

Canada's New Energy Regulator and Pipelines



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Linear Projects – Map of Pipeline Networks



Pipeline means a line that is used or to be used for the transmission of oil, gas or any other commodity and that connects a province with any other province or provinces or extends beyond the limits of a province or the offshore area as defined in section 123, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property, or immovable and movable, and works connected to them, but does not include a sewer or water pipeline that is used or proposed to be used solely for municipal purposes; (pipeline)

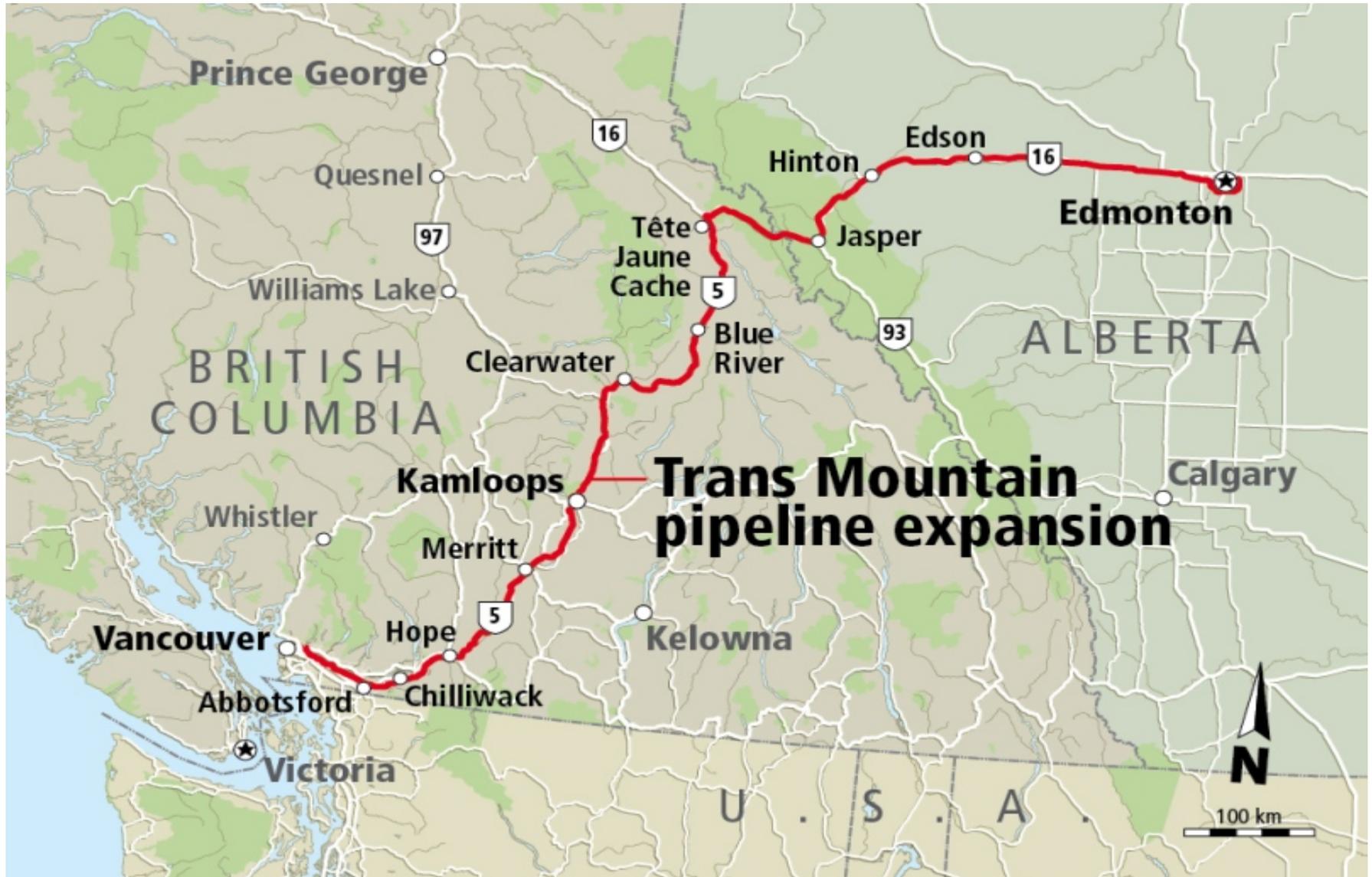
Bill C-69 Canadian Energy Regulator Act – similar definition

- “Proxy issues”
- Independence / impartiality
- Public Confidence
- First Nations opposition
- Provincial opposition
- Reviews:
 - NEB Modernization
 - Federal EIA process
 - Federal Fisheries Act

- Federal powers:
- Interconnecting “works and undertakings”
- Trade and Commerce
- Seacoast and Inland Fisheries; migratory birds
- Navigation and Shipping
- Criminal Law
- POGG

- Property and Civil Rights in the Province
- Ownership, management and sale of public lands and resources
- Nonrenewable natural resources and electricity generation
- Matters of a Local or Private Nature

- Exclusive federal and provincial powers
- Federal general power (limited)
- “pith and substance” (purpose and intent)
- Concurrent legislation potential
- If conflict (impossibility of dual compliance; frustration of legislative purpose), then federal paramountcy
- Example: *Burnaby v. Trans Mountain* (BCSC 2015) (Burnaby tree protection and planning bylaws)



- NEBA s. 52

Factors to Consider

- (2) In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:

(a) the availability of oil, gas or any other commodity to the pipeline;

(b) the existence of markets, actual or potential;

(c) the economic feasibility of the pipeline;

(d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and

(e) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.

First Nations Consultation: *Constitution Act 1982*, s. 35 and Judicial Decisions (follow)

Canadian Environmental Assessment Act, 2012



NEB failure to consider whether additional tanker traffic (potential harm to marine mammals under federal *Species at Risk Act*) should be considered part of the “project” for the purpose of conducting an environmental assessment

- **“Designated project”** means one or more physical activities that
 - (a) are carried out in Canada or on federal lands;
 - (b) are designated by regulations made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and
 - (c) are linked to the same federal authority as specified in those regulations or that order.
- It includes any physical activity that is incidental to those physical activities. (projet désigné)

- The Court at para 409:
- “The Board’s reasons do not well-explain its scoping decision, do not grapple with the relevant criteria and appear to be based on a rationale that is not supported by the statutory scheme. As explained in more detail below, it follows that the Board failed to comply with its statutory obligation to scope and assess the Project so as to provide the Governor in Council with a “report” that permitted the Governor in Council to make its decision.”

- Honour of the Crown
- Sliding scale
- Fact specific
- Example 1: Consultation meeting with Tsleil-Waututh representatives. Court, para 650-653:
 - 1. “In the view of Tsleil-Waututh, the Board erred by excluding Project-related shipping from the Project’s definition. Tsleil-Waututh was also of the view that the Board’s conditions did not address their concerns about marine shipping. For example, Tsleil-Waututh noted that very few of the Board’s conditions set out desired outcomes. Rather, they prescribed a means to secure an unspecified outcome.

- 2. At the consultation meeting of October 27, 2016, Canada's representatives repeatedly acknowledged Tsleil-Waututh's view that the Board's conditions were not sufficiently robust, that Project-related shipping ought to have been assessed under the *Canadian Environmental Assessment Act, 2012* and that the Board's failure to do so resulted in the further failure to impose conditions on marine shipping.

- 3. However, when the discussion turned to how to address Tsleil-Waututh's concerns, federal representatives noted that "proposals to strengthen marine shipping management, including nation to nation relationships, would take time to develop and strengthen." They went on to express optimism:
- ... that progress toward a higher standard of care could occur over the next few years with First Nations, at a nation to nation level, particularly on spill response and emergency preparedness capacities. As baseline capacities increased, risks would be reduced.

- 4. This generic and vague response that concerns could be addressed in the future, outside the scope of the Project and its approval, was Canada's only response. Canada did not suggest any concrete measures, such as additional conditions, to accommodate Tsleil-Waututh's concerns about marine shipping."

- Example 2. Consulting with Upper Nicola Nation representatives:
- Federal consultation representatives:
“Cabinet can’t impose additional conditions”
- Court: “this was incorrect” (para 634)

- 19(1) The environmental assessment of a designated project must take into account the following factors:
 - (a) the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;
 - (b) the significance of the effects referred to in paragraph (a);
 - (c) comments from the public — or, with respect to a designated project that requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, any interested party — that are received in accordance with this
 - (d) mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;

- (e) the requirements of the follow-up program in respect of the designated project;
- (f) the purpose of the designated project;
- (g) alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means;
- (h) any change to the designated project that may be caused by the environment;
- (i) the results of any relevant study conducted by a committee established under section 73 or 74;
- (j)) any other matter relevant to the environmental assessment that the responsible authority, or — if the environmental assessment is referred to a review panel — the Minister, requires to be taken into account.

- 22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:
 - (a) the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project, including...

- (i) the effects of malfunctions or accidents that may occur in connection with the designated project,
 - (ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and
 - (iii) the result of any interaction between those effects;
- (b) mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project;

- (c) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;
- (d) the purpose of and need for the designated project;

- (e) alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means;
- (f) any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;
- (g) Indigenous knowledge provided with respect to the designated project;
- (h) the extent to which the designated project contributes to sustainability;

- (i) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change; (also CERA)
- (j) any change to the designated project that may be caused by the environment;
- (k) the requirements of the follow-up program in respect of the designated project;
- (l) considerations related to Indigenous cultures raised with respect to the designated project;

- (m) community knowledge provided with respect to the designated project;
- (n) comments received from the public;
- (o) comments from a jurisdiction that are received in the course of consultations conducted under section 21;
- (p) any relevant assessment referred to in section 92, 93 or 95;
- (q) any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project;

- (r) any study or plan that is conducted or prepared by a jurisdiction — or an Indigenous governing body not referred to in paragraph (f) or (g) of the definition jurisdiction in section 2 — that is in respect of a region related to the designated project and that has been provided with respect to the project;
- (s) the intersection of sex and gender with other identity factors; and (also CERA)

- (t) any other matter relevant to the impact assessment that the Agency or — if the impact assessment is referred to a review panel — the Minister requires to be taken into account
- Scope of factors:
- (2) The scope of the factors to be taken into account under paragraphs (1)(a) to (f), (h) to (l) and (s) and (t) is determined by
 - (a) the Agency; or
 - (b) the Minister, if the impact assessment is referred to a review panel

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