

Intelligence MEMOS



From: Andrew Roman
To: Concerned Canadians
Date: October 10, 2018
Re: **THE TRANS MOUNTAIN APPEAL: DELAY IS DENIAL**

The Supreme Court of Canada has held that the Crown's duty of consultation does not give aboriginal peoples a legal right to veto project approvals. Yet the Federal Court of Appeal's Trans Mountain decision in August has created an effective veto.

The court held that the Crown's consultation with several First Nations about their pipeline concerns was insufficient. Unless this decision is appealed successfully, consultation will be a recurrent problem because the people consulting cannot decide anything and the people deciding (the cabinet) cannot do the consulting. Ottawa's retaining retired Supreme Court justice Frank Iacobucci for further consultations cannot fix this fundamental problem. He can no more respond in detail to every item on a long list of concerns, or make promises about future cabinet decisions, than could the earlier consulting team.

The federal court called the Crown "Canada", as that was the respondent named in the legal proceeding. "Canada" has the duty of consultation, but who is Canada? The cabinet? The minister? Their officials attending the consulting meetings? The decision repeatedly treated "Canada" as synonymous with the officials. But these officials are not equal to "Canada". "Canada" has a complex government hierarchy with different levels of authority. Legal labels like "Crown" and "Canada" should not obscure the reality of who can do what in our government.

The court criticized Canada's consultation staff for note-taking and communicating concerns to the cabinet, for being a conduit rather than providing a responsive two-way dialogue. Whatever two-way dialogue the court expected, without any explanation, is difficult to imagine. Appointing the distinguished Mr. Iacobucci to fix the consultation shows honourable intentions, but even he cannot fix the disconnect between the court's view of consultation and the reality of government processes.

It is unclear how "Canada" could ever avoid the court's criticisms unless the entire cabinet met with each First Nation. Such a requirement would run contrary to the Supreme Court's 2017 decision in *Clyde River* that a minister had no such duty.

Some First Nations characterized any issue they raised during the consultation process as being their "concern." Many of these would have required responses with new studies of questionable value, occupying months or years, fatally delaying the project. Some of the most generic, time-consuming "concerns," e.g., the economic need for the project, had no clear link to any asserted Aboriginal right.

The federal court required the consultation staff to "grapple with" every expressed "concern" individually, regardless of relevance or timing constraints, and criticized any "generic" responses. But the Crown's decision timeline cannot be infinite, to grapple with every single concern added to a lengthy list of concerns. Concerns clearly related to a particular First Nation's rights in land or marine environments require adequate responses, but generic concerns not specifically related to that First Nation's Aboriginal rights can fairly be given a generic response.

The court decision encourages any First Nation firmly opposed to a project to increase greatly the number and complexity of its "concerns" and, when Canada responds, to demand extensions of time for the First Nation's further responses, which may include more "concerns."

A reviewing court should recognize that excessive consultation demands could create needless delay and uncertainty fatal to major projects. Any major project can only tolerate so much delay and uncertainty. Facing the uncertainty of the court challenge, Kinder Morgan stopped work on its approved project even before the August federal court decision. If the government had not purchased the project, the court challenge would have killed it. The uncertainty in the court's new standard for the duty to consult represents an effective veto on such projects.

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