Court of Appeal File No. 45372

**COURT OF APPEAL**

ON APPEAL FROM the order of the honourable Mr. Justice Grauer of the Supreme Court of British Columbia pronounced on May 24, 2018

BETWEEN:

The Squamish Nation (also known as the Squamish Indian Band) and Xàlek/sekyú Siýam, Chief Ian Campbell on his own behalf and on behalf of all members of the Squamish Nation

Appellants

(Petitioners)

AND:

Minister of Environment and Minister of Natural Gas Development

Respondent

(Respondent)

AND:

Trans Mountain Pipeline ULC

Respondent

(Respondent)

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# APPELLANTS' FACTUM

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**THE SQUAMISH NATION (ALSO KNOWN AS THE SQUAMISH INDIAN BAND) AND XÀLEK/SEKYÚ SIÝAM, CHIEF IAN CAMPBELL ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE SQUAMISH NATION**

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## CHRONOLOGY

| Date | Event |
|---|---|
| June 21, 2010 | British Columbia Environmental Assessment Office (EAO) and the National Energy Board (NEB) entered into an Equivalency Agreement for environmental assessments of projects that trigger both a provincial environmental assessment and NEB review. |
| December 16, 2013 | Trans Mountain Pipeline ULC submitted an application for a Certificate of Public Convenience and Necessity (CPCN) and amended CPCNs for the Trans Mountain Expansion Project to the National Energy Board (NEB). |
| April 2, 2014 | The NEB issued the following decisions for the Project: the hearing order, the factors and scope of the factors for the environmental assessment scoping out Project-related marine shipping, the completeness determination and ruling on participation granting the Squamish Nation and the Province of British Columbia intervenor status in the hearing. |
| November 13, 2014 | By letter, Squamish put the Province on notice that the NEB process would not enable the Province to fulfill its legal obligations noting that a “number of issues important to Squamish, and other First Nations, have not been included within the scope of the environmental assessment for the Project, such as, the marine shipping activities of the Project.” |
| December 5, 2014 | The Province brought a motion before the NEB seeking an order that Trans Mountain file unredacted copies of its Emergency Management Plan documents and the Oil Spill Response Plan of its spill recovery contractor, Western Canada Marine Response Corporation, to demonstrate that Trans Mountain has the ability |

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| | to effectively respond to spills from the Project (the motion was denied by the NEB). |
| January 11, 2016 | The Province filed its final written argument with the NEB stating that it could not support approval of the Project for the primary reason that Trans Mountain did not file sufficient evidence to enable the Province to assess its ability to respond to Project-related spills. |
| January 12, 2016 | Squamish filed its final written argument with the NEB asking the NEB to recommend that the Project be rejected due to, among other reasons, the lack of information and assessment in relation to the impacts of the Project on Squamish, particularly in the event of a spill. |
| January 13, 2016 | The British Columbia Supreme Court held in *Coastal First Nations v. British Columbia (Minister of Environment)*, 2016 BCSC 34 that the Equivalency Agreement is invalid to the extent it purports to remove the need for the responsible Ministers to issue an Environmental Assessment Certificate (Certificate) under s. 17 of the *Environmental Assessment Act* and that the Province has an independent duty to consult with First Nations whose asserted rights or title stand to be affected by a project. |
| April 1, 2016 | EAO wrote to Squamish to indicate that as a result of the decision in *Coastal First Nations* a Certificate would be required for the Project and that the Province would consult with potentially affected Aboriginal groups. |
| April 8, 2016 | EAO issued the section 10(1)(c) order providing that the Project requires a Certificate and the proponent may not proceed with the Project without an environmental assessment. |
| May 19, 2016 | The NEB issued its report and recommendations recommending that the Governor in Council (GIC) approve the Project and direct |

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| | the NEB to issue the necessary CPCN subject to 157 conditions. |
| May 24, 2016 | Squamish wrote to the Province asking the Province to terminate the Equivalency Agreement and undertake its own environmental assessment due to the flaws in the NEB assessment for the Project. |
| June 16, 2016 | Squamish filed an application for judicial review of the NEB's report and recommendation in the Federal Court of Appeal. |
| June 17, 2016 | EAO issued the section 11 order for the Project that provided that the NEB report is equivalent to the assessment report required under section 17(2) of the Act. |
| November 29, 2016 | The GIC announced its decision accepting the NEB's recommendation, directing the NEB to issue the CPCN for the Project, subject to the same 157 conditions recommended by the NEB, and deciding that the Project is not likely to cause significant adverse environmental effects. |
| March 1, 2017 | Squamish filed an application for judicial review of the GIC's decision on the Project (Squamish had previously applied for and been granted leave to judicially review the decision). |
| December 8, 2016 | EAO wrote to inform Squamish that EAO had referred the Project for the Ministers' decision, noting that "[g]iven the EAO-NEB Equivalency Agreement, EAO was not in a position to conduct further technical assessment of the Project during its review." |
| January 10, 2017 | The Minister of Environment and the Minister of Natural Gas Development made the decision to issue the Certificate for the Project, subject to 37 conditions, in reliance on the NEB report. |
| April 20, 2017 | Squamish filed the petition with the British Columbia Supreme Court challenging the Ministers' decision on the Project. |

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| August 30, 2018 | The Federal Court of Appeal ruled on the challenges to the GIC's approval of the Project quashing the Order in Council P.C. 2016-1069 for the Project, rendering the CPCN approving the construction and operation of the Project a nullity. |

## OPENING STATEMENT

This appeal concerns the scope of the Province's consultation obligations to the Squamish Nation before issuing an Environmental Assessment Certificate ("**Certificate**") for the Trans Mountain Expansion Project. The Project proposal is to expand the existing Trans Mountain pipeline from a capacity of 300,000 barrels per day to 890,000 barrels per day of diluted bitumen and refined products. It will result in new and expanded infrastructure in Squamish territory including in Burrard Inlet, and an increase in tanker traffic transiting the Inlet and the Salish Sea laden with diluted bitumen from 5 to 34 tankers per month.

The Squamish consider Burrard Inlet as their "home". The lands, waters, and resources of their territory on which they depend stand to be adversely impacted by the Project.

The judge below recognized that the Province owed Squamish a duty to consult at the deep end of the *Haida* spectrum but found that the scope of that obligation was constrained by the constitutional limits on its authority. He found that it was acceptable for the Province to rely on the National Energy Board's (**NEB**) environmental review of the Project to satisfy the Province's statutory obligations under the *Environmental Assessment Act* and its constitutional duty to consult, but scrutiny of that report fell to the Federal Court of Appeal. He also found that the Province was not obliged to consult with Squamish when the Province dramatically reversed its position previously taken before the NEB on the inadequacy of information about Project risks to the environment from shipping.

The Federal Court Appeal has now set aside the NEB's report as being so deeply flawed with respect to the environmental assessment of marine shipping that it does not constitute a "report". This vindicates Squamish's position on its inadequacies. As the Province relied on this report to satisfy its own obligations, the necessary legal and statutory underpinning for the Certificate no longer exists and it must be quashed.

The judge also erred by finding that the Province's stated positions in the NEB process are irrelevant to subsequent consultation, that the Province was not in a positon to address deficiencies in the NEB report on which the Province relied to support its own statutory obligations, and in tailoring the depth of consultation owed by the Province to the perceived scope of its legislative jurisdiction, contrary to *Haida.*

## PART 1 – STATEMENT OF FACTS

### A. INTRODUCTION

1. This is an appeal from a judgment of Grauer J. denying the Squamish Nation's ("**Squamish**" or the "**Nation**") petition to quash the decision of the Minister of Environment and the Minister of Natural Gas Development (the "**Ministers**") under s. 17(3)(c) of the *Environmental Assessment Act*, S.B.C. 2002, c. 43 (the "**Act**") to issue a Certificate for the Trans Mountain Expansion Project (the "**Project**") on January 10, 2017 on the basis of the failure to consult and accommodate the Nation.[1]

### B. THE APPELLANTS

2. The appellants are the Squamish whose traditional territory (the "**Territory**"), located on the southwest coast of what is now British Columbia, is the chosen marine terminus for the Project. Squamish asserts rights and title over its Territory, which includes Burrard Inlet, Howe Sound, the Squamish Valley and north to Whistler. The Squamish rely on their territorial and reserve lands and the waters and resources adjacent to them to support them culturally, economically, socially and ceremonially.[2]

3. Squamish has 24 reserves throughout Metro Vancouver, Howe Sound and the Squamish Valley. Three of those reserves are located on the North Shore in or at the entrance to Burrard Inlet: Seymour Creek Reserve No. 2 (ch'ích'elxwi7kw) at Second Narrows near the Westridge Marine Terminal, Mission Reserve No. 1 (eslhá7an) at Mosquito Creek, and Capilano Reserve No. 5 (xwmelchstn) at First Narrows. These reserves stand to be directly impacted by the Project infrastructure, the marine terminal, and the increased tanker traffic that will pass by them. Also affected are Kitsilano Reserve No. 6 (senákw) near the entrance to False Creek, and at least three waterfront reserves in Howe Sound.[3]

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[1] Reasons for Judgment *Squamish Nation v British Columbia (Environment)*, 2018 BCSC 844 ("RFJ") (Appeal Record ("AR"), pp. 72-164)
[2] RFJ at para. 18 (AR, p. 79); Affidavit #1 of Ian Campbell made April 20, 2017 ("Campbell Affidavit"), paras. 6-8 (Joint Appeal Book ("AB"), Vol 1. pp. 2-3)
[3] RFJ at para. 19 (AR, p. 79); Campbell Affidavit, paras. 11-14 (AB, Vol. 1 pp. 3-4)

4. The majority of Squamish members live in or near what is now North Vancouver and West Vancouver both on and off reserve within close proximity to the terminals and tanker routes. The majority of those members who live on reserve live on one of the reserves on the north shore of Burrard Inlet. The Squamish Council and main administrative office is at *ch'ích'elxwi7kw* – Seymour Creek Reserve across the Inlet from the Westridge Marine Terminal.[4]

5. Generations of Squamish people have spoken about the importance of Burrard Inlet and English Bay as a "home" of the Squamish people. As reported in *Canada (A.G.) v. Canadian Pacific Ltd.*, 2002 BCCA 478 (at para. 38) in 1886, when the Canadian Pacific Railway was seeking to obtain the entirety of the Squamish Nation's Kitsilano Reserve on False Creek for its western terminus, Squamish Chief Chepwhaim protested these efforts, in an address given to and recorded by Indian Commissioner I.W. Powell who visited the Reserve on June 15, 1886, stating that:

> We want you to write strongly about this land it is our home - our ancestors are buried here. We are willing to let the railroad pass through our land but no more. We hope you can protect us.

6. Almost 130 years after Chief Chepwhaim's address and the coming of the railway, Squamish Elder David Jacobs, *Paitsmauk*, gave evidence in the NEB hearings for the Project about the continued significance of Burrard Inlet to the Squamish people, despite this industrial development, saying:

> All we see outside from our windows looking down the beach are freighters, ships, in and out. That's why I'm afraid today what the damage that if anything happened, it would destroy our home because that harbour, that bay there that's the home of the Squamish people. It's always been a home, our home.
>
> We look at the maps. We show the territories of the Squamish. I don't like to use the word "territory". I say, "That is our home. That is our home". That land will never go away. Our Squamish people will never go away, so we got to be careful what we do today. […]

[4] Campbell Affidavit, para. 28 (AB, Vol. 1 p. 7)

> Just one thing that I always think about. I think about love and our homelands and our villages. It's love for that. It's like the wind. It's still with us. It'll never go away.[5]

7. Squamish continue to occupy, and be stewards of, their Territory, and harvest resources throughout it. Squamish has extensive traditional use and occupancy sites in Burrard Inlet, Indian Arm, southern Howe Sound and the lower Fraser River. These sites illustrate the extensive and intensive nature of Squamish use and occupation of these areas, and the dependency of Squamish culture and identity on the marine and aquatic environment.[6]

## C. THE PROJECT AND ITS POTENTIAL IMPACTS ON SQUAMISH

8. The Project is a proposal by Trans Mountain Pipeline ULC ("**Trans Mountain**") to expand the Trans Mountain pipeline system from 300,000 barrels per day to 890,000 barrels per day for the transport of heavy oil, including diluted bitumen, between Edmonton and Burnaby for shipment out through Burrard Inlet and the Salish Sea. It will result in a large expansion of the Burnaby Terminal from 13 to 26 holding tanks, the construction of an entirely new Westridge Marine Terminal on Burrard Inlet with three new berths, and an increase in tanker traffic from five tankers per month to 34.[7]

9. The Project will impact areas that contain a concentration of Squamish cultural and spiritual values including multiple burial sites, ancestral villages, habitation sites, traditional transportation corridors and important fish, game and plant harvesting areas. Due to the density and significance of the cultural and spiritual values in the Project area, the lands and waters in this area are very sensitive to further development.[8]

10. Squamish is uniquely vulnerable to the impacts of the Project and will bear the burden of risks arising from the increase in the transport of diluted bitumen, including risks

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[5] Campbell Affidavit, para. 107, Ex. X (p. 381) (AB, Vol. 1 pp. 392, 399)
[6] Campbell Affidavit, paras. 18-20, 43-60 (AB, Vol. 1 pp. 4-5, 10-15)
[7] RFJ, paras. 15-16, 21(AR, pp. 78-79); Campbell Affidavit, paras. 23-26 (AB, Vol. 1 p. 6)
[8] RFJ, para. 22 (AR, p. 79); Campbell Affidavit, para. 30 (AB, Vol. 1 p. 7)

of terrestrial and marine spills or other accidents in very sensitive areas—events that could be catastrophic for Squamish people, territory, economy and culture.[9]

## D. PROVINCIAL REGULATORY SCHEME

11. The Act provides for the environmental assessment of "reviewable projects", which are set out in the *Reviewable Projects Regulation*, B.C. Reg. 370/2002. A person cannot undertake a reviewable project without first undergoing an environmental assessment and obtaining a Certificate under the Act.[10] The Executive Director of the Environmental Assessment Office (**EAO**) determined under s. 10(1)(c) of the Act that a Certificate was required for this Project.[11]

12. Once a determination under s. 10(1)(c) is made, the Executive Director must also determine by order under s. 11 of the Act (i) the scope of the required assessment of the reviewable project, and (ii) the procedures and methods for conducting the assessment.[12]

13. Once the environmental assessment is completed in accordance the Act, the Executive Director must refer the application to the Ministers under s. 17(1)(a) for a determination. This referral must be accompanied by a referral package, consisting of an assessment report, together with the Executive Director's recommendations and reasons for recommendation (s. 17(2)).[13]

14. On receipt of that referral, the Ministers must consider the assessment report and any recommendations, and may consider any other matters they consider relevant to the public interest (s. 17(3)). The Ministers must then do one of three things: issue the Certificate and attach such conditions as they consider necessary (s. 17(3)(c)(i));

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[9] RFJ, para. 22 (AR, p. 79); Campbell Affidavit, paras. 25, 28-32 (AB, Vol. 1 pp. 6, 7-8)
[10] RFJ, para. 44 (AR, p. 84)
[11] RFJ, para. 45 (AR, p. 84); Campbell Affidavit, Ex. III (AB, Vol. 5 pp. 1668-1669)
[12] RFJ, para. 46 (AR, p. 84); Campbell Affidavit, Ex. MMM (AB, Vol. 5 pp. 1679-1680)
[13] RFJ, para. 51 (AR, p. 85)

refuse to issue the Certificate (s. 17(3)(c)(ii)); or order that further assessment be carried out (s. 17(3)(c)(iii)).[14]

## E. EQUIVALENCY AGREEMENT

15. Section 27 of the Act allows the Minister to enter into an agreement that provides "for a means to accept another party's or jurisdiction's assessment as being equivalent to an assessment required under this Act". This is referred to as an "equivalency agreement".[15]

16. The EAO and the NEB entered into an equivalency agreement for environmental assessments of projects that trigger both a provincial environmental assessment and NEB review (the "**Equivalency Agreement**"). It allows for an environmental assessment done by the NEB to serve as the environmental assessment required under the Act, even though it is not the EAO that conducts that assessment. In this case, the Executive Director invoked the Equivalency Agreement as applicable to the Project.[16]

17. Clause 6 of the Equivalency Agreement allows either party to terminate the Agreement upon giving 30 days written notice to the other party.[17] The Crown's duty to consult is triggered by any decision of the Province in relation to clause 6.[18]

18. On January 13, 2016, the BC Supreme Court held in *Coastal First Nations v. British Columbia (Minister of Environment)*, 2016 BCSC 34 that the Equivalency Agreement is invalid to the extent it purports to remove the need for the responsible Ministers to issue a Certificate under s. 17 of the Act. The Court further declared that the Province has an independent duty to consult with First Nations whose asserted

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[14] RFJ, para. 52 (AR, p. 85)
[15] RFJ, paras. 47-48 (AR, p. 84)
[16] RFJ, paras. 47-48, 54 (AR, pp. 84, 86); Campbell Affidavit, para. 62, Ex. C (AB, Vol. 1 p. 15)
[17] Campbell Affidavit, Ex. C (p. 7) (AB, Vol. 1, p. 68)
[18] *Coastal First Nations v. British Columbia (Minister of Environment)*, 2016 BCSC 34, paras. 205, 209-201, 215

rights or title stand to be affected by a project that is subject to the Equivalency Agreement.[19]

## F. THE FEDERAL REGULATORY SCHEME

19. As the Project includes an interprovincial pipeline, it required a Certificate of Public Convenience and Necessity ("**CPCN**") and other related regulatory approvals under the *National Energy Board Act*, R.S.C., 1985, c. N-7 (the "**NEB Act**"). The NEB was tasked with undertaking a review of the Project under the NEB Act and an environmental assessment of the Project under the *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 52 ("**CEAA 2012**"), and producing a recommendation and report for the Governor in Council (s. 52 of the NEB Act and s. 29 of the CEAA 2012).[20]

20. After the NEB submits its report, the Governor in Council may, by order, approve the Project, send it back to the NEB for further consideration, or direct the NEB to reject the Project. The Governor in Council is also required to determine whether the Project is likely to cause significant adverse environmental effects and whether those effects can or cannot be justified in the circumstances (CEAA 2012, s. 31).[21]

21. In this case, as discussed below, the Governor in Council approved the Project with conditions but that approval was overturned by the Federal Court of Appeal.

## G. THE CONSULTATION PROCESS

### 1. Provincial Crown's Approach to Consultation

22. The Province participated in the NEB process for this Project but did not specifically recognize that it had an obligation to make a separate determination about

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[19] RFJ, paras. 53-58, 61 (AR, pp. 86-88); *Coastal First Nations*, paras. 205, 209-201, 215
[20] RFJ, para. 24 (AR, p. 80)
[21] RFJ, paras. 24-26 (AR, p. 80)

the Project under s. 17 of the Act or a distinct duty to consult with First Nations until after the decision in *Coastal First Nations.*[22]

23. The Province acknowledged it had a duty to consult Squamish at the deeper end of the *Haida* spectrum.[23] In a letter dated April 1, 2016, Nathan Braun, Executive Project Director with the EAO, advised Squamish that the EAO's consultation would inform the EAO's understanding of how Project impacts on areas within provincial jurisdiction may affect Aboriginal interests (asserted rights and title), and "to identify whether any additional mitigation or accommodation may be required to address such impacts". He further said:

> Based on the NEB's report, the consideration of any additional information and Aboriginal consultation to date, EAO will identify any provincial environmental assessment certificate conditions to recommend to Ministers" (emphasis added).[24]

24. Importantly, the Province's consultation with Squamish (and other First Nations) after this letter was conducted jointly with Canada. The Province largely relied upon, and followed the lead of, Canada in its so-called "phase III" consultation. Apart from one meeting with Squamish (discussed below), the Province did not consult independently.[25]

## 2. Federal Crown's Approach to Consultation

25. Given British Columbia's reliance on the NEB assessment and coordinated approach to consultation with Canada, it is necessary to describe the federal consultation processes.[26]

26. Canada's phased approach to aboriginal consultation was set out as follows: Phase I - Early engagement; Phase II - NEB hearings: Phase III - Government

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[22] RFJ, para. 87 (AR, p. 94)
[23] RFJ, para. 130 (AR, p. 80); *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 paras. 43-44
[24] RFJ, para. 87 (AR, pp. 94-95); Campbell Affidavit, Ex. E (AB, Vol. 1 pp. 75-76)
[25] RFJ, para. 73 (AR, p. 90)
[26] RFJ, paras. 71-74 (AR, pp. 89-90)

decision; and Phase IV - Regulatory authorizations.[27] The Province was an intervenor, along with Squamish, in the NEB hearings (Phase II) and, as noted, joined or followed Canada in Phase III.[28]

27. Canada stated that it was (i) "relying on the NEB review process, to the extent possible, to identify, consider and address any adverse impacts on potential or established Aboriginal and treaty rights resulting from the Project"; and (ii) the purpose of Phase III "consultations is to conduct a meaningful two-way dialogue to determine if there are any concerns related to the Project that have not been fully addressed by the NEB's draft conditions or the proponent's commitments to that point in the process, and to consider proposals from Aboriginal groups for accommodation measures that could be considered by the Crown to further address outstanding issues or concerns."[29]

## 3. Phase II - The National Energy Board Process

### *(a) Squamish's experience in the NEB process*

28. The NEB's hearing order for the Project was issued on April 2, 2014. At the same time the NEB also issued the scoping decision for the Project that excluded marine shipping activities as part of the "designated project" under CEAA 2012.[30]

29. Squamish was an intervenor in the hearing and participated in all stages to the extent possible. They made information requests, filed motions for adequate responses in relation to the information requests, filed written evidence, filed written argument, and made oral submissions to the NEB.[31]

30. From the outset, Squamish expressed concerns to the NEB and to British Columbia about the scope of the environmental assessment to be carried out.[32] By

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[27] RFJ, paras. 75-77 (AR, pp. 90-92); Affidavit #2 of Ian Campbell made October 17, 2017(Campbell Affidavit #2), Exs. A, B (AB, Vol. 13 pp. 5308-5313, 5314-5325)
[28] RFJ, paras. 31, 73, 175-176 (AR, pp. 81, 90, 126-127)
[29] Campbell Affidavit, Ex. MM (pp. 797, 801-802) (AB, Vol. 2 pp. 727, 731-732)
[30] RFJ, para. 78 (AR, p. 92); Affidavit #1 of Robert Love made May 17, 2017, Exs. 13, 15 (AB, Vol. 7 pp. 2598-2599, 2603, 2617, 2620-2623)
[31] RFJ, paras. 78-84 (AR, pp. 92-93)
[32] RFJ, para. 79 (AR, p. 92); Campbell Affidavit, paras. 72, 75, 86-102, 105, Exs. D, G, L-U (AB,

letter dated November 13, 2014, Squamish advised the Province that, in its view, the NEB process would not enable the Province to fulfill its legal obligations to the Squamish. Squamish stated that "a number of issues important to Squamish, and other First Nations, have not been included within the scope of the [NEB's] environmental assessment for the Project, such as, but not limited to, marine shipping activities of the Project".[33]

31. Squamish sought to use the NEB hearing process, and particularly the information request opportunities, to articulate its concerns and interests and to attempt to obtain information it considered necessary to understand the potential impacts of the Project on its asserted Aboriginal rights and title. However, the Nation was unable to obtain the information it considered necessary for this purpose.[34]

32. The Nation's unsuccessful efforts to obtain what it considered necessary information and its potential impacts are significant for two reasons:

a) the gap in necessary information was the central concern raised by the Squamish in the Crown consultation process that followed the NEB process, and the information remained outstanding, with no explanation from the Crown (in either its federal or provincial emanations) as to why this information was not necessary to assess impacts on Squamish; and

b) throughout the NEB process, the Province shared the same concerns as Squamish with regard to the lack of information, including on environmental impacts of marine shipping and other subject matters of shared concern (discussed below).

33. Among the information that Squamish sought, but did not receive, in the NEB process: the fate and behavior of diluted bitumen in an aquatic or marine environment, emergency response planning and preparedness, assessment of the risks of the

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Vol 1 pp. 17, 18, 20-23, 72-73, 80-81, 82-354)
[33] Campbell Affidavit, Ex. D (AB, Vol.1 pp. 72-73)
[34] RFJ, paras. 80, 83-84 (AR, pp. 92-94); Campbell Affidavit, paras. 86-102, 105, Exs. L-U (AB, Vol. 1 pp. 20-23, 82-354)

Burnaby Terminal and Westridge Marine Terminal and a Squamish-specific assessment of impacts.[35]

34. On January 12, 2016, Squamish filed its final written argument in the NEB process asking the Board to recommend that the Project be rejected due to, among other reasons, the lack of information and assessment in relation to the impacts of the Project on Squamish, particularly in the event of a spill from the Project.[36]

***(b) Province's Experience in the NEB process paralleled that of Squamish***

35. The Province was also an intervenor in the NEB process and made numerous information requests of both Trans Mountain and Canada. The Province's main focus was on "Trans Mountain's ability to effectively prevent and respond to spills from the proposed pipeline itself, or from tankers calling at the Westridge Marine Terminal".[37] Like Squamish, the Province was not satisfied with the information that was provided in response to these requests and unsuccessfully sought orders from the Board compelling better and more detailed information.[38]

36. For instance, on December 5, 2014, the Province brought a motion before the board seeking an order that, among other things, Trans Mountain file unredacted copies of its Emergency Management Plan documents and the Oil Spill Response Plan of its spill recovery contractor, Western Canada Marine Response Corporation, to demonstrate that Trans Mountain has the ability to effectively respond to spills from the Project. The Province said that these plans "are a mitigation measure against environmental harm that must be considered by the Board in its environmental assessment of the Project" and "in advance of certification".[39] Squamish expressly supported the relief sought by the Province in the motion.

37. The Board dismissed the Province's motion in Ruling No. 50. The Board never required Trans Mountain to provide the emergency response documents or the

[35] Campbell Affidavit, para. 105 (AB, Vol. 1 p. 24)
[36] RFJ, para. 84 (AR, pp. 93-94)
[37] RFJ, para. 31 (AR, p. 81); Campbell Affidavit, Ex. LL (p. 764) (AB, Vol. 2 p. 694)
[38] Campbell Affidavit, paras. 114-121, Exs. FF-LL (AB, Vol. 1 pp. 27-29, Vol. 2, pp. 505-725)
[39] Campbell Affidavit, para. 118, Exs. JJ (p. 720), KK (AB, Vol. 1 p. 28, Vol. 2 pp. 650, 686-691)

information on oil spill prevention and response capacity that the Province deemed an "imperative" mitigation measure prior to Project approval.[40]

38. In its closing argument before the NEB, the Province, like Squamish, stated that it cannot support approval of the Project due to the inadequacy of the evidence. The Province maintained that there was insufficient evidence about spill response to allow for a proper assessment of Trans Mountain's ability to respond to a spill[41] and noted that many of the detailed plans "that form part of an effective emergency response plan not only remain unprepared, but will, Trans Mountain tells us, be left to be formulated at the time of an incident."[42]

39. The Province also took issue with the "lack of foundation or transparency" in Trans Mountain's risk assessment with respect to the likelihood of marine spills, noting that it lacks sufficient foundation to be confidently relied upon by the Board and asked the Board to accord the risk assessment limited weight.[43]

40. The Province noted that "it is obvious that a spill in the marine environment could have significant effects"[44] and submitted that:

> …no marine spill response plans, or other detailed information, have been put on the record to show the means by which a marine spill would be responded to. In the absence of this information, the Province is not satisfied that a "world-leading" marine spill response capability will in fact be in place.[45]

41. These concerns are aligned with those of the Squamish and are reflected in the Squamish Nation's own information requests and argument to the NEB, as well as in the information gaps identified by Squamish during the Crown consultation process that followed the NEB process.

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[40] Campbell Affidavit, para. 118, Ex. KK (AB, Vol. 1 p. 28, Vol. 2 pp. 686-691)
[41] Campbell Affidavit, Ex. LL (p. 764) (AB, Vol. 2 p. 694); Affidavit #1 of Melanie Thompson made September 25, 2017, Ex. A (AB, Vol. 13 pp. 5225-5304)
[42] Campbell Affidavit, Ex. LL (p. 785) (AB, Vol. 2 p. 715)
[43] Campbell Affidavit, Ex. LL (p. 790) (AB, Vol. 2 p. 720)
[44] Campbell Affidavit, Ex. LL (p. 790) (AB, Vol. 2 p. 720)
[45] Campbell Affidavit, Ex. LL (p. 791) (AB, Vol. 2 p. 721)

## 4. The National Energy Board Report

42. On May 19, 2016, the NEB issued its report recommending approval of the Project. The NEB report did not deal specifically with Squamish's concerns or interests, or make any findings specific to Squamish. Rather, it contained only a general conclusion with regard to Aboriginal concerns, stating that "the Board is satisfied that the Board's recommendation and decisions with respect to the Project are consistent with section 35(1) of the Constitution Act, 1982."[46] It said that effects on Aboriginal interests "can be effectively minimized" and that, with the exception of traditional uses associated with the Southern resident killer whale, there would not be "significant adverse effects on the ability of Aboriginal people to continue to use lands, waters and resources for traditional purposes".[47]

43. Following the Board's decision and the BCSC decision in *Coastal First Nations*, on May 24, 2016 Squamish asked the Province to terminate the Equivalency Agreement due to the flaws in the NEB assessment for the Project (as noted by both Squamish and the Province) and conduct its own environmental assessment. The Province refused to do so and relied on the NEB assessment.[48]

## 5. Phase III – Coordinated Crown Consultation

44. By letter dated May 9, 2016, Mr. Braun of the EAO advised Squamish of the Province's intention to rely on the NEB assessment as an equivalent environmental assessment for the purposes of the Act.[49] (This was later confirmed in an order dated June 17, 2016 made under s. 11 of the Act. [50])

45. Squamish questioned this decision in a letter dated May 24, 2016, noting that both Squamish and the Province expressed concerns with the NEB process. Squamish also pointed out that, despite the concerns it had previously raised with the

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[46] RFJ, paras. 33-36 (AR, pp. 81-82); Campbell Affidavit, Ex. AAA (NEB Report, p. xii) (AB, Vol. 2 p. 771)
[47] Campbell Affidavit, Ex. AAA (NEB Report, pp. 45-52) (AB, Vol. 3 pp. 820-827)
[48] RFJ, para. 90 (AR, p. 96); Campbell Affidavit, Ex. F (AB, Vol. 1 pp. 77-79)
[49] RFJ, para. 88-89 (AR, p. 95); Campbell Affidavit, Ex. JJJ (AB, Vol. 5 pp. 1670-1675)
[50] RFJ, para. 92 (AR, p. 96); Campbell Affidavit, Ex. MMM (AB, Vol. 5 pp. 1679-1689)

Province (in its November 13, 2014 letter) about the adequacy of the NEB's (then) planned assessment, the Province did not consult with Squamish about whether the Equivalency Agreement should be terminated to allow for a full provincial environmental assessment. Squamish asked for an urgent meeting with the Province.[51] In response, however, the Province reiterated its intention to adhere to the Equivalency Agreement.[52]

46. On June 23, 2016, Squamish, along with Tsleil-Waututh Nation, met with representatives of the Province to discuss their concerns with the reliance on the NEB assessment for the Project, and the failure of the Province to consult on the termination of the Equivalency Agreement. This was the only bilateral meeting between Squamish and the Province on the Project without Canada present.[53] The two Nations followed up on the meeting with a joint letter dated August 24, 2016 reiterating their concern that the NEB process did not provide for a proper assessment of Project impacts on their interests. They stated: "Given that the Province has explicitly acknowledged the failure of the NEB process, we do not think it is appropriate for the provincial EA to rely on that process in any respect."[54]

47. In an exchange of correspondence, and in a single meeting held jointly by Canada and the Province on October 18, 2016, Squamish maintained its ongoing request for outstanding information regarding Project impacts, including with respect to potential spills of diluted bitumen in Burrard Inlet and the Salish Sea – information that the Province also sought in the NEB process.[55] They also asked that further studies be done to fill in the information gaps that Squamish and the Province highlighted in the NEB process. [56]

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[51] RFJ, para. 90 (AR, p. 96); Campbell Affidavit, Exs. D, F (AB, Vol. 1 pp. 72-73, 77-79)
[52] RFJ, para. 91 (AR, p. 96); Campbell Affidavit, Ex. LLL (AB, Vol. 5 pp. 1676-1678)
[53] RFJ, para. 94 (AR, p. 98); Campbell Affidavit, para. 179 (AB, Vol. 1 p. 47)
[54] RFJ, para. 94 (AR, p. 98); Campbell Affidavit, para. 180, Ex. NNN (AB, Vol. 5 pp. 1690-1694)
[55] RFJ, paras. 98, 101 (AR, pp. 99-100); Campbell Affidavit, paras. 182, 184, Ex. QQQ, SSS (AB, Vol. 1 pp. 47-48, Vol. 5, pp. 1695-1696, 1703-1713)
[56] Campbell Affidavit, Ex. SSS (p. 1256) (AB, Vol. 5 pp. 1703-1713)

48. However, Canada and the Province jointly responded by stating their reliance on the NEB report and did not provide the additional information or agree to further study.[57] While Squamish reiterated its position that the NEB process and report were inadequate to understand the impacts of the Project on Squamish and develop effective accommodation measures, the Crown stood by its position.[58]

49. By letter dated November 18, 2016, Squamish responded to a package of material provided on behalf of the Province with the joint federal/provincial letter of November 3, 2016. Chief Campbell, on behalf of Squamish, in setting out the reasons why in Squamish's view the Province had not discharged the obligations to Squamish noted that "[t]he Province piggybacked on the federal Crown consultation, and did not seek to directly engage Squamish on the information deficiencies in the NEB report."[59]

50. At no time did the Crown provide further information to Squamish to address the gaps identified in the NEB assessment, despite the stated shortcomings in that process articulated in the Province's argument before the Board.[60]

## H. THE FEDERAL APPROVAL AND FEDERAL COURT OF APPEAL DECISION

51. On November 29, 2016, the Governor in Council announced its approval of the Project, subject to the same 157 conditions recommended by the NEB.[61] Squamish sought and was granted leave to judicially review this decision in the Federal Court of Appeal ("**FCA**").[62]

52. On August 30, 2018, the FCA quashed the federal approval on two main grounds:

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[57] RFJ, paras. 102-103 (AR, pp. 100-101); Campbell Affidavit, para. 185, Ex. TTT (pp. 1259, 1262) (AB, Vol. 1 pp. 88-89, Vol. 5, pp. 1714, 1717)
[58] RFJ, paras. 107-108 (AR, pp. 103-104); Campbell Affidavit, para. 191, Exs. VVV, WWW (AB, Vol. 1 p. 50, Vol. 5, pp. 1730-1732, 1733-1740)
[59] RFJ, paras. 109-110 (AR, p. 104-105); Campbell Affidavit, para. 192, Ex. XXX (AB, Vol. 1 pp. 50-51, Vol. 5 pp. 1741-1746)
[60] Campbell Affidavit, paras. 213-216 (AB, Vol. 1 pp. 60-61)
[61] RFJ, para. 42 (AR, p. 83)
[62] Campbell Affidavit, para. 170 (AB, Vol. 1 p. 45)

a) The NEB failed to comply with its statutory obligation by wrongly excluding Project-related shipping from the scope of its environmental assessment, leading to "successive, unacceptable deficiencies in the Board's report and recommendations". The FCA found that the NEB report was so materially flawed that it did not constitute a "report" under the applicable legislation; and

b) Canada did not fulfill its duty to consult with and accommodate the Indigenous applicants. Canada's execution of Phase III of the consultation process was found to be "unacceptably flawed and fell short of the standard prescribed by the jurisprudence of the Supreme Court".[63]

## I. THE PROVINCIAL DECISION ON THE PROJECT

53. On December 8, 2016, the EAO informed Squamish that it had referred the Project for the Ministers' decision. It asserted that, because of the Equivalency Agreement, the "EAO was not in a position to conduct further technical assessment of the Project during its review".[64] On that same day, the Executive Director of the EAO, Kevin Jardine, forwarded his recommendations for the Project to the Ministers, including his view that "the Crown has fulfilled its obligations for consultation and accommodation to Aboriginal groups".[65]

54. On January 10, 2017, the Ministers made the decision to issue the Certificate for the Project, subject to 37 conditions. The reasons for the decision confirm that the NEB report was the assessment report that was considered for the Project.[66]

55. The Decision of the Ministers represents a substantive change in the Province's position as articulated in the NEB process, including in its motions and its final

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[63] *Tsleil-Waututh Nation v. Attorney General of Canada*, 2018 FCA 153, paras. 5, 470, 557, 764-772
[64] RFJ, para. 112 (AR, pp. 105-106); Campbell Affidavit, Ex. BBBB (AB, Vol. 6 pp. 2073-2076)
[65] Campbell Affidavit, Ex. CCCC (AB, Vol. 6 pp. 2077-2080)
[66] RFJ, para. 114 (AR, p. 106)

submissions. The Province did not notify Squamish of this change in position, or consult Squamish on the basis or reasons for this change of position.[67]

## J. JUDGMENT OF THE COURT BELOW

56. Squamish brought a petition challenging the Ministers' decision to issue the Certificate. Squamish sought an order quashing the decision and declarations that the Province did not meet its constitutional duty to consult and accommodate Squamish.

57. The judge in the Court below acknowledged that it was not in dispute that the Ministers owed an obligation to consult Squamish at the deep end of the spectrum.[68] However, he held that "British Columbia faced limits on its authority that Canada did not" and that "assessing the reasonableness of the Minister's conclusion that consultation was adequate must include reference to this context".[69] In this context, the judge concluded that "within the limits of its authority, British Columbia ascertained and addressed [Squamish] concerns, balancing them with societal interests" and that "it cannot be said that adequate consultation reasonably required British Columbia to correct any perceived shortfall in the NEB process".[70]

58. The judge did not accept that the Province was obligated to explain to Squamish the basis for its change in position from the NEB process, and found that the Province's position before the Board was "irrelevant to the question the Ministers had to consider of whether consultation was adequate in the context of the Certificate process."[71]

59. In the result, the judge found that the Ministers' conclusion, that consultation and accommodation sufficient to satisfy section 35 of the *Constitution Act, 1982*, had occurred, was reasonable and accordingly dismissed the petition.[72]

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[67] Campbell Affidavit, para. 201 (AB, Vol. 1 p. 55)
[68] RFJ, para. 130 (AR, p. 115)
[69] RFJ, para. 158 (AR, p. 122)
[70] RFJ, paras. 169,171 (AR, p. 125)
[71] RFJ, para. 177 (AR, p. 127)
[72] RFJ, para. 199 (AR, p. 132)

## PART 2 – ERRORS IN JUDGMENT

60. Squamish submits that the Court below erred in determining:

a) that the Province was able to rely on the NEB report as an equivalent assessment report for the Project;

b) that adequate consultation did not and, constitutionally, could not require the Province to fill information gaps (or consult about filling perceived gaps) in the NEB assessment before deciding whether to issue a Certificate;

c) that the Province did not have an obligation to consult with Squamish on the Province's change in position from the NEB process on the adequacy of information on Project-related spills; and

d) that the Province was constitutionally constrained with respect to its obligations to consult and accommodate Squamish and by failing to find that the Province had an obligation to explain those constraints to Squamish.

## PART 3 – ARGUMENT

### A. STANDARD OF REVIEW

61. This Court's role in hearing an appeal from a decision on judicial review is to determine whether the judge below selected and correctly applied the appropriate standard of review, effectively stepping into that judge's shoes and focusing on the administrative decision.[73]

### B. THE FOUNDATION OF THE ENVIRONMENTAL ASSESSMENT CERTIFICATE HAS DISAPPEARED

#### 1. The Court Below

62. Squamish argued in the Court below that the NEB process and report was a legally insufficient foundation for the Province to conduct its environmental assessment and discharge its duty to consult, but the judge held that Squamish "must find its

[73] *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476, paras. 73-76; *Agraira v. Canada (Public Safety and Emergency Preparedness)* 2013 SCC 36, paras. 45-46

remedies for such shortfalls in the Federal Court proceedings, not in this one" and that in this proceeding "the NEB process is the starting point, not the end point."[74]

63. The judge erred by not setting aside the Certificate due to its reliance on the flawed NEB report, and the FCA's judgment in *Tsleil-Waututh Nation*, which set aside the NEB report, now confirms that. As the Province relied on this report, and the NEB's assessment, to satisfy the same requirement for an environmental assessment under the Act, there is no longer a legal foundation for the Certificate.

### 2. The FCA Judgment in *Tsleil-Waututh Nation*

64. *Tsleil-Waututh Nation* was released three months after the decision in the Court below. The FCA held that the "Board unjustifiably excluded Project-related shipping from the Project's definition" and this undermined the central finding of the report that the Project was not likely to cause significant adverse environmental effects.[75] It found that the NEB report was so materially flawed that it did not constitute a "report" under the applicable legislation, and concluded that "[w]ith 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."[76]

65. The FCA ordered that the NEB's recommendations be referred back to the Board with the specific direction that it ought to reconsider the environmental assessment of the Project in light of the inclusion of Project-related marine shipping in the Project's definition and the Board's recommendation under s. 29 of the CEAA 2012. Canada was also required to "re-do its Phase III consultation".[77]

### 3. Environmental Assessment Report is Mandatory

66. Under section 17 of the Act, it is a statutory precondition to the Ministers' decision on issuing a Certificate that an environmental assessment is carried out in

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[74] RFJ, paras. 169-170 (AR, p. 125)
[75] *Tsleil-Waututh*, paras. 5, 470, 764
[76] *Tsleil-Waututh*, paras. 470, 766
[77] *Tsleil-Waututh*, paras. 770-771

accordance with the relevant statutory obligations. The Ministers have no jurisdiction under the Act to issue a Certificate without an environmental assessment.[78]

67. Through the Equivalency Agreement and the EAO's section 11 Order under the Act, the Province placed its complete reliance on the NEB report to fulfill the provincial statutory obligation for an environmental assessment. [79] The section 11 Order made under the Act confirms that "[t]he NEB Report is equivalent to the assessment report required under section 17(2) of the Act" and that the Province's Summary Assessment Report, submitted to the Ministers just summarizes "the key findings of the NEB Panel that are relevant to the Ministers environmental assessment certificate decision."[80]

68. The judge found that the NEB and federal cabinet processes "played a significant role in British Columbia's environmental assessment process, with the NEB review constituting the required assessment under the EAA pursuant to the Equivalency Agreement."[81] Indeed, the Reasons for the Ministers' Decision state that "[t]he NEB Report is the assessment report that [they] have considered for the Project".[82] The Certificate itself notes in the recital that the NEB completed the assessment for the Project.[83] The Province did not undertake any further assessment with respect to the Project.

69. Having placed complete reliance on the NEB process and report, and not having done its own assessment, the Province's Certificate must stand or fall on that report. In accepting "any" NEB assessment as found by the judge below, the Ministers assumed not only the benefits of the NEB assessment (thus relieving the EAO of the need to do its own assessment) but also the risks of the NEB assessment, including any inadequacies that might cause it to be struck down or otherwise found to be invalid.[84]

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[78] *Environmental Assessment Act*, s. 17 ("*EAA*"); RFJ, paras. 45 (AR, p. 84)
[79] RFJ, para. 50 (AR, p. 85)
[80] Campbell Affidavit, Ex. MMM (p. 1220) (AB, Vol. 5 p. 1682)
[81] RFJ, para. 72 (AR p. 90)
[82] Campbell Affidavit, Ex. FFFF (p. 1399) (AB, Vol. 6 p. 2149)
[83] Campbell Affidavit, Ex. EEEE (p. 1372) (AB, Vol. 6 p. 2122)
[84] RFJ, para. 50 (AR, p. 85)

70. Since the FCA has held that the NEB report is so materially flawed that it does not constitute a "report", the legal underpinnings for the decision to issue the Certificate, as required by the Act, have fallen away and the Certificate must be quashed as being inconsistent not only with the duty to consult, but with the statutory requirement (s. 17(2)) upon which the decision is based.[85]

71. Further, since the NEB assessment did not properly account for the environmental effects of the Project, it did not provide the Ministers with the foundation to make an informed decision about the Project's environmental effects that the Act and the duty to consult with Squamish requires.[86]

72. With Phase II (NEB assessment) now being reset with respect to the environmental assessment for the Project, particularly in relation to one of Squamish's key concerns over the environmental effects of marine shipping, there is no longer a foundation for the Province's consultation with Squamish. The Province cannot discharge its duty to consult Squamish when, as found by the FCA, the Project-related effects on the marine environment have not yet been properly assessed. The Province expressly asserted jurisdiction in respect of the environmental impacts of marine shipping,[87] so this deficiency in the report is material to how the Project impacts on Squamish's asserted rights and title in respect of matters within provincial jurisdiction.

**4. The Certificate Must be Quashed**

73. Since the NEB report did not account for the full extent of the environmental effects of the Project, it can no longer serve as the basis for the Ministers' decision on the Certificate. The Ministers erred in issuing the Certificate in reliance on the materially flawed NEB report (even though Squamish had brought the relevant errors to the Ministers attention in Phase III) and the Court below erred in proceeding on the

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[85] *Tsleil-Waututh*, para. 470

[86] *EAA,* s. 17; *Coastal First Nations*, paras. 102, 104, 105, 109, 134, 137- 140; *Friends of Davie Bay v. British Columbia*, 2012 BCCA 293, paras. 8, 40; *Alberta Wilderness Association v Canada (Minister of Fisheries and Oceans)*, [1999] 1 FC 483 (FCA), paras. 17-18

[87] Campbell Affidavit, Ex. FFFF (pp. 1400-1404) (AB, Vol. 6 pp. 2150-2154)

assumption that the NEB report constituted a valid equivalent assessment under s. 17(2) of the Act. The FCA has confirmed that the report is not valid.

74. The Judge acknowledged the potential effect of the parallel proceedings before the FCA noting that:

> Of course, if the Federal Court of Appeal should rule in favour of Squamish's position concerning the inadequacy of the NEB hearing, then what consultation occurred within British Columbia's jurisdiction would become largely moot in relation to the EAC at issue here. Subject to further appeal, the entire Phase II (NEB hearing) process would be reset.[88]

75. That is what has now happened, and in these circumstances, the proper course is for the Certificate to be quashed and sent back to the Ministers for redetermination following the completion of a proper assessment report.

## C. MISINTERPRETATION OF THE SCOPE OF PROVINCE'S OBLIGATIONS

76. The judge erred in finding that the Province fulfilled its duty to consult by relying on the NEB assessment of the Project without considering further assessment and by piggy-backing on the federal government's Phase III consultation, which has now been found by the FCA to fall well short of the required standard.

### 1. Province Wrongly Constrained Itself

77. The judge below misinterpreted the scope of the Province's obligations in finding that "[a]dequate consultation did not and, constitutionally, could not require British Columbia to redo the NEB process in order to fill information gaps before deciding whether to issue a Certificate" (emphasis added).[89] While it is not suggested that the Province would "redo" the entire NEB process, it was open to the Province to conduct further assessments on its own to address shortcomings in the NEB process and report.

78. While the Crown can rely on a regulatory process to fulfil the duty to consult, such reliance is subject to the Crown's overarching duty to ensure consultation is

[88] RFJ, para. 134 (AR, p. 115)
[89] RFJ, para. 174 (AR p. 176)

adequate.[90] Here, the Province relied on the NEB report and took the erroneous position that "[g]iven the EAO-NEB Equivalency Agreement, EAO was not in a position to conduct further technical assessment of the Project during its review".[91]

79. Since the honour of the Crown cannot be delegated, it is always open to the Crown to conduct further assessments beyond a regulatory proceeding to fulfill its constitutional obligations to consult.[92] In *Tsleil-Waututh*, the FCA said that (at paras. 627-628):

> …reliance on the Board's process does not allow Canada to rely unwaveringly upon the Board's findings and recommended conditions. When real concerns were raised about the hearing process or the Board's findings and recommended conditions, Canada was required to dialogue meaningfully about those concerns. …
>
> … Phase III of the consultation process afforded Canada the opportunity, and the responsibility, to dialogue about the asserted flaws in the Board's process and recommendations. This it failed to do.

80. The same may be said of the Province. *Coastal First Nations* confirmed for the Province that it held a distinct obligation to consult with First Nations, separate from Canada.[93] The Province was wrong to consider itself constrained by the Equivalency Agreement from conducting further assessments to fulfill the duty to consult.[94] When it closed consultation without taking steps to fill the information deficiencies in the NEB process, to explain to Squamish why that information was not (or, considering the Province's position in the NEB Process, no longer) necessary to assess the potential impacts to their rights and title or to address Squamish's outstanding concerns, it failed to uphold the honour of the Crown.

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[90] *Haida*, para. 53
[91] Campbell Affidavit, Ex. BBBB (p. 1325) (AB, Vol. 6 p. 2075)
[92] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, para. 106; *Haida*, para. 53, *Tsleil-Waututh*, para. 493
[93] *Coastal First Nations*, para. 196
[94] *Tsleil-Waututh*, paras. 627-628

81. This misapprehension of the scope of the Province's obligations is to be reviewed on the standard of correctness, not on a reasonableness standard as held by the judge below.[95]

### 2. Province's Consultation Stands or Falls with Canada's Phase III

82. The consultation between Squamish and the Province on the Project consisted of an exchange of correspondence and two meetings.[96] As the judge below noted, once the NEB report was issued, the Province coordinated its consultation activities with the federal Crown "making use of the federal consultation record that preceded British Columbia's regulatory involvement in the environmental assessment process."[97] Apart from the single meeting with Tsleil-Waututh Nation at the outset of the consultation process, the Province conducted no independent consultation outside of the federal process.

83. The FCA has now found that "Canada's execution of Phase III consultation process was unacceptably flawed and fell short of the standard prescribed by the jurisprudence of the Supreme Court."[98] With the FCA having now reached this conclusion, the Province's consultation must also fail.

84. The Province deliberately chose to place its reliance on the federal government's Phase III consultation. Having conducted no substantive consultation outside of that federally-led process, the Province's consultation must therefore stand or fall on the strength of that federal process. With the FCA now confirming that the federal process fell well short of the mark, the Province's adhesion to it cannot stand.

## D. PROVINCE'S CHANGE IN POSITION

85. The judge below erred in finding that the honour of the Crown did not require the Province to discuss its change of position with regard to the Project and the information necessary to assess the Project's impacts with the Squamish before approving it.

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[95] RFJ, para. 133 (AR, p. 115); Haida, para. 61; *Tsleil-Waututh*, para. 225
[96] Campbell Affidavit, para. 171 (AB, Vol. 1 p. 45)
[97] RFJ, para. 73 (AR, p. 90)
[98] *Tsleil-Waututh*, para. 557

86. As described above, throughout the entire NEB process, Squamish and the Province were *ad idem* on the need for further specific information and assessment regarding Project-related spills and the ability to clean up a spill of diluted bitumen in a marine environment. The Province opposed the approval of the Project before the NEB in part because of the failure of Trans Mountain to provide, and the NEB to insist on, the provision of this information. As both the Province and Squamish were intervenors in the NEB process, the Province knew that its position aligned with the Squamish's concerns.

87. At some point between submissions to the NEB on January 11, 2016 and the Ministers' decision on January 10, 2017 to grant the Certificate, the Province substantively changed its position on the NEB's assessment of key aspects of concern to Squamish, including emergency response preparedness, spill risk and spill response. The Province did not advise Squamish of or discuss with them this change in position or the reason for it.

88. The Ministers' decision acknowledges "that many Aboriginal groups raised concerns about the potential serious impacts on their Aboriginal Interests if a spill occurred". However, the Ministers go on to rely on the NEB's assessment of that risk without any explanation for why that assessment is now considered by the Province to be adequate when it previously considered it to be so inadequate that the Province could not support the Project.[99]

89. There was no new information put before the Ministers or presented to Squamish following the NEB process that addressed the Province's and Squamish's concerns regarding emergency response preparedness, spill risk and spill response. Based on the Ministers' reasons for decision, it appears that the Province felt that its concerns about marine spills and emergency response were addressed through the Government of Canada's announcement of the Oceans Protections Plan. However, it

[99] Campbell Affidavit, Ex. FFFF (p. 1402, 1404) (AB, Vol. 6 pp. 2152, 2154)

did not discuss its change of position, or the basis for it, with Squamish to see if it addressed their concerns.[100]

90. The NEB process was expressly stated to be part of the process by which the Crown would discharge its duty to consult. It is not in keeping with the high standard of dealings required by the honour of the Crown for the Province to take a position in that process that fully aligns with the Squamish's concerns, only to later reverse that position and abandon its concerns that were previously in line with Squamish's views without first discussing that change in position with Squamish.

91. The judge found that the Province was playing a different role advocating a position before the NEB when it raised concerns about inadequate information on spill response planning and preparedness (among other things). He held that the "position taken by British Columbia during the NEB hearings is irrelevant to the question the Ministers had to consider of whether consultation was adequate in the context of the Certificate process".[101] In these circumstances, he found that this dynamic did not "constitute a change in position that gave rise to a specific duty to consult beyond the acknowledged overarching duty."[102]

92. Meaningful consultation "entails testing and being prepared to amend policy proposals in light of the information received, and providing feedback" (emphasis added).[103]

93. Good faith is required on both sides in the consultative process: "The common thread on the Crown's part must be 'the intention of substantially addressing [Aboriginal] concerns' as they are raised […] through a meaningful process of consultation".[104] The "controlling question in all situations is what is required to maintain the honour of the

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[100] Campbell Affidavit, Ex. FFFF (p. 1403) (AB, Vol. 6 p. 2153); Campbell #2, Ex. C (AB, Vol. 13 pp. 5326-5338)
[101] RFJ, para. 177 (AR, p. 127)
[102] RFJ, paras. 176-179 (AR, p. 127)
[103] *Haida*, para. 46
[104] *Tsleil-Waututh*, para. 496; *Haida*, para. 42

Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake".[105]

94. The judge erred in finding that British Columbia wore a different hat (as advocate) in the NEB process than it did when it was participating in the Phase III consultation and making the decision to grant the Certificate. "The honour of the Crown is always at stake in its dealings with Aboriginal peoples" (emphasis added).[106] The Province's function in one part of the approval process cannot be distinguished from any other part of the process. Regardless of whether the Province was involved in consultation before the NEB, this was a process that was going to affect Squamish's interests and the Crown's honour is at stake throughout. The NEB process was expressly part of the overall process by which the Crown would fulfill its duty and the Province's function cannot be parsed out in the manner suggested by the judge.[107]

95. Further, Squamish does not (and did not) argue that the Province's unilateral change of position was itself a decision that independently attracted the duty to consult. Rather, that change in position was part of a course of dealings by the Province involving the Squamish within a broader consultation process that included the NEB process.

96. The judge took an inappropriately narrow view of the Province's obligations to Squamish in the circumstances. The Province's (and Squamish's) position before the NEB that not enough was known about Project-related spills is directly relevant to the Province's obligation to inform itself of the impact of the Project on Squamish.[108] Squamish never got a substantive response on why the Province had sufficient information to do so.

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[105] *Haida*, paras. 42, 45- 46, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, paras. 54-55; *Clyde River (Hamlet) v. Petroleum GeoServices Inc.*, 2017 SCC 40, para. 49, *Tsleil-Waututh*, paras. 756, 759
[106] *Haida*, para. 16
[107] *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68, para. 62
[108] *Mikisew*, paras. 54-55, 64; *Gitxaala Nation v. Canada*, 2016 FCA 187, para. 235; *Clyde River*, para. 45

## E. PROVINCE'S CONSTITUTIONAL LIMITS ON THE DUTY TO CONSULT

97. Much of the judge's reasoning in the Court below turns on what he saw as the limited role that the Province had to play with respect to the Project. He held that "[w]hile the constitutionally guaranteed duty to consult is 'upstream' of statutes like the EAA, it is [*sic*] does not alter the constitutional division of powers between the federal and provincial arms of government" and that "British Columbia's consultation obligations are accordingly subject to the limits of its constitutional authority."[109] He was of the view that "assessing the reasonableness of the Minister's conclusion that consultation was adequate must include reference to this context."[110]

98. Squamish submits that the judge erred in tailoring the depth of the Province's duty to consult with Squamish to the strength of the Province's jurisdiction in respect of this matter. The Province had a decision to make in respect of the Project within its jurisdiction and that decision had the potential to infringe the Squamish's asserted Aboriginal rights and title. The depth of the required consultation is dependent on the strength of Squamish's claim and the degree of impact on their asserted rights and title,[111] not on the strength of the Province's jurisdiction.

99. The Province asserts jurisdiction over the environmental impacts of marine shipping and it had the authority at least to undertake further assessment to better understand the impacts of the Project, particularly with respect to Project spills and the resources required to clean them up, and to impose Project conditions to better address those potential impacts and manage the risk. The decision to grant the Certificate without further assessment authorizes the Project to proceed without information that the Province itself once considered essential to assess Project impacts. The Province's decision therefore has a significant impact on Squamish's asserted rights and the extent of that obligation is not proportionate to a measure of its legislative jurisdiction over the Project.

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[109] RFJ, para. 136 (AR, p. 116)
[110] RFJ, para. 158 (AR, p. 122)
[111] *Haida,* paras. 39, 43-44

100. Moreover, aside from whether it is correct to limit the Province's consultation obligation based on the extent of its jurisdiction, the judge erred by not finding a concomitant duty to discuss these constraints with Squamish at the outset of the consultation process.

101. The Ministers' reasons for the decision describe, in their view, the constitutional landscape within which they were operating, namely that it was "primarily federally-regulated undertaking" pursuant to s. 92(10)(a) of the *Constitution Act*. While the Ministers recognized they retained the power to attach conditions to the Certificate pursuant to *Coastal First Nations*, they said that they undertook their considerations "aware that any EA Certificate condition cannot conflict with federal law or federally legally imposed requirements, or frustrate their purpose".[112]

102. Yet the Province did not discuss with Squamish prior to approving the Project the extent of the constitutional constraints it considered itself to be under or how this might affect the conditions it attached to the Certificate.

103. If the Province considered itself to be constrained in what it could and could not do, or what topics it could and could not discuss, with respect to consulting and accommodating asserted Aboriginal rights, the honour of the Crown compels it to at least discuss those perceived constraints, and their potential ramifications, with the affected First Nation. [113] This is particularly so if these constraints result in the Crown being held to a lower standard of conduct.[114] By failing to discuss these perceived constraints with Squamish, the Province fell short of meeting its duty to consult and the judge erred in finding otherwise.

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[112] RFJ, para. 117 (AR, pp. 107-108) ; Campbell Affidavit, Ex. FFFF (p. 1399) (AB, Vol. 6 p. 2149)
[113] *Mikisew,* paras. 54-55, 64; *Haida*, para. 43
[114] *Haida*, paras. 42, 45, 48, 62

## PART 4 – NATURE OF ORDER SOUGHT

104. The appellants seek the orders as set out in the Notice of Appeal dated June 20, 2018.[115]

All of which is respectfully submitted.

Dated at the City of North Vancouver, Province of British Columbia, this 1st day of October, 2018.

F. MATTHEW KIRCHNER

MICHELLE L. BRADLEY

[115] Notice of Appeal (AR p. 165-166)

# APPENDIX: ENACTMENTS

## PART II

## RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

**35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female per- sons. **(96)**

**(96) Subsections 35(3) and (4) were added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).**

# Environmental Assessment Act

## [SBC 2002] CHAPTER 43

*Assented to May 30, 2002*

**Requirement for environmental assessment certificate**

**8** (1) Despite any other enactment, a person must not

(a) undertake or carry on any activity that is a reviewable project, or

(b) construct, operate, modify, dismantle or abandon all or part of the facilities of a reviewable project,

unless

(c) the person first obtains an environmental assessment certificate for the project, or

(d) the executive director, under section 10 (1) (b), has determined that an environmental assessment certificate is not required for the project.

(2) Despite any other enactment, if an environmental assessment certificate has been issued for a reviewable project, a person must not

(a) undertake or carry on an activity that is authorized by the certificate, or

(b) construct, operate, modify, dismantle or abandon all or part of the project facilities that are authorized by the certificate,

except in accordance with the certificate.

**Determining the need for assessment**

**10** (1) The executive director by order

(a) may refer a reviewable project to the minister for a determination under section 14,

(b) if the executive director considers that a reviewable project will not have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

(i) an environmental assessment certificate is not required for the project, and

(ii) the proponent may proceed with the project without an assessment, or

(c) if the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

(i) an environmental assessment certificate is required for the project, and

(ii) the proponent may not proceed with the project without an assessment.

(2) The executive director may attach conditions he or she considers necessary to an order under subsection (1) (b).

(3) A determination under subsection (1) (b) does not relieve the proponent from compliance with the applicable requirements pertaining to the reviewable project under other enactments.

**Executive director determines assessment scope, procedures and methods**

**11** (1) If the executive director makes a determination set out in section 10 (1) (c) for a reviewable project, the executive director must also determine by order

(a) the scope of the required assessment of the reviewable project, and

(b) the procedures and methods for conducting the assessment, including for conducting a review of the proponent's application under section 16, as part of the assessment.

(2) The executive director's discretion under subsection (1) includes but is not limited to the discretion to specify by order one or more of the following:

(a) the facilities at the main site of the reviewable project, any of its off-site facilities and any activities related to the reviewable project, which facilities and activities comprise the reviewable project for the purposes of the assessment;

(b) the potential effects to be considered in the assessment, including potential cumulative environmental effects;

(c) the information required from the proponent

(i) in relation to or to supplement the proponent's application, and

(ii) at specified times during the assessment, in relation to potential effects specified under paragraph (b);

(d) the role of any class assessment in fulfilling the information requirements for the assessment of the reviewable project;

(e) any information to be obtained from persons other than the proponent with respect to the potential effects specified under paragraph (b);

(f) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;

(g) the opportunities for the persons and organizations specified under paragraph (f), and for the proponent, to provide comments during the assessment of the reviewable project;

(h) the time limits for steps in the assessment procedure that are additional to the time limits prescribed for section 24 or under section 50 (2) (a).

(3) The assessment of the potential effects of a reviewable project must take into account and reflect government policy identified for the executive director, during the course of the assessment, by a government agency or organization responsible for the identified policy area.

**Decision on application for environmental assessment certificate**

**17** (1) On completion of an assessment of a reviewable project in accordance with the procedures and methods determined or varied

(a) under section 11 or 13 by the executive director,

(b) under section 14 or 15 by the minister, or

(c) under section 14 or 15 by the executive director, a commission member, hearing panel member or another person

the executive director, commission, hearing panel or other person, as the case may be, must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).

(2) A referral under subsection (1) must be accompanied by

(a) an assessment report prepared by the executive director, commission, hearing panel or other person, as the case may be,

(b) the recommendations, if any, of the executive director, commission, hearing panel or other person, and

(c) reasons for the recommendations, if any, of the executive director, commission, hearing panel or other person.

(3) On receipt of a referral under subsection (1), the ministers

(a) must consider the assessment report and any recommendations accompanying the assessment report,

(b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and

(c) must

(i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,

(ii) refuse to issue the certificate to the proponent, or

(iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.

(4) The executive director must deliver to the proponent the decision and the environmental assessment certificate, if granted.

**Agreements**

**27** (1) The minister may enter into an agreement regarding any aspect of environmental assessment with another jurisdiction including but not limited to

(a) Canada,

(b) one or more provinces or territories,

(c) one or more municipalities or regional districts in British Columbia, or

(d) one or more neighbouring jurisdictions outside Canada.

(2) The minister may enter into an agreement regarding any aspect of environmental assessment with any agency, board, commission or other organization, of British Columbia or of another jurisdiction.

(3) An agreement under this section may

(a) provide for arrangements with any other party or jurisdiction regarding research and development,

(b) provide for special assessment procedures and methods with any other party or jurisdiction, arising from innovation, technological developments or changing approaches to environmental assessment,

(c) establish notification and information-sharing arrangements with any other party or jurisdiction,

(d) provide for a means to accept another party's or jurisdiction's assessment as being equivalent to an assessment required under this Act,

(e) determine which aspects of a proposal or project are governed by the laws of each jurisdiction, and

(f) establish procedures with another party or jurisdiction to cooperatively complete an environmental assessment of a project through

(i) acknowledging, respecting and delineating the roles of each jurisdiction in the process,

(ii) providing for efficiency measures in environmental assessment to avoid overlap and duplication and to ensure timely results,

(iii) providing for cost recovery or cost-sharing measures,

(iv) establishing a means of resolving disputes regarding environmental assessment, and

(v) adopting any other measure considered necessary by each party or jurisdiction.

**Variations to accommodate agreements with other jurisdictions**

**28** Effective on the date of an agreement under section 27, and for as long as the agreement remains in effect, both this Act and the

regulations are by this section deemed to be varied, in their application to or in respect of a reviewable project that is the subject of the agreement, to the extent necessary to accommodate that agreement.

# Canadian Environmental Assessment Act, 2012

## S.C. 2012, c. 19, s. 52

Current to August 27, 2018

Last amended on June 22, 2017

An Act respecting the environmental assessment of certain activities and the prevention of significant adverse environmental effects

[Enacted by section 52 of chapter 19 of the Statutes of Canada, 2012, in force July 6, 2012, see SI/2012-56.]

**Recommendations in environmental assessment report**

**29 (1)** If the carrying out of a designated project requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, the responsible authority with respect to the designated project must ensure that the report concerning the environmental assessment of the designated project sets out

**(a)** its recommendation with respect to the decision that may be made under paragraph 31(1)(a) in relation to the designated project, taking into account the implementation of any mitigation measures that it set out in the report; and

**(b)** its recommendation with respect to the follow-up program that is to be implemented in respect of the designated project.

**Submission of report to Minister**

**(2)** The responsible authority submits its report to the Minister within the meaning of section 2 of the *National Energy Board Act* at the same time as it submits the report referred to in subsection 52(1) of that Act.

**Report is final and conclusive**

**(3)** Subject to sections 30 and 31, the report with respect to the environmental assessment is final and conclusive.

**Governor in Council's decision**

**31 (1)** After the responsible authority with respect to a designated project has submitted its report with respect to the environmental assessment or its reconsideration report under

section 29 or 30, the Governor in Council may, by order made under subsection 54(1) of the *National Energy Board Act*

**(a)** decide, taking into account the implementation of any mitigation measures specified in the report with respect to the environmental assessment or in the reconsideration report, if there is one, that the designated project

**(i)** is not likely to cause significant adverse environmental effects,

**(ii)** is likely to cause significant adverse environmental effects that can be justified in the circumstances, or

**(iii)** is likely to cause significant adverse environmental effects that cannot be justified in the circumstances; and

**(b)** direct the responsible authority to issue a decision statement to the proponent of the designated project that

**(i)** informs the proponent of the decision made under paragraph (a) with respect to the designated project and,

**(ii)** if the decision is referred to in subparagraph (a)(i) or (ii), sets out conditions — which are the implementation of the mitigation measures and the follow-up program set out in the report with respect to the environmental assessment or the reconsideration report, if there is one — that must be complied with by the proponent in relation to the designated project.

**Certain conditions subject to exercise of power or performance of duty or function**

**(2)** The conditions that are included in the decision statement regarding the environmental effects referred to in subsection 5(2), that are directly linked or necessarily incidental to the exercise of a power or performance of a duty or function by a federal authority and that would permit the designated project to be carried out, in whole or in part, take effect only if the federal authority exercises the power or performs the duty or function.

**Responsible authority's obligation**

**(3)** The responsible authority must issue to the proponent of the designated project the decision statement that is required in accordance with the order relating to the designated project within seven days after the day on which that order is made.

**Posting of decision statement on Internet site**

**(4)** The responsible authority must ensure that the decision statement is posted on the Internet site.

**Decision statement considered part of certificate**

**(5)** The decision statement issued in relation to the designated project under subsection (3) is considered to be a part of the certificate issued in accordance with the order made under section 54 of the *National Energy Board Act* in relation to the designated project.

# National Energy Board Act

**R.S.C., 1985, c. N-7**

Current to August 27, 2018

Last amended on March 29, 2018

An Act to establish a National Energy Board

## Certificates

**Report**

**52 (1)** If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister, and make public, a report setting out

**(a)** its recommendation as to whether or not the certificate should be issued for all or any portion of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation; and

**(b)** regardless of the recommendation that the Board makes, all the terms and conditions that it considers necessary or desirable in the public interest to which the certificate will be subject if the Governor in Council were to direct the Board to issue the certificate, including terms or conditions relating to when the certificate or portions or provisions of it are to come into force.

**Factors to consider**

**(2)** In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:

**(a)** the availability of oil, gas or any other commodity to the pipeline;

**(b)** the existence of markets, actual or potential;

**(c)** the economic feasibility of the pipeline;

**(d)** the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and

**(e)** any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.

**Environmental assessment**

**(3)** If the application relates to a designated project within the meaning of section 2 of the *Canadian Environmental Assessment Act, 2012*, the report must also set out the Board's environmental assessment prepared under that Act in respect of that project.

**Time limit**

**(4)** The report must be submitted to the Minister within the time limit specified by the Chairperson. The specified time limit must be no longer than 15 months after the day on which the applicant has, in the Board's opinion, provided a complete application. The Board shall make the time limit public.

**Excluded period**

**(5)** If the Board requires the applicant to provide information or undertake a study with respect to the pipeline and the Board, with the Chairperson's approval, states publicly that this subsection applies, the period that is taken by the applicant to comply with the requirement is not included in the calculation of the time limit.

**Public notice of excluded period**

**(6)** The Board shall make public the dates of the beginning and ending of the period referred to in subsection (5) as soon as each of them is known.

**Extension**

**(7)** The Minister may, by order, extend the time limit by a maximum of three months. The Governor in Council may, on the recommendation of the Minister, by order, further extend the time limit by any additional period or periods of time.

**Minister's directives**

**(8)** To ensure that the report is prepared and submitted in a timely manner, the Minister may, by order, issue a directive to the Chairperson that requires the Chairperson to

**(a)** specify under subsection (4) a time limit that is the same as the one specified by the Minister in the order;

**(b)** issue a directive under subsection 6(2.1), or take any measure under subsection 6(2.2), that is set out in the order; or

**(c)** issue a directive under subsection 6(2.1) that addresses a matter set out in the order.

**Order binding**

**(9)** Orders made under subsection (7) are binding on the Board and those made under subsection (8) are binding on the Chairperson.

**Publication**

**(10)** A copy of each order made under subsection (8) must be published in the *Canada Gazette* within 15 days after it is made.

**Report is final and conclusive**

**(11)** Subject to sections 53 and 54, the Board's report is final and conclusive.

R.S., 1985, c. N-7, s. 52;
1990, c. 7, s. 18;
1996, c. 10, s. 238;
2012, c. 19, s. 83.

**Order to reconsider**

**53 (1)** After the Board has submitted its report under section 52, the Governor in Council may, by order, refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration.

**Factors and time limit**

**(2)** The order may direct the Board to conduct the reconsideration taking into account any factor specified in the order and it may specify a time limit within which the Board shall complete its reconsideration.

**Order binding**

**(3)** The order is binding on the Board.

**Publication**

**(4)** A copy of the order must be published in the *Canada Gazette* within 15 days after it is made.

**Obligation of Board**

**(5)** The Board shall, before the expiry of the time limit specified in the order, if one was specified, reconsider its recommendation or any term or condition referred back to it, as the case may be, and prepare and submit to the Minister a report on its reconsideration.

**Contents of report**

**(6)** In the reconsideration report, the Board shall

**(a)** if its recommendation was referred back, either confirm the recommendation or set out a different recommendation; and

**(b)** if a term or condition was referred back, confirm the term or condition, state that it no longer supports it or replace it with another one.

**Terms and conditions**

**(7)** Regardless of what the Board sets out in the reconsideration report, the Board shall also set out in the report all the terms and conditions, that it considers necessary or desirable in the public interest, to which the certificate would be subject if the Governor in Council were to direct the Board to issue the certificate.

**Report is final and conclusive**

**(8)** Subject to section 54, the Board's reconsideration report is final and conclusive.

**Reconsideration of report under this section**

**(9)** After the Board has submitted its report under subsection (5), the Governor in Council may, by order, refer the Board's recommendation, or any of the terms or conditions, set out in the report, back to the Board for reconsideration. If it does so, subsections (2) to (8) apply.

**Order regarding issuance or non-issuance**

**54 (1)** After the Board has submitted its report under section 52 or 53, the Governor in Council may, by order,

**(a)** direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report; or

**(b)** direct the Board to dismiss the application for a certificate.

**Reasons**

**(2)** The order must set out the reasons for making the order.

**Time limit**

**(3)** The order must be made within three months after the Board's report under section 52 is submitted to the Minister. The Governor in Council may, on the recommendation of the Minister, by order, extend that time limit by any additional period or periods of time. If the Governor in Council makes an order under subsection 53(1) or (9), the period that is taken by the Board to complete its reconsideration and to report to the Minister is not to be included in the calculation of the time limit.

**Order is final and conclusive**

**(4)** Every order made under subsection (1) or (3) is final and conclusive and is binding on the Board.

**Obligation of Board**

**(5)** The Board shall comply with the order made under subsection (1) within seven days after the day on which it is made.

**Publication**

**(6)** A copy of the order made under subsection (1) must be published in the *Canada Gazette* within 15 days after it is made.

R.S., 1985, c. N-7, s. 54;
1990, c. 7, s. 19;

## LIST OF AUTHORITIES

| | |
|---|---|
| 1982, c. 11, s. 35 | **114** |
| *National Energy Board Act*, R.S.C., 1985, c. N-7 ss. 52-54 | **19** |