The Federal Court of Appeal Quashes the Trans Mountain Pipeline Expansion: An Overview of Tsleil-Waututh Nation v Canada (Attorney General)

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In August 2018 the Federal Court of Appeal (the "Court") released its decision, *Tsleil-Waututh Nation v Canada (Attorney General)*,[1] which quashed the approval of the proposed Trans Mountain pipeline expansion project (the "Project") and remitted the matter to the Governor in Council for redetermination.[2]

On October 3, 2018, the Federal Government announced that it would not appeal the Court's decision.[3] Responding to the Court's instruction, the Federal Government:

- referred the National Energy Board's (the "Board") recommendations back to the Board for reconsideration, to account for the impact of Project-related marine shipping,[4] and
- appointed former Supreme Court Justice, the Honourable Frank Iacobucci, to oversee new consultation with each of the 117 Indigenous groups affected by the Project.[5]

According to Court's decision, key to Justice Iacobucci's success will be sustained effort to engage in meaningful two-way dialogue and openness to supplementing the Board's recommendations. This article delves into the Court's decision.

Background

In May 2016 the Board issued its report recommending that the Governor in Council approve the pipeline expansion. The Board found that the Project was in Canada's public interest and was unlikely to cause significant adverse environmental effects if recommended environmental protection procedures, mitigation measures, and conditions were implemented.[6]

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1 *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*].
2 *Tsleil-Waututh* at para 774.
3 Connolly, A. Liberals won't appeal Trans Mountain ruling, name former justice to oversee new Indigenous consultations, Global News (October 3, 2018), retrieved from: https://globalnews.ca/news/4512290/trans-mountain-supreme-court-indigenous/ [Connolly].
4 Financial Post (September 21, 2018), National Energy Board ordered to redo Trans Mountain review in 22 weeks in bid to get pipeline approved, retrieved from: https://business.financialpost.com/commodities/energy/feds-launching-review-of-oil-tanker-traffic-in-bid-to-renew-pipeline-approval.; *Tsleil-Waututh* at para 769-770.
5 Connolly; *Tsleil-Waututh* at para 771.
6 *Tsleil-Waututh* at para 1.

In November 2016, the Governor in Council issued an Order in Council accepting the Board's recommendations and directed the Board to approve the Project.[7]

Several applicants, including multiple Indigenous groups, two non-governmental agencies, the City of Burnaby, and the City of Vancouver, applied for judicial review of:

- the Board's report, which recommended approval of the Project, and
- the Governor in Council's decision (Order in Council) to accept the Board's recommendations.[8]

The Court dismissed the applications for judicial review of the Board's report.[9] The Court concluded that the Board's report was not justiciable because it "constituted a set of recommendations…that lacked any independent legal or practical effect."[10] The Court proceeded to review the Governor in Council's decision.

Judicial Review of Governor in Council's Decision

The Court determined that the Order in Council was invalid because:

1 the Governor in Council could not reasonably rely on the Board's report. The Board's report was materially flawed because the Board failed to consider the impact of Project-related marine shipping, and

2 the Crown did not fulfil its duty to consult with the Indigenous applicants.[11]

Governor in Council Could Not Rely on Board's Flawed Report

The Court held that the Governor in Council could not reasonably rely on the Board's report to assess the Project's overall public interest and environmental impacts.[12] Although the Court found that most of the flaws asserted against the Board's process and findings were unmerited, the Court concluded that the Board made a critical mistake in unjustifiably excluding marine shipping from the Project's scope.[13]

The exclusion of Project-related marine shipping precluded the Board from considering *Species at Risk Act*, s. 79, which protects at risk wildlife and their critical habitat from new projects.[14] This exclusion resulted in the Board concluding that the Project would be unlikely to cause significant environmental impacts to the Southern resident killer whale.[15]

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7 *Tsleil-Waututh* at para 2.
8 *Tsleil-Waututh* at para 3.
9 *Tsleil-Waututh* at para 202.
10 *Tsleil-Waututh* at para 180.
11 *Tsleil-Waututh* at para 4, 766-767.
12 *Tsleil-Waututh* at para 5.
13 *Tsleil-Waututh* at para 5.
14 *Tsleil-Waututh* at para 443.
15 *Tsleil-Waututh* at para 449 and 765.

The Southern resident killer whale is currently listed as endangered. The Federal Government has identified the principle threats to the Southern resident killer whale population as including oil spills, disturbance, and noise pollution[16] (each of which are potential consequences of marine shipping).

The conclusion that the Project was unlikely to cause significant environmental impacts to the Southern resident killer whale was vital to the Board's report and critical to the Governor in Council's decision. The Court found that the Governor in Council could not make an adequate assessment relying on the Board's flawed report.[17]

Crown Did Not Fulfil Duty to Consult With Indigenous Applicants

The Court held that the Governor in Council's decision should also be set aside because the Crown did not fulfil its duty to consult with the Indigenous applicants.[18]

The Court reviewed several leading cases on the duty to consult and outlined the legal principles of the duty and the standard to which the Crown must be held when fulfilling the duty.[19] The Court reaffirmed that:

- the duty to consult it is an important facet of reconciliation[20]
- in fulfilling the duty to consult, the Crown is not to be held to a standard of perfection[21]
- both the Crown and the affected Indigenous group are required to act in good faith during the consultation process. The Crown must intend to substantially address Indigenous concerns as they are raised, and Indigenous claimants must not be unreasonable or frustrate the Crown's decision where an agreement is not reached.[22]
- the duty to consult is not limited to exchanging and discussing information, but must include a substantive dimension. Where deep consultation is required, "a dialogue must ensue that leads to a serious consideration of accommodation."[23]
- where the Crown must balance many different interests, it is important that there is a safeguard requiring the Crown to explain with written reasons the impacts of Indigenous concerns on the decision-making process. The Crown should inform itself of a proposed project's impact on a concerned Indigenous group, communicate its findings to the

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16 Government of Canada, 2018. Recovery Strategy for the Northern and Southern Resident Killer Whales (Orcinus orca) in Canada 2018 (proposed), retrieved from: https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry/recovery-strategies/northern-southern-killer-whales-2018-proposed-amended.html.

17 *Tsleil-Waututh* at para 766.

18 *Tsleil-Waututh* at para 767.

19 Specifically, the Court considered *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*]; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, 325 DLR (4th) 1 [*Rio Tinto*]; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40, 411 DLR (4th) 571 [*Clyde River*]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, 254 DLR (4th) 1 [*Mikisew*]; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41, 411 DLR (4th) 596 [*Chippewas of the Thames*]; and *Gitxaala Nation v Canada*, 2016 FCA 187, 485 NR 258 [*Gitxaala Nation*].

20 *Tsleil-Waututh* at para 486.

21 *Tsleil-Waututh* at para 508.

22 *Tsleil-Waututh* at para 496-497.

23 *Tsleil-Waututh* at para 500-501.

Indigenous group, and attempt to substantially address the Indigenous group's concerns,[24] and

- consultation requires a rights-based approach. The assessment of impacts to rights may be informed by an analysis of the cumulative effects on the rights as well as historical context.[25] Mitigation measures should reasonably guarantee that "constitutionally protected rights were considered as rights in themselves – not just as an afterthought to the assessment of environmental concerns."[26]

In *Tsleil-Waututh*, the Indigenous applicants asserted that the Crown's consultation process was deficient in both design and execution.[27] The Court found that the Crown designed a reasonable and sufficient consultation framework, but failed to properly execute the process.[28]

Design of Crown's Consultation Framework

The Court held that the consultation framework selected by the Crown satisfied the indicia of a reasonable consultation process set out by the Supreme Court in *Clyde River* and *Chippewas of the Thames*. The consultation design was reasonable because:

- the Indigenous applicants were sufficiently notified about the Project, the hearing process, the consultation framework, and the Crown's intention to rely on the Board's process to fulfil its duty to consult
- the Federal and Provincial Crown as well as the Board provided participant funding to the Indigenous applicants
- the process permitted both written evidence and traditional Indigenous oral evidence
- the regulatory framework permitted the Board to impose conditions on the Project to mitigate risks on Indigenous rights
- the Crown provided a further consultation phase in addition to the Board hearing (Phase III), in which the Crown could address concerns not dealt with at the hearing, and
- the Crown understood and informed the Indigenous applicants that if additional concerns were raised during Phase III, the Crown could (i) undertake more consultation before issuing additional permits or (ii) use policies and programs to address concerns.[29]

Execution of Crown's Consultation Framework

The Court concluded that the Crown failed in Phase III "to engage, dialogue meaningfully and grapple with the concerns expressed to it in good faith by the Indigenous applicants so as to explore possible accommodation of these concerns."[30]

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24 *Tsleil-Waututh* at para 502-503.
25 *Tsleil-Waututh* at para 504-505.
26 *Tsleil-Waututh* at para 504.
27 *Tsleil-Waututh* at para 511.
28 *Tsleil-Waututh* at para 753.
29 *Tsleil-Waututh* at para 548.
30 *Tsleil-Waututh* at para 754.

The Court held that the Crown did not engage in a genuine and sustained effort to partake in meaningful, two-way dialogue.[31] The Crown provided few, brief, and generic responses during the consultation process.[32]

The Court could not find any indication that the Crown seriously considered whether any of the Board's findings were unreasonable or wrong, or considered amending any of the Board's recommendations.[33] The Court further found that the Crown mistakenly believed that it could not impose extra conditions on the Project.[34]

The Court acknowledged that the Project is "large and presented a genuine challenge to Canada's effort to fulfil its duty."[35] However, the Court found that the Indigenous applicants' concerns were specific, focussed, easy to respond to, and could have been addressed had Canada properly executed its consultation mandate.[36]

Conclusion

This case adds to the line of duty to consult jurisprudence emphasizing the imperative for two-way meaningful dialogue between the Crown and Indigenous peoples during consultation. Meaningful dialogue is a fairly intuitive and straightforward mandate, and for countless projects in Canada it has proved achievable.

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[31] *Tsleil-Waututh* at para 756.
[32] *Tsleil-Waututh* at para 756-757.
[33] *Tsleil-Waututh* at para 757.
[34] *Tsleil-Waututh* at para 759-760.
[35] *Tsleil-Waututh* at para 763.
[36] *Tsleil-Waututh* at para 763.

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