

# 7B

## LEGAL HURDLES AND CURRENT PROSPECTS OF THE TRANS MOUNTAIN PIPELINE EXPANSION

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### § 7B.01 Introduction\*

The saga of Canada's Trans Mountain Pipeline expansion project (Trans Mountain Expansion Project) illustrates many of the issues that face a pipeline developer in a sophisticated, developed nation. Governmental infighting, politically risky decision making, Indigenous peoples' rights and considerations, environmental impacts, and credit-worthiness concerns are a few of the hurdles the project faced and continues to encounter. Proponents assert that twinning the aging pipeline will allow for the greatest economic benefit to nearly all of Canada (including via sales to the United States), as oil production continues to increase in the province of Alberta. The most pressing opposition to the project comes from the province of British Columbia, particularly the popular tourist destination of Vancouver, where the government fears a pipeline expansion could ruin the coastline because of an oil spill. Many Indigenous groups also oppose the project and seek to exercise their right to be thoroughly consulted and, where appropriate, to be accommodated regarding their rights to the underlying lands. Arm's-length international observers of Canada may assume that the nation's leader, Prime Minister Justin Trudeau, who has long maintained that it is in Canada's national interest to protect the environment and to fight climate change,<sup>1</sup> would oppose the project. However, the expansion's economic benefits promised to be significant enough that Prime Minister Trudeau not only approved the project as an advisor to the Governor in Council,<sup>2</sup> but also moved for the Canadian government to purchase the project rather than see it crumble. Moreover, Indigenous groups that did not protest the project or challenge it in the Federal Court of Appeal may ultimately purchase it from the federal government, as has been proposed. While fiercely dividing the normally harmonious nation,

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<sup>1</sup>See Ian Austen, "Canada Approves Expansion of Controversial Trans Mountain Pipeline," *N.Y. Times* (June 18, 2019).

<sup>2</sup>See *Interpretation Act*, R.S.C. 1985, c. I-21, s. 35 (defining the "Governor in Council" as "the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada"; in effect, this means the Governor in Council acts by issuing orders in council when directed to do so by the entire assembly of federal cabinet ministers, of which the Prime Minister is one).

the expansion project has generated interesting debates and strange bed-fellows on the road to building infrastructure and strengthening Canada's energy industry, both domestically and internationally.

The purpose of this chapter is to provide a high-level overview of the legal, economic, and political challenges faced by the Trans Mountain Expansion Project locally, nationally, and internationally. The chapter provides a background on the pipeline and its proposed expansion, an overview of Canada's National Energy Board (NEB) and its review process, a review of the federal approval of the expansion project, highlights of the ensuing interprovincial feuding and Indigenous peoples' protests, a brief description of the deal by the Canadian government to purchase the pipeline, an examination of the Federal Court of Appeal's overturning of the NEB review and approval, an update on where the project stands today, and an analysis of how the project has impacted relations with the United States.

### § 7B.02 Background on the Trans Mountain Pipeline and Proposed Expansion

Massive oil deposits in the sands of Alberta, Canada, were discovered in 1947.<sup>3</sup> To meet markets in both Asia and the northwestern United States, pipeline developers organized to build a line from Alberta to British Columbia, where the newly discovered oil could be shipped. As a result, the Trans Mountain Pipeline was commissioned in 1951 and runs from Edmonton, Alberta, to Burnaby, British Columbia.<sup>4</sup> The pipeline ships 300,000 barrels of crude oil per day (bbl/d) across its 1,147-kilometer length.<sup>5</sup> Since 1961, the pipeline has documented 84 spills with the NEB, though some were below the threshold for required reporting. No spills have occurred due to vessels transporting the shipments from the Westridge Marine Terminal.<sup>6</sup>

Based on requests from shippers, Trans Mountain Pipeline ULC (Trans Mountain), which is owned by Kinder Morgan Canada Ltd. (Kinder Morgan), applied to expand the Trans Mountain Pipeline because of a need for more affordable transportation of crude oil from the sands of Alberta across Canada to the northwestern United States and international markets.<sup>7</sup>

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<sup>3</sup>See Earle Gray, *The Great Canadian Oil Patch: The Petroleum Era from Birth to Peak* 172–73 (2005).

<sup>4</sup>See *id.* at 214–15.

<sup>5</sup>See Trans Mountain Pipeline ULC (Trans Mountain), “Operations,” <https://www.transmountain.com/existing-pipeline>; NEB, “National Energy Board Report: Trans Mountain Expansion Project,” at 1–2 (Docket No. OH-001-2014 May 2016) (NEB Report).

<sup>6</sup>Trans Mountain, “Spill History,” <https://www.transmountain.com/spill-history>.

<sup>7</sup>NEB Report, *supra* note 5, at 1.

Currently, the production from the oil sands is increasing without the pipeline infrastructure to facilitate that growth, which requires producers to move the product via costly rail shipments.<sup>8</sup> As the NEB stated in its review of the project, “Trans Mountain Pipeline . . . has been apportioned for several years and producers have been increasingly dependent on rail.”<sup>9</sup> The report also showcased multiple forecasts of crude oil production that indicate an expected increase in the supply that “will [continue to] increase between the years 2015 and 2030.”<sup>10</sup> To alleviate the rising costs and update the pipeline infrastructure, Kinder Morgan proposed to expand the Trans Mountain Pipeline.

Additionally, markets for the oil are growing, particularly in Asia. The forecasts cited by the NEB report found that the two primary markets for the expansion would be the Puget Sound area of the northwestern United States and Northeast Asia.<sup>11</sup> The report noted that demand for oil continues to grow in Asia, though it is finite in the United States.<sup>12</sup> In the United States, Washington’s Puget Sound area contains five oil refineries, four of which receive western Canadian crude oil by the Trans Mountain Pipeline, while the fifth receives the same oil by barge.<sup>13</sup> Tankers export crude oil shipments to California, Washington, and Asia from the Westridge Marine Terminal in Burnaby, British Columbia, the pipeline’s endpoint.<sup>14</sup>

After hearing about the need for more shipping capacity from shippers in western Canada, Kinder Morgan proposed to expand the Trans Mountain Pipeline to increase oil shipments from 300,000 bbl/d to 890,000 bbl/d, almost tripling its capacity.<sup>15</sup> The pipeline will remain on the same path from Edmonton, Alberta, to Burnaby, British Columbia. The expansion will occur by looping (or twinning) the existing 1,147-kilometer Trans Mountain Pipeline system, adding nearly 987 kilometers of new buried pipeline.<sup>16</sup> While currently the Westridge Marine Terminal loads about five tankers of oil shipments per month, the proposed expansion would increase those loads to an estimated 34 vessels per month, depending on

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<sup>8</sup>Ian Austen, “In Canada, 2 Provinces Feud over Pipeline: Will It Bring Jobs or Spills?” *N.Y. Times* (Apr. 14, 2018).

<sup>9</sup>NEB Report, *supra* note 5, at 309.

<sup>10</sup>*Id.* at 310.

<sup>11</sup>*Id.* at 301.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* at 302.

<sup>14</sup>*Id.* at 1.

<sup>15</sup>*Id.* at 2; *see also* Geoffrey Morgan, “NEB Approves Kinder Morgan’s Trans Mountain Pipeline Expansion with 157 Conditions,” *Fin. Post* (May 19, 2016).

<sup>16</sup>NEB Report, *supra* note 5, at 1.

market conditions.<sup>17</sup> Cost estimates for the expansion range from approximately C\$5.5 billion to C\$9.3 billion.<sup>18</sup>

Kinder Morgan announced plans for the Trans Mountain Expansion Project in May 2012.<sup>19</sup> Trans Mountain obtained 15- to 20-year firm commitments from shippers that totaled “roughly 80 per cent of the capacity in an expanded system.”<sup>20</sup> Trans Mountain submitted its application to the NEB for a certificate of public convenience and necessity on December 16, 2013.<sup>21</sup>

### § 7B.03 National Energy Board (NEB) Authority and Review Process

In Canada, approval of an oil or natural gas pipeline requires review by federal regulatory bodies and/or provincial governments. The process begins at the federal level with review by the NEB, an independent agency.

The Canadian Parliament created the NEB in 1959, pursuant to the *National Energy Board Act (NEB Act)*,<sup>22</sup> to govern the electric energy system, including pipelines that cross provinces or international borders, and certain offshore developments. Their work must be carried out pursuant to Canada’s “public interest,” which the NEB defines as “inclusive of all Canadians . . . [in order to achieve] a balance of economic, environmental and social interests that changes as society’s values and preferences evolve over time.”<sup>23</sup>

To initiate a pipeline project approval process, the pipeline developers must submit an application for a certificate of public convenience and necessity, along with any other requests needed to construct and operate the project, to the NEB. The NEB reviews all applications and ultimately makes a recommendation to the Prime Minister for approval or denial of a certificate.<sup>24</sup>

During the review process of a pipeline application, the NEB’s analysis focuses on “the overall public good that a project may create as well as

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<sup>17</sup>*Id.* at 2.

<sup>18</sup>See *id.* at 305; Austen, *supra* note 1.

<sup>19</sup>News Release, Trans Mountain, “Project Rundown: 2012 to Today” (Aug. 1, 2017).

<sup>20</sup>*Id.*

<sup>21</sup>NEB Report, *supra* note 5, at 1.

<sup>22</sup>R.S.C. 1985, c. N-7.

<sup>23</sup>NEB, “Pipeline Regulation in Canada: A Guide for Landowners and the Public,” at 21 (2003).

<sup>24</sup>NEB Act § 52.

its potential negative impacts.”<sup>25</sup> The *NEB Act*, the *National Energy Board Rules of Practice and Procedure*, 1995,<sup>26</sup> and the NEB’s *Guidelines for Filing Requirements*<sup>27</sup> detail the requirements for the application contents and supplemental submittals. The NEB also published a filing manual to assist applicants with the approval process, most recently updated in July 2017.<sup>28</sup>

In making its decision, the NEB will consider, among other things, “(a) the availability of oil, gas or any other commodity to the pipeline; (b) the existence of markets, actual or potential; [and] (c) the economic feasibility of the pipeline . . . .”<sup>29</sup> The purpose of the factor analysis is to determine whether or not the pipeline will be adequately used over its lifetime.<sup>30</sup> Pipeline applications for new interprovincial or international pipelines over 40 kilometers in length, thus entailing a section 52 facility application or Part III application, require a public hearing. Once public hearings, consultations with Indigenous groups, financial assessments, and environmental impact analyses have occurred, the NEB decides to recommend, recommend conditionally, or deny the project.

When reviewing the Trans Mountain Expansion Project later, the Federal Court of Appeal noted that “[the] application was complex, raising challenging issues on matters as diverse as Indigenous rights and concerns, pipeline integrity, the fate and behaviours of spilled hydrocarbons in aquatic environments, emergency prevention, preparedness and response, the need for the Project and its economic feasibility and the effects of Project-related shipping activities.”<sup>31</sup> The court continued by describing the approval process as “long and demanding for all participants; after the hearing the [NEB] was left to review tens of thousands of pages of evidence.”<sup>32</sup>

### § 7B.04 Federal Government Approval of the Trans Mountain Expansion Project

On May 19, 2016, the NEB issued its recommendation to the Governor in Council to approve the Trans Mountain Expansion Project subject to 157

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<sup>25</sup>Shawn Denstedt, Martin Ignasiak & Richard J. King, Osler, “Regulatory Approvals for Energy Projects” (Dec. 2014); *see also* Brooke Neal, “The Economy, Environment, and Politics in the Canadian Pipeline Regulatory Process,” 22 *Law & Bus. Rev. Am.* 425, 427 (2016).

<sup>26</sup>SOR/95-208.

<sup>27</sup>NEB, *Guidelines for Filing Requirements* (1995).

<sup>28</sup>NEB, “Filing Manual” (Rel. 2017-01 July 13, 2017).

<sup>29</sup>*NEB Act* § 52(2)(a)–(c); *see also* NEB Report, *supra* note 5, at 293.

<sup>30</sup>NEB Report, *supra* note 5, at 293.

<sup>31</sup>*Tsleil-Waututh Nation v. Canada* (Att’y Gen.), 2018 FCA 153, para. 465.

<sup>32</sup>*Id.* para. 466.

conditions and to direct the NEB to issue the required certificate of public convenience and necessity and amended certificates.<sup>33</sup> Acting pursuant to the *NEB Act* and the *Canadian Environmental Assessment Act, 2012*,<sup>34</sup> the NEB analyzed possible environmental and socioeconomic effects of the potential project. The NEB also considered Indigenous interests pursuant to section 35(1) of the *Constitution Act of 1982*, requiring recognition of the rights of Canadian Indigenous peoples. The over-500-page report details the benefits and burdens of the expansion project. The benefits assessed included market diversification, job creation, competition among pipelines, and regional and local benefits due to spending on pipeline materials. The burdens assessed included significant adverse effects on the Southern resident killer whale population, Indigenous peoples' cultural use associated with Southern resident killer whales, and marine greenhouse gas emissions.

On November 29, 2016, Prime Minister Trudeau, acting in his capacity as advisor to the Governor in Council, approved the NEB's recommendation and issued Order in Council P.C. 2016-1069.<sup>35</sup> Prime Minister Trudeau touted the expansion's potential to open Canada to broader energy markets, stating that "Trans Mountain's unique strategic value . . . will give traditional Canadian energy resources access to international markets beyond the United States."<sup>36</sup> He also noted that the pipeline would update Canada's aging pipeline infrastructure.<sup>37</sup> On December 1, 2016, the NEB issued Certificate OC-064 allowing the project to move forward.<sup>38</sup>

Additionally, the British Columbia Environmental Assessment Office (BC EAO) performed an environmental analysis<sup>39</sup> of the expansion project and ultimately issued an environmental assessment certificate for the project.<sup>40</sup> BC EAO's assessment included consultation with Indigenous groups and analysis of the lands and wildlife potentially disrupted. Trans Mountain also engaged in a voluntary Technical Review Process of Marine

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<sup>33</sup>See generally NEB Report, *supra* note 5.

<sup>34</sup>S.C. 2012, c. 19, s. 52.

<sup>35</sup>Order in Council No. P.C. 2016-1069 (Nov. 29, 2016).

<sup>36</sup>Justin Trudeau, Prime Minister of Can., "Prime Minister Justin Trudeau's Pipeline Announcement" (Nov. 29, 2016).

<sup>37</sup>*Id.*

<sup>38</sup>NEB, "Certificate of Public Convenience and Necessity OC-064" (Dec. 1, 2016).

<sup>39</sup>BC EAO, "Trans Mountain Expansion Project—Summary Assessment Report" (Dec. 8, 2016).

<sup>40</sup>BC EAO, "Environmental Assessment Certificate E17-01" (Jan. 10, 2017).

Terminal Systems and Transshipment Sites (TERMPOL) to address the expected increase in marine traffic due to the project.<sup>41</sup>

## § 7B.05 Interprovincial Feuding and Indigenous Peoples' Protests

The Trans Mountain Expansion Project seemingly pits two provinces' interests against one another, while also forcing Prime Minister Trudeau to balance environmental and economic issues in a political quandary. Indigenous groups have demanded that their concerns be addressed, with some groups seeking recourse in the courtroom to obtain the reasonable consultations to which they are entitled under Canadian law.

### [1] Interprovincial Feuding

The oil sands of Alberta provide the nation with plentiful crude oil and natural gas. The industry provides high-paying jobs and large resource royalty payments to Alberta.<sup>42</sup> From the Trans Mountain Expansion Project's inception, Premier Rachel Notley of Alberta has emphasized the expansion's importance for the energy industry of the province.<sup>43</sup>

Opposition to the project is primarily founded on concerns about impacts on the marine environment and greenhouse gas emissions. Premier Notley's counterpart in British Columbia, Premier John Horgan, has opposed the project because of the environmental effects, especially off the coast of the province.<sup>44</sup> Environmentalists consider the oil sands to be an excessively polluting energy source and the pipeline expansion to conflict with efforts to reduce greenhouse gas emissions.<sup>45</sup> Various stakeholders have taken action to assert their positions. Prior to the federal approval, the NEB received complaints from Kinder Morgan that the City of Burnaby, British Columbia, withheld issuance of four municipal permits, though city officials denied any such delays.<sup>46</sup> Premier Notley signed a law to allow Alberta to stop sending oil and gas to British Columbia and allegedly halted wine imports from British Columbia.<sup>47</sup> After the project's federal

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<sup>41</sup> See Trans Mountain, "TERMPOL," <https://www.transmountain.com/termpol>.

<sup>42</sup> See Ian Austen, "Canadian Government to Buy Kinder Morgan's Trans Mountain Pipeline," *N.Y. Times* (May 29, 2018).

<sup>43</sup> See Ian Austen, "Justin Trudeau Approves Oil Pipeline Expansion in Canada," *N.Y. Times* (Nov. 29, 2016); Austen, *supra* note 8.

<sup>44</sup> See Austen, *supra* note 8.

<sup>45</sup> See *id.*

<sup>46</sup> See Justine Hunter, Shawn McCarthy & Jeff Lewis, "B.C. Slams Ottawa's Defence of Trans Mountain Pipeline Expansion," *The Globe & Mail* (Nov. 29, 2017).

<sup>47</sup> See Austen, *supra* note 42; see also Meghan L. O'Sullivan, "Trump's Trade War Has a Bright Side for Canada," *Bloomberg* (June 8, 2018).



approval, the City of Burnaby filed an action in federal court to challenge an NEB finding that, as a matter of constitutional law, the four permits issued by Burnaby were not required,<sup>48</sup> but in August 2018 the Supreme Court of Canada denied Burnaby's request to hear an appeal of the Federal Court of Appeal's decision.<sup>49</sup>

Throughout the interprovincial infighting, Kinder Morgan exhibited its frustration with the lengthy regional approval process required by the NEB. In November 2017, Kinder Morgan motioned for the NEB to strike the standing board that had been assigned under its conditional certificate to review the project's compliance with municipal and provincial permits. The motion was opposed by the Attorney General of Canada and was dismissed by the NEB.<sup>50</sup> Eventually, citing the uncertainty and tension posed by the public political brawl and British Columbia's opposition, Kinder Morgan suspended nonessential spending for the project in April 2018.<sup>51</sup> The company also set a hard deadline of May 31, 2018, for canceling the project unless the Canadian government showed support by that date.<sup>52</sup>

## [2] Indigenous Peoples' Protests

During the Trans Mountain Expansion Project's review process, the NEB identified 1,650 participants in the review, including 1,250 commenters and 400 intervenors.<sup>53</sup> Trans Mountain claimed to have conducted "a robust public engagement program," including "more than 24,000 points of engagement with Aboriginal communities."<sup>54</sup> According to the NEB report, Trans Mountain followed Indigenous and Northern Affairs Canada's recommendation to use a 10-kilometer buffer around the project's corridor in British Columbia to identify potentially affected Indigenous groups and consulted with them.<sup>55</sup>

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<sup>48</sup> See NEB, "Court Challenges to National Energy Board or Governor in Council Decisions," <https://www.neb-one.gc.ca/pplctnflng/crt/index-eng.html?=&wbdisable=true>.

<sup>49</sup> See Canadian Press, "'Batting a Thousand': Notley Celebrates Supreme Court Decision to Dismiss Case Against Trans Mountain Pipeline," *Edmonton Journal* (Aug. 23, 2018).

<sup>50</sup> Dep't of Justice of Can., "Attorney General of Canada Letter-Response to Trans Mountain 14 November 2017 Motion" (Nov. 28, 2017).

<sup>51</sup> Press Release, Kinder Morgan, "Kinder Morgan Canada Limited Suspends Non-Essential Spending on Trans Mountain Expansion Project," *PR Newswire* (Apr. 8, 2018).

<sup>52</sup> *Id.*

<sup>53</sup> News Release, *supra* note 19.

<sup>54</sup> News Release, Trans Mountain, "Trans Mountain Pleased with Regulator's Positive Recommendation: Company Looking Ahead to Next Steps and to Have Expanded Pipeline Operating in 2019" (May 19, 2016).

<sup>55</sup> NEB Report, *supra* note 5, at 32.

However, six First Nation tribes of Canada, located in British Columbia, did not believe they were adequately consulted and began protesting the project both on the ground and in the courtroom.<sup>56</sup> The First Nation tribes were encouraged by the success of previous pipeline protests. In 2014, Canadian natural gas giant Enbridge Inc. (Enbridge) had a project planned for the Northern Gateway Pipeline estimated at C\$7.9 billion with approval from a previously Conservative government under Prime Minister Stephen Harper.<sup>57</sup> The project initially stalled due to First Nation opposition, and then in June 2016 the Federal Court of Appeal ruled that First Nations were not sufficiently consulted between the issuance of the NEB's recommendation report and the Governor in Council's decision to approve the project and quashed the project, which the federal government and Enbridge did not appeal.<sup>58</sup> Similarly, Indigenous groups protested the Trans Mountain Expansion Project starting in spring 2018. As one First Nation protester told the press: "That pipeline will never go through."<sup>59</sup>

### § 7B.06 Federal Purchase of the Pipeline

Days before Kinder Morgan's May 31, 2018, deadline for Canadian government action, Canada's federal government announced that it would purchase the existing Trans Mountain Pipeline and expansion from Kinder Morgan for C\$3.5 billion.<sup>60</sup> The announcement came after months of closed-door negotiations between Kinder Morgan and the federal government. The purchase is meant to be temporary, until Canada finds an appropriate buyer. Prior to the purchase Canada announced it would indemnify Kinder Morgan for any costs due to the project, an offer that seemed to have been included in the deal.<sup>61</sup> Canada's Finance Minister, Bill Morneau, served as spokesman for the administration asserting that no negative fiscal impact would occur.<sup>62</sup> He told the press that "[m]any investors have already expressed interest in the project, including Indigenous groups, Canadian pension funds, and others."<sup>63</sup> Alberta's government

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<sup>56</sup>See Chantelle Bellrichard, "'More Was Required of Canada': Ruling Shows Where Ottawa Fell Short with First Nations on Trans Mountain," *CBC News* (Aug. 31, 2018).

<sup>57</sup>See Gordon Hoekstra, "Yes Could Still Be No as Kinder Morgan Awaits Trudeau's Nod on Its Multibillion-Dollar Pipeline Expansion," *Vancouver Sun* (Nov. 25, 2016).

<sup>58</sup>*Id.*

<sup>59</sup>Laura Kane, "Indigenous Protesters in Washington Insist Trans Mountain Won't Be Built," *The Canadian Press* (June 18, 2019).

<sup>60</sup>See Josh Wingrove & Greg Quinn, "Canada Buys Kinder Trans Mountain Pipeline for \$3.5 Billion," *Bloomberg* (May 29, 2018).

<sup>61</sup>*Id.*

<sup>62</sup>*Id.*

<sup>63</sup>*Id.*

sweetened the deal, agreeing to create an emergency fund of C\$2 billion for any “unforeseen circumstances” that could affect the project.<sup>64</sup>

Along with the purchase, Canada’s government issued plans for the expansion. During summer 2018, while the deal was being finalized, the pipeline construction continued while backed by a federal loan guarantee. Canada had agreed to indemnify any new owner of the project against delays or specific costs.<sup>65</sup> Some raised concerns that the United States had the power to stall or disable Canada from moving forward with the purchase, pointing to the authority of the Committee on Foreign Investment in the United States (CFIUS) to cancel any deal with a foreign nation because of national security concerns or a failed “presidential permit” review via the State Department.<sup>66</sup> However, these fears did not bear out as the agreement moved forward.

On the day that Kinder Morgan shareholders authorized Canada’s purchase of the expansion project in August 2018, a unanimous three-judge panel on the Federal Court of Appeal issued an opinion authored by Superior Appeals Court Justice Eleanor Dawson, *Tsleil-Waututh Nation v. Canada (Attorney General)*,<sup>67</sup> which quashed the government’s Order in Council P.C. 2016-1069, making the certificate of public convenience and necessity that authorized the project “a nullity.”<sup>68</sup> Soon after the ruling issued, Premier Notley notified Prime Minister Trudeau that Alberta would no longer support a federal climate change plan without clear action from the Canadian government on the expansion project. Losing Alberta’s support for the federal climate change plan, which Prime Minister Trudeau had engineered in exchange for his support of the expansion project, was described in the press as the unraveling of “Trudeau’s grand bargain” and was a particularly hard blow to the Prime Minister.<sup>69</sup>

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<sup>64</sup>*Id.*; see also “Ottawa Is Buying Trans Mountain. What Does that Mean? A Guide,” *The Globe & Mail* (May 29, 2018).

<sup>65</sup>Wingrove & Quinn, *supra* note 60.

<sup>66</sup>See Tom Sanzillo & Kathy Hipple, “US-Canada Trade Tensions Could Scuttle Transnational Pipeline Deal,” *The Hill* (Aug. 3, 2018).

<sup>67</sup>2018 FCA 153.

<sup>68</sup>*Id.* para. 768.

<sup>69</sup>Chris Fournier, Rachel Adams-Heard & Kevin Orland, “Trudeau’s Grand Bargain Unravels After Alberta Nixes Carbon Plan,” *Bloomberg* (Aug. 30, 2018); see also Jessica Murphy, “Trans Mountain: The Billion-Dollar Oil Pipeline Canadians Own and Can’t Build,” *BBC News* (Nov. 26, 2018).

## § 7B.07 Federal Court of Appeal's Overturning of the Project's Approval

The ruling in *Tsleil-Waututh Nation* forced the Trans Mountain Expansion Project on a new path of reevaluation and highlighted the importance for pipeline developers not only to anticipate and meet the requirements set forth by the reviewing regulatory body, but also to understand the legal framework and scrutiny that a reviewing court may apply to that regulatory approval. While the court here found multiple errors in the NEB's regulatory review of the project, it limited its judgment solely to what was legally binding on the project (i.e., Order in Council P.C. 2016-1069, rather than the NEB review).<sup>70</sup> The grievances of many project opponents described above, including the City of Vancouver, had been appealed before Canadian courts and were consolidated into this case.<sup>71</sup> The court highlighted a legally required level of scientific and technical rigor that it found unmet, as well as a level of cultural engagement and commitment with Indigenous groups that was also legally required and unmet, both of which led the court to nullify the project's approval. The court's examination of these errors is explored below, as well as the court's proposed instructions to remedy them.

### [1] Governor in Council Relied on a Conclusion from the NEB's Review that Improperly Excluded the Effects of the Project's Marine Shipping

The court acknowledged that the NEB report adequately informed the Governor in Council of the significant effects that the project's marine shipping was estimated to have on the Southern resident killer whales and the practices of Indigenous groups that use them.<sup>72</sup> These whales live in the Salish Sea and are an endangered species. The expansion project encompasses a route to the open ocean through the Salish Sea, including a critical habitat for the whales. The reported effects included a contribution to the

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<sup>70</sup>See *Tsleil-Waututh Nation*, 2018 FCA 153, para. 4; *id.* paras. 202, 203 (“[T]he report of the [NEB] is not justiciable. It follows that I would dismiss the six applications for judicial review which challenge that report. . . . As the City of Vancouver did not seek and obtain leave to challenge the Order in Council, it follows that the City is precluded from challenging the Order in Council.”).

<sup>71</sup>See *id.* paras. 15–49 (including the Tsleil-Waututh Nation, City of Vancouver, City of Burnaby, Squamish Nation, Coldwater Indian Band, Stó:lō Collective, Upper Nicola Band, Stk'emlupsemc te Secwepemc of the Secwepemc Nation, and Raincoast Conservation Foundation and Living Oceans Society).

<sup>72</sup>*Id.* para. 439; see *id.* para. 68 (repeating the NEB's finding that “the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale, and that it is likely to result in significant adverse effects on Aboriginal cultural uses associated with these marine mammals” (quoting NEB Report, *supra* note 5, at xii)).

total cumulative effects on the species, further hampering recovery of the species.<sup>73</sup> Regardless of these effects, the NEB found that the only mitigation measures available to the project were beyond its regulatory authority to demand; the NEB also defined the project to exclude project-related marine shipping, thus excluding the effects of such shipping from the definition of the project, which allowed the NEB to find that the project “was not likely to cause significant adverse effects.”<sup>74</sup>

However, according to the court, the NEB report was clear enough about these impacts to adequately put the Governor in Council on notice as to the significance of these effects and their unjustifiable exclusion from the report’s conclusion.<sup>75</sup> The burden, the court found, lay with the Governor in Council to recognize that by excluding the assessment from its ultimate conclusion, the NEB sidestepped its obligation under the *Canadian Environmental Assessment Act, 2012*, and *Species at Risk Act*.<sup>76</sup> The court acknowledged “inchoate initiatives” by the Governor in Council for advancing some mitigation of impacts on the species, but “while laudable and to be encouraged, [they] are by themselves insufficient to overcome the material deficiencies in the [NEB] report . . .”<sup>77</sup> Ultimately, the court found the NEB report “so flawed” that it concluded that the Governor in Council’s reliance on it was unreasonable.<sup>78</sup>

## **[2] Canadian Government Did Not Adequately Engage with Indigenous Groups Prior to Project Approval**

In addition, the court found that, after issuance of the NEB report, the Canadian government (or the “Crown”) failed to perform sufficiently meaningful two-way dialogue with the Indigenous complainants in the case. Canadian law requires meaningful and at times deep dialogue as a “prerequisite for reasonable consultation” with Indigenous groups.<sup>79</sup> The court stated that “meaningful consultation is not simply a process of exchanging information. . . . [If] deep consultation is required, a dialogue

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<sup>73</sup>*Id.* para. 68.

<sup>74</sup>*Id.* para. 439.

<sup>75</sup>*See id.* para. 440 (noting that the court took into consideration an Explanatory Note supplied by the Governor in Council, which demonstrated that the Governor in Council was “fully aware of the effects of Project-related marine shipping identified by the [NEB] and that the operation of Project-related vessels is likely to result in significant adverse effects upon both the Southern resident killer whale and Indigenous cultural uses of this endangered species”).

<sup>76</sup>*Id.* paras. 469–70.

<sup>77</sup>*Id.* para. 471.

<sup>78</sup>*Id.* para. 473.

<sup>79</sup>*Id.* para. 564.

must ensue and the dialogue should lead to a demonstrably serious consideration of accommodation,” with the Crown ready to apply changes to the proposed actions.<sup>80</sup> The court points to guidance from the Supreme Court of Canada’s precedents to identify “indicia of a reasonable consultation process,”<sup>81</sup> which here included “early notice of the Project,” funding for the Indigenous groups involved, written and oral evidence from the Indigenous groups, questions by Indigenous groups to the government and developers, Indigenous groups’ written and oral closing submissions, and an additional consultation phase (Phase III) in which the Crown agreed that outstanding concerns would be addressed, among other things.<sup>82</sup> The court found this consultation framework legally sufficient to provide the reasonable consultation owed to the affected Indigenous groups.<sup>83</sup>

However, the court found that the Crown did not in fact adequately execute the framework outlined. Rather, the evidence the Crown presented showed little more than meeting with the Indigenous groups and taking notes on those meetings. “The meeting notes show little or no meaningful responses from the Crown consultation team to the concerns of the Indigenous applicants. Instead, too often Canada’s response was to acknowledge the concerns and to provide assurance the concerns would be communicated to the decision-makers.”<sup>84</sup> During the final phase of consultation with the groups (Phase III), the court found that the Crown “displayed a closed-mindedness” to concerns with the NEB report and an unwillingness to deviate from the conclusions therein, doing little more than passively hearing and receiving the Indigenous groups’ concerns.<sup>85</sup> The court reiterated that Canada’s government relied too wholeheartedly on the NEB process to suffice for its Indigenous consultation, when it had a responsibility to address the real concerns of those groups of its own volition with “the power to impose conditions on any certificate of public convenience and necessity it directs the [NEB] to issue,”<sup>86</sup> which it failed to do.<sup>87</sup> Ultimately, the court summarized its findings as three “systemic limitations”<sup>88</sup> that led to the Crown’s legally inadequate consultation with

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<sup>80</sup>*Id.*

<sup>81</sup>*Id.* para. 548 (citing *Clyde River (Hamlet) v. Petroleum Geo-Servs. Inc.*, 2017 SCC 40; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41).

<sup>82</sup>*Id.*

<sup>83</sup>*Id.* para. 549.

<sup>84</sup>*Id.* para. 598.

<sup>85</sup>*Id.* para. 603.

<sup>86</sup>*Id.* para. 634.

<sup>87</sup>*Id.* para. 627.

<sup>88</sup>*Id.* para. 761.

Indigenous groups: (1) the lack of “a genuine and sustained effort to pursue meaningful, two-way dialogue”;<sup>89</sup> (2) the lack of “someone representing Canada who could engage interactively. . . . who could discuss . . . required accommodation measures, possible flaws in the [NEB’s] process, findings and recommendations and how those flaws could be addressed”;<sup>90</sup> and (3) “Canada’s unwillingness to meaningfully discuss and consider possible flaws in the [NEB’s] findings and recommendations and its erroneous view that it could not supplement or impose additional conditions on Trans Mountain.”<sup>91</sup> Based on its findings that because of these limitations the Crown failed to sufficiently meet the framework initially proposed to consult with Indigenous groups, and that the Governor in Council unreasonably relied on the NEB report’s flawed conclusions, the court quashed Order in Council P.C. 2016-1069, nullifying the project’s approval.

### **[3] Court’s Proposed Remedy for the Project**

Beyond nullifying the project’s approval, the court offered the expansion project a path to remedy the situation and proceed. First, the authority over the project’s development would return to the Governor in Council for “redetermination,” through which the Governor in Council must deliver all of the terms and conditions on the project back to the NEB to be reconsidered.<sup>92</sup> The court then suggested that the Governor in Council should direct the NEB to take into account the related shipping issues incidental to the project, “the application of section 79 of the *Species at Risk Act* to Project-related shipping, the [NEB’s] environmental assessment of the Project in the light of the Project’s definition, the [NEB’s] recommendation under subsection 29(1) of the *Canadian Environmental Assessment Act, 2012* and any other matter . . . consider[ed] appropriate.”<sup>93</sup> Additionally, the court indicated that Canada must redo the Phase III consultation of Indigenous groups.<sup>94</sup> The court proposed that an improved process that better engages and addresses the “specific and focused” concerns of the Indigenous groups could be “brief and efficient while ensuring it is meaningful.”<sup>95</sup> To move the project forward and ensure that its approval process passes muster with another federal appellate review, the Canadian government would need to adequately meet these suggested remedies.

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<sup>89</sup>*Id.* para. 756.

<sup>90</sup>*Id.* para. 759.

<sup>91</sup>*Id.* para. 760.

<sup>92</sup>*Id.* paras. 768, 769.

<sup>93</sup>*Id.* para. 770.

<sup>94</sup>*Id.* para. 771.

<sup>95</sup>*Id.* para. 772.

#### [4] Current Status of the Project

Following the ruling, the Canada's Privy Council issued an order directing the NEB to conduct the reconsideration taking into account specific factors and complete its reconsideration within 155 days of the order.<sup>96</sup> The NEB wasted no time in planning public hearings to begin the reconsideration of the expansion project, which were announced on September 26, 2018.<sup>97</sup> On October 3, 2018, Canada's federal government revealed that it would not seek an appeal of the decision to the Supreme Court, but it followed the order of the court by sending the project back to the NEB for reconsideration and hiring a former Supreme Court Justice to oversee a redoing of the 117 consultations with Indigenous groups.<sup>98</sup> On February 22, 2019, the NEB published and sent its reconsideration report to the Canadian government for review and approval.<sup>99</sup> The report included 16 new conditions for the project with matters outside of the purview of the NEB, but within that of the Canadian government. As for the more thorough consultations with Indigenous groups, Prime Minister Trudeau, as advisor to the Governor in Council, announced that he extended an anticipated deadline to June 18, 2019, to allow for sufficient time and consideration before approving the expansion project a second time.<sup>100</sup>

Alongside the reconsideration and re-consultations, a new negotiation was taking place between the Canadian government, as the pipeline developers, and certain Canadian Indigenous tribes: a proposal to purchase the pipeline expansion project in January 2019.<sup>101</sup> The group of Indigenous peoples is titled the Indian Resources Council (IRC) and comprises 134 Canadian First Nations.<sup>102</sup> Reports suggest the benefits to Indigenous groups are three-fold: providing a source of income to raise these groups' living standards, offering more education and high-paying jobs, and allowing certain control over the cultivation resources on their lands. As

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<sup>96</sup>Order in Council No. P.C. 2018-1177 (Sept. 20, 2018).

<sup>97</sup>News Release, NEB, "NEB Announces First Steps for Trans Mountain Expansion Project Reconsideration Hearing" (Sept. 26, 2018).

<sup>98</sup>See Amanda Connolly, "Liberals Won't Appeal Trans Mountain Ruling, Name Former Justice to Oversee New Indigenous Consultations," *Global News* (Oct. 3, 2018).

<sup>99</sup>See NEB, "Reconsideration Report – Trans Mountain Expansion Project," <https://www.neb-one.gc.ca/pplctnflng/mjrpp/trnsmntnxpnsn/trnsmntnxpnsnrprt-eng.html>.

<sup>100</sup>See Josh Wingrove, "Canada Likely to Proceed with Trans Mountain Expansion," *Bloomberg* (May 7, 2019).

<sup>101</sup>"Canada's Indigenous Tribes Consider Pipeline Stake," *Petroleum Economist* (Mar. 21, 2019).

<sup>102</sup>*Id.*



described by the CEO of the IRC, Stephen Buffalo, “[o]ur end game is not to own a pipeline, it’s indigenous ownership.”<sup>103</sup>

On June 18, 2019, Prime Minister Trudeau once again approved the Trans Mountain Expansion Project.<sup>104</sup> He held a press conference announcing the decision and addressing the Federal Court of Appeal’s decision, as well as other Canadians’ concerns. “The company plans to have shovels in the ground this construction season,” Prime Minister Trudeau stated.<sup>105</sup> “We’ve decided that every dollar that the federal government earns from this project will be invested in Canada’s clean energy transition.”<sup>106</sup> While such overtures work to sustain Prime Minister Trudeau’s pro-environment image, recent headlines already foretell “political peril” regardless of his ultimate decision.<sup>107</sup> The Trans Mountain Expansion Project will indelibly haunt the Prime Minister’s political legacy.

### § 7B.08 Political Tension with the Trump Administration

One potential wrinkle in the pipeline’s future is the rise of political tensions with the United States, particularly regarding trade. Prior to the Federal Court of Appeal’s decision, Canadian press began to report and speculate about the certainty of approvals that the Trans Mountain Expansion Project required from the Trump administration in order to export to the United States.<sup>108</sup> Effectiveness of the project’s purchase agreement by the Canadian government from Kinder Morgan relied on approval by CFIUS. Ultimately, CFIUS approved,<sup>109</sup> but as Canada renews its commitment to the project it is worth reviewing the power of this committee.

CFIUS, an interagency committee currently chaired by Steven Mnuchin, the U.S. Secretary of the Treasury, serves the president in managing the national security threats of foreign investment in the United States. At present, CFIUS’s authority to review transactions that involve foreign investment in the United States applies to certain “covered transactions,” as defined by the Foreign Investment and National Security Act of 2007

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<sup>103</sup> *Id.*

<sup>104</sup> See Scott Neuman, “Canada’s Trudeau Approves Controversial Pipeline Expansion,” *NPR* (June 19, 2019).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Amanda Coletta, “Canada’s Trudeau to Decide on Controversial Pipeline Expansion. He Faces Political Peril Either Way,” *Wash. Post* (June 17, 2019).

<sup>108</sup> See Brennan MacDonald & Vassy Kapelos, “Canada’s Purchase of Trans Mountain Faces At Least 1 More Hurdle: Donald Trump,” *CBC News* (July 25, 2018).

<sup>109</sup> See Brennan MacDonald & Vassy Kapelos, “Canada’s Purchase of Trans Mountain Clears Major U.S. Hurdle,” *CBC News* (Aug. 17, 2018).

(FINSA).<sup>110</sup> Companies considering mergers or acquisitions with foreign investors need to consider whether the transaction may be deemed controlled by foreign nations and, if so, whether a voluntary notification to CFIUS is appropriate.<sup>111</sup>

Once notified, CFIUS reviews the transactions for any implication of national security. FINSA never defines “national security,” but notes that the term includes issues relating to “homeland security,” which involve any application to “critical infrastructure.”<sup>112</sup> If CFIUS decides that the transaction does not implicate national security concerns, then the parties can proceed with the transaction. If CFIUS decides that the transaction does implicate national security concerns, it can recommend presidential action to block or unwind the transaction at any time without further review by a judicial court.

Once CFIUS’s recommendation is received, the president has 15 days to make a decision regarding the proposed transaction. In making that decision, the president must consider an array of factors when determining whether to block a foreign transaction.<sup>113</sup> As a result of the extensive scope of these factors and a unilateral decision-making ability, the president has wide latitude to nullify any transaction recommended by CFIUS for presidential review. To date, CFIUS has denied few foreign investments, though its power is expanding.<sup>114</sup> While the impetus for the Trump administration’s strengthening of the committee’s power stems from tensions with China, the result could have implications for deals with other foreign nations, as the administration will “more aggressively police foreign investment in the United States.”<sup>115</sup> This increase in scrutiny could also affect Canada’s Trans Mountain Expansion Project and future cross-border projects.

Prime Minister Trudeau openly acknowledges the importance of reducing Canada’s reliance on the purchasing power of the United States. During his press conference for newly approving the expansion project, Prime Minister Trudeau highlighted the need for the project to diversify Canada’s energy customers. “We basically have only one customer for our energy

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<sup>110</sup>50 U.S.C. § 4565(a)(4).

<sup>111</sup>See W. James McAnelly III, “Coming to America: Commercial and Legal Aspects of Foreign Investment in U.S. Oil and Gas Projects,” 60 *Rocky Mt. Min. L. Inst.* 12-1, § 12.02[3] (2014).

<sup>112</sup>50 U.S.C. § 4565(a)(1).

<sup>113</sup>*Id.* § 4565(f).

<sup>114</sup>See Alan Rappeport, “In New Slap at China, U.S. Expands Power to Block Foreign Investments,” *N.Y. Times* (Oct. 10, 2018).

<sup>115</sup>*Id.*

resources: the United States,” Prime Minister Trudeau stated.<sup>116</sup> “As we’ve seen over the past few years, anything can happen with our neighbors to the south . . . . When you only have a single customer, you’re in a weaker position. You’re vulnerable to that customer’s desires . . . [T]hat’s [not] an acceptable situation for Canada.”<sup>117</sup> He went on to frame approval of the expansion project as a means to alleviate that reliance by promoting trade with other foreign nations. Time will tell whether the project comes to fruition and reaps such benefits for Canada.

### § 7B.09 Conclusion

The Trans Mountain Expansion Project offers careful observers three primary takeaways to consider in future large pipeline development projects. First, if a project crosses many internal boundaries of a nation (i.e., state or provincial borders), as well as implicating contiguous countries, be mindful of the intra-national competing interests that the project will face such as politically diametric groups; enter the space with compromise and peace-keeping efforts baked into each step of the development. Second, the power of emotionally charged, politically hot-button issues may be enough to force uncomfortably large expenditures to sufficiently address community concerns. Build these into the project strategy. Plan ahead and forecast them with investors. Finally, a project developer can best leverage the project’s promise when the need is greatest with the community. This was demonstrated in the Trans Mountain Expansion Project by the fact that the Canadian government purchased the project from Kinder Morgan. The need for the project, based on Alberta’s increased oil output and available international markets, overwhelmed all other obstacles, pushing the government to invest in the cost up front and compensating Kinder Morgan for the initial investment and work.

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<sup>116</sup>See Neuman, *supra* note 104.

<sup>117</sup>See *id.*