WHAT NOW?

What next for TMX?

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> There is now a clear way forward – we at least now know what remains to be done. A bit more delay may very well be worth it for the greater clarity this decision has provided for this – and all future – projects.

Despite some extreme reactions at both the positive and negative ends of the spectrum, the Federal Court of Appeal has NOT stopped the Trans Mountain pipeline expansion (TMX) – far from it. Further delay is certainly problematic for the federal government and for oil producers. But there is now a clear way forward – we at least now know what remains to be done. A bit more delay may very well be worth it for the greater clarity this decision has provided for this – and all future – projects.

The *Tsleil-Waututh Nation v. Canada (Attorney General)* decision provides a positive way forward both for the construction of the pipeline AND the interests of Indigenous communities with legitimate concerns AND those with legitimate environmental concerns. This decision, now part of the law of the land, has also made it clear that although real concerns need to be addressed, neither the environmental concerns nor Indigenous community concerns can be limitless. More importantly, the decision provides specific steps needed to address those concerns. The added certainty on these points means the decision should be welcomed by both infrastructure proponents and those with legitimate environmental and Indigenous rights concerns. For sure, there are some at the extreme who are celebrating the "quashing" of the project – but the court took exception to only two specific problems, and made it clear that the remedies are achievable. In so doing, the court has given both the National Energy Board (NEB, or the Board) and the federal government an opportunity to address them. Indeed, the court went out of its way to spell out just how limited the required steps are. There will be some further delay, but the court most certainly did not "stop" the project.

The NEB

The court found that the NEB "unjustifiably excluded Project-related shipping from the Project's definition." This exclusion of project-related shipping from the project's definition permitted the NEB to conclude that section 79 of the *Species at Risk Act* did not apply to its consideration of the effects of project-related shipping. "Specifically," the court said, "the Board ought to reconsider on a principled basis whether Project-related shipping is incidental to the Project, the application of section 79 of the Species at Risk Act to Project-related shipping…".

Real concerns had been raised about the negative effects of shipping – all kinds of shipping – to the Southern resident killer whale population. This, however, is a problem for all shipping in the area, not just the incremental shipping that the TMX project would cause. Indeed, despite all the rhetoric about the resulting increase in tanker traffic, tankers are still far outnumbered by all other types of marine traffic. The TMX-related increase would amount to barely a 4% increase in the overall shipping traffic in the area. It would be inappropriate for this one project to bear the onus for all shipping's cumulative challenges to the whales, and should not be stopped on its own on these grounds. But the court said, appropriately, that the NEB should not have ignored this issue. Properly dealing with the threats to the whales is the responsibility of all shipping. A larger "fix" is needed – Transport Canada, Fisheries and Oceans, the Environmental Assessment Agency (and others) should immediately start working on rules/regulations/route requirements for ALL shipping in the area to address this concern. Even on this point, the court acknowledged that a great deal of the investigative and information-gathering work had in fact been done, and that it by no means requires starting the process over. On the contrary, the court was very clear in what limited work remains to be done, and how the process needed clarification.

Another important point concerns the overall NEB process. In this case, what is notable is what the court did not say. After reviewing the whole process in detail, the court took exception to only the one specific problem of process. Stakeholders must now accept that, other than that, the NEB process was in fact acceptable. Fix that one problem, and the NEB process just received a stamp of approval.

The duty to consult

The court told the federal government that it had not adequately fulfilled its duty to consult. It told Ottawa the same thing only two years ago in *Gitxaala Nation v. Canada* with respect to the Northern Gateway pipeline. Yet this government – which has put so much emphasis on reconciliation and improving federal/Indigenous relations – simply walked away from that decision. In its rush to deny the Northern Gateway pipeline for political reasons, it insulted both the Indigenous communities that supported that pipeline (of which there were many) as well as those that did not. Consultation cannot be dependent on whether someone is for or against – it should involve ALL perspectives, and the court laid out clearly what was needed. Then as now, the court made it clear that this requirement was not limitless. Walking away from what the Gitxaala decision recommended in terms of consultation was an opportunity missed. Taking the recommended steps at that time could have helped ensure adequate federal consultation for TMX. This then, is the second opportunity, and the court has added even more clarity in terms of specific steps to be taken. This time, the federal government must embrace it wholeheartedly, to prove that it truly wants reconciliation and strong federal/Indigenous relations. The added factor this time, of course, is that it wants this pipeline built.

The duty to consult is not limitless and now has clear parameters and requirements: "Canada is not to be held to a standard of perfection in fulfilling its duty to consult." But it must include "meaningful, two-way dialogue." This decision adds to the jurisprudence from two recent Supreme Court of Canada cases, *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* (2017 SCC 40) and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* (2017 SCC 41), both of which set out increasingly clear requirements. The latter clearly said that the consultation HAD been sufficient and denied the Indigenous claim. With this decision, Canadian law is now even clearer: the bar for duty to consult is high, and it must be meaningful – but it does NOT give Indigenous communities a veto. This clarity is critical for project proponents as well as for the government.

> This is clearly not a court saying "no" to the project; it is, instead, a court saying how to get it done.

The court also, in several places, acknowledges the desire to avoid delay: "In largest part the concerns of the Indigenous applicants were quite specific and focussed and thus quite easy to discuss, grapple with and respond to. Had Canada's representatives met with each of the Indigenous applicants immediately following the release of the Board's report, and had Canada's representatives executed a mandate to engage and dialogue meaningfully, Canada could well have fulfilled the duty to consult by the mandated December 19, 2016 deadline."

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Recommended next steps

The best course now is to move beyond the wringing of hands and partisan gnashing of teeth, heed the court's direction and do what it clearly sets out:

> " The Governor in Council [Prime Minister and Cabinet] must refer the Board's recommendations and its terms and conditions back to the Board, or its successor, for reconsideration. Pursuant to section 53 of the *National Energy Board Act*, the Governor in Council may direct the Board to conduct that reconsideration taking into account any factor specified by the Governor in Council. As well, the Governor in Council may specify a time limit within which the Board shall complete its reconsideration."

> " Further, Canada must re-do its Phase III consultation. Only after that consultation is completed and any accommodation made can the Project be put before the Governor in Council for approval", but "... 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, but, through possible accommodation the corrected consultation may further the objective of reconciliation with Indigenous peoples."

An appeal would be wrong

Appealing the decision would give the message that the federal government believes that the two concerns raised are not acceptable. This would be a mistake. The two issues the court raised are not unreasonable; they are limited and addressable. Appealing the decision to the Supreme Court would not only send a very negative message, it would delay the project far longer than simply doing what the court has called for.

It would be more constructive to accept the decision, indeed to embrace it as having helped clarify the way forward for all. We applaud the Prime Minister's approach: "We are taking the time now to understand the court ruling, which addresses two things that are very important to this government — getting the science and the environmental protections right, and making sure we are walking forward in a true path of reconciliation and partnership with Indigenous Peoples... We're going to continue to move forward to get this pipeline built in the right way by acknowledging what the court has said." Others around the country should breathe a little, and take the same approach.

Bill C-69

As noted, also important is what the court did NOT say about the process. It reviewed the entire NEB process in detail, and found only a very small, fixable part wanting. This means that the NEB is not nearly as "flawed" as some would have wanted people to believe. Indeed, the process has now withstood deep and thorough review. This supports our view that Canada does not need to replace the NEB with an entirely new energy regulator as provided for in Bill C-69, which is now before the Senate. The federal government now also has its own incentive to keep the NEB in place, because it needs the NEB to comply with the specific requirements as set out by the court right away. If Bill C-69 is passed, replacing the NEB will take a long time – and the pipeline would then be much more delayed. Better to keep the NEB. Therefore, if Bill C-69 proceeds, we recommend that the Senate call for that part of the bill to be removed in its entirety.

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Confidence for proponents

Finally, from a project proponent's perspective, the court's commentary on both the NEB and duty to consult should give confidence, rather than cause the current hue and cry. Why? Because the goalposts are now much clearer. The likelihood of more lengthy court delays is now diminished because the court was so specific with its judgement and its recommendations. Subsequent courts will be bound by this decision, and if the parameters set out here are met by the various stakeholders, projects will be able to proceed. Those worried about never-ending protests, environmental activist groups and Indigenous communities now have much less to complain of. Indeed, much of the commentary post-decision has been just that: "Finally, we've been heard!!" But for them as well, the court has clarified the parameters of engagement in order to move projects forward. They cannot simply say "no" anymore. Most investors in major infrastructure or related projects are not afraid of firm environmental regulations or of engaging in successful partnerships with Indigenous communities. Indeed, in this case the proponent, Kinder Morgan, engaged extensively with Indigenous communities – the fault lay with the federal government. What proponents need more than anything now is certainty, and clarity as to what is expected – and that the courts will not allow un-ending protest to stymie projects. This decision goes a long way to accomplishing that certainty.

One of the fundamental reasons for the difficulties all parties have had in getting this process "right," is that the regulatory process is not the place to decide and debate government policy. Yet, in the absence of clear direction from the government on economic, environmental and Indigenous rights policy, the regulatory system has become the *de facto* forum for debating these concerns. It is not set up to deal with policy debates, nor should it be. Policy-makers must determine policy up front, based on the priorities of Canadians. This will provide clarity needed for the regulator to better do its job. It will also create a strong and clear signal to investors and the public about how Canada intends to achieve economic prosperity, environmental sustainability and competitiveness.

At the Canada West Foundation, we support the construction of the infrastructure needed to get the resources that we have, and that the world wants, to market. We support getting the Trans Mountain pipeline expansion built. But we also support that it be done as well, as respectfully, as cost-effectively and in a way that is as environmentally sustainable as possible. Despite the naysayers, this decision makes it even clearer that all are possible, at the same time, and how it can be done.

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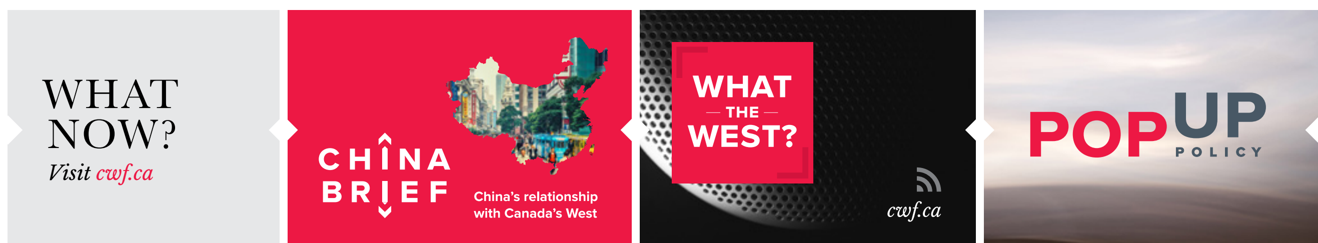

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