Federal Court of Appeal  Cour d'appel fédérale

Date: 20190904

Dockets: 19-A-35, 19-A-36, 19-A-37,
19-A-38, 19-A-39, 19-A-40,
19-A-41, 19-A-42, 19-A-44,
19-A-45, 19-A-46, 19-A-47

Citation: 2019 FCA 224

Present: **STRATAS J.A.**

BETWEEN:

RAINCOAST CONSERVATION FOUNDATION, LIVING OCEANS SOCIETY, CHIEF RON IGNACE and CHIEF ROSANNE CASIMIR, on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, SQUAMISH NATION, COLDWATER INDIAN BAND, FEDERATION OF BRITISH COLUMBIA NATURALISTS carrying on business as BC NATURE, TSLEIL-WAUTUTH NATION, STZ'UMINUS FIRST NATION, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, CITY OF VANCOUVER, SHXW'ŌWHÁMEL FIRST NATION, OLIVIER ADKIN-KAYA, NINA TRAN, LENA ANDRES, REBECCA WOLF GAGE and UPPER NICOLA BAND

Applicants

and

THE ATTORNEY GENERAL OF CANADA, TRANS MOUNTAIN PIPELINE ULC AND TRANS MOUNTAIN CORPORATION

Respondents

and

ATTORNEY GENERAL OF ALBERTA

Intervener

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 4, 2019.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] By Order in Council P.C. 2019-0820 dated June 18, 2019, the Governor in Council approved the Trans Mountain Pipeline expansion project for the second time: (2019) C. Gaz. I, Vol. 153, No. 25. Twelve sets of parties would like to challenge the approval by starting applications for judicial review. But before they can do that, they have to get leave from this Court: *National Energy Board Act*, R.S.C. 1985, c. N-7, s. 55.

[2] As a result, twelve motions for leave to start applications for judicial review have been brought. A single judge of this Court decides whether leave should be granted: *National Energy Board Act*, para. 55(2)(*c*).

[3] By Order of this Court, the motions have been consolidated. These reasons shall be placed in the lead file, file 19-A-35, and a copy shall be placed in each of the other files.

[4] For the following reasons, six of the motions for leave will be allowed and six will be dismissed. Assuming six applications for judicial review are started, they will be made ready for hearing in the shortest possible time.

A. The giving of reasons in this case

[5] The settled practice of this Court is not to give reasons when releasing its decisions on leave motions.

[6] The Chief Justice of this Court has recognized that in the unique circumstances of this case, this practice might have to be relaxed. He has issued a direction explaining this. The direction reads as follows:

> The Court's standing practice is not to issue reasons in disposing of leave applications. However this is an exceptional case as the respondents, who have a direct interest in the project, took no position for or against the leave applications in all cases but one, thereby leaving the matter to the discretion of the Court. Taking no position on a motion is a common practice when dealing with procedural matters; it is not when issues of general importance are in play.
>
> Being left without a contrary view, the Court on its own motion notified two interested parties pursuant to Rule 110 of the *Federal Courts Rules*, the Attorneys General of British Columbia and Alberta. Alberta responded by moving to intervene and, following submissions, was granted intervenor status. Alberta asks that the 12 applications be dismissed.
>
> Should the judge seized with the motions for leave decide against the applicants, the issuance of reasons explaining why may be necessary, as an exception to the Court's practice. This is because the applicants, having been told by Canada, which holds the constitutional obligation to discharge the duty to consult, that it takes no position, would be entitled to know why the Court has decided against the applicants.
>
> The matter is left to the discretion of the presiding judge.

[7] In response to this, I have exercised my discretion to issue reasons in support of the orders dismissing the leave motions.

B. The involvement of the Attorney General of Alberta in the leave motions

[8] The respondents took no position on eleven of the twelve leave motions because they considered the threshold for leave to be quite low. As described by the Chief Justice in his direction, the Court issued a notice under Rule 110. In response, the Attorney General of Alberta brought a motion to intervene to oppose the leave motions. After considering the parties' submissions on the motion to intervene, the Court decided to add the Attorney General of Alberta as an intervener.

C. The criteria for granting leave

[9] The express text of the *National Energy Board Act* does not tell us when to grant leave. However, we can deduce this from related sections of the Act and Parliament's purpose in requiring that leave be sought: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559.

[10] The portion of the *National Energy Board Act* concerning project approvals is a complete code. It provides for the National Energy Board studying and assessing the project, the Board providing a report to the Governor in Council, and the Governor in Council considering the report and deciding one way or the other: *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 at paras. 119-127, leave to appeal to SCC refused, 37201 (9 February 2017); *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2018] 3 C.N.L.R. 205 at paras. 173-203, leave to appeal to SCC refused, 38379 (2 May 2019) (the case in which this Court set

aside the Governor in Council's first approval of the project). To prevent delay to a project that may benefit the public considerably, the Act imposes deadlines during the approval process.

[11] As this process unfolds, recourse to the judicial system is forbidden; only at the end of the process, after the Governor in Council has decided the matter, is recourse potentially available: *National Energy Board Act*, ss. 52(11), 53(8) and 55(1); *Gitxaala Nation* at paras. 119-127; *Tsleil-Waututh Nation* at paras. 170-202. But this is neither automatic nor as of right; the Court must decide whether it is warranted: see *National Energy Board Act*, s. 55(1), which requires a party first to seek leave from the Court. Leave must be sought quickly so that projects approved by the Governor in Council will not be unnecessarily held up: *National Energy Board Act*, para. 55(2)(*a*). Leave must be decided upon "without delay and in a summary way": *National Energy Board Act*, para. 55(2)(*c*). And a single judge with written materials decides—not the more time-consuming panel of three considering both written materials and oral submissions at a hearing: *National Energy Board Act*, para. 55(2)(*c*).

[12] Parliament's purpose is plain: a project is not to be hamstrung by multiple, unnecessary, long forays through the judicial system. Any recourse to the judicial system must be necessary and as short as possible.

[13] Thus, the leave requirement is not just a cursory checkpoint on the road to judicial review. It is more like a thorough customs inspection at the border.

[14] Leave requirements to this Court can be found under various legislative schemes. Under a couple of these, it has been suggested that a party seeking leave must show a "fairly arguable case" that warrants "a full review of the administrative decision, [with all] the [available] procedural rights, investigative techniques and, if applicable and necessary, [all the] evidence-gathering techniques [that are] available": see, *e.g.*, *Lukács v. Swoop Inc.*, 2019 FCA 145 at para. 19 and cases cited.

[15] The standard of a "fairly arguable case" described in *Lukács* is a good place to begin. But given this legislative scheme and Parliament's purpose, more definitional guidance on the "fairly arguable" standard is needed.

[16] When applying the "fairly arguable" standard under section 55 of the *National Energy Board Act*, three ideas must be kept front of mind:

(a) *Fulfilment of the gatekeeping function*. The "fairly arguable" standard must be applied in a way that fulfils the important gatekeeping function of the leave requirement in this legislative regime. Thus, the arguments an applicant wishes to advance in a judicial review and the evidence it offers in support must be scrutinized meaningfully and rigorously to ensure they meet the "fairly arguable" standard. Leave must be denied to those without evidence who offer arguments that must have evidence and to those whose arguments face fatal legal bars.

(b) *The role of deference*. Sometimes, in law, the Court must give decision-makers a margin of appreciation, leeway or deference when reviewing their decisions. These can drastically affect what is "fairly arguable": they can take an argument that is tenable in theory and make it hopeless in reality.

(c) *Practicality matte*rs. Granting leave to an argument that, if accepted with others, will not overturn the decision under review is a waste of time and resources and frustrates Parliament's purpose. This is common sense but it is also the law: reviewing courts will not overturn and send back a decision for redetermination if it is clear the same decision will be made: see, e.g., *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710; *Robbins v. Canada (Attorney General)*, 2017 FCA 24; *Maple Lodge Farms Ltd. v. Canada (Food Inspection Agency)*, 2017 FCA 45, 411 D.L.R. (4th) 175. Arguments pointing out minor flaws in the decision are less likely to pass this hurdle than arguments striking at the root of the decision

D. Analysis

(1) Introduction

[17] The most central issues in the leave motions before this Court are the alleged substantive unreasonableness of the Governor in Council's decision to approve the project and the Crown's failure to adequately consult with Indigenous peoples and First Nations. Given the meaning of

the "fairly arguable case" standard, we must explore the extent to which margin of appreciation, deference or leeway factor into the analysis of these issues. We must also investigate whether any fatal legal bars and objections stand in the way of the applications.

(a) The deference to be afforded to the Governor in Council's decision to approve the project

[18] In reviewing the reasonableness of the Governor in Council's approval decision, the Court must give the Governor in Council the "widest margin of appreciation" over the matter: *Gitxaala Nation* at para. 155; *Tsleil-Waututh Nation* at para. 206. The level of deference is high.

[19] The Governor in Council's approval decision is a "discretionary [one]…based on the widest considerations of policy and public interest assessed on the basis of polycentric, subjective or indistinct criteria and shaped by its view of economics, cultural considerations, environmental considerations, and the broader public interest": *Gitxaala Nation* at paras. 140-144 and 154; see also *Tsleil-Waututh Nation* at paras. 206-223. Only the Governor in Council—not this Court—is equipped to evaluate such considerations with precision: *Gitxaala Nation* at paras. 142-143, citing *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, [2012] 2 F.C.R. 312 at paras. 76-77. Thus, only arguments that can possibly get past a high level of deference can qualify as "fairly arguable".

(b) The leeway that must be given on the adequacy of consultation with First Nations and Indigenous peoples

[20] Adequate consultation consists of "reasonable efforts to inform and consult", not all possible efforts: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at para. 62. There must be "meaningful two-way dialogue" and "serious consideration" about both "the real and specific concerns" of Indigenous peoples and possible measures to accommodate those concerns: *Haida Nation* at para. 62; *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 at para. 170; *R. v. Nikal*, [1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658 at para. 110; *Tsleil-Waututh Nation* at paras. 562-563.

[21] Compliance with the duty to consult is not measured by a standard of perfection: *Gitxaala Nation* at paras. 182-184; *Tsleil-Waututh Nation* at paras. 226, 508-509 and 762. Some leeway must be afforded because of the inevitability of "omissions, misunderstanding, accidents and mistakes" and "difficult judgment calls" in "numerous, complex and dynamic" issues involving many parties: *Gitxaala Nation* at para. 182.

[22] The duty to consult does not require the consent or non-opposition of First Nations and Indigenous peoples before projects like this can proceed: *Gitxaala Nation* at paras. 179-180; *Bigstone Cree Nation v. Nova Gas Transmission Ltd.*, 2018 FCA 89, 16 C.E.L.R. (4th) 1 at para. 49; *Squamish First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 216 at para. 37. Dissatisfaction, disappointment or disagreement with the outcome reached after consultation is not enough to trigger a breach of the duty: *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386 at para. 83; *Bigstone* at

para. 70. Under the duty to consult, First Nations and Indigenous peoples do not have a right to veto a project.

[23] Thus, arguments that consultation was inadequate can only meet the "fairly arguable" standard if the alleged inadequacies go beyond the leeway given to the decision-maker. The arguments must be focused on the process, quality and conduct of consultation.

(c) Fatal legal bars and objections

[24] An established body of law bars relitigation—namely the doctrines of *res judicata*, issue estoppel and abuse of process: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (issue estoppel); *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (abuse of process). With some wrinkles, these doctrines bar arguments from being advanced in a later, second proceeding when they were raised and decided in a first proceeding or could have been raised in that first proceeding.

[25] This bar is potentially live in these motions. In *Tsleil-Waututh Nation*, this Court struck down the Governor in Council's first approval of this project. In so doing, this Court did not require all the work and consultation leading up to the Governor in Council's approval to be redone. The Court decided that much of the earlier work satisfied the law. It only required targeted work and further meaningful consultation to be performed to address the specific flaws that led to the quashing of the first approval. The Governor in Council has now approved the project again and the applicants seek leave to start a new round of judicial reviews. Due to the

doctrines barring relitigation, the applicants cannot now raise issues that were raised and decided (or that could have been raised) in *Tsleil-Waututh Nation*—and there were many, as the 254 pages and 776 paragraphs in it show.

[26] As a practical matter, this means that any judicial review of the Governor in Council's latest approval decision must be limited to: (1) measuring the targeted work and further consultation required by *Tsleil-Waututh Nation* against the applicable law and the specific flaws identified in *Tsleil-Waututh Nation*; and (2) assessing any legally relevant events that postdate *Tsleil-Waututh Nation* and affect the project's approval. Due to the doctrines barring relitigation, issues raised in a judicial review application that go beyond these things cannot meet the "fairly arguable" standard.

[27] The Court has discretion to relax the doctrines barring relitigation in appropriate circumstances: see *Danyluk*, at para. 33. But the applicants—especially in their responses to the submissions of the Attorney General of Alberta on relitigation—have not presented any case, let alone an arguable case, that this Court should do so.

[28] In this case, the doctrines barring relitigation are most important. Were the doctrines ignored, a never-ending series of court challenges could ensue. For example, in file 19-A-46, parties who did not participate in *Tsleil-Waututh Nation* have applied for leave to raise Charter issues that could have been raised in *Tsleil-Waututh Nation* but were not. Without strict enforcement of the doctrines barring relitigation, this sort of thing could happen again and again, keeping the project tangled in litigation, subverting the purpose of this legislative scheme.

[29] Related to the bars against relitigation is the binding effect of prior decided cases. The law set out by this Court in *Tsleil-Waututh Nation* and *Gitxaala Nation*—both heavily based on governing authority from the Supreme Court of Canada—bind this Court and will determine large swathes of these leave applications. Thus, this is not the wider sort of case where the legal principles are unknown and have to be developed. Rather, this is the narrower sort of case where the Court must assess whether known legal principles have been followed. There is more scope for "fairly arguable" issues in the former sort of case than the latter.

(2) Evaluating the issues raised by the applicants in the leave motions

[30] To reiterate, the most central issues in the leave motions are the alleged substantive unreasonableness of the Governor in Council's decision to approve the project and the Crown's alleged failure to adequately consult with Indigenous peoples and First Nations. These issues can be subdivided for the purpose of evaluation and combined with other, narrower, issues raised by the applicants. It is useful to group them into four categories: alleged conflict of interest and bias, environmental issues and substantive reasonableness, issues relating to the consultation with Indigenous peoples and First Nations, and remaining, miscellaneous issues.

(a) Alleged conflict of interest and bias

[31] Various applicants submit that the decision of the Governor in Council is vitiated by bias and a conflict of interest. They submit that the bias and conflict of interest arises from the fact that, soon after the first approval decision, the Government of Canada, through a corporate

vehicle, acquired the respondent Trans Mountain and now, practically speaking, owns the project.

[32] This submission does not pass the "fairly arguable case" test.

[33] At the outset, it suffers from a fatal flaw. The Governor in Council is not the Government of Canada. The Governor in Council, the decision-maker here, does not own the project.

[34] More fundamentally, section 54 of the *National Energy Board Act* requires the Governor in Council to decide whether to approve a project regardless of who owns it. The Act does not disqualify the Governor in Council from discharging this responsibility based on ownership of the project. The Act prevails over any common law notions of bias and conflict of interest: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781.

[35] This case would be different if the Governor in Council blindly approved the project because the Government of Canada now owns it instead of looking at legally relevant criteria. But to make that sort of point "fairly arguable", there must be at least a shred of evidence to support it. In the evidentiary record before the Court, there is none. Without evidence, suggestions of bias or conflict of interest are just idle speculations or bald allegations and cannot possibly satisfy the test of a "fairly arguable case": *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, 321 D.L.R. (4th) 301 at para. 34 and cases cited therein; *Canada*

(National Revenue) v. JP Morgan Asset Management (Canada) Inc., 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 45 and cases cited therein.

[36] Some applicants have noted public statements on the part of certain federal politicians in support of the project as proof of disqualifying bias. This issue is not "fairly arguable". In law, statements of this sort do not trigger disqualifying bias: see, *e.g.*, *Gitxaala Nation* at paras. 195-200; *Prophet River First Nation v. British Columbia (Minister of Environment)*, 2015 BCSC 1682, [2016] 1 C.N.L.R. 207 at paras. 189-200, aff'd 2017 BCCA 58, 94 B.C.L.R. (5th) 232; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2014 BCSC 924, 76 Admin. L.R. (5th) 223 at paras. 107-110.

(b) Environmental issues and substantive reasonableness

[37] The applicants' arguments on the environmental issues cannot meet the threshold of a "fairly arguable case".

[38] In *Tsleil-Waututh Nation*, many arguments about the environmental effects of the project either were made or could have been made but were not. Most of the environmental points the applicants now raise are not fairly arguable because they fall into one of these categories. They are barred by the doctrines against relitigation.

[39] A couple of examples will suffice to illustrate this. Some applicants submit that the Governor in Council had no jurisdiction to make a decision without ensuring the requirements of

the *Species at Risk Act*, S.C. 2002, c. 29 were met. This point is not fairly arguable because this Court specifically rejected it in *Tsleil-Waututh Nation* at para. 464.

[40] Some applicants allege flaws in the Board's examination of environmental matters under the *Species at Risk Act* and the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52. Other applicants raise other matters, such as the project's greenhouse gas emissions, the need for the project, the economics of the project, and the risk of oil spills. These too are not fairly arguable because they were raised and decided or could have been raised in *Tsleil-Waututh Nation*.

[41] Recall what this Court decided in *Tsleil-Waututh Nation* (at para. 201): this Court found a "material deficiency" in the National Energy Board's work such that its report to the Governor in Council was not an admissible "report" under section 54. This meant that the Governor in Council lacked a necessary legal prerequisite to decide under section 54. The "material deficiency" in that case was major and glaring: the National Energy Board failed to examine the issue of project-related marine shipping as part of the project.

[42] Since this Court's decision in *Tsleil-Waututh Nation*, the National Energy Board addressed this material deficiency by providing a comprehensive, detail-laden, 678-page report to the Governor in Council that considered the issue of project-related marine shipping and related issues and suggested measures for mitigating effects. The Governor in Council considered the new report, as is evident from the Order in Council it issued.

[43] Many of the applicants submit that the new report is so flawed that the Governor in Council still lacks the necessary legal prerequisite of a "report" under section 54. This submission cannot possibly succeed based on the degree of examination and study of the issue of project-related marine shipping and related environmental issues in the new report.

[44] Under section 54, the Governor in Council had to consider whether the project should be approved and, if necessary, on what conditions. Based on the evidence the applicants have filed and the applicable law, it is impossible for the applicants to overcome the considerable deference the Court must afford to the Governor in Council as it considers the new report, in all its detail and technicality, and as it makes this sort of public interest decision: see paragraphs 16(b) and 18-19, above. Its decision involved a weighing and balancing of the project's benefits against its detriments, drawing upon broad considerations of economics, science, the environment, the public interest, and other considerations of a policy nature, all of which lie outside of the ken of this Court: *Gitxaala Nation* at para. 148, citing *Canada v. Kabul Farms Inc.*, 2016 FCA 143, 13 Admin. L.R. (6th) 11 at para. 25. The law forces this Court to afford significant deference—according to the cases, the "widest margin of appreciation"—to the Governor in Council and the outcome it has reached based on this weighing and balancing. The applicants' case for substantive unreasonableness on environmental issues and the issues arising under environmental legislation is no stronger than that which this Court dismissed in *Gitxaala Nation* and *Tsleil-Waututh Nation*.

[45] As well, in attempting to meet the standard of "fairly arguable", the applicants have to show that their arguments could practically change the outcome: see paragraph 16(c), above. On

this, they fail. The Governor in Council found that compelling public interest considerations clearly outweighed the adverse environmental effects. The decisive and emphatic nature of the Governor in Council's reasons set out in the Order in Council leads inexorably to the conclusion that if the matters raised by the applicants, Raincoast Conservation, Living Oceans Society, Federation of B.C. Naturalists and the City of Vancouver, were placed in a further new report given to the Governor in Council, the Governor in Council would still conclude the project is, on balance, in the public interest and would still approve it.

(c) Issues relating to the adequacy of the consultation with Indigenous peoples and First Nations

[46] At the outset, there are two sets of arguments relating to the adequacy of consultation that do not pass the "fairly arguable" standard.

[47] First, some of the applicants' arguments reflect their dissatisfaction and disagreement with the outcome of the consultation process and effectively assert a right to consent or to exercise a veto over the project—the very things that numerous authorities tell us are not encompassed by the duty to consult.

[48] Second, in *Tsleil-Waututh Nation*, many points concerning the adequacy of consultation were raised and decided and many others could have been raised but were not. The doctrines against relitigation now apply to bar these points. This renders some of the points the applicants now raise inadmissible under the "fairly arguable" standard. A good example is shown by the Stz'uminus First Nation and the Shxw'ōwhámel First Nation. They raise consultation concerns

that could have been raised and addressed in *Tsleil-Waututh Nation*. They did not appear in *Tsleil-Waututh Nation* to advance their concerns and are now barred from doing so. On this, the comments made in paragraph 28 above are apposite, as are the submissions of the Attorney General of Alberta at paragraphs 48-50 of his written submissions. These applicants will not be granted leave to start an application for judicial review.

[49] However, some issues advanced by the other Indigenous and First Nation applicants concerning the adequacy of consultation do meet the "fairly arguable" standard.

[50] The Court in *Tsleil-Waututh Nation* found (at para. 6) that Canada had not discharged its duty to consult in one part of the consultation process—Phase III. In particular, at paras. 557-563, this Court summarized a number of consultation flaws: a failure to engage in a meaningful two-way dialogue and, related to this, an unduly limited mandate given to Crown representatives who were engaged in consultation; an improper reluctance to depart from the findings of the National Energy Board and conditions on the project recommended by it; and an erroneous view on the part of the Governor in Council that it could not impose additional conditions on the project.

[51] As a result, this Court in *Tsleil-Waututh Nation* quashed the approval of the project and required more work to be done in Phase III of the consultation process. In the following months, further consultation took place to that end.

[52] Many of the Indigenous and First Nation applicants now allege that the poor quality and hurried nature of this further consultation rendered it inadequate. In order to appreciate this issue, some background needs to be set out.

[53] After *Tsleil-Waututh Nation* sent the matter back to the Governor in Council for redetermination, the Governor in Council issued an order under the *National Energy Board Act* requiring the Board, within 155 days, to reconsider its recommendation concerning the project and all terms and conditions set out in the Board's first report relevant to project-related marine shipping and related issues: Order in Council P.C. 2018-1177 (September 20, 2018). The Board delivered its reconsideration report on February 22, 2019.

[54] In *Tsleil-Waututh Nation* (at para. 771), this Court required that the further consultation process be completed before the Governor in Council decided on the approval of the project. But once the Governor in Council received the Board's reconsideration report, subsection 54(3) of the *National Energy Board Act* kicked in and required the Governor in Council to decide on the project within three months. Under subsection 54(3) the Governor in Council could extend this deadline. It did so, by one month, in order to allow more time for the further consultation process: Order in Council P.C. 2019-378 (April 17, 2019). At the time, some of the Indigenous and First Nation applicants complained that the extension was insufficient to complete the further consultation process. None of them brought an application for judicial review challenging the small size of the extension. And assuming the law permitted them to bring such an application at the time, it is now too late.

[55] Whether the further consultation process was adequate is unclear. Because a future panel of this Court will have to decide on its adequacy, only a few general comments will now follow.

[56] Given the fundamental nature of the interests of Indigenous peoples and First Nations, the applicants say the Governor in Council's decision that the further consultation was adequate should be strictly reviewed.

[57] In their evidence, consisting of many thousands of detailed pages, the Indigenous and First Nations applicants point with considerable particularity and detail to issues they say were important to them. They say the Government of Canada ignored these issues in the original process of consultation and ignored them again in the further consultation process. They add that little or nothing was done in the process of further consultation from the time *Tsleil-Waututh Nation* was released until the National Energy Board delivered its report—a period slightly less than six months. In their view, the time left for the further consultation process, roughly four months, was insufficient to address the shortcomings identified by this Court in *Tsleil-Waututh Nation*. Even during these four months, some of the applicants allege inactivity by the Government of Canada.

[58] The applicants do acknowledge that the Government of Canada introduced some new initiatives to assist consultation and added some conditions on the project approval that was ultimately given. But to them this is just window-dressing, box-ticking and nice-sounding words, not the hard work of taking on board their concerns, exploring possible solutions, and collaborating to get to a better place.

[59] The respondents, including the Attorney General of Canada representing the Government of Canada, took no position for or against the leave motions brought by the Indigenous and First Nation applicants. The respondents did state that if leave were granted and applications for judicial review were brought they would support the Governor in Council's decision and oppose the applicants. But on the leave motions they offered no submissions or evidence to assist the Court.

[60] The Attorney General of Alberta did intervene to oppose the granting of leave. But while his legal submissions were helpful, he was not involved in the further consultation process and so he could not provide evidence on it.

[61] The recitals in the Governor in Council's Order in Council are all the Court has against the applicants' position in these leave motions. They assert that by the time of the decision, the Governor in Council believed that the further consultation with Indigenous peoples and First Nations was adequate. The recitals also set out many new consultative steps and initiatives pursued to remedy the flaws identified in *Tsleil-Waututh Nation* and plenty of general activity such as 46 ministerial meetings with 65 Indigenous groups.

[62] Down the road, the respondents might be able to present strong evidence supporting the adequacy of the further consultation and show that the Governor in Council reasonably, *i.e.*, acceptably and defensibly, believed that the further consultation was adequate. The respondents might have submissions about the extent to which the Court should defer to the Governor in

Council's assessment of the adequacy of consultation and the leeway the Court must give where issues of compliance with the duty to consult arise.

[63] At this time, however, the respondents have withheld their evidence and legal submissions on these points. So the analysis cannot progress further.

[64] Therefore, this Court must conclude that the issue of adequacy of the further consultation arising from the circumstances described in paragraphs 50-62 above meets the "fairly arguable" standard for leave.

[65] I would state this issue in the form of a question: from August 30, 2018 (the date of the decision in *Tsleil-Waututh Nation*) to June 18, 2019 (the date of the Governor in Council's decision) was the consultation with Indigenous peoples and First Nations adequate in law to address the shortcomings in the earlier consultation process that were summarized at paras. 557-563 of *Tsleil-Waututh Nation*? The answer to this question should include submissions on the standard of review, margin of appreciation or leeway that applies in law.

[66] The respondents should not be foreclosed from raising any bars or defences to any applications for judicial review. Therefore, a second question should be stated: do any defences or bars to the application for judicial review apply?

[67] Finally, depending on the answers to the foregoing questions, the issue of remedy may arise. As the administrative law principle set out in paragraph 16(c) above illustrates, sometimes

the decision, despite its defects, should not be quashed and the matter should not be sent back for redetermination. As well, other considerations may affect the entitlement to a remedy, the type of remedy, or the terms of a remedy. Therefore, a third question should be stated: if the answers to the above questions are negative, should a remedy be granted and, if so, what remedy and on what terms?

[68] The parties are free to structure their submissions as they see fit, as long as they answer all of these questions in some way—and only these questions.

(d) Remaining miscellaneous issues

[69] To the extent that miscellaneous issues exist that do not neatly fit into the four categories above, none of them meet the "fairly arguable" standard. On these, the Court substantially adopts the submissions of the Attorney General of Alberta.

[70] In particular, in the case of file 19-A-46, there is no evidence supporting the applicants' Charter claims. The applicants' arguments are also barred by the doctrines against relitigation: see paragraph 28, above. On the issue of procedural fairness, this Court substantially adopts the submissions of the Attorney General of Alberta, and finds no arguable case. Here too, *Tsleil-Waututh Nation* provides a full answer. The legal principles of that case are not in question and, when applied to the facts, foreclose the finding of a fairly arguable issue here.

E. Conclusion

[71] It follows that the Indigenous and First Nation applicants, other than the Stz'uminus First Nation and the Shxw'ōwhámel First Nation, will be given leave to start applications for judicial review addressing the two questions, above. These applicants are (in alphabetical order):

- Aitchelitz, Skowkale, Shxwhá:y Village, Soowahlie, Squiala First Nation, Tzeachten, Yakweakwioose;

- Chief Ron Ignace and Chief Rosanne Casimir, on their own behalf and on behalf of all other members of the Stk'emlupsemc Te Secwepemc of the Secwepemc Nation;

- Coldwater Indian Band;

- Squamish Nation;

- Tsleil-Waututh Nation; and

- Upper Nicola Band.

[72] All of the other leave motions will be dismissed.

F. The upcoming proceedings

[73] Given the issue on which leave will be permitted, the upcoming proceedings will be narrower and more focused than those in *Tsleil-Waututh Nation* concerning the first project approval.

[74] There is a substantial public interest in having the upcoming proceedings decided very quickly one way or the other.

[75] The parties are directed to file their notices of application for judicial review within seven days and, in the case of the Attorney General of Alberta, to file a notice of motion to intervene within seven days if he intends to try to participate in the applications.

[76] The parties are directed to contact the Judicial Administrator in the next three days to advise of their availability for a conference call with the Court in the next week to discuss a highly expedited schedule for the applications for judicial review. The Court queries whether the period for submitting evidence and cross-examinations could be extremely short: the evidentiary focus will be exclusively or almost exclusively on the further consultation process and the findings of fact and law in *Tsleil-Waututh Nation* will already be before the Court. Conceivably, the applicants' affidavits on these leave motions could be filed in chief in the applications, the respondents could be permitted a short time to file their responding affidavits, and the applicants could be permitted a short time after that to file reply affidavits. The applicants have also done

much of the work necessary for their memoranda of fact and law and so the timelines for the filing of memoranda of fact and law might also be able to be shortened substantially.

G. Proposed disposition

[77] Orders will issue in accordance with these reasons. The terms of the orders for the successful applicants are the same. The terms of the orders for the unsuccessful applicants are the same except for the costs award in file 19-A-46.

[78] On the issue of costs, the respondents did not take a position in eleven of twelve motions and so no costs will be awarded for or against them in those motions. The exception is the motion in file 19-A-46. There, only the respondent, Trans Mountain Pipeline ULC, asked for its costs and it is entitled to them. The remaining respondents in that motion did not ask for costs and, thus, will not get them.

[79] The order granting the Attorney General of Alberta leave to intervene did not protect him from an award of costs nor did it potentially entitle him to costs. In the result, his position was upheld in some motions and not upheld in others. However, his intervention was very helpful to the Court. So costs will not be ordered for or against the Attorney General of Alberta.

[80] Therefore, in the motion in file 19-A-46, costs will be awarded to the respondent, Trans Mountain Pipeline ULC. In all other motions, costs will not be awarded.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	19-A-35, 19-A-36, 19-A-37, 19-A-38, 19-A-39, 19-A-40, 19-A-41, 19-A-42, 19-A-44, 19-A-45, 19-A-46, 19-A-47
STYLE OF CAUSE:	RAINCOAST CONSERVATION FOUNDATION *ET AL.* v. THE ATTORNEY GENERAL OF CANADA *ET AL.*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	SEPTEMBER 4, 2019

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