Cassels

Trans Mountain Pipeline Approval Upheld Using New Standard of Review Principles

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On February 4, 2020, the Federal Court of Appeal in *Coldwater Indian Band et al. v. Attorney General of Canada et al.*[1] considered whether to uphold the Order in Council approving the Trans Mountain Expansion Project (Project) against claims that Canada had failed to appropriately consult and accommodate Indigenous concerns.

In upholding the authorization, the Court applied new principles from the Supreme Court of Canada (SCC) for reviewing regulatory and Crown decisions, including decisions relating to the Crown's duty to consult. These principles, set out in a trilogy of SCC decisions released in December 2019, emphasize that deference must be given to Crown decision makers, who are to be evaluated on a standard of reasonableness. In particular, deference is owed to the decision maker where the Crown decision does not suffer from errors in reasoning or logical deficiencies, and where there is "a chain of reasoning progressing from a reasonable view of the evidence before it to the plausible conclusions." [2]

The Court concluded that "the decision of the Governor in Council was reasonable" within the first 30 pages of its reasons.[3] In the remaining 65 pages, the Court took the unnecessary step of also demonstrating that the decision of the Governor in Council met the more stringent 'correctness' standard. This unnecessary analysis was undertaken to "defuse any suggestion that the Court did not consider the applicants' submission."[4]

This decision marks the first time the Federal Court of Appeal has applied the new standard of review principles from the December 2019 SCC trilogy within the context of the Crown's duty to consult. As applied, these principles should give Crown decision makers greater confidence when concluding whether the Crown's duty to consult has been satisfied following the completion of a meaningful and robust consultation process.

Facts

On November 29, 2016, the Governor in Council provided its first approval for the Project.[5] This approval was successfully challenged before the Federal Court of Appeal on the basis of its under-inclusive environmental impact assessment and a failure to satisfy the Crown's duty to consult.[6] In its reasons for overturning the initial approval, the Federal Court of Appeal stated that further consultation to address the

flaws could be “specific and focused” and could be accomplished through a “brief and efficient” process.[7]

In the fall of 2018 and spring of 2019, efforts were taken to address the deficiencies with the original decision. The efforts undertaken included: (1) reinitiating consultation directly with potentially affected Indigenous groups, with a focus on responding to and remedying the concerns raised in the original Federal Court of Appeal decision; (2) hiring former Supreme Court Justice Frank Iacobucci to oversee and provide guidance on consultations; (3) 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 (4) providing a clear mandate for consultation teams to discuss and agree to accommodations, where appropriate.[8]

The new consultation efforts resulted in a report that summarized impacts of the Project on Indigenous interests and concerns, as well as an analysis of the impact on Indigenous rights and interests and future steps that would be taken to mitigate the impact and address the concerns.[9] It also resulted in a number of new accommodation measures and initiatives to avoid or mitigate effects on Indigenous interests.[10]

In June 2019 a new Order in Council was issued approving the Project, based on the updated consultation efforts undertaken. [11]

Standard of Review

The Court’s analysis was informed by the recent SCC decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*[12], part of a trilogy of decisions addressing the standard of review for administrative decisions released in December 2019. As the Court acknowledged, “[a]ll 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.”[13]

As prescribed by *Vavilov*, the standard of review generally applicable to a judicial review decision, such as the decision of the Governor in Council, is “reasonableness.”[14]

In conducting a reasonableness review, the Court was to refrain from forming their own view about the adequacy of consultation [“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.”][15] Instead, the focus of the Court was on “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.”[16]

In concluding that the Order in Council was reasonable, the Court noted that "the Governor in Council's explanations do not suffer from error 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."[17]

Key Principles of Consultation

The Federal Court of Appeal used its decision to highlight key principles associated with the Crown's duty to consult. Its summary was based on guidance of the SCC as well as recent decisions of the Federal Court of Appeal. As a consequence, the summary of law appears different than recent summaries provided by the SCC, for example in *Ktunaxa*.[18]

First, in order for a decision of the Governor in Council to be reasonable, the Crown must show that it has considered and addressed the rights claimed by Indigenous peoples in a meaningful way.[19] The Court summarized that "reasonable" and "meaningful consultation" required:

1. a process that was more than just an opportunity to blow off steam;
2. the Crown possessing a state of open-mindedness about accommodation;
3. the existence of two-way dialogue;
4. the process being more than a process for exchanging and discussing information;
5. dialogue that leads to a demonstrably serious consideration of accommodation; and
6. the Crown grappling with the real concerns of the Indigenous applicants.[20]

It should be noted that the last three of these requirements reflect statements of the Federal Court of Appeal in its earlier decision overturning the initial Project approval and have not been specifically endorsed by the SCC.

Next, the Court highlighted key principles it applied in reviewing the consultation undertaken:

1. The goal is to reach an overall agreement, but that will not always be possible; [21]
2. Perfection in the consultation process is neither required nor realistic;[22]
3. 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;[23]
4. 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;[24]
5. 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.[25]

The key principles for reviewing consultation, unlike those in the first listing, are each supported by statements from the SCC.

Relevance Moving Forward

While the Court took on the task of considering, in detail, whether the decision of the Governor in Council was correct, it acknowledged that this was an unnecessary step; the only relevant consideration was whether the decision of the Governor in Council had been reasonable.[26]

In conducting the "reasonableness" analysis, the Court incorporated new principles from the SCC on the standard of review. Under these principles, the role of the reviewing Court is tightly constrained. The new standard of review principles requires a deferential approach that restrains the court from forming its own view about the adequacy of consultation.[27]

While standards of review remain open to manipulation and interpretation, this new approach should provide greater deference to Crown decision makers. This deferential standard of review does not alleviate the Crown's obligations to act honorably and to consult and, where appropriate, accommodate. Rather, it helps reduce uncertainty for all interested parties where the Crown has conducted a robust and meaningful consultation process.

This evolution of the standard of review should reduce the legal uncertainty that often follows the consultation process, where consent from all parties has not been obtained. It should give Crown decision makers more confidence to make decisions and to balance public interest considerations. It should also give industry proponents greater confidence that government authorizations will not be endlessly litigated. Taken together, the Court's approach to the standard of review promises more robust, meaningful, and timely processes that will benefit all parties interested in continued economic development in Canada.

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[1] *Coldwater Indian Band et al. v. Attorney General of Canada et al.,* 2020 FCA 34 [*Coldwater*].

[2] *Ibid* at para 66.

[3] *Ibid* at para 83.

[4] *Ibid* at para 84.

[5] *Ibid* at para 1.

[6] *Ibid* at para 2.

[7] *Ibid* at para 17.

[8] *Ibid* at para 70.

[9] *Ibid* at para 71.

[10] *Ibid* at para 72.

[11] *Ibid* at para 3.

[12] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*].

[13] *Coldwater*, *supra* note 1 at para 25.

[14] *Ibid* at para 26.

[15] *Ibid* at para 28.

[16] *Ibid* at para 29.

[17] *Ibid* at para 66.

[18] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at paras 80-81.

[19] *Coldwater*, *supra* note 1 at para 40.

[20] *Ibid* at para 41.

[21] *Ibid* at para 52.

[22] *Ibid* at para 144.

[23] *Ibid* at para 51.

[24] *Ibid* at para 53.

[25] *Ibid* at para 55.

[26] *Ibid* at paras 83 and 85.

[27] *Ibid* at para 28.
