, unless the removal or repair is made necessary by the negligence of others. No work shall at any time be done in such a manner as to unduly obstruct, delay, or interfere with the operation of the pipe-line. Notwithstanding the foregoing, all work which might disturb the pipe and which necessitates realigning, raising, or lowering the pipe or excavating material from over or around it, or the additions of casing or other appurtenances thereto deemed necessary by the pipe-line company for the protection of the pipe-line being crossed, shall be performed by the pipe-line company whose line is being crossed, and, except as provided in subsection (b) hereof, all costs and expenses of such work shall be borne and paid by the authority having control over the highway, railway, utility line, drain, or other pipe-line, or the owner of the private road, railway, utility line, drain, or other pipe-line, as the case may be:*
>
> *(b) Subject to the approval of the Lieutenant-Governor in Council with respect to the crossing of a pipe-line by a railway or highway, neither the Pacific Great Eastern Railway Company nor the Province shall be liable for any costs incurred in the actual removing, realigning, raising, or lowering of a pipe and appurtenances thereto. The construction of the crossing shall be carried out expeditiously and with all reasonable care and diligence; provided, however, that in no case shall the Pacific Great Eastern Railway Company or the Province be liable for losses incurred through the discontinuance of operation of the pipe-line:*
>
> *(c) The authority having control over any highway, railway, utility line, drain, or other pipe-line, or the owner of any private road, railway, utility line, drain or other pipe-line crossing a pipe-line, shall at all times maintain such crossing in good working order and condition, so that at no time shall any damage be caused*

to the pipe-line, the usefulness or safety thereof be impaired, or the full use and enjoyment thereof be in any way interfered with:

(d) Before any work of construction, maintenance, renewal, or repair of any crossing of a pipe-line is begun, the authority having control over such crossing or the party making, owning, or operating such crossing, as the case may be, shall give to the pipe-line company at least forty-eight hours' notice in writing, to enable the pipe-line company to appoint an inspector to see that the work is performed in such a manner as shall in all respects comply with these regulations; and in cases of emergency the pipe-line company shall be notified immediately. Except as provided in subsection (e) hereof, the amount of the wages and expenses of such inspector shall be paid by the authority having control over such highway, railway, utility line, drain, or other pipe-line, or the owner of such private road, railway, utility line, drain, or other pipe-line, as the case may be, upon receipt from the pipe-line company of a statement showing in reasonable detail the particulars of such wages and expenses:

(e) ***In no case shall the Pacific Great Eastern Railway Company or the Province be liable for any of the costs or expenses referred to in subsection (d):***

(f) ***The pipe-line company shall at all times wholly indemnify the authority having control over the highway, railway, private road, utility line, drain, or other pipe-line, or the owner of the highway, railway, private road, utility line, drain, or other pipe-line, as the case may be, from and against all loss, costs, damage, injury, and expense to which the authority or owner may be put by reason of any damage or injury to persons or property caused by the construction, maintenance, renewal, repair, or operation of the company pipe-line, or any other works herein provided for, as well as against any damage or injury resulting from the imprudence, neglect, or want of skill of the employees or agents of the pipe-line company in connection with the construction, operation, maintenance, renewal, or repair of the pipe-line, or any other works herein provided for****, unless the cause of such loss, costs, damage, injury, and expense can be traced elsewhere.*

B.C. Reg. 451/59
Book of Authorities, Tab 17

67. In 1969 the allocation formula was amended to expressly provide cost immunity to municipalities:

2. By striking out subparagraph (b) of Rule 9 and substituting therefor the following:

"(b) Subject to the approval of the Lieutenant-Governor in Council with respect to the crossing of a pipe-line by a railway or a highway, ***in no case shall the Province of British Columbia, a municipality within the Province, nor the Pacific Great Eastern Railway be liable for any costs incurred in the actual installation, removal, realigning, strengthening, casing, raising, or lowering of a pipe and appurtenances thereto, except when a new highway is built within a municipality by the municipality on an existing right-of-way or on a newly dedicated right-of-way, the costs shall be shared equally by the municipality and the pipe-line company.*** *In the case of a new subdivision road within a municipality, the subdivider and the pipe-line company shall share the cost equally. The construction of the crossing shall be carried out expeditiously and with all reasonable care and diligence; provided, however, that in no case shall the Province of British Columbia or a municipality within the Province or the Pacific Great Eastern Railway Company be liable for losses incurred through the discontinuance of operation of the pipe-line."*

B.C. Reg. 105/69
Book of Authorities, Tab 18

2.7.2 Provincially Regulated Public Utilities under the *Utilities Commission Act*

68. In the case of public utilities governed by the *Utilities Commission Act,* RSBC 1996, c. 473, this legislation similarly requires that terms of access (which include terms related to cost allocation) be negotiated between the parties or be determined by the Utilities Commission, **in advance of any construction.**

69. This is set out in s. 32 of the *Utilities Commission Act*.

Use of municipal thoroughfares

32 (1) This section applies if a public utility

(a) has the right to enter a municipality to place its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse, and

(b) **cannot come to an agreement with the municipality on the use of the street or other place or on the terms of the use**.

(2) **On application and after any inquiry it considers advisable, the commission may, by order, allow the use of the street or other place by the public utility for that purpose and specify the manner and terms of use**.

Book of Authorities, Tab 22

70. In a recent decision of the Utilities Commission in the matter of an application by FortisBC Energy Inc. for Approval of Operating Terms Between the District of Coldstream and FortisBC Energy Inc. made pursuant to s. 32 of the *Utilities Commission Act*, the Commission established terms pursuant to which FortisBC Energy Inc. could occupy highways and other public places in the District and held in its Reasons for Decision on page 8, in section 9.0 that FortisBC Energy Inc. was bound by the Cost Allocation formula under the *Oil and Gas Activities Act*:

Oil and Gas Activities Act

> Section 8.1 of the Revised FEI Operating Terms deals with requests by FEI when they require Municipal Facilities to be altered, changed or relocated. Section 8.2 deals with requests by the Municipality when they require the same of FEI's Company Facilities. Both Section 8.1 and 8.2 require that the party making the request pay for all of the costs. **The Municipality has noted in several submissions that the requirement in Section 8.2 that the Municipality "...agrees to pay for all of the costs for changes to the affected Company Facilities" forces them to abandon their rights under the *Oil and Gas Activities Act* (the OAGA Act). The *Oil and Gas Activities Act General Regulation* provides the opportunity for cost sharing between specific parties when particular conditions are met. In the Commission's view, the Municipality does not abandon its rights under the OAGA Act, given that Section 5.1 of the Revised FEI Operating Terms requires FEI to comply with "all Federal and Provincial laws, regulations and codes.**"

BC Utilities Commission Order No. G-113-12 dated August 23, 2012 and Reasons for Decision dated August 29, 2012
Book of Authorities, Tab 24

71. In that decision the Commission also held that the municipality was not only entitled to the benefit of the cost allocation formula under the *Oil and Gas Activities Act*, **but was also entitled to a 3% operating fee on gross revenues** of FortisBC Energy Inc. **The municipality**

was also entitled to payments in lieu of property taxes which FortisBC Energy Inc. is required to pay under s. 644 of the *Local Government Act*.

Specific Terms in Dispute

The Commission has reviewed submissions from both parties and has included its determination on each of the Specific Terms in Dispute in Appendix A.1.

The Commission approves the Revised FEI Operating Terms, as amended by the Commission and set out in the attached Appendix A.1 and Appendix B.

The Commission considers that a term of twenty years is appropriate for the new Operating Agreement and is effective from July 1, 2012.

FEI and the Municipality are to file with the Commission an endorsed Operating Agreement in accordance with the terms approved by the Order accompanying the Reasons for Decision and consistent with Appendix B.

The terms of the Operating Agreement may be reviewed, upon application by FEI or the Municipality, should the Commission determine that a significant revision is required.

The amendments to the Operating Agreement, as directed by the Commission and set out in the attached Appendix A.1 and Appendix B, are to be incorporated into future operating agreements between FEI and municipalities.

……

11. Operating Fee

Fee Calculation

FortisBC agrees to pay to the Municipality **a fee of three percent (3%) of the gross revenues (excluding taxes) received by FortisBC for provision and distribution of all gas consumed within the Boundary Limits of the Municipality.** Such amount will not include any amount received by FortisBC for gas supplied or sold for resale.

The Municipality will provide FortisBC with thirty (30) days prior written notice of any boundary expansion so that new customers can be included as a part of the annual payment fee.

FortisBC will be responsible for adding those new customers within the new Municipal boundary upon receipt of such notice from the Municipality and the

revised calculation of the fee will commence effective the date that is the later of the date of actual boundary change or thirty (30) days after the notification under section 11.1.2.

Payment Date and Period

Payments by FortisBC to the Municipality will be made on the first day of March of each year of the Agreement in respect of the amount received by FortisBC during that portion of the term of these terms which is in the immediately preceding calendar year. By way of example only, payment made on November 1, 2012 will be the amount received during the 2011 calendar year.

BCUC Decision or Provincial Legislation

In the event that a decision by the BCUC, other than periodic rate changes as a result of commodity, delivery or margin increases or decreases, or new legislation by the Provincial Government, impacts the operating fee being paid to the Municipality so as to increase it or decrease it by more than 5% annually at the time of the decision or in subsequent years, the parties shall negotiate a new operating fee formula which best reflects the revenue stream received by the Municipality under these terms. For greater certainty, the parties acknowledge that a change to the BCUC's decision that FortisBC shall provide the agency billing and collections service for marketers on a mandatory basis, as set out in the "Business Rules for Commodity Unbundling dated June 5, 2003 as set out in Appendix A to Letter No. L-25-03, may impact the operating fee being paid to the Municipality.

Book of Authorities, Tab 24

72. The requirement for utility companies, including FortisBC Energy Inc., to make payments in lieu of property taxes is set out in s. 644 of the *Local Government Act* which reads:

Taxation of utility company property

644 (1) In this section:

"specified improvement" means an improvement of a utility company that is

(a) a pole line, cable, tower, pole, wire, transformer, equipment, machinery, exchange equipment, main, pipe line or structure, other than a building,

(b) erected or placed in, on or affixed to

(i) land in a municipality, or

(ii) a building, fixture or other structure in or on land in a municipality, and

(c) used solely in the municipality or a group of adjoining municipalities by the company for local generation, transmission, distribution, manufacture or transportation of electricity, telephonic communication, water, gas or closed circuit television;

"**utility company**" means an electric light, electric power, telephone, water, gas or closed circuit television company.

(2) A utility company that is carrying on business in a municipality in which it has specified improvements must be taxed annually by the municipality at the rate of 1% as follows:

(a) for a telephone or closed circuit television company, on the gross rentals received in the 2nd preceding year from its subscribers for telephone or television service located in the municipality, including telephone interexchange tolls for calls between exchanges in the municipality;

(b) for any other utility company, on the amount received in the 2nd preceding year by the company for electric light, electric power, water or gas consumed in the municipality, other than amounts received for

(i) light, power or water supplied for resale,

(ii) gas supplied for the operation of motor vehicles fueled by natural gas, or

(iii) gas supplied to any gas utility company, other than a government corporation as defined in the *Financial Administration Act* or a subsidiary of a government corporation.

(3) Tax under subsection (2) is subject to the same remedies and penalties as taxes under Part 7 *[Municipal Revenue]* of the *Community Charter*.

(4) A utility company liable to tax under subsection (2) must

(a) by October 31 in each year, for the purpose of determining the tax payable in the next year, file with the collector a return of the revenue referred to in that subsection that was received in the preceding year, and

(b) pay the tax imposed under subsection (2) in accordance with Division 10 *[Property Tax Due Dates and Tax Notices]* of Part 7 of the *Community Charter*.

(5) As an exception to subsections (2) and (4), in the case of a company to which this section applies for the first time in the municipality,

(a) the company must pay the tax imposed under subsection (2) in the 2nd year of its operation on the basis of revenue earned in the first year, and

(b) the report of revenue earned in the first year must be filed before May 8 of the 2nd year of operation.

(6) Tax imposed on a utility company under subsection (2) is in place of tax that might otherwise be imposed on the specified improvements under section 197 (1) (a) *[municipal property taxes]* of the *Community Charter*, and taxes may not be imposed under that provision on the specified improvements although they may be imposed on those improvements under section 197 (1) (b) *[property taxes for other bodies]* of the *Community Charter*.

(7) For certainty, all land and improvements of a utility company in a municipality, other than specified improvements, are subject to tax under section 197 *[annual property tax bylaw]* of the *Community Charter*.

Book of Authorities, Tab 5

73. The Utilities Commission in the Coldstream decision also held that the amendments to the Operating Agreement, as directed by the Commission and set out in the attached Appendix A.1 and Appendix B to the decision, are to be incorporated into future operating agreements between FEI (FortisBC Energy Inc.) and municipalities.

The amendments to the Operating Agreement, as directed by the Commission and set out in the attached Appendix A.1 and Appendix B, are to be incorporated into future operating agreements between FEI and municipalities.

Book of Authorities, Tab 24

2.7.3 Federally Regulated Telecommunications Companies under the *Telecommunications Act*

74. In the case of telecommunications under the federal regime, the *Telecommunications Act,* SC 1993, c.38 also requires that terms of access (which include terms related to cost allocation) be negotiated between the parties or be determined by the CRTC **in advance of any construction**.

75. This is set out in s. 43 of the *Telecommunications Act*:

Definition

43. (1) In this section and section 44, "distribution undertaking" has the same meaning as in subsection 2(1) of the Broadcasting Act.

Entry on public property

(2) Subject to subsections (3) and (4) and section 44, a Canadian carrier or distribution undertaking may enter on and break up any highway or other public place for the purpose of constructing, maintaining or operating its transmission lines and may remain there for as long as is necessary for that purpose, but shall not unduly interfere with the public use and enjoyment of the highway or other public place.

Consent of municipality

(3) **No Canadian carrier or distribution undertaking shall construct a transmission line on, over, under or along a highway or other public place without the consent of the municipality or other public authority having jurisdiction over the highway or other public place.**

Application by carrier

(4) **Where a Canadian carrier or distribution undertaking cannot, on terms acceptable to it, obtain the consent of the municipality or other public authority to construct a transmission line, the carrier or distribution undertaking may apply to the Commission for permission to construct it and the Commission may, having due regard to the use and enjoyment of the highway or other public place by others, grant the permission subject to any conditions that the Commission determines**.

Applications by municipalities and other authorities

44. On application by a municipality or other public authority, the Commission may

(a) order a Canadian carrier or distribution undertaking, subject to any conditions that the Commission determines, to bury or alter the route of any transmission line situated or proposed to be situated within the jurisdiction of the municipality or public authority; or

(b) prohibit the construction, maintenance or operation by a Canadian carrier or distribution undertaking of any such transmission line except as directed by the Commission.

Book of Authorities, Tab 20

76. In a recent case of *MTS Allstream v. Vancouver*, Telecom Decision CRTC 2009-50 involving the determination of terms pursuant to s. 43 of the *Telecommunications Act*, the CRTC held on the issue of cost allocations that in addition to other costs, Vancouver was entitled to workaround costs and relocation costs on a sliding scale.

Relocation costs

74. The City proposed a sliding scale for its share of the relocation costs for a City-initiated requirement to relocate MTS Allstream facility. The City noted that it is unusual for it to request facilities to be relocated within the first five years of construction, as it attempts to plan ahead of the City's current three-year capital plan cycle.

75. MTS Allstream proposed a revised sliding scale, noting that the City typically works within a five-year planning horizon, and submitted that its proposed schedule provided a strong incentive for the City to plan effectively within that horizon. MTS Allstream requested that, consistent with Telecom Decision 2007-100, relocations for beautification, aesthetics, or other similar purposes should be borne 100 percent by the City.

76. The City opposed this revision to the sliding scale, noting that its capital planning cycle is three years. The City also disagreed with MTS Allstream's request that relocation costs required for beautification, aesthetics, or other similar reasons be borne by the City. The City requested that if MTS Allstream's sliding scale proposal is accepted by the Commission, depreciation, salvage, and betterment costs should be deducted from the costs charged to the City.

77. The Commission notes that both the City and MTS Allstream agreed that a sliding scale for the sharing of relocation costs is appropriate, but they did not agree on what this sliding scale should be. The Commission considers that there is some merit in MTS Allstream's cost sharing proposal as it provides a strong incentive for the City to plan effectively. However, the Commission notes the City's submission that it is required by provincial legislation to follow a three-year capital planning cycle. The Commission also notes the City's comment that it is unusual for it to require relocations within the first five years of facility installation. The Commission is of the view that within the three-year capital planning period the City should generally be aware of which streets will be

subject to relocation activities. The Commission, therefore, considers it appropriate for the City to bear 100 percent of any relocation costs incurred within the first three years of a facility installation.

78. The Commission considers that past the initial three-year planning period, there may be increasing uncertainty as to the City's future project requirements. At the same time it will take a period of time for MTS Allstream to recoup its investment in the installed transmission facilities. The Commission is of the view that it would be reasonable for MTS Allstream to be able to recover its investment within a 10-year time frame. The Commission, therefore, considers it appropriate to use a sliding scale that ends after 10 years from the time of the facility installation.

79. The Commission is also of the view that costs associated with relocation for beautification, aesthetics, or other similar purposes should be the sole responsibility of the City as it is within the City's discretion to conduct projects of this nature.

80. The Commission considers that depreciation, salvage, and betterment costs are part of the transmission facilities investment made by MTS Allstream and should, therefore, be included in the relocation costs.

81. **Accordingly, the Commission determines that in the case of a City-initiated requirement to relocate an MTS Allstream facility, the relocation costs must include the depreciation, betterment, and salvage costs and that the schedule to be used for MTS Allstream facilities in Vancouver, which does not apply to relocations for beautification, aesthetics, or other similar purposes, is as follows**:

Year	**Percent of Cost Borne by the City**
1	100
2	100
3	100
4	90
5	80
6	65
7	50
8	35
9	20
10	10
11	0

77. It is also noteworthy that on the issue of indemnification, recognizing that it would not be appropriate to expose municipalities to liability for consequential losses or damages, the CRTC, a federal tribunal having similar powers as the NEB, has limited municipal liability in the context of utilities crossing highways. In *Telecom Decision CRTC 2013-618*, the Canadian Radio and Television Commission adopted a Model Municipal Access Agreement which included terms which were formed by a consensus of stakeholders and also terms for which no consensus was reached. The CRTC approved the consensus terms for the Model Agreement. From this endeavour a consensus clause dealing with the liability of both host and occupier was approved:

> *11.3. No liability, both Parties. Notwithstanding anything else in this Agreement,* ***neither Party shall be liable to any person in any way for special, incidental, indirect, consequential, exemplary or punitive damages, including damages for pure economic loss or for failure to realize expected profits, howsoever caused or contributed to, in connection with this Agreement and the performance or non-performance of its obligations hereunder****.*

Book of Authorities, Tab 35

2.7.4 Reimbursement for costs incurred by the Province and municipalities under the *Railway Safety Act,* RSC 1985, c. 32 (4th Supp.)

Amendments to *Railway Safety Act* – Cost Recovery

78. On the issue of cost recovery, it is also noteworthy that the *Railway Safety Act* was recently amended to provide relief to the province and municipalities in respect of costs incurred in responding to fire which was the result of a railway company's operations.

POWERS OF AGENCY — FIRE

Application to Agency

> **23.**(1) If a province or municipality is of the opinion that a fire to which it responded was the result of a railway company's railway operations, it may apply to the Agency to have **the costs that it incurred in responding to the fire reimbursed by the railway company**.

Form of application

(2) The application shall be in the form prescribed by regulations made under subsection (5), and it shall be accompanied by the information prescribed by those regulations.

Further information

(3) The Agency may, by notice sent to the province, municipality or railway company, require the province, municipality or railway company to provide it with any further information that it specifies relating to the application, within the period specified in the notice.

Agency's determination

(4) If the Agency determines that the fire was the result of the railway company's railway operations, it shall make an order directing the railway company **to reimburse the province or municipality the costs that the Agency determines were reasonably incurred in responding to the fire**.

Regulations

(5) The Agency may, with the Governor in Council's approval, make regulations

(*a*) prescribing the form of the application referred to in this section; and

(*b*) prescribing the information that must accompany that application.

Interpretation

(6) Despite this section, this Act is not deemed to be administered in whole or in part by the Agency for the purpose of section 37 of the *Canada Transportation Act*.

Book of Authorities, Tab 19

79. While not specific or limited to infrastructure or relocation costs, this recent amendment highlights the need to deal with the allocation and recovery of costs in advance of construction.

2.7.5 Leaving the onus on municipalities to seek an allocation of costs by making repeated applications under s. 112 of the *National Energy Board Act* is unfair and allows Kinder Morgan/Trans Mountain to leverage its position knowing that the Province and municipalities face delay costs and delay claims and project timing and funding deadlines

80. In the absence of binding provisions related to costs, municipalities and other highway authorities such as the Province will have no option but to proceed with applications for leave under s. 112 of the *National Energy Board Act* which inevitably will lead to project delays and costs to municipalities and the Province.

81. Imposing terms and conditions will ensure certainty and avoid litigation and will avoid municipalities and highway authorities being held to ransom when federal and/or provincial project funding is time sensitive and is often tied to stringent time deadlines.

82. In the absence of cost allocation provisions, Kinder Morgan/Trans Mountain has been able to leverage its position with municipalities requiring them to pay 100% of all costs and make other unreasonable demands.

83. Surrey has direct first-hand experience in this and has filed evidence of this in the form of the Affidavit of Kenneth D. Zondervan filed as Exhibits C76-9-23 and C76-9-24 in this proceeding.

> *20. Unless Surrey agrees to pay all pipeline related costs that would be incurred to accommodate a highway infrastructure project, then Surrey projects would be delayed and Surrey would not be able to proceed with its projects without incurring costs of litigation and without facing potential delay claims by third party contractors.*
>
> *21. In the case of significant highway infrastructure projects, it is not unusual for delay claims resulting from the delay of third party utility works being altered and/or relocated, to be quantified in the millions of dollars.*
>
> (Exhibits C76-9-23 (A4L9U6) and C76-9-24 (A4L9U7) - Affidavit of Kenneth D. Zondervan sworn May 26, 2015)

The 156 Street Underpass of Highway 1 Project

> *9. The 156 Street Underpass of Highway 1 Project required and involved lowering of Kinder Morgan Canada Inc.'s existing Trans Mountain pipeline which crosses 156 Street in Surrey and which in these proceedings before the National Energy Board has been referred to as the existing Trans Mountain Pipeline or "TMP".*

10. The existing Trans Mountain pipeline crosses 156th Street on the north side of Highway No. 1. Attached as Exhibit "1 " to this my Affidavit is a copy of a map which shows the location of the existing Trans Mountain pipeline crossing of 156th Street in Surrey.

11. Construction of the 156th Street underpass of Highway No. 1 required that the existing Trans Mountain pipeline be lowered across 156 Street to allow 156 Street to pass under Highway No. 1.

12. ***Unless Surrey agreed to the terms of Kinder Morgan Canada Inc.'s Facility Crossing Agreement, Kinder Morgan Canada Inc. would not undertake the required pipeline lowering to accommodate the 156 Street Underpass of Highway 1 Project.***

13. ***Kinder Morgan Canada Inc. would only agree to lower the affected portion of the existing Trans Mountain pipeline if Surrey agreed to pay all associated costs as set out in the Facility Crossing Agreement.*** *Attached as Exhibit "2" to this my Affidavit is a copy of the Facility Crossing Agreement dated April 02, 2007 that Kinder Morgan Canada Inc. required the City of Surrey to sign before Surrey proceeded with the 156 Street Underpass of Highway 1 Project.*

14. ***The actual costs that Kinder Morgan Canada Inc. invoiced Surrey and that Surrey paid totaled $1,767,682.59.*** *Attached collectively as Exhibit "3" to this my Affidavit are copies of the Kinder Morgan Canada Inc. invoices that were paid by the City of Surrey.*

The Trans Mountain Support Structure Reinforcement Project

15. The existing Trans Mountain pipeline crossing under King Road, near 139th Street in Surrey is a suspended-form timber piled support structure. The structure was constructed by the City of Surrey when King Road was established, to minimize pipe settlement, as there was an existing Metro Vancouver concrete sanitary sewer siphon located below the existing Trans Mountain pipeline and adjacent to King Road. Attached collectively as Exhibit "4" to this my Affidavit are copies of extracts from a report prepared by Associated Engineering Ltd. in August 2012 which identify the structure.

16. In or about 2011, significant settlement was observed of the existing Trans Mountain pipeline resulting from the failure of several support structure brackets. ***Kinder Morgan Canada Inc. required that Surrey pay all costs associated with reinstating the existing support structure totaling approximately $387,120.42. These additional costs could have been avoided if the existing Trans Mountain pipeline had been designed to accommodate a future road above it and future utilities in proximity to it.*** *Attached collectively as Exhibit "5" to this my*

Affidavit are invoices related to reinstating the existing Trans Mountain support structure that were paid by the City of Surrey.

The South Fraser Perimeter Road Project

17. During design discussions of the South Fraser Perimeter Road in Surrey, ***the City of Surrey was advised by the design engineering consultant that the existing Trans Mountain pipeline crossing of the South Fraser Perimeter Road required the construction of a bridge structure over the pipeline and approximately an additional one million dollars ($1,000,000.00) of lightweight fill and associated design costs to avoid settlement on the pipe.***

(Exhibits C76-9-23 (A4L9U6) and C76-9-24 (A4L9U7) - Affidavit of Kenneth D. Zondervan sworn May 26, 2015)

84. This "leveraging" and opportunistic behaviour has also been the subject matter of litigation in the Provincial context. In the case of *FortisBC Energy Inc. v. City of Surrey et al,* 2013 B.C.S.C. 2382, Justice Pearlman in finding that FortisBC Energy Inc. had terminated the 1956 Trunk Line Agreement related to the transmission of natural gas found that FortisBC Energy Inc. had fundamentally breached and repudiated the agreement by its conduct. **In making this decision, Justice Pearlman relied on evidence that FortisBC Energy Inc. had been leveraging its position to make Surrey and the Ministry of Transportation pay 100% of its pipeline relocation costs:**

[332] On July 24, 2008, officials of Terasen Gas met to review the plaintiff's policy respecting highway crossings of its transmission pipelines. Mr. Chris Coady, Terasen Gas' manager of realty services, made a power point presentation which summarized the problems Terasen Gas sought to address, the interests it sought to protect, and possible strategies.

[333] Under the heading "Problem Definition" at pages 9 and 10, Mr. Coady noted that:

· Rights contained within Terasen SRW are protective and integral to ongoing operations requirements.

· Road authorities "require" that all existing registered interests be extinguished on creation/improvement of roads.

· How can Terasen protect operational flexibility if SRW is extinguished?

· By virtue of LTO registered SRW, Terasen can reduce/eliminate cost responsibility for pipeline [relocation / reinstatement] when road authority proceeds under Expropriation Act.

· By virtue of Pipeline Regulation 9 (c), province and municipalities are not required to pay pipeline re/re costs.

· Terasen says Pipeline Regs *ultra vires*, road authorities disagree.

· Recipe for litigation.

[334] At page 11, Mr. Coady described the plaintiff's "Official Position" as:

[335]

· Terasen requires road authorities to pay 100% of relocation/reinstatement costs

· Terasen will not extinguish its Statutory Rights-of-Way

· … unless compensated

[336] The "Decision Drivers" identified by Mr. Coady included the plaintiff's legal position, future operating requirements, ratepayer protection, shareholder protection, the strength of the road authorities' position and defensibility.

[337] The plaintiff's legal position was described as follows:

· Pipeline Regulations (9 c) are not applicable - *ultra vires*.

· SRW interests mean certain cost protection is available should subject land be expropriated.

· Question of equal expropriation powers.

· Terasen has been unsuccessful in persuading road authorities of compelling nature of argument

· Strength of position can only be determined in court

[338] **At page 20, Mr. Coady discussed the plaintiff's "Leverage":**

· Terasen can withhold issuing construction permit unless road authority agrees to 100% cost responsibility and creation of utility lots.

· Risk of delaying high profile politically driven improvement projects

· Stand the heat?

[339] Mr. Coady discussed "Timing" at page 23:

· **We have MoTH attention by virtue of Gateway and Highway 15**

· We have Surrey's attention by virtue of Fraser Highway (and some others)

· Issue has been out there for 15 years

[340] In cross-examination, Mr. Coady agreed that "shareholder protection", one of the "Decision Drivers" that he had identified, meant maximizing profits, and that "ratepayer protection" meant minimizing the impact on the plaintiff's customers.

[341] Mr. Coady also gave this evidence in cross-examination:

324 Q Now, Mr. Coady, I would like you to turn to page 20. "Leverage", do you see that, "Leverage".

A Yes sir.

325 Q And it reads "Risk delaying" -- I'm sorry: Terasen can withhold issuing construction permit unless road authority agrees to 100 percent cost responsibility and creation of utility lots. That's exactly what happened here, isn't it?

A That's where -- yes, yep.

326 Q And not only that, Terasen risked delaying a high profile politically driven improvement project, correct?

A Yes, sir.

327 Q And that project would by City of Surrey Fraser Highway widening project?

A This document does not speak specifically to Fraser Highway. At the same time we had issues with the Ministry of Transportation in other municipalities.

328 Q Let's explore that a little bit, shall we?

A Sure.

329 Q My first question is could Terasen stand the heat?

A We had until now.

330 Q Sure, of course. And let's go to page 23, "Timing". It says "We have Surrey's attention by virtue of Fraser Highway and some others." Well, you certainly did, didn't you?

A Yes, sir.

MR. URQUHART: I'm sorry, yes.

MR. CAPUCCINELLO:

331 Q And not only Surrey's attention, you also had Ministry of Transportation attention as well with the Highway 15 project?

A And Gateway.

332 Q And Gateway. So it is essentially withhold construction and wait until people cave in, it's leverage, isn't it? Isn't this what this is all about?

A Sure.

[342] **I find that Terasen Gas was prepared to delay performance of the work required to protect the Pipeline and facilitate its crossing by the defendant's highway project in order to exert "leverage" or pressure on Surrey to either create the utility lot sought by the plaintiff or pay the full cost of the work in exchange for the plaintiff's consent to the dedication of the SRW land as road.**

Findings on Fundamental Breach

357 A remarkable feature of this case is that before Ms. Fung produced a copy of the TLA on June 14, 2007, there was no history of performance of that contract by either Terasen Gas or Surrey. When Mr. Sandstrom informed Surrey on September 6, 2005 that Terasen Gas would not begin work until the plaintiff had the defendant's binding assurance that it would pay the whole of the plaintiff's costs for the Pipeline upgrade work, he did so without reference to the TLA. Mr. Sandstrom was not aware of the existence of the TLA until on or about June 14, 2007. Again, when Terasen Gas responded to Surrey's request of December 21, 2005 for the plaintiff's consent to the dedication of road over the SRW on the Angus Land by asserting that it would not consent until Surrey made a commitment to pay for all of the Pipeline upgrade work, it did so without referring to the TLA.

358 Until June 14 2007, Terasen Gas asserted its corporate policy without reference to the TLA, and without any suggestion that the TLA applied to the Pipeline and the sharing of costs for the Pipeline upgrade work necessary to accommodate Surrey's Fraser Highway expansion project.

359 Before and after June 14, 2007, Terasen Gas has informed Surrey and others that it opposed the dedication of land charged with its rights of way because it wished to preserve assets that have benefitted its shareholders and ratepayers. The plaintiff has also declared that it wished to retain the right to control activities on and around the Pipeline in order to maintain the integrity of its operations and to protect public safety. However, the plaintiff's concerns respecting the preservation of its assets and the protection of public safety were not immutable. Terasen Gas was prepared to consent to the extinguishment of its SRW if it received full compensation for the cost of the work required to facilitate the crossing of the Pipeline.

360 The plaintiff's corporate policy of withholding its consent to the dedication of public roads or highways over its SRWs, of demanding the creation of fee simple utility lots to protect the rights granted under its SRWs, and of refusing to extinguish its SRW on the Angus Land unless Surrey paid 100% of the cost of the Pipeline upgrade work is inconsistent with the plaintiff's obligation under s. 4 of the TLA to not unreasonably

withhold its consent to the dedication of private property as public property for the opening up of streets, roads or highways.

361 Moreover, as Mr. Coady acknowledged in cross-examination, the plaintiff was also prepared to withhold its consent to the dedication of road over its SRW as a means of exerting leverage through delay of major public projects, including the Fraser Highway widening project. By invoking its corporate policy, and by withholding its consent to the dedication of road over its SRW in attempt to compel Surrey to accede to its position of the City either create a fee simple utility lot or bear all of the costs of the Pipeline upgrade, Terasen Gas has demonstrated a clear and unequivocal intention not to be bound by the TLA.

362 The plaintiff's refusal to perform the upgrade work until Surrey accepted its position did not constitute a reasonable withholding of consent to road dedication. The commercial value of the TLA to Surrey lay in having the Pipeline upgrade work completed without delay so as to permit the timely construction of the Fraser Highway widening project. By refusing to consent to the dedication of the SRW lands as highway unless Surrey either agreed to create a fee simple lot over the portion of the highway crossing the Pipeline, or paid all of the cost of the Pipeline upgrade work, the plaintiff deprived Surrey of substantially the whole of the commercial benefit of the TLA and committed a breach which went to the root of that contract.

363 I reach this conclusion taking into account the evidence that factors other than the failure of Terasen Gas to perform the Pipeline upgrade work until July 2008 also contributed to delay of the Fraser Highway expansion project. For example, in cross-examination Mr. Zondervan acknowledged that in April 2007 Surrey's engineering department anticipated that final completion of the Fraser Highway expansion between 168th Street and the 17900 block would extend into 2010, about three years later than originally anticipated, and that the delay was largely attributable to poor soil conditions that resulted in the need to slow down the pre-loading of soils along the highway right of way.

364 Poor soil conditions were a factor beyond the ambit of the TLA. The intended benefit of the TLA for Surrey was that Terasen Gas would perform the Pipeline upgrade work within a reasonable time of Surrey's request that it do so and that the plaintiff would not unreasonably withhold its consent to the dedication of the SRW land as highway. In cross-examination, Mr. Jamer acknowledged that he knew in early August 2006 that Surrey regarded the resolution of the parties' differences concerning payment for and performance of the Pipeline upgrade work as urgent. Mr. Jamer also understood that there were potentially adverse impacts for Surrey if the project was delayed. Similarly, Ms. Marie-France Leroi, one of the in-house solicitors advising Terasen Gas, admitted in cross-examination that she was aware as early as September 6, 2005 that if the plaintiff refused to move its Pipeline it might mean delays for Surrey. In all of the

circumstances of this case, the delay by Terasen Gas in performing the Pipeline upgrade work until July 2008 was a fundamental breach of its obligation under paragraph 4 to carry out the work with "reasonable speed" when requested to do so by Surrey.

365 I find that Surrey accepted the repudiation by Terasen Gas of the TLA when on August 7, 2007 the City delivered its statement of claim and application to the OGC for permission to cross the Pipeline, and for an order requiring the plaintiff to perform the Pipeline upgrade work. Surrey confirmed its acceptance of the plaintiff's repudiation of the TLA on October 3, 2007, when it applied for a determination by the OGC that Terasen Gas was responsible for the costs of all of the work required for the crossing of the Pipeline by the Fraser Highway expansion project. When Surrey accepted the plaintiff's repudiation of the TLA, that agreement was terminated and ceased to bind the parties.

366 Accordingly, it is necessary to determine whether, upon Surrey's acceptance of the repudiation by Terasen Gas of the TLA, s. 9(c) of the *Pipeline Regulation* applied to the allocation of costs for the work required to facilitate the crossing of the Pipeline by the Fraser Highway expansion project.

Book of Authorities, Tab 27

85. Unless the NEB includes terms and conditions establishing a cost allocation formula in any certificate it may grant, municipalities and the Province will be victims of Kinder Morgan’s/Trans Mountain’s continuing efforts to leverage its position and force municipalities and the Province to pay 100% of its relocation and pipeline work costs and to comply with Kinder Morgan’s/Trans Mountain’s other unreasonable demands, including the demands for “Lot “X”s” or “Utility lots” described below which frustrate municipal and Provincial efforts to widen or establish highways.

2.8 Without conditions being imposed, municipal and Provincial efforts to widen or establish highways will be frustrated by the proposed pipeline occupying or crossing highways

86. The current crossing provisions are deficient in that they do not provide the necessary authority to compel Trans Mountain to extinguish statutory rights of way it has acquired to allow for highways to be widened or established.

87. Under legislation in British Columbia there is no indefeasible title to highway, park or public square. This is set out in s. 107 of the *Land Title Act*, RSBC 1996, c 250.

88. To create highway, indefeasible title is extinguished through the registration and filing of a s. 107 Road Dedication Plan or through the filing and registration of a subdivision plan which dedicates certain areas as highway. In order to be able to accomplish this, any person having an interest in the land to be dedicated as highway must consent to the dedication. Absent consent, highway can only be created through expropriation which in the case of federal undertakings such as the proposed and existing pipelines is arguably unavailable.

Dedication and vesting

107 (1) **The deposit of a subdivision, reference or explanatory plan showing a portion of the land**

(a) **as a highway, park or public square**, that is not designated on the plan to be of a private nature, or

(b) as covered by water and as lying immediately adjacent to a lake, river, stream or other body of water not within the land covered by the plan, and designated on the plan to be returned to the government, operates

(c) **as an immediate and conclusive dedication by the owner to the public of that portion of land shown as a highway, park or public square,** or to be returned to the government, for the purpose indicated on or to be inferred from the words or markings on the plan,

(d) to vest in the Crown in right of the Province, subject to any other enactment, title to the highway, park or public square, or to the portion to be returned to the government, except any of the following that are registered in the name of a person other than the owner:

(i) minerals and placer minerals as defined in the *Mineral Tenure Act*;

(ii) coal;

(iii) petroleum as defined in the *Petroleum and Natural Gas Act*;

(iv) gas or gases, and

(e) to extinguish the owner's common law property, if any, in the portion of land referred to in subsection (1) (a) or (b).

(2) If the Crown in right of Canada, in trust for a band, as defined in the *Indian Act* (Canada), is the owner of the subdivided land, the Lieutenant Governor in Council may limit, in whole or in part, and subject to the terms and conditions the Lieutenant Governor in Council considers necessary, the operation of subsection (1).

(3) **An indefeasible title must not be registered for a highway, park or public square dedicated and vested under this section.**

(4) A public street, road, square, lane, bridge or other highway that vests in the City of New Westminster under section 204 of the *New Westminster Act, 1888* vests subject to the exceptions referred to in subsection (1) (d) of this section.

Book of Authorities, Tab 4

89. Without the ability to expropriate and without a provision similar to s. 2(1.3) of the *Expropriation Act,* RSBC 1996, c 125 of British Columbia which provides that the cost allocation formula applies despite any provision in an enactment to the contrary, municipalities and the Province will be unable to extinguish Trans Mountain's statutory rights of way or the registered interests of mortgagees of Trans Mountain's statutory rights of way.

Application

2 (1) If an expropriating authority proposes to expropriate land, this Act applies to the expropriation, and, if there is an inconsistency between any of the provisions of this Act and any other enactment respecting the expropriation, the provisions of this Act apply.

(1.1) Despite subsection (1), if there is an inconsistency between any of the provisions of this Act and the Nisga'a Final Agreement, as defined in the Nisga'a Final Agreement Act, the Nisga'a Final Agreement applies.

(1.2) Despite subsection (1), if there is an inconsistency between a provision of this Act and a provision of a final agreement, the provision of the final agreement applies.

*(1.3) **Despite subsection (1), if there is an inconsistency between a provision of this Act and a provision of either a regulation under section 99 (1) (m.1) of the Oil and Gas Activities Act or an order under section 76 (6) of that Act, the provision of the regulation or order prevails.***

Book of Authorities, Tab 3

90. Referring to the expropriation of pipeline statutory rights of way in the Provincial context, mortgagees of FortisBC Energy Inc.'s statutory rights of way were part of the expropriation proceedings and their mortgage interests were extinguished. These mortgagees

included Inland Energy Corp. and CIBC Mellon Trust Company. This is clear from exhibits 33 to 37 (being Notices of Expropriation and Vesting Notices filed by the City of Surrey and the Ministry of Transportation) to the Affidavits of Kenneth D. Zondervan sworn May 26, 2015 and December 1, 2015 and filed by the City of Surrey as Exhibits C76-9- 23, C76-9-24 and C76-16-2 in this proceeding.

91. As the NEB is aware, s. 114 of the *National Energy Board Act* allows a pipeline company to mortgage its statutory right of way interest.

> **Assets of company subject to executions, etc.**
>
> **114.** (1) It is hereby declared that nothing in this Act restricts or prohibits any of the following transactions:
>
> o (a) the sale under execution of any property of a company; or
>
> o (b) **the creation of any lien, mortgage, hypothec, charge or other security on the property of the company, or of any prior claim or right of retention within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec with respect to property of the company;**
>
> o (c) the sale, elsewhere than in the Province of Quebec, under an order of a court of any property of the company to enforce or realize on any lien, mortgage, charge or other security on the property of the company;
>
> o (d) the sale, in the Province of Quebec, under an order of a court or by judicial authority, of any property of the company to enforce or realize on any hypothec, charge or other security on the property of the company; and
>
> o (e) the exercise of remedies for the enforcement and realization of any prior claim referred to in paragraph (*b*) or the exercise of any right of retention referred to in that paragraph.
>
> Application of provincial law
>
> (2) It is hereby declared **that a transaction mentioned in subsection (1)** in respect of any property of a company **is subject to the same laws to which it would be subject if the work and undertaking of the company were a local work or undertaking in the province in which that property is situated.**

Book of Authorities, Tab 6

92. Section 111.4 (1)(b) also allows a pipeline company to mortgage or create a security interest in that portion of its pipeline that crosses or occupies highway.

> **111.4** (1) Despite this Act or any other general or Special Act or law to the contrary, if any section or part of a pipeline passes on, over, along or under a utility, as defined in subsection 108(6)-or passes in, on, over or under a navigable water and that section or part of the pipeline has been affixed to any real property or immovable in any of the circumstances referred to in subsection (2),
>
> *(a)* that section or part of the pipeline remains subject to the rights of the company and remains the property of the company as fully as it was before being so affixed and does not become part of the real property or immovable of any person other than the company unless otherwise agreed by the company in writing and unless notice of the agreement in writing has been filed with the Secretary; and
>
> *(b)* **subject to the provisions of this Act, the company may create a lien, mortgage, charge or other security, or the company may constitute a hypothec, on that section or part of the pipeline.**
>
> (2) The following are the circumstances for the purposes of subsection (1):
>
> *(a)* in the case of the pipeline:
>
> (i) leave has been obtained under subsection 108(2) or (5) in respect of the pipeline,
>
> (ii) the certificate issued, or the order made under section 58, in respect of the pipeline contains a term or condition relating to the utility,
>
> (iii) the pipeline has been constructed in circumstances specified in an order or regulation made under subsection 108(4),
>
> (iv) a certificate has been issued, or an order has been made under section 58, in respect of the pipeline and the pipeline passes in, on, over or under a navigable water, and
>
> (v) leave has been obtained under section 108 in respect of the pipeline at any time before the coming into force of this subsection, as that section read from time to time before the coming into force of this subsection; and
>
> *(b)* in the case of the power line to which this section applies by reason of section 58.27,

(i) leave has been obtained under subsection 58.28(2) or (5) in respect of the power line,

(ii) the permit referred to in section 58.11, or the certificate, issued in respect of the power line contains a term or condition relating to that utility,

(iii) the power line has been constructed in circumstances specified in an order or regulation made under subsection 58.28(4),

(iv) a permit referred to in section 58.11, or a certificate, has been issued in respect of the power line and the power line passes in, on, over or under a navigable water, and

(v) leave has been obtained under section 108 in respect of the power line at any time before the coming into force of this subsection, as that section read from time to time before the coming into force of this subsection.

Book of Authorities, Tab 6

93. It is only through imposing terms and conditions in a certificate pursuant to s. 108 of the *National Energy Board Act* and/or s. 52 of the Act stipulating that statutory rights of way interests in favour of Trans Mountain must be extinguished for the purposes of highway dedication will third party mortgagees have notice of and be bound by said terms and conditions. In effect, terms and conditions in a certificate approving the crossing or occupation of highways, serve as notice to any mortgagee that subsequently takes a security interest in Trans Mountain's statutory right of way or pipeline. Having a condition(s) imposed in the certificate issued under s. 108 and/or s. 52 of the *National Energy Board Act* would ensure that Trans Mountain and the mortgagees do not prevent the dedication of those lands required for highway when a portion of the statutory right of way (over which a mortgagee has a mortgage) must be extinguished for highway purposes.

94. Under the Provincial scheme in British Columbia the legislation clearly contemplates municipalities and the Province expropriating from pipeline companies. In fact, in s. 2(1.3) of the *Expropriation Act* it expressly provides the cost allocation formula provisions in the *Pipeline Crossings Regulation* apply despite the provisions of the *Expropriation Act* which would otherwise require the expropriating authority under s. 34 of the *Expropriation Act* to pay reasonable costs, expenses and financial losses that are directly attributable to the disturbance

caused to the owner ("owner" under s. 1 of the Act includes mortgagees having a security interest in a statutory right of way) by the expropriation.

Application

2 (1) If an expropriating authority proposes to expropriate land, this Act applies to the expropriation, and, if there is an inconsistency between any of the provisions of this Act and any other enactment respecting the expropriation, the provisions of this Act apply.

(1.1) Despite subsection (1), if there is an inconsistency between any of the provisions of this Act and the Nisga'a Final Agreement, as defined in the Nisga'a Final Agreement Act, the Nisga'a Final Agreement applies.

(1.2) Despite subsection (1), if there is an inconsistency between a provision of this Act and a provision of a final agreement, the provision of the final agreement applies.

(1.3) ***Despite subsection (1), if there is an inconsistency between a provision of this Act and a provision of either a regulation under section 99 (1) (m.1) of the Oil and Gas Activities Act or an order under section 76 (6) of that Act, the provision of the regulation or order prevails.***

Disturbance damages generally

34 (1) An ***owner*** *whose land is expropriated is entitled to disturbance damages consisting of the following:*

(a) ***reasonable costs, expenses and financial losses that are directly attributable to the disturbance caused to the owner by the expropriation****;*

(b) reasonable costs of relocating on other land, including reasonable moving, legal and survey costs that are necessarily incurred in acquiring a similar interest or estate in the other land.

(2) If a cost, expense or loss is claimed as a disturbance damage and that cost, expense or loss has not yet been incurred, either the claimant or the expropriating authority may, with the consent of the court, elect to have the cost, expense or loss determined at the time, not more than 6 months after the date of expropriation, that the cost, expense or loss is incurred.

(3) If an owner whose land is expropriated carried on a business on that land at the date of expropriation and, after the date of expropriation, relocates the business to and operates it from other land, reasonable business losses directly attributable to the expropriation must not, unless that person and the expropriating authority otherwise agree, be determined until the earlier of

(a) 6 months after the owner has operated the business from the other land, and

(b) one year after the date of the expropriation.

(4) If the court determines that it is not feasible for an owner to relocate his or her business, there may be included in the compensation that is otherwise payable, an additional amount not exceeding the value of the goodwill of the business.

Definitions

***1** In this Act:*

*"**owner**", in relation to land, means*

*(a) a person who has an estate, **interest,** right or title in or to the land including a person who holds a subsisting judgment or builder's lien,*

(b) a committee under the Patients Property Act,

(b.1) an attorney under Part 2 of the Power of Attorney Act,

(b.2) a guardian, executor, administrator or trustee in whom land is vested, or

(c) a person who is in legal possession or occupation of land, other than a person who leases residential premises under an agreement that has a term of less than one year;

*"**security interest**" means a charge on land, including a claim of lien filed under the Builders Lien Act, which charge is owned or held by a person as security for the payment of money.*

Book of Authorities, Tab 3

95. When land is expropriated in the Provincial context for highway purposes indefeasible title is extinguished as are any registered interests including statutory rights of way in favour of pipeline companies and mortgages of those statutory rights of way interests.

Vesting and possession

23 (1) The expropriating authority must, within 30 days after it has complied with section 20 (1) or an order under section 20 (6), file in the land title office, in accordance with the requirements of the *Land Title Act*, a vesting notice in the prescribed form, and, on filing the notice, the authority must serve a copy of it on the owner.

(2) **If a fee simple interest is expropriated, the registrar must file the vesting notice, and, on filing, the land expropriated vests in the expropriating**

authority free and clear of all charges, as defined in the *Land Title Act*, that are registered or endorsed against the lands covered by the order or notice filed under section 7 (1) other than

(a) the subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the government,

(b) a registered charge in respect of an interest in

(i) minerals, as defined in the *Mineral Tenure Act*,

(ii) coal,

(iii) petroleum, as defined in the *Petroleum and Natural Gas Act*, and

(iv) gas or gases, and

(c) a charge, specified in the vesting notice, that the expropriating authority directs the registrar not to cancel.

(3) If an estate, right, title or interest less than the fee simple is expropriated,

(a) the estate, right, title or interest in the land covered by the order or notice filed under section 7 (1) vests in the expropriating authority with priority over all charges, as defined in the *Land Title Act*, that are registered or endorsed against the land, and

(b) the registrar must register the estate, right, title or interest of the expropriating authority against the land that is affected by it.

(4) **If the order or notice filed under section 7 (1) refers to land that is intended to become a highway, an indefeasible title must not be registered for the land covered by the order or notice, and the title to that land ceases to be registered under the *Land Title Act*.**

(5) If the order or notice filed under section 7 (1) refers to land that is intended to become a park or a public square, subsection (4) applies unless the expropriating authority requests subsection (2) to apply.

(6) Subject to an agreement between the owner and the authority, if subsection (2) or (3) has been complied with, the expropriating authority is entitled to possession of the land, whether or not it has served a copy of the vesting notice on the owner.

(7) Despite subsection (6), the court may,

(a) on application by the expropriating authority made after it has complied with section 6 (1), or

(b) on the application of an owner made at any time after he or she is notified under section 5 (4) or 18 but before the 30 day period in subsection (1) has expired,

grant possession of land expropriated to the authority at a time and subject to the conditions that the court considers appropriate.

(8) If the expropriating authority is entitled to possession under this section and the owner of the land denies possession to the expropriating authority, the authority may apply to the court for an order for possession.

Book of Authorities, Tab 3

96. In fact, both Surrey and the Province (through the Ministry of Transportation and Infrastructure) have had to exercise their respective powers of expropriation against FortisBC Energy Inc. in order to establish highway. Evidence in support of this is set out in the Affidavit of Kenneth D. Zondervan sworn May 26, 2015 filed as Exhibits C76-9-23 and C76-9-24 in this proceeding which include as exhibits 33 to 37 of said affidavit actual expropriation notices and vesting notices filed.

Terasen's Corporate Policy

48. Similar to Trans Mountain Pipeline Inc. and/or Trans Mountain Pipe Line Company Ltd., a provincially regulated natural gas pipeline company, BC Gas Utility Ltd., now known as FortisBC Energy Inc. and previously known as Terasen Gas Inc. ("Terasen"), adopted a practice of refusing to endorse a subdivision plan which consents to dedication of a new roadway over an area charged by a B.C. Gas statutory right-of-way.

49. On or before February 15, 2000, BC Gas Utility Ltd., informed Surrey that it adopted a corporate policy. According to the policy, effective March 1, 1999, B.C. Gas Utility Ltd. ("B.C. Gas") will not endorse a subdivision plan which consents to dedication of a new roadway over an area presently charged by a B.C. Gas statutory right of way. The policy applies to transmission pipelines only, operating in excess of 2069 kPa. The policy requires that a fee simple lot be created over the right of—way which is to become road. The new lot must be assigned a lot number and registered with the Land Title Office. Attached as Exhibit "30" to this my Affidavit is a copy of the letter dated February 5, 2000 from B.C. Gas to Surrey outlining the corporate policy.

50. On or about April 15, 2002, Surrey City Council adopted a general policy to not support the creation of fee simple lots in those locations where proposed subdivision roads cross existing pipeline statutory rights of way. Attached as Exhibit "31" to this my Affidavit is a copy of Surrey's policy.

51. In response to Terasen's corporate policy, Surrey presented a resolution to the Union of British Columbia Municipalities ("UBCM") in 2003. Attached

hereto as Exhibit "32" to this my Affidavit is a copy of Surrey's resolution to UBCM.

52. ***Since the adoption of Terasen's corporate policy, Surrey or the Ministry of Transportation has exercised its power of expropriation to acquire highway dedications on at least five occasions. Attached as Exhibits "33" to "37" respectively to this my Affidavit are copies of the five Expropriation Notices together with copies of their corresponding Vesting Notices and the LMP Plans referred to in said Expropriation Notices..***

53. The expropriations referred to in paragraph 52 of this my affidavit are in respect of the high pressure transmission pipeline. The five expropriations are described in Expropriation Notices registered in the Land Title Office as BB536997, BB587161, BB587163, BB0817526 and BB1690464 which are attached as Exhibits "33" to "37" to this my Affidavit.

(Exhibits C76-9-23 (A4L9U6) and C76-9-24 (A4L9U7) - Affidavit of Kenneth D. Zondervan sworn May 26, 2015)

97. Justice Pearlman in the case of *FortisBC Energy Inc. v. City of Surrey et al*, 2013 B.C.S.C. 2382, also made reference to both the City of Surrey and the Ministry of Transportation resorting to their respective expropriation powers to extinguish pipeline statutory rights of way in favour of FortisBC Energy Inc. in order to establish highway.

308 Terasen Gas has invoked its corporate policy in response to requests from both Surrey and the province for road or highway dedications. For example, on June 11, 2007, Surrey requested that Terasen Gas execute a subdivision plan for the East Clayton property on 68th Avenue, to consent to the dedication of road over the Pipeline SRW, which bisected the subdivision lands. Terasen Gas refused to do so and on June 14, 2007, informed Surrey that it was not prepared to sign the developer's subdivision plan unless Surrey agreed to create two lot "Xs" in order to protect its rights under the SRW. **Surrey responded by expropriating the road dedications over the Pipeline**.

309 Earlier, Terasen Gas had taken a similar position in its dealings with the Province where Highway 15 crossed the Pipeline near the Fraser Highway crossing. The Highway 15 construction project required the construction of a temporary pipeline bypass where the highway crossed the pipeline. On December 16, 2005, Terasen Gas informed the Ministry of Transportation and Highways that it was not prepared to consent to the extinguishment of its rights by road dedication or to begin any work on Pipeline reinstatement until it had the Ministry's binding assurance that it would pay for the whole of the cost of the Pipeline reinstatement, estimated at about $400,000. **By insisting that the**

Province pay the full cost of the work, Terasen Gas took the same position with the Ministry as it did with Surrey in the case of the Fraser Highway crossing. The Ministry responded by expropriating the right of way it required for the Highway 15 crossing.

Book of Authorities, Tab 27

98. In order to create a new highway or widen existing highways by acquiring lands over which a Trans Mountain statutory right of way is registered, Trans Mountain must agree to the extinguishment of its statutory right of way over the area of land required for highway purposes. This requires Trans Mountain and mortgagees of Trans Mountain statutory rights of way to sign a s. 107 road dedication plan or a subdivision plan which when registered in the Land Title Office creates highway.

Execution of plan by owner

103 Unless the application of this section is dispensed with by the registrar, a reference or an explanatory plan **must be**

(a) **signed by each owner of the land dealt with by the plan**, and

(b) witnessed in the same manner as is required by section 72 (2).

Definitions

1 In this Act:

"charge" means an estate or interest in land less than the fee simple and includes

(a) an estate or interest registered as a charge under section 179, and

(b) an encumbrance;

"owner" means a person registered in the records as owner of land **or of a charge on land**, whether entitled to it in the person's own right or in a representative capacity or otherwise, and includes a registered owner;

Book of Authorities, Tab 4

99. Kinder Morgan/Trans Mountain has through its opportunistic behaviour "leveraged" and taken advantage of a municipality's inability to compel consent and required municipalities to create fee simple lots in areas that should be dedicated highway. These have been referred to as

Lot "X"s. or "utility lots" in the Affidavits of Kenneth D. Zondervan filed as Exhibits C76-9-23, C76-9-24 and C76-16-2 in this proceeding and were referred to as such by Justice Pearlman in the case of *FortisBC Energy Inc. v. City of Surrey et al*, 2013 B.C.S.C. 2382.

Kinder Morgan/Trans Mountain will not agree to the Establishment of Highways

22. In circumstances where Surrey has undertaken highway widening projects in locations where the existing Trans Mountain pipeline occupies and/or crosses Surrey highways, Trans Mountain Pipeline Inc. and/or Trans Mountain Pipe Line Company Ltd. has refused to sign subdivision plans and/or road dedication plans which consent to the dedication of new highway over those areas required for highway or highway widening that are charged with statutory right-of-way in favour of Trans Mountain Pipeline Inc. Trans Mountain Pipeline Inc. and/or Trans Mountain Pipe Line Company Ltd. has refused to extinguish its statutory right-of-way over those areas required for highway or highway widening and has required instead that a fee simple lot be created. As a result, Surrey has not been able to establish or widen its highways in these locations.

23. Locations where Trans Mountain Pipeline Inc. and/or Trans Mountain Pipe Line Company Ltd. has refused to consent to the establishment of a highway or to a highway widening include, but are not necessarily limited to, the following locations:

(a) 9956 Barnston Drive East (Lot 6 Plan LMP 46765);
(b) 10024-176 Street (Lot 4 Plan LMP 38539);
(c) 17688 Barnston Drive East (Lot 5 Plan LMP 38539)
(d) 9860-180A Street (Lot 37 Plan LMP 14011);
(e) 9870-181 Street (Lot 38 Plan LMP 14011)
(f) 16680- 102 Avenue (Lot 25 Plan LMP 19984); and
(g) 9830-182 Street (Lot 10 Plan LMP 28743).

Location: 9956 Barnston Drive East (Lot 6 Plan LMP 46765)

24. Attached collectively as Exhibit "6" to this my Affidavit is a certified copy of Plan LMP 46765 registered in the Land Title Office of British Columbia and a uncertified copy of Plan LMP 46765 which identifies Lot 6 highlighted in yellow. Lot 6 is the fee simple lot that Trans Mountain Pipeline Inc. and/or Trans Mountain Pipe Line Company Ltd. required to be created. The existing Trans Mountain pipeline is located within Lot 6 and crosses Highway 15 in Surrey.

25. Attached as Exhibit "7" to this my Affidavit is an aerial photo from Surrey's online mapping system which identifies Lot 6 in red.

26. Surrey as part of a rezoning and subdivision development application in or about 1997 required that the area of land identified as Lot 6 on Plan LMP 46765 be dedicated as highway in order to widen Barnston Drive East in Surrey. On or about July 28th, 1997 Trans Mountain Pipe Line Company Ltd. informed Surrey that it would not agree to sign the subdivision plan and consent to the dedication of roadway over the area charged by the statutory right-of-way in its favour. Attached as Exhibit "8" to this my Affidavit is a copy of Trans Mountain Pipe Line Company Ltd.'s letter of July 28th, 1997.

27. Attached as Exhibit "9" to this my Affidavit is a certified copy of a State of Title Certificate for Lot 6 Plan LMP 46765 and a certified copy of the registered statutory right-of-way identified therein.

<u>Locations: 10024-176 Street (Lot 4 Plan LMP 38539) & 17688 Barnston Drive East (Lot 5 Plan LMP 38539)</u>

28. Attached collectively as Exhibit "10" to this my Affidavit is a certified copy of Plan LMP 38539 registered in the Land Title Office in British Columbia and an uncertified copy Plan LMP 38539 which identifies Lot 4 highlighted in yellow. Lot 4 is the fee simple lot that Trans Mountain Pipeline Inc. and/or Trans Mountain Pipe Line Company Ltd. required to be created. The existing Trans Mountain pipeline is located within Lot 4 which crosses Highway 15 in Surrey.

29. Attached as Exhibit "11" to this my Affidavit is an aerial photo from Surrey's online mapping system which identifies Lot 4 in red.

30. Attached collectively as Exhibit "12" to this my Affidavit is a certified copy of Plan LMP 38539 registered in the Land Title Office in British Columbia and an uncertified copy of Plan LMP 38539 which identifies Lot 5 highlighted in yellow. Lot 5 is the fee simple lot that Trans Mountain Pipeline Inc. and/or Trans Mountain Pipe Line Company Ltd. required to be created. The existing Trans Mountain pipeline is located within Lot 5 which crosses Barnston Drive East in Surrey.

31. Attached as Exhibit "13" to this my Affidavit is an aerial photo from Surrey's online mapping system which identifies Lot 5 in red.

32. Surrey as part of a rezoning and subdivision development application in or about 1996 required that the area of land identified as Lot 4 and Lot 5 on Plan LMP 38539 be dedicated as highway in order to widen Highway 15 and Barnston Drive East in Surrey. On or about November 7th, 1996 Trans Mountain Pipe Line Company Ltd. informed Surrey that it would not agree to sign the subdivision plan and consent to the dedication of roadway over the area charged by the statutory right-of-way in its favour. Attached as Exhibit "14" to this my

Affidavit is a copy of Trans Mountain Pipe Line Company Ltd.'s letter of November 7th, 1996.

33. Attached collectively as Exhibit "15" to this my Affidavit are certified copies of State of Title Certificates for Lots 4 and 5 of Plan LMP 38539 and certified copies of the registered statutory rights of way identified therein.

<u>9860-180A Street (Lot 37 Plan LMP 14011) & 9870-181 Street (Lot 38 Plan LMP 14011)</u>

34. Attached collectively as Exhibit "16" to this my Affidavit is a certified copy of Plan LMP 14011 registered in the Land Title Office in British Columbia and an uncertified copy of Plan LMP 14011 which identifies Lot 37 highlighted in yellow. Lot 37 is the fee simple lot that Trans Mountain Pipeline Inc. and/or Trans Mountain Pipe Line Company Ltd. required to be created. The existing Trans Mountain pipeline is located within Lot 37 which segments 180A Street in Surrey.

35. Attached as Exhibit "17" to this my Affidavit is an aerial photo from Surrey's online mapping system which identifies Lot 37 in red.

36. Attached collectively as Exhibit "18" to this my Affidavit is a certified copy of Plan LMP 14011 registered in the Land Title Office of British Columbia and an uncertified copy of Plan LMP 14011 which identifies Lot 38 highlighted in yellow. Lot 38 is the fee simple lot that Trans Mountain Pipeline Inc. and/or Trans Mountain Pipe Line Company Ltd. required to be created. The existing Trans Mountain pipeline is located within Lot 38 which crosses 181 Street in Surrey.

37. Attached as Exhibit "19" to this my Affidavit is an aerial photo from Surrey's online mapping system which identifies Lot 38 in red.

38. Surrey as part of a rezoning and subdivision development application in or about 1992 required that the area of land identified as Lot 37 and Lot 38 on Plan LMP 14011 be dedicated as highway in order to widen 181 Street and to establish a continuous 180A Street in Surrey. On or about December 21st, 1992 Trans Mountain Pipe Line Company Ltd. informed Surrey that it would not agree to sign the subdivision plan and consent to the dedication of roadway over the areas charged by the statutory right-of-way in its favour. Attached as Exhibit "20" to this my Affidavit is a copy of Trans Mountain Pipe Line Company Ltd.'s letter of December 21, 1992.

39. Attached collectively as Exhibit "21" to this my Affidavit are copies of State of Title Certificates for Lots 37 and 38 of Plan LMP 14011 and a certified copy of the registered statutory right-of-way identified therein.

Location: 16680- 102 Avenue (Lot 25 Plan LMP 19984)

40. Attached collectively as Exhibit "22" to this my Affidavit is a certified copy of Plan LMP 19984 registered in the Land Title Office of British Columbia and an uncertified copy of Plan LMP 19984 which identifies Lot 25 highlighted in yellow. Lot 25 is the fee simple lot that Trans Mountain Pipeline Inc. and/or Trans Mountain Pipe Line Company Ltd. required be created. The existing Trans Mountain pipeline is located within Lot 25 which segments 102 Avenue in Surrey.

41. Attached as Exhibit "23" to this my Affidavit is an aerial photo from Surrey's online mapping system which identifies Lot 25 in red.

42. Surrey as part of a development application in or about 1993 required that the area of land identified as Lot 25 on Plan LMP 19984 be dedicated as highway in order to establish a continuous extension of 102 Avenue. On or about June 25th, 1993 Trans Mountain Pipe Line Company Ltd. informed Surrey that it would not agree to sign the subdivision plan and consent to the dedication of roadway over the area charged by the statutory right-of-way in its favour. Attached as Exhibit "24" to this my Affidavit is a copy of Trans Mountain Pipe Line Company Ltd.'s letter of June 25th, 1993.

43. Attached collectively as Exhibit "25" to this my Affidavit is a certified copy of a State of Title Certificate for Lot 25 Plan LMP 19984 and a certified copy of the registered statutory right-of-way identified therein.

Location: 9830-182 Street (Lot 10 Plan LMP 28743)

44. Attached collectively as Exhibit "26" to this my Affidavit is a certified copy of Plan LMP 28743 registered in the Land Title Office of British Columbia and an uncertified copy of Plan LMP 28743 which identifies Lot 10 highlighted in yellow. Lot 10 is the fee simple lot that Trans Mountain Pipeline Inc. and/or Trans Mountain Pipe Line Company Ltd. required to be created. The existing Trans Mountain pipeline is located within Lot 10 which segments 182 Street in Surrey.

45. Attached as Exhibit "27" to this my Affidavit is an aerial photo from Surrey's online mapping system which identifies Lot 10 in red.

46. Surrey as part of a development application in 1993 required that the area of land identified as Lot 10 on Plan LMP 28743 be dedicated as highway in order to establish a continuous extension of 182 Street. On or about May 4, 1993 Trans Mountain Pipe Line Company Ltd. informed Surrey that it would not agree to sign the subdivision plan and consent to the dedication of roadway over the area charged by the statutory right-of-way in its favour. Attached as Exhibit "28" to

this my Affidavit is a copy of Trans Mountain Pipe Line Company Ltd.'s letter of May 4, 1993.

47. Attached collectively as Exhibit "29" to this my Affidavit is a certified copy of a State of Title Certificate for Lot 10 Plan LMP 28743 and a certified copy of the registered statutory right-of-way identified therein.

(Exhibits C76-9-23 (A4L9U6) and C76-9-24 (A4L9U7) - Affidavit of Kenneth D. Zondervan sworn May 26, 2015)

(Exhibit C76-16-2 (A4W0I1) - Affidavit #3 of Kenneth D. Zondervan sworn December 1, 2015)

100. In the Provincial context, Surrey and the Province have been able to exercise their respective powers of expropriation to defeat similar demands made by Fortis in the past.

101. It is also noteworthy that Fortis' demand for the creation of Lot "X"s or "Utility lots" was found by Justice Pearlman to amount to fundamental breach and repudiation of an agreement that was entered into in 1956 before the cost allocation provisions related to pipeline work costs were introduced in 1959 as discussed above.

304 Effective March 1, 1999, Terasen Gas' predecessor, BC Gas, had adopted a corporate policy by which it would not endorse a subdivision plan consenting to the dedication of a new roadway over an area charged by a BC Gas statutory right of way. BC Gas required that a lot be created over the right of way which was to become a road and that the new lot be assigned a lot number and be registered in the Land Title Office in the name of the road authority. This would permit BC Gas to register a charge against title to the lot held by the road authority to protect the rights granted by its statutory right of way. The lot to be registered in the name of the road authority was referred to as a "utility lot", or "lot X". The policy applied to transmission pipelines only operating in excess of 2,069 kPa.

305 BC Gas informed Surrey of its corporate policy on February 15, 2000, and advised the City again on July 16, 2002 that it would not dedicate statutory rights of way for its transmission pipelines for roads.

306 Terasen Gas continued that policy.

307 The Pipeline operates at a pressure in excess of 2,069 kPa, and is a transmission pipeline falling within the corporate policy adopted by BC Gas and continued by Terasen Gas.

308 Terasen Gas has invoked its corporate policy in response to requests from both Surrey and the province for road or highway dedications. For example, on June 11, 2007, Surrey requested that Terasen Gas execute a subdivision plan for the East Clayton property on 68th Avenue, to consent to the dedication of road over the Pipeline SRW, which bisected the subdivision lands. Terasen Gas refused to do so and on June 14, 2007, informed Surrey that it was not prepared to sign the developer's subdivision plan unless Surrey agreed to create two lot "X"s in order to protect its rights under the SRW. Surrey responded by expropriating the road dedications over the Pipeline.

309 Earlier, Terasen Gas had taken a similar position in its dealings with the Province where Highway 15 crossed the Pipeline near the Fraser Highway crossing. The Highway 15 construction project required the construction of a temporary pipeline bypass where the highway crossed the pipeline. On December 16, 2005, Terasen Gas informed the Ministry of Transportation and Highways that it was not prepared to consent to the extinguishment of its rights by road dedication or to begin any work on Pipeline reinstatement until it had the Ministry's binding assurance that it would pay for the whole of the cost of the Pipeline reinstatement, estimated at about $400,000. By insisting that the Province pay the full cost of the work, Terasen Gas took the same position with the Ministry as it did with Surrey in the case of the Fraser Highway crossing. The Ministry responded by expropriating the right of way it required for the Highway 15 crossing.

314 Surrey opposed the creation of a utility lot on various grounds. First, the defendant was concerned that if it owned and occupied a fee simple lot where the highway crossed the Pipeline right of way, it would owe an occupier's duty of care for the safety of persons and property on that lot. As the occupier of a public highway, Surrey was not exposed to that liability. Section 8(2) of the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337 provides that the *Act* does not apply to a municipality as the occupier of a public highway. Surrey was also concerned that the creation of a utility lot subject to the plaintiff's SRW would result in some loss of the City's flexibility to use and control the highway where it crossed the utility lot.

317 I find that on November 21, 2006, and again on December 15, 2006, Terasen Gas, in response to Surrey's request that it consent to the dedication of roadway over the SRW lands, invoked its corporate policy of not extinguishing SRW's for its transmission pipelines without full compensation for the loss of the SRW and the cost of the Pipeline upgrade.

342 I find that Terasen Gas was prepared to delay performance of the work required to protect the Pipeline and facilitate its crossing by the defendant's

highway project in order to exert "leverage" or pressure on Surrey to either create the utility lot sought by the plaintiff or pay the full cost of the work in exchange for the plaintiff's consent to the dedication of the SRW land as road.

Findings on Fundamental Breach

357 A remarkable feature of this case is that before Ms. Fung produced a copy of the TLA on June 14, 2007, there was no history of performance of that contract by either Terasen Gas or Surrey. When Mr. Sandstrom informed Surrey on September 6, 2005 that Terasen Gas would not begin work until the plaintiff had the defendant's binding assurance that it would pay the whole of the plaintiff's costs for the Pipeline upgrade work, he did so without reference to the TLA. Mr. Sandstrom was not aware of the existence of the TLA until on or about June 14, 2007. Again, when Terasen Gas responded to Surrey's request of December 21, 2005 for the plaintiff's consent to the dedication of road over the SRW on the Angus Land by asserting that it would not consent until Surrey made a commitment to pay for all of the Pipeline upgrade work, it did so without referring to the TLA.

358 Until June 14 2007, Terasen Gas asserted its corporate policy without reference to the TLA, and without any suggestion that the TLA applied to the Pipeline and the sharing of costs for the Pipeline upgrade work necessary to accommodate Surrey's Fraser Highway expansion project.

359 Before and after June 14, 2007, Terasen Gas has informed Surrey and others that it opposed the dedication of land charged with its rights of way because it wished to preserve assets that have benefitted its shareholders and ratepayers. The plaintiff has also declared that it wished to retain the right to control activities on and around the Pipeline in order to maintain the integrity of its operations and to protect public safety. However, the plaintiff's concerns respecting the preservation of its assets and the protection of public safety were not immutable. Terasen Gas was prepared to consent to the extinguishment of its SRW if it received full compensation for the cost of the work required to facilitate the crossing of the Pipeline.

360 The plaintiff's corporate policy of withholding its consent to the dedication of public roads or highways over its SRWs, of demanding the creation of fee simple utility lots to protect the rights granted under its SRWs, and of refusing to extinguish its SRW on the Angus Land unless Surrey paid 100% of the cost of the Pipeline upgrade work is inconsistent with the plaintiff's obligation under s. 4 of the TLA to not unreasonably withhold its consent to the dedication of private property as public property for the opening up of streets, roads or highways.

361 Moreover, as Mr. Coady acknowledged in cross-examination, the plaintiff was also prepared to withhold its consent to the dedication of road over its SRW as a means of exerting leverage through delay of major public projects, including

the Fraser Highway widening project. By invoking its corporate policy, and by withholding its consent to the dedication of road over its SRW in attempt to compel Surrey to accede to its position of the City either create a fee simple utility lot or bear all of the costs of the Pipeline upgrade, Terasen Gas has demonstrated a clear and unequivocal intention not to be bound by the TLA.

362 The plaintiff's refusal to perform the upgrade work until Surrey accepted its position did not constitute a reasonable withholding of consent to road dedication. The commercial value of the TLA to Surrey lay in having the Pipeline upgrade work completed without delay so as to permit the timely construction of the Fraser Highway widening project. **By refusing to consent to the dedication of the SRW lands as highway unless Surrey either agreed to create a fee simple lot over the portion of the highway crossing the Pipeline, or paid all of the cost of the Pipeline upgrade work, the plaintiff deprived Surrey of substantially the whole of the commercial benefit of the TLA and committed a breach which went to the root of that contract**.

363 I reach this conclusion taking into account the evidence that factors other than the failure of Terasen Gas to perform the Pipeline upgrade work until July 2008 also contributed to delay of the Fraser Highway expansion project. For example, in cross-examination Mr. Zondervan acknowledged that in April 2007 Surrey's engineering department anticipated that final completion of the Fraser Highway expansion between 168th Street and the 17900 block would extend into 2010, about three years later than originally anticipated, and that the delay was largely attributable to poor soil conditions that resulted in the need to slow down the pre-loading of soils along the highway right of way.

364 Poor soil conditions were a factor beyond the ambit of the TLA. The intended benefit of the TLA for Surrey was that Terasen Gas would perform the Pipeline upgrade work within a reasonable time of Surrey's request that it do so and that the plaintiff would not unreasonably withhold its consent to the dedication of the SRW land as highway. In cross-examination, Mr. Jamer acknowledged that he knew in early August 2006 that Surrey regarded the resolution of the parties' differences concerning payment for and performance of the Pipeline upgrade work as urgent. Mr. Jamer also understood that there were potentially adverse impacts for Surrey if the project was delayed. Similarly, Ms. Marie-France Leroi, one of the in-house solicitors advising Terasen Gas, admitted in cross-examination that she was aware as early as September 6, 2005 that if the plaintiff refused to move its Pipeline it might mean delays for Surrey. In all of the circumstances of this case, the delay by Terasen Gas in performing the Pipeline upgrade work until July 2008 was a fundamental breach of its obligation under paragraph 4 to carry out the work with "reasonable speed" when requested to do so by Surrey.

365 I find that Surrey accepted the repudiation by Terasen Gas of the TLA when on August 7, 2007 the City delivered its statement of claim and application to the

> OGC for permission to cross the Pipeline, and for an order requiring the plaintiff to perform the Pipeline upgrade work. Surrey confirmed its acceptance of the plaintiff's repudiation of the TLA on October 3, 2007, when it applied for a determination by the OGC that Terasen Gas was responsible for the costs of all of the work required for the crossing of the Pipeline by the Fraser Highway expansion project. When Surrey accepted the plaintiff's repudiation of the TLA, that agreement was terminated and ceased to bind the parties.
>
> **366** Accordingly, it is necessary to determine whether, upon Surrey's acceptance of the repudiation by Terasen Gas of the TLA, s. 9(c) of the *Pipeline Regulation* applied to the allocation of costs for the work required to facilitate the crossing of the Pipeline by the Fraser Highway expansion project.
>
> *FortisBC Energy Inc. v. City of Surrey et al*, 2013 B.C.S.C. 2382
> Book of Authorities, Tab 27

102. In the Provincial context and referring to the decision of Madame Justice C. Lynn Smith in *Terasen Gas Inc. v. Surrey (City)* [2011] B.C.J. No. 1290 (Book of Authorities, Tab 30). Terasen Gas Inc. (now renamed to FortisBC Energy Inc.) had gone so far as to commence legal proceedings against the owner of the land from whom the City of Surrey purchased the land required for highway widening. Unless a term or condition is imposed requiring Trans Mountain to dedicate necessary land for highway and agree to the extinguishment of its statutory right of way over that required portion of land, it is likely that Trans Mountain would similarly commence legal proceedings against cooperative land owners who enter into agreements with municipalities or the Province selling lands required for highway that are encumbered by a Trans Mountain statutory right of way.

103. What is also noteworthy and what is common knowledge is that at the time Terasen Gas Inc. (which was renamed to FortisBC Energy Inc.) refused to sign road dedication plans and demanded the creation of Lot “X”s or utility lots, which lead to the decision of Justice Pearlman in *FortisBC Energy Inc. v. City of Surrey et al*, 2013 B.C.S.C. 2382, **Terasen Gas Inc. was controlled by Kinder Morgan.**

104. Facing the uncertainties and inevitable costs and delays associated with attempting to expropriate from a federal undertaking such as Kinder Morgan/Trans Mountain and in the

absence of a similar provision to s. 2(1.3) of the Expropriation Act, **municipalities and the Province are left with no option but to accept Kinder Morgan's/Trans Mountain's Lot "X" demands and are not able to widen or establish highways**.

105. Trans Mountain has confirmed that it will continue this practice of refusing to consent to the dedication of highways. This is set out in responses to the City of Surrey's Information Requests No.1 filed as Exhibit C76-11-2 (A3X6A5_-_A4Q0V6) and in the Affidavits of Kenneth D. Zondervan filed as Exhibits C76-9-23 (A4L9U6), C76-9-24 (A4L9U7) and C76-16-2 (A4W0I1) in this proceeding.

Request

Necessary consent from Trans Mountain and other interest holders in Trans Mountain's statutory right of way/easement to enable municipalities and the Province to dedicate required land for highway/road.

d) in respect of future widenings, expansions or improvements of the existing highways and roads that are proposed to be occupied by the pipeline, please confirm whether Trans Mountain is prepared to:

(i) consent (without conditions and without compensation) to the extinguishment of any statutory right of way or easement in favour of Trans Mountain over those portions of land required by the municipality or the Province to be dedicated as highway or road in order that those portions of land may be incorporated into and form part of the existing highway or road that is occupied by the pipeline;

(ii) obtain the consent (without conditions and without compensation) of any mortgagee or other person having an interest in the statutory right of way or easement to be extinguished over that portion of land to be dedicated as highway or road in order that those portions of land may be incorporated into and form part of the existing highway or road that is occupied by the pipeline; and

(iii) if Trans Mountain is not prepared to consent or obtain the consent described in paragraphs (d)(i) and (ii) without conditions and without compensation, then please provide a detailed explanation as to why not. Please also describe in detail under what circumstances Trans Mountain would be prepared to consent or obtain the consent described in paragraphs (d)(i) (ii);

e) having regard to section 108 of the *National Energy Board Act* and the jurisdiction of the NEB, please confirm whether or not Trans Mountain is

prepared to consent to including as a condition or term of any certificate or CPCN issued approving Trans Mountain's Application that Trans Mountain shall consent or obtain the consent (without conditions and without compensation) to the extinguishment of its statutory right of way or easement in those circumstances described in paragraph (d) above, and if not, please provide a detailed explanation as to why not;

f) in respect of creation of future dedicated highways and roads over the proposed pipeline that are approved or required by a municipality or imposed as a condition of development approval (whether as a condition of subdivision approval, rezoning, or other land development project approval and whether related to a land development project initiated by a private developer or by the municipality), please confirm whether Trans Mountain is prepared to:

(i) consent (without conditions and without compensation) to the extinguishment of any statutory right of way or easement in favour of Trans Mountain over that portion of land that is to be dedicated as highway or road;

(ii) obtain the consent (without conditions and without compensation) of any mortgagee or other person having an interest in the statutory right of way or easement to be extinguished over that portion of land that is to be dedicated as highway or road; and

(iii) if Trans Mountain is not prepared to consent or obtain the consent described in paragraphs (f)(i) and (ii) without conditions and without compensation, then please provide a detailed explanation as to why not. Please also describe in detail under what circumstances Trans Mountain would be prepared to consent or obtain the consent described in paragraphs (f)(i) and (ii);

g) having regard to section 108 of the *National Energy Board Act* and the jurisdiction of the NEB, please confirm whether or not Trans Mountain is prepared to consent to including as a condition or term of any certificate or CPCN issued approving Trans Mountain's Application that Trans Mountain shall consent or obtain the consent (without conditions and without compensation) to the extinguishment of its statutory right of way or easement in those circumstances described in paragraph (f) above, and if not, please provide an detailed explanation as to why not;

Response

d) (i) **Trans Mountain is prepared to allow extinguishment of the title over those parts of the Trans Mountain right-of-way <u>for roadways crossing the pipeline at approximately 90 degrees</u>** that are deemed necessary by the municipality. No compensation is requested for the property right loss, although terms and **conditions will be required with the municipality on a proximity permit from Trans Mountain, <u>including agreement over costs</u>**

incurred in undertaking any protective works, modification or re-location of the pipeline.

(ii) Trans Mountain does not anticipate the need to obtain the consent (without conditions and without compensation) of any mortgagee or other person having an interest in the statutory right of way or easement because no mortgages or other interest are registered on the title of properties that are attached to the Trans Mountain Pipeline right-of-way or pipeline on the property.

iii) Please see responses to i. and ii.

e) See the response to City Surrey IR No. 1.3c.

f) Please see response to City Surrey IR No. 1.3d.

g) See the response to City Surrey IR No. 1.3c.

(Exhibit C76-11-1 - (A3W6E6-A4Q0V5) - City of Surrey Information Request No. 1 filed May 7, 2014 (previously filed as C76-1-1))

(Exhibit C76-11-2 - (A3X6A5_-_A4Q0V6) - Response to City of Surrey Information Request No. 1 filed June 4, 2014 (previously filed as B52-1))

106. Not only do Kinder Morgan's/Trans Mountain's Lot "X" demands frustrate the ability of the Province and municipalities to establish highways, it also exposes municipalities and the Province to other liabilities and potential costs.

107. These liabilities and potential costs were referred to by Justice Pearlman in *FortisBC Energy Inc. v. City of Surrey et al*, 2013 B.C.S.C. 2382:

304 Effective March 1, 1999, Terasen Gas' predecessor, BC Gas, had adopted a corporate policy by which it would not endorse a subdivision plan consenting to the dedication of a new roadway over an area charged by a BC Gas statutory right of way. BC Gas required that a lot be created over the right of way which was to become a road and that the new lot be assigned a lot number and be registered in the Land Title Office in the name of the road authority. This would permit BC Gas to register a charge against title to the lot held by the road authority to protect the rights granted by its statutory right of way. The lot to be registered in the name of the road authority was referred to as a "utility lot", or "lot X". The policy applied to transmission pipelines only operating in excess of 2,069 kPa.

305 BC Gas informed Surrey of its corporate policy on February 15, 2000, and advised the City again on July 16, 2002 that it would not dedicate statutory rights of way for its transmission pipelines for roads.

306 Terasen Gas continued that policy.

307 The Pipeline operates at a pressure in excess of 2,069 kPa, and is a transmission pipeline falling within the corporate policy adopted by BC Gas and continued by Terasen Gas.

308 Terasen Gas has invoked its corporate policy in response to requests from both Surrey and the province for road or highway dedications. For example, on June 11, 2007, Surrey requested that Terasen Gas execute a subdivision plan for the East Clayton property on 68th Avenue, to consent to the dedication of road over the Pipeline SRW, which bisected the subdivision lands. Terasen Gas refused to do so and on June 14, 2007, informed Surrey that it was not prepared to sign the developer's subdivision plan unless Surrey agreed to create two lot "X"s in order to protect its rights under the SRW. Surrey responded by expropriating the road dedications over the Pipeline.

309 Earlier, Terasen Gas had taken a similar position in its dealings with the Province where Highway 15 crossed the Pipeline near the Fraser Highway crossing. The Highway 15 construction project required the construction of a temporary pipeline bypass where the highway crossed the pipeline. On December 16, 2005, Terasen Gas informed the Ministry of Transportation and Highways that it was not prepared to consent to the extinguishment of its rights by road dedication or to begin any work on Pipeline reinstatement until it had the Ministry's binding assurance that it would pay for the whole of the cost of the Pipeline reinstatement, estimated at about $400,000. By insisting that the Province pay the full cost of the work, Terasen Gas took the same position with the Ministry as it did with Surrey in the case of the Fraser Highway crossing. The Ministry responded by expropriating the right of way it required for the Highway 15 crossing….

314 Surrey opposed the creation of a utility lot on various grounds. First, the defendant was concerned that if it owned and occupied a fee simple lot where the highway crossed the Pipeline right of way, it would owe an occupier's duty of care for the safety of persons and property on that lot. As the occupier of a public highway, Surrey was not exposed to that liability. Section 8(2) of the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337 provides that the *Act* does not apply to a municipality as the occupier of a public highway. Surrey was also concerned that the creation of a utility lot subject to the plaintiff's SRW would result in some loss of the City's flexibility to use and control the highway where it crossed the utility lot.

A Lot “X”/Utility Lot is not a highway dedication

108. In assessing the reasonableness of a demand for a Lot "X", one must not lose sight of the simple fact that a Lot “X” is a fee simple lot and is not a highway in law.

109. Moreover, there are numerous reasons why a municipality or the Province through the Ministry of Transportation and Infrastructure cannot accept a Lot “X” in place of highway dedication.

110. Pipeline safety and the need to preserve its right to operate its pipelines are the primary reasons advanced by Kinder Morgan/Trans Mountain in support of Lot "X". Neither of which, however, is convincing.

111. The issue of safety is adequately addressed through legislation; ie. the *National Energy Board Act* and its Regulations.

112. Existing evidence also does not support the arguments advanced by Kinder Morgan/Trans Mountain. Currently there exist hundreds (if not thousands) of locations, including major arterial roads, where Trans Mountain's existing pipeline crosses municipal and Provincial highways without a statutory right-of-way in place. At no time has there been any reason to question municipal or Provincial efforts regarding safety, nor has there been any issue raised regarding the right of Trans Mountain to continue its pipeline operations at these locations.

113. There are also numerous negative consequences which flow from permitting the creation of Lot "X"s.

A. Added Liability

(i) The *Occupiers Liability Act,* RSBC 1996, c 337

114. Added liability is a significant concern to municipalities. Under the *Occupiers Liability Act*, municipalities would be considered an "occupier" of a Lot "X":

> **"occupier"** means a person who
>
> (a) is in physical possession of premises, or
>
> (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,
>
> and, for this Act, there may be more than one occupier of the same premises;

Book of Authorities, Tab 10

115. As an occupier, municipalities owe a duty of care to ensure that all persons and property of persons, including Trans Mountain's pipeline, are safe in using the premises. This duty of care applies to the condition of the premises, activities on the premises or the conduct of third parties on the premises. This duty is set out s. 3(1) and s. 3(2) of the *Occupiers Liability Act*:

> **Occupiers' duty of care**
>
> **3** (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.
>
> (2) The duty of care referred to in subsection (1) applies in relation to the
>
> (a) condition of the premises,
>
> (b) activities on the premises, or
>
> (c) conduct of third parties on the premises.

Book of Authorities, Tab 10

116. Under the current statutory scheme, municipalities do not have to worry about the liability the *Occupiers Liability Act* imposes because s. 8(2) provides that the Act does not apply

to a municipality as the occupier of a public highway or a public road. Should a municipality, however, choose or be forced to accept a fee simple lot in the form of a Lot "X" in place of a dedicated highway, then this exclusion no longer applies. This would mean that plaintiffs such as third parties in motor vehicle accidents and other third parties using Lot "X" including Kinder Morgan/Trans Mountain would be able to rely on the *Occupiers Liability Act* in advancing claims against municipalities.

> **Crown bound**
>
> **8** (1) Except as otherwise provided in subsection (2), the Crown and its agencies are bound by this Act.
>
> (2) Despite subsection (1), this Act **does not apply to** the government or to the Crown in right of Canada **or to a municipality** if the government, the Crown in right of Canada or the municipality is the occupier of
>
> (a) **a public highway**, other than a recreational trail referred to in section 3 (3.3) (c),
>
> (b) **a public road**,
>
> (c) a road under the *Forest Act*,
>
> (d) a private road as defined in section 2(1) of the *Motor Vehicle Act*, other than a private road referred to in section 3(3.3)(b)(iv) of this Act, or
>
> (e) an industrial road as defined in the *Industrial Roads Act.*

Book of Authorities, Tab 10

(ii) Breach of Contract as well as Tort of Negligence will Apply

117. Previously a municipality's exposure to liability in the event of an accident or catastrophe involving a pipeline, would be determined by the Courts in accordance with the law of negligence as it applies to municipalities. In a Lot "X" arrangement, liability may also take the form of a claim for breach of contract/statutory right of way. Under such circumstances the Courts will view a statutory right-of-way registered on the title of the Lot "X" as an agreement/contract between Trans Mountain and the City. Consequently, a breach of any of its terms including implied terms regarding, for example safety, may become the subject matter of a

claim for breach of the statutory right of way agreement. This likely will then expose municipalities to added liability.

(iii) Statutory Dispute Resolution and Crossing Benefits Lost

118. A further instance where uncertainty may be introduced is when a disagreement arises between a municipality and Trans Mountain over the scope of the terms of the statutory right-of-way. Under the existing statutory scheme set out in s 112 of the *National Energy Board Act*, statutory dispute resolution and crossing provisions are in place to address disputes and crossing applications between the municipality and the pipeline company. For example, the *National Energy Board Act* empowers the NEB to grant leave for a facility to cross a pipeline on terms it considers appropriate.

119. Under the Lot "X" arrangement and having regard to the fact that in British Columbia we have a Torrens land title system that under s. 23 of the *Land Title Act* guarantees title subject only to those encumbrances, charges and interests listed therein, an argument may be advanced by Trans Mountain that the National Energy Board, which oversee and regulates Trans Mountain, does not have jurisdiction to disregard the terms of an agreement the parties are bound to in the form of a statutory right-of-way. As a result, by being forced to agree to a Lot "X" arrangement, municipalities will have effectively contracted out of statutory dispute resolution mechanisms put in place to resolve disputes between a municipality and Trans Mountain.

Effect of indefeasible title

23 (1) In this section, **"court"** includes a person or statutory body having, by law or consent of parties, authority to hear, receive and examine evidence.

(2) An indefeasible title, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following:

(a) the subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown;

(b) a federal or Provincial tax, rate or assessment at the date of the application for registration imposed or made a lien or that may after that date be imposed or made a lien on the land;

(c) a municipal charge, rate or assessment at the date of the application for registration imposed or that may after that date be imposed on the land, or which had before that date been imposed for local improvements or otherwise and that was not then due and payable, including a charge, rate or assessment imposed by a public body having taxing powers over an area in which the land is located;

(d) a lease or agreement for lease for a term not exceeding 3 years if there is actual occupation under the lease or agreement;

(e) a highway or public right of way, watercourse, right of water or other public easement;

(f) a right of expropriation or to an escheat under an Act;

(g) a caution, caveat, charge, claim of builder's lien, condition, entry, exception, judgment, notice, pending court proceeding, reservation, right of entry, transfer or other matter noted or endorsed on the title or that may be noted or endorsed after the date of the registration of the title;

(h) the right of a person to show that all or a portion of the land is, by wrong description of boundaries or parcels, improperly included in the title;

(i) the right of a person deprived of land to show fraud, including forgery, in which the registered owner has participated in any degree;

(j) a restrictive condition, right of reverter, or obligation imposed on the land by the *Forest Act*, that is endorsed on the title.

(3) After an indefeasible title is registered, a title adverse to or in derogation of the title of the registered owner is not acquired by length of possession.

(4) Despite subsection (3), in the case only of the first indefeasible title registered, it is void against the title of a person adversely in actual possession of and rightly entitled to the land included in the indefeasible title at the time registration was applied for and who continues in possession.

Book of Authorities, Tab 4

B. Loss of Flexibility and Control

120. As with any fee simple lot subject to a statutory right-of-way, a municipality's use of Lot "X" will ultimately be subject to the terms and provisions of the registered statutory right-of-way in favour of Trans Mountain. This results in a loss of a municipality's flexibility to use the "*highway*" (more accurately the travelled pavement) that traverses a Lot "X". For example, under the provisions of the existing statutory right-of-way registered over a developer's subdivision lands, a municipality would not have the unconditional right to use Lot "X" for highway purposes or for allowing other users to cross this lot. This loss of flexibility can, however, be lessened to some degree by revising the terms of the statutory right-of-way registered against Lot "X". Ultimately, however, a municipality's use of Lot "X" will always be restricted by the terms of the statutory right-of-way registered against it. Furthermore, as in any negotiation process, it can be expected that compromises will have to be made by the municipality when it comes to revising the terms of the registered right-of-way, particularly when the municipality has no real leverage or negotiating power in the negotiation process and is unable to avail itself of expropriation powers it would otherwise have in the Provincial context.

121. The municipality will also lose the many broad powers a municipality has to regulate its highways under the *Community Charter*, S.B.C. 2003, c. 26 and the *Local Government Act*, RSBC 2015, Chapter 1 which do not apply to fee simple lots, in this case to a Lot "X".

C. Other Utilities/Commercial Entities

122. If municipalities agree a Lot "X" arrangement, other utilities similarly circumstanced, such as telecommunication companies, will demand the same treatment. In doing so, they would likely claim they are being treated unfairly and make reference to Section 263(1)(c) and s. 273 of the *Local Government Act*, as amended:

Corporate powers

263 (1) Subject to the specific limitations and conditions established under this or another Act, the corporate powers of a board include the following:

(a) to make agreements respecting

(i) the regional district's services, including agreements respecting the undertaking, provision and operation of those services, other than the exercise of the board's regulatory authority,

(ii) operation and enforcement in relation to the board's exercise of its regulatory authority, and

(iii) the management of property or an interest in property held by the regional district;

(b) to make agreements with a public authority respecting

(i) activities, works or services within the powers of a party to the agreement, other than the exercise of regulatory authority, including agreements respecting the undertaking, provision and operation of activities, works and services,

(ii) operation and enforcement in relation to the exercise of regulatory authority within the powers of a party to the agreement, and

(iii) the management of property or an interest in property held by a party to the agreement;

(c) to provide assistance for the purpose of benefiting the community or any aspect of the community;

(d) to acquire, hold, manage and dispose of land, improvements, personal property or other property, and any interest or right in or with respect to that property;

(e) to delegate its powers, duties and functions, in accordance with Division 7 *[Delegation of Board Authority]* of Part 6 *[Regional Districts: Governance and Procedures]*;

(f) to engage in commercial, industrial and business undertakings and incorporate a corporation or acquire shares in a corporation for that purpose;

(g) to establish commissions to

(i) operate regional district services,

(ii) undertake operation and enforcement in relation to the board's exercise of its regulatory authority, and

(iii) manage property or an interest in property held by the regional district.

(2) In exercising its powers under subsection (1), a board may establish any terms and conditions it considers appropriate.

(3) The powers of a board under subsection (1) may be exercised outside the boundaries of the regional district.

Definition of "assistance"

271 For the purposes of section 263 (1) (c) *[assistance for community benefit]* and this Division, **"assistance"** means providing a grant, benefit, advantage or other form of assistance, including

(a) any form of assistance referred to in section 272 (1), and

(b) an exemption from a tax, fee or charge.

General prohibition against assistance to business

273 As a limitation on section 263 (1) (c) *[assistance for community benefit]*, a board must not provide assistance to an industrial, commercial or business undertaking.

Book of Authorities, Tab 5

D. Negatively Affects the Establishment of Proper Highway Corridors

123. A municipality, as a custodian of its highways, has a responsibility to ensure that the rights of other entities who currently enjoy the legislative right to occupy highways are preserved and that adequate highway corridors are established through the subdivision and land development approval process. While these entities have the legislative right to occupy highways together with Trans Mountain, they do not have the legislative right to interfere with Trans Mountain's rights/interest in land secured on the title of Lot "X" in the form of a statutory right of way/easement. These entities include telecommunication companies, BC Hydro, cable providers, railways, etc. (Note: a statutory right of way is a form of easement without a dominant tenement).

E. Zoning and Administrative Considerations

124. There are also zoning and administrative considerations which would have to be addressed. Municipal zoning by-laws would have to be amended to ensure that Lot "X"s created conform to current zoning. Administrative procedures would also have to be implemented to ensure the location of all Lot "X"s are identified and that the terms of registered statutory rights-of-way registered over the Lot "X"s are reviewed prior to any work taking place within the Lot "X"s.

F. Environmental Liability

125. Under Environmental legislation municipalities are protected from remediation and clean up costs of highways contaminated by a third party. This same protection would not extend to Lot "X"s.

G. Control will be shifted to Trans Mountain and the Mortgagees of its statutory rights of way and Liens could also be registered on title of the Lot "X".

126. By holding a statutory right of way in priority to all other registered interests, anyone crossing the Lot “X” would require approval of Trans Mountain and of the registered interest holders of the mortgagees of its statutory right of way. Moreover, further complications would arise if lien claimants registered liens on title.

2.9 Without conditions being imposed establishing timelines for necessary pipeline work to be performed by Trans Mountain to accommodate utility infrastructure projects including highway construction, widening and improvement projects, substantial project delays will be incurred as well as potential liability arising from third party delay claims

127. In the absence of conditions being imposed that require Trans Mountain to undertake and complete pipeline work within a prescribed period of time that may only be varied by application to the NEB, Trans Mountain will be able to continue to delay projects unless municipalities and the Province agree to its terms, no matter how unreasonable those terms may be.

128. As set out in the Responses of Trans Mountain excerpted and relied upon above and as supported by the Affidavits of Kenneth D. Zondervan also excerpted and relied upon above, those demands include demands that the municipalities and the Province pay all costs and agree to the creation of Lot "X"s.

2.10 Conditions related to Indemnification, Liability and Reimbursement for certain costs should also be imposed

129. Just as land owners enjoy indemnification under s. 86 of the *National Energy Board Act* which is limited only in the case of **gross negligence**, municipalities and the Province should enjoy at a minimum this same level of indemnification particularly in light of the fact that municipalities have less control than fee simple land owners as to who occupies or enters its highways or public places including parks. Others that have the legislative right to occupy highways and other public places such as parks include public utilities, telecommunication companies, pipeline companies, railway companies to name a few.

ACQUISITION OF LANDS

Definition of "owner"

85. In sections 86 to 107, "owner" means any person who is entitled to compensation under section 75.

Methods of acquisition

86. (1) Subject to subsection (2), a company may acquire lands for a pipeline under a land acquisition agreement entered into between the company and the owner of the lands or, in the absence of such an agreement, in accordance with this Part.

Form of agreement

(2)**A company may not acquire lands for a pipeline under a land acquisition agreement unless the agreement includes provision for**

(*a*) compensation for the acquisition of lands to be made, at the option of the owner of the lands, by one lump sum payment or by annual or periodic payments of equal or different amounts over a period of time;

(*b*) review every five years of the amount of any compensation payable in respect of which annual or other periodic payments have been selected;

(*c*) compensation for all damages suffered as a result of the operations of the company;

(*d*) **indemnification from all liabilities, damages, claims, suits and actions arising out of the operations of the company other than liabilities, damages, claims, suits and actions resulting from**

(i) in the Province of Quebec, the gross or intentional fault of the owner of the lands, and

(ii) in any other province, the gross negligence or wilful misconduct of the owner of the lands;

(*e*) restricting the use of the lands to the line of pipe or other facility for which the lands are, by the agreement, specified to be required unless the owner of the lands consents to any proposed additional use at the time of the proposed additional use; and

(*f*) such additional matters as are, at the time the agreement is entered into, required to be included in a land acquisition agreement by any regulations made under paragraph 107(*a*).

Book of Authorities, Tab 6

130. It is also noteworthy that on the issue of indemnification, recognizing that it would not be appropriate to expose municipalities to liability for consequential losses or damages, the CRTC, a federal tribunal having similar powers as the NEB, has limited municipal liability in the context of utilities crossing highways. In *Telecom Decision CRTC 2013-618*, the Canadian Radio and Television Commission adopted a Model Municipal Access Agreement which included terms which were formed by a consensus of stakeholders and also terms for which no consensus was reached. The CRTC approved the consensus terms for the Model Agreement. From this endeavour a consensus clause dealing with the liability of both host and occupier was approved:

11.3. No liability, both Parties. Notwithstanding anything else in this Agreement, neither Party shall be liable to any person in any way for special, incidental, indirect, consequential, exemplary or punitive damages, including damages for pure economic loss or for failure to realize expected profits, howsoever caused or contributed to, in connection with this Agreement and the performance or non-performance of its obligations hereunder.

Book of Authorities, Tab 35

131. On the issue of indemnity and cost recovery, it is also noteworthy that the federal *Railway Safety Act* was recently amended to provide relief to the province and municipalities in respect of costs incurred in responding to fire which was the result of a railway company's operations.

POWERS OF AGENCY — FIRE

Application to Agency

23. (1) If a province or municipality is of the opinion that a fire to which it responded was the result of a railway company's railway operations, it may apply to the Agency to have **the costs that it incurred in responding to the fire reimbursed by the railway company**.

Form of application

(2) The application shall be in the form prescribed by regulations made under subsection (5), and it shall be accompanied by the information prescribed by those regulations.

Further information

(3) The Agency may, by notice sent to the province, municipality or railway company, require the province, municipality or railway company to provide it with any further information that it specifies relating to the application, within the period specified in the notice.

Agency's determination

(4) If the Agency determines that the fire was the result of the railway company's railway operations, it shall make an order directing the railway company **to reimburse the province or municipality the costs that the Agency determines were reasonably incurred in responding to the fire**.

Regulations

(5) The Agency may, with the Governor in Council's approval, make regulations

(*a*) prescribing the form of the application referred to in this section; and

(*b*) prescribing the information that must accompany that application.

Interpretation

(6) Despite this section, this Act is not deemed to be administered in whole or in part by the Agency for the purpose of section 37 of the *Canada Transportation Act*.

Book of Authorities, Tab 19

132. This recent amendment highlights Parliaments recognition of the need to indemnify and hold municipalities harmless.

2.11 Conditions must be imposed that prohibit Trans Mountain from including provisions in its Crossing Permits issued under the *National Energy Board Pipeline Crossing Regulations* that commit municipalities to terms and conditions, including indemnities that they otherwise would not be subject to

133. Having regard to the "leveraging" and opportunistic behavior of Kinder Morgan/Trans Mountain described above and the provisions of the *National Energy Board Pipeline Crossing Regulation*, Part I, that commit a person wishing to carryout construction over a pipeline to agree to the terms and conditions imposed by Kinder Morgan/Trans Mountain no matter how outrageous they may be, the NEB must impose a condition to prevent this pattern of behavior from continuing.

4. Leave of the Board is not required for any con- struction or installation of a facility, other than the instal- lation of an overhead line referred to in section 5, if

(*b*) the facility owner obtains written permission from the pipeline company prior to the construction or in- stallation of the facility **and accepts any conditions set out in the permission**;

6. Leave of the Board is not required for an excava- tion, other than an excavation referred to in section 7, if

(*b*) the excavator obtains written permission from the pipeline company prior to the excavation **and accepts any conditions set out in the permission**;

Book of Authorities, Tab 7

134. Only by imposing a condition or term of approval prohibiting Trans Mountain from including provisions in its crossing permits or approvals issued pursuant to the Act and Regulations (including s. 112 of the Act and the provisions of the *National Energy Board Pipeline Crossing Regulations*, Part I and Part II), can municipalities and the Province be assured that they will not be leveraged into agreeing to terms that they would otherwise not be subject to.

2.12 A Condition(s) requiring Trans Mountain to enter into a Highway Licence and Crossing Agreement(s) related to impacted utilities including highway occupation and crossings with each affected municipality and affected Provincial highway authorities prior to construction must be imposed, failing which terms should be imposed by the NEB.

135. The existing National Energy Board Pipeline Crossing Regulations, Part I and Part II, do not reflect the reality of highway and utility infrastructure projects. As described above, they create an environment where Kinder Morgan/Trans Mountain will be able to leverage its position and require municipalities and other highway authorities to pay all costs and agree to Lot "X" demands or face project delays. This is an unacceptable outcome and in the absence of legislative change, can only be remedied through imposing terms and conditions in the Certificate.

136. A condition(s) requiring Trans Mountain to enter into a Highway Licence and Crossing Agreement(s) related to impacted utilities including highway occupation and crossings with each affected municipality and affected Provincial highway authorities, **prior to construction** must be imposed, failing which terms should be imposed by the NEB.

137. The fact that there are no agreement(s) or conditions of a certificate in place establishing terms and conditions related to occupying or crossing highways or to impacted utilities for the existing pipeline has resulted in the problems described above.

138. Moreover, as discussed above, the requirement to enter into an agreement prior to construction is common place under both federal and provincial legislation in respect of in other

regulated utilities. For example, s. 43 of the *Telecommunications Act*, s. 32 of the *Utilities Commission Act* and s. 34 of the *Oil and Gas Activities Act*.

139. Trans Mountain itself in its Application has impliedly agreed to such a condition. Trans Mountain in its Application has stated that it would enter into agreements with municipalities either in the form of permits or licence agreements. This is set out in document A3S0R0, Volume 2 – Project Overview, Economics and General Information, Section 5.0 Land Relations, Rights and Acquisitions, Section 5.3 Land Rights, Section 5.4 Lands Acquisition Process, Section 5.4.1 Process, Section 5.5 Land Acquisition Agreements (PDF pages 2-59 to 2-62, PDF pages 2-64 to 2-70).

140. This was additionally confirmed in Trans Mountain's Response to Information Request No. 1 of the City of Surrey filed as Exhibit C76-11-2 .

> **Request:**
>
> Terms of licence agreements and permits existing and contemplated in the City of Surrey
>
> m) please provide a copy(ies) of the proposed form(s) of licence agreement(s) that Trans Mountain contemplates entering into with the Province and with the City of Surrey and with other municipalities in BC related to the proposed Line 2 pipeline occupying highways or roads or occupying the South Fraser Perimeter Road corridor or occupying the Golden Ears Connector corridor;
>
> n) please confirm whether or not Trans Mountain has existing agreements and permits in relation to existing highway or road crossings in the City of Surrey by the existing Trans Mountain pipeline (whether those highways or roads are under the jurisdiction of City of Surrey or the Province). If so, please provide copies of all such agreements and permits and please also identify the dates of each;
>
> o) please provide a copy(ies) of the proposed licence agreement(s) and permits that Trans Mountain contemplates entering into with the Province and with the City of Surrey and with other municipalities in relation to proposed highway and road crossings by the proposed Line 2 pipeline in the City of Surrey;
>
> p) having regard to s. 112 of the National Energy Board Act and the jurisdiction of the NEB, please provide a copy of the form of permit that Trans

Mountain contemplates the City of Surrey and other municipalities in BC would require to obtain from Trans Mountain before performing any work in existing highway or road to be occupied by the proposed Line 2 pipeline;

q) please confirm whether or not Trans Mountain is prepared to pay the City of Surrey and other municipalities in BC compensation in the form of an annual fee for crossing and occupying highways or roads under municipal jurisdiction and if so, an explanation of how the compensation would be determined and if not, an explanation as to why not;

r) please provide a detailed summary of the consultations made and the findings regarding the statutory process Trans Mountain expects to follow in attempting to acquire land tenure in dedicated park. Please also provide an explanation of how compensation payable to the authority having ownership of the dedicated park will be determined;

Response:

m) **Currently, Trans Mountain has no licenses or other permits with municipalities for the existing federally regulated Trans Mountain Pipeline system.** However, Trans Mountain is aware that the City of Surrey and other municipalities are interested in negotiating such agreements, and has begun working on a form of protocol agreement to reasonably address any issues of concern to the municipalities. There has been one informal meeting held to date on May 16, 2014 between Trans Mountain and the City of Surrey to discuss this issue. Trans Mountain would welcome the opportunity to discuss this issue further with the City of Surrey and work towards a mutually acceptable protocol agreement.

n) Please see response to City Surrey IR No. 1.30.

o) Please see response to City Surrey IR No. 1.30.

p) Please see the response to City Surrey IR No. 1.30. Trans Mountain anticipates the form of permit for crossings of the pipeline would be a point of discussion during engagement around development of overall crossing agreements.

q) Trans Mountain does not anticipate annual fees for the Project. Trans Mountain anticipates that discussion regarding compensation would be included within the overall discussion of crossing agreements.

Trans Mountain believes that historical practice provides a reasonable approach respecting cost sharing and cost recovery for past, current and future

infrastructure development. In general, Trans Mountain believes it is reasonable for the project to reimburse municipalities for any modifications to their existing infrastructure required to accommodate the Project. In the planning and design of the Project, Trans Mountain is willing to work with municipalities to accommodate reasonably foreseeable plans for municipal infrastructure including roads and utilities in the design and placement of the pipeline. Once the Project is in place, any subsequent design and development of municipal infrastructure would be completed with the pipeline in place and should modifications or relocations of the pipeline be required to accommodate new municipal infrastructure, Trans Mountain would look to the municipality for reimbursement.

Trans Mountain is committed to working cooperatively with municipalities in the development of the Project. More specifically, Trans Mountain is prepared to:

- work with municipalities in the planning and engineering, and detailed design to accommodate future growth and minimize potential future impacts to existing infrastructure;
- pay for reasonable costs to inspect, relocate if needed, and protect their infrastructure during pipeline construction;
- work with the municipalities to fulfill federal requirements for pipeline protection including ground disturbance measures imbedded in the NEB crossing regulations; and
- construct the Project, and operate it and the existing pipeline in accordance with practices and procedures that are consistent with all other utility service and development infrastructure.
- There are established rules and protocols that must be met for the protection of the pipeline and municipal infrastructure, including formalized crossing agreements between infrastructure owners. Trans Mountain expects these rules and protocols will not be different than the processes currently used for the protection of the existing operating pipeline and for municipal development in proximity and directly over/under the pipeline.

With the installation of the proposed pipeline, all reasonable costs associated with construction and associated infrastructure changes would be borne by the Project, but costs for operations following installation would be in accordance with currently accepted practice and formalized in crossing agreements between infrastructure owner.

r) Legislative requirements respecting land acquisition for the Trans Mountain Expansion Project are set out within the NEB Act. Those provisions of the NEB Act apply specifically to directly affected parties and include:

- Under NEB Act, Section 75, “A company shall, in the exercise of the powers granted by this Act or a Special Act, do as little damage as possible,

and shall make full compensation in the manner provided in this Act and in a Special Act, to all persons interested, for all damage sustained by them by reason of the exercise of those powers."

- Under the NEB Act Section 86, when a company acquires lands for its operations, they are responsible for any damages directly related to and caused by the acquisition of lands, construction of the pipeline, and inspection, maintenance or repair of the pipeline. Under that Section, compensation related to the installation of a pipeline includes compensation for the acquisition of lands, compensation for damages, and indemnification of land owners from all liabilities related to the company's operations. These requirements would apply to the Trans Mountain Expansion Project.
- Under Section 97, factors an arbitration committee would consider in a determination of compensation include the market value of the lands taken both for permanent easement and temporary working space, loss of use of the lands by the owner, damages caused by construction and, noise and inconvenience that can reasonably be expected to arise from the construction. Trans Mountain is incorporating these factors in the compensation framework being developed for the Trans Mountain Expansion Project. Additional information respecting Trans Mountain Expansion Project compensation framework for directly affected landowners can be found in responses to NEB IR No. 1.29 and CGLAP IR No. 1.7b.

Trans Mountain anticipates it will negotiate agreements with each municipality where it is proposing to place the pipeline within roadways or on other municipal lands, including Parks, in accordance with these NEB Act requirements.

(Exhibit C76-11-1 - (A3W6E6-A4Q0V5) City of Surrey Information Request No. 1 filed May 7, 2014 (previously filed as C76-1-1)**)**

(Exhibit C76-11-2 - (A3X6A5_-_A4Q0V6) Response to City of Surrey Information Request No. 1 filed June 4, 2014 (previously filed as B52-1))

141. Parliament through s. 108 of the *National Energy Board Act* and through the broad jurisdiction of s. 52 of the Act has provided authority and direction to the NEB for this same approach and it is, therefore, incumbent on the NEB to recognize the need and imperative to impose such a condition.

142. In exercising the authority conferred under s. 108 of the Act, the NEB must also be mindful that the sections related to the Acquisition of Land in the Act (ss. 85 to 107) have no application to highways, parks and other public property for which no indefeasible title exists.

An interest in land cannot be acquired in highway, park and public square and it is precisely for this reason s. 108 was enacted by Parliament.

2.13 Terms and Conditions to be imposed on any Certificate Issued

143. Having regard to the above submissions in this section, it is submitted that the following terms and conditions should be imposed on any Certificate that may be issued. These terms and conditions should apply to the entire expanded pipeline system being both the proposed pipeline as well as the existing pipeline, or in the alternative to the proposed pipeline:

JOINT MUNICIPAL CONDITIONS

Present and future costs arising as a consequence of the pipeline occupying or crossing highways and impacting utilities

1. Trans Mountain shall be responsible for all present and future costs that will be incurred by the Municipality or others undertaking work in connection with a Municipality approved project or development (the "Approval Holder"), that the Municipality or Approval Holder would not have incurred but for the location, installation, construction and/or operation of the pipeline across, under, over or within the highway or in proximity to a municipal utility including, but not limited to:

(i) costs to realign, raise or lower the pipeline;

(ii) costs to excavate material from around the pipeline;

(iii) costs to add casing or other appurtenances for the protection of the pipeline; and

(iv) costs to accommodate future construction projects including, but not limited to, the construction, upgrading, maintenance, renewal, widening and/or replacement of any improvements, infrastructure, utilities and/or highway that occurs across, under, over or in proximity to the pipeline.

Necessary consent from Trans Mountain and other interest holders in Trans Mountain's statutory right of way/easement to enable municipalities and the Province to dedicate required land for highway/road.

2. Trans Mountain shall in respect of future widenings, expansions or improvements of the highway:

(i) consent (without conditions and without compensation) to the extinguishment of any statutory right of way or easement in favour of Trans Mountain over those portions of land required by the Municipality or the Province to be dedicated as highway or road in order that those portions of land may be incorporated into and form part of the existing highway that is occupied by the pipeline;

(ii) obtain the consent (without conditions and without compensation) of any mortgagee or other person having an interest in the statutory right of way or easement to be extinguished over that portion of land to be dedicated as highway or road in order that those portions of land may be incorporated into and form part of the existing highway that is occupied by the pipeline.

3. Trans Mountain shall in respect of creation of future dedicated highways and roads over the pipeline that are approved or required by a municipality or imposed as a condition of development approval (whether as a condition of subdivision approval, rezoning, or other land development project approval and whether related to a land development project initiated by a private developer or by the municipality):

(i) consent (without conditions and without compensation) to the extinguishment of any statutory right of way or easement in favour of Trans Mountain over that portion of land that is to be dedicated as highway or road;

(ii) obtain the consent (without conditions and without compensation) of any mortgagee or other person having an interest in the statutory right of way or easement to be extinguished over that portion of land that is to be dedicated as highway or road.

Fixed timing of pipeline work to be performed by Trans Mountain to accommodate highway, utility, infrastructure and improvement projects so as not to delay municipal projects

4. Trans Mountain shall perform all necessary pipeline related work within **90 days of being notified by the Municipality**, or within such period of time mutually agreed upon between the Municipality and Trans Mountain, or within such other time period as may be varied by Order of the Board so as not to delay any future highway, utility, infrastructure or improvement project that occurs across or in vicinity of the pipeline which might disturb the pipeline or which necessitates realigning, raising or lowering the pipeline or excavating material from, over or around it, or adding casings or other appurtenances deemed necessary by Trans Mountain for the protection of the pipeline.

Inconsistent Terms contained in Permits are Void

5. Unless otherwise ordered by the Board any permit issued by Trans Mountain pursuant to s. 112 of the *National Energy Board Act* or the *National Energy Board Pipeline Crossing*

Regulations (Part 1 and Part 2) shall be consistent with the terms of this Order and to the extent of any inconsistency such inconsistent terms are void.

Release and Indemnification in favour of Municipality

6. Trans Mountain shall indemnify and save the Municipality harmless from any and all liabilities, damages, claims, suits and actions arising out of Trans Mountain's operations and/or the construction, installation or placement of its infrastructure, including but not limited to, the pipeline, across, under, over or within the highway or in proximity to municipal utilities other than liabilities, damages, claims, suits and actions resulting the gross negligence or wilful misconduct of the Municipality.

7. Notwithstanding anything else in this Order, the Municipality shall not be liable to any person in any way for special, incidental, indirect, consequential, exemplary or punitive damages, including damages for pure economic loss or for failure to realize expected profits, howsoever caused or contributed to.

Requirement to Enter into Agreements with Affected Municipalities Prior to Construction

8. A Condition(s) requiring Trans Mountain to enter into a Highway Licence and Crossing Agreement(s) related to impacted utilities including highway occupation and crossings with each affected municipality and affected Provincial highway authorities prior to construction, failing which terms shall be imposed by the NEB.

Conditions Apply to Entire Expanded Pipeline System: To Both Existing and Proposed Pipelines

9. The above conditions 1 to 8 inclusive shall apply to the entire expanded pipeline system being both the existing and proposed pipelines.

APPENDIX "C"

CITY OF SURREY

the future lives here.

Legal Services
CRAIG MacFARLANE, City Solicitor
MAUREEN ST. CYR, Assistant City Solicitor
KELLY RAYTER, Assistant City Solicitor
ANTHONY CAPUCCINELLO, Assistant City Solicitor
PHILIP C.M. HUYNH, Assistant City Solicitor
BENJIE LEE, Assistant City Solicitor
HUGH CAMPBELL, Assistant City Solicitor

Our File: 5500-01/ #1
2430-20-591
Direct Line: (604) 591-4188

VIA EMAIL: damagepreventionregs@neb-one.gc.ca

April 12, 2016

Chantal Briand, Regulatory Approaches
National Energy Board
517 Tenth Avenue S.W.
Calgary, AB T2R 0A8

Dear Sirs and Mesdames:

Re: 30-Day Comment Period for National Energy Board Proposed Regulations for Pipeline Damage Prevention in *Canada Gazette* Part I (date of publication: March 19th, 2016)

In light of the brief period available for comment, the focus of this letter is limited to highlighting deficiencies in the proposed regulations that from a preliminary review alone are glaringly obvious. The fact that other provisions have not been commented on should not be construed as the City of Surrey's endorsement of those provisions, nor should one infer that Surrey does not have concerns with them. Unfortunately, in the absence of direct consultation with the City of Surrey (one of the municipalities most impacted by federal pipelines) and other impacted municipalities and without a meaningful comment period, this letter is all that time permits.

Firstly, the general tenor of the proposed regulations is that they unfairly shift burdens, obligations, costs and liabilities to municipalities and continue to frustrate and delay the ability of municipalities to undertake even the most routine services. Sadly, one cannot avoid being left with the impression that the draft regulations were written by pipeline company representatives.

Secondly, a glaring deficiency of the draft regulations is that they do not address the pipeline crossing issues raised by the City of Surrey and other municipalities (including the City of Coquitlam, the City of Abbotsford, the Township of Langley and the City of Edmonton) in the recent National Energy Board Hearing related to Kinder Morgan's Trans Mountain Pipeline Expansion Project (Board File: OF-Fac-Oil-T260-2013-03 02). The imperative to impose a cost allocation formula and provisions related to the issues and necessary requirements captured in the *Joint Municipal Conditions* (which are set out on p.180 to p.182 of the enclosed Written Argument) have been ignored by the drafters of the proposed regulations. Also ignored is the fact that pipeline companies do not compensate municipalities for their pipelines occupying and crossing municipal highways and that municipalities incur extraordinary present and future costs

as a consequence of such occupation and crossings. The City of Surrey and other municipalities requested that these "*Joint Municipal Conditions*" be imposed because, in part, the following issues and necessary requirements they address are not dealt with in legislation and continue to remain unaddressed in the proposed regulations:

- The allocation of present and future costs to the pipeline company arising as a consequence of the pipeline occupying or crossing highways and impacting utilities including, but not limited to:

    (i) costs to realign, raise or lower the pipeline;
    (ii) costs to excavate material from around the pipeline;
    (iii) costs to add casing or other appurtenances for the protection of the pipeline; and
    (iv) costs to accommodate future construction projects including, but not limited to, the construction, upgrading, maintenance, renewal, widening and/or replacement of any improvements, infrastructure, utilities and/or highway that occurs across, under, over or in proximity to the pipeline;

- The obligation of the pipeline company to provide necessary consent and obtain necessary consent from other interest holders in the pipeline company's statutory right of way/easement to enable municipalities and the Province to dedicate required land for highway/road;

- Fixed timing of pipeline work to be performed by the pipeline company to accommodate highway, utility, infrastructure and improvement projects so as not to delay municipal projects;

- Prohibiting the pipeline company from including certain terms in its consents or permits such as terms requiring municipalities to release and indemnify the pipeline company and assume liabilities and pay costs;

- Requiring the pipeline company to release and indemnify municipalities from any and all liabilities, damages, claims, suits and actions arising out of the pipeline company's operations and/or the construction, installation or placement of its infrastructure, including but not limited to, the pipeline, across, under, over or within the highway or in proximity to municipal utilities other than liabilities, damages, claims, suits and actions resulting the gross negligence or willful misconduct of the municipality; and

- Requiring the pipeline company to enter into agreements related to impacted utilities including highway occupation and crossings with each affected municipality and affected Provincial highway authorities prior to construction, failing which terms shall be imposed by the NEB.

The legal basis, need, rationale and evidence relied upon for the inclusion of provisions addressing these issues and necessary requirements is set out in section 2.0 of the enclosed Written Argument (p.2 to 110). We also suggest that you listen to the City of Surrey's presentation to the NEB in order to appreciate their significance. The presentation can be viewed using the following link: http://neb.isilive.net/TMPULC/2016-01-19/video-english.html.

Finally, as for specific provisions of the proposed regulations, we offer the following additional comments:

National Energy Board Pipeline Damage Prevention Regulations - Authorizations

s.4 - Duty to Inform - This exposes municipalities to extraordinary potential liability particularly in light of the joint and several liability provisions set out in section 16 of the *Pipeline Safety Act*, SC 2015, c.21, which amends the *National Energy Board Act* by adding s.48.12 to that *Act*. The addition of s.48.12 unfairly shifts liability to municipalities and arguably has the effect of nullifying the existing protection under s.86(2)(d)(ii) of the *National Energy Board Act* which Surrey and other municipalities have requested the NEB to clearly provide applies to municipalities as the owner of highways. Not only is it virtually impossible to prove that someone has been informed, but municipalities would have no reasonable means, nor can they be reasonably expected to know what subcontractors, if any, have been engaged. Also, keep in mind, that the duty to inform is far more difficult to satisfy than a duty to notify.

s.7(1)(c), s. 10(1)(c) - This improperly puts the onus on municipalities to be satisfied that they have obtained the information referred to in paragraphs 6(1)(a) and (c) of the regulation. The most municipalities can do is request said information and assume that the information the pipeline company provides is in fact all of the information s.6(1)(a) and (c) describes. It should not be left to the municipalities to assess the completeness and accuracy of the information provided by the pipeline company in response to a municipality's request.

s.7(3), s. 9(2), s.10(3) - The mandatory language "*must*" should be qualified with language similar to "*Unless otherwise ordered by the Board or consented to by the pipeline company, any person...*". On an application to the Board for a crossing, the NEB may relieve municipalities and others of some of these obligations.

s.7(3)(a), s.10(3)(a) - The language "*and that have been accepted by the pipeline company*", should be deleted. The pipeline company has either consented or it has not. This language creates uncertainty and arguably suggests that you need more than just consent but that you also need evidence of acceptance as well.

s.8(a) - The phrase "*compatible with the pipeline's safety and security*" should be deleted. Municipalities are not pipeline experts. Once the crossing is approved, it is enough that the facility (which includes "*highways*") is properly maintained in a good state of repair.

s.8(b) - This provision provides too much power to the pipeline company. What if the municipality does not agree that there is any "*deterioration*"? Keep in mind "*facility*" includes "*highways*".

s.8(d) - This provision puts a ridiculously uncertain onus on municipalities with the word "*could*". Why should municipalities be obligated to "*remove or alter the facility*"? One should also be mindful of the added exposure to municipalities created by the new liability provisions set out in the new s.48.12 of the *National Energy Board Act* (soon to be in force) added through section 16 of the *Pipeline Safety Act* which was enacted without municipal consultation and without regard to the unfair burden and additional liability it places on municipalities. Instead, the regulations should provide that the pipeline company shall undertake all necessary work to protect the pipeline at its expense. Again, one should not lose sight of the fact that pipeline companies do not compensate municipalities for their pipelines occupying and crossing municipal highways and

that municipalities incur extraordinary present and future costs as a consequence of such occupation and crossings.

s.10 - The incorporation of the definition of "*ground disturbance*" is problematic as the definition itself is unworkable. How could municipalities possibly prove there has been no "*reduction of the earth cover over the pipeline to a depth that is less than the cover provided when the pipeline was constructed*"? The obvious problems that result from such an unworkable definition are described in the letter from the Township of Langley dated November 13, 2015 which is enclosed with this letter.

Moreover, how are municipalities able to rely on the exception set out subparagraph (c) of the definition of "*ground disturbance*" in the *Pipeline Safety Act* without having any knowledge or reasonable means of ascertaining the depth of cover over the pipeline when the pipeline was constructed? The federally regulated Trans Mountain pipeline that traverses the City of Surrey was constructed in 1953 and we suspect that not even the NEB has the required information related to depth of cover. Also, in some cases, the depth of cover may have changed from the time of construction with the consent of the pipeline company or by order of the Board.

At a minimum, if this definition is to remain, then the regulation should clearly provide that certain activities are permitted to a depth of 30 cm without the added requirement that there be no reduction of the earth cover over the pipeline. There should also be a requirement that the pipeline company provide the depth of cover information required.

s.10(a) (see comments related to s.3(2) of the proposed *National Energy Board Pipeline Damage Prevention Regulations – Obligations of Pipeline Companies*) - There must be limitations imposed on the terms and conditions that can be imposed in a consent. While s.3(2) of the *National Energy Board Pipeline Damage Prevention Regulations – Obligations of Pipeline Companies* states that the conditions must relate to "*... conditions necessary for the protection of property and the environment, the safety and security of the public and of the company's employees or the pipeline's safety and security*", the pipeline company practice has been to include conditions imposing indemnities, releases and other provisions related to liability all in favour the pipeline company which have the effect of nullifying existing protections under the *National Energy Board Act* (such as those set out in s.86(2)(d)(ii) of the *National Energy Board Act*) as well as eliminating common law and other statutory defences available to municipalities. Unless a prohibition is expressly included in the regulations that has the effect of prohibiting such terms and conditions from being added then this pipeline company practice will undoubtedly continue.

s.10(3)(c) - By incorporating the definition of "*ground disturbance*" in this provision, the same concerns expressed above in relation to s.10 generally apply.

s. 10(3)(c) (ii) - Also, the 60 cm depth differential requirement is too large. An acceptable municipal standard is 30 cm clearance. The imposition of a 60 cm depth differential practically sterilizes otherwise usable portions of highway and utility corridors (which are already constrained for space) by effectively requiring municipalities and other utilities to place all facilities beneath the pipeline at tremendous expense. These facilities would include municipal and third party utilities that are typically placed very shallow in highways for access and construction cost reasons and include streetlighting, water lines and mains, catch basins, gas lines and mains, and electrical and telecommunication conduit, etc.

s.12 - When read in conjunction with the new section 112(2) of *National Energy Board Act* enacted by s.34 of the *Pipeline Safety Act* which will be in force shortly, section 12 of the proposed regulation does not go far enough. The ambit of varied routine municipal activities that must be undertaken with a vehicle or mobile equipment such as ditch cleaning, arguably cannot under the current language of the draft regulation be undertaken without the pipeline company's consent. The exemption for vehicles and equipment operated within "*the travelled portion of a highway or road*" set out in section 112(2)(b) is not helpful or workable because of the uncertainty of what constitutes the "*travelled portion of a highway or road*". At a minimum, s.12 of the regulation should be expanded to clearly provide that the operation a vehicle or mobile equipment for the purposes of undertaking certain routine municipal activities are permitted across a pipeline without the pipeline company's consent.

National Energy Board Pipeline Damage Prevention Regulations – Obligations of Pipeline Companies

s.3(2) - There must be limitations imposed on the terms and conditions that can be imposed in a consent. While s.3(2) of the *National Energy Board Pipeline Damage Prevention Regulations – Obligations of Pipeline Companies* states that the conditions must relate to "*... conditions necessary for the protection of property and the environment, the safety and security of the public and of the company's employees or the pipeline's safety and security*", the pipeline company practice has been to include conditions imposing indemnities, releases and other provisions related to liability all in favour the pipeline company which have the effect of nullifying existing protections under the *National Energy Board Act* (such as those set out in s.86(2)(d)(ii) of the *National Energy Board Act*) as well as eliminating common law and other statutory defences available to municipalities. Unless a prohibition is expressly stated that has the effect of prohibiting such terms and conditions from being added then this pipeline company practice will undoubtedly continue.

In light of the above, we trust that you will take necessary action and revise the draft regulations to address the concerns raised and the deficiencies identified in this letter.

Yours truly,

ANTHONY CAPUCCINELLO
Assistant City Solicitor

AC:kls
Enclosures:
- Written Argument of the City of Surrey dated January 12, 2016 (excluding Appendix "B" and Appendix "C")
- Township of Langley Letter dated November 13, 2015

c.c. Federation of Canadian Municipalities (Via Email)
Scott Neuman, Manager, Design & Construction

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APPENDIX "D"

FCM FEDERATION OF CANADIAN MUNICIPALITIES FÉDÉRATION CANADIENNE DES MUNICIPALITÉS

April 18, 2016

Chantal Briand, Regulatory Approaches
National Energy Board
517 Tenth Avenue S.W.
Calgary, AB T2R 0A8
Email: damagepreventionregs@neb-one.gc.ca

Dear Ms. Briand:

Thank you for the opportunity to submit comments regarding the National Energy Board Proposed Regulations for Pipeline Damage Prevention.

FCM is the national voice for Canada's local governments. Our members include nearly 2,000 municipalities—urban, rural, northern and remote—representing 90 per cent of Canada's population.

Our members are directly impacted by federally regulated pipelines in multiple ways. As such, FCM recognizes the importance of a regulatory regime that balances the environmental and public safety risks presented by pipelines with the reality that pipelines cross through existing urban areas and that construction and maintenance work must occur within the rights of way of federally regulated pipelines.

FCM commends the federal government for taking steps to attempt to improve pipeline safety legislation. However, we feel that the proposed regulations do not adequately address a number of municipal concerns.

New regulations must ensure that municipalities can conduct routine maintenance activities on municipal highways without undue burden from pipeline operators, while still ensuring appropriate consultation where necessary for safety and environmental considerations. Further, new regulations must not place additional liability on municipalities for activities undertaken by third party contractors.

Specific concerns from municipalities with experience conducting highway maintenance and construction projects in proximity to federally regulated pipelines are being submitted to the NEB as part of this consultation by individual municipalities.

.../2

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www.fcm.ca

FCM's National Board of Directors has passed three broad principles with respect to the federal review and assessment of pipeline projects, which are attached for your reference.

I look forward to working with the NEB to ensure that the regulatory regime governing federally regulated pipelines is improved in a way that protects the environment and public safety, as well as enabling local governments to build and maintain the municipal infrastructure that communities depend on.

Sincerely,

Raymond Louie
Acting Mayor, City of Vancouver
FCM President

Enclosure

APPENDIX

PRINCIPLES TO PROTECT MUNICIPAL INTERESTS IN FEDERAL ASSESSMENT PROCESSES

Municipalities regularly participate in federal, provincial or territorial assessment and review processes for larger projects, where the outcomes have local impact on areas of municipal responsibility. Major new projects subject to these review processes, especially resource development projects, are essential to the economic prosperity and quality of life of local communities, particularly for rural, remote and northern communities.

The following three principles, adopted by the FCM Board of Directors, speak to those areas where local governments have a legitimate interest to ensure their rights and responsibilities are protected:

1. **Protect and strengthen local economies, quality of life and the health and integrity of the local environment as top priorities in federal assessment and review processes:**
   - A project's contribution towards local economies must be a priority in federal review and assessment processes, and must also be balanced with the environmental and social priorities of local communities.
   - Municipal interests must be respected and reflected in federal assessment and review process.
   - Federal review and assessment processes must be efficient and ensure effective "smart government" coordination between government and departments.

2. **Equip and support municipal first responders to respond to emergencies related to proposed projects:**
   - Municipalities need to know what dangerous goods are being transported through, stored or used in their communities so local services can plan and respond effectively to emergencies.
   - Private sector project operators and federal, provincial and territorial oversight agencies cannot plan for emergencies alone. Local governments and authorities must be involved as partners in emergency planning.

3. **Prevent downloading of project-related safety, emergency response and other costs to municipal taxpayers:**
   - Third-party liability insurance systems must be sufficient to prevent the downloading of liability costs on municipal taxpayers, even in the event of the bankruptcy of the original insurance holder.
   - Municipal first responders must be equipped and supported to effectively respond to an emergency arising from a new federally-regulated project.
   - Up-front costs associated with participation in a federal review process and back end costs resulting from any unrecoverable burden placed on municipal services and infrastructure by a federally-regulated project must not be unfairly imposed on local governments.

THE CITY OF Edmonton
LAW BRANCH

9th Floor Chancery Hall
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April 14, 2016

VIA E-MAIL: damagepreventionregs@neb-one.gc.ca

National Energy Board
517 10th Avenue S.W.
Calgary, Alberta T2R 0A8

Attention: Chantal Briand, Regulatory Approaches

Dear Ms. Briand:

RE: Proposed Amendments to the NEB Regulations for Pipeline Damage Prevention (Canada Gazette, Part I – 18 April 2016)

Please be advised the City of Edmonton agrees that the deficiencies identified by the City of Surrey in its correspondence of April 12th, 2016 to the proposed regulations must be addressed. The City of Edmonton, therefore, requests that the National Energy Board revise the proposed regulations to remedy the noted deficiencies.

Yours truly,

David S. Woo
Barrister and Solicitor
(780) 944-7874
email: David.Woo@edmonton.ca
DSW/bg

Montréal

Direction générale
Bureau des relations gouvernementales et municipales

275, rue Notre-Dame Est, 3e étage (3.108)
Montréal (Québec) H2Y 1C6
Téléphone : 514 872-8444
Télécopieur : 514 872-6067

Le 18 avril 2016

Objet : Période de commentaires de 30 jours à la suite de la publication dans la Gazette du Canada, Partie I, des modifications proposées à la réglementation de l'Office national de l'énergie sur la prévention des dommages aux pipelines (date de publication 19 mars 2016).

Madame Briand,

À la lumière des documents disponibles concernant le sujet cité en objet et après analyse sommaire de ceux-ci, la Ville de Montréal demeure préoccupée face aux changements apportés.

De façon globale, la Ville de Montréal se questionne sur les nouvelles dispositions proposées à la règlementation, notamment au niveau de sa capacité à effectuer, de façon adéquate et dans les délais requis, ses travaux d'entretien courant de même que ses travaux d'urgence, le cas échéant.

De plus, la Ville n'est pas entièrement persuadée que les nouvelles dispositions relatives aux *Conditions municipales conjointes* permettent de régler de façon efficace les préoccupations des municipalités relativement aux pipelines sur leur territoire. À plusieurs égards, la Ville de Montréal rejoint les commentaires de la Ville de Surrey ainsi que ceux d'autres municipalités allant dans ce sens.

Je vous remercie de l'attention que vous porterez à nos commentaires. Veuillez agréer, madame Briand, l'expression de mes salutations distinguées.

La directrice,

Peggy Bachman

Township of Langley

Est. 1873

April 13, 2016

File No: 0400-40-011

Chantal Briand, Regulatory Approaches
National Energy Board
517 Tenth Avenue S.W.
Calgary, AB T2R 0A8

VIA EMAIL: damagepreventionregs@neb-one.gc.ca

Dear Sirs and Mesdames:

Re: 30-Day Comment Period for National Energy Board Proposed Regulations for Pipeline Damage Prevention in *Canada Gazette* Part I (date of publication: March 19th, 2016)

By letter to the National Energy Board dated November 13, 2015 (attached), the Township of Langley set out several of the Township's concerns with respect to the framework overview of the proposed amendments to the National Energy Board's Damage Prevention Regulatory Framework. Unfortunately, those concerns are not addressed or resolved by the Proposed Regulations that are the subject of the present 30-day comment period.

Furthermore, with respect to the text of the Proposed Regulations, the Township of Langley agrees with and shares the additional substantive concerns set out in the letter of the City of Surrey dated April 12, 2016 (attached). The Proposed Regulations do not recognize or provide for fair and efficient mechanisms for municipalities to carry out necessary and routine civic infrastructure maintenance and construction. The Township of Langley is very concerned that, as drafted, these Proposed Regulations place unwarranted and unnecessarily onerous burdens upon municipalities.

The deficiencies set out in the Township's letter of November 13, 2015 and the City of Surrey's letter of April 12, 2016 must be remedied to properly provide for a fair, safe and balanced approach to the practical issues that arise in the interface between municipal infrastructure and National Energy Board regulated pipelines. These issues are not isolated to the Township of Langley—they recur regionally, and nationally, and must be substantively addressed by the regulations.

Yours truly,

Roeland Zwaag, PEng
Director, Public Works Engineering Services

Attach.

Township of Langley

Est. 1873

November 13, 2015

BY EMAIL

NEB Pipeline *Damage Prevention Regulations*
Sheri Young
Secretary of the Board
National Energy Board
517-10th Avenue SW
Calgary, AB T2R 0A8

Email: damagepreventionregs@neb-one.gc.ca

Dear Ms. Young:

Re: Township of Langley Comments on National Energy Board *Damage Prevention Regulatory Framework*

This letter sets out the comments of the Township of Langley on the framework overview of the proposed amendments to the National Energy Board's Damage Prevention Regulatory Framework.

Our specific comments are set out below. As a general framework to our comments, it is important to recognize that the Township of Langley treats pipeline safety within our community as a priority. The development of an efficient system for ensuring pipeline safety that is marked by certainty of obligations is of significant importance to the Township of Langley.

Township of Langley's Recent Experiences with Regulatory Framework

In recent years, the Township of Langley has had to spend unnecessary time and resources in addressing issues arising from one pipeline company, and subsequently the National Energy Board, misapplying the existing pipeline safety regulations and seeking to extend regulatory control beyond the legislated safety zones. The Township of Langley relies upon the standards set out in the *National Energy Board Act* and regulations when planning, authorizing and carrying out municipal infrastructure work. As currently worded, s. 112 of the *Act* states:

> **112.** (1) Subject to subsection (5), no person shall, unless leave is first obtained from the Board, construct a facility across, on, along or under a pipeline or excavate using power-operated equipment or explosives within thirty metres of a pipeline.

To the extent that the language and standards are clear, there is no basis for pipeline company interference with municipal works that fall outside the regulated safety zone. This causes delay and expense to the municipality. To the extent that there is any uncertainty in the regulatory language and standards, the Township of Langley supports legislative efforts to remove that uncertainty.

The National Energy Board has on three occasions of which we are aware supported the pipeline company in its allegations of "unauthorized activity" by the Township of Langley, without providing the Township of Langley an opportunity to respond. In each case, the Township of Langley's view is that the safety regulations were clear, and the Township of Langley was operating well within what is permitted under the law. For context and for your reference, we provide a summary of the incidents here:

1) One ditch cleaning incident that was determined in advance by the Township of Langley to be well outside the 30 meter regulated safety zone established by s. 112(1) of the *Act*. In fact, the cleaning occurred 150 meters away from the pipeline in question. This was confirmed by the pipeline company representative who visited the site. There was no reasonable or legal basis to suggest that the municipality had done anything contrary to the *Act* or regulations, or to jeopardize pipeline safety. Nevertheless the company and subsequently the National Energy Board asserted that the ditch cleaning was "unauthorized activity". Although the NEB appears to have subsequently acceded that there is no factual basis for such an assertion, it has not as far as we have been advised, corrected its records on this incident.

2) One tree removal incident in which the Township of Langley's contractor removed a tree by hand within the regulated safety zone. No power-operated equipment was used. Leave of the Board is not required for excavation by hand (see text of s. 112 above). Nevertheless, the National Energy Board has recorded this as an "unauthorized activity" by the municipality.

3) The NEB recorded municipal crews milling and paving a road to a depth of 75mm within the 30 meter regulated zone as an "unauthorized activity."

    a. The Township of Langley does not understand milling or paving to be an "excavation", which is what is regulated under the *Act*. Existing pavement is merely ground and repaved. Therefore, leave of the Board is not required for that activity: *NEB Act* s. 112(1).

    b. However, even if the Township of Langley is wrong on its interpretation of "excavation" as excluding milling and paving, this activity was well within the depth permitted by the *National Energy Board Pipeline Crossing Regulations, Part 1* SOR/88-528 apply: s. 3 (which apply under the *Act*, s. 112 (1) and (5)). Leave of the Board is not required for excavation below 300mm that will not reduce the overall cover over the pipeline: the 75mm to which the road is milled is far below that threshold, and the repaving replaces the depth of cover.

Comments based on Recent Experiences for Framework Update Process

These experiences lead to the following comments relevant to the update of the NEB's damage prevention regulatory framework:

- First, incidents #1 and #2 above should not have arisen as incidents at all. The Township of Langley was well within the scope of allowed activity under the regulatory framework, and there was no reasonable basis for the pipeline company to interfere with the Township of Langley's activities, nor for the National Energy Board to support the company's position. Such interference is a drain on resources, without any benefit to pipeline safety, which is our shared goal. The revised regulatory framework should leave no ambiguity for pipeline companies, the National Energy Board, and the communities that host pipelines about the boundaries and limits of the regulations.

- With respect to the third incident, the Township of Langley's position is that the existing regulatory language permits, on its face, milling and paving. However, as the word "excavation" will be removed from s. 112 of the Act upon coming in to force (and in so far as there may have been ambiguity or disagreement about the interpretation), then this regulatory update process is an excellent opportunity to eliminate that uncertainty. The Township of Langley will submit below that certain activities, including milling and paving, should be expressly permitted under the new regulations in the same way that "Low Risk Crossings by Agricultural Vehicles" will be permitted under the new regulations.

Comments on NEB's Three Areas to be Updated

The new model of a "positive structure" for regulation, as the NEB describes it, will only be of assistance to the shared goal of pipeline safety if the regulations under s. 112(5) give greater certainty and clarity than the *Act* will provide upon the coming into force of the amendments.

1) **"Ground Disturbance"**: The new negative definition of ground disturbance risks confusion and uncertainty at the implementation stage. In particular, part (c) of the definition will be difficult to implement in practice. That part excludes from the definition of "ground disturbance": "any other activity to a depth of less than 30 cm and that does not result in a reduction of the earth cover over the pipeline to a depth that is less than the cover provided when the pipeline was constructed".

   Natural forces of accretion and erosion of soil and other materials will make it difficult, if not impossible, for the municipality to know whether shallow digging activities (i.e. less than 30 cm) might lessen the original cover of the pipeline. The ongoing relative depth of the pipeline is a matter within the pipeline company's means of knowledge, not the municipality's, however, this definition puts the responsibility on the municipality.

Recommendations:

a) **Grant express permission under s. 112(5) regulations for:**

a. Ditch cleaning

Ditch cleaning will often disturb soil, and may sometimes remove soil, although generally at depths less than 30 cm. Like cultivation and low risk agricultural vehicles, subject to appropriate restrictions, ditch cleaning is a very low risk activity to pipeline safety. To avoid uncertainty arising from the requirement to maintain original depth of soil under (c), it is recommended that ditch cleaning be expressly permitted, similar to the express permission anticipated for cultivation and low risk crossings by agricultural vehicles.

b. Milling, paving and routine highway maintenance

Road milling (and subsequent paving) would on the face of the revised definition of "ground disturbance" appear to be permitted under the *Act*. However uncertainty arises again with respect to the requirement at (c) with respect to original ground cover levels over the pipeline, which is a matter within the company's means of knowledge, not the municipality's. On the same basis that it is proposed that ditch cleaning should be expressly permitted under regulation, the Township of Langley submits that so too should milling and paving, subject to appropriate express conditions which the Township would be pleased to discuss with the NEB in this process.

The Township of Langley similarly supports the September 2015 resolution of the Union of BC Municipalities with respect to the filling of potholes and other "Routine Highway Maintenance Over Pipelines":

> WHEREAS timely maintenance of municipal highways is a matter of public safety;
>
> AND WHEREAS Kinder Morgan has taken issue with municipalities filling potholes and performing routine maintenance citing regulations under the National Energy Board Act;
>
> AND WHEREAS the National Energy Board General Order No. 1 Respecting Standard Conditions for Crossings of Pipelines imposes certain conditions which include a condition that a pipeline crossing a highway shall be located so that it will not interfere with highway traffic or maintenance;

AND WHEREAS there is uncertainty and confusion regarding the application of regulations cited by Kinder Morgan, the effect of National Energy Board General Order No. 1 Respecting Standard Conditions for Crossings of Pipelines and conditions that may have been imposed under the earlier enactments of s.108 of the National Energy Board which provides that any certificate approving a pipeline may contain terms and conditions related to pipelines crossing highways and other utilities:

THEREFORE BE IT RESOLVED that UBCM and FCM request the federal Ministry of Natural Resources to revise the regulations under the National Energy Board Act such that the regulations appropriately balance public safety and the continuing need for municipalities to undertake routine highway maintenance without having to first provide notice to or obtain a permit from the owner or operator of the pipeline.

c. Tree removal and replanting

"Cultivation" (part (b) of the definition of ground disturbance) should be defined. It is not clear whether tree planting and removal would be captured under the definition.

In any event, express permission should be given for tree planting and removal where the digging is done without power-operated equipment. As the current regulatory framework recognizes, hand digging for this purpose does not pose a threat to pipeline safety. This would relate to small to medium sized trees whose root systems are not deep enough to be close to pipelines. The planting or removal of larger trees with deep root systems that could approach depths of relevance to a pipeline would not be captured under this express exemption (in part because of the need for power operated equipment for removal of large trees).

b) Impose an express obligation upon pipeline companies to make original depths of pipeline relative to present depths readily available so as to prevent or minimize delay in municipal maintenance and work planning.

2) **"Prescribed Area":** The Township of Langley submits that the existing 60 metre safety zone (that is, 30 m on either side of the pipeline) is an appropriate "prescribed area" for the regulatory framework.

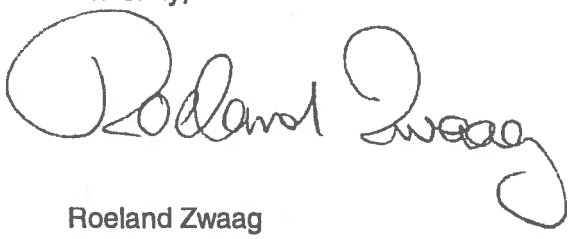
3) **One-call requirements**: Based on the Township of Langley's experience in recent years, as set out above, the Township of Langley submits that it is imperative that any legislated obligation to initiate a one-call request leave no ambiguity as to when such a request must be submitted. The Township of Langley submits that the 60 metre (30 + 30 metre) safety zone provides a sufficient buffer to reasonably protect pipelines. No obligation to call should arise when a contemplated activity is outside the zone of regulated activity (both in terms of distance from the pipeline or depth of disturbance).

4) **Identification of required measures to safe construction, activities and crossings of pipelines**: No measures have been provided for comment at this stage in the regulatory update process. The municipality would welcome the opportunity to review proposed measures and comment from the perspective of municipal works.

As stated above, the Township of Langley would welcome the opportunity to discuss with the appropriate conditions to be attached to the express permissions set out above. Certainty of language and practicality of conditions will be of fundamental importance to a successfully renewed pipeline safety regulatory framework.

If you have any questions, please contact the undersigned at 604.533.6163 or rzwaag@tol.ca .

Sincerely,



Roeland Zwaag
Director, Public Works

Coquitlam

Direct Line: 604-927-3092
Facsimile: 604-927-3445

April 15, 2016
Our File: 06-2430-20/14-02/1
Doc #: 2247682.v1

VIA EMAIL (damagepreventionregs@neb-one.gc.ca)

Chantal Briand
Regulatory Approaches
National Energy Board
517 Tenth Avenue S.W.
Calgary, AB T2R 0A8

Dear Ms. Briand:

RE: 30 Day Comment Period for National Energy Board Proposed Regulations for Pipeline Damage Prevention in *Canada Gazette* Part 1, 19 March 2016
Your File No: Ad-GA-ActsLeg-Fed-NEBA-RRG-DPR 02 01

The City of Coquitlam is one of several municipalities whose staff has spent considerable time studying the *National Energy Board Act*, the new *Pipeline Safety Act*, and their existing and the proposed new regulations over the last few years. The City shares the Board's goal of ensuring interjurisdictional pipeline activities are regulated to operate safely, and the City is supportive of a fulsome review of pipeline regulation in Canada. Regrettably, the City of Coquitlam has a number of procedural and substantive concerns with the proposed Pipeline Damage Regulations as published in the 19 March 2016 *Gazette*.

On the procedural side, Coquitlam questions the timing of the proposed amendments. While we understand the desire to update the Regulations in tandem with the coming into force of the *Pipeline Safety Act* on June 19, 2016, as the Board is aware, the hearing record in the Trans Mountain Expansion Project (TMX) application has recently closed. The enactment of new regulations at this time seems to undermine the public participation in the hearing process. For example, as intervenors in the TMX hearings, Coquitlam and four other Lower Mainland municipalities submitted for consideration a set of Joint Municipal Conditions if TMX is approved. Those Conditions were drafted in the context of the existing regulatory landscape. The appropriate time to draft and receive comments on proposed

changes to those regulations is after the Board releases its conditions and recommendations in respect of the TMX application, and once the government determines whether or not to approve it. At that time, Canadians will have a better understanding of which elements of pipeline safety and operations are appropriately the subject of project approval conditions, and which elements must be addressed in a new regulatory regime.

As both a level of government and as affected landowners, municipalities are uniquely situated to provide input into pipeline regulation. Despite this significant role, Coquitlam notes that it was not directly notified of this 30 day comment period. It also does not appear the umbrella organizations representing municipalities' interests in British Columbia and nationally (e.g. Union of British Columbia Municipalities, Federation of Canadian Municipalities) were consulted during the drafting process.

In terms of substantive comments on the proposed Regulations, the City of Coquitlam refers you to the deficiencies and concerns outlined by the City of Surrey in its letter dated April 12, 2016, a copy of which is enclosed. The City of Coquitlam requests that the National Energy Board revise the proposed Regulations to remedy these deficiencies. As set out in the City's written arguments in the TMX application (https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2905654&objAction=browse&viewType=1), a lawful federal regulatory scheme must advance goals within its legislative authority, such as pipeline safety, in a way that minimally impairs municipalities' ability to regulate matters within their legislative authority, such as use and occupation of highways. Also, the federal regulatory scheme must not unduly transfer risk and burden from private pipeline companies to the residents for whom municipalities operate and maintain those public assets. The City of Coquitlam respectfully says that the proposed Regulations do not meet either of these requirements.

In short, outstanding issues of considerable concern to municipalities, which are not dealt with in existing legislation, remain unaddressed in the proposed Regulations.

Yours truly,

Stephanie James
Assistant City Solicitor

Encl. - City of Surrey – 12 April 2016 Letter to NEB Re: 30-Day Comment Period for National Energy Board Proposed Regulations for Pipeline Damage Prevention in Canada Gazette Part I (date of publication: March 19th, 2016)

c- Federation of Canadian Municipalities

Attachment #3

City of Burnaby

Engineering Department

2016 April 15 FILE: 33200 10

Chantal Briand, Regulatory Approaches
National Energy Board
517 Tenth Avenue S.W.
Calgary AB T2R 0A8

VIA EMAIL: damagepreventionregs@neb-one.gc.ca

Dear Sirs and Mesdames:

SUBJECT: 30-Day Comment Period for National Energy Board Proposed Regulations for Pipeline Damage Prevention in Canada Gazette Part I (Publication Date: 2016 March 19)

In reviewing the Proposed Regulations within a very constrained 30 day comment period, the City of Burnaby notes that the Proposed Regulations unfairly shifts the burden, obligations, costs and liabilities to municipalities to carry out necessary and routine civic infrastructure maintenance and construction.

The City of Burnaby agrees with the deficiencies outlined in the letter from the City of Surrey dated 2016 April 12 to the National Energy Board and requests the Board to remedy the deficiencies, and provide a fair and balanced approach to address issues that arise in the interface between municipal infrastructure and the National Energy Board regulated pipelines. In addition, City of Burnaby requests extension of the comment period in order to allow all stakeholders to provide comments on the Proposed Regulations.

Yours truly,

Leon A. Gous, P. Eng., MBA
Director Engineering

DD:ac

Copied to: City Manager
City Solicitor