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Federal Court of Appeal Rejects Another Attempted Appeal of the TMX Leave Decision

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Case Commented On: *Raincoast Conservation Foundation v Canada (Attorney General)*, 2019 FCA 259

The FCA has released another ruling in relation to its earlier leave decision on the consolidated TMX legal challenges (*Raincoast Conservation Foundation v Canada* (Attorney General), 2019 FCA 224 (Can LII); for our post on that decision see here). In this latest ruling the panel (including Justice David Stratas - who had authored the original decision) dismissed an attempted appeal (at para 4) brought by two NGOs. The panel reiterated Justice Stratas' previous conclusion in *Ignace v Canada (Attorney General)*, 2019 FCA 239 (for our post on that decision see here) that "appeals cannot be brought from this Court to this Court" and again pointing to the lack of any statutory basis for the FCA to hear such an appeal (at paras 7-9).

The FCA also reiterated its view on the reviewability of environmental assessment reports, stating that "only the Governor in Council's decision can be challenged by way of judicial review, not the earlier report of the National Energy Board; as a result, case law under other legislative regimes suggesting the availability of immediate judicial review following an environmental assessment report does not apply" (at para 13).

Regarding the "policy views" that might favour review of the NEB's recommendations to Cabinet, the FCA emphasized that it "must apply Parliament's law, not the personal policy views urged by the parties or our own personal policy views" (at para 11). The FCA was of the view that by adopting the *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19 and the amendments to the *National Energy Board Act*, RSC 1985, c N-7, "Parliament prioritized the construction of pipeline projects and economic development" (at para 13). As for the future of judicial review under the recently enacted *Impact Assessment Act*, the FCA observed that it "changes the process for approving pipelines, placing greater priority on, among other things, environmental protection" (at para 14). The FCA went on to acknowledge that while the "policy choices expressed by Parliament in its 2012 law no doubt frustrate the appellants and others", those parties "should express their frustration at the ballot box or by other lawful and democratic means—not by relitigating points already decided" (at para 16). The FCA also noted that it remains open to a party to apply for leave to appeal from *Raincoast Conservation* to the Supreme Court (at para 19), which reiterates the same invitation from Justice Stratas in *Ignace*.

Finally, similar to *Ignace*, the FCA concluded that these proceedings amounted to an abuse of process and awarded costs payable by appellants to each respondent in the amount of $1000 (at paras 21-22)

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