Federal Court of Appeal Allows Six New Appeals of Long-Delayed Trans Mountain Pipeline

September 09, 2019

On September 4, 2019, the Federal Court of Appeal allowed six of twelve appeals of the long-delayed Trans Mountain Pipeline, which, if built, will carry nearly a million barrels of oil per day from Alberta to B.C.'s coast. In the decision, Appeals Court Justice David Stratas divided the dozen legal challenges into two categories; six were based solely on the negative environmental impacts of the pipeline and six were based on whether the Crown had fulfilled its duty to consult. The Court dismissed the six environmental challenges based on the fact that they were an attempt to re-litigate previous court cases. However, the Court agreed to hear evidence of certain B.C.-based Indigenous groups—including the Coldwater Indian Band, the Squamish Nation, the Tsleil-Waututh Nation, the Upper Nicola Band and the Secwepemc Nation—that the Crown's duty to consult had still not been met.

The duty to consult is an obligation that must be fulfilled by the Crown prior to taking actions or making decisions that may have consequences for Indigenous rights. The duty arises when the government has knowledge, real or constructive, of the potential existence of an Indigenous right or title and contemplates conduct that may adversely affect it. The nature and scope of the duty to consult will vary with the circumstances based on the strength of the case to right or title and the seriousness of the potentially adverse effect upon the right or title claimed and the Crown ultimately retains the responsibility to ensure that the necessary consultation, and if appropriate, accommodation, has occurred. The failure to consult meaningfully may result in the delay or eventual cancellation of a proposed project.

The approvals for the Trans Mountain Pipeline were previously overturned in August 2018, in part, due to inadequate consultation with Indigenous, groups and the federal government immediately re-launch consultations to try to remedy the problem. Interestingly, when the approvals were challenged by the Indigenous groups at the Federal Court of Appeal this week on the same basis, the federal government declined the opportunity to present evidence and legal submissions with respect to how it carried out its duty to consult under the re-launched consultation. In light of the lack of evidence, the Appeals Court found the challenge by the Indigenous Groups met the "fairly arguable" standard for leave and agreed to allow the challenges to proceed to a legal hearing.

The applications by the Indigenous groups are challenging the decisions and approvals given by the Canada Energy Regulator and the federal government for the Trans Mountain project (which received the green light from Prime Minister Justin Trudeau in June), but do not negate the existing approvals unless and until the Appeals Court rules otherwise. As a result, the decision to allow the six challenges is not likely to halt construction of the project. However, the decision raises new legal hurdles and uncertainty for completion of the highly contentious and long-awaited pipeline expansion project.

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