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Federal Court of Appeal Quashes Trans Mountain Pipeline Approval: The Good, the Bad, and the Ugly

By: Martin Olszynski

Case Commented On: *Tsleil-Waututh Nation v. Canada (Attorney General)* [2018 FCA 153](#)

Last Thursday, the Federal Court of Appeal released its decision in *Tsleil-Waututh Nation v. Canada (Attorney General)*. Those following Canada's contentious pipeline debate will know that this was the primary legal challenge to Kinder Morgan's certificate of public convenience and necessity (CPCN or certificate) for its Trans Mountain Expansion Project (TMX) (for a series of related ABlawg posts, see [here](#)). The Federal Court of Appeal quashed the CPCN on two grounds: first, the Court held that the National Energy Board's (NEB) decision to exclude the increased marine traffic associated with the project from the environmental assessment (EA) conducted pursuant to the *Canadian Environmental Assessment Act, 2012* [SC 2012, c 19, s 52](#) (*CEAA, 2012*) was unreasonable; and second, Canada did not adequately discharge its constitutionally-rooted duty to consult and accommodate affected Indigenous peoples. This post focuses primarily on the first ground, although as will be seen the two are related. As further discussed below, the Federal Court of Appeal's analysis with respect to marine traffic appears to be on solid footing (the Good). More problematic is the Court's approach to the reviewability of EAs generally (*i.e.* the ability to challenge such reports in court) (the Bad). Most problematic, however, has been the decision's reception and distortion by various groups and individuals to make various claims that the decision simply does not substantiate (the Ugly).

The TMX Project and Regulatory Regime

As previously noted [here](#), Kinder Morgan applied to the NEB for approval of the TMX back in December 2013. The Court of Appeal described the project as follows – foreshadowing the importance that marine traffic would play in its analysis:

[12] The application described the Project to consist of a number of components, including: (i) twinning the existing pipeline system with approximately 987 kilometres of new pipeline segments, including new proposed pipeline corridors and rights-of-way, for the purpose of transporting diluted bitumen from Edmonton, Alberta to Burnaby, British Columbia; (ii) new and modified facilities, including pump stations and tanks (in particular, an expanded petroleum tank farm in Burnaby which would be expanded from 13 to 26 storage tanks); (iii) a new and expanded dock facility, including three new berths, at the Westridge Marine Terminal in Burnaby; and, (iv) two new pipelines running from the Burnaby storage facility to the Westridge Marine Terminal.

[13] *The Project would increase the number of tankers loaded at the Westridge Marine Terminal from approximately five Panamax and Aframax class tankers per month to approximately 34 Aframax class tankers per month. Aframax tankers are larger and carry more product than Panamax tankers. The Project would increase the overall capacity of Trans Mountain’s existing pipeline system from 300,000 barrels per day to 890,000 barrels per day.*

[14] *Trans Mountain’s application stated that the primary purpose of the Project is to provide additional capacity to transport crude oil from Alberta to markets in the Pacific Rim, including Asia. If built, the system would continue to transport crude oil—primarily diluted bitumen.*

(emphasis added)

For those unfamiliar with the relevant statutory schemes, the principal provisions are sections 52 – 54 of the *National Energy Board Act*, [RSC 1985, c N-7](#) (*NEBA*), which set out the process for obtaining a CPCN and the factors that the NEB may consider, including “any public interest that...may be affected by the issuance of a certificate”:

52 (1) If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister [of Natural Resources], and make public, a report setting out

- (a) its recommendation as to whether or not the certificate should be issued...taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation; and
- (b) regardless of the recommendation that the Board makes, all the terms and conditions that it considers necessary or desirable in the public interest to which the certificate will be subject...

(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... 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.

(3) *If the application relates to a designated project within the meaning of section 2 of the Canadian Environmental Assessment Act, 2012, the report must also set out the Board’s environmental assessment prepared under that Act in respect of that project...*

(emphasis added)

As noted by the Court of Appeal, upon receipt of such a report the Governor in Council (*i.e.* Cabinet) has three choices: (i) direct the NEB to issue the CPCN subject to the terms and conditions set out in its report; (ii) direct the NEB to dismiss the application; or (iii) “refer the recommendation, or any of the terms and conditions, set out in the report back to the NEB for reconsideration” (*Tsleil-Waututh* at para 64).

Because TMX is a “designated project” within the meaning of subsection 52(3) above, the NEB had to include, as part of its section 52 report, an EA report pursuant to *CEAA, 2012*. While several provisions of this statute are at play in *Tsleil-Waututh*, the most important for the purposes of this post are the definition of “designated project” and sections 29 – 31. Pursuant to subsection 2(1), “designated project” means one or more physical activities that

- (a) are carried out in Canada or on federal lands;
 - (b) are designated by the [Physical Activities, Regulations Designating, SOR/2012-147]; 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.*

(emphasis added)

As further discussed below, it was the NEB’s approach to the last part of this definition, and specifically its decision to exclude the planned increase in marine traffic from the project to be reviewed (what the NEB referred to as “project-related marine traffic”), that the Court of Appeal ultimately took issue with.

Section 29 requires the NEB to prepare an EA report, setting out its recommendation with respect to the likelihood, or not, of a project resulting in “significant adverse environmental effects” and any mitigation measures and follow-up programs to be implemented. Section 31 authorizes the Governor in Council, upon receipt of this report, to make the final determination as to whether a project is likely to result in such effects and, if so, whether such effects are “justified in the circumstances”. If such effects are not likely, or if they are likely but deemed justified, the Governor in Council may direct the NEB to issue a “decision statement” which sets out the mitigation measures and follow-up programs that the proponent must comply with. Subsection 31(5) states that such decision statements form part of any CPCN eventually issued by the NEB.

Finally, where a designated project may have an impact on a species listed under the *Species at Risk Act* [SC 2002, c 29](#), section 79 imposes a duty on persons (defined by subsection 79(3) to include federal authorities under *CEAA, 2012*) to notify the relevant Minister and to take measures to avoid or lessen those effects

79 (1) Every person who is required by or under an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted...must, without delay, notify the competent minister or ministers in writing of the project if it is likely to affect a listed wildlife species or its critical habitat.

(2) The person must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, *must ensure that measures are taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.*

(emphasis added)

Following roughly two years of hearings, the NEB issued its [report](#) (TMX report), including its EA report pursuant to *CEAA, 2012*, recommending that a CPCN be issued. As further discussed below, because the NEB considered the issue of increased marine traffic through its *NEBA* public interest mandate (*NEBA* paragraph 52(2)(e) above) rather than under *CEAA, 2012*, its EA report (found at Chapter 10 of the TMX report) recommended a finding that significant adverse environmental effects were not likely. It also did not formally engage in its *SARA* s 79 duty with respect to listed species, in this case Southern resident killer whales, again on the basis that project-related marine traffic was not formally part of the “designated project” assessed pursuant to *CEAA, 2012* (*Tsleil-Waututh* at para 448). Excluding project-related marine traffic, the project’s effects on marine mammals (especially in relation to the construction of the Westridge Marine Terminal) were deemed minor (TMX report at 224 – 225).

On November 29, 2016, and following consideration of the NEB’s report, as well as the *Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project*, Environment Canada’s *Review of Related Upstream Greenhouse Gas Emissions Estimates*, and the *Report from the Ministerial Panel for the Trans Mountain Expansion Project*, the Governor in Council directed the NEB to issue a CPCN for the project pursuant to s 54 of the *NEBA*.

The Good: Marine Traffic as an Incidental Physical Activity

As noted in some [media reports](#), the Court of Appeal dismissed the vast majority of the challenges to the EA report prepared by the NEB. This includes allegations that the hearings were procedurally unfair, for, among other reasons, the absence of any the opportunity of interveners to cross-examine Kinder Morgan; that the NEB failed to decide certain issues before recommending approval; and a failure to consider alternatives to the Westridge Marine Terminal (*Tsleil-Waututh* at paras 228 - 387).

Where the report did run into trouble was with respect to project-related marine traffic, which had knock-on effects on the NEB’s ultimate recommendation to the Governor in Council pursuant to section 29 of *CEAA, 2012* as well as *SARA* section 79. The Court of Appeal held that the NEB failed to provide a reasonable basis for the exclusion of marine traffic from the scope of review and remitted the matter back to it for reconsideration (*Tsleil-Waututh* at para 780). The Court’s analysis sets out several issues and factors that the NEB will need to “grapple” with in this context, which are worth citing in full:

[395] I begin my analysis with Trans Mountain’s application to the Board... In Volume 1 of the application, at pages 1-4, Trans Mountain describes the primary

purpose of the Project to be “*to provide additional transportation capacity for crude oil from Alberta to markets in the Pacific Rim including BC, Washington State, California and Asia.*” ...

[396] This evidence demonstrates that marine shipping is, at the least, an element that accompanies the Project. Canada argues that an element that accompanies a physical activity while not being a major part of the activity is not “incidental” to the physical activity. Canada says that this was what the Board implicitly found.

[397] The difficulty with this submission is that it is difficult to infer that this was indeed the Board’s finding, albeit an implicit finding. I say this because in its scoping decision the Board gave no reasons for its conclusion...

[398] Having defined the designated project not to include the increase in marine shipping, the Board dealt with the Project-related increase in marine shipping activities in Chapter 14 of its report [pursuant to its *NEBA* public interest mandate]. Consistent with the scoping decision, at the beginning of Chapter 14 the Board stated, at page 323:

As described in Section 14.2, marine vessel traffic is regulated by government agencies, such as Transport Canada, Port Metro Vancouver, Pacific Pilotage Authority and the Canadian Coast Guard, under a broad and detailed regulatory framework. The Board does not have regulatory oversight of marine vessel traffic, whether or not the vessel traffic relates to the Project. There is an existing regime that oversees marine vessel traffic. The Board’s regulatory oversight of the Project, as well as the scope of its assessment of the Project under the *Canadian Environmental Assessment Act (CEAA 2012)*, reaches from Edmonton to Burnaby, up to and including the Westridge Marine Terminal (WMT).... [Emphasis in original]

[399] Two points emerge from this passage. The first point is the closest the Board came to explaining its scoping decision was that the Board did not have regulatory oversight over marine vessel traffic. There is no indication that the Board grappled with this important issue. ...

[401] Neither Canada nor Trans Mountain point to any authority to the effect that a responsible authority conducting an [EA under *CEAA, 2012*] must itself have regulatory oversight over a particular subject matter in order for the responsible authority to be able to define a designated project to include physical activities that are properly incidental to the Project. The effect of the respondents’ submission is to impermissibly write the following italicized words into the definition of “designated project”: “It includes any physical activity that is incidental to those physical activities *and that is regulated by the responsible authority.*”

[402] In addition to being impermissibly restrictive, the Board’s view that it was required to have regulatory authority over shipping in order to include shipping as

part of the Project is inconsistent with the purposes of [CEAA, 2012] enumerated in subsection 4(1). These purposes include protecting the components of the environment that are within the legislative authority of Parliament and ensuring that designated projects are considered in a careful and precautionary manner to avoid significant adverse environmental effects. [emphasis in original]

[403] The second point that arises is that the phrase “incidental to” is not defined... It is not clear that the Board expressly directed its mind to whether Project-related marine shipping was in fact an activity “incidental” to the Project. Had it done so, the Canadian Environmental Assessment Agency’s [“Guide to Preparing a Description of a Designated Project under the Canadian Environmental Assessment Act, 2012”](#) provides a set of criteria relevant to the question of whether certain activities should be considered “incidental” to a project. These criteria are:

- (i) the nature of the proposed activities and whether they are subordinate or complementary to the designated project;
- (ii) whether the activity is within the care and control of the proponent;
- (iii) if the activity is to be undertaken by a third party, the nature of the relationship between the proponent and the third party and whether the proponent has the ability to “direct or influence” the carrying out of the activity;
- (iv) whether the activity is solely for the benefit of the proponent or is available for other proponents as well; and,
- (v) the federal and/or provincial regulatory requirements for the activity.

[404] The Board does not advert to, or grapple with, these criteria in its report. Had the Board grappled with these criteria it would have particularly considered whether marine shipping is subordinate or complementary to the Project and whether Trans Mountain is able to “direct or influence” aspects of tanker operations.

[405] In this regard, Trans Mountain stated in its application, on pages 8A-33 to 8A-34, that while it did not own or operate the vessels calling at the Westridge Marine Terminal, “it is an active member in the maritime community and works with BC maritime agencies to promote best practices and facilitate improvements to ensure the safety and efficiency of tanker traffic in the Salish Sea.” Trans Mountain also referenced its Tanker Acceptance Standard whereby it can prevent any tanker not approved by it from loading at the Westridge Marine Terminal...

[407] To similar effect, as discussed below in more detail, Trans Mountain committed...to require, through its tanker acceptance process, that tankers steer a certain course upon exiting the Juan de Fuca Strait.

[408] Trans Mountain’s ability to “direct or influence” tanker operations was a relevant factor for the Board to consider...

As noted at the outset of this post, in my view this analysis is sound. Support for the Court of Appeal’s conclusion that the scope of federal EA is not to be conflated with a given department

or agency's regulatory authority goes back as far as the Supreme Court of Canada's landmark ruling in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3. It is also supported by *CEAA, 2012*'s provisions regarding decision statements. Upon receipt of the NEB's report, it is the Governor in Council that makes a final determination as to a project's adverse effects and the conditions that may be included in a decision statement, which pursuant to subsection 31(5) become part of any subsequent CPCN. This suggests that the decision statement is different in kind from the CPCN; the NEB's authority limits the latter, not the former.

As an aside, even if the NEB were to somehow reasonably conclude that increased marine shipping is not an "incidental activity," in my view its effects would still seem to be caught by *CEAA, 2012*'s rules with respect to the kinds of environmental effects that an EA must consider. The argument here is distinct from the paragraph 19(1)(a) requirement to consider the project's potential for cumulative effects, which the NEB concluded would be "inconsequential" (TMX report at 225). Pursuant to section 5, an EA must consider, in relation to a designated project, changes to the environment that fall within Parliament's legislative authority, such as fish, fish habitat, and migratory birds (subs 5(1)), but also those changes that are "directly linked or necessarily incidental" to the exercise of a federal power or duty:

5(2) However, if the carrying out of the...designated project...requires a federal authority to exercise a power or perform a duty or function conferred on it under any Act of Parliament other than this Act, the following environmental effects are also to be taken into account:

(a) *a change...that may be caused to the environment and that is directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of ... the designated project...*

(emphasis added)

In other words, if the definition of "designated project" asks whether a physical activity is incidental to another physical activity, subsection 5(2) asks whether a change to the environment is "directly linked or necessarily incidental" to the exercise of a federal power. Bearing in mind that the NEB did consider the issue of marine traffic as part of its "public interest" mandate (see *Tsleil-Waututh* at para 394 for the nature of this determination), it would seem to follow that such a change in the environment is "directly linked or necessarily incidental" to its issuance of a CPCN. To my knowledge, the only panel to have considered this issue, the [New Prosperity Mine Panel](#), approached the question as follows: "'directly linked' environmental effects to be effects that *are the direct and proximate result of a federal decision*; and 'necessarily incidental' environmental effects are other effects that are substantially linked to a federal decision although they may be secondary or indirect effects." It seems incontrovertible that increased marine traffic will be a direct and proximate result of the issuance of a CPCN for TMX.

Having concluded that the NEB's decision to exclude project-related marine traffic from its EA was unreasonable, the Court of Appeal went on to consider whether this failure had any practical

effect, bearing in mind that, as noted above, the NEB did consider the issue pursuant to its *NEBA* mandate (see Chapter 14 of the TMX report). The Court’s review of the NEB’s report showed that the NEB considered:

- the effects of Project-related marine shipping on Southern resident killer whales;
- the significance of the effects;
- the *cumulative effect of Project-related marine shipping on the recovery of the Southern resident killer whale population*;
- the resulting significant, adverse effects on the traditional Indigenous use associated with the Southern resident killer whale;
- mitigation measures *within its regulatory authority*; and,
- *reasonable alternatives to Project-related marine shipping*.

(*Tsleil-Waututh* at para 438) (emphasis added)

However, because the NEB concluded that marine shipping was beyond its regulatory authority, “it assessed the effects of marine shipping *in the absence of mitigation measures and did not recommend any specific mitigation measures*. Instead it encouraged other regulatory authorities ‘to explore any such initiatives’” (*Tsleil-Waututh* at para 456) (emphasis added). Further, because these effects were considered outside the formal context of an EA under *CEAA, 2012*, the NEB also potentially failed to fulfill its *SARA* s 79 obligations to “ensure that measures are taken to avoid or lessen” effects on Southern resident killer whales “in a way that is consistent with any applicable recovery strategy and action plans” (*SARA* s 79). Assuming that upon reconsideration the NEB finds that marine shipping is an activity incidental to the construction and operation of the TMX, this is the hard work that a reconvened NEB panel will have to complete.

The Bad: Reviewability of Environmental Assessments

Before engaging in its analysis of the NEB’s report, the Court of Appeal first had to address arguments about the proper approach to judicial review in this context. Several parties argued that the approach set out in *Gitxaala Nation v. Canada*, [2016 FCA 187](#) (the Northern Gateway litigation) is incorrect. According to *Gitxaala*, EA reports under *CEAA, 2012* are not directly reviewable; rather it is the Governor in Council’s assessment of whether such reports are adequate that is reviewable. According to the applicants *Tsleil-Waututh*, this approach overlooked a long line of jurisprudence to the contrary, as well as the fact that the provisions at play in *Tsleil-Waututh* [were not actually applicable](#) to the Northern Gateway Project.

In a fairly remarkable series of paragraphs, the Court of Appeal conceded that the wrong provisions were applied in *Gitxaala* (*Tsleil-Waututh* at paras 188 – 189) but then doubled down on the approach set out therein, appearing to set aside twenty years of EA jurisprudence in the process:

[185] The City of Vancouver also points to jurisprudence in which environmental assessment reports prepared by joint review panels were judicially reviewed, and argues that this Court erred by failing to deal with this jurisprudence. The

authorities relied upon by Vancouver are: *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425...; *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C.R. 263...; *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302...; *Grand Riverkeeper, Labrador Inc. v. Canada (Attorney General)*, 2012 FC 1520...; and, *Greenpeace Canada v. Canada (Attorney General)*, 2014 FC 463...

[186] All of these authorities predate *Gitxaala*. They do not deal with the “complete code” of legislation that was before the Court in *Gitxaala*. But, more importantly, in none of these decisions was the availability of judicial review put in issue—this availability was assumed. In *Gitxaala* the Court reviewed the legislative scheme and explained why the report of the Joint Review Panel was not justiciable. The Court did not err by failing to refer to case law that had not considered this issue.

With respect, the availability of judicial review has indeed been previously considered. In *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*, [1998 CanLII 9122](#) (FCA), for example, the Federal Court of Appeal stated clearly that a joint review panel report was directly reviewable: “The combined effect...is that before taking a course of action, the Minister must consider an environmental assessment, that was conducted in accordance with the Act. Therefore, the *appellants are entitled to bring into question the report and are not barred from doing so because they did not challenge the federal response*” (emphasis added). And yet the Court of Appeal in *Tsleil-Waututh* barred the City of Vancouver’s application on exactly this ground (at para 203).

Ultimately, however, and bearing in mind the relatively robust review that the TMX report appears to have received under the guise of assessing the reasonableness of the Governor in Council’s acceptance of it, I wonder if the difference between the two approaches is more theoretical than practical. The real problem seems to lie in the uncertain and uneven application of reasonableness review in this context. In *Tsleil-Waututh*, reasonableness review required over two hundred paragraphs (excluding the duty to consult issues). In *Gitxaala*, on the other hand, it took just one stunningly brief one:

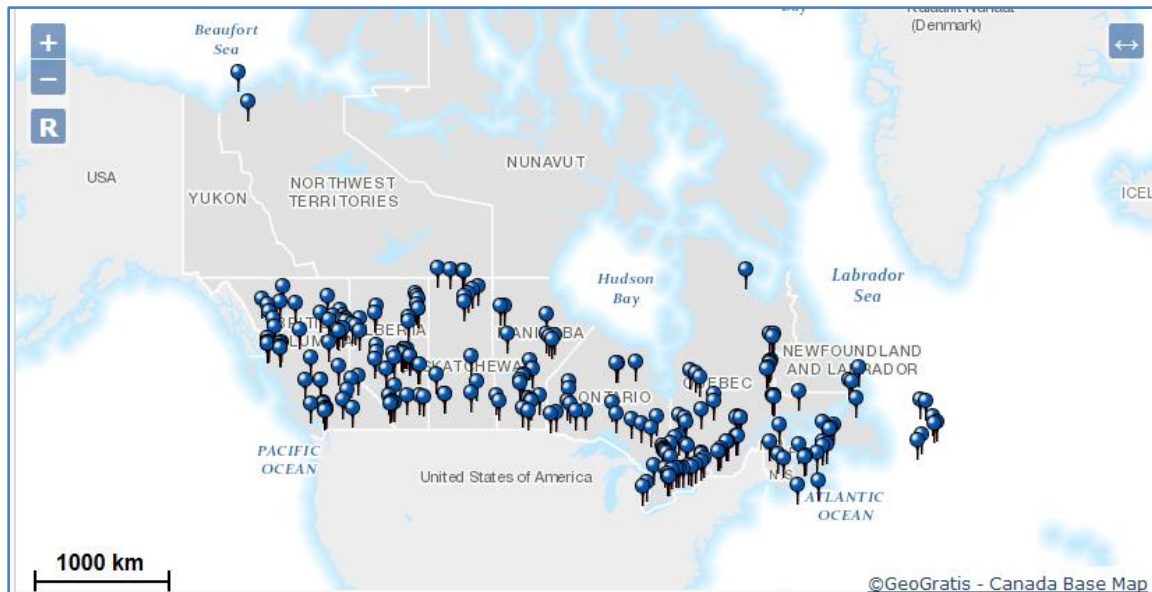
[157] The Governor in Council was entitled to assess the sufficiency of the information and recommendations it had received, balance all the considerations—economic, cultural, environmental and otherwise—and come to the conclusion it did. To rule otherwise would be to second-guess the Governor in Council’s appreciation of the facts, its choice of policy, its access to scientific expertise and its evaluation and weighing of competing public interest considerations, matters very much outside of the ken of the courts.

Similarly, the Federal Court’s direct review of the panel report in *Greenpeace Canada v Canada (Attorney General)* was [robust](#) but then, as Professor Meinhard Doelle and I described [here](#), the Court of Appeals’ subsequent appellate decision set an exceedingly low bar for such review. Hopefully, the Supreme Court will provide some clarity on the contours of reasonableness review when it reconsiders the current Canadian administrative law framework for judicial review [later this fall](#).

The Ugly: *Tsleil-Waututh*'s Reception and Distortion

One of the first reactions to *Tsleil-Waututh* was to decry Canada's regulatory regime as broken – that Canada cannot get its resources to market. One need only glance at the two hundred projects currently listed on the [Canadian Environmental Assessment Registry](#) to see that the vast majority do not end up in court or make the news (see Figure 1 below). The reality is that linear projects like interprovincial pipelines are exceptionally difficult to move through the system – and have been since 1957, when the original [TransCanada pipeline](#) cost C.D. Howe his government. It is also reasonable to suggest that pipelines contributed to Stephen Harper's defeat and they may well do the same to Justin Trudeau. All of which to say, the exception should not be put forward as the rule.

Figure 1: Map of Projects on the Canadian Environmental Assessment Registry



A related distortion is that this decision somehow impugns legislative reforms currently before the Senate, namely *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts* ([Bill C-69](#)). If anything, the *CEAA, 2012* aspects of the decision are an indictment of the 2012 changes made by the previous government. It is reasonable to suggest, for example, that granting the NEB sole authority for pipeline project EAs contributed to a narrow view of its mandate under that legislation. Bill C-69 would reinstate the pre-2012 *status quo* where the NEB reviewed projects jointly with a *CEAA* panel.

Finally, another [bad take](#) is that the EA-related shortcomings found in *Tsleil-Waututh* could be remedied simply by clarifying, through legislation, that the NEB has no jurisdiction over marine shipping. With respect and for the reasons set out above, this totally misses the mark. The Court of Appeal's main point was that regulatory mandates do not restrict the scope of EA under *CEAA, 2012*. More importantly, however, it would doom the federal government's efforts to

buttress its consultation efforts, bearing in mind that the significant adverse effects related to marine shipping are of particular concern to First Nations, including the Tsleil-Waututh (see *e.g.* para 389).

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