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Tsleil-Waututh Nation v. Canada: A case of easier said than done

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Case Commented On: *Tsleil-Waututh Nation v. Canada (Attorney General)* 2018 FCA 153

The Federal Court of Appeal (FCA) released its long-awaited decision on the Trans Mountain Expansion Project ("TMX") on August 30, 2018 as *Tsleil Waututh v. Canada (Attorney General)*. The case is the latest in a series of decisions in which the FCA has considered duty to consult issues in the post-2012 federal regime for review and approval of interprovincial pipelines. This brief post summarizes shortcomings found by the court and discusses points of clarification offered by the court with respect to the duty to consult and accommodate. In doing so, I suggest that *Tsleil Waututh* is a case of "easier said than done" on a number of levels, including next steps for the federal government. Details of the TMX project and legal challenges are not included in this post, but previous ABlawg posts on TMX contain such and may be found here.

Background

Consultation with respect to TMX was an opportunity for Canada to apply the learnings from the shortcomings identified by the FCA in *Gitxaala Nation v. Canada,* 2016 FCA 187, (which considered the Northern Gateway Project). In that case, the FCA found that Canada had not fulfilled the obligations it owed to Indigenous peoples. Specifically, the FCA underscored the following:

> "Based on our view of the totality of the evidence, we are satisfied that Canada failed in Phase IV to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations. Missing was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report, or to provide meaningful feedback in response to the material concerns raised. Missing was a real and sustained effort to pursue meaningful two-way dialogue. Missing was someone from Canada's side empowered to do more than take notes, someone able to respond meaningfully at some point." (at para 279)
>
> (emphasis added)

In *Gitxaala*, the court prescribed specific steps that Canada could take to fulfill Crown consultation and accommodation obligations (e.g. extend the consultation period, consider additional project conditions) en route to redetermination by the Governor in Council (at paras 329 - 341). But, as *Tsleil-Waututh* shows, this was easier said than done.

Before moving on, I should note that in a previous post I explained that in the subsequent case of *Bigstone Cree Nation v. Nova Gas Transmission Ltd.,* 2018 FCA 89 a unanimous FCA

(which had one member of the bench in common with *Tsleil Waututh*) upheld the pipeline approval at issue in that case, finding that Canada did appropriately did apply lessons from *Gitxaala*. It is now clear, based on the court's analysis in *Tsleiel Waututh*, that implementing the FCA's *Gitxaala* prescription will be far more straightforward, for better or worse, in a context where there is a small number of First Nations involved in relation to a smaller project and where there are, as a result, far fewer points of contention.

TMX Quashing

In *Tsleil Waututh*, the FCA quashed the TMX approval on two bases, one of which was Canada's failure to fulfill its consultation and accommodation obligations (the other was shortcomings in the environmental assessment conducted by the NEB, as commented on by my colleague, Martin Olsyznski here). Despite the significance of this decision in relation to today's highly contentious climate change and energy policy sphere, and strong reactions by some groups and individuals, *Tsleil Waututh* does not actually chart any significant new legal territory. Rather, as the FCA states up front, the decision is mostly an exercise in the court "applying largely uncontested legal principles that underpin the duty to consult Indigenous peoples and First Nations set out by the Supreme Court" (at para 6). It is fair to say that *Tsleil Waututh* is a direct application of the majority's reasoning and findings in *Gitxaala*. However, the court does offer several helpful restatements of the law and a handful of notable guideposts and clarifications with respect to the duty to consult, including one, which I discuss below, that may require some significant rethinking and restructuring on the part of Canada. Overall, the court in *Tsleil Waututh* emphasized the importance of meaningful two-way dialogue that includes the Governor in Council responding to each Indigenous community's concerns in a genuine, meaningful and specific way, and in a way that gives serious consideration to amending or supplementing the Board's recommended conditions. This, of course, sounds familiar because it is almost exactly what the FCA stated in the above-cited excerpt from *Gitxaala*.

Duty to Consult Shortcomings and Clarifications

While the unanimous court in *Tsleil Waututh* (which is significant, as *Gitxaala* was a 2:1 decision) found Canada's phased consultation framework was "reasonable and acceptable" (at para 753) and noted "significant improvements in the consultation process" over what took place in the Northern Gateway review (at para 552), the Court ultimately found that Canada failed to fulfill the duties owed to Indigenous peoples (at para 6). The problem was not in process design; rather, the failures came in implementation of the consultation framework. As articulated by the Court in language borrowed from its decision in *Gitxaala*, Canada fell "well short of the mark" (at paras 6, 561, 600) by conducting consultation in a manner that was "unacceptably flawed" (at para 557).

The problems took place entirely in "Phase III" of the consultation process, which is the stage after the NEB provides its final report to the Governor in Council but before the final decision of the Governor in Council (i.e. Cabinet). This is the same phase where Canada fell short in *Gitxaala* (though in that situation it was "Phase IV", but that difference is immaterial). The Court found several specific shortcomings, which are helpfully summarized as "the three significant impediments to meaningful consultation" in paragraph 562:

> "the Crown consultation team's implementation of their mandate essentially as note-takers, Canada's reluctance to consider any departure from the Board's findings and

> recommended conditions, and Canada's erroneous view that it lacked the ability to impose additional conditions on Trans Mountain".

The court added that "Canada's late disclosure of its assessment of the Project's impact on the Indigenous applicants" exacerbated these other shortcomings, particularly because Canada failed to provide Indigenous communities sufficient time to respond with detailed comments on the second draft of the Crown Consultation Report.

In its reasoning behind finding these shortcomings, the court provides helpful points of clarification with respect to the duty to consult. Though none of these are particularly surprising, they certainly represent useful additional guideposts going forward, even if easier said by the court than done by Canada in future contexts. First, the court emphasized that the Governor in Council must be willing to meaningfully discuss and consider possible flaws in the NEB's findings and recommendations (at para 760). The court took issue with the fact that the Crown Consultation Report simply reiterated the Board's findings and conditions without meaningfully engaging with the specific concerns raised (at paras 727 and 734). This means Canada must give serious consideration to amending or supplementing the Board's recommendations and associated project conditions. The court made very clear that the Governor in Council has power to impose additional conditions on any certificate of public convenience and necessity it directs the National Energy Board to issue (at para 634). Citing *Gitxaala*, the court emphasized that Canada was aware of this power given that Canada had acknowledged such in its oral arguments and given that the FCA had made this point very clearly in *Gitxaala* (at para 635), which came out five months before the Governor in Council approved the TMX.

In perhaps the most significant duty to consult point in the decision, at least in practical terms, the court explained that the Crown consultation team construed their mandate in a way that was too limited, as evidenced by a consultation team that was incomplete: "Missing was someone representing Canada who could engage interactively. Someone with the confidence of Cabinet who could discuss, at least in principle, required accommodation measures, possible flaws in the Board's process, findings and recommendations and how those flaws could be addressed" (at para 759). The court found that in Phase III the Crown consultation team was essentially playing the role of note-takers reporting concerns of the Indigenous applicants back to the decision-makers (at para 575). In the court's view, such an approach does not facilitate meaningful two-way dialogue that would put Canada in a position to "genuinely understand the concerns of the Indigenous applicants and then consider and respond to those concerns in a genuine and adequate way" (at para 560). Again, these findings should not come as a surprise, as they are nearly identical to shortcomings underscored by the FCA in *Gitxaala*.

Also similar to *Gitxaala*, the court in *Tsleil Waututh* set out a legal pathway forward: The court stated plainly that "Canada must re-do its Phase III consultation" (at para 771). However, in somewhat surprising language, the court indicated that the further consultation could be "brief and efficient" because concerns of the Indigenous applicants were "specific and focussed." This, the court said, may result in only a "short delay, but, through possible accommodation the corrected consultation may further the objective of reconciliation with Indigenous peoples." With respect, and notwithstanding the significant amount of good faith consultation between Canada and First Nations with respect to TMX already, is it possible that "brief and efficient" consultation that is "specific and focussed" may further the objective of consultation in this case?

Easier Said Than Done

In my view, just as Canada had difficulty implementing the guidance provided in *Gitxaala*, the prescription set out in *Tsleil Waututh* may also be a case of easier said than done. It would be, as the court says, relatively straight forward for the Governor in Council to impose additional conditions. However, the path from the present to that point is probably not straight (nor short) at all. First, despite the court's characterization of "specific and focused" concerns that can be dealt with in a "brief and efficient" manner, the reality is that the First Nations involved likely do not see it that way. As pointed out in a recent post by my colleague, Robert Hamilton, the First Nations in the TMX case may continue to take the view that consent is the standard, not just deep consultation, which may well lead to further litigation (e.g. an infringement action or claim of Aboriginal title) after any redetermination by Cabinet to approve the project. Second, and this is the linkage between the dual environmental assessment and consultation shortcomings in *Tsleil Waututh*, Canada will have to address the identified consultation shortcomings while also consulting further on the supplemental environmental assessment of marine shipping dimensions that must be conducted. While this is entirely fathomable (no pun intended), it will take more time and will take place in an already intense legal and political context, recalling, for example, the BC reference case on jurisdictional questions.

Finally, while the need for the "missing someone" with the "confidence of cabinet" is helpful fresh guidance from the FCA (at para 759), and is consistent with its reasoning in *Gitxaala*, it requires a systems change that addresses the immediate issue of how Canada fulfills its consultation obligations at this stage of the process but also works to integrate this specific change with the government's broader reconciliation agenda. This is essentially the point raised on Twitter shortly after the decision's release by a prominent member of the private bar - that the court's prescription in *Tsleil Waututh* actually requires a significant redesign of the Phase III consultations. The "missing someone" needs to actually be some kind of special someone who speaks for Canada in a nation-to-nation dialogue with each First Nation. This person needs to be able to engage in a manner that facilitates a genuine understanding of Indigenous concerns and views, and then, vested with appropriate authority from the federal cabinet, respond in a substantive manner that appropriately accommodates Indigenous rights and demonstrably integrates Indigenous input into a revised pathway forward. While this may be doable in a one-off context like TMX (and I won't be surprised if Canada pursues this model), it may be more difficult on an ongoing basis across numerous projects going forward. Again, fulfilling this part of the court's prescription is not impossible, but it is certainly easier said than done.

Ultimately, *Tsleil Waututh* illustrates that both the federal government and the courts may be susceptible to thinking that the interplay between the rights of Indigenous peoples and the approval of major linear energy projects is more straightforward than it actually is. The case makes clear that the broad objectives of reconciliation and meaningful nation-to-nation relationships, and the fulfilling of consultation obligations as just one measure in service of these objectives, may be relatively easy to talk about, but much more difficult to actually implement.

(Those interested in a detailed look at the legal landscape pertaining to federal linear energy infrastructure and the rights of Indigenous peoples can refer to my forthcoming article on this subject entitled "Federal Linear Energy Infrastructure Projects and the Rights of Indigenous Peoples: Current Legal Landscape and Emerging Developments", which will be published in the Review of Constitutional Studies.)

I am grateful for comments from several colleagues on an earlier draft of this post.

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