Federal Court of Appeal | Cour d'appel fédérale

Date: 20200204

Dockets: A-324-19 (lead file),
A-325-19, A-326-19, A-327-19

Citation: 2020 FCA 34

CORAM: **NOËL C.J.**
PELLETIER J.A.
LASKIN J.A.

BETWEEN:

COLDWATER INDIAN BAND, SQUAMISH NATION, TSLEIL-WAUTUTH NATION, and AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE

Applicants

and

ATTORNEY GENERAL OF CANADA, TRANS MOUNTAIN PIPELINE ULC and TRANS MOUNTAIN CORPORATION

Respondents

and

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN and CANADIAN ENERGY REGULATOR

Interveners

Heard at Vancouver, British Columbia, on December 16-18, 2019.

Judgment delivered at Ottawa, Ontario, on February 4, 2020.

REASONS FOR JUDGMENT BY: THE COURT

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REASONS FOR JUDGMENT

THE COURT

[1] On November 29, 2016, weighing the benefits and detriments of the Trans Mountain Pipeline Expansion Project and considering Canada's duty to consult with Indigenous peoples, the Governor in Council decided to approve the Project: Order in Council P.C. 2016-1069 (December 10, 2016), issued under section 54 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEB Act*).

[2] Several applicants successfully challenged the approval (*Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. 3 [*TWN 2018*]). This Court found two fundamental defects: the impermissibly under-inclusive nature of the environmental assessment that formed part of the basis for the approval and the Crown's failure to fulfil its duty to consult with Indigenous peoples. This Court remitted the matter back to the Governor in Council in order for these flaws to be addressed and for re-decision.

[3] Toward that end, a reconsideration hearing was ordered to take place before the National Energy Board (NEB), as part of Phase II, and the Phase III consultation process was re-initiated. For a second time, the Governor in Council approved the Project (see Order P.C. 2019-820 (June 18, 2019), p. 1) (online: http://www.gazette.gc.ca/rp-pr/p1/2019/2019-06-22/pdf/g1-15325.pdf#page=251) [Order in Council]. As required by the *NEB Act*, the decision was issued with reasons, which took the form of 37 recitals that precede the operative portion of the Order in Council (the Recitals). An explanatory note was also issued providing additional reasons for the

decision (online: http://www.gazette.gc.ca/rp-pr/p1/2019/2019-06-22/pdf/g1-15325.pdf#page=271) [*Explanatory Note*].

[4] Several parties sought to challenge the second approval on environmental grounds and on grounds of the Crown's alleged continued failure to fulfil its duty to consult. However, only six applicants were granted leave under section 55 of the *NEB Act* to start applications for judicial review of the Order in Council. Two have discontinued their applications, leaving four applicants before the Court: Coldwater Indian Band (Coldwater), Squamish Nation (Squamish), Tsleil-Waututh Nation (Tsleil-Waututh) and Aitchelitz, Skowkale, Shxwhá:y Village, Soowahlie, Squiala First Nation, Tzeachten and Yakweakwioose (Ts'elxwéyeqw).

[5] Coldwater is a band, as defined under the *Indian Act*, R.S.C. 1985, c. I-5 (*Indian Act*), comprising over 850 members. Coldwater forms part of the Nlaka'pamux Nation, which asserts Aboriginal title to an area that includes the Lower Thompson River area, the Fraser Canyon, the Nicola and Coldwater Valleys, and Canada's North Cascades, including the Coquihalla area. Squamish is a Coast Salish Nation, with over 4,212 registered members. Squamish's traditional territory extends from the Lower Mainland of British Columbia to Whistler, and includes Burrard Inlet, English Bay, Howe Sound, and the Squamish Valley. Tsleil-Waututh is a Coast Salish Nation, and a band within the meaning of the *Indian Act*. In the traditional dialect of Halkomelem, the name Tsleil-Waututh means "People of the Inlet". Tsleil-Waututh's asserted traditional territory extends approximately west to Gibsons, east to Coquitlam Lake, north to the vicinity of Mount Garibaldi, and south to the 49th parallel and beyond, and includes sections of the Lower Fraser River, Howe Sound, Burrard Inlet, and Indian Arm. Ts'elxwéyeqw represents

the seven Ts'elxwéyeqw (Stó:lō) villages of Aitchelitz, Skowkale, Shxwhá:y Village, Soowahlie, Squiala First Nation, Tzeachten, and Yakweakwioose. Each of the seven villages is a band within the meaning of the *Indian Act*. In the traditional dialect of Halkomelem, one translation of "Stó:lō" is "People of the River", being the Fraser River. Ts'elxwéyeqw's traditional territory includes the lower Fraser River watershed in southwestern British Columbia.

[6] The applications for judicial review were restricted to the duty to consult issues, on the basis that the environmental concerns did not possess sufficient merit to justify the granting of leave (see *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224 [*Raincoast No. 1*]). Specifically, the order granting leave (Leave Order) confined the applications to the following issues:

> 1. From August 30, 2018 (the date of the decision in [*TWN 2018*]) to June 18, 2019 (the date of the Governor in Council's decision) was the consultation adequate in law to address the shortcomings in the earlier consultation process that were summarized at paras. 557-563 of [*TWN 2018*]? The answer to this question should include submissions on the standard of review, margin of appreciation or leeway that applies in law.
>
> 2. Do any defences or bars to the application apply?
>
> 3. If the answers to the questions 1 and 2 are negative, should a remedy be granted and, if so, what remedy and on what terms?

[7] The applications were consolidated by an order issued on September 20, 2019 later amended on November 5, 2019. In the consolidated applications, the applicants allege that the renewed consultation in which they were each involved did not adequately address the shortcomings identified in *TWN 2018*. They invite us to answer the first two questions in the negative, and to grant the remedy of an order quashing the Order in Council as a consequence.

[8] The Attorney General of Canada on behalf of the Crown (the Crown or Canada), Trans Mountain Pipeline ULC and Trans Mountain Corporation (together, Trans Mountain) resist the consolidated applications on the basis that the duty to consult was adequately fulfilled, and ask that they be dismissed on this basis. The Attorneys General of Alberta and Saskatchewan, as interveners, support the Crown's position.

[9] The third intervener, the Canada Energy Regulator (CER), successor to the NEB, takes no position as to the merits of the judicial review applications, and appears in order to assist the Court as to the role of the NEB in the consultation process to date and its continued role in monitoring and ensuring ongoing compliance with the conditions that accompanied the issuance of the Order in Council.

[10] For the reasons that follow, we conclude that there is no basis for interfering with the Governor in Council's second authorization of the Project. The judicial review applications will be dismissed.

[11] In conformity with the amended consolidation order, these reasons will be filed in docket A-324-19 and a copy thereof will be filed in dockets A-325-19, A-326-19 and A-327-19.

I. Opening observations

[12] The applicants have argued their case very much as if this was the first time that their case was adjudicated. In fact our task is more limited.

[13] In *TWN 2018*, this Court examined the consultation process that preceded the first Project approval in exhaustive detail, finding many aspects of that process to be adequate. It found that the execution of one part of the consultation, Phase III, was deficient.

[14] When it came to remedy, this Court in *TWN 2018* did not require that the consultation process begin anew. Instead, it required focused consultation to address the shortcomings it identified. While the flaws were significant, they were restricted to precise issues within the overall consultation process.

[15] Our focus now is on the Governor in Council's decision to approve the Project a second time. The Governor in Council considered that the consultation efforts made after *TWN 2018* adequately remedied the identified flaws. Those efforts were sufficient to meet the duty to consult and, considering the benefits and detriments of the Project, the Project was in the public interest and should be approved.

[16] The existence and depth of the duty to consult are not in issue. All parties agree that the duty was one of deep consultation. The fundamental issue to be decided is whether taking this into account, the Governor in Council could reasonably conclude that the flaws identified in *TWN 2018* were adequately remedied by the renewed consultation process. This is a narrow issue primarily based on the Governor in Council's evaluation of the adequacy of the consultation that took place during the second consultation process, an assessment that is fact-intensive and that calls for deference.

[17] The Governor in Council was entitled to measure the adequacy of the second consultation process in light of what was possible in the circumstances. Among these circumstances is the fact that the consultation under scrutiny in this case was conducted pursuant to this Court's decision in *TWN 2018*. In that case, the Court, having identified the flaws that needed further attention, was best positioned to evaluate how they could be addressed adequately. It concluded that the further consultation required to address the flaws could be "specific and focussed" and could be accomplished through a "brief and efficient" process (*TWN 2018*, para. 772).

[18] The Court in *TWN 2018* did not envisage that much more had to be done in order for the consultation process to address the identified flaws. This appreciation of the nature and extent of the work to be done could legitimately be relied on by the Governor in Council in determining what was needed in order to conduct the reparative consultation process (*Explanatory Note*, pp. 22, 27). Absent new concerns or difficulties not envisaged in *TWN 2018*, it is not open to the applicants to now say—as they all do in one way or another—that something more than a "specific and focussed [and] brief and efficient" process was necessary.

[19] As well, consistent with this Court's advice in *TWN 2018*, all understood, or should have understood, that the time available for the renewed consultation was not open-ended. The Governor in Council referred the matter back to the NEB for reconsideration on September 20, 2018 and gave the NEB until February 22, 2019 to produce its Reconsideration Report (Order in Council P.C. 2018-1177 (September 20, 2018)). Canada announced that it would also re-initiate Phase III of the consultation process beginning October 5, 2018. On April 17, 2019 the Governor in Council by way of a further Order in Council extended by roughly a month the time limit for

its decision, bringing the deadline to June 18, 2019 (Order in Council P.C. 2019-378 (April 17, 2019)).

[20] The applicants complain that the time for the renewed consultation was insufficient to allow Canada to discharge its constitutional duty to consult. None of the applicants challenged the constitutional validity of section 54 of the *NEB Act* or the Orders in Council setting the time frame for the subsequent steps on the ground that they did not allow sufficient time for Canada to discharge its duty to consult. Absent such a challenge and given the time available, it was incumbent on all parties to engage in the consultation process diligently and to work toward accommodations that were responsive to the flaws identified in *TWN 2018*. Unfortunately, this did not always take place: much time was taken up by unnecessary delay, posturing and insisting on matters of form rather than substance.

[21] As well, all the applicants contend that Canada did not engage in the consultation process with an open mind. The suggestion in each case is that the outcome was pre-determined because Canada owned Trans Mountain.

[22] This argument was considered in *Raincoast No. 1*, and was held not to meet the "fairly arguable case" test for granting leave to commence a judicial review application for a number of reasons (paras. 33-36):

> [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.
>
> [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".
>
> [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.
>
> [citations omitted]

[23] The bias argument, having been excluded at the leave stage, is not properly before us. However, we believe it useful to nevertheless confirm that based on the record before us, there is no evidence that the Governor in Council's decision was reached by reason of Canada's ownership interest rather than the Governor in Council's genuine belief that the Project was in the public interest. While the assessment that was ultimately made may benefit the Crown as owner of the Project, nothing suggests that the Governor in Council was not guided by the public interest throughout.

II. The standard of review

A. *General considerations*

[24] After the hearing in this matter, the Supreme Court released its decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], concerning the

standard of review that governs in matters such as this. This Court called for further submissions in writing from the parties concerning *Vavilov*. We have received their submissions and have considered them.

[25] All are agreed that *Vavilov* does not bring a material change to the standard of review in this litigation. However, *Vavilov* does bring together and clarify a number of principles in a useful way.

[26] This is a statutory judicial review, not a statutory appeal. In such circumstances, there is a presumption that the standard of review is reasonableness (*Vavilov*, paras. 23-32), and none of the exceptions to reasonableness review identified in *Vavilov* apply.

[27] In *Vavilov*, the Supreme Court held that questions as to "the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982* […] require a final and determinate answer from the courts" and, thus, must be reviewed for correctness (*Vavilov*, para. 55). But, as mentioned, the scope of the duty to consult under section 35 is not in issue before us. Thus, reasonableness is the standard of review (see also *TWN 2018*, paras. 225-226). That said, we are dealing with a constitutional duty of high significance to Indigenous peoples and indeed the country as a whole. This is part of the context that informs the conduct of the reasonableness review.

[28] In conducting this review, it is critical that we refrain from forming our own view about the adequacy of consultation as a basis for upholding or overturning the Governor in Council's

decision. In many ways, that is what the applicants invite us to do. But this would amount to what has now been recognized as disguised correctness review, an impermissible approach (*Vavilov*, para. 83):

> It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[29] Rather, our focus must be on the reasonableness of the Governor in Council's decision, including the outcome reached and the justification for it. The issue is not whether the Governor in Council could have or should have come to a different conclusion or whether the consultation process could have been longer or better. The question to be answered is whether the decision approving the Project and the justification offered are acceptable and defensible in light of the governing legislation, the evidence before the Court and the circumstances that bear upon a reasonableness review.

[30] There are many such circumstances. The Supreme Court emphasized in *Vavilov* that reasonableness is a single standard that must account for context. In its words, "the particular context of a decision constrains what will be reasonable for an administrative decision maker to

decide in a given case" (*Vavilov*, para. 89). Thus, reasonableness "takes its colour from the context" and "must be assessed in the context of the particular type of decision-making involved and all relevant factors" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, para. 59; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, para. 18 [*Catalyst*]; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, para. 22). In other words, the circumstances, considerations and factors in particular cases influence how courts go about assessing the acceptability and defensibility of administrative decisions (*Catalyst*, para. 18; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, para. 54; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, para. 44).

[31] In *Vavilov*, the Supreme Court emphasized that reasonableness review is to be conducted by appreciating the decision, the reasons for it, and the context in which it was made. This requires us to consider the reasons offered in justification of the decision in light of the evidentiary record.

B. *Factors that bear on reasonableness review*

[32] One factor affecting the reasonableness review has already been examined above: the comments of this Court in *TWN 2018* regarding what sort of work was required to address the shortcomings through a brief and efficient consultation process. The Governor in Council was entitled to take this assessment into account in determining whether the duty to consult was adequately met. But there are other factors that affect the reasonableness review.

(1) Empowering legislation

[33] One important factor to consider is the empowering legislation as set out in sections 54 and 55 of the *NEB Act* (*Vavilov*, para. 108; *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 87 Admin. L.R. (5th) 175, para. 36). It sets permissible bounds for the Governor in Council's approval decision.

[34] Under section 54, the Governor in Council is the only body empowered to determine whether the Project should be approved or denied on any basis, including compliance with the duty to consult. When regard is had to this provision, this Court has no role in deciding whether the Project should be approved or not and should not second-guess the outcome based on its own view of the matter.

[35] Under section 55, challenges to an approval can only be brought by way of judicial review (*TWN 2018*, paras. 170ff., leave to appeal to SCC refused, 38379 (2 May 2019); *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418, paras. 92ff., 119ff., leave to appeal to SCC refused, [2017] 1 S.C.R. xvi [*Gitxaala Nation*]). Reviewing courts are limited to a reviewing function and are not to pronounce on the merits (see *Raincoast No. 1*, paras. 44, 50ff.; *Ignace v. Canada (Attorney General)*, 2019 FCA 239, para. 36; *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 259, paras. 13-15).

[36] This is particularly so given the nature of the question before us. As mentioned above, the Governor in Council decided that the duty to consult was adequately fulfilled, *i.e.*, that there had been meaningful two-way dialogue during the reparative consultation process. This is a fact-

intensive question of mixed fact and law that commands deference. Under section 54, it is up to the Governor in Council to assess the facts in order to determine the adequacy of consultation. Our role is restricted to testing the reasonableness of this assessment.

(2) The law concerning the duty to consult

[37] The law concerning the duty to consult constrains the Governor in Council under section 54 of the *NEB Act* and affects this Court's review of the Governor in Council's decision (*Vavilov*, paras. 111-114).

[38] The practical requirements of the duty to consult have been compared to administrative law standards of procedural fairness (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, para. 41 [*Haida Nation*]; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, para. 46 [*Beckman*]). The cases on point emphasize that consultation need not be perfect (*Haida Nation*, para. 62; *TWN 2018*, paras. 226, 508). It follows that the Governor in Council was entitled to give the government actors leeway in assessing whether their efforts resulted in compliance with the duty to consult.

[39] The words of this Court in *Gitxaala Nation* are apposite here (para. 182):

> In this case, the subjects on which consultation was required were numerous, complex and dynamic, involving many parties. Sometimes in attempting to fulfil the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfil the duty, there will be difficult judgment calls on which reasonable minds will differ.

(See also *TWN 2018*, paras. 509, 762; *Ahousaht First Nation v. Canada (Fisheries and Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722, para. 54 [*Ahousaht First Nation*]; *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209, para. 133 [*Long Plain First Nation*]; *Yellowknives Dene First Nation v. Canada (Aboriginal Affairs and Northern Development)*, 2015 FCA 148, 474 N.R. 350, para. 56 [*Yellowknives Dene First Nation*].)

[40] For example, it has been said that to satisfy the duty, consultation must be "reasonable" (*Haida Nation*, paras. 62-63, 68; *Gitxaala Nation*, paras. 8, 179, 182-185; *TWN 2018*, paras. 226, 508-509; *Squamish First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 216, para. 31 [*Squamish First Nation*]). "Reasonable" consultation means Canada must show that it has considered and addressed the rights claimed by Indigenous peoples in a meaningful way (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, para. 41 [*Clyde River*]; *Squamish First Nation*, para. 37; *Haida Nation*, para. 42). "Meaningful" is a standard that also appears in the case law (*Gitxaala Nation*, paras. 179, 181, 231-234; *TWN 2018*, paras. 6, 494-501, 762; *Haida Nation*, paras. 10, 36, 42; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, paras. 2, 29 [*Taku River*]; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099, paras. 32, 44 [*Chippewas of the Thames*]).

[41] So what do the words "reasonable" and "meaningful" mean in this context? The case law is replete with indicia, such as consultation being more than "blowing off steam" (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, para. 54 [*Mikisew 2005*]), the Crown possessing a state of open-mindedness about

accommodation (*Gitxaala Nation*, para. 233), the Crown exercising "good faith" (*Haida Nation*, para. 41; *Clyde River*, paras. 23-24; *Chippewas of the Thames*, para. 44), the existence of two-way dialogue (*Gitxaala Nation*, para. 279), the process being more than "a process for exchanging and discussing information" (*TWN 2018*, paras. 500-502), the conducting of "dialogue […] that leads to a demonstrably serious consideration of accommodation" (*TWN 2018*, para. 501) and the Crown "grappl[ing] with the real concerns of the Indigenous applicants so as to explore possible accommodation of those concerns" (*TWN 2018*, para. 6). In cases like this where deep consultation is required, the Supreme Court has suggested the following non-binding indicia (*Chippewas of the Thames*, para. 47; *Haida Nation*, para. 44; *Squamish First Nation*, para. 36; see also *Yellowknives Dene First Nation*, para. 66):

- the opportunity to make submissions for consideration;
- formal participation in the decision-making process;
- provision of written reasons to show that Indigenous concerns were considered and to reveal the impact they had on the decision; and
- dispute resolution procedures like mediation or administrative regimes with impartial decision-makers.

[42] Examples and indicia in the case law are nothing more than indicators. The Supreme Court, while providing us with many of these indicia, has made it clear that what will satisfy the duty will vary from case to case, depending on the circumstances (*Haida Nation*, para. 45). So where do we get guidance?

[43] The Supreme Court has identified the concepts that animate the duty. In its view, the "controlling question" as to what is "reasonable" or "meaningful" consultation is "what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake" (*Haida Nation*, para. 45).

[44] The Supreme Court's most recent discussion of the honour of the Crown appears in paragraphs 21 and 22 of the majority reasons in *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765 [*Mikisew 2018*]:

> [The honour of the Crown] recognizes that the tension between the Crown's assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples creates a special relationship that requires that the Crown act honourably in its dealings with Aboriginal peoples (*Manitoba Metis*, at para. 67; B. Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 *S.C.L.R.* (2d) 433, at p. 436).
>
> The underlying purpose of the honour of the Crown is to facilitate the reconciliation of these interests (*Manitoba Metis*, at paras. 66-67). One way that it does so is by promoting negotiation and the just settlement of Aboriginal claims as an alternative to litigation and judicially imposed outcomes (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24). This endeavour of reconciliation is a first principle of Aboriginal law.

[45] However, the precise content of the honour of the Crown also turns on the circumstances of the particular case (*Mikisew 2018*, para. 24):

> [T]his Court has made clear that the duties that flow from the honour of the Crown will vary with the situations in which it is engaged (*Manitoba Metis*, at para. 74). Determining what constitutes honourable dealing, and what specific obligations are imposed by the honour of the Crown, depends heavily on the circumstances (*Haida Nation*, at para. 38; *Taku River*, at para. 25; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at paras. 36-37).

[46] Further on in *Mikisew 2018*, the Court identified consultation as a requirement that flows from the honour of the Crown. Consultation is connected to the honour of the Crown because it is not honourable for Canada to act unilaterally in a way that could affect the rights of Indigenous peoples, without first engaging in meaningful consultation (*Mikisew 2018*, para. 25):

> The duty to consult is one such obligation. In instances where the Crown contemplates executive action that may adversely affect s. 35 rights, the honour of the Crown has been found to give rise to a justiciable duty to consult (see e.g. *Haida Nation*, *Taku River*, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, and *Little Salmon*). This obligation has also been applied in the context of statutory decision-makers that—while not part of the executive—act on behalf of the Crown (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc*., 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 29). These cases demonstrate that, in certain circumstances, Crown conduct may not constitute an "infringement" of established s. 35 rights; however, acting unilaterally in a way that may adversely affect such rights does not reflect well on the honour of the Crown and may thus warrant intervention on judicial review.

[47] The other controlling concept is reconciliation. The best description of reconciliation to date appears in the following passage from *Beckman* (para. 10):

> The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.

[48] Reconciliation must nonetheless begin by looking back and developing a deep understanding of the centuries of neglect and disrespect toward Indigenous peoples, well-summarized in a number of reports and studies (see, *e.g.*, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: The Commission, 1996); Truth and Reconciliation Commission, *Honouring the truth, reconciling for the future: summary of the final report of the Truth and Reconciliation Commission of Canada* (Winnipeg: The Commission, 2015)). Too often decisions affecting Indigenous peoples have been made without regard for their interests, dignity, membership and belonging in Canadian society, with terrible neglect and damage to their lives, communities, cultures and ways of life. Worse, almost always no effort was made to receive their views and try to accommodate them—quite the opposite. The duty to consult is aimed at helping to reverse that historical wrong.

[49] Reconciliation also looks forward. It is meant to be transformative, to create conditions going forward that will prevent recurrence of harm and dysfunctionality but also to promote a constructive relationship, to create a new attitude where Indigenous peoples and all others work together to advance our joint welfare with mutual respect and understanding, always recognizing that while majorities will sometimes prevail and sometimes not, concerns must always be taken on board, considered and rejected only after informed reflection and for good reason. This is a recognition that in the end, we all must live together and get along in a free and democratic society of mutual respect.

[50] Reconciliation in this sense is about relationship (Mark Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in Will Kymlicka & Bashir Bashir, eds, *The*

Politics of Reconciliation in Multicultural Societies (New York: Oxford University Press, 2008) 165, p. 168):

> Reconciliation as relationship […] is always […] reciprocal, and […] invariably involves sincere acts of mutual respect, tolerance, and goodwill that serve to heal rifts [and includes] facing past evil openly, acknowledging its hurtful legacies, and affirming the common humanity of everyone involved. [It] is about peace between communities divided by conflict, but it is also about establishing a sense of self-worth or internal peace within those communities.

[51] The process of meaningful consultation can result in various forms of accommodation. But the failure to accommodate in any particular way, including by way of abandoning the Project, does not necessarily mean that there has been no meaningful consultation.

[52] Moreover, the fact that consultation has not led the four applicants to agree that the Project should go ahead does not mean that reconciliation has not been advanced. The goal is to reach an overall agreement, but that will not always be possible (*Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, paras. 83, 114 [*Ktunaxa Nation*]). The process of consultation based on a relationship of mutual respect advances reconciliation regardless of the outcome.

[53] Put another way, reconciliation does not dictate any particular substantive outcome. Were it otherwise, Indigenous peoples would effectively have a veto over projects such as this one. The law is clear that no such veto exists (*Haida Nation*, paras. 62-63, citing *R. v. Nikal*, [1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658, para. 110; *Chippewas of the Thames*, para. 59; *Ktunaxa Nation*, para. 83; *R v. Marshall*, [1999] 3 S.C.R. 533, 179 D.L.R. (4th) 193, para. 43; *Gitxaala*

Nation, para. 179; *TWN 2018*, para. 494; *Yellowknives Dene First Nation*, para. 56). At some juncture, a decision has to be made about a project and the adequacy of the consultation. Where there is genuine disagreement about whether a project is in the public interest, the law does not require that the interests of Indigenous peoples prevail.

[54] Some important ramifications arise from this. First, imposing too strict a standard of "perfection", "reasonableness" or "meaningfulness" in assessing whether the duty to consult has been adequately met would *de facto* create a veto right.

[55] Second, the case law is clear that although Indigenous peoples can assert their uncompromising opposition to a project, they cannot tactically use the consultation process as a means to try to veto it (*Haida Nation*, para. 42; *Prophet River First Nation v. British Columbia (Environment)*, 2017 BCCA 58, 408 D.L.R. (4th) 201, para. 65 [*Prophet River BCCA*]; *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, para. 161; *Ahousaht First Nation*, paras. 52-53; *Long Plain First Nation*, paras. 158-63; *R. v. Douglas et al.*, 2007 BCCA 265, 278 D.L.R. (4th) 653, para. 39). Tactical behaviour aimed at ensuring that discussions fail within the time available for consultation is not consistent with reconciliation and would, if tolerated, allow for the effective use of a veto right.

[56] Reconciliation as relationship can only be advanced through consultation when the respective parties commit to the process, avoid counterproductive tactics, get to the substance of the issues of concern and exercise good faith—Indigenous peoples by communicating their concerns in the clearest possible way and the Crown by listening to, understanding and

considering the Indigenous peoples' points with genuine concern and an open mind throughout. Only then can the process lead to accommodations that respond to the concerns of the Indigenous peoples.

[57] When adequate consultation has taken place but Indigenous groups maintain that a project should not proceed, their concerns can be balanced against "competing societal interests". This is the role of accommodation (*Chippewas of the Thames*, paras. 59-60; *Haida Nation*, para. 50; *TWN 2018*, para. 495).

[58] Like consultation, accommodation does not guarantee outcomes. It is an ongoing "give and take" process. One way to accommodate is to impose conditions on a project proponent, such as ongoing participation of Indigenous groups (see, *e.g.*, *Chippewas of the Thames*, para. 57; *TWN 2018*, para. 637). Canada must act in good faith, but at the same time accommodation cannot be dictated by Indigenous groups (*Chippewas of the Thames*, para. 60; *Haida Nation*, paras. 48-49; *Ktunaxa Nation*, para. 114).

[59] The duty to accommodate requires Canada to "balance Aboriginal concerns reasonably with the potential impact […] on the asserted right or title and with other societal interests" (*Haida Nation*, para. 50). Canada can assign this balancing task to an administrative agency, as it has done in part in this case, to the NEB. As well, in this case, section 54 of the *NEB Act* permits the Governor in Council to weigh all the considerations.

(3) Relevance of post-approval consultation

[60] Contrary to what the applicants assert, post-approval consultation is both relevant and important. The duty to consult is owed by the Crown and the honour of the Crown is always in play.

[61] The Governor in Council's decision speaks extensively to the fact that consultation is an ongoing process (see in this respect the *Explanatory Note*). Further consultation will take place, for example, in connection with the CER's future determination of routing and permits. The certainty of further consultations and the certainty of the terms on which they will be conducted are factual elements that the Governor in Council was entitled to take into account when making its decision. Even if Canada's consultation and accommodation measures up to June 18, 2019 were found to be inadequate, consultation activities that took place after the issuance of the Order in Council would remain relevant. Sending the decision back to the Governor in Council yet again for reconsideration would be pointless if the inadequacies have since been resolved (*Vavilov*, para. 142; *MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, paras. 43-52; *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710, para. 44).

(4) The importance of the matter

[62] Another contextual factor that affects the reasonableness analysis in this case is the importance of this matter to those directly impacted by the Project (*Vavilov*, paras. 133-135). The duty to consult has underpinnings in section 35 of the *Constitution Act, 1982*, being Schedule B

to the *Canada Act 1982* (U.K.), 1982, c. 11, and forms the legal basis for positive long-term relationships. This affects the extent and quality of the reasons that the Governor in Council is expected to provide in support of its decision.

[63] This being said, as will be seen, the reasons offered by the Governor in Council, both in the Recitals and in the accompanying *Explanatory Note,* are more than sufficient in providing justification for the decision. This is even more so when it is recognized that justification for an administrative decision may also be found by examining the record that was before the decision-maker (*Vavilov*, paras. 91-98).

III. Was the Governor in Council's decision reasonable?

[64] In our view, the Governor in Council's decision was reasonable. It is acceptable and defensible in light of both the outcome reached on the facts and the law and the justification offered in support.

[65] As the Governor in Council has explained in the Recitals and in the *Explanatory Note*, and as is apparent from the record before us, it could reasonably adopt the view that the limited flaws identified by this Court in *TWN 2018* had been adequately addressed and that reasonable and meaningful consultation had taken place.

[66] The Governor in Council's explanations do not suffer from errors in reasoning or logical deficiencies of the sort identified by the Supreme Court in *Vavilov* (paras. 102-104). Taken

together, the explanations show a chain of reasoning progressing from reasonable views of the evidence before it to plausible conclusions well within the bounds of the governing legislation.

[67] Although the Governor in Council had previously approved the Project and, in the course of doing so, had considered the duty to consult to have been met, in making the present decision it properly did not consider itself constrained by its prior decision. It looked at the issue of Canada's compliance with the duty to consult afresh based on its understanding of the duty to consult and the facts before it.

[68] The Governor in Council has demonstrated that it understood the legal content of the duty to consult (*Explanatory Note*, p. 43, third whole paragraph). It has also shown that it understood the import of this Court's decision in *TWN 2018* and the shortcomings in its earlier consultation process (Order in Council, p. 5, fourth whole paragraph; *Explanatory Note*, p. 45, second whole paragraph). It instructed itself, appropriately and reasonably, as follows (Order in Council, p. 6, first whole paragraph):

> Whereas, on October 5, 2018 the Government reinitiated Phase III consultations, in keeping with the Court's decision and direction, and guided by the objectives of meeting its consultation obligations under section 35 of the Constitution Act, 1982, and its commitments to advance reconciliation with Indigenous peoples, engaged in substantive, meaningful two-way dialogue in order to fully understand the concerns raised and the nature and seriousness of potential impacts on rights and, where appropriate, to work collaboratively with Indigenous groups to identify and provide accommodations, and respond to concerns raised in these and the previous Phase III consultations in a flexible manner that takes into account the potential impacts and needs of each Indigenous group;

[69] It also reviewed some of the work that had been done to that end and the accommodations made (Order in Council, p. 6) and summarized these in great detail in the *Explanatory Note* (pp. 45-49).

[70] This work included reinitiating consultations directly with potentially affected Indigenous groups, with a focus on responding to and remedying the concerns raised by this Court in *TWN 2018*; retaining a recognized expert with extensive experience in Indigenous matters in the person of former Supreme Court Justice Frank Iacobucci, to oversee and provide guidance in respect of the re-initiated consultations; developing a process for meaningful, two-way dialogue between Indigenous groups and Canada through consultation teams composed of federal officials drawn from various federal departments, and led by senior government officials operating at the Director General level and reporting to the Assistant Deputy Minister responsible for the Consultation Secretariat; and providing a clear mandate for consultation teams to discuss and agree to accommodations, where appropriate (Labonté Affidavit, paras. 4, 51, Canada Record, p. 2; Order in Council, p. 6; *Explanatory Note*, pp. 45-46).

[71] The Governor in Council explained that in the end, a detailed Crown Consultation and Accommodation Report (CCAR) was provided to all members of the Governor in Council and was publicly disclosed, including to Indigenous groups (*Explanatory Note*, p. 47). The CCAR summarized the impacts of the Project on Indigenous interests and concerns, conclusions made by the NEB, the perspectives and views of the Indigenous peoples, Canada's analysis of the impact on Indigenous rights and interests and future steps that will mitigate the impact and address the concerns (*Explanatory Note*, pp. 47-48).

[72] Also placed before the Governor in Council was a detailed summary of new accommodation measures and initiatives that would avoid or mitigate the effects on Indigenous interests, including the Salish Sea Initiative, the Co-Developing Community Response program, the Enhanced Maritime Situational Awareness program, the Marine Safety Equipment and Training program, the Quiet Vessel Initiative, the Aquatic Habitat Restoration Fund, the Terrestrial Cumulative Effects Initiative, and the Terrestrial Studies Initiative (*Explanatory Note*, pp. 48-49).

[73] In making its decision, the Governor in Council considered the recommendations made by the NEB and adopted them after explaining why (*Explanatory Note*, pp. 53-63). It also considered its power to impose new conditions on any approval of the Project, discussed the considerations in great detail, and decided to implement amendments to the NEB conditions (*Explanatory Note*, pp. 63-65).

[74] On the issue of Canada's compliance with the duty to consult, the Governor in Council concluded as follows (Order in Council, p. 7, last whole paragraph):

> Whereas the Governor in Council, having considered Indigenous concerns and interests of 129 groups as set out in the Crown Consultation and Accommodation Report for the Reconsideration of the Trans Mountain Expansion Project dated June 13, 2019, and having considered Justice Iacobucci's oversight, direction and advice, is satisfied that: the consultation process undertaken is consistent with the honour of the Crown and meets the guidance set forth in [*TWN 2018*] for meaningful two-way dialogue focused on rights and the potential impacts on rights, and that the concerns, and potential impacts to interests including established and asserted Aboriginal and treaty rights identified in the consultation process have been appropriately accommodated;

[75] It cannot be said that the decision reached by the Governor in Council is outside the bounds of section 54, reasonably interpreted. None of the applicants made that submission. Nor can it be said, based on these justifications and the record before us, that the Governor in Council did not adequately, meaningfully and reasonably address and consider the key issues raised by this Court in *TWN 2018* and the parties during the renewed consultation.

[76] In this case, the Governor in Council's key justifications for deciding as it did are fully supported by evidence in the record. The evidentiary record shows a genuine effort in ascertaining and taking into account the key concerns of the applicants, considering them, engaging in two-way communication, and considering and sometimes agreeing to accommodations, all very much consistent with the concepts of reconciliation and the honour of the Crown.

[77] Contrary to what the applicants assert, this was anything but a rubber-stamping exercise. The end result was not a ratification of the earlier approval, but an approval with amended conditions flowing directly from the renewed consultation. It is true that the applicants are of the view that their concerns have not been fully met, but to insist on that happening is to impose a standard of perfection, a standard not required by law.

[78] Significantly, the consultation process initiated by Canada invited the participation of 129 Indigenous groups potentially impacted by the Project and, in the end, more than 120 either support it or do not oppose it. As well, benefit agreements had been signed with 43 Indigenous groups as of June 22, 2019 (*Explanatory Note*, p. 43, second whole paragraph).

The Governor in Council was entitled under section 54 to take this broad consensus into account in concluding that the Project was in the public interest. This is a factor that also speaks to the fact that the process that has taken place is consistent with the objectives of reconciliation and the honour of the Crown (Order in Council, p. 7, last whole paragraph).

[79] As mentioned above, in conducting reasonableness review, our focus must be on the reasonableness of the Governor in Council's decision, including the outcome reached and the justification for it. Although the parties' submissions raise a number of specific concerns, our focus must remain on the decision itself. It bears noting that a decision can be reasonable even though some affected parties continue to have strong objections to it on the merits.

[80] At an early stage in these proceedings, the applicants were twice invited to focus on the Governor in Council's decision and to address the standard of review (see the terms of the Leave Order, above, and discussion of these matters in the decision of this Court in *Ignace v. Canada (Attorney General*), 2019 FCA 266, paras. 13-20). Instead, they chose to focus on the merits of the decision.

[81] As a result, their submissions are extensive in scope, referring to an evidentiary record of some 60,000 pages. In effect, the four applicants argued their applications as if they were seeking a freestanding declaration that the duty to consult had not been met.

[82] Under their approach, the Governor in Council's decision was quite beside the point. Indeed, we received no submissions from the applicants on the nature and quality of the

Governor in Council's decision, the constraints acting upon the Governor in Council including the governing legislation, or the justification offered in support of the decision, with a view to establishing the unreasonableness of the decision. The submissions that we received following the release of *Vavilov* do not put into question any of the observations we have made concerning the reasonableness of the Governor in Council's decision under the framework of analysis set out in that decision.

[83] In light of the above analysis and given the applicants' failure to focus on a review of the decision of the Governor in Council in accordance with the governing standard of review, nothing more need be said in order to conclude that the decision of the Governor in Council was reasonable.

[84] Nevertheless, we have decided to respond to the applicants' detailed submissions on the terms in which they have articulated them. We recognize that this approach is not required by the analysis of reasonableness we are to follow under *Vavilov* and the Supreme Court's first two decisions after *Vavilov*, *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, and *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67. However, the shortcomings on which the applicants were asked to comment pursuant to the Leave Order were detailed and specific in nature and, to that extent, may have led the applicants to adopt a more merits-based approach than that sanctioned in *Vavilov*. It is also important that we defuse any suggestion that the Court did not consider the applicants' submissions.

IV. Response to the applicants' specific submissions

[85] Our review of the applicants' detailed submissions leads us to conclude that even if we were reviewing the Governor in Council's decision on the basis of a more stringent standard, *i.e*. correctness, we would still not be persuaded that interference with the Governor in Council's decision is warranted.

[86] The applicants' submissions are essentially that the Project cannot be approved until all of their concerns are resolved to their satisfaction. If we accepted those submissions, as a practical matter there would be no end to consultation, the Project would never be approved, and the applicants would have a *de facto* veto right over it.

[87] Overall, each of the applicants' detailed submissions fails for one or more of five reasons:

- they raise matters that could have been raised before this Court in *TWN 2018* but were not and, accordingly, the applicants are estopped from raising them now;
- they raise matters that were raised before this Court in *TWN 2018* and that were dealt with by this Court;
- they raise matters outside of the scope of the issues the Leave Order permitted to be raised;
- they have no merit on their own terms; what is said to be unaddressed has in fact been adequately addressed by Canada; or

- they, alone or in combination with other matters, do not take away from the overall reasonableness of the Governor in Council's decision that the duty to consult had been adequately met and that, overall, the Project is in the public interest.

[88] The analysis of each of the applicants' case-specific contentions follows.

A. *Coldwater*

[89] The focus of Coldwater's concerns was on the potential impact of the Project on the aquifer from which it draws its drinking water supply. In *TWN 2018*, this Court identified two shortcomings in the consultations that took place between Canada and Coldwater.

(1) The flaws identified in *TWN 2018* were remedied

[90] This Court first noted that Canada conducted the consultations under the erroneous assumption that it could not impose additional conditions on the proponent beyond those imposed by the NEB. This flaw has now been addressed. Canada has formally acknowledged that it has this power. And it has exercised it by initiating a new Proponent Commitment to Coldwater made binding on Trans Mountain by the Governor in Council's amended NEB Condition 6.

[91] The second flaw identified in *TWN 2018* was that Condition 39 provided no certainty about the pipeline route or how the NEB would assess risks to the aquifer. Before us, Coldwater maintains that, if anything, more uncertainty about the pipeline route and risk to its aquifer has

been created as a result of the renewed consultation process and the Proponent Commitment. Not only was the Proponent Commitment communicated too late in the process, but the Order in Council was issued without the benefit of a completed hydrogeological study.

[92] Coldwater's concern with the hydrogeological study is that the December 31, 2019 date for its production pursuant to the new Proponent Commitment did not allow for a sufficient period to gather baseline data. It says that data collection for at least one full year after the installation of the monitoring wells—preferably two—is required. During the renewed consultation process, Coldwater also made clear its view that the duty to consult could not adequately be met if the Project was approved before the hydrogeological study had been fully completed. Coldwater expressed this view in a letter to Canada in the following words (Exhibit A to the Taylor Affidavit #1, Canada Record, p. 13451):

> […] baseline information is needed to understand the plumbing system, then risks can be assessed. Only once you understand what you are trying to protect can the ability of mitigation measures to manage risks be considered. Specifically, you cannot compare the relative risks of the alternative routes without the aquifer study nor can you consider the adequacy of any proposed pipeline protection measures until the aquifer study is complete.
>
> [emphasis added]

[93] This very issue was considered by this Court in *TWN 2018*. Coldwater's argument was that the NEB should have considered the West Alternative (a possible alternate route) during the hearing. The Court rejected this argument (*TWN 2018*, paras. 375-385). Specifically, it held that should the hydrogeological study favour an alternative route, the NEB will be in a position to order a variation of the route during the Detailed Route Hearing. Indeed, the NEB had the power

to approve a route outside of the approved corridor and could at that time choose the West Alternative if it felt it was the better route (*TWN 2018*, paras. 383-384):

> Additionally, section 21 of the *National Energy Board Act* permits the Board to review, vary or rescind any decision or order, and in *Emera* the Board recognized, at page 31, that where a proposed route is denied on the basis of evidence of a better route outside of the approved pipeline corridor an application may be made under section 21 to vary the corridor in that location.
>
> It follows that the Board would be able to vary the route of the new pipeline should the hydrogeological study to be filed pursuant to Condition 39 require an alternative route, such as the West Alternative route, in order to avoid risk to the Coldwater aquifer.
>
> [emphasis added]

[94] Based on this determination, this Court concluded that the NEB did not have to consider the West Alternative because, after the Governor in Council approves the Project, pipeline routing will remain a "live issue, depending on the findings of the hydrogeological report" (*TWN 2018*, para. 385, emphasis added).

[95] Further, beginning at paragraph 542 of *TWN 2018*, the Court addressed Coldwater's argument that the structure of the consultation process was flawed because it "allowed the Project to be approved when essential information was lacking". The Court explained that the concern about "Canada's reliance on a process that left important issues unresolved at the time the Governor in Council approved the Project" found its answer in two Supreme Court companion cases (*Clyde River*, paras. 25-29; *Chippewas of the Thames*, paras. 29-31). Relying on these cases, this Court held that "the Board's approval process may itself trigger the duty to consult where that process may result in adverse impacts upon Indigenous and treaty rights" (*TWN 2018*, para. 546, citations omitted).

[96] Applying this reasoning to Coldwater's situation, the Court noted that the NEB's decision on routing following the Detailed Route Hearing would trigger the Crown's duty to consult. Even though the Crown remains responsible for ensuring that the NEB decision upholds the honour of the Crown, the NEB would have to inform itself of the impact to the aquifer and take the rights and interests of Coldwater into consideration before making its final decisions about routing and compliance with Condition 39. This was "a full answer to the concern that the consultation framework was deficient because certain decisions remain to be made after the Governor in Council approved the Project" (*TWN 2018*, para. 547).

[97] Thus, Coldwater's contention that the December 31, 2019 deadline did not allow sufficient time for the collection of the required baseline data for the Project to be approved and that the Project could not be approved before the report was completed was addressed and disposed of in *TWN 2018*. As was the case then, the NEB (now the CER) will have the occasion to inform itself of the impact to the aquifer and take the rights and interests of Coldwater into account before making a final decision.

[98] The Court in *TWN 2018* went on to hold that Canada could not rely on Condition 39 to satisfy its duty to consult and accommodate by reason of two particular circumstances. It said (para. 679):

> In circumstances where Coldwater would bear the burden of establishing a better route for the pipeline, and where the advice given to Coldwater by the Board's technical expert was that he was personally unaware of a route being moved out of the approved pipeline corridor, Canada placed its reliance on Condition 39, and so advised Coldwater. However, as Canada acknowledged, this condition carried no certainty about the pipeline route. Nor did the condition provide any certainty as to how the Board would assess the risk to the aquifer.

[99] At the source of these uncertainties was the information provided by a contractor made available to answer questions relating to the NEB during a meeting between Canada and Coldwater who asserted that the burden of establishing that there is a better route that falls outside the approved corridor would lie on the party seeking the change (*i.e.*, Coldwater) (*TWN 2018*, paras. 671, 676). As well, when Coldwater asked during the course of the re-initiated consultation whether an approved route corridor had ever been changed because of a report released following a Governor in Council approval (here the Condition 39 study), the technical expert explained that while possible, this had never happened in any case that he was aware of. The Crown confirmed that given the momentum behind the Project following a Governor in Council approval, Coldwater would have a hard time discharging the burden (*TWN 2018*, para. 676). Coldwater insisted at the time that given the fact that it would have to bear the burden, the Detailed Route Hearing was not a realistic option for its concerns (*TWN 2018*, para. 673). These observations are at the root of the uncertainty about the pipeline route and the assessment of risks to the aquifer referred to in the above passage.

[100] As the Court made clear in *TWN 2018*, the structure of the consultation process was not flawed because the NEB was bound to take into account the risk to the aquifer, and the West Alternative could be considered by the NEB in making its Detailed Route decision if the hydrogeological study so required. However, given the evidence that this could only take place in the event that Coldwater was able to discharge the onus of showing that the West Alternative was the better route and that, as agreed by all, this was an unlikely outcome, the Court held that the protection of Coldwater's aquifer was left in too uncertain a state. Specifically, the uncertainty as to the routing hinged on the unlikely prospect that Coldwater would be able to

discharge its onus and failing this, there was no certainty about how the NEB would go about assessing the risk to the aquifer.

[101] In the present case, these two uncertainties have been addressed. The CER has confirmed that the burden of demonstrating the better route will rest on the proponent, Trans Mountain, and not Coldwater. Specifically, the CER confirmed that "[t]he party having the onus to show that the proposed route is the best possible route is the company applying for approval", citing *Emera Brunswick Pipeline Company Ltd. (Re)*, 2008 LNCNEB 10, Nos. MH-3-2007 (May 2008) MH-1-2008 (August 2008), p. 32 (Memorandum of the CER, para. 26). Moreover, in order to remove any possible ambiguity in this regard, Trans Mountain has undertaken that Coldwater will "not carry any evidentiary burden of routing decisions placed [before] the [NEB]" (Exhibit EEEE to the Spahan Affidavit, Coldwater Record, p. 682).

[102] Coldwater did not take issue with this confirmation or the effect of Trans Mountain's binding commitment, and could hardly have done so, given that they resolve a fundamental issue which it raised during the first consultation. It follows that Trans Mountain will have the burden of showing which is the better route during the Detailed Route Hearing, and in assessing whether this onus has been met, the CER will have to take into account the hydrogeological study. Only then will the CER be in a position to determine whether Condition 39 has been satisfied.

[103] This does away with the uncertainty pointed to in *TWN 2018*. But Canada did not rest on this. It further bolstered Condition 39 by imposing a deadline by which Trans Mountain had to file the hydrogeological study with the CER; requiring Trans Mountain to file a feasibility study

of the West Alternative route with the CER, which report has to consider geotechnical, geohazard, and species at risk and environmental factors; and imposing a clear process as to how Trans Mountain must proceed before the CER during the Detailed Route Hearing. Beyond this, Canada remains responsible to ensure that the Detailed Route Hearing decision, whatever it might be, upholds the honour of the Crown.

[104] Coldwater maintains that this initiative came too late in the renewed consultation process. We disagree. The measure is in line with the approach sanctioned in *TWN 2018* and Coldwater retains the right to bring its input into the process. As well, Coldwater complains that the Project was approved on the basis of insufficient information and data. Again, it is not for this Court to weigh in on the science and pronounce on the sufficiency of the data, since the CER will consider the science and data sufficiency during the Detailed Route Hearing (NEB Reconsideration Report, Book of Major Documents, p. 0975, under the heading "Condition Filings for approval" [NEB Reconsideration Report]).

[105] In sum, this Court in *TWN 2018* has already provided a full answer to the argument that the consultation process was flawed because the hydrogeological study had yet to be completed when the Project was approved. Coldwater is barred from litigating this issue again. In addition, it was open to the Governor in Council to conclude that the deficiency relating to a lack of meaningful dialogue with Coldwater was adequately remedied. We note in this respect the ongoing consideration of alternative routes, inclusive of the West Alternative, as well as Canada's clearly expressed understanding that it was not confined to the NEB's findings in developing accommodations. On this last point, Canada has spoken through its actions by

initiating a binding Proponent Commitment that addresses Coldwater's concerns about routing and provides more certainty that the risk to Coldwater's aquifer will be addressed. While Coldwater remains dissatisfied, the flaw identified in *TWN 2018* has been remedied.

(2) The West Alternative is no longer the preferred route

[106] Having said this, it appears to us that reaching an agreement with Coldwater through meaningful consultation was an unlikely prospect. This can best be illustrated by Coldwater's increasing disenchantment with the West Alternative as it became increasingly apparent to it that this alternative was being integrated through meaningful consultation and in a manner that provided an adequate response to its concerns.

[107] Throughout the consultations that preceded *TWN 2018* and up to March 2019, Coldwater's position was that it had a "strong preference" for the West Alternative given that it posed no risk to its aquifer and its drinking water supply (*TWN 2018*, para. 586). However, during the renewed consultation process, after Trans Mountain indicated its willingness to consider the West Alternative, Coldwater's position began to shift. On or around March 6, 2019, Coldwater raised for the first time concerns about "how risky the river crossings associated with the West Alternative actually are" (Exhibit WW to the Spahan Affidavit, Coldwater Record, p. 499, emphasis added). It had long been known that the West Alternative had two river crossings; this was one of the reasons why Trans Mountain did not choose it as the preferred route.

[108] Later, in early June 2019, when confronted with the prospect that the West Alternative could provide a realistic solution to its aquifer concerns, Coldwater changed course altogether

and asserted that no route was safe enough (Exhibit CCCC to the Spahan Affidavit, Coldwater Record, p. 678):

> We do not see how the Project can be approved unless it has been determined that there is a feasible route through the Coldwater Valley that does not put our aquifer at risk or otherwise unduly harm our aboriginal rights and interests. Absent completion of the hydrogeological study and an assessment of the West (or other) route alternatives, any approval of the project would have to contemplate the possibility that there is no safe route through our valley. In this respect, there is no condition that can suffice given our unaddressed and undiscussed concerns about our aquifer and routing lie at the very heart of the Crown's constitutional obligations to us.

[109] This is a position that Coldwater was entitled to take. However, it would have been more useful and productive for everyone if this had been clear from the beginning.

[110] As stated at the outset of these reasons, the issue to be decided in these judicial review applications is confined to the reasonableness of the Governor in Council's conclusion that the flaws identified in *TWN 2018* have been adequately remedied. Coldwater would now like to go back in time and address issues not raised or addressed in *TWN 2018*. This is precluded by the Leave Order.

[111] Beyond this, we believe that the words of the British Columbia Court of Appeal in *Prophet River BCCA*, at paragraph 65, are apposite given Coldwater's revised position that no route is safe enough for the Project to be approved:

> Here, the appellants have not been open to any accommodation short of selecting an alternative to the project; such a position amounts to seeking a "veto". They rightly contend that a meaningful process of consultation requires working collaboratively to find a compromise that balances the conflicting interests at

> issue, in a manner that minimally impairs the exercise of treaty rights. But that becomes unworkable when, as here, the only compromise acceptable to them is to abandon the entire project.

[112] The Governor in Council's decision that Coldwater was adequately consulted and accommodated during the renewed consultation process is eminently reasonable and therefore the Order in Council approving the Project against Coldwater's opposition must stand.

B. *Squamish*

[113] Squamish's primary concerns with the Project have been the risk of spills of the diluted bitumen that would be carried by the pipeline and the consequences of a spill for Squamish's rights and interests.

[114] In *TWN 2018* (paras. 662-668), this Court identified three specific shortcomings in the earlier consultation between Canada and Squamish on these subjects. The first was that there was no meaningful response from Canada to Squamish's concern that too little was known about how diluted bitumen would behave if spilled to permit approval of the Project. The second was that there was nothing in Canada's response to show that Squamish's concern about diluted bitumen was given real consideration or weight. The third was that there was nothing to show that any consideration was given to any meaningful and tangible accommodation measures.

[115] The Court went on to set out how, in its view, the consultation by Canada with Squamish fell short of the required standard. It pointed out that there was only one consultation meeting with Squamish in Phase III of the consultation process. During the meeting, Squamish took the

position that it had "insufficient information about the Project's impact on Squamish to make a decision on the Project or to discuss mitigation measures" (*TWN 2018*, para. 662). There was reference in particular to a lack of information about the fate and behaviour of diluted bitumen if spilled in a marine environment. Canada responded by describing this as an "information gap". It stated that it was unsure how the Governor in Council would weigh the uncertainties in considering whether, despite them, it was acceptable for the Project to go forward. The Court observed that the meeting notes did not reflect that there was any further discussion about the fate and behaviour of diluted bitumen in water.

[116] The Court also referred to a joint letter to Squamish from Canada and the B.C. Environmental Assessment Office, responding to the issues raised by Squamish and dated the day before the Project was approved. The letter noted that Squamish had raised concerns relating to potential spills and the fate and behaviour of diluted bitumen, but stated only, in effect, that a pipeline company was required to follow regulatory requirements. The Court described the letter as a "generic response" and "not a meaningful response to Squamish's concern that too little was known about how diluted bitumen would behave if spilled" (*TWN 2018*, para. 666).

[117] Squamish submits that the renewed consultation that followed this Court's decision did not address these shortcomings: that Canada failed again to engage substantively on the issues of concern to Squamish, and unilaterally relied on accommodation measures that would not mitigate or accommodate impacts to Squamish. Therefore, in its view, it was unreasonable for the Governor in Council to approve the Project.

[118] We disagree. In our view, the record demonstrates that in the renewed consultation process, Canada meaningfully responded to Squamish's concerns through, among other things, discussion, the exchange of expert scientific opinion, and the provision of relevant information and documentation. Canada also proposed accommodation measures that could contribute to mitigating the impacts with which Squamish was concerned, including agreeing to conduct a joint experimental study with Squamish and Tsleil-Waututh (which shares Squamish's concerns about diluted bitumen and spills) on the behaviour of diluted bitumen in the Burrard Inlet and Fraser River area, the area where Squamish and Tsleil-Waututh were concerned a spill could occur.

[119] Ultimately, Squamish and its experts were not persuaded that enough was known about the fate and behaviour of diluted bitumen to permit a decision approving the Project. For their part, Canada and its experts were not persuaded, given the current state of scientific knowledge, that further information was required before a decision could be made. But the law governing consultation does not impose a duty to agree (*Haida Nation*, para. 42). Nor is it the role of the Court to act as an "academy of science" to decide whose view is correct (*Inverhuron & District Ratepayers Ass. v. Canada (Minister of The Environment)*, 2001 FCA 203, 273 N.R. 62, para. 40). Rather, provided the Governor in Council could reasonably determine that there was meaningful consultation, the appropriateness of a decision on the Project given the current state of scientific knowledge was a matter for the Governor in Council to determine.

[120] What, then, were the elements of the renewed consultation with Squamish on potential spills and the fate and behaviour of diluted bitumen?

[121] First, updated evidence was filed in the NEB reconsideration hearing, in which Squamish participated. Canada had advised that it intended to rely on the NEB reconsideration hearing, to the extent possible, to fulfil its duty to consult. The updated evidence addressed, among other things, the fate and behaviour of diluted bitumen and oil spill clean-up technologies. It included a 2018 report on a review conducted by federal scientists and external experts that summarized the state of knowledge in the field and provided direction for further research. There was also evidence from Squamish's expert, Dr. Short, concerning the submergence of diluted bitumen following a spill. The NEB found that the weight of the evidence did not support Dr. Short's assertion that rapid, widespread submergence of diluted bitumen was likely. It concluded that there was sufficient evidence regarding the fate and behaviour of an oil spill, including diluted bitumen, to support assessment of potential spill-related effects and spill response planning (NEB Reconsideration Report, pp. 0479-0503).

[122] Second, two of the seven technical consultation meetings between Canada and Squamish, and a substantial portion of a third (a telephone meeting), were devoted to these and related issues. These meetings were convened in response to the identification by Squamish of the fate and behaviour of diluted bitumen and spill response as issues that it considered outstanding or unaddressed in light of the NEB Reconsideration Report, and as subjects requiring consultation (Exhibit A to the Taylor Affidavit #2, Canada Record, pp. 14474-14480, 14498-14502). Both federal experts and Squamish's experts attended these technical consultation meetings. Federal experts gave presentations on oil spills, including spill modelling, the biodegradation of diluted bitumen, and spill response. They advised that much additional research had been conducted since 2016. They presented substantial information on spill response capacities and programs.

Squamish and its expert expressed the view that additional work on the fate and behaviour of diluted bitumen must nonetheless be completed before the Governor in Council could make a decision on the Project. Canada responded directly that, given the extent of current scientific knowledge, it did not share that view (Taylor Affidavit #2, paras. 60-61, Canada Record, p. 14254; Exhibit A to the Taylor Affidavit #2, Canada Record, pp. 14729-14783, 15088-15103). The second meeting included a presentation on spill response capacity by Western Canada Marine Response Corporation (the Transport Canada-certified marine spill response organization for Canada's west coast). There was also discussion of available information on spill response capacity that Squamish's expert on this subject had apparently not considered (Exhibit A to the Taylor Affidavit #2, Canada Record, pp. 15101-15102). This was meaningful dialogue.

[123] Third, during the consultation period Canada provided to Squamish and its experts substantial research and other written material providing further information on these subjects (Taylor Affidavit #2, paras. 58-59, 62-64, 71, 74, 80, 82, 86, Canada Record, pp. 14252-14255, 14258-14259, 14262-14267; Exhibit A to the Taylor Affidavit #2, Canada Record, pp. 14667-14669, 14687-14693, 14716-14728, 14792, 14850, 14931-14932, 15162-15164, 15178-15189, 15240-15246). This too contributed to the dialogue on these issues.

[124] In our view, these three elements, taken together, reasonably address the first two of the three shortcomings related to the earlier consultation on diluted bitumen and spill modelling specifically identified by this Court in *TWN 2018*. While we have focused on the consultation relating to these subjects because of their importance to Squamish and the shortcomings found in *TWN 2018*, the record also shows substantive dialogue on other concerns communicated by

Squamish. For example, among the concerns discussed at the May 23, 2019 consultation meeting were protocols for vessels when killer whales are in port waters, threats facing the whale population and the initiatives being developed by Canada to address them, measures to mitigate impacts on Chinook salmon, and a number of proposed accommodation measures (discussed below) (Taylor Affidavit #2, para. 75, Canada Record, pp. 14259-14260; Exhibit A to the Taylor Affidavit #2, Canada Record, pp. 16431-16439). As a further example, in a letter dated May 28, 2019, Canada responded to Squamish's concerns on various subjects, in addition to diluted bitumen and oil spill response capacity, including cumulative effects, Squamish's restoration efforts, the health and sustainability of killer whales, and measures to avoid potential harms identified by Squamish to the ability to engage in cultural and spiritual practices in marine environments (Taylor Affidavit #2, para. 80, Canada Record, pp. 14262-14264; Exhibit A to the Taylor Affidavit #2, Canada Record, pp. 15156-15167).

[125] That leaves the third identified shortcoming, the failure in the earlier consultation to consider any meaningful and tangible accommodation measures, as well as the further inadequacies that Squamish asserts in the renewed consultation process: the alleged withholding by Canada of certain "reviews", the late provision by Canada of other relevant information, and the "rushing" of the consultation process toward a "pre-determined outcome".

[126] We address these points in turn.

(1) The proposed accommodation measures were meaningful and tangible

[127] In the renewed consultation process with Squamish, Canada proposed a series of eight accommodation measures, which it stated had been developed to respond to concerns expressed by Squamish and other Indigenous groups about the potential impact of the Project on Aboriginal rights. Canada also proposed these measures to the other applicants. It contemplated from the outset that there would be discussions with interested Indigenous groups to develop the measures further and to refine their application to address each group's particular concerns.

[128] These measures included the Salish Sea Initiative (SSI), described as "a joint Indigenous-government governance structure, to be co-developed, with funding to support Indigenous capacity to better understand and put in place mechanisms to monitor and address cumulative effects in the Salish Sea"; Co-Developing Community Response (CDCR), described as "a measure that could deliver training and equipment and bring Indigenous groups to the table for the planning of emergency response in the marine environment"; Enhanced Marine Situational Awareness (EMSA), designed to provide real-time vessel information in response to safety concerns expressed by Indigenous groups; Marine Safety Equipment and Training (MSET), created to provide funding for safety equipment to improve marine safety on the water; Quiet Vessel Initiative (QVI), created "to test safe and effective quiet vessel technologies and operational practices that reduce underwater noise at its source as a complement to various other measures currently underway to support the recovery of [killer whales]"; and Aquatic Habitat Restoration Fund (AHRF), designed to support collaboration with Indigenous groups to protect and restore aquatic habitats that would be affected by the Project (Taylor Affidavit #2, para. 41, Canada Record, pp. 14245-14247; Exhibit A to the Taylor Affidavit #2, Canada Record, pp.

14524-14544). Squamish was invited to an information session with officials who had lead responsibility for these measures, but did not attend (Taylor Affidavit #2, paras. 42-43, Canada Record, p. 14247). However, a number of these measures were discussed during consultation meetings between Canada and Squamish (Taylor Affidavit #2, para. 75, Canada Record, pp. 14259-14260; Exhibit A to the Taylor Affidavit #2, Canada Record, pp. 16431-16439).

[129] In addition to proposing these measures, Canada agreed to collaborate with Squamish and Tsleil-Waututh, and their expert, on the joint diluted bitumen study referred to above.

[130] Squamish submits that these proposed measures were unilaterally developed by Canada, without any effort by Canada to collaborate with Squamish in developing them so as to address Squamish's concerns. Squamish states that it provided feedback to Canada on their inadequacies, including that they were unresponsive to Squamish's concerns, deferred the gathering of essential information until after Project approval, could not at this time be considered accommodation because they do not minimize or avoid effects to Squamish's rights, and provide only for the collection of baseline information (Memorandum of Squamish, paras. 121-122). Squamish further argues that other initiatives—it cites the QVI as an example—"are at the early stages and remain untested and unproven as to whether they will actually mitigate impacts" (Memorandum of Squamish, para. 123).

[131] However, as Canada points out, Squamish expressed the view during the renewed consultation process that "[u]nderstanding the current cumulative impact loads to Burrard Inlet and the Salish Sea and how the Project will add to those existing impacts, is critical to

understanding the impacts of the Project to the Nation and to developing mitigation measures" (Exhibit A to the Taylor Affidavit #2, Canada Record, p. 14476). Squamish also raised, among other things, the potential impact of the Project on Squamish's current restoration efforts in its territory (Exhibit A to the Taylor Affidavit #2, Canada Record, p. 14580). Canada provided information on how mitigation measures already in place could address this issue. Canada also proposed in response to these and other issues raised by Squamish the use and tailoring of the eight proposed accommodation measures to address Squamish's specific concerns. For example, it identified the QVI as responsive to Squamish's specific concern about vessel noise and its impacts on killer whales (Taylor Affidavit #2, paras. 58(a), 70, 75, 80-81, Canada Record, pp. 14252, 14257-14260, 14262-14265; Exhibit A to the Taylor Affidavit #2, Canada Record, pp. 14543-14544, 14674-14675, 14684-14685, 14720-14721, 15075-15078, 15156-15167, 15250-15251, 16431-16439).

[132] In further response to Squamish's concerns about Project impacts on killer whales, Canada provided to Squamish details about the initiatives and programs implemented since the first NEB hearing to support the recovery of the species. It explained that in 2016 Canada had launched what it described as the $1.5 billion national Oceans Protection Plan (OPP), a primary component of which is to protect at-risk whale species. As part of this initiative, Canada committed that there would be no net noise increase from vessel traffic associated with the Project. In May 2018, having concluded that killer whales are facing imminent threats to their survival and recovery, Canada initiated the Whales Initiative, which involves among other things emergency measures specifically to protect the species. These include initiatives to increase the amount of prey available to killer whales, reduce vessel noise, and reduce contaminants (Labonté

Affidavit, paras. 120-121, Canada Record, p. 00035; CCAR, Book of Major Documents, pp. 0237-0246; Exhibit A to the Taylor Affidavit #2, Canada Record, pp. 14674-14675, 14695-14704, 15108-15111, 15164).

[133] While in *TWN 2018* (paras. 471, 661, 667), the Court described the OPP and a related initiative as "laudable", but "inchoate", and stated that the record before it "[did] not allow consideration of whether, as those initiatives evolved, they became something that could meaningfully address real concerns", the record in these proceedings is different. As Canada submits (Memorandum of Canada, para. 49), the record shows that these initiatives have undergone significant development and implementation. Canada's evidence filed in the NEB reconsideration hearing outlined how the OPP, the Whales Initiative, and other federal initiatives addressed Indigenous communities' concerns relating to marine transportation (Labonté Affidavit, para. 18, Canada Record, p. 00007). It was reasonable for the Governor in Council to consider Canada's evidence before the NEB in determining that Canada had proposed responsive accommodation measures.

[134] To the extent that Squamish is suggesting that some of the measures proposed by Canada do not qualify as accommodation measures because they provide at this stage largely for the collection of information, including baseline information, and do not themselves mitigate adverse impacts, this proposition does not reflect the law (see *Taku River*, paras. 43-44, recognizing "directions […] to develop baseline information" as an appropriate accommodation measure). To the extent that Squamish submits that it must be demonstrated that proposed

accommodation measures will necessarily succeed in mitigating impacts, this too is not a tenable proposition (see *Ktunaxa Nation*, para. 79).

[135] In our view, Canada has addressed the shortcoming in relation to accommodation measures addressing Squamish's concerns that this Court identified in *TWN 2018*. The proposed accommodation measures that Canada put forward in the renewed consultation process cannot be dismissed as not meaningful or tangible. The Governor in Council specifically considered the proposed accommodation measures in coming to its decision on Project approval (*Explanatory Note*, pp. 48-49). In our view it acted reasonably in doing so.

(2) Canada did not withhold necessary information

[136] Squamish submits that Canada also breached its duty to consult by withholding or delaying production of what it describes as "highly relevant information" (Memorandum of Squamish, para. 55(a)). (Tsleil-Waututh makes a similar assertion; see the discussion at paragraphs 190 and 191 below.) The focus of Squamish's submission is on documents that it describes as "reviews" by Canada's internal experts of expert reports filed with the NEB by Squamish, Tsleil-Waututh, and others. These expert reports addressed the fate and behaviour of diluted bitumen in the event of a spill, as well as spill response capabilities. The documents were disclosed to Squamish for the first time on June 10, 2019, after the consultation period ended. They were disclosed to Tsleil-Waututh 10 days earlier, on May 31, 2019.

[137] As noted above, Squamish describes these documents as "reviews" of its expert reports. It asserts that someone at Environment and Climate Change Canada (ECCC) appears to have

made changes in the original "reviews"—changes that, according to Squamish, included, among other things, deletion of language that was supportive of Squamish's experts' opinions, and insertion of language supportive of Canada's view that the Governor in Council could render a decision on the Project based on the current state of scientific knowledge. Canada's evidence is that the documents are "internal summaries", created by scientists within ECCC to inform Canada's consultation discussions and that their contents are consistent with the positions communicated by Canada during the re-initiated consultations.

[138] Squamish contests this. It also raises the spectre that alterations to the documents were made without their authors' knowledge or consent. It suggests that the withholding of and alterations to the documents "raise serious questions about whether Canada has been forthright in advancing its responses to Squamish concerns", and "a serious question about the honour of the Crown" (Memorandum of Squamish, paras. 69-70).

[139] Despite these serious allegations, Squamish has put forward no evidence that changes to the documents were made without their authors' knowledge, and no evidence of misconduct by Canada. Nor has Squamish explained why, if Canada was intent on withholding information, it would have provided the documents earlier to Tsleil-Waututh, when Squamish and Tsleil-Waututh were so clearly aligned on the diluted bitumen and spill response issues.

[140] Canada provided the "reviews" to Squamish and Tsleil-Waututh upon request and provided an explanation for the changes which they incorporate. Squamish is entitled to its doubts about Canada's explanation, but in the absence of some evidence that Canada's

explanation is false, Squamish is not entitled to ask this Court to conclude that Canada's conduct was inconsistent with the honour of the Crown.

[141] Squamish also submits that Canada breached the duty to consult by making only late disclosure to Squamish of three further documents or categories of information—an updated draft CCAR, Canada's reassessment of impacts on Squamish, and Canada's reassessment of Squamish's strength of claim.

[142] Canada provided Squamish with a draft of its CCAR annex on April 24, 2019. It invited Squamish to provide comments by May 29, a deadline that was extended to May 31. Squamish took up this opportunity. It was also invited to provide to the Governor in Council its independent submissions on the draft CCAR annex within a deadline that was extended to June 6. It also took up this opportunity, and its independent submissions were included in the material provided to the Governor in Council (Taylor Affidavit #2, paras. 56, 79, 83, 88, 93, Canada Record, pp. 14251-14252, 14261, 14265, 14267-14268; Exhibit A to the Taylor Affidavit #2, Canada Record, pp. 14613, 15150-15151, 15190-15196, 15278-15279, 16320-16323).

[143] Squamish complains that Canada provided Squamish with only one draft of the CCAR for comment, and that this draft was provided relatively early in the process. The result, it submits, was that Squamish did not have an opportunity to comment on the much-enlarged further draft prepared later, which reflected the content of the issue-specific meetings that took place following the preparation of the initial draft. Squamish describes the CCAR as "a key document for the [Governor in Council] decision", and states that although it filed its own

independent submission, it was unable to respond in that submission to Canada's updated position (Memorandum of Squamish, paras. 76-77).

[144] We agree that it would have been desirable for Squamish to have had an opportunity to comment on a revised and updated draft of the CCAR. But Squamish itself was a contributor to the delay: it took from the end of January 2019 until late March for Squamish to confirm its availability for a consultation meeting ultimately held in early April (Taylor Affidavit #2, paras. 24-39, Canada Record, pp. 14242-14245). How the timing of the draft CCAR would have turned out but for this delay can only be speculative. As noted above, perfection in the consultation process is neither required nor realistic. Given the opportunity available to and exercised by Squamish to express independently to the Governor in Council its views on the consultation and accommodation process, we do not see the lack of an opportunity to comment on the updated draft CCAR as sufficiently serious to constitute a breach of the duty to consult or render the Governor in Council's decision unreasonable.

[145] Squamish further submits that Canada failed to communicate its revised assessment of impacts to Squamish until May 29, 2019, one week before the close of consultation, and that as a consequence Squamish had no opportunity to see or discuss with Canada the basis for the assessment. It complains that even then Canada communicated only the conclusion of its assessment—that the Project would have up to moderate impacts on Squamish—and did not provide the basis for this assessment in a revised draft of the CCAR. It points out that in *TWN 2018* (paras. 640, 646-647), this Court held that Canada's failure to disclose its assessment of the

Project's impacts until two weeks before the close of consultation "contributed to the unreasonableness of the consultation process" (Memorandum of Squamish, paras. 71-73).

[146] Squamish had also, from the first renewed consultation meeting on January 31, 2019, taken the position that Canada must reassess its strength of claim before there could be any substantive consultations (Taylor Affidavit #2, para. 21, Canada Record, p. 14241; Exhibit A to the Taylor Affidavit #2, Canada Record, pp. 14395, 14472). This was so despite Canada's advice that regardless of the strength of claim, it was consulting with Squamish at the deep end of the consultation spectrum. Canada agreed to do so, and committed to consider information provided by Squamish relevant to its strength of claim. Squamish provided a significant volume of additional information (Taylor Affidavit #2, paras. 31, 52, Canada Record, pp. 14243, 14250-14251; Exhibit A to the Taylor Affidavit #2, Canada Record, pp. 14485-14488, 14604-14605).

[147] On May 15, 2019, Canada sent Squamish a draft reassessed strength of claim, based on a variety of documentary and other sources, including documents and oral traditional evidence submitted by Squamish to the NEB, documents provided by Squamish to Canada, and further documents collected by Canada. The draft concluded that the strength of Squamish's claims varied depending on the particular portion of Squamish's traditional territory concerned and its intersection with the Project. Canada invited Squamish's comments on the draft reassessed strength of claim, and the draft and the basis for its conclusions were subjects discussed at three consultation meetings held on May 16, 2019, May 23, 2019 and May 30, 2019 (Taylor Affidavit #2, paras. 69-70, 75(a), 81(f), Canada Record, p. 14257-14259, 14265; Exhibit A to the Taylor Affidavit #2, Canada Record, pp. 14905-14913, 15131-15132, 15247-15251, 16431-16433,

16445). Squamish asked that Canada reconsider certain of its conclusions and add further detail where claims were strong. Canada declined to do so on the basis that the assessment was intended to be a high-level assessment, not a detailed analysis of every site throughout each Nation's territory (Taylor Affidavit #2, paras. 75(a), 77, Canada Record, pp. 14259, 14261; Exhibit A to the Taylor Affidavit #2, Canada Record, pp. 15132, 16432-16433).

[148] Canada reiterated that it was consulting with Squamish at the deep end of the consultation spectrum, regardless of the outcome of the strength of claim assessment. It ultimately provided Squamish with a revised strength of claim assessment on May 15, 2019 (Taylor Affidavit #2, para. 69, Canada Record, 14257; Exhibit A to the Taylor Affidavit #2, Canada Record, pp. 14905, 14909-14912). In Squamish's independent submission to the Governor in Council on the draft CCAR, it addressed among other things the significance of the Project to Squamish and its potential impacts on Squamish and its rights and interests (Exhibit WWW to the Lewis Affidavit, Squamish Record, pp. 1703-1774).

[149] Having considered what the record discloses, we do not accept Squamish's submission that it had no opportunity to discuss the assessment of impacts of the Project on Squamish. In our view, Squamish had and exercised that opportunity. Squamish's submission is accordingly not a basis on which we can conclude that the Governor in Council acted unreasonably.

(3) The bias allegation is not properly before this Court

[150] Finally, Squamish submits that Canada "rushed" the consultation process toward a "pre-determined outcome"—"that the Project would be built as proposed, regardless of what Canada,

as the new owner of the Project, might learn in the NEB or consultation process" (Memorandum of Squamish, para. 55(d)). This amounts to an assertion of bias or conflict of interest.

[151] As set out above, in our view, the Leave Order bars Squamish from advancing this ground for its application. This Court concluded on the motions for leave that this ground was not "fairly arguable" and could not therefore meet the test for granting leave (*Raincoast No. 1*, paras. 31-36). It is accordingly not properly before us, and there is no need to consider it any further than we already have (see paragraph 23 above).

C. *Tsleil-Waututh*

[152] In *TWN 2018*, this Court concluded that the Crown's initial consultation with Tsleil-Waututh was inadequate. Tsleil-Waututh's main concern was marine shipping. The Court characterized Canada's response to this concern as "generic and vague", and as devoid of "concrete measures" (*TWN 2018*, para. 653). More specifically, it identified as shortcomings Canada's failure to consult with Tsleil-Waututh or accommodate its concerns respecting: (1) the NEB's exclusion of Project-related marine shipping from the Project definition; (2) the inadequacy of the conditions imposed by the NEB to address Tsleil-Waututh's concerns about marine shipping; (3) the likelihood of oil spills in Burrard Inlet; (4) spill response capabilities; (5) the ability to recover spilled oil; and (6) marine shipping impacts on Tsleil-Waututh's title, rights, and interests (*TWN 2018*, paras. 649-650).

[153] In support of its current application for judicial review, Tsleil-Waututh submits that in the re-initiated consultation process, Canada failed to address these shortcomings and again breached

its duty to consult. Tsleil-Waututh submits Canada made "consultative errors" in relation to Tsleil-Waututh's concerns respecting: (1) the likelihood of oil spills; (2) the ability to recover spilled oil; (3) the fate and behaviour of diluted bitumen; (4) impacts on Tsleil-Waututh's cultural relationship with killer whales; (5) impacts on Tsleil-Waututh's sacred tunnels; and (6) the need for the Project (Memorandum of Tsleil-Waututh, paras. 34-61, 70-89).

[154] Tsleil-Waututh further submits Canada took an incorrect and unreasonable approach to accommodation (Memorandum of Tsleil-Waututh, paras. 90-107). It also alleges that Canada suppressed and altered its reviews of Tsleil-Waututh's expert reports (Memorandum of Tsleil-Waututh, paras. 31-33, 62-69). It argues that Canada did not approach the re-initiated consultation with an open mind, and that the mandate of Canada's officials was unreasonably constrained so as to frustrate genuine consultation (Memorandum of Tsleil-Waututh, paras. 108-116).

[155] We do not accept these submissions. First, three of Tsleil-Waututh's arguments are barred by the Leave Order. Tsleil-Waututh's claim that Canada failed to consult about and accommodate impacts on Tsleil-Waututh's sacred tunnels is a new impact raised for the first time in the re-initiated consultations and one that Tsleil-Waututh could have raised in *TWN 2018* (*Raincoast No. 1*, para. 25). The Leave Order also expressly bars both consideration of the need for the Project because this issue was raised and decided in *TWN 2018* (*Raincoast No. 1*, para. 40) and the claim that Canada failed to consult with an open mind because, among other things, "public statements on the part of certain federal politicians […] do not trigger disqualifying bias" (*Raincoast No. 1*, para. 36 and authorities cited therein).

[156] Therefore, these issues are not properly before the Court in this application.

[157] Accordingly, we limit our analysis to examining Tsleil-Waututh's contentions that: (1) Canada made "consultative errors" in relation to Tsleil-Waututh's concerns about Project-related marine shipping impacts; (2) Canada took an incorrect and unreasonable approach to accommodation; (3) Canada withheld necessary information until the end of the consultation process; and (4) Canada's mandate was unreasonably constrained.

[158] As the following analysis shows, the record does not support Tsleil-Waututh's characterization of the re-initiated consultation process. Rather, the record demonstrates that Canada adequately consulted Tsleil-Waututh in relation to its concerns about Project-related marine shipping impacts and reasonably approached accommodation. As set out above in relation to the similar assertion by Squamish, there is also no evidence to suggest that Canada withheld necessary information from Tsleil-Waututh. Nor does the record support the contention that Canada's mandate was inappropriately constrained. While the record does show that Tsleil-Waututh's conduct during the re-initiated consultation process hindered Canada's consultation efforts, Canada nonetheless succeeded in addressing the shortcomings identified in *TWN 2018*. Therefore, Tsleil-Waututh fails to show that the Governor in Council's assessment of the consultation with and accommodation of Tsleil-Waututh was unreasonable.

[159] We turn now to consider in further detail the "consultative errors" asserted by Tsleil-Waututh.

(1) Canada adequately consulted Tsleil-Waututh in relation to its concerns about Project-related marine shipping impacts

[160] Tsleil-Waututh submits that, during the re-initiated consultation, it raised the following "specific, focused concerns, substantiated with evidence and argument": (1) oil spills from the Project are inevitable; (2) significant amounts of spilled oil cannot be cleaned up in Burrard Inlet; (3) a spill of diluted bitumen in Burrard Inlet or the Fraser River Estuary will cause catastrophic environmental effects and will have corresponding impacts on Tsleil-Waututh's title and rights; and (4) the Project will impair Tsleil-Waututh's cultural relationship with killer whales (Memorandum of Tsleil-Waututh, para. 16). Tsleil-Waututh maintains that Canada failed to adequately consult Tsleil-Waututh in relation to these concerns.

[161] Contrary to Tsleil-Waututh's submission, the record demonstrates that Canada engaged in meaningful dialogue with Tsleil-Waututh respecting its concerns about Project-related marine shipping impacts. While Canada disagreed with Tsleil-Waututh's experts on certain issues, disagreement is not grounds for invalidating consultation. As set out above, there is no duty to agree, and the duty to consult does not require a particular outcome. Here, the re-initiated consultation process was consistent with the honour of the Crown and led to the development of responsive accommodation measures.

[162] As noted above, Canada informed Tsleil-Waututh that it intended to rely on the NEB reconsideration hearing, to the extent possible, to fulfil its duty to consult. The NEB is recognized for its "expertise in the supervision and approval of federally regulated pipeline

projects", making it "particularly well positioned to assess the risks posed by such projects to Indigenous groups" (*Chippewas of the Thames*, para. 48; see also *Clyde River*, para. 33).

[163] Tsleil-Waututh commissioned and filed with the NEB expert reports that, according to Tsleil-Waututh, support its position that oil spills from Project-related marine shipping are "essentially inevitable" (George Affidavit, para. 131, Tsleil-Waututh Record, p. 77). Tsleil-Waututh also submitted to the NEB expert evidence respecting spill response capabilities and the fate and behaviour of diluted bitumen (George Affidavit, paras. 157(c), 193(c), Tsleil-Waututh Record, pp. 90, 102).

[164] The NEB, however, disagreed with Tsleil-Waututh's experts' opinion, finding that a credible worst-case oil spill from the Project would cause adverse environmental effects, but that such a spill "is not likely" and that the risks "can be justified in the circumstances" (NEB Reconsideration Report, pp. 0312, 0344, 0803-0804, 0807, 0824-0829). The NEB also ultimately disagreed with Tsleil-Waututh's experts' conclusions on the issues of spill response capabilities and the ability to recover spilled diluted bitumen (George Affidavit, paras. 169-172, 213-214, Tsleil-Waututh Record, pp. 94-96, 109-111; NEB Reconsideration Report, pp. 0492-0503, 0844-0848).

[165] Tsleil-Waututh also expressed a particular concern regarding the effects of marine shipping on killer whales and presented evidence on this issue before the NEB (George Affidavit, paras. 285-295, Tsleil-Waututh Record, pp. 136-139). The NEB concluded the Project is "likely to cause significant adverse environmental effects on" killer whales (NEB

Reconsideration Report, p. 0671) and "imposed (through conditions) and recommended (to the [Governor in Council]) measures to avoid or lessen those effects and to monitor them" (NEB Reconsideration Report, p. 0312).

[166] But Tsleil-Waututh took issue with the NEB's conclusions and raised these issues again during the re-initiated consultations (Memorandum of Tsleil-Waututh, paras. 34-37, 44-45, 48). On April 29, 2019, the parties and their respective experts and officials met to discuss Tsleil-Waututh's concerns respecting the likelihood of oil spills, response capabilities, and the fate and behaviour of diluted bitumen (Tupper Affidavit, paras. 78-84, 86, Canada Record, pp. 16482-16485; George Affidavit, paras. 144-145, 147-153, 155-156, 173-191, 215-216, Tsleil-Waututh Record, pp. 84-89, 96-101, 112-113).

[167] The record demonstrates that the parties engaged in meaningful discussion on these issues (George Affidavit, paras. 144-153, 155, 173-190, 215-223, Tsleil-Waututh Record, pp. 84-89, 96-101, 112-116). For example, according to Tsleil-Waututh's own evidence, "[a] very technical and scientific discussion […] ensued among" the parties' respective experts respecting the fate and behaviour of diluted bitumen, and the parties reached an agreement to conduct further research on the issue (George Affidavit, paras. 219-220, Tsleil-Waututh Record, p. 114; Exhibit A to the Tupper Affidavit, Canada Record, pp. 18129-18134). In response to Tsleil-Waututh's concerns about spill response, the Canadian Coast Guard outlined "collaborative projects with [Tsleil-Waututh] and other Indigenous communities, the development of the Greater Vancouver Integrated Response Plan (which was created with federal, provincial, municipal, and Indigenous participation), and $10 million dollars invested in updating

emergency response equipment" (Exhibit A to the Tupper Affidavit, Canada Record, p.18133). Canada also informed Tsleil-Waututh that, as of December 2018, there is unlimited compensation available under the Ship-Source Oil Pollution Fund in the event of a tanker spill (Tupper Affidavit, para. 81, Canada Record, 16483; Exhibit A to the Tupper Affidavit, Canada Record, p. 18133).

[168] At the April 16, 2019 consultation meeting, the parties discussed potential Project impacts on killer whales (Tupper Affidavit, paras. 61-64, Canada Record, pp. 16477-16478; Exhibit A to the Tupper Affidavit, Canada Record, pp. 17266-17271; George Affidavit, paras. 322-336, Tsleil-Waututh Record, pp. 148-152). In response to Tsleil-Waututh's "desire to develop noise thresholds", Transport Canada expressed its interest in developing a policy on underwater noise management plans, and outlined the QVI, which "will examine how quieter tankers can be made" (Exhibit A to the Tupper Affidavit, Canada Record, pp. 17268-17269). Canada and Tsleil-Waututh ultimately agreed to conduct further joint studies relating to impacts on killer whales (Exhibit A to the Tupper Affidavit, Canada Record, p. 17267; George Affidavit, para. 335, Tsleil-Waututh Record, p. 152).

[169] The parties also continued to dialogue respecting Project-related marine shipping impacts, including impacts on killer whales, following the initial consultation meetings (see, *e.g.*, Exhibit A to the Tupper Affidavit, Canada Record, pp. 18292-18295, 18437-18446, 18486-18493; Tupper Affidavit, paras. 66-67, 86-87, Canada Record, pp. 16478-16479, 16484-16485; George Affidavit, paras. 225-230, 340-344, Tsleil-Waututh Record, pp. 116-118, 153-155; Exhibit 48 to the George Affidavit, Tsleil-Waututh Record, pp. 1537-1544; Exhibit 49 to the

George Affidavit, Tsleil-Waututh Record, pp. 1545-1547; Exhibit 50 to the George Affidavit, Tsleil-Waututh Record, pp. 1548-1555; Exhibit 77 to the George Affidavit, Tsleil-Waututh Record, pp. 2228-2232).

[170] Throughout the re-initiated consultation process, Canada expressed a position consistent with the NEB's conclusions, federal experts' opinions, the Technical Review Process of Marine Terminal Systems and Transshipment Sites committee's assessment, and/or the Marine Technical Advisor's perspective (Tupper Affidavit, paras. 79-81, 84, 86-87, Canada Record, pp. 16482-16485; see also Exhibit A to the Tupper Affidavit, Canada Record, pp. 18444-18446, 18492). Tsleil-Waututh's experts maintained a different view (Tupper Affidavit, paras. 78-81, 84, 86-87, Canada Record, pp. 16482-16485).

[171] As already stated, it is not the role of this Court to act as "an academy of science" to decide whose view is correct. Here, the NEB, Canada, and the Governor in Council all considered Tsleil-Waututh's experts' opinions and disagreed with those opinions based on other evidence and opinions. Disagreement does not indicate a failure of consultation; failure to adopt specific scientific and technical views does not render consultation unreasonable.

[172] There is also no merit to Tsleil-Waututh's contention that Canada did not bring the appropriate experts to the table to address Tsleil-Waututh's concerns respecting Project-related marine shipping impacts (George Affidavit, para. 146, Tsleil-Waututh Record, p. 84). Meeting minutes from the April 29, 2019 consultation meeting show that many experts and officials attended the meeting, including representatives from Natural Resources Canada, the Department

of Fisheries and Oceans, ECCC, Transport Canada, the Canadian Coast Guard, and the Department of Justice (Tupper Affidavit, para. 78, Canada Record, p. 16482; Exhibit A to the Tupper Affidavit, Canada Record, pp. 18129-18134).

(2) Canada's approach to accommodation was reasonable

[173] We also conclude that Canada's approach to accommodation was reasonable. The proposed accommodation measures flowed from an understanding of potential impacts on Tsleil-Waututh's rights and interests and were responsive to Tsleil-Waututh's concerns respecting Project-related marine shipping impacts. Counsel for Canada prepared a useful table that outlines the NEB conditions, proponent commitments, federal initiatives, and additional federal accommodation measures intended to accommodate Tsleil-Waututh's concerns (Memorandum of Canada, paras. 176, 178, 180, 184). The list of these measures is a lengthy one.

[174] While Tsleil-Waututh takes issue with aspects of the accommodation process, these alleged deficiencies do not render Canada's approach unreasonable. As noted above, the duty to consult "guarantees a process, not a particular result. […] There is no guarantee that, in the end, the specific accommodation sought will be warranted or possible" (*Ktunaxa Nation*, para. 79). And there is no assurance that proposed accommodation measures will result in agreement between the parties (*Mikisew 2005*, para. 66).

[175] On April 1, 2019, Canada shared information with Tsleil-Waututh and the other applicants regarding eight new proposed accommodation measures (CCAR, pp. 0260-0261; Labonté Affidavit, para. 87, Canada Record, p. 00026; Exhibit A to the Tupper Affidavit,

Canada Record, pp. 16976-16996). Tsleil-Waututh argues that it was unreasonable for Canada to propose these accommodation measures before holding consultation meetings with Tsleil-Waututh. It asserts that "the duty to accommodate is a potential result of consultation, necessarily flowing from a mutual understanding of potential impacts to Aboriginal rights" (Memorandum of Tsleil-Waututh, para. 91, emphasis in original).

[176] However, the re-initiated consultation process did not occur in a vacuum. In *TWN 2018*, "this Court did not require all the work and consultation leading up to the Governor in Council's approval to be redone. […] 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" (*Raincoast No. 1*, para. 25). It was reasonable for Canada to suggest accommodation measures "intended to respond to the concerns" that Indigenous groups had earlier expressed (Exhibit A to the Tupper Affidavit, Canada Record, p. 16995).

[177] In any event, Canada did directly respond to Tsleil-Waututh's position that the accommodation measures were not sufficiently responsive to Tsleil-Waututh's concerns. Canada advised Tsleil-Waututh that "the April 1, 2019 letter was intended to provide consistent information regarding Canada's proposed accommodation measures to all the Indigenous communities working with Canada, while more customized conversations could take place about how accommodations could be tailored to TWN's specific concerns" (Tupper Affidavit, para. 69, Canada Record, p. 16479; see also Exhibit A to the Tupper Affidavit, Canada Record, pp. 17263-17264).

[178] Tsleil-Waututh itself characterizes the consultation meetings as including "extensive discussion on [proposed accommodation] measures" (Memorandum of Tsleil-Waututh, para. 102). On May 28, 2019, Canada outlined how it could tailor the broad accommodation measures listed in the April 1, 2019 letter to address Tsleil-Waututh's specific concerns (Tupper Affidavit, para. 107, Canada Record, p. 16491; Exhibit A to the Tupper Affidavit, Canada Record, pp. 18343-18348). Despite Canada's best efforts at the May 29, 2019 consultation meeting, Tsleil-Waututh did not engage and maintained the position that the measures were unresponsive (Tupper Affidavit, paras. 109-111, Canada Record, pp. 16491-16492; Exhibit A to the Tupper Affidavit, Canada Record, pp. 18465-18472). In other words, Canada and Tsleil-Waututh differed about the efficacy of Canada's proposed accommodations: Canada believed the measures were responsive, and Tsleil-Waututh disagreed.

[179] Tsleil-Waututh now relies on this disagreement to submit that Canada's approach to accommodation was unreasonable. But as noted above, the duty to consult does not guarantee that a specific accommodation sought will be warranted or possible, or that accommodation will result in agreement between the parties. As the British Columbia Court of Appeal has observed, "[t]he fact that the [Indigenous group's] position was not accepted does not mean the process of consultation in which they were fully engaged was inadequate" (*Prophet River BCCA*, para. 67). Here, as in *Prophet River BCCA*, the record "demonstrates the thorough consultation and efforts to accommodate" that were made (para. 67).

[180] Contrary to Tsleil-Waututh's claim that Canada did not propose any new measures to avoid or reduce impacts on Tsleil-Waututh's rights (Memorandum of Tsleil-Waututh, para. 106),

Canada and Tsleil-Waututh did agree on accommodation measures targeted at Tsleil-Waututh's concerns about Project-related marine shipping impacts. As discussed above, Canada committed to undertake joint research with Tsleil-Waututh on the behaviour of diluted bitumen in the Burrard Inlet and Fraser River Estuary. Canada also agreed to conduct further research investigating the impacts of the Project on killer whales. Respecting the likelihood of oil spills, Canada offered to engage in additional joint spill modelling—including at the site requested by one of Tsleil-Waututh's experts—but Tsleil-Waututh declined (Tupper Affidavit, para. 87, p. 16485; Exhibit A to the Tupper Affidavit, Canada Record, p. 18492).

[181] Tsleil-Waututh takes issue with Canada's position that it was not necessary to conduct this additional research before the Governor in Council could make a decision on the Project (Memorandum of Tsleil-Waututh, para. 104). Canada maintained the position that, while "the additional work the parties agreed [on] would be valuable", given the current state of scientific knowledge it "was not necessary prior to the [Governor in Council's] decision on the Project" (Tupper Affidavit, para. 144, Canada Record, p. 16501; see also Exhibit C to the Tupper Affidavit, Canada Record, p. 18906). Canada's scientists supported this position (Tupper Affidavit, para. 146, Canada Record, p. 16502). The parties thus had different perspectives. But on the record before the Governor in Council, it was reasonable for it to decide that additional scientific research was not required before approving the Project.

[182] Tsleil-Waututh relies on *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, 323 F.T.R. 297, at paragraph 25, for the proposition that "the possibilities of future research and development do not constitute mitigation measures". The

Federal Court made that statement in the context of an environmental assessment under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. In the context of the duty to consult, however, the Supreme Court has made it clear that directions to develop baseline information are proper accommodation measures (*Taku River*, paras. 43-44).

[183] Tsleil-Waututh further argues that Canada's approach to accommodation was unreasonable because Canada did not agree with its proposed accommodations (Memorandum of Tsleil-Waututh, para. 106). However, many of Tsleil-Waututh's proposed accommodations concerned issues that had already been addressed or were otherwise outside the scope of the "specific and focussed" re-initiated consultation process (*TWN 2018*, para. 772; see also Exhibit A to the Tupper Affidavit, Canada Record, pp. 18491-18492).

[184] For example, Tsleil-Waututh suggested that consideration be given to alternative configurations of the pipeline, including alternative terminal locations. Canada responded that alternative configurations had already been considered both as part of the NEB process and in *TWN 2018*. Canada was not prepared to consider alternatives that had already been assessed as impractical or non-viable (Tupper Affidavit, para. 184, Canada Record, pp. 16513-16514; Exhibit A to the Tupper Affidavit, Canada Record, pp. 18443-18444, 18492). This was an entirely reasonable position. Moreover, the challenge to the Project in *TWN 2018* based on alternate configurations was rejected. Therefore, Canada could properly have responded that the issue was barred. As explained in the reasons in support of the Leave Order (*Raincoast No. 1*, para. 24), the doctrines of law barring relitigation apply both to issues that were raised and decided, and to those that could have been raised, in an earlier proceeding. It is therefore

immaterial that the issue was raised by the City of Burnaby rather than by Tsleil-Waututh or another of the applicants in these proceedings.

[185] Similarly, Canada declined to consider proposals for joint studies on the economics of the Project, Project alternatives, transporting oil in puck format, upgrading diluted bitumen in Alberta before transporting it, and reducing marine traffic in Burrard Inlet (Tupper Affidavit, paras. 54, 167, 183-184, Canada Record, pp. 16474-16475, 16508, 16512-16514). None of these proposed accommodation measures was a proper subject of discussion in the re-initiated consultation process. Canada's failure to consider them provides no proper basis for concluding that Canada acted unreasonably.

[186] Finally, Tsleil-Waututh contends that a decision not to proceed with the Project must be an available option for there to be meaningful consultation and accommodation (Memorandum of Tsleil-Waututh, paras. 96-97). On April 17 and May 3, 2019, Tsleil-Waututh expressed its concern that "none of the 'accommodation' measures are responsive to the very serious concern that [Tsleil-Waututh] has been raising since at least 2013: that the Project is too risky because spills are inevitable, they cannot be cleaned up, and they will cause catastrophic impacts if they occur" (George Affidavit, para. 367, Tsleil-Waututh Record, p. 161; Exhibit 84 to the George Affidavit, Tsleil-Waututh Record, p. 2330).

[187] There is nothing in the record to suggest that Canada, or the Governor in Council, were unaware of Tsleil-Waututh's position. Therefore, the question becomes whether, given this competing position—that the Project should not proceed—Canada breached its duty to consult

and accommodate Tsleil-Waututh by ultimately approving the Project (*William v. British Columbia (Attorney General)*, 2019 BCCA 74, 20 B.C.L.R. (6th) 355, para. 41). In our view, it did not. Throughout the re-initiated consultation process, Canada dialogued with Tsleil-Waututh respecting the need for the Project, but the parties ultimately held opposing views on whether the Project was needed (see, *e.g.*, Tupper Affidavit, paras. 164-171, Canada Record, pp. 16507-16510). Canada provided Tsleil-Waututh with an explanation for the need for the Project in the consultation meetings, as well as through other information that was made available to Tsleil-Waututh during the re-initiated consultation process and through the Order in Council and the *Explanatory Note*.

[188] A meaningful process "becomes unworkable when, as here, the only compromise acceptable to [the Indigenous group] is to abandon the entire project" (*Prophet River BCCA*, para. 65). Insisting that the only acceptable accommodation is selecting an alternative to the Project amounts to seeking a veto over the Project, which forms no part of the duty to consult (*Prophet River BCCA*, para. 65; *Haida Nation*, para. 48). The record "demonstrates the thorough consultation and efforts to accommodate apart from abandoning the project" that were made throughout the re-initiated consultation process (*Prophet River BCCA*, para. 67).

[189] The standard for consultation and accommodation is not perfection; the process viewed in its entirety must result in adequate consultation with and accommodation of the Indigenous group (*Haida Nation*, para. 62). We are satisfied that it was open to the Governor in Council to conclude, on the record before it, that the re-initiated consultation conducted with Tsleil-Waututh

following *TWN 2018* was adequate, and resulted in proposed accommodation measures that are responsive to Tsleil-Waututh's concerns.

(3) Canada did not withhold "reviews" of Tsleil-Waututh's expert reports

[190] Like Squamish, Tsleil-Waututh submits that Canada intentionally withheld its "reviews" of Tsleil-Waututh's expert reports, the content of which, Tsleil-Waututh contends, "bears directly on [its] specific, focused concerns regarding the Project" (Memorandum of Tsleil-Waututh, para. 31). Tsleil-Waututh goes so far as to submit that Canada altered the content of these responding reviews to support Canada's position, failed to inform Tsleil-Waututh that Canada's experts agreed with Tsleil-Waututh's experts on many issues, and took positions contrary to the scientific conclusions reached in the responding reports (Memorandum of Tsleil-Waututh, paras. 31, 33, 62-69).

[191] Like Squamish, Tsleil-Waututh, despite making these serious allegations, has put forward no evidence of misconduct by Canada. The contents of the "reviews" are consistent with the positions communicated by Canada during the re-initiated consultations, and Tsleil-Waututh has provided no evidence that changes to the documents were made without their authors' knowledge. For the same reasons discussed above in addressing Squamish's similar submission, we reject the submission by Tsleil-Waututh that the documents were improperly altered or withheld.

(4) Canada's mandate was appropriately defined

[192] Tsleil-Waututh submits Canada failed to rectify the concern identified in *TWN 2018* that Canada's ability to execute its consultation framework was unreasonably constrained by the way its officials implemented their mandate, "limiting their role to mostly listening and recording Indigenous concerns and transmitting those concerns to decision-makers" (Memorandum of Tsleil-Waututh, para. 116). Tsleil-Waututh submits that it raised similar concerns about Canada's mandate in the re-initiated consultation, but Canada denied there was a problem (Memorandum of Tsleil-Waututh, para. 116).

[193] The objective of Canada's mandate for the re-initiated consultations was "to work with Indigenous groups to understand impacts and seek to identify potential accommodations for the Project, where appropriate" (Exhibit 43 to the George Affidavit, Tsleil-Waututh Record, p. 935). As discussed above, Canada's consultation teams in the re-initiated process were composed of senior officials, who were tasked with engaging with Indigenous groups, not merely taking notes. The mandate given to them was appropriately defined to remedy the shortcomings identified by this Court in *TWN 2018*. The record is replete with examples of discussions and exchanges of information and perspectives consistent with this mandate.

[194] However, Tsleil-Waututh submits that Canada's mandate should have included seeking or obtaining Tsleil-Waututh's consent (George Affidavit, paras. 95-97, 119(b), Tsleil-Waututh Record, pp. 65-66, 71). Canada expressed its desire to "seek to secure the free, prior, and informed consent" of Tsleil-Waututh for the Project at the start of the re-initiated consultation process (Exhibit 38 to the George Affidavit, Tsleil-Waututh Record, p. 916). That being said,

Canada was under no obligation to obtain consent prior to approving the Project. That would, again, amount to giving Indigenous groups a veto.

(5) Tsleil-Waututh's conduct during the re-initiated consultation process hindered Canada's consultation efforts

[195] Canada alleges, and we agree, that Tsleil-Waututh's conduct during the re-initiated consultation process hindered Canada's consultation efforts. While the duty to consult imposes obligations on Canada, it also gives rise to corresponding obligations on the part of Indigenous groups. Indigenous groups "must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached" (*Haida Nation*, para. 42; see also *Ktunaxa Nation*, para. 80).

[196] While hard bargaining on the part of Indigenous groups is permissible, Tsleil-Waututh's conduct during the re-initiated consultation process exceeded hard bargaining and interfered with Canada's efforts to consult and accommodate. Canada's efforts nonetheless resulted in adequate consultation and responsive accommodation measures.

D. *Ts'elxwéyeqw*

[197] In *TWN 2018* (paras. 681-727), six shortcomings were pointed to in support of the conclusion that Canada's initial consultations with the Stó:lō (including Ts'elxwéyeqw) were not meaningful. First, Canada failed to give due consideration to the 89 recommendations contained in the Integrated Cultural Assessment for the Proposed Trans Mountain Expansion Project

(ICA), a detailed technical submission prepared by the Stó:lō concerning potential impacts of the Project (*TWN 2018*, para. 712). Second, Canada failed to address the Stó:lō's position that Lightning Rock is a "no go" area (*TWN 2018*, paras. 716-717). Third, Canada failed to ensure that the Stó:lō cultural sites were incorporated into the Project's alignment sheets (documents showing the exact route proposed for the pipeline) (*TWN 2018*, paras. 697, 718). Fourth, Canada failed to accommodate the request for Indigenous groups to select Indigenous monitors (*TWN 2018*, paras. 700-701). Fifth, Canada failed to guarantee that Trans Mountain would be held accountable for its commitments (*TWN 2018*, para. 715). Finally, Canada did not succeed in explaining how the Stó:lō's constitutionally protected right to fish was accounted for during the consultation process (*TWN 2018*, para. 727).

[198] Responding to these flaws in the order presented above, Canada maintains that each has been adequately addressed in light of the following measures implemented in the course of the renewed consultation process.

[199] First, due consideration has been given to the 89 recommendations reflected in the ICA (Dekker Affidavit, paras. 7-9, Canada Record, pp. 09571-09572).

[200] Second, Trans Mountain adjusted the Project footprint at Lightning Rock, will complete the archaeological and cultural heritage assessment required by NEB Condition 77 prior to construction and will work with the Stó:lō Collective on measures to avoid impacts to the site (NEB Reconsideration Report, pp. 0630, 0888).

[201] Third, Trans Mountain incorporated traditional knowledge, including Stó:lō cultural sites in the Project corridor identified by Ts'elxwéyeqw in the ICA, into its environmental alignment sheets (Anderson Affidavit #2, paras. 86(m)-(q), (t)-(x), (dd), Trans Mountain Record, pp. 18153-18156, 18159) and committed to update its Resource Specific Mitigation Tables and work with Ts'elxwéyeqw on an ongoing basis to develop site-specific measures to manage Project effects (Dekker Affidavit, para. 84, Canada Record, pp. 09604-09605).

[202] Fourth, Trans Mountain has committed to hiring a Ts'elxwéyeqw monitor selected by Ts'elxwéyeqw to be on Trans Mountain's inspection team (Dekker Affidavit, para. 74(l), Canada Record, p. 09600). Fifth, the Governor in Council amended NEB Condition 6 to require Trans Mountain to add all commitments made during consultations to its commitments tracker, rendering them enforceable by virtue of NEB Condition 2 (NEB Reconsideration Report, p. 0861; Order in Council, pp. 10-11).

[203] Finally, Canada acknowledged Ts'elxwéyeqw's constitutionally protected Aboriginal right to fish and took this right into account in assessing Project impacts (Dekker Affidavit, paras. 31(c), 58(f), Canada Record, pp. 09578, 09593).

[204] Ts'elxwéyeqw chooses not to confront these measures and to try to show why they fail to adequately address the flaws identified in *TWN 2018*. Rather, it begins its submissions by providing its account and assessment of the reconsideration hearing before the NEB and the renewed consultation process. The gist of its position is that nothing useful came out of either. Not a single positive feature is acknowledged (Memorandum of Ts'elxwéyeqw, paras. 13-72).

[205] Ts’elxwéyeqw goes on to advance four contentions as follows: (1) Canada failed to adequately engage with the ICA and the 89 recommendations; (2) Canada’s accommodation measures are generic, conceptual, not specific, and rely heavily on future commitments; (3) Canada failed to re-initiate consultations in a timely manner and then truncated their execution; and (4) Canada failed to consider the infringement of its established fishing right (Memorandum of Ts’elxwéyeqw, paras. 86-87).

[206] A review of the arguments made in support of these contentions shows that Ts’elxwéyeqw has lost sight of the fact that this is a judicial review application (Memorandum of Ts’elxwéyeqw, paras. 95-110). It essentially invites us to consider the overall conclusion reached by the Governor in Council to the effect that the duty to consult was adequately met, weigh the evidence that bears on this question, and come to a different conclusion. Notably, Ts’elxwéyeqw makes no mention of the reasons given in support of the issuance of the Order in Council or the *Explanatory Note* that accompanied it.

[207] The *Explanatory Note* among other things outlines the re-initiated consultation process and the new “specific, targeted accommodation measures […] developed and proposed as part of the consultations […] [,] designed specifically to respond to concerns raised by Indigenous groups in the consultations, and to address areas where the consultations highlighted the potential for an enhancement to existing efforts or to close a programming gap in a particular area” (*Explanatory Note*, p. 48). Among these measures is funding to support Indigenous-led studies to gain a better understanding of the Project’s potential land-based impacts, for example on traditional land use. As part of that initiative, Canada offered $250,000 in funding to facilitate the

protection of Stó:lō cultural sites (Dekker Affidavit, para. 87, Canada Record, pp. 09605-09606). Also addressed is amended Condition 6, which makes Trans Mountain's commitments to Ts'elxwéyeqw mandatory, and amended Condition 100, which ensures that Trans Mountain takes necessary steps to preserve and protect cultural sites during construction, 400 of which belong to the Stó:lō. Amended Condition 98 is also referenced; it provides that Trans Mountain will have to justify how it has incorporated the results of its consultation, including any recommendations from those consulted, into the plan describing Indigenous participation in construction monitoring (*Explanatory Note*, p. 64).

[208] The modifications ordered by the Governor in Council as a result of the renewed consultation process are set out in Annex A of the Order in Council, beginning at page 10. These form part of the foundation for its conclusion that the renewed consultations were adequate for all applicants, including Ts'elxwéyeqw.

[209] When regard is had to the reasons given by the Governor in Council in support of its conclusion and the record, insofar as it pertains to Ts'elxwéyeqw's four contentions, it becomes clear that they are without merit. In each case, save for the legal issue underlying the fourth contention, we are essentially asked to prefer Ts'elxwéyeqw's account and assessment of the consultations over Canada's without any indication as to why we should do so (contrast paras. 95-110 of the Memorandum of Ts'elxwéyeqw with paras. 215-233 of the Memorandum of Canada). Indeed, when reviewing the record to test Ts'elxwéyeqw's four contentions against Canada's responses, Canada's account of the consultation process is to be preferred. This is the issue to which we now turn.

(1) Canada adequately engaged with the ICA and the 89 recommendations

[210] In *TWN 2018*, this Court found that Canada had blatantly disregarded the ICA and the 89 recommendations (para. 712):

> [T]here is no discussion or indication that Canada seriously considered implementing any of the 89 recommended actions, and no explanation as to why Canada did not consider implementing any Stó:lō specific recommendation as an accommodation or mitigation measure.

[211] During the re-initiated consultation process, Canada and Trans Mountain both produced reports responding to each of the 89 recommendations raised in the ICA. Trans Mountain's report demonstrates how information contained in the ICA and Cultural Heritage Overview Assessment were incorporated into Trans Mountain's environmental plans (Ardell Affidavit, para. 86, Ts'elxwéyeqw Record, p. 603), while Canada's report pointed to specific conditions, commitments or accommodation measures addressing each of the 89 recommendations. This is shown by the table highlighting Canada's consideration of the potential impacts raised (Memorandum of Canada, para. 224). The bolded numbers in the table highlight the additional actions, measures or commitments that were taken as a result of the renewed consultation process. When regard is had to the changes highlighted in this table, it cannot be said that Canada failed to grapple with the 89 recommendations (Dekker Affidavit, paras. 8-9, Canada Record, p. 09572; Exhibit A to the Dekker Affidavit, Canada Record, pp. 13092-13099).

[212] Ts'elxwéyeqw further argues that both ICA response reports were received too late in the process to allow for a meaningful response on its part given its limited resources (Memorandum of Ts'elxwéyeqw, para. 102(e)). The Crown ICA report, however, came on March 6, 2019

whereas Trans Mountain's was provided on April 30, 2019. Ts'elxwéyeqw asserts that "[w]orkshops were a necessary component to begin to address the 89 Recommendations, and would provide an opportunity to review the mitigation and management strategies that Canada and [Trans Mountain] proposed to address [its] concerns" (Memorandum of Ts'elxwéyeqw, para. 101). However, Ts'elxwéyeqw insisted that it could not participate in workshops to discuss Canada's analysis without first having Trans Mountain's updated ICA responses. Mindful of the fact that the renewed consultation process was not open-ended, Canada instead took the position that the Crown ICA report was a proper starting point to guide further collaborative discussions (Dekker Affidavit, para. 57, Canada Record, p. 09592). Although Ts'elxwéyeqw does not agree with Canada's approach, it has not shown that it was inappropriate or in any way unreasonable.

[213] Given Ts'elxwéyeqw's refusal to participate in workshops in early March, Canada waited for Trans Mountain's responses to the ICA before holding the workshops. All were held in May 2019. Canada asserts that the workshops resulted in substantive feedback and discussion (Memorandum of Canada, para. 219). Ts'elxwéyeqw controlled the agenda, which spoke to a wide array of issues contained in the ICA. Despite having delayed the holding of the workshops, Ts'elxwéyeqw did have an opportunity to provide input on the draft report, and to dialogue on Canada's analysis, when the workshops finally took place.

[214] Moreover, Canada's goal was to present to the Governor in Council a joint report on the 89 recommendations. The record shows that multiple efforts were made toward that end. On May 7, 2019, Canada provided Ts'elxwéyeqw with a draft table of contents and proposed a teleconference to explore whether there could initially be an agreement as to the contents.

Ts’elxwéyeqw indicated they would comment, but did not (Dekker Affidavit, paras. 70, 76, Canada Record, pp. 09597, 09600). On May 28, 2019, Canada made another attempt to discuss how to best move forward with making joint submissions incorporating the work done by Canada, Trans Mountain and Ts’elxwéyeqw on addressing the 89 recommendations (Dekker Affidavit, para. 85, Canada Record, p. 09605). This attempt also proved to be unsuccessful. Ultimately, Canada nonetheless ensured that the final Crown ICA report and the CCAR, which were provided to the Governor in Council in order to inform its decision, reflected the feedback received, including that conveyed at all workshops and in written responses provided by Ts’elxwéyeqw.

[215] In the end, there is no support for Ts’elxwéyeqw’s contention that Canada failed to adequately engage with the ICA and the 89 recommendations.

(2) Canada’s accommodation measures cannot be said to be generic, conceptual, and not specific, or to rely heavily on future commitments

[216] On their face, all six measures proposed during the course of the renewed consultation process (see paragraphs 198 to 203 above) are particularized and specific to Ts’elxwéyeqw or the Stó:lō.

[217] In order to illustrate the point that the measures taken by Canada to address its concerns are “generic, conceptual and non-responsive”, Ts’elxwéyeqw refers to *TWN 2018*, at paragraph 653, where this Court commented on specific measures put in place during the initial consultation process. It omits to point out that these measures were aimed at assuaging the

concerns of Tsleil-Waututh. Ts'elxwéyeqw also cites paragraphs 660, 661, 668 and 735 of *TWN 2018*. Again these comments concerned measures pertaining to Tsleil-Waututh's, Squamish's and Upper Nicola's experiences. Paragraph 703 in *TWN 2018* is the only cited paragraph that relates to the Stó:lō, where this Court found that Canada had failed to provide for a new condition that would ensure the presence of local Indigenous monitors. As explained earlier, this flaw, insofar as it relates to Ts'elxwéyeqw, has been remedied by the commitment to hire a Ts'elxwéyeqw monitor selected by Ts'elxwéyeqw.

[218] Additionally, Ts'elxwéyeqw makes sweeping allegations to the effect that Canada did not consider whether the accommodation measures will actually materialize, whether they respond to concerns that are specific to Ts'elxwéyeqw or whether the forward-looking measures will be enforceable so as to lead to actual mitigation of Project impacts (Memorandum of Ts'elxwéyeqw, para. 110). These submissions are, however, difficult if not impossible to assess because in making them Ts'elxwéyeqw fails to refer to the record or to specify the measures that it targets. It further argues that "commitments to send reports […] are also not a commitment to meaningfully implement adequate mitigation measures" (Memorandum of Ts'elxwéyeqw, para. 110). Here again, it fails to refer to the record—we are again left in the dark as to what exactly is being argued. No further enlightenment was provided in oral argument. These unsubstantiated assertions do nothing to show that the Governor in Council's approval of the Project was unreasonable.

[219] Similarly, Ts'elxwéyeqw argues that some of the accommodations that were proposed to it were also extended to the other applicants, thereby suggesting that these accommodations are

unresponsive to its specific concerns (Memorandum of Ts'elxwéyeqw, para. 109). There is, however, nothing wrong with Canada attempting to address concerns that are common to more than one Indigenous group through a common measure (Exhibit A to the Dekker Affidavit, Canada Record, pp. 10585-10604). This is particularly so given the brief and efficient process envisaged in *TWN 2018*.

[220] We note in this respect that nearly all the measures alluded to by Ts'elxwéyeqw are either joint initiatives between Canada and Indigenous groups, or funding measures for Indigenous-led studies to better understand potential Project-related impacts (Exhibit A to the Dekker Affidavit, Canada Record, pp. 10603-10604). Accommodation measures that are to be co-developed with Ts'elxwéyeqw cannot be labelled as "vague" and "not specific".

(3) The accommodation measures implemented by Canada address the shortcomings identified in *TWN 2018*

[221] When regard is had to the first of the six measures proposed by Canada to remedy the shortcomings highlighted in *TWN 2018*—proper consideration of the ICA—it is apparent from the earlier analysis that the accommodation measures taken by Canada to respond to the ICA and the 89 recommendations were anything but "generic, conceptual, [and] not specific". As to the sixth measure, the question whether Canada adequately considered Ts'elxwéyeqw's established fishing right is addressed and answered in paragraphs 245 to 253 below.

[222] The fifth measure—the amendment of NEB Condition 6—although not exclusive to Ts'elxwéyeqw or the Stó:lō, operates to their benefit. This measure makes Trans Mountain's

commitments binding and enforceable. It was advanced in response to this Court's concern in *TWN 2018* that Trans Mountain had a history of not following through with its commitments (*TWN 2018*, para. 715). Insofar as amended Condition 6 makes any commitment tailored to Ts'elxwéyeqw's concerns enforceable, it cannot reasonably be contended that such an accommodation is "vague" or "conceptual".

[223] By the same token, the fact that some of these commitments have a post-approval impact is not a ground for complaint. What matters is that the CER has been vested with the responsibility of ensuring that Trans Mountain's commitments are complied with.

[224] Further, no direct argument is made by Ts'elxwéyeqw about the lack of responsiveness or specificity of the second, third and fourth accommodation measures proposed during the renewed consultation process. We nevertheless offer a few comments.

[225] The second and fourth accommodation measures are on their face specific and responsive to the precise flaws identified in *TWN 2018*—that Canada failed to address the Stó:lō's position that Lightning Rock is a "no go" area and failed to accommodate the request to select Indigenous monitors. Nothing more needs to be said as to their adequacy. The third accommodation measure—the inclusion of Stó:lō cultural sites in the Project design—requires some elaboration.

[226] This measure was devised in response to Canada's earlier failure, identified in *TWN 2018*, to ensure that the Stó:lō cultural sites were incorporated into the Project design. Specifically, Canada had failed to meaningfully engage with the Stó:lō on their traditional

knowledge, including the location of Stó:lō cultural sites (*TWN 2018*, paras. 712, 715). In contrast, this accommodation is demonstrably the by-product of a meaningful two-way dialogue about the protection of Stó:lō cultural sites along the Project corridor.

[227] Indeed, the environmental alignment sheets, to be used by Trans Mountain during construction, were modified to include the location of Stó:lō cultural sites identified by Ts'elxwéyeqw. We note as well that commitments made by Trans Mountain are in place to work with Ts'elxwéyeqw to ensure each site will be adequately protected.

[228] These commitments include ensuring Stó:lō sites are included in Trans Mountain's final alignment sheets used during construction; updating Trans Mountain's Resource Specific Mitigation Tables to ensure that mitigation measures are specific to various types of cultural sites; providing Stó:lō representatives opportunities to deliver cultural awareness training to Trans Mountain staff and contractors; incorporating information regarding the cultural site boundaries identified by Stó:lō when considering appropriate mitigation measures; and meeting with Stó:lō to discuss timeframes for construction that respect Stó:lō cultural practices and events (Exhibit A to the Dekker Affidavit, Canada Record, pp. 12779-12780). Beyond these commitments, amended NEB Condition 100 provides that Trans Mountain must take mitigation measures to reduce or eliminate, to the extent possible, Project effects on cultural sites during construction. Additionally, as noted above, Canada offered a further $250,000 in funding to facilitate the protection of cultural sites, through the Terrestrial Studies Initiative.

[229] It can be seen from this review that the measures proposed by Canada to address the particular shortcomings identified by this Court in *TWN 2018* were neither generic nor vague. Given that Ts'elxwéyeqw has not pointed to any precise measure proposed during the renewed consultations—aside from the measures common to more than one group dealt with above—that would be unresponsive to its concerns, we see no reason to conclude that the Governor in Council's decision was unreasonable (Memorandum of Ts'elxwéyeqw, paras. 107-109).

[230] We are satisfied that it was open to the Governor in Council to conclude that the consultations conducted in the aftermath of *TWN 2018* have been adequate and have resulted in measures that address Ts'elxwéyeqw's concerns in a meaningful way.

(4) Canada re-initiated consultations in a timely manner and did not truncate their execution

[231] Ts'elxwéyeqw argues first that Canada spent months establishing how the re-initiated consultations would take place and then "sped through execution", thereby denying Ts'elxwéyeqw the opportunity for meaningful two-way dialogue (Memorandum of Ts'elxwéyeqw, para. 95). It also contends that in imposing this timeline on Ts'elxwéyeqw, Canada overlooked the fact that in contrast with Canada and Trans Mountain, it has limited capacity in terms of staff, knowledge holders and leaders, and that all of these individuals had other responsibilities to attend to (Memorandum of Ts'elxwéyeqw, para. 97).

[232] Ts'elxwéyeqw first blames Canada for "sitting on its hands" from September 2018, when the Order in Council referring the matter back to the NEB for reconsideration was issued, to

January 2019, when the first face-to-face meeting with representatives of Canada took place (Exhibit A to the Dekker Affidavit, Canada Record, p. 12445; Memorandum of Ts'elxwéyeqw, paras. 29-38). In response, Canada acknowledges that during the initial months, it was putting in place a team from across the federal government, and conducting significant preparatory work. It also points out that meetings did take place before January, namely one with Minister Sohi in early October 2018 and a roundtable discussion headed by former Justice Frank Iacobucci on December 11, 2018.

[233] As well, it is useful to recall that the Governor in Council also referred the matter back to the NEB for reconsideration so that Project-related marine shipping impacts could be taken into account (Order in Council, p. 3, fourth whole paragraph). Ts'elxwéyeqw participated extensively in the Reconsideration Hearing as an intervener and repeatedly raised its limited capacity to engage in multiple activities at once with both the NEB through the Reconsideration Hearing and with Canada directly (Memorandum of Ts'elxwéyeqw, paras. 27, 56; Ardell Affidavit, paras. 23-25, 31, Ts'elxwéyeqw Record, pp. 582-584). Beyond the fact that the consultation process could not be fully operative instantly (Memorandum of Canada, paras. 21-22), it would have been inappropriate for Canada to require Ts'elxwéyeqw to engage in more substantive discussion while the NEB process was on-going. Moreover, this Court explained in *TWN 2018* that Phase III of the consultation process was designed to address any outstanding concerns following the NEB hearing process (Phase II), and provide Canada with the opportunity to propose appropriate accommodation measures to remedy these issues (*TWN 2018*, para. 530). Canada cannot be faulted for engaging with Ts'elxwéyeqw more intensively following the NEB process.

[234] Ts'elxwéyeqw further contends that once Phase III was re-initiated, Canada truncated its execution. At the first consultation meeting held on January 17, 2019, Ts'elxwéyeqw and Canada agreed that the ICA was a critical part of the renewed consultations and that the technical workshops would provide an opportunity to review mitigation measures proposed by Canada and Trans Mountain. Also essential to addressing the 89 recommendations was the Crown ICA responses. As noted earlier, Ts'elxwéyeqw insisted on waiting for Trans Mountain's updated ICA responses to hold the workshops on the ICA despite having Canada's analysis of the ICA in hand since early March 2019. Ts'elxwéyeqw insists that it was "always clear that it was only after receiving and having adequate time to review information such as the Crown ICA Response, [and] the [Trans Mountain] ICA Response […] that […] [w]orkshops could be held" (Memorandum of Ts'elxwéyeqw, para. 101). Instead, a review of the record suggests that Ts'elxwéyeqw was engaged in a delay exercise.

[235] Indeed, Canada was ready and willing to hold the first workshop on February 20, 2019, but Ts'elxwéyeqw declined (Exhibit M to the Ardell Affidavit, Ts'elxwéyeqw Record, p. 1307):

> In order for the Tribe to identify the right individuals to form part of our working group, we would like to see the responses from the various Federal departments on the ICA/89 recommendations which we understand is not going to be available to circulate to us until February 15. This does not leave us sufficient time to review and ensure all of the right people can be present on the 20th.
>
> [emphasis added]

[236] Canada agreed by email on the same day, noting it was available February 25 to February 28 to hold the first workshop (Exhibit M to the Ardell Affidavit, Ts'elxwéyeqw Record, p. 1306).

[237] On February 14, 2019, Canada sent draft agendas for the workshops to Ts'elxwéyeqw for comment and asked Ts'elxwéyeqw to confirm whether it was available for the first two technical workshops in the week of March 4 to March 8, 2019 and the week of March 25 to April 1, 2019 (Exhibit M to the Ardell Affidavit, Ts'elxwéyeqw Record, p. 1318). On February 22, 2019, Ts'elxwéyeqw responded that it would get back to Canada once it had reviewed the agenda and considered the potential dates (Exhibit A to the Dekker Affidavit, Canada Record, p. 10290).

[238] Ts'elxwéyeqw emailed Canada three days later and stated that it could not yet meet (Exhibit R to the Ardell Affidavit, Ts'elxwéyeqw Record, pp. 1341-1342):

> The Tribe has taken steps to identify and coordinate the individuals who will form part of the technical working group; however, we have not received Canada's comments on the ICA and 89 recommendations which is critical for the working group to move forward in a timely way. If you can provide an update on the timing for us to receive this, it will assist in scheduling the first working group meeting and ensuring that all of the appropriate individuals have been identified.
>
> [emphasis added]

[239] Canada replied that the first draft would be issued before the first workshop was held and, during a teleconference that took place on March 1, 2019, it committed to providing Ts'elxweyeqw with this document by March 6, 2019, which it did (Dekker Affidavit, paras. 42, 44(c), 45, Canada Record, pp. 9584, 9586).

[240] On March 18, 2019, Ts'elxwéyeqw sent a letter (dated March 14, 2019) to Prime Minister Justin Trudeau outlining its outstanding concerns with the renewed consultation. On the topic of the technical workshops, it decried the fact that Canada had only submitted its responses in March, despite having the ICA for five years (Exhibit P to the Jimmie Affidavit,

Ts’elxwéyeqw Record, p. 90). During a teleconference held on the same day between Canada and Ts’elxwéyeqw, Canada again requested confirmation of dates when the workshops could take place, but Ts’elxwéyeqw advised “that they intend[ed] to consult internally […] and that they were unable to commit to dates at that time” (Exhibit A to the Dekker Affidavit, Canada Record, p. 12447).

[241] Canada again tried to schedule the technical workshops on March 21, 2019, but Ts’elxwéyeqw did not respond (Dekker Affidavit, para. 51, Canada Record, p. 9589). On April 2, 2019, Canada suggested dates for two technical workshops between April 15 and April 26, 2019 (Exhibit A to the Dekker Affidavit, Canada Record, p. 10605). Ts’elxwéyeqw informed Canada by email two days later that it required Trans Mountain’s updated response to the 89 recommendations before it would respond to Canada’s analysis and participate in the workshops (Exhibit A to the Dekker Affidavit, Canada Record, p. 10652):

> The Tribe also remains eager to set the meeting schedule for the technical working groups; however, the most pressing concern is ensuring that this work is done right. […] [W]e requested a timeline from [Trans Mountain] to update alignment sheets with Stó:lō cultural sites […]. […] [Trans Mountain] is in the process of preparing an updated response to the 89 recommendations. The Tribe requires this before providing its response to Canada's analysis. It is not efficient for the Tribe to respond to Canada and then be required to prepare a further response after receiving [Trans Mountain]’s analysis. In the Tribe's view, these steps are critical prerequisites to the technical working groups' work as it will inform the analysis to be undertaken concerning the gaps between the ICA, alignment sheets and EPPs. […] [T]he Tribe may be available to meet the week of April 22nd or the week of May 6th […].
>
> [emphasis added]

[242] While it was not unreasonable for Ts’elxwéyeqw to seek to maximize efficiency, this had to be done with some regard to the available time. Having all the elements in place for effective

consultations without any time left for the actual consultations was not the proper course in the circumstances.

[243] Notably, although scheduling the workshops was discussed numerous times since January 2019, Trans Mountain's ICA response was referred to as a condition precedent for the holding of the workshops for the first time in April 2019.

[244] Based on the foregoing, it cannot seriously be argued that Canada failed to re-initiate consultation in a timely manner and then truncated its execution. Canada made every effort to schedule the workshops and substantially engage with Ts'elxwéyeqw on the ICA and the 89 recommendations, but was consistently faced with refusals to set dates. Additionally, Ts'elxwéyeqw did not provide its response to Canada's analysis of the 89 recommendations sent on March 6, 2019 until May 3, 2019 (Exhibit A to the Dekker Affidavit, Canada Record, pp. 11489-11490).

(5) Canada was not required to engage in the infringement and justification analysis of Ts'elxwéyeqw's established fishing right

[245] The last flaw identified in *TWN 2018* was Canada's failure to make any mention of the Stó:lō's constitutionally protected right to fish, and show how this constitutionally protected right would be taken into account (*TWN 2018*, para. 727). The Court also noted that there was no explanation as to how the consultation process affected Canada's ultimate assessment of the impact of the Project on the Stó:lō. It then added that "[m]eaningful consultation required something more than simply repeating the Board's findings and conditions without grappling

with the specific concerns raised by the Stó:lō about those same findings" (*TWN 2018*, para. 727).

[246] The record shows unequivocally that during the renewed consultation process, Canada acknowledged Ts'elxwéyeqw's constitutionally protected Aboriginal right to fish and took this right into account in assessing Project impacts (Exhibit A to the Dekker Affidavit, Canada Record, pp. 10186-10188; Exhibit R to the Jimmie Affidavit, Ts'elxwéyeqw Record, p. 116). Canada's position was that potential impacts to water and marine life were adequately mitigated or accommodated through NEB Conditions, new and existing Trans Mountain commitments, and federal accommodation initiatives (Memorandum of Canada, para. 226).

[247] The new commitments included in particular Trans Mountain's undertaking to use Ts'elxwéyeqw (Stó:lō) traditional and technical knowledge and data in creating Trans Mountain's watercourse crossing inventories and plans. As well, Trans Mountain committed to treat waterbodies classified as non-fish-bearing but with hydrological connectivity to fish-bearing waters as potentially fish-bearing, and in the event that a contingency open cut crossing method was required (*i.e.*, without flow isolation), to provide notice to Stó:lō.

[248] Ts'elxwéyeqw has not shown that the Governor in Council acted unreasonably in approving the Project on the basis that in conducting the renewed consultation, Canada failed to take into account Ts'elxwéyeqw's constitutionally protected fishing right.

[249] Finally, Ts'elxwéyeqw contends that Canada's legal approach in addressing its constitutionally protected fishing right was flawed. It argues that Canada ought to have engaged in a *Sparrow*-type justification analysis based on the alleged infringement of its established fishing right (*R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, pp. 1113-1119) as part of the consultation process because, according to Ts'elxwéyeqw, the justification analysis forms part of the duty to consult and accommodate.

[250] Although the argument relating to the content of the duty to consult was before the Court in *TWN 2018*, it went unaddressed by reason of the Court's finding that no consultation had taken place with respect to Stó:lō's established right to fish (Memorandum of Stó:lō in Docket A-78-17, paras. 62-78). The argument is therefore within the scope of the Leave Order and appropriately before us.

[251] In our view, there is no merit to Ts'elxwéyeqw's contention. The consultation process and the justification process occur at different points in time and address different circumstances. The consultation framework aims to prevent potential infringement of Aboriginal rights, whereas the justification analysis is intended to justify a *prima facie* infringement that has been demonstrated. Finding that the duty to consult and accommodate requires as a starting point the need to justify the infringement of an Aboriginal right is putting the cart before the horse, as the former seeks to prevent the latter. In *Beckman*, the Supreme Court described the consultation process as an attempt "to head off confrontations [when an infringement is alleged] by imposing on the parties a duty to consult and (if appropriate) accommodate in circumstances where the development might have a significant impact on Aboriginal rights when and if established"

(para. 53). Additionally, concluding otherwise would lead to a circular result, the first step of the justification analysis being whether the Crown has discharged its procedural duty to consult and accommodate (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, para. 77).

[252] Moreover, this Court in *Prophet River First Nation v. Canada (Attorney General)*, 2017 FCA 15, 408 D.L.R. (4th) 165 [*Prophet River FCA*], held that the Governor in Council, when making a decision under subsection 52(4) of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, did not have the power to determine whether infringements to treaty rights are justified. This is because it "lacks the necessary hallmarks associated with adjudicative bodies: public hearings, ability to summon witnesses and compel production of documents and the receipt of submissions by interested parties" (para. 70).

[253] Ts'elxwéyeqw argues that *Prophet River FCA* does not address the question that arises here, *i.e.*, whether the justification analysis forms part of the duty to consult and accommodate, and thus the Crown's failure to do so is in breach of that duty. That is so. It remains, however, that the rationale advanced in *Prophet River FCA* supports the conclusion drawn above. Accepting that the adjudication of treaty rights (or established Aboriginal rights, akin to treaty rights in that respect) or claimed Aboriginal rights must take place every time an infringement is alleged during the consultation and accommodation process would effectively revert to the pre-*Haida Nation* case law, which led to complex and lengthy litigation (*Prophet River FCA*, paras. 36, 57). This was precisely the problem that *Haida Nation* sought to remedy by clearly indicating

that negotiations—before an infringement occurs—are the preferred way toward reconciliation between the Crown and Indigenous groups (*Prophet River FCA*, para. 57).

[254] In the end, Ts'elxwéyeqw did not show that Canada failed to meet its duty to consult and accommodate during the re-initiated consultations.

V. Disposition

[255] For the foregoing reasons, the applications for judicial review are dismissed with costs to the respondents.

"Marc Noël"
C.J.

"J.D. Denis Pelletier"
J.A.

"J.B. Laskin"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-324-19, (lead file), A-325-19, A-326-19, A-327-19

CONSOLIDATED APPLICATIONS FOR JUDICIAL REVIEW OF A DECISION DATED JUNE 18, 2019 BY THE GOVERNOR IN COUNCIL (ORDER IN COUNCIL P.C. 2019-820)

STYLE OF CAUSE:	COLDWATER INDIAN BAND *et al.* v. ATTORNEY GENERAL OF CANADA *et al.*
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	DECEMBER 16-18, 2019
REASONS FOR JUDGMENT BY:	THE COURT
DATED:	FEBRUARY 4, 2020

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