VANCOUVER CALGARY TORONTO OTTAWA HALIFAX

ecojustice

Dyna Tuytel &
Margot Venton
390-425 Carrall Street
Vancouver, BC V6B 6E3
Telephone: (604) 685-5618
Fax: (604) 685-7813
E-Mail: dtuytel@ecojustice.ca,
mventon@ecojustice.ca
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Sent via E-mail to Panel.RBT2@ceaa.gc.ca

Review Panel, Roberts Bank Terminal 2 Project
Canadian Environmental Assessment Agency
160 Elgin Street, 22nd floor
Ottawa, ON K1A 0H3

To the Panel:

Re: Terms of Reference and scope of environmental assessment for Roberts Bank Terminal 2 Project

We represent the David Suzuki Foundation, Georgia Strait Alliance, Raincoast Conservation Foundation, and the Wilderness Committee (the "Conservation Groups") in the Canadian Environmental Assessment Agency environmental assessment of the Roberts Bank Terminal 2 Project (the "Project"). We write concerning the Terms of Reference and the scope of the Project for the purpose of the environmental assessment under the *Canadian Environmental Assessment Act, 2012* ("CEAA 2012").

As you know, the Federal Court of Appeal issued its judgment on August 30, 2018 in the case of *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 ("*Tsleil-Waututh*"), concerning the Trans Mountain Expansion Project. This decision affects the Panel's review of the Project.

Summary of *Tsleil-Waututh*

Tsleil-Waututh was an application for judicial review before the Federal Court of Appeal (the "Court") of the Governor in Council's approval of the Trans Mountain Expansion Project, which approval was based on the National Energy Board (the "Board")'s review and environmental assessment.

The Trans Mountain Expansion Project included a pipeline, marine terminal, and marine shipping. The pipeline was the physical activity that triggered the environmental assessment pursuant to the Regulations Designating Physical Activities under CEAA 2012.

In its environmental assessment, the Board included only the pipeline and marine shipping and excluded project-related marine shipping from its definition of the "designated project" to be assessed under CEAA 2012. The "designated project", as defined in s. 2 of CEAA 2012, includes physical activities "incidental" to the component of the project that triggers an environmental assessment. The Board considered marine shipping as a part of its review under the *National Energy Board Act* instead.

This approach made a practical difference. The Court noted that "the definition of the designated project truly frames the scope of the Board's analysis", because activities that are part of the designated project are assessed under CEAA 2012, and trigger additional obligations under s. 79(2) of the *Species at Risk Act* ("SARA").[1] The Court noted that the exclusion of marine shipping from the designated Project "permitted the Board to conclude that section 79 of the Species at Risk Act did not apply to its consideration of the effects of Project-related marine shipping" and "permitted the Board to conclude that, notwithstanding its conclusion that the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale, the Project (as defined by the Board) was not likely to cause significant adverse environmental effects."[2]

The Court held that "the Board erred by unjustifiably excluding Project-related marine shipping from the Project's definition", because marine shipping was part of the designated project.[3] The Court noted on the facts of that case that the primary purpose of the project was to provide additional marine transportation capacity for crude oil to Pacific Rim markets[4], and rejected "the Board's view that it was required to have regulatory authority over shipping in order to include shipping as part of the Project".[5]

The Court found that the Board "unjustifiably defined the scope of the Project under review not to include Project-related tanker traffic", which "led to successive, unacceptable deficiencies in the Board's report and recommendations."[6] Specifically, the Board concluded that the project would have significant adverse effects on Southern resident killer whales (the "Southern residents"), but found that the designated project would have no significant adverse environmental affects for the purposes of CEAA 2012 due to the Board's restrictive interpretation of the designated project.[7] The Board also unjustifiably failed to apply s. 79 of SARA to its consideration of the effects of marine shipping on the Southern residents.[8]

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[1] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 ("*Tsleil-Waututh*") at para 393.
[2] *Ibid* at para 469.
[3] *Ibid* at para 468.
[4] *Ibid* at para 395.
[5] *Ibid* at paras 401-402.
[6] *Ibid* at para 5.
[7] *Ibid* at para 430
[8] *Ibid* at para 449.

The Court held that the exclusion of marine shipping was a "critical error" which meant that "the Governor in Council could not rely on the Board's report and recommendations when assessing the Project's environmental effects and the overall public interest."[9] The Board's report was "so deficient that it could not qualify as a 'report' within the meaning of the legislation was it was unreasonable for the Governor in Council to rely upon it."[10] As such, the Order in Council approving the project was quashed.

The Minister of Natural Resources has confirmed that Canada will not appeal the decision.[11]

The Panel's current scoping of the Project excludes marine shipping

The Panel is currently not treating marine shipping as part of the designated project for the purposes of its environmental assessment of the Project under CEAA 2012. The EIS Guidelines and the Terms of Reference state that marine shipping "beyond the care and control of the proponent" will be "taken into account" pursuant to s. 19(1)(j) of CEAA 2012.

The Canadian Environmental Assessment Agency's April 17, 2015 "Updated Guidelines for the Preparation of an Environmental Impact Statement" for the Roberts Bank Terminal 2 Project (the "Updated EIS Guidelines") identify marine shipping as an "additional matter relevant to the environmental assessment that must be taken into account" pursuant to s. 19(1)(j), as opposed to part of the Project.[12]

The Updated EIS Guidelines further state that:

> The Minister's decision under CEAA 2012 on whether the Project is likely to cause significant adverse environmental effects, and any conditions to the proponent, should the Project be allowed to proceed, will be based on environmental effects that are caused by the Project.
> Marine shipping associated with the Project that is beyond the care and control of the Port is not considered to be part of the Project for the purposes of the environmental assessment. As a result, the Minister will not make a decision under CEAA 2012 about whether that marine shipping associated with the Project is likely to cause significant adverse environmental effects, and it will not be subject to conditions issued to the proponent in any decision statement allowing the Project to proceed. However, marine shipping associated with the Project is within the jurisdiction of the federal government. The environmental assessment

[9] *Ibid* at para 5.
[10] *Ibid* at para 470.
[11] Natural Resources Canada, News Release, "Government Announces Part II of Path Forward on the Trans Mountain Expansion Project" (Ottawa: 3 October 2018), online at https://www.canada.ca/en/natural-resources-canada/news/2018/10/government-announces-part-ii-of-path-forward-on-the-trans-mountain-expansion-project.html.
[12] Canadian Environmental Assessment Agency, Updated Guidelines for the Preparation of an Environmental Impact Statement, Pursuant to the *Canadian Environmental Assessment Act, 2012*, for the Roberts Bank Terminal 2 Project proposed by Port Metro Vancouver (17 April 2015), online at http://ceaa-acee.gc.ca/050/documents/p80054/101303E.pdf, at PDF page 2.

> will act as a means for the federal government to collect information on the effects of increased marine shipping associated with the Project for use by programs or activities within federal jurisdiction.[13]

Similarly, the April 2015 Terms of Reference state that "[...] the project includes all components associated with the Roberts Bank Terminal 2 Project that fall within the care and control of the proponent."[14]

The Terms of Reference further state that:

> 2.3. As required by the Minister pursuant to paragraph 19(1)(j) of CEAA 2012, the environmental assessment must also take into account the following matters that are relevant to the environmental assessment:
>
> 1. the environmental effects of marine shipping associated with the project which is beyond the care and control of the proponent and within the 12 nautical mile limit of Canada's territorial sea. Consideration includes the environmental effects of malfunctions or accidents and any cumulative environmental effects, the significance of those effects, suggested mitigation measures and the possible requirements of any follow-up program that may be required; and
> 2. the potential economic, social, heritage and health effects of the project, including cumulative effects, that may not be encompassed by the definition of environmental effects under CEAA 2012, and practicable means to mitigate such potential adverse effects.
>
> 2.4. For greater certainty, factors taken into account under 19(1)(j) of CEAA 2012 are not environmental effects of the project for the purposes of the Minister's decision on whether the project is likely to cause significant adverse environmental effects and will not be subject to conditions to the proponent in any decision statement issued by the Minister under CEAA 2012.[15]

<u>The Panel must revise the scope and Terms of Reference for its assessment of the Project</u>

The Panel's current scoping of the Project means that the Panel will not assess the environmental effects of marine shipping as environmental effects of the Project under CEAA 2012, and will not meet the obligations of s. 79(2) of SARA with respect to the environmental effects of marine shipping.

The Court in *Tsleil-Waututh* found, in a case with highly similar facts, that the marine shipping aspect of a project with a marine terminal, whose purpose is to enable marine shipping, must be considered part of the designated project for the purposes of CEAA 2012 and its effects must be assessed as environmental effects of the project. This is true regardless of who regulates marine shipping and whether the project proponent will be conducting the marine shipping.

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[13] *Ibid* at PDF pages 2-3.
[14] Canadian Environmental Assessment Agency, FINAL Roberts Bank Terminal 2 Project Review Panel Terms of Reference (April 2015), online at https://ceaa-acee.gc.ca/050/documents/p80054/101301E.pdf at page 2.
[15] *Ibid* at pages 2-3.

The facts are highly similar to the facts in *Tsleil-Waututh*. The marine terminal is the activity that triggers the environmental assessment pursuant to the Regulations Designating Physical Activities. Marine shipping is part of the designated project because it is "incidental" to the marine terminal for the purposes of the definition of the "designated project" in s. 2 of CEAA 2012. This is comparable to the Trans Mountain Expansion Project, where the pipeline was the activity that triggered an environmental assessment and, as the Court confirmed in *Tsleil-Waututh*, marine shipping should have been considered part of the designated project because it is "incidental" to the pipeline.

In both cases, the result is a lower standard for the review of marine shipping's effects. In *Tsleil-Waututh*, the Court noted that activities excluded from the designated project were assessed under the *National Energy Board Act*, on a discretionary basis, as opposed to being assessed under CEAA 2012 and its prescribed list of factors (in s. 19(1)(a), (b), (d), (g)), and consistent with the additional obligations of SARA with respect to SARA-listed species.[16] In the case of this Project, marine shipping would be assessed under the catch-all provision in s. 19(1)(j) of CEAA 2012, rather than pursuant to the stricter provisions in s. 19(1)(a), (b), (d) and (g) and the obligations under SARA.

It is clear from *Tsleil-Waututh* that the Panel's current scoping of the designated project for the purpose of its environmental assessment of the Project is unlawful under CEAA 2012. The Panel's current approach will result in a deficient environmental assessment report that does not meet the requirements of CEAA 2012 and SARA and that the Minister cannot rely on, similar to the Board's report in *Tsleil-Waututh*.

The Panel must include marine shipping as part of the Project for the purposes of its environmental assessment in order to comply with CEAA 2012.

Sincerely,

Dyna Tuytel
Barrister & Solicitor

Margot Venton
Barrister & Solicitor

c. David Suzuki Foundation
Georgia Strait Alliance
Raincoast Conservation Foundation
Wilderness Committee

[16] *Tsleil-Waututh* at paras 393-394, 411.