TSLEIL-WAUTUTH NATION

Children of TAKaya – Wolf Clan

Media Legal Backgrounder:

Tsleil-Waututh Nation (TWN) Legal Challenge to the National Energy Board's (NEB) review of Kinder Morgan Trans Mountain Pipeline and Tanker Project

About Tsleil-Waututh Nation – the People of Burrard Inlet

Tsleil-Waututh Nation (TWN) is a progressive and vibrant Coast Salish community. In our traditional dialect of Halkomelem, the name Tsleil-Waututh means "People of the Inlet." The name reflects our deep physical, cultural, and spiritual connection to Burrard Inlet. Our primary community of Sleil-Waututh is on the north shore of Eastern Burrard Inlet, a short paddle across the water from Kinder Morgan's Westridge Marine Terminal and Tank Farm, where the new Trans Mountain pipeline will end.

Since time immemorial, our people have hunted, fished, gathered, travelled and raised families on the land and in the water in our traditional territory, which is an area that extends approximately from the vicinity of Mount Garibaldi to the North, the 49th parallel and beyond to the south, east to Gibsons, and west to Coquitlam Lake. The marine water and foreshore environments have always been, and continue to be, of particular importance as a means of sustenance, spirituality, economy and transportation to our people. Tsleil-Waututh elders teach us that when "the tide went out, the table was set."

The proposed pipeline project (the "Project") would result in 890,000 barrels of diluted bitumen flowing through Tsleil- Waututh territory every day. It would see more than a tanker a day, each larger Vancouver's tallest building, pass through the Burrard Inlet and Salish Sea, and with them increased risk of Exxon-Valdez like oil spills.

About the Case

TWN is commencing this legal action to ensure that the Federal Crown fulfils its constitutional and environmental statutory obligations to the Nation and all Aboriginal communities with respect to resource and infrastructure projects in their respective territories. This legal challenge will demonstrate that Kinder Morgan's new pipeline and tanker proposal is open to significant delay and uncertainty. Filed in the Federal Court of Appeal, the case challenges the NEB review process, through an appeal of decisions made by the NEB review of the Kinder Morgan Trans Mountain pipeline and tanker project on April 2, 2014, including the Hearing Order commencing the NEB review of the Project (the "April 2 Decisions").

The April 2 Decisions: (i) defined the factors and scope of factors for the environmental assessment of the Project pursuant to CEAA 2012;[1] (ii) decided that Kinder Morgan's application is complete and

[1] NEB April 2, 2014 letter re: Factors and Scope of the Factors for the Environmental Assessment pursuant to the *Canadian Environmental Assessment Act, 2012.*

should proceed to assessment and public hearing;[2] and (iii) established the hearing schedule and nature of hearing events, including tight timelines and a one-sided process for receiving and testing evidence.[3]

The April 2 Decisions are final decisions that will adversely affect the rights of TWN and other intervenors in the NEB process, making this challenge important and timely. The challenge cannot wait until after the flawed process has played out. If the Federal Court of Appeal agrees to hear the case, the positive result would be a "restart" of the process, a restart based on compliance with Tsleil-Waututh law, Canada's constitutional obligations and environmental statute.

Grounds for Appeal

There are four independent grounds for seeking leave to appeal:

1) The NEB erred in law or was without jurisdiction to make the April 2 Decisions because the Crown failed to discharge its constitutional duty to consult and accommodate TWN before the NEB made the Decisions.
    a. Courts have held that meaningful consultation requires discussion and consultation at the earliest stage possible, including on the design of the environmental assessment and regulatory review process. This duty is "upstream" of the NEB's role and requires government-to-government engagement between TWN and the federal government. To date the federal government has refused to directly engage with TWN in discussions about the Project, despite repeated attempts by TWN. *TWN says that without this constitutionally required step having been taken, the NEB had no jurisdiction to issue the order commencing its review process.*
2) The NEB erred in law by failing to offer to consult and cooperate with TWN as a jurisdiction pursuant to s. 18 of *Canadian Environmental Assessment Act, 2012*[4] ("**CEAA**"), and also by creating, and the failing to meet TWN's legitimate expectations as a jurisdiction.
    a. Section 18 required the NEB to offer to "consult and cooperate" with other jurisdictions who also have the authority to undertake environmental assessment of the Project. TWN has the legal authority to review and make decisions that affect our territory according to our legal traditions and responsibilities. The TWN Stewardship Policy provides for assessment of projects that affect the Nation's title and rights. TWN notified the NEB that TWN is a jurisdiction with the authority to assess the project on January 31, 2014 but the NEB made the April 2, 2014 decisions without any consultation or cooperation with TWN.

[2] NEB April 2, 2014 letter re: Completeness Determination and Legislated Time Limit.
[3] NEB April 2, 2014 Hearing Order OH-001-2014.
[4] *Canadian Environmental Assessment Act*, *2012*, SC 2012, c. 19, s. 52, s.18 [Appendix "A"].

3) The NEB erred in law when it breached the duty of procedural fairness that it owed to TWN as an intervenor by setting an unfair schedule and targeting oral traditional history for unfair treatment.
    a. The 'oral hearing' is one-sided and unfair: TWN and other intervenors will not have the opportunity to test Kinder Morgan's evidence through cross-examination, while Kinder Morgan will have the opportunity to cross-examine TWN and other Aboriginal elders, should they decide to share those oral histories in the NEB process; and
    b. The NEB schedule is extremely condensed to fit the 15 month time limit imposed by the Federal Government. For example, it initially provided only 30 days to review the approximately 15,000 page application before the first round of Information Requests. A 10 day extension did little to rectify the situation.
4) The NEB erred in law and jurisdiction in its decisions on how CEAA applies to the physical activities making up the Project. It unlawfully excluded marine shipping activities. Also, it failed to identify that the Project included two or perhaps three "designated projects," not one: the new pipeline, the expanded Burnaby petroleum storage facility, and the new marine terminal. The Canadian Environmental Assessment Agency ("**Agency**"), not the NEB, is responsible for the storage facility and marine terminal environmental assessments. The NEB also erred in law by failing to cooperate with the Agency about the environmental assessments of the other "designated projects" as it was required to do pursuant to s. 16 of CEAA.

Possible Outcomes

Should leave to appeal be granted, the Federal Court of Appeal may make orders to correct these errors of law and jurisdiction, ensure that all required environmental assessments are conducted in a way that takes TWN's constitutionally protected Aboriginal title and rights into account, and re-establish the role of the Crown in advancing reconciliation with First Nations.

Each ground of appeal may result in the Federal Court of Appeal overturning the decisions made to date, thereby restarting the regulatory process for the Kinder Morgan Trans Mountain pipeline and tanker project and potentially pushing a Cabinet decision well into 2016. The NEB could have to start its process from the beginning, cooperating with TWN in the design of the process, and the scope and factors to be considered.