Court of Appeal File No. CA45372
Vancouver Registry

COURT OF APPEAL

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

BETWEEN:

THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND) and XÀLEK/SEKYÚ SIÝ AM, 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 and TRANS MOUNTAIN PIPELINE ULC

Respondents
(Respondents)

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CHRONOLOGY

Date	Event
June 21, 2010	B.C. Environmental Assessment Office and National Energy Board enter into Equivalency Agreement for environmental assessment projects that trigger both a provincial environmental assessment and National Energy Board review.
May 23, 2013	Trans Mountain filed its Project Description for the Trans Mountain Expansion Project with the National Energy Board.
August 13, 2013	The National Energy Board wrote to 131 Aboriginal groups to inform them of the Project and the potential for establishing a hearing process.
December 16, 2013	Trans Mountain submitted its application for a Certificate of Public Convenience and Necessity to the National Energy Board for the Project.
April 2, 2014	The National Energy Board determined the project application to be complete, released the Hearing Order, announced the hearing participants, and released the Factors and Scope of the Factors for the Environmental Assessment.
January 13, 2016	The BC Supreme Court held in *Coastal First Nations v. British Columbia (Minister of Environment)*, 2016 BCSC 34 that the Ministers were required to decide whether to issue a provincial Environmental Assessment Certificate for NEB regulated projects and that the Equivalency Agreement was invalid to the extent that it purported to remove the need for such projects to obtain an Environmental Assessment Certificate, 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	Environmental Assessment Office wrote to Squamish Nation to indicate that as a result of the decision in *Coastal First Nations* an EAC would be required for the Project and that the Province would consult with potentially affected Aboriginal groups.
April 8, 2016	Environmental Assessment Office issued the section 10(1)(c) order providing that the Project requires an EAC to proceed and the proponent may not proceed with the Project without an environmental assessment.
April 15, 2016	Trans Mountain advised Environmental Assessment Office that it was ready to initiate the provincial environmental assessment process.
May 19, 2016	National Energy Board found that the Project is in Canada's public interest and recommended that Governor in Council approve the Project, subject to 157 conditions.
June 16,	Squamish filed an application for judicial review of the National Energy

2016	Board's report and recommendation in the Federal Court of Appeal.
June 17, 2016	Environmental Assessment Office, pursuant to the Environmental Assessment Act, issued the section 11 order for the Project setting out procedures leading to the referral of the Project to the Ministers for a pursuant to s. 17(2) of the *Act.*
November 29, 2016	The Governor in Council directed the National Energy Board to issue a Certificate of Public Convenience and Necessity for the Project.
December 8, 2016	Environmental Assessment Office Executive Director referred Project package to the Ministers of Environment and Natural Gas Development.
January 10, 2017	Ministers issued an EAC for the Project subject to 37 binding conditions.
March 1, 2017	Squamish filed an application in Federal Court for judicial review of the GIC's decision on the Project.
August 30, 2018	The Federal Court of Appeal quashed the GIC's Order in Council rendering the CPCN approving the construction and operation of the Project a nullity.

OPENING STATEMENT

This Court is put in the "unusual, if not awkward, position" of having to consider the discharge of the provincial Crown's duty to consult on the Environmental Assessment Certificate issued by the Ministers for the Trans Mountain Expansion Project in the face of the Federal Court of Appeal decision setting aside the federal approval of the Project due to scoping errors in the National Energy Board Report and a breach of the federal consultation duty. The Attorney General appears to speak to two issues: (1) the impact, if any, on the EAC of the scoping errors given that the Ministers, pursuant to a federal/provincial Equivalency Agreement, had relied upon the NEB Report in their considerations; and (2) the impact, if any, on the provincial Certificate of the failure of the federal Crown to meet is consultation obligations.

In respect to the first issue, this Court is not bound to allow the appeal and set aside the EAC on the basis of the scoping errors in the National Energy Board Report. Absent administrative or constitutional limitations, section 37 of the *Environmental Assessment Act* provides a complete code with respect to the circumstances under which an Environmental Assessment Certificate can be cancelled or suspended; the scoping errors did not fall within this section. In addition, the scoping errors in the National Energy Board Report led to the failure of *federal* decision makers to properly discharge their obligations under *federal* statutes with respect to areas of *federal* responsibilities: the *Canadian Environmental Assessment Act, 2012* and the *Species at Risk Act*. Therefore, the deficiencies found by the Federal Court of Appeal do not automatically make the NEB Report insufficient for the purposes of reliance by the Ministers in their decision to issue an Environmental Assessment Certificate for the Project.

In respect of the second issue, the provincial consultation, despite being part of the joint consultation process, was different in form and content from Canada's, such that the decision of the chambers judge that the Province fulfilled its duty to consult and satisfied the honour of the Crown should not be disturbed.

PART 1 - STATEMENT OF FACTS

1. The respondent does not object to the facts as set out by the appellants save as amended by the facts set out below.

2. In the Court below, Grauer J. noted that it was not for him to decide whether the federal Crown fulfilled its duty in relation to the National Energy Board ("NEB") hearings and the federal cabinet decision to approve the Project.[1]

3. Nonetheless, Grauer J. found that both the NEB and federal cabinet processes played significant roles in the provincial "… environmental assessment process, with the NEB review constituting the required assessment under the *EAA*[2] [*Environmental Assessment Act*] pursuant to the Equivalency Agreement." [3]

4. The Government of Canada relied upon the NEB review process "to the extent possible" to meet the federal duty to consult, and the Province followed a similar approach, coordinating consultation with the federal Crown and making use of the federal consultation record that preceded the Province's regulatory involvement in the environmental assessment process.[4]

5. The Province's consultation process dovetailed with the federal government's Phase III process.[5]

6. On April 1, 2016 the Environmental Assessment Office's ("EAO") Executive Project Director, Mr. Braun, advised the appellants that, given the decision in *Coastal*

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[1] Reasons for Judgment, *Squamish Nation v British Columbia (Environment)*, 2018 BCSC 844 at para 71 ("RFJ"); Appeal Record ("AR"), Tab 5, pp. 89-90; Respondent Attorney General of British Columbia Book of Authorities ("AG BoA"), Tab 4.
[2] *Environmental Assessment Act*, SBC 2002, c. 43.
[3] RFJ at para. 72, AR Tab 5, p. 90; AG BoA, Tab 4.
[4] RFJ at para. 73, AR Tab 5, p. 90; AG BoA, Tab 4.
[5] RFJ at para. 86, AR Tab 5, p. 94; AG BoA, Tab 4.

First Nations,[6] the Trans Mountain Expansion Project (the "Project") would require an Environmental Assessment Certificate ("EAC") (s. 10 Order).[7]

7. On May 9, 2016, Mr. Braun wrote to the Squamish Nation, providing a draft s.11 order under the *EAA* (defining the scope of the required assessment of the reviewable project, and the procedures and methods for conducting the assessment) and advising the appellants that the EAO would "coordinate Aboriginal consultation activities" with other provincial agencies and Canada. The Squamish Nation was further advised that the EAO would still be communicating directly with Aboriginal groups in the future to provide information "on the specific next steps in the provincial consultative process, including regarding any coordinated consultation activities with the federal government".[8]

8. Mr. Braun went on to outline consultation opportunities for the appellants, as well as what procedural aspects of Aboriginal consultation would be delegated to Trans Mountain.[9]

9. In a letter dated May 24, 2016, Squamish Nation's Chief Williams raised an issue central to this case – the Province's reliance on NEB Report, which the appellants felt was deficient.[10]

10. Mr. Braun responded to the May 24th letter noting that the *Coastal First Nations* decision upheld the validity of the Equivalency Agreement, save for the provision removing the EAC requirement. Grauer J. noted that Mr. Braun did not answer the two questions that were raised: how could the Province rely on the NEB Report when it had previously taken the position that the NEB process was inadequate; and why did the

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[6] *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34 (*Coastal First Nations*), AG BoA, Tab 2.
[7] RFJ at para. 87, AR Tab 5, p. 94; AG BoA, Tab 4.
[8] RFJ at para. 88, AR Tab 5, p. 95; AG BoA, Tab 4.
[9] RJF at para. 89, AR Tab 5, p. 95; AG BoA, Tab 4.
[10] RFJ at para. 90, AR Tab 5, p. 96; AG BoA, Tab 4.

Province not consult with Squamish about not terminating the Equivalency Agreement?[11]

11. On June 17, 2016, after considering feedback on the draft s. 11 order, Mr. Braun issued the order which set out the procedures for the environmental assessment process for the Project. It provided that the NEB Report would be equivalent to the ss. 27 and 28 assessment and to the assessment report required under 17 (2) of the EAA.[12]

12. Schedule B to the s. 11 order listed the Aboriginal groups to be consulted at the deeper end of spectrum. This included the appellants, and listed consultation opportunities which included: notification; opportunities to discuss and comment on issues rasied at NEB panel review or in further consultations; opportunities to review and comment on supplemental materials and to meet to discuss both the materials and potential Project impacts; and an opportunity to make submissions to the EAO which would be included in the materials provided to the Ministers.[13]

13. On June 23, 2016, representatives from the Province met with the appellants and another Aboriginal group to discuss their concerns with the EAO's reliance on the NEB assessment. In a follow-up letter dated August 24, 2016, the two First Nations reiterated their concerns that the process was inadequate for proper assessment of the Project's impacts on their interests.[14]

14. In July 2016, Trans Mountain filed its Aboriginal Engagement Report, indicating that the appellants had advised Trans Mountain that they only wanted consultation with the Crown.[15]

15. Trans Mountain went on to address issues raised by the appellants in the Traditional Land Use report submitted to NEB, including salmon harvesting, protection

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[11] RFJ at para. 91, AR Tab 5, p. 96; AG BoA, Tab 4.
[12] RFJ at para. 92, AR Tab 5, p. 96; AG BoA, Tab 4.
[13] RFJ at para. 93, AR Tab 5, p. 97; AG BoA, Tab 4.
[14] RFJ at para. 94, AR Tab 5, p. 98; AG BoA, Tab 4.
[15] RFJ at para. 95, AR Tab 5, p. 98; AG BoA, Tab 4.

of culturally important and surface waters, protection of burial sites, loss of access due to increased shipping, effects of dredging on marine habitat and effects on marine mammals, especially killer whales. The appellants were also concerned with threats to their marine-based economic interests and the lack of an adequate spill response plan.[16]

16. On August 17, 2016, the federal and provincial Crowns (through the federal Major Projects Management Office and the EAO) provided the appellants with an early draft of the Joint Federal/Provincial Consultation and Accommodation Report ("CCAR") released in November 2016, for review, asking for comments to "ensure that the report reflected the view of the Squamish community".[17]

17. The draft CCAR included a draft Appendix C.4 specific to the Squamish Nation, providing background strength of claim information, a summary of the appellants' involvement in the regulatory review and consultation for the Project, key interests and concerns, potential impacts as raised by the appellants and applicable mitigation and accommodation measures identified in the review process.[18]

18. The preliminary strength of claim assessment ranged from weak near the terminal in Burnaby to moderate to moderate-to weak in the marine shipping corridor.[19]

19. On September 19, 2016, the appellants responded to the August 17th letter, claiming that the draft CCAR "repackages information that Squamish has already determined is inadequate", and outlined their outstanding concerns regarding information gaps and need for further studies.[20]

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[16] RFJ at para. 96, AR Tab 5, p. 98; AG BoA, Tab 4.
[17] RFJ at para. 98, AR Tab 5, p. 99; AG BoA, Tab 4.
[18] RFJ at para. 99, AR Tab 5, p. 99; AG BoA, Tab 4.
[19] RFJ at para. 100, AR Tab 5, p. 100; AG BoA, Tab 4.
[20] RFJ at para. 101, AR Tab 5, p. 100; AG BoA, Tab 4.

20. The Province and Canada responded to this letter on October 6, 2016, in a joint letter acknowledging the appellants' concerns and requests but stating the Crown view that substantive concerns had been addressed in the review process.[21]

21. The final meeting between the parties took place on October 18, 2016. The meeting record was reviewed at length by the Court below as an indication of the substantive discussion that occurred.[22]

22. On November 3, 2016, the Province and Canada sent the revised CCAR to the appellants along with a package of additional documentation, including a substantive review of issues and concerns raised by the appellants regarding the process and the impact of the Project on their rights. The CCAR stated that "both governments have relied on the NEB Review to assess and seek to minimize, to the degree possible, the potential adverse impacts of the Project on Aboriginal rights, title and interests, thereby supporting the Crown's broader duty to consult obligations".[23]

23. Chief Campbell responded by letter dated November 14, 2016 and reiterated the appellant's concerns that there was no provincial review independent of the "deficient" NEB process.[24]

24. On November 28, 2016, British Columbia and Canada responded to the November 14th letter, advising Chief Campbell that his comments had been added to the CCAR and shared with federal ministers, and would be shared with the provincial Ministers. The federal and provincial Crowns advised that a decision on the EAC was expected to follow shortly after the federal decision.[25]

25. On December 8, 2016, after Governor in Council ("GiC") approval for the Project, Mr. Braun, separately, wrote to the appellants to respond to Chief Campbell's comments in the November 14th letter. Mr. Braun referenced the provincial process and

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[21] RFJ at paras. 102-103, AR Tab 5, p. 100-101; AG BoA, Tab 4.
[22] RFJ at para. 104, AR Tab 5, p. 101; AG BoA, Tab 4.
[23] RFJ at paras. 107-108, AR Tab 5, p. 103; AG BoA, Tab 4.
[24] RFJ at paras. 109-110, AR Tab 5, p. 104; AG BoA, Tab 4.
[25] RFJ at para. 111, AR Tab 5, p. 105; AG BoA, Tab 4.

referral materials, and addressed the draft conditions proposed in the EAC regarding oil spill containment and recovery, emergency response plans, and research on the fate and behaviour of diluted bitumen.[26]

26. On January 10, 2017, the Ministers issued an EAC to Trans Mountain, subject to 37 conditions. The Court below appended to the decision the full text of the Reasons and Table of Conditions and excerpted in the body of the decision extensive segments of the Ministers' reasons dealing with: the nature and scope of the decision; the Ministers' considerations based on the EAO's Assessment and the Recommendations of the Executive Director; Key Considerations expressing the Ministers' concerns with spill impacts, as well as Project impacts on vegetation, wildlife and protected areas; terrestrial and marine spills; Aboriginal consultation; and the Ministers' views that the Crown's duty to consult and accommodate had been met. Ultimately the Ministers concluded, after listing all the materials considered – the NEB Report, CCAR, EAO's summary assessment report, proposed Project design, recommendations of the Executive Director, and the 37 proposed conditions and having regard to the Crown's constitutional duty to consult - that they would issue the EAC.[27]

27. The Court below found that the appellants accepted that "it was not open to the Ministers to refuse to issue an EAC".[28]

PART 2 - ISSUES ON APPEAL

28. The appellants raise a number of issues in this appeal. They submit that the decision of the Federal Court of Appeal[29] ("FCA"), in declaring the NEB Report inadequate for federal purposes and nullifying federal approval of the Project, means that the NEB Report is also insufficient to support the provincial Ministers' decision to issue an EAC. They say this is so as the NEB Report served as the provincial environmental assessment report for the purposes of the provincial EAC. The Attorney

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[26] RFJ at para. 112, AR Tab 5, p. 105; AG BoA, Tab 4.
[27] RFJ at paras. 114-121 AR Tab 5, p. 106-112; AG BoA, Tab 4.
[28] RFJ at para. 122, AR Tab 5, p. 112; AG BoA, Tab 4.
[29] *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 ("FCA Decision"), AG BoA Tab 5.

General submits that the Ministers turned their minds to the aspects of environmental protection that they understood to be within provincial jurisdiction and imposed conditions in the EAC in relation to these matters within those areas of provincial competence. Consequently, the NEB's scoping error, which led to the failure of the GiC to properly discharge its duties under relevant federal legislation, namely the *Canadian Environmental Assessment Act, 2012* [30] and the *Species at Risk Act* [31] did not constrain the exercise of the provincial statutory power of decision under the provincial *EAA*.

29. The appellants argue that the chambers judge erred in finding that the Province fulfilled its duty to consult by relying on the NEB Report and 'piggy-backing' on the deficient federal consultation process. The Attorney General submits that the provincial environmental assessment process was much more robust than the appellants suggest and, as found by the Court below, there were substantial differences between federal and provincial participation in the joint consultation process.

30. The appellants also argue that the chambers judge erred in not finding that the Province, in issuing the EAC, effectively changed its position from that taken at the NEB hearing, without consultation with the appellants. However, the law is clear that the Province's jurisdiction in regard to federal projects is limited to regulating matters within provincial jurisdiction, without going so far as to refuse to issue an EAC and attempt to block a federal project from proceeding. Rather, refusing to issue an EAC would just ensure there were no provincial conditions attached to the Project. The Ministers' EAC decision was made in the context of this legal reality rather than as an aspect of a reconsideration of any previous decision. Consequently, this ground of appeal is without merit and the EAC was properly found by the Court below to have been issued after adequate consultation in fulfilment of the honour of the Crown.

31. Finally, the appellants assert that the chambers judge fell into error in failing to determine that the provincial decision makers unreasonably constrained themselves by feeling bound to act only within the constitutional boundaries of their authority.

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[30] SC 2012, c. 19.
[31] SC 2002, c. 29.

Alternatively, the appellants argue, if the Ministers were obliged to restrain themselves only to actions within their constitutional capacity, they were obliged to consult with the appellants about that constraint. The Ministers acted within the law as set out in the *Coastal First Nations* decision, which defined their ability to act as within areas of provincial interest. Consequently, the Court below made no error in observing that "the "constitutional reality" is that the attachment of (Project) conditions was the only possible outcome of the provincial Crown's contemplated conduct".[32] No duty to consult arose in such circumstances.

PART 3 - ARGUMENT

A. Scope of Review

32. The appellants, at paragraph 61 state that, "[t]his 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."

33. This Court, in *Prophet River First Nation v. British Columbia (Environment)*[33] ("*Prophet River*"), most recently considered the scope of review. In that case, this Court "focussing on whether the Crown's constitutional duty in that regard [consultation] has been properly discharged…"[34] found that:

> [48] While the notion of an appellate court stepping into the shoes of the reviewing judge has been applied to the extent of suggesting that, in considering the Crown's duty to consult and accommodate, it is necessary to "re-do" the judge's reasonableness analysis to see if the same conclusion is reached (*Canada v. Long Plain First Nation*, 2015 FCA 177 at para. 93), it appears to have been qualified with respect to what are clear findings of fact in *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada),* 2015 FCA 4. There, on an appeal concerning the fulfillment of the Crown's duty of consultation and accommodation the following was stated:

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[32] RFJ at para. 171, AR Tab 5, p. 125; AG BoA, Tab 4.
[33] 2017 BCCA 58, AG BoA Tab 3.
[34] *Prophet River*, at para 47, AG BoA Tab 3.

> [75] *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, 2013 SCC 36 at paragraph 46 stands for the proposition that we are to stand in the shoes and consider whether the Federal Court properly applied the standard of review. I do not believe that this allows us to substitute our factual findings for those made by the Federal Court.
> [76] In my view, as is the case in all areas of appellate review, absent some extricable legal principle, we are to defer to findings that are heavily suffused by the first instance court's appreciation of the evidence, not second-guess them. Only palpable and overriding error can vitiate such findings.

34. This Court also found that the standard of reasonableness applies to whether the process of consultation and accommodation has been met. [35]

35. The appellants argue that the chambers judge nonetheless fell into error in applying the standard of reasonableness rather than correctness, because, they assert, the scope of the Province's obligations was wrongly identified. The Attorney General says that the scope of the Province's consultation obligations is a question of mixed fact and law and subject to the reasonableness standard.

B – The Scoping Errors in the NEB Report Do Not Undermine the Foundation of the EAC

36. The scoping errors identified by the FCA in the NEB Report were not before the Court below, nor did the appellants raise any other scoping issues. Be that as it may, the NEB Report and aspects of the joint federal/provincial consultation process have been found deficient by the FCA, raising the question of whether the NEB Report was sufficient to be relied upon by the Ministers.

37. The authority for the Ministers' decision to issue the EAC is found in the *EAA*. Absent administrative or constitutional limitations, section 37 of the *EAA* provides a complete code with respect to the circumstances under which an EAC can be cancelled or suspended, or where the Ministers could add additional conditions or amend existing

[35] *Prophet River*, at paras. 49, 52, AG BoA, Tab 3.

ones[36]. There is no provision or mechanism within s. 37 whereby a provincial official can rescind or revoke an EAC for a project on the basis that federal approval of the project has been set aside. Had the Legislature intended that ministers have the power to more broadly reconsider an EAC, those powers would have been set out explicitly. Therefore, as a matter of law, the EAC remains valid.

38. As a consequence, barring any grounds for the revocation or reconsideration of the EAC pursuant to the terms of the provincial *EAA*, the EAC will stand unless and until set aside by order of this Court, pursuant to this challenge under the *Judicial Review Procedure Act*.[37] If the EAC were set aside, then the conditions attached to it would also be of no force or effect.

39. In addition, the *Coastal First Nations* decision makes clear that the Project requires both federal and provincial environmental assessment reviews and approvals – that is, two separate, distinct and self-standing approvals. In *Coastal First Nations*, the court reviewed the Equivalency Agreement between the Crowns, which dealt with projects requiring both federal and provincial environmental reviews. The court held the Equivalency Agreement invalid to the extent that it purported to remove the need for such projects to obtain an EAC.[38] Thus, while the EAO and the Ministers could still use an NEB Report as a *provincial* environmental assessment report, they did not have statutory authority to avoid the requirement under s. 17 of the *EAA* that the Province carry out its own EAC review process. The court also held that before making a s. 17 decision, the Province was required to consult with Indigenous groups about potential impacts of the project on areas of *provincial* jurisdiction and how those impacts could be accommodated.[39]

40. Consequently, while the NEB's scoping errors led to a situation in which *federal* decision-makers failed to properly discharge their obligations under f*ederal* statutes addressed to *federal* areas of responsibility, it is necessary to consider what the FCA

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[36] *EAA*, s. 17.
[37] RSBC 1996, c. 241.
[38] *Coastal First Nations* at paras. 180-183 and 214, AG BoA, Tab 2.
[39] *Coastal First Nations* at para. 68, AG BoA, Tab 2.

said with respect to the NEB Report itself to determine the impact, if any, of the FCA Decision on the validity of the EAC.

41. First, the FCA dismissed the six applications for judicial review which challenged the NEB Report, on the basis that the NEB Report itself was not justiciable.[40] Rather, the FCA found a reviewing court "must be satisfied that the decision of the Governor in Council is lawful, reasonable and constitutionally valid. If the decision of the Governor in Council is based upon a materially flawed report, the decision may be set aside on that basis."[41] Therefore, the NEB Report remains valid for use, via the Equivalency Agreement, as the *provincial* environmental assessment report.

42. It is true that pursuant to the Equivalency Agreement, the NEB Report also became "… the provincial EA [Environmental Assessment] technical assessment report" required under s. 17(2) of the EAA. In addition, the EAO provided the following materials to the Ministers to inform their s. 17 decision:[42]

a. Recommendations of the Executive Director, recommending the issuance of an EAC with 37 proposed conditions;[43]
b. EAO Summary Assessment Report, detailing the provincial Crown's consultations with Indigenous groups including the Petitioners and proposing various conditions within the 37 recommended to respond to the concerns raised by Indigenous groups;[44]
c. The CCAR;[45]
d. the proposed EAC;[46]
e. Indigenous groups' post-NEB submissions on the EAC, including the Petitioners' 186-page submission;[47]

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[40] FCA Decision at para. 202, AG BoA, Tab 5.
[41] FCA Decision at para. 201, AG BoA, Tab 5.
[42] Ex. "D" to the Affidavit #1 of Nathan Braun ("Braun #1"), Joint Appeal Book ("AB"), Vol. 7, p. 2730.
[43] Ex. "CCCC" to Affidavit #1 of Chief Ian Campbell ("Campbell #1"); Ex. "D" Braun #1, p. 43; AB, Vol. 6, pp. 2077-2080.
[44] Ex. "DDDD" Campbell #1; Ex. "D" Braun #1, p. 47 ff; AB, Vol. 6, pp. 2081-2121.
[45] Ex. "ZZZ" Campbell #1; Ex. "D" Braun #1, p. 88 ff; AB, Vol. 5, pp. 1755-2050.
[46] Ex. "D" Braun #1 at p. 1196 ff; AB, Vol.7, pp. 2731-2868.
[47] Ex. "D" Braun #1 at p. 1334 ff; AB, Vol. 7, pp. 2869-2933; AB Vol. 8, pp. 2934-3356.

f. the NEB Report (recommending approval of the Project subject to 157 conditions);[48]
g. three supplementary federal reports:
    i. the Report from the Ministerial Panel for the Trans Mountain Expansion Project dated November 1, 2016;[49]
    ii. the draft Environment and Climate Change Canada Review of Related Upstream Greenhouse Gas Emissions Estimates dated May 19, 2016;[50] and
    iii. the Final Report of Nielsen, Delaney + Associates prepared for Natural Resources Canada dated November 1, 2016;[51]
h. proponent supplemental information, including:
    i. an Aboriginal Engagement Report dated July 28, 2016;[52]
    ii. Additional Information dated August 15, 2016;[53] and
    iii. the Stakeholder Engagement Report dated September 2016.[54]

43. The EAO's 37 proposed conditions (all of which were accepted) were intended to respond to "concerns … raised by communities and Aboriginal groups during consultation, and to the key areas of provincial interest and jurisdiction"[55]. The Ministers agreed with the Executive Director of the EAO that "*with the addition of the proposed EA conditions* the potential adverse impacts on areas of provincial interest and jurisdiction would be avoided, minimized or otherwise accommodated to an acceptable level".[56] (emphasis added)

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[48] Ex. "AAA" Campbell #1; Ex. "D" Braun #1, p. 1822 ff; AB, Vol. 2, pp. 756-818; AB Vol. 3, pp. 819-1218; AB Vol. 4, pp. 1219-1309.
[49] Ex. "GGG" Campbell #1; Ex. "D" Braun #1, p. 2375 ff; AB, Vol. 4, pp. 1392-1451.
[50] Ex. "D" Braun #1, p. 2439 ff; AB, Vol. 9, pp. 3357-3400.
[51] Ex. "D" Braun #1, p. 2479 ff; AB, Vol. 9, pp. 3401-3438.
[52] Ex. "D" Braun #1, p. 2699 ff. AB, Vol. 9, pp. 3621-3756; AB Vol. 10, pp. 3757-4173; AB Vol. 11, pp. 4174-4574.
[53] Ex. "D" Braun #1, p. 2518 ff. AB, Vol. 9, pp. 3439-3620.
[54] Ex. "D" Braun #1, p. 3655 ff. AB, Vol. 12, pp. 4575-4703.
[55] RFJ at para. 107, AR Tab 5, p. 103; AG BoA, Tab 4.
[56] RFJ, at para. 117, AR Tab 5, p. 107; AG BoA, Tab 4.

44. Consequently, the provincial decision-makers, in addition to the NEB Report, had the additional information flowing from this expanded environmental review process. They then turned their minds to the aspects of environmental protection that they understood to be within provincial jurisdiction and attached the proposed conditions, including those highlighted below, to the EAC:

a) Marine Environment: Many of the concerns identified by the appellants related to the marine environment. However, the EAO developed conditions to supplement, to the extent possible, the NEB conditions related to marine shipping and potential accidents or malfunctions in the marine environment. In particular, EAC condition 34 requires Trans Mountain to participate in coastal geographic response planning upon request. EAC condition 35 requires Trans Mountain to provide a report (in consultation with Indigenous groups) regarding its current and future research programs regarding the fate and behaviour of bitumen in water.[57]

b) Accidents or malfunctions in the terrestrial environment: Several EAC conditions relate to spill preparedness and response and build incrementally on the NEB's conditions to address concerns raised by the Province and Indigenous groups: Pipeline Design to Reduce Spill Risk (EAC condition 30); Oil Spill Containment and Recovery Units (EAC condition 31); Emergency Response Plans (EAC condition 32); Geographic Response Plans (EAC condition 33); Fate and Behaviour of Bitumen Research (EAC condition 35); Emergency Preparedness and Response Exercise and Training Program and Reporting (EAC condition 36); and Pre-Operations Emergency Response Exercises (EAC condition 37).[58]

c) Marine outreach: EAC condition 11 requires Trans Mountain to develop and implement an Indigenous marine outreach program in consultation with Indigenous groups that must include the means by which it will communicate with Indigenous groups regarding relevant marine-related initiatives, programs, and research that Trans Mountain is directly or indirectly involved in to address the impacts of increased Project-related tanker traffic in the Salish Sea; and provide opportunities for continued engagement with Indigenous groups to identify potential activities and actions that Trans Mountain may undertake to support safe Indigenous

[57] Ex. "EEEE" Campbell #1; Ex. "E" Braun #1; AB, Vol. 6, pp. 2122-2147.
[58] Ex. "EEEE" Campbell #1; Ex. "E" Braun #1; AB, Vol. 6, pp. 2122-2147.

traditional marine use and to support on-going education and planning related to spill preparedness and response.[59]

d) Access management through the Appellants' asserted traditional territory: EAC condition 22 requires Trans Mountain to prepare an access management plan in consultation with Indigenous groups that must identify measures to avoid or mitigate the disruption caused by construction or operations to the exercise of the rights of access of members of Indigenous groups carrying out traditional use activities[60]

e) Protection of burial sites and other land uses for cultural and spiritual purposes: EAC condition 27 requires Trans Mountain to obtain a plan (to be developed in consultation with Indigenous groups) for the mitigation of any Project impacts on archaeological and heritage resources.[61]

f) EAC condition 10 requires Trans Mountain to provide the EAO with Indigenous consultation reports at specified intervals.

45. As set out above, a number of the addition provincial conditions required ongoing consultation with Indigenous groups. The Supreme Court of Canada ("SCC") has held that project conditions requiring ongoing consultation may constitute reasonable accommodation. In *Chippewas of the Thames,*[62] the SCC considered a challenge to the NEB's approval of a modification to Enbridge Pipelines Inc.'s Line 9 pipeline, which crosses the traditional territory of the Chippewas of the Thames. The NEB imposed a number of conditions on Enbridge to accommodate the interests of the Chippewas of the Thames and to ensure ongoing consultation between the proponent and Indigenous groups. The Chippewas of the Thames argued that any consultation that had occurred was inadequate because it was focused on balancing multiple interests. The SCC found that the appropriate process was "…a cooperative one [process] with a view towards reconciliation" and that "[b]alance and compromise are inherent in that process."[63]

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[59] Ex. "EEEE" Campbell #1; Ex. "E" Braun #1; AB, Vol. 6, pp. 2122-2147.
[60] Ex. "EEEE" Campbell #1; Ex. "E" Braun #1; AB, Vol. 6, pp. 2122-2147.
[61] Ex. "EEEE" Campbell #1; Ex. "E" Braun #1; AB, Vol. 6, pp. 2122-2147.
[62] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc*., 2017 SCC 41, AG BoA, Tab 1.
[63] *Chippewas*, at para. 60, AG BoA Tab 1.

46. The Ministers' imposition of conditions in relation to matters within areas of provincial jurisdiction shows that the NEB's scoping errors did not constrain the exercise of the Ministers' statutory power of decision under the *EAA*.

47. The appellants have also raised the issue of whether the Ministers properly appreciated the scope of consultation required. The Court below was of the view that the Ministers did appreciate the context of the consultation and the appellants' opposition to the Project and took the steps that were available to them address those concerns. The Ministers understood that, consistent with the findings of the court in *Coastal First Nations*, they had "[t]otal discretion" to impose any conditions … *within areas of provincial competence*.[64] (emphasis added) The Ministers employed that discretion in issuing the EAC subject to 37 conditions. As a result, there was no scoping error by the Ministers in the provincial process.

48. However, the GiC has accepted the FCA's direction and instructed the NEB to return to an earlier stage of the Project review so as to deal with the maritime transportation failing, as well as to undertake additional consultation with Indigenous groups. This additional Project review may lead to changes to the Project arising from the hearings themselves and from further consultation with Indigenous groups and may lead to the requirement for Trans Mountain to apply for an amendment to the EAC.

C. The Provincial Consultation on the EAC remains adequate despite the FCA decision

49. Canada and the Province were joint participants in the Phase III consultations impugned by the FCA. It is the appellants' submission that the FCA determination that the federal aspect of the joint consultation was insufficient inevitably means the provincial consultation is also inadequate. From that perspective, the mere fact of joint consultation, without more, means consultation was inadequate and the EAC cannot stand. However, the discussion cannot stop there. Rather, the essential issue is whether the deficits identified by the FCA in respect of Canada's consultation are also

[64] *Coastal First Nations*, at para. 181; see also para. 73; AG BoA Tab 2.

attributable to the Province, given the Ministers relied on the joint consultation process in making their EAC decision.

50. In contrast to the federal approach, the EAO process for informing the Ministers was more robust and ultimately more responsive to Indigenous concerns through the imposition of additional conditions.

51. Canada was criticized by the FCA for its reluctance to depart from NEB's finding, with the FCA stating that Canada could not rely "unwaveringly" on the NEB's findings.[65] Both the provincial EAO and Canada proceeded with consultation on the footing that the Project's impact on the appellants would generally be minor, but that impact assessment relied in large part on the NEB Report, which had concluded that the impact of the Project on Squamish's hunting, trapping and gathering rights was negligible to minor. However, the EAO did go beyond the NEB Report to note that: "a spill associated with the Project could result in minor to serious impacts on Squamish's Aboriginal Interests".[66]

52. In addition, in contrast to the repeated criticism that the FCA made about Canada's consultation process not providing a meaningful two-way dialogue and that Canada's consultation team members were essentially "note-takers," the chambers justice found that:

> As I read the documentation, the [Provincial] Crown representatives did more than merely record Squamish's concerns for communication to the decision-makers (the Ministers). It is true that they indicated a desire to ensure that they were clearly recording Squamish's concerns. But they also grappled with those concerns and considered them, and in doing so, engaged in a two-way dialogue. This is shown by the exchange of correspondence following the draft section 11 order, and the exchange that followed the meeting of June 23, 2016. It is also demonstrated by the CCAR and its Appendix C.4. That report set out what the Crown had considered, what it understood, and what it concluded. It incorporated Squamish's comments and responses as received.[67]

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[65] FCA Decision at para. 627, AG BoA, Tab 5.
[66] FCA Decision at para. 677, AG BoA, Tab 5.
[67] RFJ at para. 155, AR Tab 5, p. 121; AG BoA, Tab 4.

53. The FCA also consistently criticised Canada for erroneously taking the view that it could not impose additional conditions, which unreasonably limited the scope of federal consultation and accommodation[68]. In contrast, the EAO recommended and the Ministers accepted the 37 conditions to the EAC, which the chambers judge described as follows:

> The conditions recommended by the EAO after consultation, adopted by the Ministers, included a number addressing the marine environment, oil spill preparedness, access through traditional territory, land uses for cultural and spiritual purposes and requirements for ongoing consultation reports from Trans Mountain (para. 172).

54. Therefore, again in contrast to the FCA critique of Canada's approach, there was evidence of two-way dialogue between the Province and the appellants, showing that the Ministers and EAO were cognizant that they could impose conditions on the Project, as they did.

D. There was no Change in the Province 's Position when the Ministers issued the EAC.

55. The issuance of the EAC did not constitute a "change" in the position the Province advanced before the NEB. The Project required both federal and provincial approval to proceed. The GiC's direction to the NEB to grant a Certificate of Public Convenience and Necessity ("CPCN") was based on the exercise of exclusively federal powers. The EAC, in contrast, was issued in the exercise of the Ministers' jurisdiction under s. 17 of the *EAA* to adopt measures to, amongst other things, protect the Province's environment. *Coastal First Nations* has made clear that the Ministers cannot refuse to issue an EAC for interprovincial pipelines or otherwise block such projects from proceeding. Consequently, as the Ministers were obliged to do so (if they wished provincial conditions to attach to the Project), the issuance of the EAC cannot be considered a "change" in the position the Province advanced before the NEB.

56. In addition, as a matter of law, the Ministers, as statutory decision makers, could not be fettered by the position the Province took before the NEB.

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[68] FCA Decision, AG BoA Tab 5.

57. The appellants also assert that the chambers judge fell into error in failing to determine that the provincial decision makers unreasonably constrained themselves by feeling bound to act only within the constitutional boundaries of their authority. Alternatively, the appellants argue, if the Ministers were obliged to restrain themselves only to actions within their constitutional capacity, they were obliged to consult with the appellants about that constraint.

58. The Ministers acted within the law as set out in *Coastal First Nations*, which defined their ability to act as within areas of provincial interest. Consequently, the Court below made no error in finding the Ministers accepted "the constitutional reality that the attachment of project conditions was the only possible outcome of the provincial Crown's contemplated conduct"[69]. A duty to consult on the issue of restraint does not arise in a situation where the Ministers are following the direction of the courts.

59. It was in this legal context that the chambers judge made his comments with respect to the question of the adequacy of provincial consultation being "largely moot"[70] should the appellants be successful before the FCA in their challenge to the adequacy of "the NEB process (Phase II of the consultation process)…"[71] He was considering the potential effects of parallel proceedings, given that the EAC had issued for a federal project. In that context, should the FCA, as it did, stop the Project from going forward on its current terms and conditions, the EAC would also be put on hold, until such time as the Project is "reset" and another CPCN is issued, following additional review and consultation as directed by the FCA.

60. This Court, in *Prophet River*, has stated that judicial review of the decisions of the Ministers in directing an EAC to issue must take place within the context of an understanding of the jurisdictional limits of the decision makers' constitutional authority. In that case, dealing with the challenge of an EAC issued in respect of the Site C project, this Court found:

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[69] RFJ at paras. 169 and 171, AR Tab 5, p. 125; AG BoA, Tab 4.
[70] RFJ, at para. 134, AR Tab 5, p. 115; AG BoA, Tab 4.
[71] RFJ, at para. 132, AR Tab 5, p. 115; AG BoA, Tab 4.

> … there is no sound basis on which to conclude the process of consultation in which the appellants were engaged was other than adequate in the sense of being reasonable in all the circumstances. Reconciliation, as indeed the judge concluded, was not achieved because of an honest disagreement over whether the project should proceed, but that does not mean the process was flawed. The fact that the appellants' position was not accepted does not mean the process of consultation in which they were fully engaged was inadequate.[72]

61. The key element is that the Crown must consider all options *reasonably* available to it in considering its response to the issues and concerns raised by the Indigenous group(s) with whom the Crown consults, and after or as a part of such consultation, provide a reasonable response. In our case, the Ministers were not constrained by self-imposed constitutional limitations, but were making their decision within the parameters set out in *Coastal First Nations*. The Court below made no error in finding consultation based on such grounds to be reasonable.

PART 4 - NATURE OF ORDER SOUGHT

The respondent Attorney General seeks an Order dismissing the appeal without costs.

All of which is respectfully submitted.

Dated at the City of Victoria, Province of British Columbia, November 9, 2018.

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Keith J. Phillips
Counsel for the Respondent
Attorney General of British Columbia

[72] *Prophet River*, para. 67, AG BoA Tab 3.

APPENDIX - ENACTMENTS

ENVIRONMENTAL ASSESSMENT ACT

CHAPTER 43 [SBC 2002]

[includes 2010 Bill 17, c. 22 amendments (effective June 3, 2010)]

Contents

PART 1 – Definitions

Definitions

1. In this Act:

"approval under another enactment" means an approval, licence, permit or other authorization under another enactment and **"approvals under other enactments"** has a corresponding meaning;

"assessment" means an assessment under this Act of a reviewable project's potential effects that is conducted in relation to an application for

(a) an environmental assessment certificate, or

(b) an amendment of an environmental assessment certificate;

"assessment report" means a written report submitted to ministers under section 17 (2), summarizing the procedures followed during, and the findings of, an assessment;

"class assessment" means an assessment conducted under section 20 of some or all of the potential effects of a specified category of projects, and includes a set of measures or conditions for managing some or all of the potential adverse effects of the specified category of projects to the satisfaction of the executive director;

"environmental assessment certificate" means an environmental assessment certificate issued by the ministers under section 17 (3);

"executive director" means the individual appointed under section 3 as the Executive Director of the Environmental Assessment Office;

(AM) Jan 14/10 **"ministers"** means the minister and the responsible minister;

"project" means any

(a) activity that has or may have adverse effects, or

(b) construction, operation, modification, dismantling or abandonment of a physical work;

"proponent" means a person or an organization that proposes to undertake a reviewable project, and includes the government of Canada, British Columbia, a municipality or regional district, another province, another jurisdiction and a first nation;

"responsible minister" means the member of the Executive Council that the Lieutenant Governor in Council designates by order as the minister responsible for a specified reviewable project or specified category of reviewable projects;

"reviewable project" means a project that is within a category of projects prescribed under section 5 or that is designated by the minister under section 6 or the executive director under section 7, and includes

(a) the facilities at the main site of the project,

(b) any off-site facilities related to the project that the executive director or the minister may designate, and

(c) any activities related to the project that the executive director or the minister may designate.

2002-43-1; B.C. Reg. 5/2010.

PART 3 – Environmental Assessment Process

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.

2002-43-10.

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;

(AM) Jun 03/10

(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.

2002-43-11; 2010-22-44.

Limits on discretion of executive director

12. The executive director's discretion to make a determination under section 11 (1) for a reviewable project does not include the discretion to consign the assessment of the reviewable project to

(a) a commission,

(b) a hearing panel, or

(c) a person not employed in or assigned to the Environmental Assessment Office.

2002-43-12.

Variation of scope, procedures and methods by executive director

13. The executive director may vary the scope, procedures and methods determined under section 11

(a) to take into account modifications proposed for the reviewable project by the proponent, including modifications proposed in relation to an application submitted under section 16, or

(b) if necessary in his or her opinion to complete an effective and timely assessment of the reviewable project.

2002-43-13.

Minister determines assessment scope, procedures and methods for referred project

14. (1) If the executive director under section 10 (1) (a) refers a reviewable project to the minister, the minister by order

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

(b) may determine procedures and methods for conducting the assessment, including for conducting as part of the assessment a review, under section 16 (6), of the proponent's application.

An application for an environmental assessment certificate must contain the information that the executive director requires.

(3) The executive director must not accept the application for review unless he or she has determined that it contains the required information.

(4) On accepting the application for review, the executive director

(a) must notify the proponent of the acceptance for review, and

(b) may require the proponent, for the purpose of the review, to supply a specified number of paper or electronic copies of the application, in the format specified by the executive director.

(5) On receipt of the copies of the application required under subsection (4), the executive director must proceed with and administer the review of the application in accordance with the assessment procedure determined under section 11 (1) or as varied under section 13.

(6) The proponent of a reviewable project for which the minister has made a determination under section 14 may apply for an environmental assessment certificate in the manner determined by the minister, and must pay any prescribed fee in the prescribed manner.

2002-43-16.

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.

2002-43-17.

Duration and effect of certificate

18. (1) An environmental assessment certificate must specify a deadline, at least 3 years and not more than 5 years after the issue date of the certificate, by which time the holder of the certificate, in the reasonable opinion of the minister, must have substantially started the project.

(2) However, the holder of an environmental assessment certificate may apply in writing to the executive director for an extension of the deadline specified in the environmental assessment certificate, stating why the proponent wishes an extension of the deadline.

(3) On receipt of an application under subsection (2), the minister or the executive director must complete a review of

(a) the application, and

(b) the reasons given under subsection (2),

in accordance with any procedure determined by the minister or the executive director to assess the proposed extension.

(4) The minister or the executive director may

(a) extend the deadline specified in the environmental assessment certificate, on one occasion only, for not more than 5 years, or

(b) refuse to extend the deadline.

(5) After the deadline specified under subsection (1) or, if an extension is granted under subsection (4), after the period of the extension, if the project has not yet been substantially started, in the reasonable opinion of the minister, the environmental assessment certificate expires.

(6) After a reviewable project is substantially started, in the reasonable opinion of the minister as set out in subsection (1) or (5), the certificate remains in effect for the life of the project, subject to cancellation or suspension under section 37.

2002-43-18.

Amending environmental assessment certificate

19. (1) A holder of an environmental assessment certificate may apply in writing to the executive director to amend the certificate, stating the holder's reasons, and must pay any prescribed fee in the prescribed manner.

(2) The executive director must consider an application under subsection (1) and the reasons stated, in accordance with any procedures, determined by the executive director, for the assessment of the proposed change, including any time limits.

(3) After considering the application under subsection (1), the executive director, or the minister if the executive director refers the application to the minister, must

(a) amend the environmental assessment certificate, varying or deleting conditions of the certificate or attaching new conditions to the certificate that the executive director or the ministers consider necessary, or

(b) refuse to amend the certificate.

(4) The executive director must deliver a decision under subsection (3) of the executive director or of the minister to the holder of the environmental assessment certificate.

(5)

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.

2002-43-27.

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.

2002-43-28.

Agreements with Nisga'a Nation

29. The minister may enter into agreements for the purposes set out in paragraph 1 of the Environmental Assessment and Protection chapter of the Nisga'a Final Agreement.

2002-43-29.

Agreements and consultations with treaty first nations

LIST OF AUTHORITIES

Cases	**Para # in factum**
Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., 2017 SCC 41	45
Coastal First Nations v British Columbia (Environment), 2016 BCSC 34	6, 10, 31, 39, 47, 55, 58, 61
Prophet River First Nation v. British Columbia (Environment), 2017 BCCA 58	33, 34, 60
Squamish Nation v British Columbia (Environment), 2018 BCSC 844	3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 31, 43, 52, 58, 59
Tsleil-Waututh Nation v. Canada (Attorney General), 2018 FCA 153	28, 33, 36, 40, 41, 42, 49, 50, 52, 53, 54