

## Federal Court Quashes Approval of Trans Mountain Pipeline Expansion

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### Decision Summary

On August 30, the Federal Court of Appeal released its decision in *Tsleil-Waututh Nation v. Canada (Attorney General)* regarding the Governor in Council's (GIC) approval of the proposed Trans Mountain pipeline expansion (TMX) in 2016. The Court overturned the decision of the GIC, finding that the National Energy Board's (NEB) report was too flawed for the Federal Government to rely on when approving the project and declaring that the Government had insufficiently consulted with Indigenous groups.

In this case, various Indigenous and environmental groups, as well as the cities of Vancouver and Burnaby had challenged the decision of the GIC to allow TMX to proceed. The Court dismissed most of the challenges to the approval, including the argument that the NEB had breached its duty of procedural fairness in preparing its report. The Court also dismissed arguments that the NEB had failed to decide certain issues before recommending approval of the project and had failed to consider alternatives to the proposed project location.

The Court's decision to overturn the project's approval was based on the narrow issue of project-related marine shipping, which it found was not adequately addressed in the NEB report, as well as the Federal Government's inadequate consultation with Indigenous groups. While the Government's consultation framework was reasonable and sufficient, it failed in the last step of consultation to meaningfully engage with the Indigenous applicants' concerns. These two reasons that led the Court to overturn the project's approval and its legal implications are considered below.

### Failure to Consider the Effects of Marine Shipping

The first ground the Court provides for quashing the approval is that the NEB's report was not sufficient, because the NEB did not consider its finding that marine shipping was "*likely to result in significant adverse effects on the Southern resident killer whales*" in its overall conclusion that the Project was not likely "*to cause significant adverse environmental effects*". The Court found that the NEB was only able to conclude that there would be no significant adverse environmental effects, because it did not adequately consider whether the effects of marine shipping fell within its assessment of the Project, and that the NEB failed to adequately explain why it made the decision not to consider marine shipping.

The Court's reasoning on this point is disappointing. First, while implicitly criticizing the NEB throughout the decision for not considering marine shipping, the Court then declines to specifically decide whether the NEB was, in fact, required to consider this issue. Instead, it remits the matter to the NEB for further consideration. This means that, presumably, the NEB could go back and explicitly decline to consider the effects of marine shipping and, according to the Court, such a decision would be subject to significant deference. However, this would likely lead to additional litigation and more delay. It would have been preferable for the Court to have made a final decision on this specific point.

Additionally, the Court seems to discount the decision by the GIC as simply a rubber stamp of the NEB report. Despite the fact that the NEB did not specifically consider the effects of marine shipping in its final decision, the Court found that the NEB had provided the necessary information on this issue in its report to the GIC.

This information would have given the GIC the opportunity to consider the effects of marine shipping in its decision. The Court fails to grapple with this aspect of the GIC's decision making and that the GIC

had the necessary information before it when making its own decision. This is all the more puzzling given the Court's refusal to give any weight to the Federal Government's \$1.5 billion Oceans Protection Plan. This would certainly seem to be some indication that the GIC considered the NEB findings regarding marine shipping and considered how to mitigate the associated risk, but simply relied on other mechanisms to deal with it.

#### **Failure to Adequately Consult**

Although the Court found that the consultation framework Canada selected was reasonable, it went on to decide the framework was not adequately implemented. Despite finding that the consultation on TMX was a "significant" improvement over the process in Northern Gateway, the Court found that Canada failed to engage "in a considered, meaningful two-way dialogue". In making this finding, the Court identified three shortcomings: (1) the Crown implemented their mandate as essentially "note-takers"; (2) Canada was reluctant to depart from the NEB's findings and recommended conditions; and (3) Canada's erroneous view that it could not impose additional considerations on TMX.

The Court's conclusions on the adequacy of consultation are perplexing given the Court's findings that the consultation framework selected by Canada was reasonable and sufficient and that Canada's consultation team worked in "good faith and assiduously" to understand and report concerns to the GIC; particularly when coupled with Canada's ultimate assessment that the Project would not have a high level of impact on the Applicants' exercise of their "Aboriginal Interests". In reaching its decision, the Court, while suggesting that Canada should not be held to a standard of perfection in fulfilling its duty to consult, appears to have in many respects held Canada to just such a standard.

Moreover, the extent of the consultation and the issues the Court found ought to have been considered during the consultation process appear to extend far beyond the direct impacts of the projects, which in many ways conflicts with the Supreme Court's existing jurisprudence in this area.

The reasoning of the Court on the duty to consult relies heavily on the Federal Court of Appeal's decision in *Gitxaala Nation v Canada*, in regard to Northern Gateway, which was subject to significant criticism in this area. Should the Supreme Court take up this decision we expect that a renewed assessment of the boundaries of the duty to consult may be appropriate.

#### **Where does this leave TMX?**

The Court suggests in its section on remedy that the deficiencies it found in the NEB report and the consultation process can be rectified in fairly short order. In particular, the Court finds that the government may "specify a time limit" for the NEB to make its reconsideration and that the concerns over consultation are "specific and focused" and that this "may serve to make the corrected consultation process brief and efficient while ensuring it is meaningful".

It is as yet unclear whether the government will take up the Court's invitation to engage in a fast but meaningful consultation process to get TMX restarted. However, the Court's comments suggest that there may be mechanisms to rectify the problems the Court identified relatively quickly. In addition, the Government has sixty days to appeal this decision to the Supreme Court. At the time of writing, no announcement on whether an appeal would be launched had been made.

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