Major victory for Trans Mountain after federal court dismisses appeal

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Introduction

On February 4, 2020, the Federal Court of Appeal dismissed the final legal challenge to the Trans Mountain Expansion Project (Project), which related to whether the crown had adequately discharged its duty to consult certain Indigenous peoples prior to approving the Project. This decision represents another major legal victory for the Project and comes on the heels of the Supreme Court of Canada's recent dismissal of British Columbia's attempt to regulate heavy oil transportation.[1] Both decisions bring several years of litigation challenging the Project to a close and thus pave the way for its completion.

Background

On November 29, 2016, after considering the benefits and risks of the Project, and being satisfied that the duty of consult was discharged, Canada approved the Project in the public interest. Several parties responded and successfully challenged this approval at the Federal Court of Appeal, which ruled in *Tsleil-Waututh Nation v Canada (Attorney General),* 2018 FCA 153 (*Tsleil-Waututh*) that Canada had (1) failed to consider certain marine impacts in its environmental assessment; and (2) failed to fulfil its duty to consult with Indigenous peoples. In response, Canada initiated a reconsideration hearing and continued Indigenous consultations with affected communities. Cabinet formed the view that it had complied with the direction set out in *Tsleil-Waututh* and reapproved the Project for a second time on June 22, 2019. Several parties again sought to challenge Canada's approval on the same grounds as in *Tsleil-Waututh*. The court granted leave to appeal, but only on the issue of the crown's duty to consult.

Reasons for decision

The court was careful to articulate at the outset that the focus of this case was on whether the crown had addressed the specific consultation deficiencies outlined in *Tsleil-Waututh.* That decision did not require consultations to begin afresh. Instead, the court provided a roadmap to Canada to engage in more robust and meaningful consultation, stating however, that additional consultations could be "specific and

focussed" and accomplished through a "brief and efficient process." Accordingly, and contrary to the position of the applicants, this case was not judged on the merits of overall consultation strategy, but rather on whether it was reasonable for cabinet to conclude that it had addressed the specific flaws outlined in *Tsleil-Waututh*.

The court reviewed Canada's reapproval of the Project on a reasonableness standard and examined several contextual indicia of reasonableness, including the empowering legislation, the law of the duty to consult, post approval consultation, and the importance of the matter to those directly affected. In particular, the court provided an extensive review of the nature of the duty to consult and what actions this doctrine demands of the crown. It concluded that "consultation means that Canada consider and address the rights claimed by Indigenous peoples in a meaningful way" but cannot be used to create a "de facto veto right."

The court considered each of the reasonableness indicia and concluded that cabinet's decision was ultimately reasonable and it understood both its previous flaws in the consultation as well as the nature of its duty to consult. Specifically, the court reviewed the crown's consultation efforts and concluded they represented "a genuine effort in ascertaining and taking into account the key concerns of the applications, considering them, engaging in a two-way communication, and considering and sometimes agreeing to accommodations, all very much consistent with the concepts of reconciliation and the honour of the crown."

Implications

This ruling is a major victory for the embattled Project and brings nearly four years of litigation threatening its viability to a close. With these legal hurdles overcome, the Project should now proceed with construction and eventual operation. In addition to these immediate implications, this decision also introduces some clarity into the crown's consultation obligations and provides an illustrative example of what robust and meaningful consultation for large scale, interprovincial projects looks like. Furthermore, the court affirms the principle that while the duty to consult represents a higher standard than a "rubber stamp", it does not confer a veto right upon affected Indigenous groups.

Parties now have sixty days to apply to the Supreme Court of Canada for leave to appeal.

[1] BLG Lawyers Michael A. Marion, Alan Ross, and Brett R. Carlson acted as counsel for the Canadian Energy Pipeline Association, an intervenor in the proceedings. For further analysis of this decision, read their article.

By

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