

Goodmans^{LLP} Update

Federal Court of Appeal Quashes Approval of the Trans Mountain Expansion Project

Yesterday, in a unanimous decision¹, the Federal Court of Appeal (the “**Court**”) quashed the federal government’s Order in Council approving the Trans Mountain Expansion project on two grounds:

1. The National Energy Board (the “**Board**”) “made one critical error” by unjustifiably defining the scope of the Trans Mountain Expansion project to exclude project-related tanker traffic; and
2. The duty to consult Indigenous peoples and First Nations was not adequately discharged by the Government of Canada.

Exclusion of Tanker Traffic from Scope of Assessment

The Court found the Board unjustifiably excluded project-related marine shipping from the scope of environmental assessment, permitting the Board to conclude that the project is not likely to cause significant adverse environmental effects, notwithstanding the fact that tanker traffic is likely to result in significant adverse effects to the southern resident killer whale. The Court concluded the exclusion of project-related tanker traffic from the scope of the assessment “led to successive, unacceptable deficiencies in the Board’s report and recommendations”. As a result, the Governor in Council could not rely on the Board’s report and recommendations when assessing the Project’s environmental effects and the overall public interest.

Duty to Consult

While the Court concluded that Canada acted in good faith and selected an appropriate consultation framework, it found that Canada’s consultation fell “well short of the mark” set by the Supreme Court of Canada in the last stage of the consultation process. The Phase III consultation should have focused on outstanding concerns raised by affected Indigenous groups about project-related impacts and on measures that could be undertaken to accommodate the concerns raised. The Court concluded that the record did not reflect responsive, considered and meaningful dialogue from Canada in response to the concerns raised. Further, Canada’s unwillingness to depart from the Board’s recommendations and its belief that it could not impose additional conditions on the approval of the project negatively impacted Canada’s ability to consult effectively and in good faith. The Court ultimately concluded that Canada failed to meaningfully discharge its duty to consult.

Order in Council Quashed

The Court quashed the Order in Council and remitted the matter back to the Governor in Council “for appropriate action, if it sees fit, to address these flaws and, later, proper redetermination”. The Court made a number of suggestions regarding environmental matters that the Board ought to reconsider and stated that Canada must re-do its Phase III consultation. Only “after that consultation is completed and any accommodation made can the Project be put before the Governor in Council for approval”.

Unless overturned, the Court’s decision will require significant further consideration by the Board and Canada of the project and consultation with affected Indigenous peoples, thus further delaying this controversial project.

For more information on any of the above information, please contact any member of our [Environmental Group](#).

¹ *Tsleil-Waututh Nation et al. v. Attorney General of Canada et al.*, 2018 FCA 153.

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