Intelligence MEMOS

From: Andrew Roman

To: The Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General, and
The Honourable Amarjeet Sohi, Minister of Natural Resources.

Date: September 20, 2018

Re: APPEALING THE TRANS MOUNTAIN DECISION

Following the Federal Court of Appeal's August 30th decision quashing approval of the Trans Mountain pipeline expansion, the federal government is rightly addressing what the FCA held as deficiencies. However, the government should appeal the decision to the Supreme Court of Canada. Canada needs legal certainty around the relationship between mandatory considerations in project assessment and the definition of a "designated project" that requires an environmental assessment. As it is, the revisions to environmental assessment under Bill C-69 (which overhauls the *Canadian Environmental Assessment Act 2012*) do not provide this certainty, without which investors will be deterred from proposing new projects.

During judicial review of government agencies the test is not whether the court would have made the same decision, but whether the decision fell within a range that was reasonable, interpreting the statute purposively, not literally.

The FCA decision is unprecedented because it is the first to consider potential marine effects of a pipeline. Such effects are outside of the proponent's pipeline on land. If licensed, Trans Mountain could only control and operate its pipeline. The pipeline's customers charter the tankers, the Port of Vancouver controls local tanker traffic, and the government controls tanker traffic elsewhere in Canadian waters. Therefore, the potential effects of tanker traffic could not be made a licence condition. As the sole purpose of a project assessment is for the Cabinet to decide whether to license it, the statutory purpose cannot be to require the National Energy Board's assessment to consider effects beyond the proponent's control.

Since Cabinet has full jurisdiction to consider effects outside of the project, the NEB reasonably limited its assessment to consideration of licence conditions that could be imposed on the proponent. Despite this, the NEB's report provided some discussion of the potential impacts of marine traffic. As other federal departments and agencies have been working to protect the orcas from various environmental threats, Cabinet's approval would have considered mitigation of all potential impacts on the orcas.

The University of Calgary's Martin Olszynski has commented that the NEB's decision is inconsistent with the SCC's 1992 *Oldman River* decision That decision (which did not involve the NEB) held that the decision maker (the Minister) must take specified considerations into account in the environmental impact assessment. But the NEB is not the decision maker, and the applicable statutes are quite different today. Neither that decision, nor any other I am aware of, has held that under current federal legislation the NEB must expand its assessment beyond the proposed construction to consider secondary effects, leading to licence conditions with which a proponent cannot possibly comply.

Because the NEB cannot itself regulate tanker traffic and because Cabinet (the actual decision-maker) would consider potential marine effects, limiting the NEB's assessment to the project proposed by the proponent was within the range of reasonable alternatives.

Uncertainty about the finality of approval contributed to Kinder Morgan's sale of the pipeline to the federal government. But the government cannot buy every proposed project faced with such uncertainty. Therefore, the government should improve legal clarity through an appeal to the SCC and amendments to Bill C-69.

Andrew Roman practiced administrative and environmental law for 40 years prior to his retirement. He has also been an adjunct law professor at four Canadian law schools and is the author of more than 100 published articles.

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