

# The ongoing battle for pipeline projects in Canada

## AUTHORS



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Canada has the world's [third-largest oil reserves and is currently the seventh-largest producer of crude oil](#). Oil production from the [Western Canada Sedimentary Basin \(WCSB\)](#), where the majority of Canada's crude oil is produced, has increased from 2.28M barrels per day (b/d) in 2005 to 4.14M in 2017, with estimates at 4.58M in 2018. Assuming the necessary infrastructure is built, the National Energy Board (NEB)<sup>1</sup> estimates [production from the WCSB](#) will grow to 6M b/d by 2030 and 6.7M b/d in 2040.

Whether the necessary infrastructure will be built, however, is a critical question facing Canada's oil and gas sector given the significant regulatory challenges and political uncertainty which exist in respect of building major pipelines.

While several pipeline projects have been proposed during the last decade, many have been cancelled or delayed as a result of regulatory challenges or political decisions. If all of the export pipelines applied for since 2012, which have now been cancelled or delayed, were instead approved and completed as per their original proposed in-service dates, then [3.42M b/d of additional capacity](#) would have been added to Canada's output by the beginning of 2019. Instead, between 2013 and 2016, only [1M b/d of nameplate crude oil pipeline capacity](#) was added and since then no additional capacity. As at September 2018, the amount of crude oil available for export in Canada exceeded available pipeline capacity by 202,000 b/d, or if measured by reference to pipeline throughput instead, approximately 365,000 b/d.<sup>2</sup>

This lack of takeaway capacity has contributed to a widening price differential for Western Canadian Select (WCS) compared to Western Texas Intermediate (WTI). Due to its lower quality and higher cost to transport to US refineries, WCS has historically sold at a discount to WTI. However, in 2018 the discount averaged US\$27.09 (with a discount of US\$50 per barrel on some trading days in October 2018) compared to an average differential of US\$12.95 per barrel between 2015 and 2017.<sup>3</sup> This widening differential prompted the government of Alberta, the major oil producing province in Canada, to mandate production curtailment from January 1 to December 31 2019. [The government cited](#) lack of sufficient pipeline and rail takeaway capacity, as well as storage facilities being at near capacity and asserted the differential was costing the Canadian economy more than C\$80M per day. While [various commentators](#) have claimed this figure may be inflated, the negative impact such lack of capacity has had on investment in Canada's oil and gas sector is undeniable. For example, [the Canadian Association of Petroleum Producers \(CAPP\) has forecasted](#) that capital investment across Canada's oil and natural gas sector will fall to C\$37B in 2019 compared to C\$81B in 2014.

## Canada's regulatory and political environment and its impact on major pipeline development

[A 2016 WorleyParsons review](#) of international government regulatory practices commissioned by CAPP found that while Canada has a state-of-the-art, environmental assessment process with globally recognized best practices, it is also one of the most expensive, time and resource consuming processes in the world. The review below of some of

the most high-profile pipeline projects in Canada in recent history confirms this conclusion and demonstrates the uncertain political and challenging regulatory environments within which major pipelines are approved and constructed.

As a preliminary matter, it is important to understand, at a high level, the way in which significant international or interprovincial oil or gas pipelines in Canada are currently approved:

First, approval of the Governor General, acting on the advice of the Prime Minister and Cabinet (Governor in Council) in the form of a certificate of public convenience and necessity and a positive federal environmental assessment decision statement is required. This involves an iterative process between the NEB, which is responsible for conducting the actual review and assessment of a project, including holding any required public hearings and making its report and recommendation,<sup>4</sup> and the Governor in Council, who is the ultimate decision maker.

Second, provinces have their own environmental assessment requirements that can be required in addition to the federal environmental assessment.

Finally, the federal, provincial and territorial governments in Canada have a legal duty to consult, and where appropriate, accommodate Indigenous groups when it considers decisions or actions that might potential adverse impacts or established aboriginal or treaty rights and such duty is required to be integrated into environmental assessment and regulatory review processes. The specific requirements of this duty have developed through case law and the degree of consultation and required accommodation can vary widely depending on the potential impact of the conduct on the aboriginal or treaty right as well as the particulars of the right in question. As demonstrated by the Northern Gateway and TMX examples below, the failure to conduct meaningful consultation can result in the delay or cancellation of a project.

## Northern Gateway

The Northern Gateway Pipeline proposed by Enbridge would have consisted of two parallel pipelines, one westbound pipeline carrying up to 525,000 b/d of diluted bitumen from Alberta to the west coast of Canada in British Columbia (BC), for loading onto tankers for delivery to export markets and the other, an eastbound pipeline carrying 193,000 b/d of condensate. Applied for in 2010, the Joint Review Panel recommended,<sup>5</sup> in 2013, that the federal government approve the project subject to 209 conditions. The federal government, then ruled by the Conservatives, accepted the recommendation and approved the project in mid-2014, subject to the same conditions recommended by the Joint Review Panel.<sup>6</sup> Thereafter 18 legal challenges to the federal government's approval were launched and in mid-2015, the Federal Court of Appeal ruled that the prior Conservative government had failed in its duty to consult and accordingly, quashed the orders made by the Governor in Council and the approvals subsequently issued by the Joint Review Panel.<sup>7</sup> By this time, the Liberals had gained control of the government and decided not to conduct the necessary additional Indigenous consultations and instead in late 2016, directed the NEB to dismiss the Northern Gateway Project citing concerns about crude oil tankers transiting through [sensitive ecosystems](#).

## Energy East

The application for Energy East was filed by TransCanada Pipelines (TCP) in October 2014. The project would have delivered 1.1M b/d of diluted bitumen from western Canada to eastern Canada with 70 per cent of the pipeline coming from the conversion of an existing natural gas pipeline. In response to environmental concerns and objections, [TransCanada filed an amended application for Energy East](#) in late 2015 which made almost 700 route changes and updated its cost estimate from C\$12B to C\$15.7B. Thereafter, the NEB's review encountered several delays, including a decision to restart the entire hearing process in January 2017 and then in August 2017, [the NEB announced](#) that, for the first time, it would consider upstream and downstream greenhouse gas emissions in its assessment of the project. Shortly thereafter, in early October 2017, the [application for Energy East was withdrawn](#) by TCP "after careful review of changed circumstances". The company estimated a C\$1B after-tax non-cash charge would be recorded in its fourth quarter results as a result of its abandonment of the project.<sup>8</sup>

## Trans Mountain

The Trans Mountain Expansion Project (TMX) is a proposal to twin the existing Trans Mountain pipeline and expand a marine terminal in BC. TMX would increase Trans Mountain's shipping capacity from 300,000 b/d to 890,000 b/d. At the time its application to the NEB was submitted in 2013, the estimated in-service date was December 2019. In May

2016, the NEB recommended approval of TMX, subject to 157 conditions and in November 2016, the Liberal government approved TMX, subject to the same conditions.<sup>9</sup> Thereafter, in 2017 the then Liberal government of BC, having secured an unprecedented revenue sharing agreement with worth up to C\$1B, together with satisfaction of other conditions it had placed on its approval, announced its support for TMX. However, in mid-2017, the BC Liberal government was ousted from power and replaced with a minority NDP (New Democratic Party) government backed by the Green Party [pursuant to an agreement](#) to “immediately employ every tool available to the new government to stop the expansion of the Kinder Morgan pipeline”. Thereafter, the new BC government joined existing legal actions which challenged the federal government’s approval of TMX and further launched a constitutional reference case to determine its ability to place “[restrictions on the increase of diluted bitumen transportation](#)” through its borders (the *BC Reference Case*).

On April 8 2018, Kinder Morgan Canada Ltd, having already spent approximately C\$1.1B on TMX, announced that it was [suspending all non-essential activities and related spending](#) on TMX as a result of the uncertainty created by the BC government’s actions and stated that if agreement could not be reached between all stakeholders by 31 May 2018, it would not be possible to proceed with TMX. On May 29 2018, [the government of Canada announced](#) it would purchase the Trans Mountain pipeline system for C\$4.5B and thereafter seek a third-party buyer. The day after completion of this transaction, the Federal Court of Appeal overturned the federal government’s approval of TMX on the basis that the government had breached its duty to consult with Indigenous groups and because the NEB had excluded the impact of marine traffic from its environmental assessment review.<sup>10</sup> Up to this point, the TMX project had won [16 consecutive legal battles](#).

## Present and future: more challenges and uncertainty

As of the end of June 2019, the following significant matters affecting the future of pipelines in Canada and accordingly, the nation’s entire oil and gas sector remained outstanding:

### BC reference case

In May 2019, the BC Court of Appeal unanimously ruled against the BC government’s proposed regulations which would require a hazardous substance permit be obtained to transport any increased amount of heavy oil through BC.<sup>11</sup> The BC government has indicated its intent to appeal and with an automatic right to appeal in respect of constitutional reference questions submitted to its highest court, the Supreme Court of Canada will hear the appeal if it is made.

### Trans Mountain

In mid-June 2019, the federal government re-approved TMX. No date has been set for the commencement of construction, although the CEO for TMX has stated it could be as early as [September 2019](#).

### Bill C-69

Bill C-69<sup>12</sup> was introduced by the federal Liberal government in February 2018 and seeks to overhaul how major infrastructure projects, including interprovincial pipelines, are reviewed and approved in Canada. Dubbed the ‘No More Pipelines Law’ by many in the energy industry, Bill C-69 has been controversial from the beginning with opponents claiming it will in fact lengthen and complicate the regulatory process, increase litigation risk and present a significant barrier to future investment in Canada. An amended version of Bill C-69 cleared the final hurdle to becoming law and received royal assent in June 2019. The government of Alberta has vowed to launch a constitutional challenge to Bill C-69 and Bill C-48.

### Bill C-48

Bill C-48<sup>13</sup> was introduced by the Liberal government in May 2017 and seeks to formalise a crude oil tanker moratorium. [Opponents claim](#) the bill will effectively prevent construction of oil export facilities and associated pipelines on the northern portion of the coast of BC thereby impairing Canada’s ability to export crude oil to growing global markets in Asia. Bill C-48 received royal assent on the same day as Bill C-69.

## US legal challenges

Cross-border pipelines such as Enbridge's Line 3 Replacement Project, originally estimated to be in service before the end of 2019, and TCP's XL pipeline, approved in Canada in 2010, have also encountered significant opposition on the US side of the border and have been delayed due to legal challenges which remain unresolved.

## Conclusion

While there is some potential relief on the horizon in light of TMX's recent re-approval and if any of the Line 3 Replacement Project or Keystone XL receive their outstanding approvals, there is nevertheless as much uncertainty, now as ever, as to whether the infrastructure necessary to expand Canada's oil and gas sector will be built. Unless the sector gains more confidence in the Canadian regulatory regime and its ability to build pipelines and other infrastructure on time and to budget, these projects will struggle to attract investment capital. Even with positive legal decisions and catalysts in favour of these projects, it will take years to recover from the chilling effect legal challenges, political decisions and takeaway capacity issues have had on Canada's oil and gas sector.

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<sup>1</sup> The NEB is the national regulator responsible for the oversight of the approval, construction and operation of, inter alia, interprovincial and international oil and gas pipelines in Canada.

<sup>2</sup> WCS Supply Markets and Pipeline Capacity, note 10.

<sup>3</sup> *Ibid*, 12.

<sup>4</sup> The NEB's authority as described derives from the *National Energy Board Act*, RSC 1985, c N-7 and the *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19.

<sup>5</sup> At the time the application for Northern Gateway was submitted, the former federal environmental review assessment process applied and accordingly, a Joint Review Panel was established by the Minister of the Environment and the NEB to conduct both the assessment of environmental effects required under the former Canadian Environmental Assessment Act, SC 1992, c 37 and the application for certificates of public convenience and necessity required under the NEB Act.

<sup>6</sup> PC 2014-809, 17 June 2014, *Canada Gazette*, Part 1, Vol 148, no 26, p 1645, 28 June 2014.

<sup>7</sup> *Gitxaala Nation v Canada*, 2016 FCA 187 (FCA) at paragraphs 325-333.

<sup>8</sup> See more in TC Energy's "[TransCanada Announces Termination of Energy East Pipeline and Eastern Mainline Projects](#)".

<sup>9</sup> PC 2016-1069, 29 November 2016, Supplement to *Canada Gazette*, Part 1, Vol 150, no 50, p 2, 10 December 2016.

<sup>10</sup> *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 (FCA) at paragraphs 744-772.

<sup>11</sup> *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 (BCCA) at paragraphs 105-106.

<sup>12</sup> *An Act to enact the Impact Assessment Act and the Canadian Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Session, 42nd Parliament, 2019, Royal Assent 21 June 2019.

<sup>13</sup> *An Act respecting the regulation of vessels that transport crude or persistent oil to or from ports or marine installations along British Columbia's north coast*, 1st Session, 42nd Parliament, 2019, Royal Assent 21 June 2019.

To discuss these issues, please contact the author(s).

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