

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 Siyam, 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)

APPELLANTS' REPLY

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

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APPELLANTS' REPLY

A. CONTEXT

1. This reply addresses only discrete points that require further response or explanation, beyond that which is set out in the appellants' factum.

B. SCOPE OF THE RECONSIDERATION

2. Trans Mountain states at paragraph 57 of its factum that the scope of the reconsideration is limited to distinct *Canadian Environmental Assessment Act*, S.C. 2012, c. 19, s. 52 and *Species at Risk Act*, S.C. 2002, c. 29 requirements "namely, alternate means of carrying out Project-related marine shipping and measures that are technically and economically feasible and would mitigate the already identified, significant adverse environmental effects of Project-related marine shipping." This is an overly narrow description of what the Federal Court of Appeal ("FCA") held be remanded back to the National Energy Board ("NEB") for reconsideration. The FCA said:

Specifically, the Board ought to reconsider on a principled basis whether Project-related shipping is incidental to the Project, the application of section 79 of the *Species at Risk Act* to Project-related shipping, the Board's environmental assessment of the Project in the light of the Project's definition, the Board's recommendation under subsection 29(1) of the *Canadian Environmental Assessment Act*, 2012 and any other matter the Governor in Council should consider appropriate.¹

3. While the *Canadian Environmental Assessment Act* and the *Species at Risk Act* are indisputably part of what has been referred back to the NEB, the reconsideration is not confined to those points and raises broader issues, including the Board's environmental assessment of the Project in light of the inclusion of Project-related shipping in the Project's definition and the Board's recommendation on the significance of the environmental effects of the Project. These are critical matters relevant to the environmental effects of the Project in British Columbia that were required to be considered by the Ministers.

¹ [Tseil-Waututh Nation v. Attorney General of Canada, 2018 FCA 153](#), para. 770

4. The Province asserts at paragraph 46 of its factum that the “NEB’s scoping errors did not constrain the exercise of the Ministers’ statutory power of decision under the EAA.” This submission also ignores the breadth of the FCA’s findings.

5. The FCA held that the recommendation in the NEB report “that the Project was not likely to cause significant adverse environmental effects” was “flawed” noting that:

The unjustified failure to assess the effects of marine shipping under the *Canadian Environmental Assessment Act, 2012* and the resulting flawed conclusion about the effects of the Project was so critical that the Governor in Council could not functionally make the kind of assessment of the Project’s environmental effects and the public interest that the legislation requires.²

6. The Ministers relied on this “flawed” report and recommendation in making their decision on the Project, as they were required to do by s. 17(3)(a) of the *Environmental Assessment Act*, S.B.C. 2002, c. 43 (the “Act”). The Summary Assessment Report, which “summarizes some of the findings of the NEB Report in relation to some of the key issues of provincial interest”, and the Recommendations of the Executive Director, expressly reference the report and recommendation of the NEB.³ None of the additional information referenced at paragraph 42 of the Province’s factum remedied the flaws in the NEB report and recommendation as found by the FCA.

7. Thus, the NEB report could not provide the Ministers with the information that they required to make the decision under s. 17 of the Act, including as to what conditions to attach to the Certificate, and to discharge the duty to consult Squamish.

C. BRITISH COLUMBIA’S JURISDICTION OVER THE MARINE ENVIRONMENT

8. Trans Mountain makes extensive submissions on the “limits to the Province’s environmental jurisdiction”.⁴ Trans Mountain asserts at paragraph 51 of its factum that the Reasons for the Ministers’ Decision state that “marine spills are the responsibility of the federal government”. This is not correct. The reasons state that “[m]arine spill response remains a responsibility of the federal government”, but then go on to detail

² *Tsleil-Waututh Nation*, para. 470 (emphasis added)

³ Affidavit #1 of Ian Campbell made April 20, 2017 (“Campbell Affidavit”), Exs. CCCC, DDDD, (Joint Appeal Book (“AB”), Vol. 6 pp. 2077-2080, 2081-2121)

⁴ Trans Mountain’s Factum, paras. 68-75, 82

the Province's involvement in marine spill response, including through the imposition of project conditions with regard to the emergency response plans (Condition 32), coastal geographic response (Condition 34) and the fate and behavior of diluted bitumen in a marine environment (Condition 35).⁵

9. The Ministers further acknowledge that "Project and related shipping activities have the potential to adversely impact areas of provincial interest and jurisdiction, including impacts to vegetation, wildlife, aquatic species, parks and protected areas, and greenhouse gas emissions"⁶ (emphasis added).

10. Given that the Province has asserted some level of jurisdiction over marine spills and the consequent environmental effects, and that assertion has gone unchallenged, there is no basis to question in this proceeding whether the NEB's reconsideration of Project-related shipping is relevant to the Ministers' decision. There is further no basis to question whether it would be outside the scope of the Province's jurisdiction to require the provision of information on these matters to assess impacts on Squamish's rights and title as part of fulfilling the Province's consultation obligations under s. 35 of the *Constitution Act, 1982*.

11. Indeed, the Province has brought a reference question before this Court where the Province itself asserts jurisdiction to enact amendments to provisions in the *Environmental Management Act*, R.S.B.C. 2003, c. 53 to regulate hazardous substances, including heavy oil, in order to protect British Columbia's terrestrial, freshwater, marine and atmospheric environment.⁷

D. TRANS MOUNTAIN'S SUPPLEMENTARY FILINGS

12. Trans Mountain asserts at paragraph 31 of its factum that its supplementary filings, submitted to the Environmental Assessment Office in August 2016, "resolved or addressed the issues and concerns raised by Indigenous groups (including Squamish), the Province and BC municipalities." If those filings addressed the concerns outlined by

⁵ Campbell Affidavit, Ex. FFFF, pp. 1403-1404 (AB, Vol. 6 pp. 2153-2154); see [Reference re: Ownership of the bed of the Strait of Georgia and related area, \[1984\] 1 S.C.R. 388](#)

⁶ Campbell Affidavit, Ex. FFFF, p. 1400 (AB, Vol. 6 p. 2150)

⁷ Court of Appeal File No. CA45253

the Province in its motion for production of Trans Mountain's Emergency Response Plans or the shortcomings identified in its closing argument with respect to Trans Mountain's ability to respond to a spill, the Province never advised Squamish of that or discussed it with them, even after Squamish had raised the issue of marine spill response with the Province throughout the fall of 2016. The supplemental filings are therefore not an answer to the Province's failure to discuss its change of position with Squamish, even if it could be said that they satisfied the Province's concerns.

E. RESPONSIVENESS OF THE SQUAMISH NATION

13. Trans Mountain asserts at paragraph 42(c) of its factum (without any specific references) that Squamish was not responsive to the Province's correspondence during the consultation process. This is incorrect. Squamish fully and actively participated in all the consultation forums relied upon by the Crown, including as full participants in the NEB process and in Phase III consultation.⁸ Squamish responded to the correspondence of the Province that requested or required a response.

14. Trans Mountain further asserts at paragraph 42(g) of its factum that Squamish "routinely rebuffed" opportunities to consult with Trans Mountain. The duty to consult on the Project is the responsibility of the Crown, and when Squamish fully participated in the processes set out by the Crown, it cannot be faulted for not expending further time and resources to engage bilaterally with Trans Mountain when that process does not constitute Crown consultation.

F. SQUAMISH ARE NOT "VEHEMENTLY OPPOSED" TO THE PROJECT

15. Trans Mountain states in its factum that Squamish are "vehemently opposed to the Project."⁹ This is a mischaracterization of the Squamish position. Squamish's position was that the lack of information on the key areas identified by Squamish prevented Squamish from assessing impacts on their rights and title and, in the absence of that information and proper assessment, Squamish could not support the approval of the Project. This does not constitute "vehement" opposition to the Project.

⁸ Reasons for Judgment, paras. 79-80, 86-113 (Appeal Record, pp. 92-93, 94-106)

⁹ Trans Mountain's Factum, opening statement

16. The Squamish position was stated in its September 19, 2016 letter to the federal and provincial Crown consultation representatives:

Once there has been a fulsome assessment, based on full information, of the impacts to Squamish rights and title from the Project, then Squamish will be in the position to discuss appropriate accommodation ... Until full information has been provided on the Project to Squamish, and the duty to consult and accommodate discharged, the Project must not be approved.¹⁰

17. The minutes of the October 18, 2016 meeting, as prepared by Canada, also reflect the Squamish position, with the following being attributed to Chief Bill Williams:

It is important to note that Squamish has not yet made a decision on the project, as they require information necessary to undergo an adequate project assessment.¹¹

18. Thus, Squamish's position that the Project should not go ahead at that point was based on the lack of information and analysis to date. It was not outright opposition to the Project in any circumstances.

19. Trans Mountain relies on the report of the Ministerial Panel to support its assertion.¹² The Panel's report states that "First Nations such as the Squamish" are "firmly opposed to the project". However, Squamish did not participate in the Ministerial Panel process and there is no explanation for why or how the Ministerial Panel reached this conclusion. Insofar as the Ministerial Panel was suggesting that Squamish is opposed to the Project in any circumstances, its statement is plainly wrong in the face of the evidence from Squamish correspondence and representatives like Chief Williams.

All of which is respectfully submitted.

Dated at the City of North Vancouver, Province of British Columbia, this 16th day of November, 2018.



Fid: F. MATTHEW KIRCHNER

¹⁰ Campbell Affidavit, Ex. SSS, p. 1257 (emphasis added) (AB, Vol. 5 p. 1712)

¹¹ Campbell Affidavit, Ex. UUU, pp. 1267-1268 (AB, Vol. 5 pp. 1722-1723)

¹² Trans Mountain's Factum, para. 28; Campbell Affidavit, Ex. GGG, p. 969 (AB, Vol. 4 p. 1433)

LIST OF AUTHORITIES

Authorities	Para.
<i>Reference re: Ownership of the bed of the Strait of Georgia and related area</i>, [1984] 1 S.C.R. 388	8
<i>Tsleil-Waututh Nation v. Canada (Attorney General)</i>, 2018 FCA 153	2, 5
Statutes	
<i>Canadian Environmental Assessment Act</i> , S.C. 2012, c. 19, s. 52	2, 3
<i>Constitution Act, 1982, being Schedule B to the Canada Act 1982, (U.K.) 1982, c. 11, s. 35</i>	10
<i>Environmental Assessment Act</i> , S.B.C. 2002, c. 43	6, 7
<i>Environmental Management Act</i> , R.S.B.C. 2003, c. 53	11
<i>Species at Risk Act</i> , S.C. 2002, c. 29	2, 3