The TMX Expansion and the Duty to Consult and Accommodate

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The History

Outline

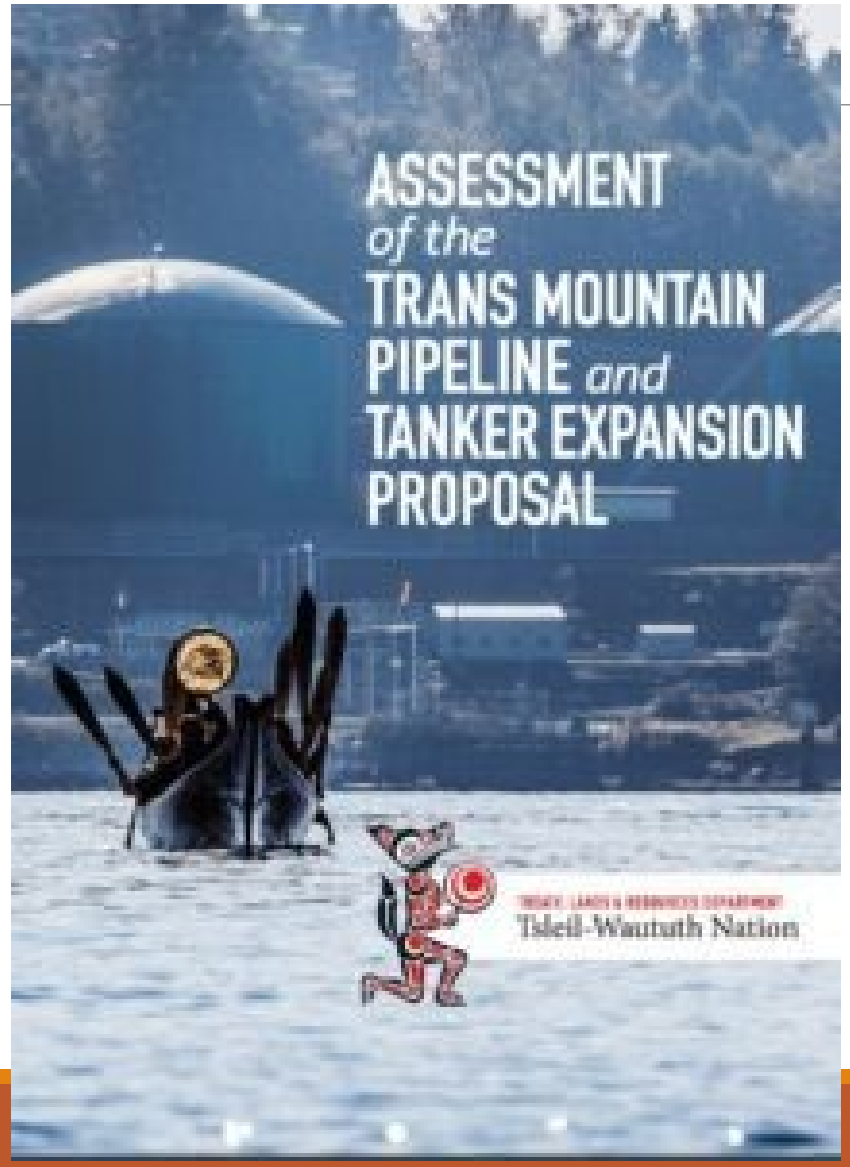
- Brief overview of the duty to consult
- Review of the Tsleil-Waututh decision
- Discussion of the reasons provided on leave to appeal
- Review of Crown Consultation and Accommodation efforts

The Duty to Consult

"The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof."

- Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, at para 27

Tsleil-Waututh Nation v. Canada, FCA 2018



Four Phase Process

“Phase I”: early engagement, from the submission of the Project description to the start of the National Energy Board hearing;

“Phase II”: the National Energy Board hearing, commencing with the start of the Board hearing and continuing until the close of the hearing record;

“Phase III”: consideration by the Governor in Council, commencing with the close of the hearing record and continuing until the Governor in Council rendered its decision in relation to the Project; and

“Phase IV”: regulatory authorization should the Project be approved, commencing with the decision of the Governor in Council and continuing until the issuance of department regulatory approvals, if required.

The Design

"[549] I am satisfied that the consultation framework selected by Canada was reasonable. It was sufficient, if properly implemented, to enable Canada to make reasonable efforts to inform itself and consult. Put another way, this process, if reasonably implemented, could have resulted in mutual understanding on the core issues and a demonstrably serious consideration of accommodation."

The Execution

"Canada's execution of Phase III of the consultation process was unacceptably flawed and fell short of the standard prescribed by the jurisprudence of the Supreme Court. As such, the consultation process fell short of the required mark for reasonable consultation."

The Leave to Appeal

"In the period between August 30, 2018 (the date of the decision in Tsleil-Waututh Nation) to June 18, 2019 (the date of the Governor in Council's decision) was the consultation with Indigenous peoples and First Nations adequate in law to address the shortcomings in the earlier consultation process that were summarized at paras 557-563 of Tsleil-Waututh Nation?"

Crown Consultation and Accommodation