

CANADA / JUDGMENT

Trans Mountain Pipeline ULC v. Gold

2014 BCSC 2133

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 2133 Trans Mountain Pipeline ULC v. Gold

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Trans Mountain Pipeline ULC v. Gold,

2014 BCSC 2133

Date: 20141114

Docket: S148358

Registry: Vancouver

Between:

Trans Mountain Pipeline ULC

Plaintiff

And

Adam Gold, Mia Nissen, Stephen Collis, Lynne Quarmby, Alan Dutton

in his personal capacity and as a representative of Burnaby Residents

opposing Kinder Morgan Expansion also known as BROKE,

John Doe, Jane Doe and persons unknown

Defendants

Corrected Judgment: The text of the judgment was corrected

on August 5, 2015

Before: Associate Chief Justice Cullen

Reasons for Judgment

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& M. Good

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and Mia Nissen:

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and Stephen Collis:

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and BROKE:

N. Chantler

Appearing for Attorney General of Canada on

behalf of the RCMP:

R.K. Friesen

Place and Date of Hearing:

Vancouver, B.C.

November 5-7, 2014

Place and Date of Judgment:

Vancouver, B.C.

November 14, 2014

[1] This is an application for an injunction brought by the plaintiff Trans Mountain Pipeline ULC against certain named and unknown defendants.

- [2] The underlying action and the injunction application arise from opposition to a proposed expansion of an existing pipeline system "which currently moves crude oil, refined and semi refined petroleum products from Sherwood Park, Alberta to marketing terminals and refineries in Central B.C. to the lower mainland, Puget Sound or Washington State and other markets including California, U.S. Gulf Coast and overseas." The pipeline is 1,147 kilometers long and has a capacity of 300,000 barrels a day.
- [3] The proposed expansion is in response to a demand from producers, refineries and offshore markets.
- [4] The project is controversial because of concerns of environmental degradation through the increased use of fossil fuels throughout the world and potential for immediate, local environmental damage due to leaks and spills.
- [5] The movement of petroleum and crude oil products through pipelines is regulated and controlled through the authority of the National Energy Board (the "NEB") and its enabling act, the National Energy Board Act, R.S.C., 1985, c. N-7 [NEBA].
- [6] The plaintiff applied to the NEB under s. 52 of the NEBA on December 16, 2013 seeking approval of the proposed project, which would involve about 987 new kilometers of buried pipeline and at 193 kilometers of reactivated existing pipeline.
- [7] On April 2, 2014, the NEB issued Hearing Order OH 001 2014 to establish timelines and a process for the project hearing, identifying various issues it would consider in a hearing of the plaintiff's application.
- [8] On May 14, 2014, the plaintiff provided responses to information requests issued by the NEB proposing two alternate routes, one being a "preferred corridor", said to be responsive to stakeholders' feedback involving "a trenchless direct route option where a tunnel would be used to install the pipelines through Burnaby Mountain."
- [9] That option required the plaintiff to undertake certain studies and assessments to meet requirements of the NEB for the hearing process.
- [10] To conduct the requisite assessment, the plaintiff requires access to lands within the City of Burnaby as described in the Notice of Civil Claim (the "NOCC") at para. 21. The studies mandated by the NEB are set out in para. 22 of the NOCC as follows:
 - 22. To meet the NEB's information requirements for their assessment of the Preferred Corridor, Trans Mountain must, inter alia, conduct the following investigations as part of the Mandated Field Studies on the Burnaby Lands, and elsewhere, including:
 - (a) geotechnical investigations, including drilling of four boreholes at two sites;
 - (b) soil surveys;
 - (c) drilling a series of vertical walls to ascertain groundwater conditions for the HDD;

- (d) vegetation surveys focusing on the entry and exit points of the Preferred Corridor;
 - (e) wildlife surveys focusing on the entry and exit points of the Preferred Corridor;
 - (f) archaeological surveys; and
 - (g) an update on the human occupancy and resource use element in consideration of the Preferred Corridor.
- [11] On July 15, 2014, the NEB issued Procedural Direction #4 requiring the plaintiff, among other things, to "file new studies and information to the preferred corridor by December 1, 2014."
- [12] The plaintiff was not successful in securing Burnaby's cooperation in permitting access to the lands to conduct the necessary assessment. Between May 2012 and September 2014, the plaintiff and Burnaby communicated their respective positions.
- [13] On August 12, 2014, on application by the plaintiff to the NEB issued Order 28 stating its opinion that "Trans Mountain has the power to enter into and on Burnaby land without Burnaby's agreement in the manner outlined in Trans Mountain's 25 July 2014 request. Trans Mountain does not require a Board order for temporary access, nor has it requested a Board order."
- [14] Thereafter, Burnaby continued to resist the plaintiff's activities on Burnaby Mountain and on September 2, 2014, the City issued two orders to cease Bylaw contraventions under the Burnaby Street and Traffic Bylaw and the Burnaby Parks Regulation by law.
- [15] On September 2, 2014, the plaintiff filed a Notice of Motion with the NEB seeking an order that Burnaby comply with s. 73(a) of the NEBA. That section reads as follows:
73. A company may, for the purposes of its undertaking, subject to this Act and to any Special Act applicable to it,
- (a) enter into and on any Crown land without previous licence therefor, or into or on the land of any person, lying in the intended route of its pipeline, and make surveys, examinations or other necessary arrangements on the land for fixing the site of the pipeline, and set out and ascertain such parts of the land as are necessary and proper for the pipeline;
- [16] On September 8, 2014, Burnaby brought parallel proceedings in the B.C. Supreme Court seeking among other things, an injunction to prohibit Trans Mountain from conducting the mandated field studies. On September 11, the application for an injunction was heard. It was dismissed on September 17 with written reasons provided on September 26, 2014 indexed as *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2014 BCSC 1820 [Burnaby (City)]. Burnaby's injunction application was dismissed.

- [17] On October 9, 2014, the plaintiff's application to the NEB was heard. On October 23, 2014 in Ruling 40 the NEB ordered Burnaby to allow Trans Mountain access to the Burnaby lands to conduct the mandated field study studies.
- [18] Burnaby has appealed both the dismissal of its application for an injunction and the NEB order, the former to the B.C. Court of Appeal and the latter to the Federal Court of Appeal. The order from Ruling 40 has been filed in the Federal Court of Canada.
- [19] In the meantime, following the issuance of the NEB Order 40, Trans Mountain gave notice to Burnaby of its intention to resume work on the mandated studies on October 29, 2014.
- [20] Essentially, it is the events of that day which underpin this action and this application.
- [21] The plaintiff/applicant has summarized the events at issue in paragraphs 13 to 20 of its Notice of Application as follows:
13. On October 29, 2014, Trans Mountain dispatched employees and contractors to three separate locations to perform work: Barnet Marine Park, adjacent to Barnet Highway in Burnaby, Borehole No. 1, a wooded area on Burnaby Mountain, and Borehole No. 2.
 14. The work intended to be performed at Borehole No. 1 and No. 2 was simply to erect posts and signage to demark a work zone for upcoming work related to the drilling of boreholes at those locations. At Borehole No. 1 a platform must be erected and a drilling rig installed for the purposes of drilling the borehole. At Borehole No. 2 a mobile drilling platform must be used but the area must be secure first for operational and safety reasons.
 15. When the Trans Mountain crew tried to access Borehole No. 1, they encountered a number of protesters congregated in and around the site of Borehole No. 1. The protesters physically blocked access to Borehole No. 1, shouted slogans and comments at the crew and behaved in a manner than made it clear to the crew that if they attempted to perform the tasks for which they came to the site of Borehole No. 1 there would be a physical confrontation and that they would be physically prevented from doing so.
 16. The same work crew was intended to erect and post signage at Borehole No. 2. The crew attended at Borehole No. 2 but determined that it would not be possible to perform their work as access was blocked by an encampment, numerous vehicles and many protesters.
 17. The third worksite intended for October 29, 2014 involved the clearing of cut-lines off a trail on Burnaby Lands that runs past the Kask Bros, plant on Barnet Highway towards the Westridge Terminal. The purpose of the work is to clear paths for certain geophysical studies that will be done in the park to determine its viability as a corridor for the proposed pipeline. The work involved marking out and cutting certain pathways heading north off the trail that runs east to west from the Kask Bros, and the Westridge Terminal. When the Trans Mountain work crew arrived at the Barnet Marine Park, there were no other individuals in sight and the work area was set up and marked out with signage which indicated no entry into the worksite. The signage was posted on both the eastern and western extremities as

well as other locations.

18. The clearing work proceeded without incident in the morning hours but, at approximately 12 pm, two women arrived at the site, went to the area that the crew was working, and seated themselves in the area which stopped the work. The continuation of the work at that point would have created a safety danger to those individuals.
 19. Shortly thereafter, additional protesters arrived. They surrounded the work crew in the work area, walking past the No Entry signs and taking them out of the ground. The protesters acted in a very aggressive and loud manner, including yelling with a bullhorn and using the siren function of the bullhorn close to the ears of the work crew.
 20. The protesters succeeded in halting the ongoing work. Eventually, the RCMP attended at the site and the Trans Mountain crew departed the site as it was clear that they would be unable to continue the work commenced that morning.
- [22] In support of its application, the plaintiff has filed two affidavits of Carey Johannesson contracted to Trans Mountain as Projecthead to the expansion project, the affidavits of Gordon Santaiga, Alejandro Hurtado-Arias, Leonard Nuttall, Andrew Newman, contracted as security workers to the plaintiff and an affidavit of Gregory Key, also contracted to Trans Mountain. In their affidavits, these deponents describe their observations and experience on Burnaby Mountain on October 29, 2014.
- [23] Included in the plaintiff's materials are photographs and videos of the events of the day, as well as several publications, and a Youtube video of an interview conducted of Stephen Collis, one of the named defendants in this action.
- [24] It is the plaintiff's position that the evidence which they have marshalled and presented establishes to the necessary degree, causes of action in trespass, nuisance, assault, intimidation, intentional interference with contractual relations, and conspiracy.
- [25] The applicant relies on evidence that if an injunction is not imposed to enable it to complete the field tests, there will be substantial harm to it and to third parties. In particular, the appellants say a delay in completing field studies will delay the hearing before the NEB to determine the appropriateness of the project and will create uncertainty about the project. The plaintiff says delays will lead to direct financial harm to it, and to others contracting with it, estimating direct costs of \$5.6 million per month of delay and potentially losses of revenue of many millions of dollars per month.
- [26] Additionally, there are significant daily costs related to keeping crews on standby pending determination of this application. The plaintiff also points to serious threats to the validity of the preferred corridor and even a potential failure of the project.

[27] The plaintiff also points to potential harm to third parties that could result from the failure to enjoin the defendants' activities that prevent these third parties from doing their work. This potential harm includes loss of opportunity for groups to consult in the process, financial harm to local, provincial and federal economy and "delay and compromise of a Canadian National Infrastructure project".

[28] The plaintiff relies on the well-known authority of *RJR-MacDonald Inc. v. Canada* (Attorney General), [1994] 1 S.C.R. 311 at 334 [RJR-MacDonald] as follows:

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

[29] The plaintiff submits that the evidence establishes at least a serious question to be tried, the prospect of irreparable harm to the plaintiff (and to third parties), and that greater harm would enure to the plaintiff if no injunction were granted, than to the defendants if it were not.

[30] The resistance of the named defendants to the injunction is predicated upon a number of factual and legal grounds. In broad terms, the defendants' challenge the plaintiff's application on the basis that this Court either lacks jurisdiction, or ought to decline jurisdiction, over its subject matter to the NEB; that this application is premature in that it is an attempt to circumvent the appeals before the Federal Court of Appeal and the B.C. Court of Appeal; and, that on the merits this application fails to meet the test for an injunction.

JURISDICTION

[31] In its essence, the defendants' argument on jurisdiction is that where a specialized Tribunal granted exclusive jurisdiction under a comprehensive legislative scheme and a court have concurrent jurisdiction over the subject matter of a dispute, barring exception circumstances, the court should decline to exercise its jurisdiction.

[32] The defendants rely on the provision of the NEBA. Specifically, they rely on subsections 11, 12, 13, 73 and 75 which read as follows:

11. (1) The Board is a court of record.
- (2) The Board shall have an official seal, which shall be judicially noticed.

- (3) The Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of property and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.
- (4) Subject to subsections 6(2.1) and (2.2), all applications and proceedings before the Board are to be dealt with as expeditiously as the circumstances and considerations of fairness permit, but, in any case, within the time limit provided for under this Act, if there is one.
- 12. (1) The Board has full and exclusive jurisdiction to inquire into, hear and determine any matter
 - (a) where it appears to the Board that any person has failed to do any act, matter or thing required to be done by this Act or by any regulation, certificate, licence or permit, or any order or direction made by the Board, or that any person has done or is doing any act, matter or thing contrary to or in contravention of this Act, or any such regulation, certificate, licence, permit, order or direction; or
 - (b) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be done.
- (1.1) The Board may inquire into any accident involving a pipeline or international power line or other facility the construction or operation of which is regulated by the Board and may, at the conclusion of the inquiry, make
 - (a) findings as to the cause of the accident or factors contributing to it;
 - (b) recommendations relating to the prevention of future similar accidents; or
 - (c) any decision or order that the Board can make.
- (2) For the purposes of this Act, the Board has full jurisdiction to hear and determine all matters, whether of law or of fact.
- 13. The Board may
 - (a) order and require any person to do, forthwith, or within or at any specified time and in any manner prescribed by the Board, any act, matter or thing that such person is or may be required to do under this Act, or any regulation, certificate, licence or permit, or any order or direction made or given under this Act; and
 - (b) forbid the doing or continuing of any act, matter or thing that is contrary to this Act or any such regulation, certificate, licence, permit, order or direction.

73. A company may, for the purposes of its undertaking, subject to this Act and to any Special Act applicable to it,
- (a) enter into and on any Crown land without previous licence therefor, or into or on the land of any person, lying in the intended route of its pipeline, and make surveys, examinations or other necessary arrangements on the land for fixing the site of the pipeline, and set out and ascertain such parts of the land as are necessary and proper for the pipeline;
 - (b) purchase, take and hold of and from any person any land or other property necessary for the construction, maintenance and operation of its pipeline and sell or otherwise dispose of any of its land or property that for any reason has become unnecessary for the purpose of the pipeline;
 - (c) construct, lay, carry or place its pipeline across, on or under the land of any person on the located line of the pipeline;
 - (d) join its pipeline with the transmission facilities of any other person at any point on its route;
 - (e) construct, erect and maintain all necessary and convenient roads, buildings, houses, stations, depots, wharves, docks and other structures, and construct, purchase and acquire machinery and other apparatus necessary for the construction, maintenance and operation of its pipeline;
 - (f) construct, maintain and operate branch lines, and for that purpose exercise all the powers, privileges and authority necessary therefor, in as full and ample a manner as for a pipeline;
 - (g) alter, repair or discontinue the works mentioned in this section, or any of them, and substitute others in their stead;
 - (h) transmit hydrocarbons by pipeline and regulate the time and manner in which hydrocarbons shall be transmitted, and the tolls to be charged therefor; and
 - (i) do all other acts necessary for the construction, maintenance and operation of its pipeline.
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.

[33] The defendants also rely on language in the NEB's Ruling 40 at p. 16 where the NEB held:

If justified by a particular fact situation, the Board has the authority to issue an order to allow the NEB's statutory scheme to be carried out. That includes issuing an order under subsection 13(b) of the NEB Act that forbids the doing of any Act, matter or thing that is contrary to the NEB Act, or the Board's directions.

- [34] In addition to the specifics of the NEB's authority and jurisdiction under its enabling legislation, the defendants rely on jurisprudence considering the issue of concurrent jurisdiction between courts and tribunals, citing *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] SCC 14, [*Regina Police Assn.*], *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, [*Weber*], *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16 [*Okwuobi*]; and *Kelly v. Ontario*, (2008), 91 O.R. (3d) 100, 67 A.C.W.S. (3d) 908 (S.C.) [*Kelly*].
- [35] In particular, the defendants rely on the Supreme Court of Canada's (the "SCC") ruling in *Okwuobi*. That case involved parents of students who sought access for their children to public instruction in English in Quebec, pursuant to s. 73 of the Charter of the French language, R.S.Q. c. C -11. They sought injunctive and declaratory relief in the Quebec Superior Court, by passing the administrative appeal process set out in the Charter of French language, involving the jurisdiction of the Administrative Tribunal of Quebec ("ATQ").
- [36] In ruling the appellant parents had no right to bypass the ATQ because of its exclusive jurisdiction to hear appeals in respect of entitlement to minority language education, the SCC dealt with the "residual jurisdiction" of the Superior Court under such a legislative scheme "to grant injunctive relief in urgent situations and, potentially, to hear direct constitutional challenges to a legislative scheme": *Okwuobi* at para. 1.

[37] In respect of the former circumstances, the Court held as follows as paras. 51 to 53:

51 The legislature's intention to confer exclusive jurisdiction over the matter in issue on the ATQ should be respected to the greatest extent possible. However, the fact remains that an injunction is defined in art. 751 of the Code of Civil Procedure as "an order of the Superior Court or of a judge thereof". Thus, the Superior Court has exclusive jurisdiction to grant an injunction, in the strict sense of the word.

52 That said, an injunction is a discretionary remedy that courts have on many occasions declined to grant where other avenues of recourse were available (see *D. Ferland and B. Emery, Précis de procédure civile du Québec* (4th ed. 2003), vol. 2, at p. 435). We have accordingly been at pains in this judgment to emphasize the exclusive jurisdiction and broad remedial powers accorded to the ATQ. As a result, the Superior Court should exercise sparingly its discretion to award injunctive relief in minority language education claims. Such injunctive relief should be granted only to fill in the cracks in the administrative process, so to speak. In this way, injunctive relief can complement the administrative process rather than serving to weaken it.

53 As a result, recourse to urgent injunctive relief remains possible in certain circumstances, but it should remain the rare exception, rather than the rule. Seeking injunctive relief should not be allowed to develop into a means of bypassing the judicial process, or as P.-A. Gendreau et al. note in *L'injonction* (1998), at p. 201: [translation] ". . . neither the injunction nor any other procedure may be used to short-circuit an administrative tribunal's exercise of its exclusive jurisdiction or to obtain a review of its decision . . .".

- [38] The defendants contend that all of the substantive issues between the parties are already before the NEB and that, particularly in view of the judgment of Madam Justice Brown regarding Burnaby's application for an injunction against Trans Mountain in its action commenced in this Court on September 8, 2014, this Court should decline to exercise its jurisdiction in favour of the NEB. The defendants cite Brown J. in Burnaby City where she held as follows at para 16:
- [16] In my view, it is not appropriate to issue the injunction sought by Burnaby. The matter is properly before the NEB. Burnaby has the ability to pursue the relief that it seeks in that proceeding and, indeed, has done so. In the event that the NEB reaches conclusions that Burnaby considers to be in error, Burnaby may pursue an appeal to the Federal Court and may seek an injunction or a stay at that Court. Accordingly, this Court need not grant an injunction.
- [39] Brown J. also noted at para. 31 as follows:
- [31] Here, we are not dealing with a private entity offending bylaws. Rather, the true dispute is between competing public interests. The Act confers on the NEB certain jurisdiction. That includes the right to determine whether it is in the public interest that the pipeline project proceed and that includes permitting certain investigations. The NEB has the right under the Act to control that process.
- [40] The defendants submit that in view of the ruling of Brown J. it would be inconsistent for this Court to hold that in the present circumstances, the Court has and should exercise its jurisdiction to grant the injunction sought by the plaintiff, as the plaintiff is already engaged before the NEB in relation to its entitlement to conduct the activities on Burnaby Mountain; activities that it is seeking to enforce through this Court.
- [41] The defendants point out that the NEB is a specialized tribunal with the expertise to determine the nature and scope of the plaintiff's need to perform studies on the mountain, and to determine the nature and breadth of any order required for enforcement. The defendants say the NEB is uniquely positioned to adjudicate this sort of issue and to determine the work that needs to be done under s. 73(a) and how best to enforce it under ss. 12 and 13.
- [42] In response, the position of the plaintiff is that the defendants' position is unsustainable. The action at issue is based on allegations of tortious behaviour over which this Court, not the NEB, has the necessary constitutional and inherent jurisdiction. The plaintiff says the NEB has no jurisdiction to deal with the allegedly tortious behaviour at issue and that Parliament could not vest them with such authority.
- [43] The plaintiff says that what is at issue before me is fundamentally different from what was before Brown J. in Burnaby City. In the present case, there is no NEB order that affects the defendants, whereas in the case before Brown J. there was an order which Burnaby said directly implicated its authority to make bylaws.

- [44] Here, the plaintiff says the relationship between the plaintiff and the defendants is not one that is engaged by the proceedings before the NEB, nor by the leave to appeal applications before the Federal Court of Appeal.
- [45] The plaintiff relies in particular on the decision of the British Columbia Court of Appeal in *Vancouver Museums and Planetarium Assn. v. Vancouver Municipal and Regional Employees' Union* (1981), 27 B.C.L.R. 73, 8 A.C.W.S. (2d) 92 (C.A.) as authority for the proposition that while a specialized tribunal such as the Labour Relations Board has the authority to determine where and when picketing may take place, the Superior Court retains the jurisdiction to deal with the "how".
- [46] By analogy, the plaintiff argues that it is this Court, and not the NEB that has the jurisdiction to make the judgment whether the evidence of the defendants' actions in whole or in part raise a serious issue to be tried or a strong prima facie case so as to justify consideration of the last two prongs of the RJR-MacDonald test.
- [47] The plaintiff submits that what is before this Court may be the beginning of a long and difficult issue and the NEB has intrinsic limitations to its powers to deal with such issues, that a court does not have, including being able to: (1) enjoin persons unknown; (2) impose a civil enforcement order; or (3) enforce its own orders, as it must file these orders in Federal Court or this Court. The plaintiff says it would be inappropriate to defer jurisdiction to a tribunal whose expertise has nothing to do with these measures.
- [48] The plaintiff emphasizes that there are no parallel proceedings to the case at bar as there were in *Burnaby City* before Brown J. Thus, the plaintiff argues this application, unlike the one before her, cannot be viewed as a collateral attack on the ruling of the NEB or as an attempt to bypass its jurisdiction.

DISCUSSION AND CONCLUSION - JURISDICTION

- [49] I conclude that although the circumstances before me are distinguishable from those before Brown J., the question of jurisdiction in each case rests on the same jurisprudence.
- [50] That jurisprudence emerges from a reading of *St. Anne Nackawic Pulp & Paper*, [1986] 1 S.C.R. 704, [St. Anne Nackawic], *Weber*, *Regina Police Assn.* and *Okwuobi*.
- [51] At issue in *Weber* was the interpretation of s. 45(1) of the Labour Relations Act, R.S.O. 1990, c. L.2. The SCC was tasked with determining to what extent s. 45(1) ousted the courts' jurisdiction over Charter and tort claims: *Weber* at para. 37.
- [52] The SCC examined the concurrent, overlapping, and exclusive models of jurisdiction with respect to tribunals and found that the exclusive jurisdiction model was applicable: *Weber* at paras. 39-58. Under this model "disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts": *Weber* at para. 54. The SCC found that the subject matter underlying the pleadings in trespass, nuisance, deceit, and invasion of privacy fell within the umbrella of the dispute arising out of the collective agreement and

could not be separately pursued in the courts: Weber at para. 36. This finding was based on the reasons of Estey J., in *St. Anne Nackawic* at 718-719, which McLachlin J. (as she then was) adopted at para. 41:

The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law. . . . The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks. [Emphasis added by McLachlin J.]

[53] However, the SCC in *Weber* discussed situations under the exclusive jurisdiction model where the courts properly retained jurisdiction at para. 57:

It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction. This Court in *St. Anne Nackawic* confirmed that the New Brunswick Act did not oust the residual inherent jurisdiction of the superior courts to grant injunctions in labour matters (at p. 724). Similarly, the Court of Appeal of British Columbia in *Moore v. British Columbia* (1988), 50 D.L.R. (4th) 29, at p. 38, accepted that the court's residual jurisdiction to grant a declaration was not ousted by the British Columbia labour legislation, although it declined to exercise that jurisdiction on the ground that the powers of the arbitrator were sufficient to remedy the wrong and that deference was owed to the labour tribunal. What must be avoided, to use the language of Estey J. in *St. Anne Nackawic* (at p. 723), is a "real deprivation of ultimate remedy".

[54] McLachlin J. also noted at para. 54 as follows:

This approach does not preclude all actions in the courts between employer and employee. Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the court. [citations omitted]. Additionally, the courts possess residual jurisdiction based on special powers, as discussed by Estey J. in *St. Anne Nackawic*, *supra*.

[55] Justice McLachlin went on to deal with the argument that "jurisdiction over torts and Charter claims should not be conferred on arbitrators" under the labour legislative regime "because they lack expertise on the legal questions which such claims raise." *Weber* at para. 55. She wrote at para. 55 as follows:

The answer to this concern is that arbitrators are subject to judicial review. Within the parameters of that review, their errors may be corrected by the courts. The procedural inconvenience of an occasional application for judicial review is outweighed by the advantages of having a single tribunal deciding all issues arising from the dispute in the first instance. This

does not mean that the arbitrator will consider separate "cases" of tort, contract or Charter. Rather, in dealing with the dispute under the collective agreement and fashioning an appropriate remedy, the arbitrator will have regard to whether the breach of the collective agreement also constitutes a breach of a common law duty, or of the Charter.

[56] In *Regina Police Assn.*, Justice Bastarache for the Court summarized the reasoning in *Weber* as follows at para. 39:

To summarize, the underlying rationale of the decision in *Weber*, *supra*, is to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties. The analysis applies whether the choice of forums is between the courts and a statutorily created adjudicative body, or between two statutorily created bodies. The key question in each case is whether the essential character of a dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determining this question, a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction not intended by the legislature. [Emphasis added.]

[57] In *Okwuobi*, the statutory scheme at issue conferred exclusive jurisdiction on the ATQ to hear appeals in respect of entitlement to minority language education.

[58] The Court summarized the process at para. 19 as follows:

The administrative process thus requires that before turning to the superior court to gain access to minority language education in Quebec, a claimant must first apply to a designated person for a certificate of eligibility, and, if necessary, appeal that decision to the ATQ. Following a determination by the ATQ, it is possible for the claimant to seek relief from the superior court.

[59] The SCC in *Okwuobi* acknowledged that the superior courts have a residual jurisdiction "to grant injunctive relief in urgent situations and, potentially, to hear direct constitutional challenges to a legislative scheme": at para. 50.

[60] As earlier noted, the Court in *Okwuobi* nevertheless concluded that "recourse to urgent injunctive relief should remain the rare exception, rather than the rule": at para. 53. In that case, the appellants were essentially asking the Quebec Superior Court to usurp the authority of the ATQ with respect to minority language education claims.

[61] In *St. Anne Nackawic* (which was the case upon which *Weber v. Ontario Hydro* was based), a somewhat different perspective on the residual injunctive power was expressed, in the context of restraining illegal strike activity. While holding that in the context of labour relations legislation with a comprehensive provision for a submission to arbitration, the Court had no jurisdiction to hear an action for damages for breach of the collective agreement and the applicable statute, the Court dealt differently with a superior court's residual power to enjoin the activity.

[62] In paras. 29 and 30, Estey J., for the Court held as follows:

29. When a court issues an injunction to restrain illegal strike activity, the courts have based such relief in both the breach of collective agreement and the breach of statute: *Winnipeg Builders' Exchange*, supra. However, it is clearly the breach of statute that is most significant. It is the statutory scheme to which the courts have deferred, not the single provision for arbitration in a collective agreement. Thus, in the court below, La Forest J.A. (as he then was), after discussing the statutory scheme, wrote:

To allow a party to a collective agreement, at its whim, to bring an action for damages for what really constitutes a difference arising out of a collective agreement would, as it appears to me, be to set up a remedy in substitution for that established by the Legislature.

He concluded with respect to the power to enjoin illegal strikes, however, that

...this power has been used with the intention of supporting the legislative scheme, not to supplant it. As Cartwright C.J.C. stated in...[*Winnipeg Builders' Exchange*, supra], "the purposes of the...Act would be in large measure defeated if the Court were to say that it is powerless to restrain the continuation of a strike engaged in in [sic] direct violation of the terms of a collective agreement binding on the employees and in breach of the express provisions of the Act".

30. When viewed from this perspective, it is apparent that the cases affirming the courts' injunctive power do not purport to create a power in the courts to enforce the terms of collective agreements. Rather, they enforce the general law as embodied in the statute, which includes both an express prohibition on strikes during the currency of a collective agreement and provision for binding and enforceable arbitration which, in many cases, would resolve the dispute underlying illegal strike activity. An injunction restraining a strike also upholds incidentally the rights of an employer under a collective agreement, and specifically enforces the individual obligations of the employees on whose behalf the collective agreement was negotiated pursuant to the Industrial Relations Act of New Brunswick, supra. Such incidental effects, as the *Winnipeg Builders' Exchange* case, supra, demonstrates, are not sufficient reason to deny an injunction to prevent immediate harm arising out of a clearly illegal act, where no adequate alternative remedy exists.

[63] He concluded at para. 34, in part, that:

[T]he courts do have a limited residual presence in the labour relations scheme as it has evolved in the legislative program where the conduct amounts to illegal strike or lockout and that the general jurisdiction to issue injunctions under the Judicature Act is unimpaired in this context.

- [64] As I see it, the critical question for determination on the issue of jurisdiction in this case is that which was posed by Bastarache J. in the *Regina Police Assn.* decision, that is, whether the essential character of the dispute in its factual context, arises either expressly or inferentially from the statutory scheme of the NEBA?

- [65] If the answer to that question is yes, then the question becomes whether the court's residual jurisdiction to grant injunctive relief in urgent situations is engaged "with the intention of supporting the legislative scheme, not to supplant it" and "where no adequate alternate remedy exists": St. Anne Nackawic at paras. 29 - 30.
- [66] An application of Weber principles can be found in the judgment of Morrison J. in Mainland Sawmills Ltd. v. IWA-Canada Local 13567 Society, 2004 BCSC 1469, leave to appeal refused, 2005 BCCA 89. In that case, the plaintiff brought actions in trespass, assault, battery, intimidation and harassment for monetary relief. The defendants argued that the events giving rise to the claims arose from a labour dispute and the specialized Labour Relations Board had exclusive jurisdiction to hear the matters. Madam Justice Morrison described the events giving rise to the tortious behaviour at paras. 25 and 26 of her Judgment:
- [25] The events alleged in the statements of claim of both actions occurred on December 16, 2003 at or around the premises of Mainland at approximately 10:00 p.m. A group estimated to be 100 persons or more, members of Local 1-3567, arrived at Mainland. The plaintiffs allege their purpose was to shut down operations. Some of the group were armed with sticks and bats. They allegedly entered the property of Mainland, where they assaulted several personal plaintiffs. They also caused the forcible removal of some members of Local 2171.
- [26] There were allegations of members of Local 2171 being scabs; there were threats of violence as well as acts of violence. When the graveyard shift arrived at 11:00 p.m. at Mainland, they were prevented from entering. The police were called.
- [67] In her analysis, Morrison J. canvassed the law with respect to torts in labour disputes, including Weber, and found that "[t]he court must retain jurisdiction to deal with tortious or criminal conduct that may accompany picketing": at para. 101. She found that the acts complained of were properly described as torts and thus the proper subject matter for the courts.
- [68] In my view, this is a case which is akin to the circumstances in Mainland Sawmills, and the activities at issue are ones over which the courts do retain jurisdiction.
- [69] What is alleged are activities comprising tortious behaviour by parties who are not engaged in the processes before the NEB in respect of either Order 28 or Order 40. What is being sought by the plaintiff in this action before this Court are remedies for the alleged tortious behaviour, including monetary damages and injunctive relief. There is no legislative basis for the NEB to assess or award damages for tortious behaviour. Even though the NEB may have the authority to restrain the activities of the defendants as part of its legislative regime, the court's authority to act to limit the damages incurred by the torts alleged cannot be hindered or precluded by that fact, particularly where as here, a monetary judgment is not likely to be enforceable.
- [70] I conclude that what is before this Court is in substance a separate case of tort which arises not "expressly or inferentially from a statutory scheme" but only incidentally to it.

[71] Unlike the City of Burnaby, which is clearly engaged in a process before the NEB in respect of Order 28 and Order 40, the present defendants are not. Their activities are therefore essentially separate and discrete from the statutory scheme even though their motivations may stem from the Orders issued from it, and the actions taken under it.

[72] I thus conclude that there is no bar to the Court assuming jurisdiction in this case.

PREMATURITY

[73] The defendants have argued that it will be premature to issue an injunction in this case as the foundation for the injunction, namely, Trans Mountain's authority to conduct the survey work, is "squarely before the Federal Court of Appeal and the B.C. Court of Appeal." The defendants rely on the fact that the City of Burnaby has sought leave to appeal to the Federal Court of Appeal from the NEB Ruling 40 issued on October 23, 2014 and has sought leave to appeal to the B.C. Court of Appeal from the decision of Brown J. in Burnaby City dismissing the City's application for injunctive relief.

[74] The defendants argue that if the appeals were to be successful it would undermine the basis for this injunction but by that time the harm would in effect be done and conceivably arrests may have been effected on account of a process that may yet be determined to be unjustified.

[75] I do not accept the defendants' submissions on prematurity. The proceedings at bar have nothing to do with the proceedings under appeal which involve the City of Burnaby, the plaintiff, and the NEB. Although Burnaby through its counsel has sought to expedite the application for leave to appeal before the Federal Court of Appeal and has indicated it will seek a stay of proceedings, it has not to date, to my knowledge, done so.

[76] This Court is faced with the state of affairs as they exist today, not as they may become in the future. What the defendants are in effect asking this Court to do is to assess the merits of the appeals before the Federal Court of Appeal and the British Columbia Court of Appeal and decide whether a stay should be issued in one or another of those Courts if one were sought by Burnaby. I am in no position to make that assessment. In my view, the defendants' argument of prematurity must fail.

THE MERITS

[77] On the merits, the defendants argue that the evidence advanced by the plaintiff does not establish a strong prima facie case or a serious question to be tried, and that even if this threshold is met, the balance of convenience weighs heavily in favour of dismissing the application.

[78] It is the defendants' contention that the first step of the RJR-MacDonald test should be considered to be the higher threshold of a "strong prima facie case" because if the relief sought by Trans Mountain were granted, it would be dispositive of the case.

[79] The defendants argue that the circumstances of this case fall within the exception to the general rule that the first step of an injunction does not generally involve much consideration of the merits. They rely on one of the two exceptions outlined in *RJR-MacDonald* as follows at 338:

[W]hen the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial.

[80] The defendants analogize this case to protests against logging in which the higher standard articulated in *RJR-MacDonald* usually applies because the injunctive relief sought usually has the effect of amounting to a final determination of the action. The defendants cite *International Forest Products Ltd. v. Kearn*, 2000 BCSC 888 at para. 41 and *Relentless Energy Corporation v. Davis*, 2004 BCSC 1492 at para. 13.

[81] The plaintiff says whatever the threshold test – serious questions to be tried or significant prima facie case – it is met. The plaintiff submits that the evidence discloses a concerted and organized effort among the named defendants and others to deliberately obstruct and interfere with the mandated field studies in ways which support the torts alleged.

[82] The actions and events at issue took place at three separate locations on the lands in question: at Barnet Marine Park, at the site designated as Borehole No. 1, and at the site designated as Borehole No. 2. Much of the plaintiff's evidence in relation to the events at Barnet Marine Park is set out in the affidavit of Carey Johannesson sworn October 30, 2014, and in the video and audio recordings of the events attached to the second affidavit of Leonard Nuttall sworn November 4, 2014.

[83] In his affidavit, Mr. Johannesson describes being at Barnet Marine Park with two fallers and two security guards where he erected signs prohibiting entry from the proposed work area. The object of the work at that site was to cut lines through shrubs and bushes with chainsaws to enable geophone testing. As to the signs, he deposed as follows at paras. 80 and 81:

80. At approximately 10:11 am, we arrived at the Kask-Brothers parking lot. The Trans Mountain work crew began unloading equipment and proceeded up the path that leads to the work site. When we arrived, I erected four signs to delineate the work area. The signs each read: "TRANS MOUNTAIN KINDER MORGAN CANADA / NO ENTRY UNTIL FURTHER NOTICE: FIELD TESTING AREA UNDER ORDER OF THE NATIONAL ENERGY BOARD / FOR YOUR OWN SAFETY, PLEASE REMAIN OUTSIDE OF THE SIGNED-OFF AREA".

81. The signs were located in a line along the path: one before the work, one after the work, and two in the middle. The lines that were to be cut were perpendicular to the path heading north from the path.

- [84] Two young women went to the work site saying that they were there to stop the work being done and saying "more aggressive" protestors were coming. Subsequently, about 20 protestors attended including Mr. Gold and Ms. Nissen. Mr. Johannesson described what happened next in paragraph 89 of his affidavit as follows:
89. The protestors verbally attacked us, and stood in the way of our work. The protestors obstructed us from carrying on with the brush clearing. They screamed and yelled at us, and blasted megaphones in our ears. They moved very close to us while doing so, making it very comfortable [sic], especially for my hearing. They told us that we should not be there, and that they would prevent us from conducting our work. I felt intimidated by the protestors and did not feel safe.
- [85] He deposed that the fallers did not continue their work because "although they were contracted to do the work" they "could not do so without a serious risk of injury to a number of the protestors" so they did not and the decision was made "to withdraw from the site".
- [86] Video and audiotapes that were taken during the events at the Barnet Marine Park area were included with the affidavit of Mr. Nuttall. The video and audio tapes confirm the tenor of the confrontation, including the protestors directing bullhorn sirens close to the ears of the Trans Mountain contractors and, using aggressive language. One unknown protestor was recorded as saying "Put the pipeline up your ass and turn the flow on high "
- [87] Both Ms. Nissen and Mr. Gold were recorded using aggressive language "referring to the Trans Mountain contractors as "assholes", telling them to "shove it [their] ass", referring to them as 'scum bags", and asserting that the project "will not be completed."
- [88] At Boreholes No. 1 and 2, the evidence comes from the affidavits of Mr. Hurtado-Arias and Mr. Key. Mr. Key described going to Borehole No. 1 with other crew members and hearing two male voices say multiple times "everyone to the choke point". As they got to the location of the Borehole, he saw "at least 15 people there and more people coming". They were "blocking off the entrance from the trail to the partially cleared area at Borehole No. 1. One of the crew attempted to walk around the protestors but was physically blocked by someone stepping into his way. Mr. Key deposed:
- There was no way we could safely access the site of Borehole No. 1 without either physically contacting the protestors or creating a more serious confrontation than already existed. There was no ability for us to safely erect the signs and we gave up trying.
- [89] As they walked back, many people from the site, were yelling at them, one person referring to them as "Nazis".
- [90] As they returned to where their Jeep was parked, they saw that there was a man who was lying under their vehicle making it impossible to use. They were also blocked by another man from attempting to put their equipment into the vehicle. They then left on foot.

- [91] Subsequently, Mr. Key went to Borehole No. 2. He described there being 30 to 40 people there with tents and vehicles parked in and around Borehole No. 2. In his affidavit Mr. Key deposed that the site "was completely surrounded by vehicles and protestors" and "[t]here was no opportunity for anyone from Trans Mountain to access the actual location of Borehole No. 2."
- [92] Mr. Key attached pictures of what he described at Borehole No. 1 and Borehole No. 2 and at the Jeep to his affidavit.
- [93] As to the involvement of Mr. Collis, Mr. Dutton and Ms. Quarmby, much of the evidence comes from the affidavit of Mr. Johannesson. With respect to Mr. Collis, the second affidavit of Leonard Nuttall contains a video of an interview of him conducted on October 29, 2014, and a transcript of that video. In that interview, Mr. Collis acknowledges that "when Kinder Morgan workers tried to come into the clearing at Borehole Site No. 1 down in the forest, activists met them there and chased them off "
- [94] Mr. Collis also characterized what was happening as "a cat and mouse game all afternoon chasing each other around. Kinder Morgan trying to find places they can work and the caretakers trying to find Kinder Morgan and stop what they were doing." Mr. Collis acknowledged he is part of the group called "Caretakers of Burnaby Mountain" whose aim "is to not allow the pipeline project to go ahead whatsoever." He acknowledged that other groups were "pursuing legal means of trying to stop this project and "[s]o in some ways our role has become a delay tactic how we can slow them down."
- [95] In an earlier publication, Mr. Collis was reported to have said "people are here and awaiting Kinder Morgan with the intention of being in the way to prevent them from doing their work." In another article he is reported to have said Kinder Morgan workers will have to go through his groups "band of citizen rangers" and that their intent is to be in the way. He was quoted as saying "As long as we're organized we will stand in their way."
- [96] So far as Mr. Dutton is concerned, the evidence of his involvement personally and as the representative of Burnaby Residents Opposing Kinder Morgan Expansion (BROKE), comes from postings on the BROKE website and a newspaper article in which he was quoted as saying:

We have been mobilizing and training people for the last three weeks or so and we are ready. People will be present on the mountain occupying the conservation area, as they have a right, and they will be having picnics instead of pipelines.

He also referred to a telephone network "to advise people if Kinder Morgan starts to do their work."

- [97] In the case of Ms. Quarmby, the evidence of her involvement primarily consists of statements which she was reported to have made concerning being willing to be arrested and to "put her body in the way to stop Trans Mountain from building the pipeline across B.C."
- [98] The defendants Alan Dutton, Adam Gold and Mia Nissen each filed affidavits on this application.
- [99] In his affidavit, Mr. Gold deposed that he did not interfere or attempt to interfere with "any person who looked like they were working". He acknowledged that he expressed "highly critical views of Kinder Morgan" and those who work for it. He deposed that he did not think that Mr. Johannesson was intimidated by the protestors but "seemed to be mildly amused". He denied obstructing anyone, screaming at anyone or touching anyone. He agreed he used a megaphone "but did not have the volume high enough to damage anybody's hearing".
- [100] He referenced Kinder Morgan's "environmental track record".
- [101] Ms. Nissen deposed similarly to Mr. Gold that she did nothing to interfere with anybody working. She acknowledged using the "F word" once or twice. She denied screaming but agreed that she yelled.
- [102] Mr. Dutton attested to his background and to that of the organization BROKE of which he is a representative. He described his involvement with the ongoing processes between the City of Burnaby and Trans Mountain and his involvement in holding rallies against the project.
- [103] As to his involvement with the events at issue in this application, he deposed as follows at paragraphs 40 and 41:
40. On October 28, 2014 there were rumours that a small group of people had erected a barrier and at BH1 and BH2. I attended and took pictures. The demonstrators appeared tense and I later spoke with several members of other groups working with the demonstrators about the situation.
41. On or about October 29, 2014 I attended a demonstration near BH2 and at the base of Centennial Way. There were a great number of media and demonstrators that filled the road. I spoke to several officers at the site about concerns about traffic and safety. There was an incident at BH1 and I visited that area. When I arrived there was a report that a Kinder Morgan crew had attempted to begin work but were warned off. I was not present at the time that Kinder Morgan attempted to resume clear cutting and did not witness any incident. There were possibly 20-30 people present with one RCMP officer in attendance when I arrived. There was some yelling by the clearing, but I heard persons cautioning others to be calm.
- [104] The defendants raise a number of issues with respect to the first step of the RJR-MacDonald test, that is, whether there is a serious question to be tried or a strong prima facie case.

[105] The defendants say that the submissions with respect to NEB being the proper forum apply equally to the question whether there is a strong prima facie case, relying on the judgment of Brown J. in *Burnaby (City)* at para. 35 where she said as follows:

I have doubt in this case that there is a serious question to be tried because there is another forum in which the matter before me can be determined. Indeed, as I have set out above, Burnaby has already engaged that forum and can raise this very question before that forum.

[106] The defendants also say that Trans Mountain has no prima facie claim in trespass. They rely on the Trespass Act, R.S.B.C. 1996, c. 462 and the Occupiers Liability Act, R.S.B.C. 1996, c. 337 to argue that the definition of the term "occupier" in those Acts precludes either the plaintiff or the NEB from assuming the status of an occupier of the property. They say, in the result, the plaintiff cannot claim to be an "authorized person" under the Trespass Act "to exercise a power or duty", interference with which will constitute a trespass.

[107] The defendants argue that the plaintiff's rights under s. 73(a) of the NEBA do not correlate to any sort of proprietary right in the land necessary to justify a claim in trespass. The defendants say that this is important because a part of the relief sought by the plaintiff "depends on a finding that the respondents have committed the offence of trespass".

[108] As to the tort of nuisance, the defendants argue similarly that, in the case of private nuisance a claim will fail where there is no interest in land or at least a profit à prendre. The holder of a mere licence cannot maintain an action for private nuisance.

[109] Insofar as public nuisance is concerned, the defendants rely on the judgment of the SCC in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, 168 D.L.R. (4th) 513, and submit that the tort is not made out where the activity at question affects only the plaintiff's private interests. They contend that the activity must affect the rights of the public generally and the plaintiff specifically in order to engage liability under the rubric of public nuisance.

[110] The defendants say that the evidence does not establish the torts of assault or intimidation. They submit that the evidence falls short of establishing the essential elements of those torts and that further, the defendants are simply engaging their right to freedom of expression with respect to what they describe as "the defining issue of the age".

[111] Similarly, with respect to the torts of interference with contractual relations and conspiracy, the defendants assert that the evidence manifestly falls short of establishing the necessary elements of those torts. The defendants emphasize that their activities and utterances, including building the structures impeding Trans Mountain's access to Borehole No. 2, were, and are, all expressions which fall within the legitimate bounds of free speech.

DISCUSSION AND CONCLUSION

[112] In my view, the plaintiff has, through their evidence, established a strong prima facie case with respect to at least some of the torts which have been pleaded. While I accept that the tort of trespass may be elusive given the uncertainty of the plaintiff's status as an occupier

or authorized person, there is no doubt that the plaintiff has the express lawful authority to access those parts of the land from which its representatives have been impeded and to conduct activities in respect of which its representatives have been prevented. I do not regard the jurisdictional issue as having an effect on the strength of the case for the reasons given.

- [113] In my view, on the evidence advanced, a court could conclude that the torts of assault and intimidation are made out, given the misuse of the bullhorns, when coupled with the aggressive and threatening language, and the general and specific efforts to physically block the plaintiff's representatives from accessing their work sites. In other words, the plaintiff's representatives were faced with either physical confrontation or retreat. They wisely chose the latter.
- [114] Similarly, given the utterance of Mr. Collis and to a lesser extent Mr. Dutton and Ms. Quarmby, a court reasonably could conclude that there was a concerted and coordinated effort to thwart the plaintiff's representatives from performing their duties on behalf of the plaintiff through the use of the unlawful means which are pleaded. In my view, the circumstances at bar reach the level of a strong *prima facie* case in view of all of the evidence.
- [115] It is of course important to consider the defendants' assertions and submissions that what they were engaging in was freedom of expression to address an issue of critical importance. The courts must be careful not to act in ways that dissuade concerned and engaged citizens from expressing their opposition to activities which they view as destructive of the social or political good.
- [116] The dilemma that the courts face in distinguishing between legitimate protest involving freedom of expression and unlawful activity was expressed in *Greenpeace Canada Ltd. v. MacMillan Bloedel Ltd.* (1994), 96 B.C.L.R. (2d) 201, 50 A.C.W.S. (3d) 663, *aff'd*, [1996] 2 S.C.R. 1048, 137 D.L.R. (4th) 633 at para. 28 where the majority said as follows:
- Undoubtedly, grave problems arise in situations where the line between the right of public protest and right to use and enjoy private property is difficult to define. The greater the cause of public dissent, and the greater the belief in the cause, the more dangerous it is for civil courts to get involved. But in the end, realizing the danger of appearing to enter the public debate, the courts cannot shirk their duty to prevent irreparable harm to private persons who have no other effective recourse but to come to the civil courts for help. Lessons have been learned in respect of the use of labour injunctions. Those lessons will be clearly in mind as the courts are asked to intervene to protect private interests which are threatened in the course of legitimate public dissent.
- [117] I am satisfied that as much as the right of public dissent must be carefully protected, what is at issue in the present case goes beyond that and engages a strong *prima facie* case of liability for tortious behaviour.

- [118] As to the question of irreparable harm, I am satisfied that the failure to grant the injunction would cause the plaintiff irreparable harm. The plaintiff has advanced essentially uncontradicted evidence that the delays occasioned by the activities at issue have and will continue to cause the substantial costs and potential losses of revenues which are not recoverable. The harm although primarily economic, is thus, nonetheless, irreparable.
- [119] I am not satisfied that to grant the injunction would cause irreparable harm to the defendants. While I accept that the NEB ruling in Order 40 does not exhaustively define the work to be done, and different iterations of what that work constitutes have been advanced by the plaintiff at different times, what remains to be done relates to geophysical testing, including geophone data collection at the Burnet Marine Park, geotechnical testing including borehole drilling (and associated site preparation at Borehole No. 1 and Borehole No. 2), and soil testing and archaeological surveying on Eastland Drive, Gagliardi Way and Stoney Creek Park.
- [120] Some aspects of the work to be done are temporary and others are "minimally intrusive". As I understand it, a number of trees have been taken down already at Borehole No. 1, whereas at Borehole No. 2, there is no need for significant clearing. In my view, the situation which confronts me in terms of irreparable harm to the defendants is akin to that which confronted Brown J. in *Burnaby (City)* where she held at para. 49 as follows:
- [49] I am not persuaded that felling the limited number of trees that Trans Mountain has felled and proposes to fell within a relatively small area of the Burnaby Mountain Conservation Area would constitute irreparable harm. Moreover, as Trans Mountain submitted and the Act provides in s. 75, Trans Mountain is required to remediate any damage that it causes to the area. I am not satisfied that the investigations to be conducted by Trans Mountain constitute irreparable harm as contemplated in *RJR-MacDonald* as to warrant an injunction.
- [121] My view that what is at stake in this injunction does not cause irreparable harm to the defendants is bolstered by the fact that the City of Burnaby which is the occupier and ultimate custodian of the lands has not yet brought an application for a stay to suspend the balance of Trans Mountain's investigations, notwithstanding that they have brought an appeal from the NEB's Order 40. Although Burnaby has indicated that it will bring such an application which will affect prospective work, despite being faced with the imminent conclusion of the remaining investigative work under Order 40, it has not yet done so.
- [122] I therefore find that the balance of convenience favours the plaintiff. What the plaintiff faces is the prospect of ongoing cost and damages which are not likely to be recovered. In my view, the countervailing interests of the defendants relate not to the relatively minor prospective harm from the plaintiff completing its investigation, but the much larger issue which is yet to be engaged and which is not implicated by this application.
- [123] On balance therefore, I am satisfied that the injunction sought by the plaintiff should be granted.

[124] As to the terms, I am alive to the defendants' submission that the plaintiff, by carving out worksites for themselves within the terms of the injunction are seeking a proprietary right which is beyond what was granted to them under s. 73 of the NEBA and to which they would not otherwise be entitled. I conclude, however, that what is sought by the plaintiff is not in the nature of a proprietary right rather that it is a limited and temporary right to enforce the authorization which they have been given to complete the required investigation. I will thus grant the order in the terms sought. The defendants and all others having notice of the order will have until 4:00 p.m. on November 17th, 2014 to remove those things contemplated in paragraph 2 of the draft order.

"A.F. CULLEN ACJ."

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