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Federal Court of Appeal Provides Reasons in TMX Leave Applications

By: Nigel Bankes, Martin Olszynski and David Wright

Decision Commented On: *Raincoast Conservation Foundation v Canada (Attorney General)*, 2019 FCA 224.

On September 4, 2019, the Federal Court of Appeal (FCA) granted leave to six of the twelve parties who had applied for judicial review of Cabinet's decision to re-approve the Trans Mountain Expansion (TMX) project. This post situates this most recent development in the broader TMX context and examines this rare instance of the FCA providing reasons in a leave decision.

Context

On June 18, 2019, by Order in Council PC 2019 – 0820, the Governor in Council (i.e. Cabinet) directed the National Energy Board (NEB), now the Canadian Energy Regulator (CER)) to issue a certificate of public convenience and necessity (CPCN) for the TMX project, the earlier project certificate having been quashed by the Federal Court of Appeal in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 (CanLII). In *Tsleil-Waututh*, the Court of Appeal identified two particular failings in the government's decision-making process (see here and here for related ABlawg posts).

First, the NEB (at para 764) had "failed to comply with its statutory obligation to scope and assess the Project so as to provide the Governor in Council with a 'report' that permitted the Governor in Council to make its decision whether to approve the Project. The Board unjustifiably excluded Project-related shipping from the Project's definition." This meant that the NEB was in breach of its obligations under both the *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 52 (*CEAA, 2012*) and under section 79 of the *Species at Risk Act*, SC 2002, c 29 (*SARA*). It also meant that the Governor in Council was not in a position to make a decision under section 31 of *CEAA*, 2012.

The Board's obligation under section 79 of *SARA* was as follows:

> **79 (1)** Every person who is required by or under an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted, and every authority who makes a determination under paragraph 67(a) or (b) of the *Canadian Environmental Assessment Act, 2012* in relation to a project, must, without delay, notify the competent minister or ministers in writing of the project if it is likely to affect a listed wildlife species or its critical habitat.
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> **(2)** The person must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken

> to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.

Justice Dawson summarized as follows:

> This exclusion of Project-related shipping from the Project's definition permitted the Board to conclude that section 79 of the *Species at Risk Act* did not apply to its consideration of the effects of Project-related shipping. Having concluded that section 79 did not apply, the Board was then able to conclude that, notwithstanding its conclusion that the operation of Project-related 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.
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> This finding—that the Project was not likely to cause significant adverse environmental effects—was central to its report. The unjustified failure to assess the effects of Project-related shipping under the *Canadian Environmental Assessment Act, 2012* and the resulting flawed conclusion about the environmental effects of the Project was critical to the decision of the Governor in Council. With such a flawed report before it, the Governor in Council could not legally make the kind of assessment of the Project's environmental effects and the public interest that the legislation requires. (at paras 765 – 766)

Second, Justice Dawson concluded (at para 767) "that Canada did not fulfil its duty to consult with and, if necessary, accommodate the Indigenous applicants."

Accordingly, the Court quashed the original OiC and remitted the matter to the Governor in Council for its redetermination. The Court noted that should the Governor in Council decide to refer the matter back to the Board, under section 53 of the *National Energy Board Act*, RSC 1985, c N-7, *NEBA*, the Board should be directed to (at para 770) "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, the Board's environmental assessment of the Project in the light of the Project's definition, the Board's recommendation under subsection 29(1) of the *Canadian Environmental Assessment Act, 2012* and any other matter the Governor in Council should consider appropriate."

The Court also noted that Canada would have to re-do its Phase III consultation (this was the consultation that needed to occur in the period between when the Board would send its new report to the Governor in Council and the Governor in Council's own final decision on the project). The Court suggested that Canada's consultation (or dialogue) with the Indigenous applicants could be "specific and focused".

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.

Cabinet did elect to refer the matter back to the Board Order by Council P.C. 2018-1177. The Board decided that project-related marine shipping should be included in the designated project

out to Canada's 12 nautical mile territorial sea. It went on to conclude in its report to the Governor in Council in February 2019 (as summarized in OiC 2019-0820) that:

> …. the Project is likely to cause significant adverse environmental effects, specifically that Project-related marine shipping is likely to cause significant adverse environmental effects on the Southern Resident Killer Whale, and on Indigenous cultural use associated with the Southern Resident Killer Whale, despite the fact that effects from Project-related marine shipping will be a small fraction of the total cumulative effects, and that the level of marine traffic is expected to increase regardless of whether the Project is approved, that greenhouse gas (or GHG) emissions from Project-related marine vessels would result in measureable increases and, taking a precautionary approach, are likely to be significant and that while a credible worst-case spill from the Project or a Project-related vessel is not likely, if it were to occur, the environmental effects would be significant.

Notwithstanding this conclusion, the Board went on to advise that the project could still be approved under both *CEAA*, 2012 and under *NEBA*. Under *CEAA, 2012* the project could be "justified in the circumstances" and under *NEBA* the project was still "required by the present and future public convenience and necessity, and is in the Canadian public interest".

The Board's report proposed some additional conditions with respect to project approval as well as recommendations on a number of matters that the Board concluded were beyond its jurisdiction and the responsibility of the proponent. Those recommendations dealt with "cumulative effects management for the Salish Sea, measures to offset increased underwater noise and increased strike risk posed to the *Species at Risk Act*-listed marine mammal and fish species, including the Southern Resident Killer Whale, marine oil spill response, marine shipping and small vessel safety, reduction of greenhouse gas emissions from marine vessels, and engagement on the marine safety system with the Indigenous Advisory and Monitoring Committee".

Canada re-commenced its Phase III consultations on October 5, 2018 and inter alia "appointed the Honourable Frank Iacobucci, former Supreme Court of Canada Justice, as a Federal Representative, to provide oversight and direction to the Government on how to conduct meaningful consultations and accommodations and ensure that the consultation process proceeded as the Court prescribed" (quoting from OiC 2019-820). Canada also indicated that it would be relying on the NEB process to the extent possible to assist it in discharging its consultation obligations.

In its decision to reapprove the project, the Governor in Council undertook to implement all of the Board's recommendations.

The overall assessment of the Governor in Council with respect to both the main environmental issues and the duty to consult and accommodate, as stated in the Order in Council recitals, was as follows:

> Whereas, the Governor in Council, having considered the Board's Reconsideration Report, the terms and conditions for Trans Mountain and the Recommendations to the Governor in Council, measures being taken by Canada with respect to *Species at Risk Act*-listed species

> including the Southern Resident Killer Whale and including measures related to the reduction of underwater noise and vessel strikes such as the Oceans Protection Plan, the Whales Initiative, and the measures set out in Order in Council P.C. 2018-1352 dated November 1, 2018 and the measures announced in May 2019, the concerns of Indigenous groups including potential impacts to Indigenous interests, including established and asserted Aboriginal and treaty rights, in relation to the Southern Resident Killer Whale and measures being taken by Canada to address those concerns and potential impacts, and Canada's commitment to assess, monitor and report on the effectiveness of these measures and adaptively manage them, is satisfied that measures have been and are being taken to mitigate the significant adverse environmental effects on the Southern Resident Killer Whale and Indigenous cultural use of the Southern Resident Killer Whale and to avoid or lessen the adverse effects of Project-related marine shipping on listed species at risk and their critical habitat, including the Southern Resident Killer Whale and their critical habitat, and that those measures will be assessed, monitored and adaptively managed;

Any remaining impacts could be "justified in the circumstances" (the language of section 31 of *CEAA, 2012*) on the basis "that the Project would increase access to diverse markets for Canadian oil and support economic development".

Twelve parties sought to challenge Order in Council 2019 – 0820 and accordingly applied for leave under section 55 of *NEBA*, which provides that:

> **55 (1)** Judicial review by the Federal Court of Appeal with respect to any order made under subsection 54(1) is commenced by making an application for leave to the Court.
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> **(2)** The following rules govern an application under subsection (1):
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> **(a)** the application must be filed in the Registry of the Federal Court of Appeal ("the Court") within 15 days after the day on which the order is published in the *Canada Gazette*;
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> **(b)** a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice; and
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> **(c)** a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance.

Eight of the applicants were First Nations and the other applicants included two ENGOs, the City of Vancouver, and four young women (Adkin-Kaya et al). Adkin-Kaya et al alleged that the Project as approved breached their Charter rights as a result of project-related upstream and downstream greenhouse gas emissions. The applications were all consolidated. The respondents (Trans Mountain and Canada) decided to "take no position" with respect to 11 of the 12 applications. The respondents did contest the application of Adkin-Kaya et al.

The Judicial Directions

In a Direction issued on July 24, 2019, Chief Justice Nöel concluded that the respondents' positions left the Court in "an unusual position". He continued:

> In these eleven motions, this Court has evidence and arguments in favour of granting leave but not against it. The experience of this Court, and all courts for that matter, is that the best, fully informed, impartial decisions are made when all arguments, for and against, are placed before the Court. Further, in our adversarial system, the Court does not normally come up with arguments on its own. In the current circumstances, the Court has formed the view that it requires evidence, representations or both from parties on both sides.

In order to achieve that result the Chief Justice exercised his discretion under Rule 110(b) of the Federal Court Rules which allows the Court "[w]here a question of general importance is raised in a proceeding" to "direct the Administrator to bring the proceeding to the attention of…any attorney general of a province who may be interested." The Chief Justice concluded that the Attorneys General of both British Columbia and Alberta might well be interested. He also noted that "[t]his Court reserves the right to appoint an amicus to offer arguments responding to the motions for leave if it remains in the current situation, i.e., no party prepared to place substantive representations or evidence or both before the Court in response to the motions."

The Attorney General of Alberta took advantage of this opportunity and applied for and was granted intervenor status and opposed all of the leave motions. For its part the AG of Canada (AGC) wrote to the Court (letter of July 25, 2019) clarifying and explaining that it took no position with respect to 11 of the 12 motions because it had concluded that those "proposed applications for judicial review may warrant consideration by the Court" (citing AGC memorandum of fact and law). The AGC continued, "[i]n other words, it is the AGC's assessment that the 11 Motions may meet the *low* threshold of an 'arguable case' that we understand that the Court applied to applications for leave to seek judicial review" (emphasis added).

The AGC further clarified, citing *Lukács v Swoop Inc*., 2019 FCA 145 (CanLII), that it was not conceding that the applications were well-founded on the merits and that it would "vigouroulsy contest any applications that the Court permits to proceed." It also noted that it was not without precedent for the AGC to adopt "no position" in this sort of litigation. It took a similar position in both TMX round 1 (i.e. *Tsleil-Waututh*) and in Northern Gateway (*Gitxaala Nation v Canada*, 2015 FCA 73), although it acknowledged that in both of those cases the proponents had (as one might expect) contested the leave application. What was different in this case of course was that TM (now owned by the Government of Canada) was of a similar mind. In a letter to the Court of the same date, counsel for TM indicated that TM recognized that the 11 motions met "the relatively low standard for leave on such matters". TM also gave a further reason which was that as the proponent "the efficient and timely prosecution of this matter is a key priority for Trans Mountain". For the same reason counsel urged the Court not to appoint an *amicus* in the leave process.

While these are the reasons that both respondents adduced one wonders whether both respondents had also simply concluded that a decision of the Federal Court of Appeal not to grant leave -- without reasons (as is normally the case) -- would be profoundly frustrating for the applicants and

raise questions in the minds of some as to the legitimacy and certainly the transparency of the decision-making process. Better perhaps simply to allow the conflicting views as to (especially) the adequacy of the Crown's consultation efforts to be tested through a judicial process on the merits.

This last observation also serves as a segue to Justice Stratas' decision in this matter insofar as its 27 pages of reasons represents a significant departure from the practice of the Federal Court of Appeal which is typically to grant or deny leave without any accompanying reasons. Justice Stratas indicated that the Chief Justice had also addressed this in a subsequent direction in which he had observed as follows:

> The Court's standing practice is not to issue reasons in disposing of leave applications. However this is an exceptional case as the respondents, who have a direct interest in the project, took no position for or against the leave applications in all cases but one, thereby leaving the matter to the discretion of the Court. Taking no position on a motion is a common practice when dealing with procedural matters; it is not when issues of general importance are in play.
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> ….
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> Should the judge seized with the motions for leave decide against the applicants, the issuance of reasons explaining why may be necessary, as an exception to the Court's practice. This is because the applicants, having been told by Canada, which holds the constitutional obligation to discharge the duty to consult, that it takes no position, would be entitled to know why the Court has decided against the applicants.
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> The matter is left to the discretion of the presiding judge. (at para 6 of the reasons)

Justice Stratas concluded that this was a case in which he should exercise his discretion to issue (at para 7) "reasons in support of dismissing the leave applications." In the end, Justice Stratas provided reasons not only in the six instances in which he denied leave but also, to some extent at least, the reasons why leave was granted in the other six cases.

The balance of this post is organized around the following headings: the significance of reasons; the test for leave; and application of the test.

The Significance of Reasons

As noted above it is not the practice of the Federal Court of Appeal to provide reasons when it grants or denies an application for leave to appeal or, as here, leave to commence an application for judicial review. Since both sections 22 and 55 of *NEBA* require leave, aggrieved parties frequently find themselves dismissed and precluded from arguing their case on the merits without the benefit of judicial reasons evaluating the strengths and weaknesses of their arguments. In a case such as TMX, which pits municipalities, cities, landowners, concerned citizens, First Nations and ENGOs against project proponents, dismissal without reasons is frustrating and leaves applicants wondering whether their arguments have been taken seriously.

Courts in different contexts have recognized the importance of reasons to ideas of justice and the rule of law in a number of different ways. For example, in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, in the immigration law context, the Supreme Court ruled that principles of procedural fairness may require that a court or tribunal provide reasons in some circumstances. More germane to the TMX context, in *Kainaiwa/Blood Tribe v Alberta (Energy)*, 2017 ABQB 107 (CanLII), an Alberta case dealing with a specific claim in relation to the government selling reserve lands in error many years ago, the court noted that giving reasons can communicate respect and courtesy (at paras 117-118) by the Crown to First Nations (see here for a related post). And, in some contexts, reasons are required by statute (see e.g. section 7 of the Alberta *Administrative Procedures Act*, RSA 2000, c.A-3).

Previous ABlawg posts (see here and here) have also argued that the Federal Court of Appeal should change its practice. Those posts have observed that provincial Courts of Appeal frequently provide reasons (which reasons inter alia suggest that the Courts are not always consistent in terms of the test that they apply to grant leave or permission to appeal: see Shaun Fluker "A Closer Look at Leave to Appeal Requirements Under the Municipal Government Act (Alberta)" (19 October, 2017). Those posts have also pointed to an anomaly in Federal Court practice insofar as in the event that an applicant in a non-certificate case not covered by section 55 of *NEBA* can bring itself within the judicial review provisions of the *Federal Courts Act*, RSC 1985, c F-7 (specifically section 18.5), rather than section 22 of *NEBA*, an applicant *will* get reasons. The best example of this is the Federal Court of Appeal's decision in *Forest Ethics Advocacy Association and Donna Sinclair v National Energy Board*, 2014 FCA 245– which, as it happens, is also a decision of Justice Stratas.

In sum, we welcome the Court's decision to provide reasons in this case and hope that it will become a common, or at least a more common, practice for the Court.

The Test for Leave

Justice Stratas finds guidance as to the test for leave under section 55 of *NEBA* in two sources: first, the overall structure of the project approval provisions in *NEBA*, and, second, the practice of the Court in relation to other statutory leave provisions.

As for *NEBA*, Justice Stratas observes that *NEBA* offers the Court no explicit guidance as to the test to be applied although some guidance can be inferred from the structure and timelines of the relevant provisions. These provisions serve to channel judicial supervision of the Governor in Council's decision thereby insulating earlier steps in the process from judicial review as established in both *Gitxaala* and *Tsleil-Waututh*. We pause to note that these decisions have not gone without criticism insofar as they seem to render the NEB's report non-justiciable in a way that conflicts with more general and recent administrative law jurisprudence, including from the FCA, as to what constitutes a reviewable decision; see *Girouard v Canada (Attorney General)*, 2018 FC 865 (CanLII) at para 165 - 171, affirmed 2019 FCA 148 (CanLII)) at para 111, with reasoning that is entirely applicable to the EA context). Nevertheless, Justice Stratas is clearly of the view that those earlier decisions are binding on him. His overall assessment of the *NEBA* leave requirement is that it "is not just a cursory checkpoint on the road to judicial review. It is more like a thorough customs inspection at the border." (at para 13)

As for the Court's practice under similar statutory provisions, Justice Stratas drew on his own recent decision in *Lukács v Swoop Inc.*, *supra*, for the proposition that (at para 14) "a party seeking leave must show a 'fairly arguable case' that warrants 'a full review of the administrative decision, [with all] the [available] procedural rights, investigative techniques and, if applicable and necessary, [all the] evidence-gathering techniques [that are] available'". *Lukács* was also cited by the Justice Nöel in his above-cited Direction to the parties. Other cases cited in Lukács (at para 15, not para 19 as Justice Stratas references) include *Canadian National Railway Company v Emerson Milling Inc.*, 2017 FCA 79 (CanLII), [2018] 2 FCR 573 at paras 13 and 56; *Canadian Pacific Railway Co. v Canada (Transportation Agency)*, 2003 FCA 271 (CanLII), [2003] 4 FCR 558 at para 17; *CKLN Radio Incorporated v Canada (Attorney General)*, 2011 FCA 135 (CanLII), 418 NR 198; *Rogers Cable Communications Inc. v New Brunswick (Transportation)*, 2007 FCA 168 (CanLII), 367 NR 78.

But for Justice Stratas, at least in the context of this statutory scheme, the "fairly arguable case" was just a beginning. He went on from this to elicit three additional "ideas" in order to give full effect to parliament's evident intention.

First, the fairly arguable test must be applied in a way that honours the Court's gatekeeping function. Thus (at para 16(a)) "Leave must be denied to those without evidence who offer arguments that must have evidence and to those whose arguments face fatal legal bars." As one example of a bar that might be fatal, Justice Stratas subsequently referred to the various rules of law that bar relitigation, namely *res judicata*, issue estoppel and abuse of process. Given that the project approval issues had already been before the Court once, Justice Stratas was of the view that the scope of judicial review this second time around "must be limited to: (1) measuring the targeted work and further consultation required by *Tsleil-Waututh Nation* against the applicable law and the specific flaws identified in *Tsleil-Waututh Nation*; and (2) assessing any legally relevant events that postdate *Tsleil-Waututh Nation* and affect the project's approval" (at para 26). Issues that go beyond this do not meet the fairly arguable test. The doctrines barring relitigation covers both issues that were raised and decided in a first proceeding as well as those issues that could have been raised in that first proceeding but were not.

Second, the Court must keep in mind the role of deference, leeway or margin of appreciation. Where a decision maker is entitled to deference, this "can take an argument that is tenable in theory and make it hopeless in reality" (at para 16(b)). We observe that it is odd to frame this point in terms of "deference, leeway or margin of appreciation" rather than more broadly with concept of standard of review. We say this partly because the Supreme Court has actually discouraged the notion of "margins of appreciation" (see *Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29 (CanLII), at para 18), but also because ideas of deference, leeway or margin of appreciation are only relevant where the Court is of the view that the applicable standard of review is reasonableness. If the Court has already decided that the standard of review is correctness, then no deference is owed. Evidently, this test was especially relevant to the Governor in Council's approval decision since the court had already decided in *Gitxaala* and *Tsleil-Waututh* that this attracted the "widest margin of appreciation" (at para 18). But it was also relevant to arguments related to the adequacy of consultation since the Courts have decided that the Crown's efforts should be measured against a standard of reasonableness rather than a standard of perfection (at para 21) and that the duty to consult does not require the consent or non-opposition of First Nations

and Indigenous peoples before projects like this can proceed". (at para 22). This led Justice Stratas to the conclusion that "arguments that consultation was inadequate can only meet the 'fairly arguable' standard if the alleged inadequacies go beyond the leeway given to the decision-maker. The arguments must be focused on the process, quality and conduct of consultation." (at para 23)

And third, Justice Stratas opined (at para 16(c)) that "Granting leave to an argument that, if accepted with others, will not overturn the decision under review is a waste of time and resources and frustrates Parliament's purpose. This is common sense but it is also the law: reviewing courts will not overturn and send back a decision for redetermination if it is clear the same decision will be made …". This must be a difficult test to apply at the leave stage because it seems to go to the exercise of judicial discretion as to whether or not to grant a remedy, breach already having been established.

Application of the Test

In applying the test, Justice Stratas began with a set of issues related to the alleged conflict of interest and bias of the Governor in Council arising from the fact that the Governor of Canada is now the owner of the Trans Mountain. Here Justice Stratas principally applied the gatekeeper strand of his test and used it to deny leave. He took the view that common law arguments based on conflict of interest and bias could not prevent the Governor in Council from discharging its statutory obligation. Justice Stratas saw this line of argument as suffering from "a fatal flaw" – that the decision-maker in this context (i.e. the Governor in Council) is not the project owner (i.e. the Government of Canada) and that the *NEBA* does not disqualify the Governor in Council from discharging this responsibility based on ownership of the project. These arguments could only have merit if the applicants could show that the Governor in Council (at para 35) "blindly approved the project because the Government of Canada now owns it". But for that argument the applicants would need evidence and there was no such evidence before the Court.

Justice Stratas characterized the second set of issues as those related to "environmental issues and substantive reasonableness". This is an unfortunate way of characterizing the arguments of the applicants since those arguments must have related not to "environmental issues" in general but rather must have been based on specific statutory powers that had to be exercised. In any event, in denying leave with respect to all of the issues arising under this heading, Justice Stratas seems to have relied on all three strands of the test. First, with respect to the gatekeeper function, Justice Stratas took the view that some arguments under this head faced the fatal legal bar of the doctrines against the doctrine of relitigation. Justice Stratas gave several examples of arguments that could not be raised this time around:

- Arguments to the effect that the Governor in Council had no jurisdiction to make a decision without ensuring the requirements of *SARA* were met.
- Arguments with respect to flaws in the Board's examination of environmental matters under *SARA* and *CEAA, 2012*.
- Arguments with respect to the project's greenhouse gas emissions, the need for the project, the economics of the project, and the risk of oil spills.

In each case Justice Stratas concluded either that the issue had already been addressed in *Tsleil-Waututh* or that the issue could have been raised in the earlier proceedings but had not been. With respect, this seems too broad insofar as the *Tsleil-Waututh* court clearly decided that the Board had failed to address one issue under *SARA*, namely the duty under section 79 to "identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them." It is this duty that the Board had to address in its reconsideration report and which has not been, and could not have been, previously raised.

The second strand of the fairly arguable test concerns deference. Here Justice Stratas focused on the broad language of section 54 and concluded that since the Board had evidently considered the project-related marine shipping issues in its reconsideration decision it could not be said that this was not a proper report, and the actual exercise of the Governor in Council discretion in relation to that report demanded considerable deference. This must be true in relation to section 54 of *NEBA* but surely Justice Stratas needed to extend that analysis to both section 79 of *SARA* and section 31 of *CEAA, 2012*. He mentions neither provision in this context which is perhaps a consequence of using, as noted above, the basket term "environmental issues". This is not a helpful label in an analysis of statutory powers of decision-making. As but one example, section 79 is not even directed at the Governor in Council but rather the Board, and is written in mandatory, rather than discretionary, language.

Finally, Justice Stratas also deploys the third strand of the fairly arguable test. He observes that the Governor in Council's decision to approve the project notwithstanding its environmental effects was based on "compelling public interest considerations" expressed in a "decisive and emphatic" manner leading "inexorably to the conclusion that if the matters raised by the applicants, Raincoast Conservation, Living Oceans Society, Federation of B.C. Naturalists and the City of Vancouver, were placed in a further new report given to the Governor in Council, the Governor in Council would still conclude the project is, on balance, in the public interest and would still approve it." (at para 45) Absent more information about the nature of these submissions it is difficult to evaluate the validity of this assessment, though there does appear to be a dangerous slippery slope here, bearing in mind that the vast majority of project EAs end in approval It is precisely for this reason – governments' predisposition to approve resource projects without a robust and transparent understanding of their environmental effects -- that EA regimes were created in the first place. Relying on the inevitability of approval to dismiss substantive concerns about any given EA would seem to undermine the role for democratic accountability that Parliament intended: *Greenpeace Canada v Canada (Attorney General)*, 2014 FC 463 (CanLII) at para 237.

The third set of issues concerns the adequacy of the Crown's consultation and accommodation efforts. Here Justice Stratas relied on the "fatal legal bars" strand of the "fairly arguable test" to dismiss arguments premised on "a right to consent or to exercise a veto over the project" as well as applications by First Nations who had not contested the adequacy of the Crown's consultation efforts in the *Tsleil-Waututh* proceedings (at paras 47 & 48). Other applications however did pass the test based on the evidentiary record adduced by those applicants specifying "with considerable particularity and detail" the shortcomings of those efforts. Since neither the Crown nor Trans Mountain provided evidence to support the adequacy of the Crown's consultation efforts beyond the recitals in the order in Council Justice Stratas clearly believed that the merits of the applicants'

cases needed to be fully explored. In an effort to narrow the issues on which he was granting leave Justice Stratas formulated three questions ("and only these questions") that the successful applicants should address:

> 1. In the period between August 30, 2018 (the date of the decision in *Tsleil-Waututh Nation*) to June 18, 2019 (the date of the Governor in Council's decision) was the consultation with Indigenous peoples and First Nations adequate in law to address the shortcomings in the earlier consultation process that were summarized at paras 557-563 of *Tsleil-Waututh Nation*? The answer to this question should include submissions on the standard of review, margin of appreciation or leeway that applies in law.
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> 2. Are there any defences or bars to the application for judicial review that might apply?
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> 3. If the answers to the above questions are negative, should a remedy be granted and, if so, what remedy and on what terms? (At paras 65 -68)

Finally, Justice Stratas rejected the Charter and procedural fairness arguments of Adkin-Kaya et al on the basis of the "fatal legal bars" strand of the fairly arguable case standard: the application lacked an evidentiary basis and was also barred by the doctrines against relitigation.

In conclusion, six First Nations met the test for leave. Leave on the other six applications brought by other First Nations, Vancouver, two ENGOs and Adkin-Kaya et al was denied. We also now have a rare view into the test and reasoning the FCA uses in deciding whether to grant leave. It is worth noting that this FCA leave decision may be appealed to the Supreme Court of Canada; however, it is also the practice of that court to not give reasons (see for example *City of Burnaby v Attorney General of Canada et al*, May 2, 2019). In the meantime, as these latest legal challenges to TMX proceed, the CPCN remains valid and the government has indicated that construction will proceed.

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