Federal Court of Appeal Cour d'appel fédérale

Ottawa, August 30, 2018 – Judgments were issued today by the Federal Court of Appeal (Dawson, de Montigny and Woods JJ.A.) in files A-78-17 (lead file); A-217-16; A-218-16; A-223-16; A-224-16; A-225-16; A-232-16; A-68-17; A-74-17; A-75-17; A-76-17; A-77-17; A-84-17 and A-86-17: *Tsleil-Waututh Nation et al. v. Attorney General of Canada et al.*, 2018 FCA 153.

The following is an unofficial summary of the Court's reasons and judgments. The Court's reasons and judgments are authoritative.

Trans Mountain applied to the National Energy Board for approval of a project to expand Trans Mountain's existing pipeline system in Western Canada. The Board issued a report recommending approval of the project, subject to a number of conditions. The Governor in Council issued an Order in Council in which it accepted the Board's recommendation, approved the project subject to the conditions recommended by the Board and directed the Board to issue a certificate of public convenience and necessity.

In response, a number of First Nations, the cities of Vancouver and Burnaby, and two non-governmental agencies applied for judicial review. They asked the Federal Court of Appeal to set aside the report and the Order in Council.

Decision: The applications for judicial review challenging the report of the Board are dismissed. The Board's report is not subject to judicial review. The Order in Council is the only matter properly subject to review. **The applications for judicial review challenging the Order in Council are allowed.** The Order in Council is quashed, rendering the certificate a nullity. The matter is remitted to the Governor in Council to remedy two flaws, described below, and, after that, for a fresh decision.

The validity of the Order in Council was challenged on two main grounds: first, the Board's process and findings were so flawed that the Governor in Council could not reasonably rely on the Board's report; second, the Government of Canada failed to fulfil the legal duty to consult Indigenous peoples. The Court accepted both grounds.

On the Board's process and findings, most of the flaws the parties asserted are without merit. It was not demonstrated that the Board breached any duty of procedural fairness. Further, it was not shown that the Board's approval process is in any way contrary to the legislative scheme or that the Board impermissibly deferred regulatory determinations necessary for an approval to be given. The Board's decision to accept many of Trans Mountain's explanations, such as eliminating certain alternative routes for the project, was based on factual and technical considerations well within the expertise of the Board. As well, it was not shown that the Board breached its statutory obligation to consider alternative routes for the project.

However, the Board made one critical error. The Board unjustifiably defined the scope of the project under review not to include project-related tanker traffic. This exclusion permitted the Board to conclude that, notwithstanding its conclusion that the operation of project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale, the project was not likely to cause significant adverse environmental effects. The unjustified exclusion of project-related marine shipping from the definition of the project rendered the Board's report impermissibly flawed: the report did not

give the Governor in Council the information and assessments it needed in order to properly assess the public interest, including the project's environmental effects—matters it was legally obligated to assess. As a result, the Governor in Council must refer the Board's recommendation and its terms and conditions back to the Board, or its successor, for reconsideration as directed by the Governor in Council within the time specified by the Governor in Council.

Turning to the duty to consult Indigenous peoples, the Government of Canada acted in good faith and formed an appropriate plan for consultation. However, at the last stage of the consultation process, a stage called Phase III, Canada fell well short of the minimum requirements imposed by the case law of the Supreme Court of Canada.

The Government of Canada was required to engage in a considered, meaningful two-way dialogue. However, for the most part, Canada's representatives limited their mandate to listening to and recording the concerns of the Indigenous applicants and then transmitting those concerns to the decision-makers. On the whole, the record does not disclose responsive, considered and meaningful dialogue coming back from Canada in response to the concerns expressed by the Indigenous applicants. The law requires Canada to do more than receive and record concerns and complaints.

Phase III was to focus on two questions: outstanding concerns about project-related impacts and any measures that could be undertaken to accommodate the concerns. Canada's ability to consult and dialogue on these issues was constrained by two limitations: first, Canada's unwillingness to depart from the Board's findings and recommended conditions so as to genuinely understand the concerns of the Indigenous applicants and then consider and respond to those concerns; second, Canada's erroneous view that it was unable to impose additional conditions on any approval of the project. This was exacerbated by Canada's late disclosure to Indigenous peoples of its view that the project did not have a high level of impact on their established and asserted rights.

Overall, on the issue of consultation with Indigenous peoples, while in law Canada is not to be held to a standard of perfection it failed to engage, dialogue meaningfully and grapple with the real concerns of the Indigenous applicants so as to explore possible accommodation of those concerns. The duty to consult was not adequately discharged.

As a result, Canada must re-do its Phase III consultation. Only after that consultation is completed and any accommodation made can the project again be put before the Governor in Council for approval.

The concerns of the Indigenous applicants, communicated to Canada, are specific and focussed. This means that the dialogue Canada must engage in can also be specific and focussed. This may serve to make the corrected consultation process brief and efficient while ensuring it is meaningful. The end result may be a short delay in the project, but, if the flawed consultation process is remedied, the objective of reconciliation with Indigenous peoples may be furthered.