The End of the Long and Winding Road? The Federal Court of Appeal Upholds the Trans Mountain Pipeline Expansion Project

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On February 7, 2020, the Federal Court of Appeal (the "FCA") upheld the approval of the proposed Trans Mountain Pipeline Expansion Project (the "Project") in its decision in *Coldwater First Nation v Canada (Attorney General)*.[1] The FCA's decision follows the FCA's previous decision in *Tsleil-Waututh Nation v Canada (Attorney General)*,[2] ("*Tsleil-Waututh Nation*") in which the FCA quashed the approval of the Project and remitted the matter back to the Governor in Council for redetermination.

History of Project Approvals

On November 29, 2016, the Governor in Council approved the Project following the National Energy's Board's ("Board") recommendation to approve the Project.

In *Tsleil-Waututh Nation*, several applicants successfully challenged the Governor in Council's decision. The FCA found two fundamental defects: failure to assess the impact on endangered Southern Resident Killer Whales and the Crown's failure to adequately fulfil its duty to consult with Indigenous peoples during the last stage of the consultation process prior to the decision made by the Governor in Council.[3] The FCA remitted the matter back to the Governor in Council for appropriate action.

See our previous article here, for a full discussion of *Tsleil-Waututh Nation*.

The National Energy Board held a reconsideration hearing and the consultation process was re-initiated. On June 18, 2019, the Governor in Council approved the Project for a second time.

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1 *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 [*Coldwater*].
2 *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153.
3 *Coldwater* at para 2.

The Issues Before the Federal Court of Appeal

Several applicants challenged the Governor in Council's second approval, alleging that the Crown still failed to fulfill its duty to consult based on activities following the decision in *Tsleil-Waututh Nation*.[4]

The Standard of Review

The FCA considered the Supreme Court of Canada's ("SCC") recent reasons in *Canada (Minister of Citizenship and Immigration) v. Vavilov*.[5]

The SCC in *Vavilov* stated that questions as to the scope of Aboriginal and treaty rights under section 35 requires a standard of correctness. However, in *Coldwater*, the scope or nature of such rights was not in issue but rather whether the Crown had met the duty to consult. The FCA found that this question should be judged on the basis of reasonableness, while also considering that the assessment raises a "constitutional duty of high significance to indigenous peoples and indeed the country as a whole".[6]

The FCA noted that imposing too strict a standard of perfection in assessing whether the duty to consult has been met would *de facto* create a veto right.[7]

The FCA found the Crown's decision to be both Reasonable and Correct

The FCA found that the flaws identified in *Tsleil-Waututh Nation* had been adequately addressed and that reasonable and meaningful consultation had taken place.[8] The FCA further found that had they been required to review on a standard of correctness, the Crown's decision would have also been correct.

The FCA considered the consultation work that had been done and the accommodations made. Specifically, the FCA noted that the Crown's work included:

- reinitiating consultations directly with Indigenous groups, with a focus on remedying the concerns raised in *Tsleil-Waututh Nation*
- retaining former Supreme Court Justice Frank Iacobucci, an expert with extensive experience in Indigenous matters, to oversee the re-initiated consultations
- developing a process for meaningful, two-way dialogue between Indigenous groups and Canada through consultation teams led by senior government officials, and

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4 *Coldwater* at para 6.
5 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.
6 *Coldwater* at para 27.
7 *Coldwater* at para 54.
8 *Coldwater* at para 65.

- providing a clear mandate for consultation teams to discuss appropriate accommodations.[9]

Practical Guidance on Consultation

As is in prior decisions, the FCA considered specific actions taken during consultation. These actions serve to provide practical guidance to those engaged in consultation. The FCA found the following actions to contribute to meaningful consultation:

- Canada proposed accommodation measures that responded to concerns about the potential impact of the Project on Aboriginal rights, including
  - training Indigenous groups on marine emergency response planning,
  - funds to support collaboration with Indigenous groups to protect aquatic habitats, and
  - a joint experimental study with Squamish and Tsleil-Waututh on the behaviour of diluted bitumen in the area of concern.[10]
- Canada engaged in scientific discussions amongst the parties' experts and agreed to conduct further research on outstanding issues, such as a joint study relating to impacts on Killer Whales.
- Canada responded to concerns about spill response by developing the Greater Vancouver Integrated Response Plan with Indigenous participation and investing $10 million dollars in upgrading emergency response equipment.[11]
- Trans Mountain adjusted the Project footprint at an area identified by Stó:lō' as a "no go" area, committed to conduct archaeological and cultural heritage assessment prior to construction and committed to work with the Stó:lō Collective on measures to avoid impacts.[12]
- Trans Mountain incorporated traditional knowledge, such as Stó:lō cultural sites into its environmental alignment sheets.[13]
- Trans Mountain committed to hire a Ts'elxwéyeqw monitor to be on Trans Mountain's inspection team.[14]

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9 *Coldwater* at para 70.
10 *Coldwater* at para 118 and 128.
11 *Coldwater* at para 167 – 170.
12 *Coldwater* at para 200.
13 *Coldwater* at para 200-201.
14 *Ibid*.

The FCA Decision - Appeal to SCC?

Given recent opposition to the Coastal Gas Link, it seems likely that parties will seek leave to appeal to the SCC. The deadline for the parties to seek leave to appeal the *Coldwater* decision to the SCC is April 4, 2020.

Related Decisions - Environment-Based Appeals

A related series of decisions have also dealt with applications for judicial review based on environmental concerns.

In *Raincoast Conservation Foundation v Canada (Attorney General)*,[15] the FCA denied leave to the applicants, on the grounds that the environmental concerns did not justify the granting of leave.

The applicants applied to the SCC for leave to appeal the FCA's decision in *Raincoast Conservation Foundation.*

On March 5, 2020, the SCC dismissed these applications for leave to appeal without reasons.

Conclusion

Coldwater discusses the specific consultation activities that occurred during the execution of the renewed consultation process and how those activities satisfied the duty to consult. This jurisprudence provides a valuable contribution regarding the duty to consult and illustrates practical examples of meaningful consultation between the Crown and Indigenous communities.

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[15] *Raincoast Conservation Foundation v Canada (Attorney General)*, 2019 FCA 224.

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