Court of Appeal File No. CA45372

COURT OF APPEAL

ON APPEAL FROM the order of the honourable 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

RESPONDENTS/Respondents

AND:

TRANS MOUNTAIN PIPELINE ULC

RESPONDENT/Respondent

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CHRONOLOGY

Date	Event
June 21, 2010	The National Energy Board ("**NEB**") and British Columbia ("**BC**") Environmental Assessment Office ("**EAO**") entered into an Equivalency Agreement under which the EAO accepts NEB assessments as equivalent for projects that trigger both EAO and NEB reviews.
December 14, 2011	Trans Mountain Pipeline ULC ("**TM**") began its efforts to engage and consult with Squamish Nation ("**Squamish**") regarding the Trans Mountain Expansion Project ("**Project**").
December 16, 2013	TM submitted its 15,000 page Project application to the NEB.
April 2, 2014	The NEB: (1) granted participation status to 400 intervenors and 1,250 commenters, including Squamish and the Province of British Columbia (the "**Province**"); (2) issued a Hearing Order setting out events, steps and deadlines; (3) determined that TM's application was complete; and, (4) determined the scope of its environmental assessment ("**EA**"), noting that Project-related marine shipping would be considered under the *National Energy Board Act*, R.S.C., 1985, c. N-7 ("**NEB Act**") and cumulative effects analysis under the *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 19, s. 52 ("**CEAA 2012**").
December 11, 2014	Transport Canada ("**TC**") issued the Technical Review Process of Marine Terminal Systems and Transhipment Sites ("**TERMPOL**") report, which made 17 recommendations and 31 findings regarding Project-related marine shipping safety.
January 15, 2015	The NEB issued Ruling No. 50 denying the Province's motion to require TM file un-redacted and additional emergency management program ("**EMP**") information and documents. The NEB noted that it had "sufficient information" to meet its filing requirements and that consultation with the Province, including disclosure, would occur in the future.
January 13, 2016	The Supreme Court of British Columbia issued Reasons for Judgment in *Coastal First Nations v. British Columbia (Environment)*, 2016 BCSC 34 ("***Coastal First Nations***"). The Court found that, among other things, BC cannot refuse to issue an Environmental Assessment Certificate ("**EAC**") for an interprovincial pipeline but has the power to impose conditions

Date	Event
	on areas of provincial jurisdiction subject to the constitutional doctrines of interjurisdictional immunity and federal paramountcy.
January 27, 2016	The Federal Government introduced Interim Measures for Pipeline Reviews. For the Project this included deeper consultations with Indigenous groups, an upstream greenhouse gas assessment and a three-member ministerial panel to engage local and Indigenous communities.
April 1, 2016	The EAO informed Squamish that it would consult on "areas of provincial jurisdiction".
April 8, 2016	The EAO ordered that the Project requires an EAC.
May 9, 2016	The EAO requested Squamish's comments on proposed procedures for the EAO assessment, including consultation on issues of "provincial jurisdiction". Additionally, the EAO explained TM's role in the consultation process.
May 18, 2016	TM provided to Squamish a draft Aboriginal Engagement Report.
May 19, 2016	The NEB released its report ("**NEB Report**") recommending the Governor in Council ("**GIC**") approve the Project in the Canadian public interest, subject to 157 conditions (the "**Federal Conditions**").
May 24, 2016	Squamish wrote to the EAO regarding the Project, requesting that the EAO terminate the Equivalency Agreement and subject the Project to a full EAO assessment.
June 2, 2016	The EAO wrote to Squamish regarding the Project, explaining processes by which it would assess the Project short of terminating the Equivalency Agreement.
June 17, 2016	In its "**S. 11 Order**" the EAO accepted the NEB assessment as equivalent and established the scope, procedures and methods for the EAO review, noting that it would consult identified Indigenous groups on issues of "provincial jurisdiction".
June 17, 2016	The EAO offered Squamish $5,000 in funding to participate in the EAO review process. Squamish did not respond.

Date	Event
June 19, 2016	Canada's *Pipeline Safety Act* came into force, imposing new requirements on pipeline operators.
June 23, 2016	The EAO met with Squamish and Tsleil-Waututh Nation ("**TWN**") to discuss the Project.
July 2016	TM submitted to the EAO its Aboriginal Engagement Report, which summarized issues and concerns raised by affected Indigenous Groups and the Federal Conditions and TM commitments that address them.
August 12, 2016	TM submitted to the EAO its Supplemental Filing: Part 1, which summarized issues the Province raised during the NEB review and TM's proposals to resolve them.
August 17, 2016	The EAO and Federal Crown provided to Squamish for its comments an early draft of the Joint Crown Consultation and Accommodation Report ("**CAR**").
August 24, 2016	Squamish and TWN wrote to the EAO regarding the Project, again requesting that the EAO terminate the Equivalency Agreement.
August 24, 2016	The EAO provided Squamish with an update on the remaining BC review process and requested Squamish's comments regarding TM's Supplemental Filing: Part 1 and Aboriginal Engagement Report.
September 19, 2016	Squamish wrote to the EAO and Federal Crown regarding the draft CAR.
September 19, 2016	The EAO wrote to Squamish regarding its letter of August 24, 2016, noting that the EAO review process would achieve the same outcome as terminating the Equivalency Agreement.
September 30, 2016	TM submitted its Stakeholder Engagement Report to the EAO, which summarized and provided a status update on key issues raised by the Province and BC municipalities during the NEB review and provided an update on the resolution of those issues.
October 6, 2016	The EAO and Federal Crown wrote to Squamish to address its procedural and substantive concerns. They invited Squamish to discuss Project concerns and potential EAC conditions to supplement the Federal Conditions.

Date	Event
October 18, 2016	The EAO and Federal Crown met with Squamish regarding the Project. At the meeting the EAO informed Squamish that any EAC conditions must be "complementary" to the Federal Conditions.
November 1, 2016	The ministerial panel submitted its report ("**Panel Report**") to the Minister of Natural Resources Canada.
November 3, 2016	The EAO and Federal Crown provided to Squamish, for its comments, drafts of the: (1) revised CAR, including a Squamish-specific appendix; (2) EAO Summary Assessment Report; and, (3) EAC conditions.
November 7, 2016	The Prime Minister launched the $1.5 billion national Oceans Protection Plan ("**OPP**") to protect Canada's marine environment.
November 17, 2016	Squamish provided its submissions regarding the Project to the GIC and the EAO.
November 18, 2016	Squamish provided comments on the draft CAR, Summary Assessment Report and EAC conditions.
November 28, 2016	The EAO and Federal Crown responded to Squamish's letters dated November 17 and 18, 2016.
November 29, 2016	The GIC issued Order in Council P.C. 2016-1069 (the "**First OIC**") in which it approved the Project subject to the Federal Conditions.
December 8, 2016	The EAO wrote to Squamish regarding the Project, answering Squamish's concerns regarding the draft EAC conditions.
December 8, 2016	The EAO issued its Summary Assessment Report ("**EAO Report**") summarizing key findings in the NEB Report and key aspects of the EAO review process.
December 8, 2016	The EAO Executive Director recommended the BC Ministers of Environment and Natural Gas Development ("**BC Ministers**") issue an EAC for the Project.
January 10, 2017	The BC Ministers issued TM an EAC subject to 37 conditions (the "**BC Conditions**"), in addition to the Federal Conditions.
January 11, 2017	Then Premier Christy Clark announced that the Project satisfied her "five conditions" to support a heavy oil pipeline, including

Date	Event
	world-leading marine and land spill response, prevention and recovery systems.
February 22, 2017	The Federal Court of Appeal ("**FCA**") granted Squamish and other parties leave to apply for judicial review of the First OIC.
April 20, 2017	Squamish filed a Petition requesting the EAC be quashed.
May 24, 2018	The Supreme Court of British Columbia issued Reasons for Judgment dismissing the Squamish Petition.[1] The Court concurrently released Reasons for Judgment dismissing a parallel City of Vancouver Petition that sought to quash the EAC on administrative law grounds.
August 30, 2018	The FCA issued its Judgments and Reasons for Judgment in the consolidated judicial review of the First OIC.[2] The FCA quashed the First OIC on two grounds: (1) the NEB unjustifiably excluded marine shipping from the scope of the "designated project"; and, (2) Canada failed to adequately consult Indigenous groups during Phase III (between the NEB Report and the First OIC). However, the FCA dismissed all other challenges to the NEB's process and findings and Canada's consultation process.

[1] *Squamish Nation v. British Columbia*, 2018 BCSC 844 ("**RFJ**").

[2] *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 ("***TWN 2018***").

OPENING STATEMENT

At its core, this appeal is about the Province's limited jurisdiction over the approval of a federal pipeline project: the Trans Mountain Expansion Project.

Squamish remains vehemently opposed to the Project. It sought judicial review of both federal and provincial Project approvals. Now, Squamish asserts that the provincial Project approval must be quashed because the federal approval was quashed.

This argument fails to recognize the significant limits on provincial jurisdiction. While the Province retains some limited jurisdiction over environmental matters, only Canada can determine whether the Project proceeds. Further, the Province's consultation process was not tainted by the flaws identified in the execution of Canada's consultation process.

Here, the Province was an active participant in, and reasonably relied on, a 2+ year National Energy Board review process. Ultimately, BC was satisfied that the process fulfilled the Province's environmental assessment obligations. While the Province was at liberty to impose an additional environmental assessment process, it chose not to do so.

Nonetheless, the Province engaged in its own review process, consulted on matters within its provincial jurisdiction and imposed 37 additional conditions on the Project. In doing so, the Province more than met its provincial environmental assessment obligations. The Chambers Judge reasonably found as much.

To the extent the Federal Court of Appeal subsequently found that the NEB process was flawed, it did so on the basis of a clear federal issue. None of the issues on which the Applicants argued successfully at the FCA were of provincial jurisdiction. Indeed, the Province has no jurisdiction to mitigate the impacts of Project-related marine shipping.

Finally, the Chambers Judge found as a fact that provincial consultation was adequate. This finding was eminently reasonable. The Province's consultation representatives were more than note-takers and did not simply follow the NEB recommendation and conditions. Indeed, the Province actively participated in the NEB process to advocate for BC's interests. The Province also imposed additional conditions based on its own meaningful two-way dialogue with Squamish and others. Squamish fails to identify any error. This appeal must fail.

PART 1. STATEMENT OF FACTS

A. The Proponent, the Project and Related Marine Shipping

1. TM is the proponent of the Project. The Project will nearly triple the capacity of the existing Trans Mountain pipeline (the "**Pipeline**") that transports oil from Alberta to BC. Project components include: (i) the twinning of the existing Pipeline; (ii) new and modified facilities, including pump stations and tanks; and, (iii) three new berths at the Westridge Marine Terminal ("**WMT**") in Burnaby, BC. Over 89% of the route parallels existing disturbances, including the Pipeline right of way.[3]

2. The purpose of the Project is to expand Canadian crude oil exports markets in the Pacific Basin. This will provide a critical market alternative for Canadian producers and a projected $73.5 billion increase in Canadian oil production revenues in the first 20 years.[4]

3. To date, at least 30 Indigenous groups in BC support the Project.[5]

4. As proposed, Project-related marine shipping activities will transport oil from the WMT to international markets using existing shipping routes.[6]

B. The Federal Regulatory Framework

5. The federal Project review is critical to understanding the BC review that followed.

6. To implement its exclusive jurisdiction over interprovincial pipelines, Parliament assigned to the NEB and GIC the task of balancing project risks and benefits and determining the terms and conditions to any approval.[7]

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[3] RFJ, paras. 15-16 (Appeal Record ("**AR**"), p. 78); NEB Report, pp. 1-2, 278, 495-496 (Appeal Book ("**AB**"), Vol. 2, pp. 776-777, Vol. 3, pp. 1053, Vol. 4, pp. 1270-1271).

[4] RFJ, para. 17 (AR, p. 78); NEB Report, pp. 14-15 (AB, Vol. 2, p. 789-790).

[5] Affidavit #1 of Robert Love sworn May 17, 2017 ("**Love Affidavit**"), para. 82, Ex. 94 (AB, Vol. 6, pp. 2197, Vol. 7, pp. 2650-2665).

[6] NEB Report, pp. 323-327 (AB, Vol. 3, pp. 1098-1102).

[7] *Constitution Act, 1867*, ss. 91(29), 92(10)(a); RFJ, para. 24 (AR, p. 80); *Burnaby (City) v. Trans Mountain Pipeline ULC* ("***Burnaby***"), 2015 BCSC 2140, paras. 5, 59-60, aff'd on other grounds 2017 BCCA 132.

7. To proceed, the Project required from the NEB: (i) a certificate of public convenience and necessity ("**CPCN**"), following GIC approval; and, (ii) once built, leave to open, following the NEB's determination that it can be safely operated.[8]

8. Prior to this, the NEB was required to hold a public hearing, conduct an EA and issue a report for the GIC that sets out its recommendation as to whether, and on what terms, the CPCN should be granted.[9]

9. The controlling considerations for the NEB and GIC, both acting under legislated time limits, are whether the project: (i) is and will be required by the present public convenience and necessity; (ii) is likely to cause significant adverse environmental effects; and, (iii) if so, whether those effects are justified.[10] Additionally, the GIC can only approve a project if Canada has met its duty to consult.[11]

10. Once approved, the proponent has the statutory power to do all acts necessary for the construction, maintenance, operation and abandonment of its pipeline.[12]

11. Project approval is just one phase of NEB lifecycle regulation. Prior to construction, the proponent must satisfy all pre-construction conditions, obtain NEB approval of the detailed route, and complete the detailed pipeline design. Prior to operations, the proponent must complete all pre-operation conditions, develop an emergency response plan in compliance with the *National Energy Board Onshore Pipeline Regulations* and obtain leave to open. Throughout the project lifecycle, the NEB verifies compliance, oversees emergency preparedness and response and employs enforcement measures where necessary to obtain compliance, prevent harm and deter future non-compliance.[13]

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[8] NEB Act, ss. 2 ("certificate"), 30, 47, 52-54; *TWN 2018*, paras. 9, 54.

[9] RFJ, para. 25 (AR, p. 80); *TWN 2018,* paras. 55-62.

[10] *TWN 2018*, paras. 55-56, 62; NEB Act, ss. 52(1), (2), (4), (7), 54(3); CEAA 2012, ss. 29(1), 31(1)(a).

[11] *Gitxaala Nation v. Canada*, 2016 FCA 187, para. 7.

[12] NEB Act, s. 73.

[13] NEB Report, pp. 7-10, 19-23, 139 (AB, pp. Vol. 2, pp. 782-785, 794-798, Vol. 3, p. 914); *TWN 2018*, paras. 286-289.

C. The BC Regulatory Framework

12. To proceed in BC, "transmission pipelines" of a certain size must obtain an EAC from the BC Ministers.[14] However, the BC Ministers cannot refuse to grant an EAC for an interprovincial project or otherwise obstruct, impair or frustrate such a project or federal authority over it.[15]

13. The BC review process typically requires the EAO to conduct an EA and prepare an assessment report. Based on that report, the EAO Executive Director's recommendation, and any other relevant information, the BC Ministers must either: (i) issue an EAC with or without conditions; (ii) refuse to issue an EAC; or, (iii) order further assessment.[16] As a lifecycle regulator, the EAO monitors condition compliance during project construction and operation.[17]

14. To promote coordination, achieve efficiencies and avoid duplication in the EA process, the EAO has exercised its statutory powers to enter into an "**Equivalency Agreement**" with the NEB which provides that where both provincial and federal EAs are triggered the EAO will accept a NEB EA as equivalent to a BC EA.[18]

15. It is not unusual for the Province to participate in the federal EA process for projects subject to the Equivalency Agreement, as it did in this case.

16. Initially, the Equivalency Agreement provided that an EAC was not required for projects subject to it. However, in the January 2016 *Coastal First Nations* decision regarding the Northern Gateway Project (the "**NGP**"), Koenigsberg J. found that clause to be *ultra vires* the EAO's statutory power.[19]

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[14] *Environmental Assessment Act*, S.B.C. 2002, c. 43 ("**EAA**"), ss. 1 ("reviewable project"), 8-9; *Reviewable Projects Regulation*, B.C. Reg. 370/2002, Table 8.

[15] RFJ, paras. 7-9 (AR, p. 76); *Coastal First Nations*, paras. 47, 55, 58, 76.

[16] EAA, ss. 10-11, 16-17; Braun Affidavit, paras. 3-7 (AB, Vol. 7, pp. 2714-2718).

[17] EAA, ss. 34-37, 41, 43, 45; EAC E17-01, p. 2, para. I (AB, Vol. 6, p. 2123).

[18] EAA, ss. 27-28; Equivalency Agreement, recitals, ss. 1-3, 5-7 (AB, Vol. 1, pp. 66-68).

[19] *Coastal First Nations*, paras. 182-183; Braun Affidavit, para. 10 (AB, Vol. 7, p. 2714).

D. The Federal Regulatory Review

17. In 2013, TM submitted its 15,000 page application to the NEB for a CPCN.[20] The NEB hearing was among the largest in its history, including the participation of more than 400 intervenors and 1,250 commenters.[21] Both Squamish and the Province were intervenors.

18. The NEB's list of issues included, among other things: (i) potential environmental and socio-economic effects, including cumulative effects; (ii) potential environmental and socio-economic effects of Project-related marine shipping activities, including accidents or malfunctions; (iii) potential impacts on Aboriginal interests; (iv) contingency plans for spills, accidents or malfunctions; and, (v) safety and security during construction and operation, including emergency response planning and third-party damage prevention.[22]

19. The NEB determined that Project-related marine shipping was not part of the "designated project" to be assessed under CEAA 2012. Nevertheless, the NEB considered Project-related marine shipping under its broader NEB Act jurisdiction to assess impacts and make a recommendation in the public interest. Additionally, the NEB considered the cumulative effects of the Project and its related marine shipping under CEAA 2012. As a result, the NEB considered detailed and extensive evidence and submissions on the potential environmental effects of Project-related marine shipping.[23]

20. Further, in conjunction with the NEB process, TM initiated TERMPOL, chaired by TC and consisting of other federal agencies. TERMPOL focused on the safety and risks of Project-related marine tanker movements between the Pacific Ocean to, from and

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[20] *TWN 2018*, para. 11; Love Affidavit, paras. 16-17 (AB, Vol. 6, p. 2169).

[21] RFJ, para. 28 (AR, p. 80); Love Affidavit, para. 34 (AB, Vol. 6, pp. 2173-2174).

[22] Love Affidavit, para. 32 (AB, Vol. 6, pp. 2172-2173); NEB Report, p. 409 (AB, Vol. 3, p. 1184).

[23] NEB Report, pp. 6, 16-17, 332 (AB, Vol. 2, pp. 781, 791-792, Vol. 3, p. 1107). See also Chapter 14 (AB, Vol. 3, pp. 1098-1182).

around the WMT. The TERMPOL report was part of TC's evidence at the NEB. TM adopted each of TERMPOL's 17 recommendations and 31 findings.[24]

21. The 2+ year NEB review consisted of: (i) procedural and constitutional motions by intervenors; (ii) more than 17,000 intervenor information requests ("**IRs**") to TM; (iii) oral traditional evidence from 35 Indigenous groups; (iv) written evidence, including expert reports from TM and intervenors; (v) written and oral argument; and, (vi) intervenor comments on the NEB's draft conditions.[25]

22. Squamish was granted $44,270 in NEB participant funding and participated through motions, 344 IRs, oral traditional evidence, 219 pages of written evidence, written and oral argument, and comments on draft conditions. Squamish's evidence and submissions addressed concerns regarding a potential oil spill, emergency preparedness and response, a lack of information on key issues of concern and marine shipping.[26]

23. The Province also participated in the NEB process through motions, 544+ IRs, written argument and comments on draft conditions. The Province's submissions addressed its concerns regarding a potential oil spill, emergency preparedness and response, a lack of information on key issues of concern and marine shipping.[27]

E. The NEB Report Recommending Project Approval

24. In May 2016 the NEB issued its 500+ page report that recommended that the GIC approve the Project, subject to the Federal Conditions, in the Canadian public interest.[28]

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[24] RFJ, para. 29 (AR, p. 81); *TWN 2018*, paras. 11, 88-93; TERMPOL Review Process Report (AB, Vol. 6, pp. 2232-2288).

[25] RFJ, paras. 30-32 (AR, p. 81); *TWN 2018*, paras. 94-98; Love Affidavit, paras. 16-73 (AB, Vol. 6, pp. 2169-2187).

[26] RFJ, paras. 28, 79-84 (AR, pp. 80, 92-94).

[27] The Province's NEB process materials are included in AB, Vol. 2, pp. 505-550, 644-685, 692-725, Vol. 6, pp. 2289-2498, Vol. 7, pp. 2499-2510, Vol. 13, pp. 5225-5304.

[28] RFJ, para. 36 (AR, p. 82); NEB Report, pp. xi-xii, xv, 18 (AB, Vol. 2, pp. 770-771, 774, 793).

25. To reach this conclusion, the NEB considered, among other things: (i) potential impacts on Aboriginal groups; (ii) pipeline and facility integrity; (iii) safety, security and emergency management; (iv) the environmental behaviour of spilled oil; (v) emergency prevention, preparedness and response; (vi) potential effects on the air, surface and groundwater, terrestrial and marine wildlife, soil, plants, communities, land use and human health; (vii) the need for the Project and economic feasibility; (viii) financial assurances for the cost of an oil spill; and, (ix) Project-related marine shipping.[29]

26. The NEB's findings included that:

(a) the Project will have considerable benefits, including market diversification, job creation, spending on pipeline materials and government revenues;[30]

(b) the Project can be safely constructed, operated and maintained;[31]

(c) TM provided extensive and sufficient evidence regarding oil spill modelling and emergency preparedness and response;[32]

(d) TM provided sufficient evidence regarding the behaviour of spilled oil;[33]

(e) the Project would not cause significant adverse environmental effects; however, Project-related marine shipping was likely to have significant adverse effects on greenhouse gas emissions, impacts on the Southern resident killer whale ("**SRKW**"), Indigenous uses of same, and a large or credible worse-case spill;[34] and,

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[29] NEB Report, pp. iii-viii, xi-xv (AB, Vol. 2, pp. 762-767, 770-774).

[30] NEB Report, pp. 14-15, 17 (AB, Vol. 2, pp. 789-790, 792).

[31] NEB Report, p. xi (AB, Vol. 2, p. 770).

[32] NEB Report, pp. 143, 156 (AB, Vol. 3, pp. 918, 931).

[33] NEB Report, pp. xiv, 11, 136-137, 235-236, 377-378 (AB, Vol. 2, pp. 773, 786, Vol. 3, pp. 912-913, 1010-1011, 1152-1153).

[34] NEB Report, pp. xii, xiv, 337, 350-351, 363, 399 (AB, Vol. 2, pp. 771, 773, Vol. 3, pp. 1112, 1125-1126, 1138, 1174).

(f) TM's Indigenous consultation program was effective and provided adequate opportunities for potentially affected Indigenous groups to discuss concerns and measures to reduce or avoid potential effects.[35]

F. Canada's Interim Measures for Pipeline Reviews

27. In addition to the NEB review, Canada made the Project subject to Interim Measures for Pipeline Reviews that included an upstream greenhouse gas assessment and a Ministerial Panel that engaged local and Indigenous communities through 44 public meetings, 20,000 email submissions and 35,000 responses to an online questionnaire.[36]

28. In its report, the Ministerial Panel summarized a variety of community perspectives and noted that, while some First Nations provided meaningful input, there were gaps in the process because "First Nations such as the Squamish … are firmly opposed to the project and … have chosen to pursue their interests in the courts or pursue direct discussions with the Crown rather than engage at this level".[37]

G. The Complementary Provincial Regulatory Review

29. In March 2016, the EAO Executive Director assigned Nathan Braun as Project Assessment Lead (the "**Project Lead**") to review and evaluate the Project.[38]

30. Pursuant to the Equivalency Agreement, the Project Lead accepted the NEB EA as equivalent to a BC EA.[39] Nevertheless, following initial Indigenous consultation, the Project Lead prescribed[40] and implemented the following steps to review the Project.

31. *Supplemental Information from TM*. TM filed with the EAO supplemental reports summarizing how TM has resolved or addressed the issues and concerns raised by

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[35] NEB Report, pp. 48-50 (AB, Vol. 3, pp. 823-825).

[36] Love Affidavit, Ex. 99 (AB, Vol. 7, pp. 2666-2669); Panel Report, pp. 2-3 (AB, Vol. 4, pp. 1395-1396).

[37] Panel Report, p. 40 (AB, Vol. 4, p. 1433).

[38] Letter from Kevin Jardine dated March 17, 2016, pp. 1-3 (AB, Vol. 7, pp. 2692-2694).

[39] S. 11 Order, Schedule A, s. 2 (AB, Vol. 5, p. 1682).

[40] S. 11 Order, Schedule A (AB, Vol. 5, pp. 1679-1689).

Indigenous groups (including Squamish),[41] the Province and BC municipalities.[42] For example, TM's Supplemental Filing: Part 1 responds to the Province's concerns regarding emergency response and the prevention and detection of pipeline spills and leaks.[43]

32. *Indigenous Consultation.* As described below, the Project Lead incorporated Indigenous consultation on issues of provincial jurisdiction into the EAO review process.[44]

33. *EAO Report.* The report, among other things: (i) summarized the NEB's findings in areas of provincial interest/jurisdiction relevant to the BC Ministers' decision; (ii) described key conclusions from the Province's Indigenous consultation process; (iii) identified and explained the EAO's proposed 37 conditions to an EAC; (iv) set out the EAO's conclusions; and, (v) concluded that the NEB EA adequately identified and assessed the potential adverse Project effects to areas of provincial jurisdiction.[45]

34. On completion of these steps, the EAO Executive Director recommended the BC Ministers issue an EAC subject to the BC Conditions.[46]

H. Canada's Consultation Process

35. Because the Project has the potential to adversely affect asserted Aboriginal rights and title, the Crown assessed its duty to consult with Squamish as being on the deep end of the spectrum.

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[41] Aboriginal Engagement Report, pp. 2-344 – 2-351, A-8 – 13, A-17, H-187 – H-195 (AB, Vol. 10, pp. 4003-4010, Vol. 11, pp. 4181, 4190, 4417-4425).

[42] Supplemental Filing: Part 1 (AB, Vol. 9, p. 3449); Stakeholder Engagement Report (AB, Vol. 12, p. 4575).

[43] Supplemental Filing: Part 1, pp. 2-24, 8-3 – 8-5, 8-8 (AB, Vol. 9, pp. 3470, 3491-3493, 3496).

[44] S. 11 Order, Schedule A, s. 4 (AB, Vol. 5, pp. 1682-1684); Affidavit #1 of Nathan Braun dated July 7, 2017 ("**Braun Affidavit**"), paras. 30-62 (AB, Vol. 7, pp. 2718-2729).

[45] EAO Report, pp. 1, 28 (AB, Vol. 6, pp. 2082, 2109).

[46] Recommendations of the Executive Director, pp. 2-3 (AB, Vol. 6, pp. 2079-2080).

36. Canada employed a multi-phase approach to Indigenous consultation.[47]

37. In Phase I, prior to the NEB hearing, Canada provided Project notification and information to potentially impacted Indigenous groups, and offered to consult on funding and procedure.[48] Additionally, TM engaged in NEB-mandated direct consultation with Squamish and over 100 other Indigenous communities. However, for the most part, Squamish refused or declined to engage and consult with TM.[49]

38. In Phase II, Canada relied on the NEB process, to the extent possible, to fulfill its duty to consult.[50] As part of this process, the NEB relied on TM's direct consultations with Indigenous groups.[51] Further, federal departments participated in the NEB process so that Canada could better understand and consider Project-related impacts, Indigenous issues and concerns, and proposed mitigation measures.[52]

39. As an intervenor in the NEB process, the Province had access to all of the evidence and submissions filed by Indigenous groups, including Squamish.

40. In Phase III, Canada engaged in additional direct consultations with Indigenous groups for the purpose of identifying and attempting to address outstanding concerns and impacts that Indigenous groups believed were outstanding following the NEB review. To facilitate meaningful consultation, Canada provided additional participant funding and extended the time limit for a GIC decision.[53] Much of Canada's Phase III was Joint Crown consultation coordinated with BC, described below, including the 1,100+ page CAR.

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[47] RFJ, para. 76 (AR, pp. 91-92).

[48] RFJ, paras. 75-76 (AR, pp. 90-92); CAR, pp. 38-39 (AB, Vol. 5, pp. 1805-1806).

[49] NEB Report, pp. 32-36, 46, Appendix 9 (AB, Vol. 2, pp. 807-811, Vol. 3, p. 821, Vol. 4, p. 1290); Aboriginal Engagement Report, p. 1-1 (AB, Vol. 9, p. 3642); Love Affidavit, paras. 45, 78-81, Ex. 29 (AB, Vol. 6, pp. 2177, 2188-2197, Vol. 7, pp. 2624-2644).

[50] RFJ, paras. 76-85 (AR, pp. 91-94); CAR, pp. 40-43 (AB, Vol. 5, pp. 1807-1810).

[51] NEB Report, p. 46 (AB, Vol, 3, p. 821); *TWN 2018*, paras. 153-161.

[52] CAR, p. 40 (AB, Vol. 5, p. 1807).

[53] CAR, pp. 43-46 (AB, Vol. 5, pp. 1810-1813); GIC Explanatory Note, pp. 16-20 (AB, Vol. 4, pp. 1470-1474).

41. Phase IV, which has yet to be completed, is intended to provide additional consultations in relation to permitting activities.[54]

I. The Province's Consultation on Issues of Provincial Jurisdiction

42. BC consulted 96 Indigenous groups, 80+ of which it consulted on the deep end of the spectrum.[55] Its deep consultation process with Squamish included:[56]

(a) an offer of capacity funding that Squamish did not accept;

(b) the opportunity to comment on the proposed consultation process, which Squamish did not do;

(c) meetings and correspondence regarding impacts on areas of provincial jurisdiction, to which Squamish did not always respond;

(d) two opportunities to comment on the draft CAR;

(e) the opportunity to comment on drafts of the BC Conditions and EAO Report;

(f) the opportunity to make submissions directly to the BC Ministers, in which Squamish argued that the Project should not proceed; and,

(g) opportunities to consult with TM, which Squamish routinely rebuffed.

43. During consultation, Squamish asserted that: (i) the EAO should terminate the Equivalency Agreement and conduct its own EA; (ii) Squamish should be a decision-

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[54] RFJ, para. 76 (AR, pp. 91-92).

[55] CAR, p. 13 (AB, Vol. 5, p. 1780); S. 11 Order, Schedules B and C (AB, Vol. 5, pp. 1687-1689).

[56] Braun Affidavit, paras. 21-62, Ex. D-5, G, H, I, J, K, L, M, N, O, P (AB, Vol. 7, pp. 2717-2728, 2869-2933, Vol. 12, p. 4709-4982, Vol. 13, pp. 4983-5222); CAR, pp. 9, 46-48, 53 (AB, Vol. 5, pp. 1776, 1813-1815, 1820); S. 11 Order, Schedule A, s. 4.1 (AB, Vol. 5, p. 1682-1683); Love Affidavit, paras. 43, 45, 78-81, Ex. 29 (AB, Vol. 6, pp. 2176, 2177, 2188-2197, Vol. 7, pp. 2624-2644); Affidavit #1 of Ian Campbell made April 20, 2017 ("**Campbell Affidavit #1**"), Ex. E, LLL, SSS, TTT, XXX, YYY (AB, Vol. 1, pp. 74-76, Vol. 5, pp. 1676-1678, 1703-1719, 1741-1746, 1747-1754).

maker regarding the Project and wished to conduct its own assessment that would take at least seven years to complete; and, (iii) the Province should not authorize the Project until all information gaps were addressed, including emergency response planning and the fate and behaviour of diluted bitumen.[57]

44. A consultation team with the confidence of the BC Ministers responded to Squamish's concerns and engaged interactively throughout the consultation process.

45. In November 2016, the Joint Crown released the CAR, which describes Indigenous consultation (including TM's engagement), Indigenous concerns that influenced Project design, Project impacts on Indigenous interests, proposed accommodation and the adequacy of consultation. In addition to describing overlapping and similar Indigenous concerns thematically, the CAR attaches appendices specific to each Indigenous group. The 19+ page Squamish appendix considers Squamish's concerns and concludes that, taking into account TM's commitments and Joint Crown accommodation measures, potential Project impacts on Squamish are minor.[58]

46. BC's consultation process is ongoing in relation to permit applications.[59]

J. GIC Approval in the Canadian Public Interest

47. In the First OIC, the GIC accepted the NEB's recommendation and directed it to issue a CPCN subject to the Federal Conditions. The GIC approved the Project because, among other things, it will increase markets for Canadian oil, significantly benefit the Canadian economy and support environmentally sustainable resource development.[60]

48. To address spill risks, the GIC referred to: (i) Federal Conditions; (ii) NEB lifecycle regulation and oversight, including comprehensive EMPs; (iii) amendments to the NEB

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[57] Braun Affidavit, paras. 39-40, 47, Ex. M (AB, Vol. 7, pp. 2720-2721, 2723, Vol. 13, p. 4983-4991); Campbell Affidavit #1, Ex. NNN (AB, Vol. 5, p. 1690-1694).

[58] CAR, Chapters 3, 4 and 5, Appendices C.4, F, G, I (AB, Vol. 5, pp. 1801-1965, 2047-2050, 2054-2072).

[59] CAR, pp. 21-23 (AB, Vol. 5, pp. 1788-1790).

[60] First OIC and GIC Explanatory Note (AB, Volume 4, pp. 1456-1457, 1465-1469).

Act including enhanced liability; and, (iv) a $1.5 billion OPP to enhance Canada's world-leading marine safety regime, including new preventative and response measures.[61]

K. The Province's Environmental Assessment Certificate

49. In January 2017, the BC Ministers granted TM an EAC, subject to the BC Conditions[62] - that is, 37 additional conditions on top of the Federal Conditions.

50. In their Reasons for Decision ("**RMD**"), the BC Ministers identified considerable provincial benefits of the Project, acknowledged the concerns the Province raised during the NEB process, but were satisfied that the Federal Conditions, BC Conditions and regulatory requirements would mitigate spill risks.[63]

51. Additionally, the BC Ministers noted that the Project is "primarily federally-regulated", meaning that: (i) BC cannot impose conditions that conflict with or frustrate federal law; and, (ii) marine spills are the responsibility of the federal government.[64]

52. Then Premier Christy Clark was satisfied that the Project met her "five conditions" to support a heavy oil pipeline, including world-leading spill response and BC's "fair share" of fiscal and economic benefits. Regarding the latter, Premier Clark identified 75,110 person-years of employment, $19.1 billion in BC GDP over 20 years, approximately $2.2 billion in BC tax revenue, $512 million in municipal property taxes, and up to $1 billion in direct payments from TM's then parent.[65]

L. The BCSC Upheld the Entire Provincial Regulatory Review

53. Squamish sought judicial review of the EAC, arguing that the Province's consultation was inadequate. Squamish's primary argument was that the Province was required to fill perceived information deficiencies from the NEB process.[66]

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[61] GIC Explanatory Note, pp. 18-19 (AB, Vol. 4, pp. 1472-1473).

[62] EAC E17-01 (AB, Vol. 6, p. 2122).

[63] RMD, pp. 4-8 (AR, pp. 137-141).

[64] RMD, pp. 1, 5 (AR, pp. 134, 138).

[65] Love Affidavit, Ex. 125 (AB, Vol. 7, pp. 2698-2704).

[66] RFJ, para. 5 (AR, pp. 75-76).

54. Grauer J. dismissed Squamish's Petition. Based on an extensive evidentiary record, Grauer J. found as fact that the Province's consultation on issues of provincial jurisdiction was adequate. The Province grappled with, considered, and engaged in a two-way dialogue regarding Squamish's concerns, and proposed a number of additional conditions to address potential impacts on Indigenous interests. Consultation did not require that BC correct perceived shortfalls in the NEB process.[67]

55. Concurrently, Grauer J. dismissed a similar judicial review by the City of Vancouver on administrative law grounds. The Court found that the BC Ministers' decision not to order additional Project assessment fell within the range of possible, acceptable outcomes defensible in respect of the facts and law.[68]

M. The FCA Upheld the Vast Majority of the Federal Regulatory Review

56. The FCA heard 14 consolidated challenges to the NEB Report and/or the First OIC. The applicants asserted dozens of alleged deficiencies on administrative and constitutional grounds.

57. The FCA dismissed all but one asserted flaw regarding the NEB process and recommendations, finding that the NEB unjustifiably excluded Project-related marine shipping from part of its CEAA 2012 review. Nevertheless, the FCA found that the NEB adequately assessed the scope and significance of the effects of Project-related marine shipping. As a result, the FCA ordered that the GIC direct the NEB to conduct a limited reconsideration of Project-related marine shipping to address distinct CEAA 2012 and *Species at Risk Act* requirements; namely, alternative 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.[69]

58. Notably, the FCA rejected Squamish's administrative and constitutional arguments that the NEB and Canada unlawfully deferred the collection of Project information to

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[67] RFJ, paras. 127-200 (AR, pp. 114-132).

[68] *Vancouver (City) v. British Columbia*, 2018 BCSC 843, paras. 168-174.

[69] *TWN 2018*, paras. 439-440, 456, 469-470, 764-766, 769-770.

Federal Conditions. The FCA found that this argument overlooked the NEB's legislated lifecycle regulation, including oversight of condition compliance.[70]

59. The FCA also dismissed many of the asserted flaws regarding Canada's Indigenous consultation process. It found Canada's consultation framework and reliance on the NEB process to be reasonable.[71] It also noted "significant improvements" from Canada's consultation on the NGP. However, the FCA found that Canada's execution of Phase III was unreasonable because: (i) Canada's consultation representatives were mere "note-takers"; (ii) Canada was unwilling to depart from the NEB's findings and recommendations; and, (iii) Canada believed it was unable to impose additional conditions.[72] The FCA also found that Canada's late delivery of its Project impact assessment contributed to, but was not a main factor in, consultation inadequacy.[73]

PART 2. ISSUES ON APPEAL

60. The issues on appeal are:

(a) What is the Province's jurisdiction over the Project and marine shipping?

(b) Are flaws in the NEB's marine shipping assessment relevant to the EAC?

(c) Did the Province adequately consult regarding the EAC?

(d) If the Province's review or consultation is inadequate, what is the remedy?

PART 3. ARGUMENT

A. The Standard of Review is Reasonableness

61. TM agrees that this Court must determine whether Grauer J. correctly identified and applied the standard of review by focusing, in effect, on the administrative decision.[74]

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[70] *TWN 2018,* paras. 278-291, 335-351, 542-547.

[71] *TWN 2018*, paras. 520-531, 548-549.

[72] *TWN 2018*, paras. 552-562.

[73] *TWN 2018*, paras. 638-648.

[74] *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, paras. 45-46.

62. The required depth of consultation is reviewed on a correctness standard. In contrast, adequacy of consultation and accommodation is assessed on a reasonableness standard.[75] Here, the Province decided to consult Squamish on the "deep" end of the spectrum. Therefore, the only issue is adequacy of consultation.

63. The Court must determine whether the consultation process, viewed as a whole, resulted in "reasonable efforts to inform and consult". Neither perfect satisfaction nor agreement is required. The duty to consult does not provide Aboriginal groups with a "veto" over final Crown decisions; it is reciprocal. Good faith participation is required on both sides. Sometimes, the Crown must make a decision in the face of disagreement as to the adequacy of mitigation measures. The process of consultation and accommodation is determinative, not the outcome.[76]

B. Limited Provincial Jurisdiction over Interprovincial/International Transport

(i) The Constitutional Context of the Provincial Assessment

64. This appeal arises within a specific constitutional context: the Province's obligations to assess and consult regarding an interprovincial undertaking and related marine shipping activities. In this context, the Province was constrained by both the constitutional division of powers and the duty to consult.

65. Grauer J. recognized the importance of this constitutional context, finding that the Province was only required to consult within its legislative jurisdiction under the *Constitution Act, 1867*.[77] Specifically, Grauer J. noted that: (i) the BC Ministers had to issue an EAC; but, (ii) pursuant to provincial jurisdiction to regulate the environment within provincial boundaries, the BC Ministers had the authority to impose EAC conditions; subject to, (iii) the constitutional doctrines of interjurisdictional immunity and federal

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[75] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, paras. 61-63.

[76] *Haida*, paras. 45-50, 62-63; *Prophet River First Nation v. British Columbia (Minister of the Environment)*, 2017 BCCA 58, para. 65, leave to appeal to SCC refused; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations*), 2017 SCC 54, paras. 77, 79, 82-83.

[77] RFJ, paras. 136, 158 (AR, pp. 116, 122).

paramountcy.[78] The Province's duty to consult was triggered by the application for an EAC, not the broader federal decision to proceed with the Project.[79]

66. It is within this constitutional framework that the EAO and BC Ministers considered the Project. They recognized that: (i) "the Project is a primarily federally-regulated undertaking"; (ii) "any [EAC] condition cannot conflict with federal law or federally legally imposed requirements, or frustrate their purpose"; (iii) "[p]ipeline safety is primarily managed and regulated through the NEB"; and, (iv) "marine spill response remains a responsibility of the federal government and the certified response organization".[80]

67. This Court must assess each of the issues raised by Squamish in this appeal with reference to this constitutional context.

(i) The Scope of Provincial Jurisdiction

68. Parliament has exclusive jurisdiction over interprovincial undertakings (including pipelines and integrated facilities) and marine navigation and shipping.[81] The framers' purpose in assigning this jurisdiction to Parliament was to unify the colonies and secure the economic and political viability of the country as a whole.[82]

69. However, the framers did not specifically assign environmental jurisdiction to either level of government. As a result, each of Parliament and the provincial legislatures have constitutional authority over the environment, with their respective jurisdictions limited to environmental issues under their respective heads of power.[83]

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[78] RFJ, paras. 7-9 (AR, p. 76).

[79] RFJ, paras. 158-162 (AR, pp. 122-123).

[80] RMD, pp. 1, 5 (AR, pp. 134, 138).

[81] *Constitution Act, 1867*, ss. 91(10), 91(29), 92(10)(a).

[82] *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23 ("***Lafarge***"), para. 31; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, paras. 36-39.

[83] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 ("***Oldman River***"), pp. 63-68.

70. There are three powerful limits to the Province's environmental jurisdiction.

71. First, the Province cannot use its environmental jurisdiction to invade areas of federal jurisdiction unconnected to a provincial head of power. For example, the Province is "constitutionally incapable of enacting legislation authorizing an interference with navigation … [because] [e]verything connected with navigation and shipping seems to have been carefully confided to the Dominion Parliament".[84]

72. Second, interjurisdictional immunity renders inapplicable provincial impairment of the "core" of federal powers.[85] Interjurisdictional immunity is generally confined to situations that are covered by precedent.[86] The established "core" of interprovincial undertakings includes: (i) their orderly development and efficient operation;[87] (ii) when and where a project is built and operated;[88] and, (iii) project design.[89] The NEB and the courts have repeatedly applied the doctrine to preclude the Province and municipalities from impairing the federal power over the Pipeline and Project.[90]

73. Third, federal paramountcy renders inoperative any provincial law that conflicts with federal law. A conflict arises where either: (i) it is impossible to comply with both laws; or, (ii) although it is possible to comply with both laws, the operation of the provincial law

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[84] *Oldman River*, p. 56, citing (in part) *Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222, p. 232.

[85] *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536 ("***COPA***"), paras. 26-27, 43, 77.

[86] *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, paras. 61-63.

[87] *Rogers*, paras. 5, 66, 71-72, 120; NEB Reasons for Decision, Order MO-057-2017, pp. 24-25 ("**NEB Reasons MO-057-2017**"), leave to appeal to FCA and SCC refused.

[88] NEB Ruling No. 40, pp. 13-15, leave to appeal to FCA refused; NEB Reasons MO-057-2017**,** p. 25; *Burnaby*, paras. 63-68, 72, 75, 78-81; *COPA*, paras. 37, 46-47.

[89] *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, pp. 770-771; NEB Ruling No. 40, p. 14; *Burnaby*, para. 72.

[90] *Campbell-Bennett v. Comstock Midwestern Ltd*., [1954] S.C.R. 207, p. 216; *Burnaby*, para. 75, 81; NEB Ruling No. 40, pp. 13-15; NEB Reasons MO-057-2017, pp. 24-25.

frustrates the purpose of the federal enactment.[91] For example, the Province cannot prohibit or add conditions to a positive legal entitlement under federal law.[92] This principle extends to federal projects authorized by a federal body to which Parliament has granted final decision-making authority.[93] Both the NEB and the courts have applied federal paramountcy to prevent municipal interference with Project-related environmental testing and inordinate delays in the bylaw assessment process. Each did so on the basis that the NEB Act gives TM broad powers to do everything necessary to plan for and carry out Project construction and operations.[94]

74. In *Coastal First Nations,* the BCSC found that the Province could not say "no" to the NGP, but could say "yes" with additional conditions, so long as those additional conditions did not trigger interjurisdictional immunity or federal paramountcy. The Court left open for future consideration the scope of the Province's authority to add conditions.[95]

75. Based on established Supreme Court of Canada jurisprudence, the Court's reasoning in *Coastal First Nations* may be challenged elsewhere.[96] However, for the purpose of this proceeding, TM acknowledges that the Province has limited authority to add *complementary* conditions that build on any Federal conditions. However, those provincial conditions cannot, among other things: (i) impose requirements that the NEB and/or the GIC considered but rejected; (ii) unreasonably delay the development and operation of the Project; or, (iii) impact Project location or design.

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[91] *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 ("***Moloney***"), paras. 18, 29.

[92] *Moloney*, para. 26; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, pp. 151-155; *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, para. 72 ("***Mangat***").

[93] *Lafarge*, paras. 75-85; *Burnaby*, paras. 67, 81.

[94] *Burnaby*, para. 75, 81; NEB Ruling No. 40, pp. 11-13; NEB Reasons MO-057-2017, pp. 23-24; NEB Act, s. 73.

[95] *Coastal First Nations*, paras. 47, 55, 58, 76.

[96] *Reference Re Amendments to the Environmental Management Act*, CA 45253.

C. The Environmental Assessment Certificate remains Valid

76. Squamish argues that the EAC must be quashed because the BC Ministers relied on a flawed NEB Report that did not adequately consider Project-related marine shipping.[97] This argument must fail because: (i) the Province lacks constitutional authority to mitigate or avoid impacts of Project-related marine shipping; and, (ii) the FCA found that the NEB assessment of Project-related marine shipping was adequate to identify potentially significant adverse environmental effects. While the FCA ultimately ordered the NEB to reconsider certain Project-related shipping issues, its findings are irrelevant to the Province's assessment of the Project. Quashing the EAC would serve no practical purpose and must accordingly be refused.

(i) The NEB's Reconsideration is a Narrow Marine Shipping Review

77. Squamish incorrectly argues that the FCA "reset" the "entire Phase II (NEB hearing)".[98] To the contrary, the FCA rejected the vast majority of challenges to the NEB process and assessment. Indeed, the FCA expressly dismissed Squamish's argument that the NEB and the GIC unlawfully deferred the collection of risk assessment and emergency preparedness information to later stages of the NEB's Project lifecycle regulation.[99]

78. The FCA found a single flaw in the NEB's review: the exclusion of marine shipping from its CEAA 2012 review.[100] In particular, the FCA was concerned that this exclusion resulted in the NEB: (i) omitting from its review alternative shipping routes and technically and economically feasible mitigation measures to avoid the impacts of Project-related marine shipping; and, (ii) improperly concluding under CEAA 2012 that the Project will not have significant adverse environmental effects; and, (iii) as a result, not determining

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[97] Squamish Factum, paras. 62-75.

[98] Squamish Factum, paras. 74-75.

[99] *TWN 2018,* paras. 170-387 (in particular, 278-291, 322-351), 520-532, 542-547.

[100] *TWN 2018*, para. 5.

whether those effects are justified.[101] Nevertheless, the FCA found the NEB assessment to be adequate to inform the GIC about the effects of Project-related shipping.[102]

79. As a result of the FCA decision, the GIC ordered the NEB to reconsider, within 155 calendar days, its marine shipping assessment to take into account environmental effects under CEAA 2012 and avoidance and mitigation measures on listed wildlife species (namely, the SRKW) under the *Species at Risk Act* ("**SARA**").[103]

80. That process has already begun. The NEB's List of Issues for the Reconsideration Hearing include: (i) the environmental effects of Project-related shipping; (ii) marine shipping mitigation measures that are technically and economically feasible; (iii) alternative means of carrying out Project-related marine shipping; (iv) follow-up program requirements; and, (v) measures to avoid or lessen adverse effects of Project-related marine shipping on SARA-listed wildlife species and their critical habitat. The NEB's deadline to issue its Reconsideration Report is February 22, 2019.[104]

81. Consistent with the FCA's finding that the NEB's previous assessment of the environmental effects of marine shipping was adequate, the NEB noted that the issue had already been "thoroughly canvassed …. and may not require additional evidence". Further, the NEB noted that mitigation measures will focus on the significant adverse effects of Project-related marine shipping contained in the NEB's original assessment.[105]

(ii) The Province Lacks Constitutional Authority over Marine Shipping

82. Project-related marine shipping falls under Parliament's exclusive jurisdiction over navigation and shipping. This Court has held that "where protection of the environment requires regulation of vessels operating in navigable waters, the Province cannot

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[101] *TWN 2018,* paras. 411, 456, 469-470.

[102] *TWN 2018*, para. 468.

[103] Order in Council P.C. 2018-1177.

[104] Hearing Order MH-052-2018 dated October 12, 2018.

[105] NEB Letter dated September 26, 2018.

legislate".[106] Even where a province has jurisdiction over the management of its land, it has no legislative jurisdiction over federally-regulated activities occurring on water bodies above that land.[107] Further, as noted above, shipping routes are outside the Province's jurisdiction.[108] If the Province cannot legislate, it cannot impose technically and economically feasible conditions to avoid or mitigate pursuant to its legislation, rendering any BC assessment of marine shipping of no practical value.

83. This contrasts starkly with the federal jurisdiction over marine shipping. Indeed, it was the GIC's broad authority over the marine environment that led the FCA to find that the NEB erred by omitting Project-related marine shipping from the "designated project" notwithstanding the NEB's lack of authority to regulate marine shipping. In other words, while the NEB's regulatory authority was limited, the GIC's was not.[109]

84. Parliament has enacted a marine regulatory regime supported by more than 100 regulations enabled by almost 30 statutes as well as international agreements and commitments. TC, with the support of other federal agencies such as the Coast Guard, is responsible for ensuring the regime is comprehensive, addressing safety, environmental preparedness and response, oversight, enforcement and liability.[110]

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[106] *R. v. Kupchanko*, 2002 BCCA 63, paras. 42-43, citing (in part) *St-Denis de Brompton (Municipality) v. Filteau* (1986), 59 D.L.R. (4th) 84 (Que. C.A.), p. 91.

[107] *Morton v. British Columbia, (Minister of Agriculture & Lands)*, 2009 BCSC 136 (*per* Hinkson J., as he then was), paras. 167, 169, remitted on other grounds 2009 BCCA 481, supplemental reasons 2010 BCSC 100, aff'd 2010 BCCA 435 (costs).

[108] NEB Ruling No. 40, pp. 13-15; NEB Reasons MO-057-2017**,** p. 25; *Burnaby*, paras. 63-68, 72, 75, 78-81; *COPA*, paras. 37, 46-47.

[109] *TWN 2018,* para. 456.

[110] Canada, "Our response to British Columbia's Policy Intentions Paper for Engagement: Activities related to spill management"; TC, "Submission to the National Energy Board Review Panel For the Trans Mountain Expansion Project" (AB, Vol. 7, pp. 2511-2577); *Canada Shipping Act, 2001*, S.C. 2001, c. 26; *Vessel Pollution and Dangerous Chemicals Regulations*, SOR/2012-69; *Marine Liability Act*, S.C. 2001, c. 6.

85. For this reason, the Province selected the FCA as the appropriate forum to continue to advocate for additional marine spill risk assessment.[111]

86. Squamish does not delineate or provide any authority for provincial jurisdiction over marine shipping. Instead, it grounds its entire argument on what it perceives as the Province "expressly assert[ing]" jurisdiction over the environmental impacts of marine shipping because the BC Ministers considered it in the Reasons for Decision.[112]

87. Whether the Province "asserted" jurisdiction is irrelevant. In any event, the Province did no such thing. To the contrary, it carefully declined to assert jurisdiction.

88. The Project Lead carefully limited the scope of EAO review to the "proposed Project": namely, the expansion and reactivation of the Pipeline and the new and modified facilities within BC.[113] Likewise, the BC Ministers in their Project Description described the "Project authorized by this [EAC]" as the expanded and reactivated Pipeline, pump stations, terminals and temporary construction infrastructure.[114] They did so because tanker transit and marine spill response falls under federal jurisdiction, while the Province has some limited jurisdiction under its provincial land powers.[115]

89. The Project Lead and the BC Ministers recognized that marine spills can negatively impact BC's coastal lands, and that the Province has a role in coastal emergency response. Therefore, it was important to align regulatory processes for federal marine response and joint federal/provincial land response.[116] Accordingly, the BC Conditions

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[111] *TWN 2018,* paras. 475, 481-483; *Tsleil-Waututh Nation v. Canada (Attorney General*), 2017 FCA 174, paras. 58, 64.

[112] Squamish Factum, para. 72, referencing RMD, pp. 2-5 (AR, p. 135-138).

[113] Section 10(1)(c) Order, paras. A, D (AB, Vol. 5, p. 1668); S. 11 Order, paras. A, D, Schedule A, s. 1 ("Proposed Project") (AB, Vol. 5, pp. 1679, 1681).

[114] Certified Project Description (AB, Vol. 12, p. 4704-4708).

[115] EAO Report, pp. 5, 16, 18 (AB, Vol. 6, pp. 2086, 2097, 2099); RMD, p. 5 (AR, p. 138).

[116] EAO Report, p. 18 (AB, Vol. 6, p. 2099); RMD, p. 5 (AR, p. 138).

related to the marine environment are informational and deal with coastal geographic response planning and shoreline clean-up.[117]

90. Certainly, for both the EAO and the BC Ministers, marine shipping was an issue of "provincial interest".[118] However, given the constitutional limitations on the Province's ability to impact marine shipping activities, their jurisdiction was seriously constrained. In any event, through the NEB's adequate assessment of the environmental effects of Project-related marine shipping, the Province had the information it required to impose mitigation measures.

D. The Province Met Its Duty to Consult

91. Squamish argues that the Province failed to meet its duty to consult because it: (i) relied on the NEB assessment without considering further EAO assessment; (ii) coordinated its consultation process with Canada's Phase III, which the FCA found to be inadequate; and, (iii) relied on aspects of the NEB assessment that it criticized during the NEB hearing. Additionally, Squamish argues that Grauer J. erred by assessing consultation with reference to the Province's limited legislative jurisdiction.

92. For the reasons that follow, each of these arguments must fail.

(i) The Province's Duty to Consult regarding Federal Projects

93. The Province's constitutional boundaries are critical to assessing the adequacy of its consultation. This is because the Crown's duty to consult is triggered where it has real or constructive knowledge of a potential Aboriginal claim or right and contemplates conduct that may adversely affect it. The content of the duty falls along a spectrum ranging from limited to deep consultation, depending on the strength of the Aboriginal claim and the seriousness of the potential impact on the right.[119]

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[117] BC Conditions 11, 34, 35 (AR, pp. 150, 162).

[118] EAO Report, p. 10 (AB, Vol. 6, p. 2091); RMD, p. 2 (AR, p. 135).

[119] *Haida*, paras. 35, 39.

94. Grauer J. recognized that the duty to consult "does not alter the constitutional division of powers between the federal and provincial arms of government".[120] The Province was only obligated to consult, and discuss potential accommodation, in relation to provincial heads of power (here, the determination of conditions within provincial jurisdiction that should be imposed on the EAC).[121] The Province was further constrained by the doctrines of interjurisdictional immunity and federal paramountcy.

95. Canada, as the primary regulator and final decision-maker, did not face the same constraints. Indeed, the GIC could have rejected the Project, required changes to Project design and marine shipping routes, required the NEB review further information or, according to the FCA, imposed additional conditions beyond the jurisdiction of the NEB. Therefore, the GIC decision required consultation on a broader area of topics.

96. Grauer J.'s reasoning is neither novel nor controversial. The Federal Court applied similar reasoning regarding a primarily provincially regulated oil sands project. The Court found that Canada was not required to consult and accommodate on matters within provincial jurisdiction; that duty was reserved for the province.[122] Here, the Province was similarly not required to consult and accommodate on matters within federal jurisdiction.

97. Squamish seeks to apply the duty to consult absent a consideration of the constitutional division of powers. Such an approach is improper, contrary to precedent and ought to be rejected.

(ii) The Province Understood that it could Order Further Assessment

98. Squamish, referring to an EAO letter, argues that the Province wrongly saw itself as constrained by the Equivalency Agreement from ordering further assessment.[123] However, Squamish fails to note that the same EAO letter expressly states that: "based on the information available to Ministers, one option for them under the *Environmental*

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[120] RFJ, para. 136 (AR, p. 116).

[121] RFJ, paras. 160-162 (AR, p. 122-123).

[122] *Adam v. Canada (Environment)*, 2014 FC 1185, paras. 78, 83, 91-94, 105.

[123] Squamish Factum, paras. 77-81.

Assessment Act is to order that further assessment be carried out."[124] The BC Ministers clearly believed that they had the authority to order further assessment; indeed, they also referenced s. 17(3) of the *Act*, which includes the authority to order further assessment.[125]

99. Squamish's real complaint is not that the Province misunderstood that it could order further assessment, it is that the Province declined to order further assessment. Contrary to Squamish's argument, this is either a purely administrative law issue or an issue of consultation adequacy. Either way, the standard of review is reasonableness.

100. Grauer J. found the Province's approach to be reasonable. He noted that further assessment "was constitutionally feasible, depending on its extent, but given the Equivalency Agreement, would have been largely redundant and wasteful of resources given the provincial Crown's opportunity to consult and attach project conditions after completion of the NEB process".[126] The Supreme Court of Canada agrees: equivalency agreements "reduce unnecessary, costly and inefficient duplication".[127]

101. Regardless of whether the BC Ministers ordered further assessment, the Province could – and did – address its concerns through conditions. Through conditions, consultation continues.[128] Further, any additional assessment cannot impair the timely operation of the Project or impose informational requirements that the NEB and the GIC considered but declined to impose prior to Project approval.[129]

102. Squamish's preferred outcome would have been to cancel the Equivalency Agreement for the Project. However, the Equivalency Agreement is of general application. If cancelled, it is cancelled for all projects. In this context, it is logical and reasonable that

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[124] Braun Affidavit, Ex. P, p. 3 (AB, Vol. 13, p. 5219).

[125] RMD, p. 1 (AR, p. 134).

[126] RFJ, para. 161 (AR, p. 123).

[127] *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, para. 41.

[128] RFJ, para. 170 (AR, p. 125); Braun Affidavit, para. 62 (AB, Vol. 7, pp. 2728-2729).

[129] *Rogers*, paras. 5, 66, 71-72, 120; NEB Reasons MO-057-2017, pp. 24-25; *Lafarge*, paras. 75-85; *Bank of Montreal*, pp. 151-155; *Mangat*, para. 72.

the EAO accepted the NEB assessment as equivalent while acknowledging the BC Ministers could order further assessment as permissible under provincial jurisdiction.

(iii) The Province's Consultation Does not Fall with Canada's Phase III

103. Squamish argues that because the Province jointly consulted with Canada during Phase III, unlawful deficiencies in Canada's consultation process must also be attributed to the Province.[130] This argument must fail because it ignores key differences between the provincial and federal consultation processes.

104. The FCA required Canada conduct a "brief and efficient" redo of Phase III because its representatives were mere "note-takers", relied unwaveringly on the NEB assessment and recommendations and thought they were bound by proposed Federal Conditions.[131]

105. None of these flaws were present during the Province's consultation. Further, while the Province coordinated some of its consultation with Canada, it expressly limited its obligations to consult and accommodate to areas of provincial jurisdiction.[132]

106. The majority of the Province's consultation was carried out directly by the Project Lead. Far from a mere "note-taker", the Project Lead proposed 37 BC Conditions, which were in addition to and built incrementally on the Federal Conditions. The Project Lead developed these BC Conditions based in part on his consultation with – and input from – Indigenous groups, including Squamish.[133]

107. Grauer J. found as fact that the Project Lead: (i) "grappled with [Squamish's] concerns and considered them, and … engaged in a two-way dialogue"; and, (ii)

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[130] Squamish Factum, paras. 82-84.

[131] *TWN 2018*, paras. 557-562.

[132] Campbell Affidavit #1, Ex. E (AB, Vol. 1, pp. 74-76); Braun Affidavit, Ex. G, K (AB, Vol. 12, pp. 4709-4710, 4716-4734); S. 11 Order, paras. 4.1.2, 4.1.3. 4.1.5 (AB, Vol. 5, pp. 1682-1683).

[133] Braun Affidavit, paras. 1, 23-62 (AB, Vol. 7, pp. 2711, 2717-2729); S. 11 Order, ss. 3-8 (AB, Vol. 5, pp. 1682-1685).

"proposed a number of additional conditions, several of which were intended to address potential impacts".[134] This is precisely what the FCA found that Canada did not do.

108. The BC Ministers adopted the Project Lead's proposed conditions. Unlike Canada's consultation representatives, the Project Lead had the confidence of the BC Ministers as required by the FCA.[135]

109. Further, the Project Lead engaged with Squamish in the type of meaningful, two-way dialogue contemplated by the FCA. By way of example, in a letter dated December 8, 2016, the Project Lead responded to Squamish's comments on the proposed BC Conditions, noting limits to the Province's constitutional authority over marine shipping and its intent to build incrementally on the Federal Conditions.[136]

110. Contrary to Squamish's argument, the Province's consultation process included more than an exchange of correspondence and two meetings. The uncontroverted facts are that the process included:[137]

(a) requests for Squamish's input on the proposed consultation process;

(b) direct correspondence and meetings with the EAO Executive Director and Project Lead, who had the power to propose legally binding conditions;

(c) opportunities to comment on two draft versions of the CAR;

(d) revisions to draft versions of the CAR based on feedback from Squamish;

(e) access to strength of claim information;

(f) written submissions to the BC Ministers;

(g) explanations from the Project Lead when the EAO disagreed with Squamish's preferred accommodation and positions;

(h) BC Conditions that respond to Indigenous groups' concerns;

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[134] RFJ, paras. 153-157 (AR, pp. 120-122).

[135] *TWN 2018*, para. 759.

[136] Braun Affidavit, Ex. P (AB, Vol. 13, pp. 5217-5222).

[137] See references at footnote 56.

(i) extensive reasons in the CAR, EAO Report, Executive Director's recommendations and Reasons for Ministers' Decision;

(j) the opportunity to engage directly with TM; and,

(k) the opportunity to comment on TM's draft Aboriginal Engagement Report.

(iv) There is no Duty to Consult Regarding Policy Positions

111. Grauer J. rejected Squamish's argument that the Province had a specific duty to explain why it did not require further information prior to issuing an EAC notwithstanding its position before the NEB that such information was required. The Province appeared before the NEB as an advocate; however, once the NEB made its recommendation and the GIC approved the Project "the constitutional table was set". Grauer J. found that the Province "was no longer advocating a position, but rather was dealing with a federal decision that it was constitutionally constrained from impairing or frustrating".[138]

112. Squamish argues that this finding is flawed. It asserts that the Province was required to inform Squamish why it would issue an EAC without requiring TM to provide the information the Province unsuccessfully sought before the NEB. This argument must fail. The Province did not have the constitutional authority to order further assessment of an issue on which the NEB explicitly declined to order further assessment. This would be a clear frustration of the purpose of the NEB's authority.[139]

113. In any event, the Province will receive further information on the Project through the BC Conditions. For instance, in BC Condition 35, the Province required TM to provide a report on its current and future research programs regarding the behaviour and recovery of spilled oil.[140] This BC Condition complements the NEB's finding that the results of ongoing research should continue to inform spill response planning, but that sufficient

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[138] RFJ, paras. 174-179 (AR, pp. 126-127).

[139] *Lafarge*, paras. 75-85; *Bank of Montreal*, pp. 151-155; *Mangat*, para. 72.

[140] BC Condition 35 (AR, p. 26).

evidence was on the record to support the assessment of potential spill-related effects and spill response planning.[141]

114. In any event, the Province *did* explain to Squamish – through both letters and its approval documentation – why it issued the EAC without requesting further information. For example, the Project Lead noted that the proposed BC Conditions built incrementally on the Federal Conditions and addressed the Province's concerns. The BC Ministers also identified the BC Conditions, federal and provincial legislative changes, and the OPP as reasons for finding that Project spills would be mitigated to an acceptable level.[142]

(v) Squamish Understood the Province's Constitutional Limitations

115. Squamish argues that even if the Province was subject to constitutional constraints, it failed to inform Squamish of those constraints.

116. Squamish's argument is unfounded. The Project Lead repeatedly informed Squamish that the Province was consulting only on "areas of provincial jurisdiction".[143] The Project Lead explained to Squamish that this meant the EAO "can advise ministers to consider the inclusion of other complementary conditions in the provincial EA[C]".[144]

117. Squamish, throughout Project review and consultation, had knowledge of and consulted with the Province regarding *Coastal First Nations*.[145] At no point did Squamish ask for clarification or seek an explanation of how the Province was constrained by the division of powers. In any event, such a request would require the Province reveal privileged legal information, which would be improper.

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[141] NEB Report at pp. 136-137 (AB, Volume 3, pp. 911-12).

[142] Braun Affidavit, Ex. P (AB, Vol. 13, pp. 5217-5222); RMD, pp. 4-6 (AR, p. 137-139).

[143] Campbell Affidavit #1, Ex. E (AB, Vol. 1, p. 74-76); Braun Affidavit, Ex. G, K, P (AB, Vol 12, pp. 4709-4710, 4716-4734, Vol. 13, pp. 5217-5222); S. 11 Order, paras. 4.1.2, 4.1.3 and 4.1.5 (AB, Vol. 5, pp. 1682-1683).

[144] Braun Affidavit, Ex. M (AB, Vol. 13, p. 4983-4991).

[145] Campbell Affidavit #1, Ex. E, F, LLL (AB, Vol. 1, pp. 74-79, Vol. 5, pp. 1676-1678); Braun Affidavit, paras. 39-40 (AB, pp. 2720-2721).

PART 4. NATURE OF ORDER SOUGHT

118. TM respectfully requests this appeal be dismissed, with costs.

119. Alternatively, in the event this Court finds an error in the Province's assessment or consultation process, TM submits that quashing the entire EAC is unwarranted. Such a result would result in disproportionate harm to the Canadian economy, TM and other third parties invested in the Project. Instead, the Court should exercise its broad remedial jurisdiction to address any administrative and consultation deficiencies through an alternative remedy that is just and proportionate in the circumstances.[146]

120. Here, the most just remedy is a declaration and limited stay of the EAC on traditional Squamish territory until consultation with Squamish on areas within provincial jurisdiction is complete. The reasons for this are: (i) primary jurisdiction lies with Canada; (ii) the BC Ministers have limited jurisdiction to impose complementary conditions; (iii) Squamish is the only Indigenous group that challenged the EAC; (iv) Squamish did not apply to stay the EAC; (v) the territory over which Squamish asserts rights and title represents only a small portion of the Project, which may only be impacted years from now; and, (vi) the Project is in the Canadian public interest. TM submits that this remedy is proportional, just and will advance reconciliation.

121. All of which is respectfully submitted.

Dated at the City of Calgary, Province of Alberta, this 7th day of November of 2018

Maureen Killoran, QC, Olivia C. Dixon and Sean Sutherland
Counsel to the Respondent,
Trans Mountain Pipeline ULC

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[146] *MiningWatch*, para. 52; *Haida*, paras. 13-14; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, para. 37; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359, paras. 78-83, aff'd on this ground 2011 BCCA 247, paras. 166-167 (*per* Finch C.J.B.C.), para. 169 (*per* Hinkson J.), leave to appeal to SCC refused; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, paras. 39 (*per* Karakatsanis J.), 97-98 (*per* Abella J.).

APPENDIX: ENACTMENTS

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, ss. 91(10),(29), 92(10)(a)

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

10. Navigation and Shipping

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces

Subjects of exclusive Provincial Legislation

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province

***Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 19, s. 52, ss. 29(1), 31(1)(a)**

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.

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; an

***Environmental Assessment Act*, S.B.C. 2002, c. 43. ss. 1, 8-11, 16-17, 27-28 34-37, 41-43, 45**

Definitions

1 In this Act:

"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**.**

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.

Effect on approvals under other enactments

9 (1) Despite any other enactment, a minister who administers another enactment, or an employee or agent of the government or of a municipality or regional district, must not issue an approval under another enactment for a person to

(a) undertake or carry on an 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 satisfied that

(c) the person has a valid environmental assessment certificate for the reviewable project, or

(d) there is in effect a determination under section 10 (1) (b) that an environmental assessment certificate is not required for the project.

(2) Despite any other enactment, an approval under another enactment is without effect if it is issued contrary to subsection (1).

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.

Applying for environmental assessment certificate

16 (1) The proponent of a reviewable project for which an environmental assessment certificate is required under section 10 (1) (c) may apply for an environmental assessment certificate by applying in writing to the executive director and paying the prescribed fee, if any, in the prescribed manner.

(2) 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.

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.

Minister's order to cease or remedy

34 (1) If the minister considers that a reviewable project is not being constructed, operated, modified, dismantled or abandoned or, in the case of an activity that is a reviewable project, carried out, in accordance with an environmental assessment certificate, the minister,

(a) if an environmental assessment certificate for the reviewable project has not been issued or has been issued but does not remain in effect, may order that construction, operation, modification, dismantling or abandonment of the project cease, or that the activity cease, either altogether or to the extent specified by the minister, until the proponent obtains an environmental assessment certificate, or

(b) if an environmental assessment certificate for the reviewable project has been issued and remains in effect, may

(i) order that construction, operation, modification, dismantling or abandonment of the project cease, or that the activity cease, either altogether or to the extent specified by the minister, until the holder of the certificate complies with it, or

(ii) order that the holder of the certificate carry out, within the time to be specified in the order, measures specified by the minister in order to mitigate the effects of non-compliance.

(2) If the minister considers that a person is not complying or has not complied with an order under this Act, in this section called the "original order", the minister may

(a) order the person to comply with the original order, and

(b) specify in the order measures to address the non-compliance and the time within which it must be remedied.

(3) An order under this section may be made to apply generally or to one or more persons named in the order.

Supreme Court order for compliance

35 (1) If the minister considers that any person or organization is not complying or has not complied with an order made under this Act, the minister may apply to the Supreme Court for either or both of the following:

(a) an order directing the person or organization to comply with the order or restraining the person or organization from violating the order;

(b) an order directing the directors and officers of the person or organization to cause the person or organization to comply with or to cease violating the order.

(2) On application by the minister under this section, the Supreme Court may make an order it considers appropriate.

Compliance agreement

36 (1) If the minister considers it appropriate to do so, the minister may give the holder of an environmental assessment certificate an opportunity to make a written compliance agreement with the minister, by which the holder undertakes to comply with the environmental assessment certificate within the time and on the terms specified in the agreement.

(2) Despite a written compliance agreement, the minister may make an order referred to in section 34 in respect of the holder of an environmental assessment certificate or another person that is the subject of an order under section 34

(a) on matters not covered by the agreement,

(b) if the agreement is not complied with, on matters covered in the agreement, and

(c) on matters covered in the agreement if all the material facts related to those matters were not known by the minister at the time of the agreement.

(3) On the application of a holder of an environmental assessment certificate that has a compliance agreement with the minister, the minister may approve an alteration of the agreement.

Suspension, cancellation and amendment of certificates

37 (1) For any of the reasons listed in subsection (2), the minister by order may

(a) suspend all or some of the rights of the holder of an environmental assessment certificate under the certificate or cancel an environmental assessment certificate, or

(b) amend or attach new conditions to an environmental assessment certificate.

(2) The reasons referred to in subsection (1) are as follows:

(a) the holder of the environmental assessment certificate does not substantially start the project by the deadline specified in the certificate;

(b) the minister has reasonable and probable grounds to believe that the holder of the certificate is in default of

(i) an order of the Supreme Court made under section 35, 45 or 47,

(ii) an order of the minister made under section 34 or 36 (2), or

(iii) one or more requirements of the certificate;

(c) the holder of the certificate has been convicted of an offence under this Act;

(d) the holder of the certificate is in default of an order made under section 32 that the proponent pay costs.

(3) Any amendment made or condition attached to an environmental assessment certificate under this section is conclusively deemed to be part of the certificate, whether contained in or attached to it or contained in a separate document.

Offences

41 (1) Section 5 of the *Offence Act* does not apply to this Act or the regulations.

(2) A person commits an offence who

(a) contravenes section 8 (1) or (2),

(b) does not comply with

(i) an environmental assessment certificate, or

(ii) an order referred to in section 34 or 35, or

(c) makes a statement in a record filed or provided under this Act that is false or misleading with respect to a material fact or that omits to state a material fact, the omission of which makes the statement false or misleading.

(3) A person does not commit an offence under subsection (2) (c) if at the time of the statement the person did not know that the statement was false or misleading and, exercising due diligence, could not have known that the statement was false or misleading.

(4) If a corporation commits an offence under this Act, any employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the offence commits the same offence whether or not the corporation is convicted of the offence.

Effect of voluntary compliance agreement

42 An environmental assessment certificate holder that

(a) enters into a voluntary compliance agreement approved under section 36 by the minister, and

(b) is complying fully with the agreement

does not commit an offence under section 41 (2) in respect of a contravention of this Act that the agreement is intended to rectify.

Penalties

43 A person who commits any offence under section 41 is liable,

(a) in the case of a corporation on a first conviction, to a fine of not more than $100 000 and, on each subsequent conviction, to a fine of not more than $200 000, and

(b) in the case of an individual

(i) on a first conviction, to a fine of not more than $100 000 or to imprisonment for not more than 6 months or to both, and

(ii) on each subsequent conviction, to a fine of not more than $200 000 or to imprisonment for not more than 12 months or to both.

Court order to comply

45 If a person is convicted of an offence under this Act, then, in addition to any punishment the court may impose, the court may order the person to comply with the provisions of this Act.

***National Energy Board Act*, R.S.C., 1985, c. N-7, ss. 2, 30, 47, 52-54, 73**

Definitions

2 In this Act

certificate means a certificate of public convenience and necessity issued under Part III or III.1 except that certificate means

(a) in Part III, a certificate issued in respect of a pipeline, and

(b) in Part III.1, a certificate issued in respect of an international or interprovincial power line; (certificat)

Operation of pipeline

30 (1) No company shall operate a pipeline unless

(a) there is a certificate in force with respect to that pipeline; and

(b) leave has been given under this Part to the company to open the pipeline

Compliance with Conditions

(2) No company shall operate a pipeline otherwise than in accordance with the terms and conditions of the certificate issued with respect thereto

Leave to open line

47 (1) No pipeline and no section of a pipeline shall be opened for the transmission of hydrocarbons or any other commodity by a company until leave to do so has been obtained from the Board.

Grant of Leave

(2) Leave may be granted by the Board under this section if the Board is satisfied that the pipeline may safely be opened for transmission.

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

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 mad

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.

Powers of company

73 A company may, for the purposes of its undertaking, subject to this Act and to any Special Act applicable to it,

(a) enter into and on any Crown land without previous licence therefor, or into or on the land of any person, lying in the intended route of its pipeline, and make surveys, examinations or other necessary arrangements on the

land for fixing the site of the pipeline, and set out and ascertain such parts of the land as are necessary and proper for the pipeline;

(b) purchase, take and hold of and from any person any land or other property necessary for the construction, maintenance, operation and abandonment of its pipeline, or the maintenance of its abandoned pipeline, and sell or otherwise dispose of any of its land or property that has become unnecessary for the purpose of the pipeline or the abandoned pipeline;

(c) construct, lay, carry or place its pipeline across, on or under the land of any person on the located line of the pipeline;

(d) join its pipeline with the transmission facilities of any other person at any point on its route;

(e) construct, erect and maintain all necessary and convenient roads, buildings, houses, stations, depots, wharves, docks and other structures, and construct, purchase and acquire machinery and other apparatus necessary for the construction, maintenance, operation and abandonment of its pipeline or the maintenance of its abandoned pipeline;

(f) construct, maintain and operate branch lines, and for that purpose exercise all the powers, privileges and authority necessary therefor, in as full and ample a manner as for a pipeline;

(g) alter, repair or discontinue the works mentioned in this section, or any of them, and substitute others in their stead;

(h) transmit hydrocarbons by pipeline and regulate the time and manner in which hydrocarbons shall be transmitted, and the tolls to be charged therefor; and

(i) do all other acts necessary for the construction, maintenance, operation and abandonment of its pipeline or the maintenance of its abandoned pipeline

***Reviewable Projects Regulation*, B. C. Reg. 370/2002, Table 8**

Table 8

Project Category	New Project	Modification of Existing Project
Transmission Pipelines	**Criteria:** (1) Subject to subsection (2), a new transmission pipeline facility with (a) a diameter of ≤ 114.3 mm and a length of ≥ 60 km, (b) a diameter of between > 114.3 and ≤ 323.9 mm and a length of ≥ 50 km, or (c) a diameter of > 323.9 mm and a length of ≥ 40 km. (2) Assessment of a new facility under subsection (1) does not include the dismantling and abandonment phases.	**Criteria:** (1) Subject to subsections (2) and (3), modification of an existing facility if (a) the existing facility, were it a new facility, would meet the criteria set out opposite in Column 2, and (b) the modification results in (i) for a facility that when modified will have a diameter of ≤ 114.3 mm, (A) rebuilding over a length of ≥ 60 km, or (B) an extension of ≥ 60 km in length, (ii) for a facility that when modified will have a diameter of between > 114.3 and ≤ 323.9 mm, (A) rebuilding over a length of ≥ 50 km, or (B) an extension of ≥ 50 km in length, or (iii) for a facility that when modified will have a diameter of > 323.9 mm, (A) rebuilding over a length of ≥ 40 km, or (B) an extension of ≥ 40 km in length. (2) Assessment of the modification of an existing facility described in subsection (1) does not include the dismantling and abandonment phases.

		(3) Replacement of pipe primarily for maintenance or repair purposes is not reviewable under subsection (1).

LIST OF AUTHORITIES

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