A Steady Judicial Tune Resonates Uncertainty: Federal Court of Appeal Orders Canada to Re-Consult on Trans Mountain Pipeline Expansion Project Approvals

September 05, 2018

Dennis P. Langen, Leland P. Corbett, Vincent M. Light, Gordon Masson

Canada once again faces uncertainty in relation to the Trans Mountain pipeline expansion project (TMX), which itself is a harbinger of the continued unpredictability surrounding the state of Canada's regulatory landscape for major energy infrastructure projects as a whole. This latest installment in uncertainty arises due to the recent Federal Court of Appeal (FCA) decision, *Tsleil-Waututh Nation v. Canada (Attorney General)*, released on August 30, 2018, where the Court found that the National Energy Board (NEB) failed in its duty to consider the impact on marine life from marine shipping associated with TMX, and that the Crown failed to properly consult with Indigenous groups. The Court quashed the Order in Council (OIC) issued by the Federal Cabinet (GIC) rendering the Certificate of Public Convenience and Necessity (CPCN) issued by the NEB for TMX a nullity.

On the same day, and shortly after the release of the decision, shareholders of Kinder Morgan overwhelmingly voted to approve the sale of TMX to the Government of Canada. While the sale from TMX to Canada remains unaffected by the decision, the Government of Canada's ability to re-sell the pipeline to a third party is subject to further uncertainty as a result of the delay and potential changes to conditions on TMX which may be occasioned by further consultations.

Court challenges to NEB project approvals are not novel.[1] In 2016, in *Gitxaala Nation v Canada* – a decision also written by Dawson JA – the FCA made a similar finding, quashing the OIC issued by the GIC and thereby rendering the CPCN for the Northern Gateway Pipeline a nullity. The ultimate result being that the Northern Gateway Pipeline did not proceed. Only time will tell whether a similar fate awaits TMX.

Case Summary

The judicial review in *Tsleil-Waututh* focused primarily on two sets of alleged deficiencies in the decision of the GIC relating to TMX. The first dealt with administrative and regulatory issues, while the second dealt with the Crown's duty to consult Indigenous peoples. The review was brought by six Indigenous groups[2], the cities of Vancouver and Burnaby and by two non-governmental organizations[3] (collectively, the "Parties"). Together, they challenged the OIC and decision of the GIC and its ability to rely on the May 2016 NEB report which recommended that the GIC approve the construction and operation of TMX.

Administrative and Regulatory Issues

In the review, the Parties alleged that the following issues rendered the NEB report so deficient the GIC could not rely on it to make its decision ordering approval of TMX:

1. the NEB process breached the requirements of procedural fairness;
2. the NEB failed to decide certain issues before TMX was recommended for approval;
3. the NEB failed to consider alternatives to the Westridge Marine Terminal;
4. the NEB failed to assess project-related marine shipping under the *Canadian Environmental Assessment Act, 2012*, (CEAA 2012); and
5. the NEB erred in its treatment of the *Species at Risk Act* (SARA).

While the Parties attempted to argue that the NEB report and recommendation to the GIC were subject to judicial review, the Court – following precedent set in *Gitxaala* - dismissed these arguments. In doing so it found that under the current legislative scheme, the decision maker was the GIC but that the GIC cannot base its decision on a materially deficient NEB report. In this way, the Court concluded that the NEB's report is not immune from review but instead must be reviewed to ensure that it is one that can be relied on by the GIC.

It is in this context that the Court found, in *Tsleil-Waututh*, that the majority of the administrative and regulatory issues raised by the Parties on review did not affect the validity of the NEB report. However, the Court did find that the NEB made a "critical error" at the project scoping stage when it unjustifiably excluded project-related marine shipping from the project scope for consideration under CEAA 2012. By doing so, the NEB thereby avoided the requirement for it to determine, for the purposes of CEAA 2012, whether the effects arising from project-related marine shipping were likely to cause significant adverse environmental effects and if so, whether such effects were justified in the circumstances. Instead the NEB considered any project-related marine shipping effects in the context of its public interest determination under the *National Energy Board Act*. In doing so, it appears the NEB ostensibly relied on the fact that it did not have regulatory oversight over marine vessel traffic.

As a result of this exclusion, the NEB concluded that section 79 of the SARA did not apply to its consideration of the effects of marine shipping associated with TMX. In turn, it failed to consider its obligations under section 79 as it related to listed wildlife species, notably the Southern resident killer whale. Nevertheless, the NEB did – in its report - undertake a partial analysis of the impacts arising from project-related marine shipping, concluding that those operations were likely to result in significant adverse effects to the Southern resident killer whale population. It was argued that this assessment resulted in the NEB substantially complying with section 79 of SARA, notwithstanding its scoping error under CEAA 2012. However, while acknowledging that the NEB could not regulate shipping – including vessel speeds and routes, the Court concluded that the NEB was obligated to consider the consequence of its inability to ensure measures were taken to ameliorate impacts on Southern resident killer whales but that it failed to do so and instead recommended approval of TMX without any mitigation measures being imposed so as to avoid or lessen those impacts.

The Court found that the exclusion by the NEB of project-related marine shipping from the scope of its review of TMX resulted in successive deficiencies such that the NEB's report was not the kind of "report" that would arm the GIC with the information it required. The NEB's flawed conclusion about the effects of TMX was found by the Court to be so critical that the GIC could not functionally make the kind of assessment of TMX's environmental effects and the public interest that is required by the legislation.

Indigenous Consultation Issues

In the review the Indigenous Parties expressed a myriad of concerns and asserted deficiencies with the consultation process conducted by the Crown, challenging both the design of the process and the execution of the process. Notwithstanding this, the Court found that the consultation framework selected by the Crown for TMX was reasonable and sufficient and found that the NEB adequately fulfilled its

Indigenous consultation obligations. However the Court concluded that in the consultation that followed the issuance of the NEB report – known as phase III consultation – the Crown failed to properly execute its duty to consult. This is, unfortunately, not dissimilar to the situation in *Gitxaala*, where the FCA found that the Crown also failed to execute at the same stage (known as phase IV consultation in *Gitxaala*).

In reaching its conclusion that the phase III consultation for TMX, which was focused on any outstanding Indigenous concerns about project-related impacts and any required incremental accommodation measures, was unacceptably flawed and fell short of the required mark for reasonable consultation, the Court found on the facts that:

1. The Crown's representatives listened to and recorded the concerns of the Indigenous Parties in good faith, but failed to provide responsive, considered and meaningful dialogue in response to those concerns.
2. The Crown's ability to consult and dialogue in phase III of the consultation process was constrained by two factors: (a) the Crown's unwillingness to depart from the NEB's findings and recommendations so as to genuinely understand the concerns of the Indigenous Parties and then consider and respond to those concerns in a genuine and adequate way, and (b) the Crown's erroneous view that it was unable to impose additional conditions on TMX. This was an erroneous view that failed to follow the law in *Gitxaala* that the GIC necessarily has the power to impose conditions on any CPCN.
3. The Crown's supplemental consultation and mitigation efforts, such as the Indigenous Advisory and Monitoring Committee and Oceans Protection Plan – which the Court described as laudable initiatives, and designed to supplement the consultation process and to address marine shipping issues, respectively – were ill-defined at the time of the phase III consultations and could not accommodate or mitigate any concerns at the time the TMX was approved.

Next Steps for the GIC and TMX

In quashing the GIC's OIC, the Court rendered the CPCN approving the construction and operation of TMX a nullity and remitted the approval of TMX to the GIC for prompt redetermination. In any redetermination, the Court has directed that:

1. the GIC must refer the NEB's recommendations and its terms and conditions back to the NEB (or its successor) for reconsideration;
2. the GIC may direct the NEB to conduct that reconsideration taking into account any factor specified by the GIC;
3. the GIC may specify a time limit within which the NEB is to complete its reconsideration,
4. the NEB ought to reconsider on a principled basis whether project-related shipping is incidental to the TMX, the application of section 79 of SARA to project-related shipping, the NEB's environmental assessment of TMX in the light of TMX's definition, the NEB's recommendation under CEAA 2012, and any other matter the GIC considers appropriate, and
5. the Crown must re-do its phase III consultation – only after that consultation is completed and any accommodation made can TMX be put before the GIC for approval.

In the context of any future phase III consultation, the Court found that the concerns raised by the Indigenous Parties during the previous phase III consultation were specific and focused, meaning that the dialogue the Crown must engage in may also be specific and focused. In the Court's view, this may serve to make the corrected consultation process brief and efficient while ensuring it is meaningful, with the end result being what the Court referred to as a "short delay".

It remains to be seen whether the Government of Canada will seek leave to appeal the decision to the Supreme Court of Canada, or instead attempt to remedy the deficiencies identified by the Court in its reasons.

Conclusion

In the aftermath of *Gitxaala,* the Court's decision in *Tsleil-Waututh* once again unfortunately demonstrates that project proponents of major energy infrastructure projects in Canada – in particular projects subject to NEB oversight - face a great deal of regulatory risk that is largely beyond their ability to control or mitigate. Errors by regulators and government either at the beginning of the regulatory review process, like in this case with the scoping of the TMX under CEAA 2012 by the NEB, or near the conclusion of the regulatory review process, like in the Indigenous consultation undertaken post NEB decision in each of TMX and the Northern Gateway Pipeline, continue to occur. Those errors occur notwithstanding that the regulatory regime and laws, including the law surrounding the Crown's duty in respect of Indigenous consultation, are well established and known.

Ultimately, project proponents, regulators and government must take great care – both individually and collectively – to identify, understand and then to address the issues and concerns that underlie opposition to energy infrastructure projects. This rings especially true, given the broader set of issues proposed in Bill C-69 that the Canadian Energy Regulator will need to consider for future pipeline applications.

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[1] *Gitaxaala Nation v Canada*, 2016 FCA 187, [2016] 4 FCR 418; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 SCR 1099; *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 SCR 1069.

[2] Tsleil-Waututh Nation, The Squamish Nation, the Coldwater Indian Band, the Stó:lō Collective, the Upper Nicola Band and the Stk'emlupsemc te Secwepemc of the Secwepemc Nation.

[3] Raincoast Conservation Foundation and Living Oceans Society.