



Intelligence MEMOS

From: Grant Bishop
To: The Hon. Amarjeet Sohi, Minister of Natural Resources, The Hon. Jody Wilson-Raybould, Minister of Justice.
Date: August 31, 2018
Re: **MOVING FORWARD ON TRANSMOUNTAIN**

Yesterday's [decision](#) by the Federal Court of Appeal to quash the federal cabinet's approval of the TransMountain pipeline expansion exacerbates the uncertainty facing investment in major energy projects and exhibits the complex legal issues at play – particularly the still-evolving duty to consult and accommodate Aboriginal peoples.

Much immediate reaction has been despair that Canada cannot get pipelines built – and tempers have flared in Western Canada. However, this is not the end for TransMountain: The project's additional capacity is critical to get Canadian oil to global markets and relieve the discount faced by western Canada producers. The [C.D. Howe Institute's oil & gas competitiveness scorecard](#) underscores the overwhelming impact from this discount on attractiveness for investment in Canadian energy.

But the court's decision is not "back to the drawing board". In its 272-page reasons the court actually rejected most of the grounds asserted against the project. It also pointed the path forward for the federal government to resolve its errors in an expedited and focused manner in order to approve the project.

The federal government may consider grounds for appealing the decision to the Supreme Court of Canada; however, even if appealing, Ottawa should expeditely move to address the two issues on which the court quashed the approval: First, the court found the National Energy Board unjustifiably excluded an increase in tanker traffic from the project definition for the scope of the NEB's environmental assessment. Second, the court found the federal government had inadequately consulted affected Aboriginal groups at the final "Phase III" stage.

The court's reasoning on the first error is somewhat convoluted – and its lack of deference to the reasonableness of the NEB's scoping represents a possible ground for appeal. While the NEB excluded increased tanker traffic from its definition of the TransMountain project, the [NEB's report](#) nonetheless featured a chapter on the environmental and socio-economic effects of increased tanker traffic – in particular, examining the potential adverse effects on southern resident killer whales. But the NEB emphasized that it lacked authority to regulate marine traffic directly and therefore could not itself ensure mitigation of tanker-related effects. Notably, cabinet's [explanatory note](#) for approving the TransMountain project also expressly discussed mitigation for impacts on killer whale habitat.

Nonetheless, the court held that the NEB's written reasons had not sufficiently justified excluding tanker traffic from the project definition, and this resulted in the NEB's finding that the project would not cause significant adverse effects. Given the potential effects on killer whales, the court held that cabinet was on notice of this error and should have not given approval until all feasible mitigation was in place.

The second error is about the constitutional duty to consult Aboriginal peoples. Here, the court held that the federal government got the consultation framework right but fell short on the execution. It found that the federal government representatives recorded concerns but did not engage in dialogue, failing to give serious consideration to measures that would accommodate Aboriginal concerns. The evidence may be disputed on an appeal, but the court's reasons carefully canvass instances where consultation was insufficient.

Such a misstep on Aboriginal consultation by this federal government is surprising: Phase III consultation took place after guidance from a string of duty to consult cases (including the Federal Court of Appeal's 2016 [decision on Northern Gateway](#)), and Ottawa should have been closely attuned to Aboriginal concerns around the project. Alberta's government has pushed for the federal government to legislatively affirm the NEB's scoping of the project (i.e., to exclude tanker traffic); however, the duty to consult is a constitutional requirement, which Parliament cannot circumvent.

The ball is now in the federal government's court to get TransMountain back on track and the Federal Court of Appeal has outlined what is required to move ahead. Beyond this, the federal government must establish confidence and predictability for the review of future projects – a critical concern with many uncertain about the pending revisions to impact assessment under [Bill C-69](#) (up for reading by the Senate this fall).

Grant Bishop is Associate Director, Research at the C.D. Howe Institute.

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