

APPENDIX A

417 A company's policies and practices are also public interest considerations that can
418 inform the Board's assessment of the Project.⁵⁷
419

420 The City says that the combined effect of an order authorizing Trans Mountain to utilize
421 municipal highways without a negotiated co-location agreement, coupled with Trans Mountain's
422 permitting requirements for the municipalities' own subsequent use of those lands, has the
423 practical effect of encumbering public lands in a way that is prejudicial to the municipalities'
424 bundle of ownership and occupation rights. The City, as the owner being deprived of the property
425 rights Trans Mountain constructively acquires, is entitled to compensation for the loss of
426 unencumbered ownership and use of these valuable public assets. The City, as a validly
427 authorized regulatory authority, is also entitled to exercise its regulatory powers to protect and
428 preserve those assets notwithstanding any rights Trans Mountain may acquire to also use those
429 lands.

430 **5.2.3 The Need for a Co-location Agreement**

431 One of the core purposes of municipalities in British Columbia is set out the *Community Charter*:

432 7 The purposes of a municipality include
433 [...]
434 (c) providing for the stewardship of the public assets of its community.⁵⁸
435

436 As municipal legal scholar William Buholzer notes, some assets are held by the municipality on a
437 trust-like basis for the benefit of the public:

438 While natural persons of full capacity may acquire and dispose of property as they
439 see fit, municipal corporations in British Columbia continue under the *Community*
440 *Charter* to be constrained in their property dealings by special rules applicable to
441 particular types of property. These rules derive from the trust-like basis on which
442 municipal corporations usually hold these types of property [...].⁵⁹
443

444 Municipal highways are one type of property municipalities hold on a "trust-like basis", with an
445 extensive statutory scheme enabling municipalities to govern and use roads, and placing limits on

⁵⁷ Exhibit B444-2, *supra* note 5, s.2.2.2, PDF p. 51 of 452, lines 861-863

⁵⁸ *Community Charter*, *supra* note 50, s.7

⁵⁹ Buholzer, W. (2013), *Local Government in British Columbia*, 5th Ed., p 131

446 their ability to dispose of those public assets.⁶⁰ The City says that, if the Board is going to
447 authorize Trans Mountain to utilize municipal lands for the TMEP, the Board must do so in a way
448 that is consistent with municipalities' mandate as trustees of public assets, including municipal
449 highway infrastructure. The City says a requirement that Trans Mountain enter into a co-location
450 agreement with a causal cost recovery mechanism is necessary to ensure: (1) Trans Mountain's
451 private interests are being paid for by Trans Mountain's beneficiaries, not the beneficiaries in
452 whose interest municipalities hold and manage public assets; and (2) Trans Mountain's use
453 minimally impairs the City's uses. The City says that a co-location agreement is the appropriate
454 means by which to balance the rights and interests of both Trans Mountain, as a federally
455 regulated pipeline operator, and the City, as owner and regulator of the highways Trans
456 Mountain wishes to use.

457

458 In its own words, Trans Mountain identifies the benefits of the TMEP as follows:

459 The main benefits of the Project result from alleviating the current shortage of
460 pipeline capacity, diversifying market access (e.g., to growing markets in the Pacific
461 basin) and providing option value to producers. The Project will enable Western
462 Canadian producers to realize higher prices throughout the life of the Project.⁶¹
463

464 The City of Coquitlam does not own, operate or in any way utilize oil or gas pipelines, so
465 alleviating capacity shortage, diversifying market access, and providing option value for producers
466 are not benefits to Coquitlam as a municipal corporation or to its taxpayers or residents.
467 However, it is those very same people and businesses who are being asked to subsidize the
468 beneficiaries through favourable use of public assets held by Coquitlam at a cost detriment to
469 Coquitlam taxpayers. Local governments are not permitted to subsidize private business
470 interests.⁶²

471

⁶⁰ For example, *Community Charter*, *supra* note 50, ss.35-46

⁶¹ **Exhibit B444-2**, *supra* note 5, p. 398, lines 7145-7148

⁶² *Community Charter*, *supra* note 50, s.25 prohibits the provision of a grant, benefit, advantage or other form of assistance to a business, including through the disposition of lands or interests in them for less than market value

472 As described in section 5.2.3.2.2, British Columbia municipalities are no strangers to utility co-
473 location. The City submits, however, that a cornerstone of the relationships between
474 municipalities and the utility providers should be the recognition of the local public benefit (or
475 lack thereof) that the utility provides. This is apparent in section 644 of the *Local Government*
476 *Act*,⁶³ the provision setting out the municipal taxes payable by linear utilities. That statutory
477 scheme recognizes the “localness” of the utility works (e.g. the definition of “specified
478 improvement” talks about the works being in one or a group of adjoining municipalities) and the
479 fact that the local residents are benefiting from the utility’s non-traditional use of land in the
480 municipality (e.g. the amount payable by the utility relates to the number of subscribers served or
481 the amount of utility consumed in that municipality). The City says that there is no local public
482 benefit to Trans Mountain’s use of municipal lands. The TMPL and the proposed TMEP do not
483 serve Coquitlam residents. Infrastructure those residents pay for is simply the conduit for Trans
484 Mountain to transport its product from its point of extraction in Alberta to its coastal shipping
485 point. Trans Mountain is not a public utility servicing Coquitlam residents.

486

487 Coquitlam respectfully submits that, absent a causal cost recovery mechanism, its residents will
488 be subsidizing Trans Mountain’s transportation costs. Subsidizing Trans Mountain is at odds with
489 local governments’ legal obligations not to grant assistance to private enterprises and, quite
490 opposite to Trans Mountain’s suggestion,⁶⁴ could provide Trans Mountain a significant advantage
491 over those utilities that do provide a local public benefit.

492 **5.2.3.1 The Legal Basis for a Co-location Agreement**

493 Municipal regulation of the use and occupation of highways is a constitutionally valid,⁶⁵ *intra vires*
494 exercise of properly delegated statutory authority. In addition to the rights incidental to
495 ownership (such as the rights to close and sell, or reopen highways, which came with the change

⁶³ R.S.B.C. 2015, c.1, s.644

⁶⁴ **Exhibit B418-4**, *supra* note 28, PDF pp.5, 10 and 11 of 11, lines 6-8, 13-16, 16-18; **Exhibit B444-2**, *supra* note 5, PDF pp. 117-118, lines 2109-2112

⁶⁵ The Provincial spheres of authority under subsections 92(10), (13) and (16) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c.3, include property and civil rights in the Province, matters of a merely local or private nature, and local works and undertakings

496 in ownership in 2004), the Province delegated to municipalities broad statutory authority to
497 regulate and prohibit uses of highways long ago. For example, by operation of Provincial statute,
498 the City has the following powers in respect of its highways:

499 36(1) In addition to its authority in relation to highways as a service, a council may,
500 by bylaw, regulate and prohibit in relation to all uses of or involving a highway or
501 part of a highway.

502
503 [...]

504
505 38(1) A council may temporarily restrict or prohibit all or some types of traffic on a
506 highway.

507
508 [...]

509
510 39(1) A council may, by bylaw, do one or more of the following:

511 [...]

512 (e) require persons to take specified actions for the purposes of
513 maintaining the cleanliness or safety of a highway that is next to property
514 that they own or occupy, or that is affected by property that they own or
515 occupy.⁶⁶

516
517 Furthermore, it is an offence under the *Community Charter* to excavate in or obstruct a highway:

518 46(1) Except as permitted by bylaw or another enactment, a person must not
519 excavate in, cause a nuisance on, obstruct, foul or damage any part of a highway
520 or other public place.⁶⁷

521

522 A company's engagement in a principally federally-regulated undertaking does not immunize it
523 from valid provincial or municipal regulations. In order to be immune from the City's regulations
524 a federally-regulated undertaking such as Trans Mountain's TMPL or the proposed TMEP must be
525 more than negatively affected before the City's regulation becomes completely inapplicable—
526 Trans Mountain must be impaired from discharging a vital or essential component of its
527 undertaking.⁶⁸ It is only if a City bylaw directly conflicts with a valid and competing federal law
528 (i.e. such that compliance with both is impossible) or if the City bylaw fundamentally frustrates
529 the federal interest in interprovincial pipeline infrastructure that Trans Mountain will be excused

⁶⁶ *Community Charter*, *supra* note 50, ss.36, 38, 39

⁶⁷ *Supra*, s. 46

⁶⁸ *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras. 48-49

530 from complying with the City requirement. Even then, Trans Mountain is only excused from
531 compliance with the City bylaw to the extent of the incompatibility.⁶⁹

532

533 While the routing of pipelines may fall within the core of the federal jurisdiction over
534 interprovincial pipelines,⁷⁰ the City says that nothing in the *National Energy Board Act* grants
535 Trans Mountain a right to free, unencumbered use of municipal highways, or the unilateral ability
536 to control the subsequent use of those lands by their owner. Neither the requirement to enter
537 into a co-location agreement of the nature described in these submissions, nor the requirement
538 to compensate municipalities for their causal costs, impairs Trans Mountain from discharging any
539 vital or essential component of its pipeline operations. The City says that Trans Mountain is not
540 immune from local regulation, and notes that the Board has recognized this principle in the
541 context of this Hearing. Although ruling provisions of Burnaby's parks and traffic bylaws
542 inapplicable to Trans Mountain's preliminary survey work for this Hearing, the Board cautioned:

543 This is not to suggest that a pipeline company can generally ignore provincial law
544 or municipal bylaws. The opposite is true.⁷¹

545

546 The question of which municipal bylaws or requirements will apply to any given action by Trans
547 Mountain is a complex legal issue, as evidenced by the protracted legal proceedings between the
548 City of Burnaby and Trans Mountain argued across several courts and tribunals. It is
549 counterproductive to both Trans Mountain's and the public's interest to have every construction,
550 operation, and maintenance decision about the pipeline or the extensive municipal and other
551 public infrastructure surrounding the pipeline, potentially embroiled in a complex legal dispute.
552 The City respectfully submits that it is incumbent upon the Board to ensure that any regulatory
553 approval it grants to Trans Mountain for the TMEP is structured in a way that minimally impairs
554 municipalities' highway ownership rights and constitutionally-valid, *intra vires*, right to regulate
555 the use and occupation of highways. Failure to do so will undoubtedly result in continued,
556 jurisdictional disputes between Trans Mountain and the numerous municipalities through which

⁶⁹ *supra*, paras. 69-75

⁷⁰ **Exhibit A97-1**: NEB Ruling No. 40, filed October 23, 2014 (A4D6H0), PDF p.14 of 20

⁷¹ *supra*, PDF p. 13 of 20

557 it intends to route the TMEP. As the Board has noted, jurisdictional issues can be addressed
558 through the imposition of conditions on approval:

559 Federally regulated pipelines are required, through operation of law and the
560 imposition of conditions by the Board, to comply with a broad range of provincial
561 laws and municipal bylaws.⁷² [emphasis added]
562

563 The City submits that it is in the public's interest to ensure as many jurisdictional disputes as
564 possible are resolved before any construction commences by way of a co-location agreement
565 between the City and Trans Mountain reinforced through Board conditions.
566

567 The fact that municipalities have an important public interest in regulating access to municipal
568 road infrastructure factored into the Court's 2015 decision in *wpd Sumac Ridge Wind Inc. v. City of*
569 *Kawartha Lakes*.⁷³ In that case, *wpd Sumac Ridge* ("Sumac"), a wind energy proponent,
570 challenged the City's refusal to issue permits for it to open, upgrade and use an unused road
571 allowance owned by the City. Sumac had in place all necessary provincial regulatory approvals for
572 the project, and argued the City's refusal frustrated the valid senior-level permit and was
573 therefore *ultra vires*. Notwithstanding what the Court found to be bad faith conduct by the City,
574 the Court agreed the City "may legitimately require agreements with respect to indemnity,
575 liability, decommission costs and the like."⁷⁴ The Ontario Superior Court ordered to the City to
576 reconsider Sumac's application and to negotiate those matters in good faith. It did not grant
577 Sumac an unfettered right to use the City's lands without such an agreement in place.
578

579 The City of Coquitlam says that Sumac rightfully acknowledged Kawartha Lakes' ownership of
580 and valid regulatory authority in respect of municipal highways. Sumac's success in challenging
581 Kawartha Lakes' refusal lay in the fact that it had tried, on numerous occasions, to negotiate the
582 highway use conditions with Kawartha Lakes. Further, Kawartha Lakes failed to raise co-location
583 or highway use concerns within the provincial regulatory approval process, leading the Court to
584 conclude its subsequently raised objections were tantamount to a collateral attack on the valid

⁷² *supra*, PDF p. 13 of 20

⁷³ 2015 ONSC 4164

⁷⁴ *supra*, para. 51

585 provincial process. The City of Coquitlam notes that, despite its repeated statement that it
586 intends to establish protocol agreements, Trans Mountain has taken no steps to negotiate such
587 terms and conditions with the City. Unlike Kawartha Lakes, the City of Coquitlam has raised
588 concern about the impact of Trans Mountain’s use of highway infrastructure throughout the NEB
589 regulatory process. The City says that this history speaks loudly of the need for the Board to
590 impose the requirement for certain co-location terms as a condition of any TMEP approval it may
591 grant. With respect, the City says that, unlike Sumac, Trans Mountain has shown no genuine
592 interest in negotiating a co-location agreement with the municipalities on whose highway and
593 utility infrastructure the TMEP, as currently proposed, is dependent.

594 **5.2.3.2 A Response to Trans Mountain’s Opposition**

595 Trans Mountain appears to oppose Coquitlam’s request for a co-location agreement with causal
596 cost recovery/sharing provisions on two primary bases: (1) Trans Mountain does not need to
597 compensate municipalities because it already pays more than its fair share through taxes; and (2)
598 the request is unfair and/or discriminatory vis-à-vis other utilities. The City respectfully says that
599 neither basis of opposition holds any factual or legal weight.

600 **5.2.3.2.1 Trans Mountain’s Misunderstanding of Municipal Taxation**

601 In response to calls from Lower Mainland municipalities for a causal cost recovery mechanism,
602 Trans Mountain has stressed that it will “continue to pay municipal taxes that are in excess of the
603 costs of municipal services required by Trans Mountain.”⁷⁵ Not only does this argument lack any
604 evidentiary foundation—there is no evidence before the Board of the costs of municipal services
605 required by or benefitting Trans Mountain—it represents a fundamental misunderstanding of
606 municipal revenue sources and implies a causal relationship between tax revenue and service
607 consumption where no such relationship exists.

608

⁷⁵ Exhibit B418-4, *supra* note 28, PDF p. 10 of 11, lines 38-39

609 The sources of municipal revenue are set out in section 192 of the municipal enabling statute in
610 British Columbia, the *Community Charter*.⁷⁶ The revenue sources are itemized as fees, taxes
611 (including property, parcel, local service, and certain utility taxes), specified fines and penalties,
612 other revenues specifically authorized by statute, and “revenues received by way of agreement,
613 enterprise, gift, grant or otherwise.”⁷⁷

614

615 There is considerable legal authority distinguishing between fees and taxes. Each has distinct
616 characteristics, and each may only be valid in certain circumstances. In *Re Eurig Estate*,⁷⁸ the
617 Supreme Court of Canada established a test to determine whether a levy is a fee or a tax. One of
618 the cornerstone considerations, and the one underpinning Trans Mountain’s misunderstanding, is
619 whether there exists a nexus between the amount paid and the service offered. Fees are based
620 on such a nexus; taxes are not:

621 Another factor that generally distinguishes a fee from a tax is that a nexus must
622 exist between the quantum charged and the cost of the service provided in order
623 for a levy to be considered constitutionally valid [as a fee, as opposed to a tax].⁷⁹
624

625 In short, Trans Mountain’s argument that its taxation payments exceed its draw on municipal
626 services, in addition to lacking any evidentiary foundation, overlooks the differences between
627 taxes and fees or other permitted revenue sources.

628

629 Property taxation is based on the assessed value of the land or improvements and the property’s
630 usage classification (e.g. residential vs commercial vs industrial), and has no direct relationship to
631 the occupiers’ actual or intended use of general municipal services. For example, homeowners
632 cannot opt out of paying some or all of their assessed taxes because they choose not to use the
633 municipally-funded library or recreation services, or because they were fortunate enough not to
634 be the victims of property crime or a fire requiring police or fire suppression services the previous
635 year. The differing intensities with which diverse land uses draw on general municipal services is

⁷⁶ *supra*, note 50

⁷⁷ *supra*, s.192(h)

⁷⁸ *Re Eurig Estate*, [1998] 2 S.C.R. 565

⁷⁹ *Eurig, supra*, at para. 21

636 arguably reflected in the differing taxation rates assigned to each property classification, matters
637 of policy decision for elected local officials within the constraints of provincial regulation.⁸⁰

638

639 The taxes Trans Mountain pays to the City are similarly lacking any nexus to the provision of
640 municipal services. Like traditional residential property taxes, the amount payable is calculated
641 by applying a taxation rate to an assessed value. However, the assessed value is set by the B.C.
642 Assessment Authority as the per-kilometer current cost of construction of Trans Mountain's
643 infrastructure, averaged across the province.⁸¹ The rate at which the City may levy taxes on that
644 assessed value is constrained by provincial regulation.⁸²

645

646 It is also important to note that the total amount paid to municipalities as taxes includes
647 remittances that municipalities are required to collect on behalf of other taxation authorities.⁸³
648 Trans Mountain suggests the proposed TMEP will generate about \$22.1 (or perhaps \$23.2)⁸⁴
649 million in annual municipal property taxes in British Columbia. Table 7.2.7-12 of Volume 5B of
650 Trans Mountain's initial filings, entitled "Trans Mountain Municipal Taxes Paid, 2013 and
651 Projected Increase" indicates a 2013 payment to the City of Coquitlam of \$200,000. This is
652 consistent with the City's evidence of a 2014 payment of \$208,235. However, Trans Mountain's
653 evidence and argument fail to note that of that \$208,235 paid to Coquitlam in 2014, \$62,278
654 (30% of the total) was remitted by Coquitlam to other organizations at the rates and in the
655 amounts mandated by those other organizations: B.C. Assessment Authority, Municipal Finance

⁸⁰ See, for example, the Municipal Tax Regulation, B.C. Reg. 426/2003, Taxation Rate Cap for Class 2 Property Regulation, B.C. Reg. 329/96

⁸¹ *Assessment Act*, R.S.B.C. 1996, c.20, s.21; Railway, Pipeline, Electric Power, and Telecommunications Corporations Right of Way Valuation Regulation, B.C. Reg. 218/86; Railway & Pipeline Corporations Valuation Regulation, B.C. Reg. 203/86

⁸² Taxation Rate Cap for Class 2 Property Regulation, B.C. Reg. 329/96

⁸³ *Community Charter*, *supra* note 50, s.197(1)(b)

⁸⁴ Trans Mountain's written argument-in-chief says \$22.1M (**Exhibit B444-2**, *supra* note 5, PDF p.433, lines 7772-7773) but Volume 5B of Trans Mountain's application materials, say \$23.2M (**Exhibit B5-38**: Volume 5B ESA-Socio-Economic Effects Assessment Part 13 of 16, filed December 16, 2013 (A35157) PDF pp. 184-185 of 245 and table 7.2.7-12)

656 Authority, the School Board, the Regional District, and Translink.⁸⁵ The actual tax revenue the City
657 received from Trans Mountain in 2014 was \$145,957.⁸⁶

658

659 The municipal authority to raise revenue specifically contemplates the imposition of fees in
660 respect of the use of municipal property.⁸⁷ Municipalities also have the authority to receive funds
661 under agreement.⁸⁸ As detailed below, since 2004 when municipalities acquired expanded
662 property rights in highways, they also have specific authority to grant licences of occupation or
663 easements, and to permit encroachments, in respect of highways.⁸⁹ The City has introduced
664 evidence that it has numerous regulatory and permitting schemes in place to balance competing
665 interests in the use of its highways, and to ensure it receives compensation for the use of that
666 public asset.⁹⁰ Payment of other municipal taxes or fees does not exempt a user from paying for
667 use of the highway, whether by way of a bylaw-prescribed fee or payment under a negotiated
668 licence or easement agreement.

669

670 The City says that persons granted permission (whether by the City or by regulatory order) to use
671 the City's lands must do so in a way that does not transfer the financial burden to the owner of
672 those lands. As detailed below in section 5.2.3.2.2, the City submits that, independent of Trans
673 Mountain's payment of taxes, Trans Mountain must negotiate terms and conditions of its
674 intended access to and use of municipal highways and other public lands prior to commencement
675 of construction, just like Trans Mountain must do with private land owners. A causal cost
676 recovery mechanism that does not leave Coquitlam residents subsidizing a private "utility" is
677 necessary.

678

⁸⁵For a discussion of the role of municipalities in collecting and remitting other organizations' taxation revenue, see Ministry of Community, Sport and Cultural Development, *Municipal Revenue Sources Review: An Analysis of Property Taxation* (August 2012) available here:

http://www.cscd.gov.bc.ca/Lgd/library/revenue_source_review/An%20Analysis%20of%20Property%20Taxation.pdf

⁸⁶ **Exhibit C-70-3-2**, *supra* note 4, PDF p. 10 of 13, line 150

⁸⁷ *Community Charter*, *supra* note 50, s.194(1)(b)

⁸⁸ *supra*, s. 192(h)

⁸⁹ *supra*, s.35(11)

⁹⁰ **Exhibit C-70-3-2**, *supra* note 4, PDF pp. 6-7 of 13, lines 91-107 and appendices cited therein