Cabinet Gives the Trans Mountain Expansion Project the Go-Ahead

June 20, 2019

Today, Canada's Governor in Council (Cabinet) issued a second Order in Council (OIC), PC Number 2019-0820, directing the National Energy Board to issue the primary regulatory approval required for the Trans Mountain Expansion Project (TMX) to proceed.

What is the Trans Mountain Expansion Project?

Since 1953 the Trans Mountain Pipeline (TMP) has transported crude oil and refined products (gasoline, diesel and jet fuel) from Edmonton, Alberta to the west coast of British Columbia. It is the only oil pipeline to Canadian tidewater that provides Canada's oil sands producers with access to global export markets, like China, as an alternative to selling into an already well-supplied U.S. market at discounted prices. TMX would increase the overall capacity of TMP from 300,000 barrels per day to 890,000 barrels per day. TMX is therefore a pipeline expansion project of strategic national importance and one that is critical to the growth and financial success of Canada's oil industry that will also bring jobs, opportunities for Indigenous communities and considerable revenues to various levels of government.

What regulatory body decides if TMX should be built?

The primary regulatory regime applicable to building TMX can be summarized as follows: The developer of TMX applies to a federal regulatory body, called the National Energy Board (NEB), for something called a certificate of public convenience and necessity (CPCN). The NEB then assesses TMX (holds hearings, hears from experts, etc.) and delivers a report to Cabinet in which the NEB sets out its recommendation, with reasons, as to whether or not a CPCN should be granted to build TMX, including any terms and conditions that the NEB believes should be imposed on TMX in the CPCN. Once Cabinet receives the NEB report, it is required to consider and consult with affected Indigenous peoples and thereafter issue an OIC either (i) directing the NEB to issue a CPCN with or without additional conditions, (ii) directing the NEB not to issue a CPCN, or (iii) referring the CPCN recommendation from the NEB, or any of the terms and conditions in the NEB report, back to the NEB for reconsideration. The NEB then does what it is told to do by Cabinet in the OIC.

Straightforward and quick?

Sounds straightforward and quick, doesn't it? Not in the case of TMX. It has been more than five years since Kinder Morgan, the original owner of TMP before selling it to the Government of Canada last summer, first applied to the NEB for a CPCN. It took three years, but on December 1, 2016, after a positive NEB report and an OIC from Cabinet directing the issuance of a CPCN, the NEB finally issued a CPCN for TMX.

Well, kind of.

Last August, the Federal Court of Appeal concluded that the CPCN was a "nullity", or worthless, because (i) the NEB report issued for TMX did not adequately consider marine shipping issues related to TMX, and (ii) when considering the NEB report and making its decision on the content of its OIC, Cabinet did not adequately discharge its duty to meaningfully consult with Indigenous peoples. The CPCN that the NEB and Cabinet agreed TMX should receive was essentially taken away by the Court.

What has been happening since the Court decision?

For the past ten months, since the Federal Court of Appeal took away the original CPCN, the NEB and Cabinet have been working to address the errors noted by the Federal Court of Appeal and to decide whether or not another CPCN should be issued for TMX. The NEB portion of that exercise ended on February 22, 2019 when the NEB delivered a Reconsideration Report in respect of TMX to Cabinet, including a chapter dedicated to the marine shipping issues that the Court said was missing from its first report. It again concluded that TMX is in the Canadian public interest and should be granted a CPCN, but stated that the NEB will impose 156 conditions on TMX if it is directed by Cabinet to issue a CPCN for TMX. The NEB's Reconsideration Report also included 16 non-binding recommendations to the Government of Canada related to the increase in marine traffic on the west coast that will arise as a result of TMX. That left it up to Cabinet who, again, was required to consider the Reconsideration Report, consult with affected Indigenous peoples, including remedying the errors identified by the Federal Court of Appeal in the last consultation process and issue a new OIC (CPCN, no CPCN or refer back to the NEB for reconsideration) for TMX.

What did Cabinet decide?

Cabinet passed an OIC that directs the NEB to issue a CPCN in respect of the proposed construction and operation of TMX. It gave TMX the go-ahead for the second time. In response to Canada's consultation that it undertook with Indigenous groups and communities, the OIC requires that six of the 156 conditions proposed by the NEB in its Reconsideration Report be strengthened to address particular Indigenous concerns about marine response, construction monitoring, emergency management and sacred and cultural sites. Cabinet also announced eight accommodation measures that it will propose in response to the Indigenous concerns it heard during the consultation process and that focus on matters like marine safety, spill prevention, response capacity, fish and fish habitats and quieter vessels. The strengthening of the NEB's proposed conditions and the introduction of the new accommodation measures will be

important evidence that this round of Indigenous consultation was meaningful should, as expected, this OIC also be challenged in the courts by TMX opponents.

The Government of Canada also announced a couple of major policy decisions today that relate to its ownership of TMX. First, it announced that all profits earned from TMX will be invested in Canada's clean energy transition — that includes any profits earned from a future sale of TMX. Second, it announced that it will commence an engagement process with Indigenous groups on additional ways they could economically benefit from TMX, including through ownership or revenue sharing. This is consistent with Canada's stated intention not to be a long term owner of TMX.

What happens from here?

The next order of business will be for the NEB to issue the CPCN that Cabinet has directed it to issue. That should happen quickly, as last time it took less than a week. TMX will also ask the NEB to reinstate the previous regulatory proceedings under the last CPCN and for TMX to be brought back to the same state of construction readiness that it was at under that CPCN. There are some other miscellaneous approvals that will be required under statutes like the *Fisheries Act*, *Species at Risk Act* and *Canadian Transportation Act*. Fortunately TMX has continued to work on the design and planning for TMX while it waited for this second CPCN process to play out. It has also purchased some of the pipe that will be required once construction starts. It is therefore reasonable to expect that construction will start again in 2019 so that this construction season is not lost and the in-service date for TMX does not slip any further. Yes, appeals will be launched in the Courts regarding today's Cabinet decision and OIC, other TMX court cases will continue to play out, and the project opponents will continue to protest, but June 18, 2019 was a good day for TMX supporters. TMX will shortly have another CPCN and now has a path forward to completion — one that may include Indigenous ownership or revenue sharing.

By

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