Federal Court of Appeal | Cour d'appel fédérale

Ottawa, February 4, 2020 – Judgments were issued today by the Federal Court of Appeal (Noël C.J. and Pelletier and Laskin JJ.A.) in files A-324-19 (lead file), A-325-19, A-326-19 and A-327-19: *Coldwater et al. v. Canada (Attorney General) et al.*, **2020 FCA 34**. In these judgments, the Federal Court of Appeal dismissed four challenges to the federal Cabinet's approval of the Trans Mountain Pipeline Expansion Project.

The following is an unofficial summary of the Court's decision. The Court's reasons for judgment are alone authoritative.

Background

The Trans Mountain Pipeline Expansion Project concerns the expansion of the existing 1,150-kilometre pipeline that runs roughly from Edmonton, Alberta to Burnaby, British Columbia. New works, such as pump stations, tanks and the expansion of an existing marine terminal, are also planned. The Project will increase pipeline capacity from 300,000 barrels per day to 890,000 barrels per day. It also will cause environmental effects and affect the interests of certain Indigenous peoples.

The governing law requires the federal Cabinet to approve a project such as this before it can proceed. In November 2016, Cabinet approved the Project.

Several legal challenges were brought against this approval. In August 2018, this Court upheld portions of the challenges: see 2018 FCA 153. The Court found the approval to be deficient for two reasons: the environmental assessment supporting it was too narrow and the Government of Canada failed in its duty to consult with Indigenous peoples about the Project.

In response to this Court's decision, the federal Cabinet sent the matter back to the National Energy Board for further consideration on the environmental issues, particularly on the issue of marine shipping. A few months later, the National Energy Board reported to Cabinet. It recommended the Project be approved with amended conditions. Also in response to this Court's decision, the Government of Canada consulted further with Indigenous peoples to address the shortcomings in consultation this Court had identified. Ultimately, a lengthy report on consultation was provided to Cabinet.

With the information gathered from these processes, Cabinet considered the Project once again. It decided to approve the Project with conditions, some of which it modified itself in order to accommodate some of the concerns of Indigenous peoples. In approving the Project, Cabinet decided that the Government of Canada's duty to consult with Indigenous peoples had been adequately fulfilled.

Under the governing legislation, those dissatisfied with a project approval have to seek the permission of this Court to have Cabinet's decision judicially reviewed. Twelve parties sought permission. Only six received permission. They were limited to the issue whether the

Government of Canada had adequately fulfilled its duty to consult with Indigenous peoples. In the end, four of the six parties pursued their challenges through to hearing: Coldwater Indian Band, Squamish Nation, Tsleil-Waututh Nation and the Ts'elxwéyeqw Tribe, a collective of seven Stó:lō villages.

This Court's decision

Today, the Court dismissed the challenges. The reasons of the Court were authored jointly.

As is required by law in cases of judicial review, the Court focused on the reasonableness of Cabinet's decision to approve the Project a second time, specifically Cabinet's conclusion that the Government of Canada had remedied the flaws in consultation earlier identified by this Court and had engaged in adequate and meaningful consultation with Indigenous peoples.

The Court found this to be a reasonable conclusion based on, among other things, the evidence in the record, the law concerning the duty to consult, the legislation governing project approvals and the justification offered by Cabinet for its conclusion. The Court found that the decision approving the Project was not a ratification of the earlier approval, but an approval with amended conditions flowing directly from renewed consultation. The Court's conclusion was that there were no legal grounds for setting aside Cabinet's decision. While the parties challenging Cabinet's decision are fully entitled to oppose the Project, reconciliation and the duty to consult do not provide them with a veto over projects such as this one.

Although the Court found it unnecessary to go beyond upholding the reasonableness of Cabinet's decision, the Court reviewed the detailed arguments of the parties, including their arguments on the adequacy of the renewed consultation. It found that the arguments failed on their own terms or concerned matters that were litigated or could have been litigated in earlier proceedings and, thus, were not properly before the Court.

Where matters now stand

The parties can apply to the Supreme Court of Canada for permission to appeal from today's decision. They have sixty (60) days to do so.

Other parties who were refused permission by this Court to challenge Cabinet's decision have already applied to the Supreme Court for permission to appeal from this Court's refusal to hear their challenges. They await a decision from that Court.

Source documents

Today's decision of this Court dismissing the challenges: **https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/460815/index.do**

The Cabinet decision and explanatory note: **http://www.gazette.gc.ca/rp-pr/p1/2019/2019-06-22/pdf/g1-15325.pdf#page=231** and

The legislative section under which Cabinet made its decision:
https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-n-7/135259/rsc-1985-c-n-7.html#sec54subsec1

The decision of this Court granting permission to certain parties to challenge the Cabinet decision:
https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/421006/1/document.do