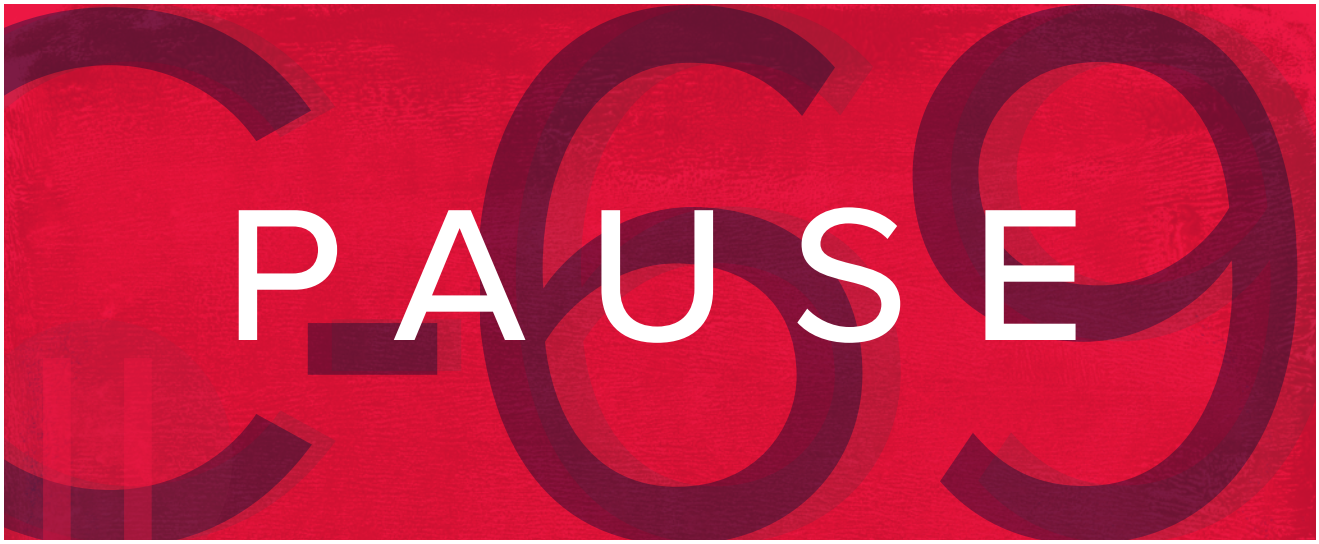


# WHAT NOW?

## TMX and Bill C-69

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Martha is a thought leader whose career has been diverse, spanning law, business, technology, politics and public policy.

**The TMX Federal Court of Appeal decision provides even more reason to pause Bill C-69.**

The recent Federal Court of Appeal decision on the Trans Mountain pipeline expansion (TMX) (Tsleil-Waututh Nation v. Canada (Attorney General) may be – wait for it – the best thing to happen to Canada's investment climate in a long time.

What?

Yes – although it will add a bit more delay to the TMX project itself, it has added significantly to the clarity – yes, clarity – needed for investors for all currently planned and future projects; it should also silence much of the protest that has rendered building infrastructure so difficult in this country. The law of the land, thanks to this decision which builds on several prior court decisions, is finally clear on what the respective participants in any major project must do. And if they do what is prescribed properly, the rule of law will support them. Canada, and in particular our resource sector, has been yearning for this clarity for years.

BUT – the Canadian government is about to toss this hard-won opportunity out the window. The long-term effects of this mistake on both our Canadian economic and social prosperity could be massive. This is not an overreaction – Bill C-69 is absolutely the wrong thing to do right now, **because it will set our entire project-approval process back to square one, and reopen every potential economic development project to a new round of protests, court battles, years of delays and investment uncertainty**. In the process, we will also lose an extraordinary opportunity to significantly move forward in reconciliation with Indigenous peoples.

Why on Earth would we do this to ourselves?

This is what the good people in the Senate must question. They are being asked to pass Bill C-69, a seriously flawed piece of proposed legislation, after appallingly minimal review by the House of Commons, despite the potential harm to Canada's economy. This is a critical moment for true sober second thought – and a critical moment for the country.

## Why we are so bullish about the TMX decision?

Despite some extreme reactions at both the positive and negative ends of the spectrum, the Federal Court of Appeal has not stopped the TMX project – far from it. The TMX decision determined that there are only two things that need to be done in order for the project to go ahead. The two issues the court raised are not unreasonable – and the court itself made it clear that they are limited and addressable.

The decision provides a positive way forward for the construction of the pipeline, AND the interests of Indigenous communities with legitimate concerns, AND those with legitimate environmental concerns. This decision has also made it clear that i) real concerns need to be addressed, ii) neither the environmental concerns nor Indigenous community concerns can be limitless, and iii) no one has a veto. The added certainty on these points means the decision should be welcomed by both infrastructure proponents and those with legitimate environmental and Indigenous rights concerns.

**The NEB's process**

The first issue that needs to be rectified is the NEB's decision concerning the project's scope. The court found that the NEB "unjustifiably excluded Project-related shipping from the Project's definition." This exclusion 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 shipping. "Specifically," the court said, the NEB "ought to reconsider on a principled basis whether Project-related shipping is incidental to the Project, the application of section 79 of the Species at Risk Act to Project-related shipping, the Board's environmental assessment of the Project in the light of the Project's definition, the Board's recommendation under subsection 29(1) of the *Canadian Environmental Assessment Act*, 2012 and any other matter the Governor in Council [Prime Minister and Cabinet] should consider appropriate."[1]

The federal government has already started this process. On September 20, Cabinet referred the NEB's report back for reconsideration and has given the regulatory agency 22 weeks to do the work. The NEB has announced its process to do so. Following the court's guidance, the entire process will not start over. Evidence that has been submitted will be reconsidered as well as new evidence. The NEB's draft list of issues begins where the previous process left off – specifically given that the NEB found significant adverse effects in its original assessment, this process will focus on possible mitigation measures and any other marine animal life that may have been added to the Species at Risk list since the last consideration.

**The bigger implication of this part of the decision is that the court, having reviewed the entire NEB process in detail, found only a small, fixable part wanting.** Like the *Gitxaala Nation v. Canada*, 2016 FCA 187 (Northern Gateway) decision, the TMX decision found no evidence "that the Board breached any duty of procedural fairness,"[2] and that the delegation of the duty to consult to the Joint Review Panel was not unacceptable or unreasonable.[3] In addition, the judge further noted that the NEB approach was based on consideration of factual and technical considerations well within the expertise of the Board.[4]

This means that the NEB is not nearly as "flawed" as some would want people to believe. Indeed, the process has now withstood deep and thorough review from multiple court challenges. Stakeholders must now accept that, other than for its exclusion of marine shipping, the NEB process was acceptable – indeed, the law of the land has given the NEB process a stamp of approval. And those who have been protesting and launching court challenges cannot now complain.

**The Duty to Consult**

On the federal government's duty to consult with Indigenous peoples, here, too, the court was very specific.

> *"Further, Canada must re-do its Phase III consultation. Only after that consultation is completed and any accommodation made can the Project be put before the Governor in Council for approval",* ***but*** *"... the dialogue Canada must engage in can* ***also be specific and focussed. This may serve to make the corrected consultation process brief and efficient while ensuring it is meaningful.*** *The end result may be a short delay, but, through possible accommodation the corrected consultation may further the objective of reconciliation with Indigenous peoples"*[5] [emphasis added].

This simply reinforces prior jurisprudence that holds that the duty to consult is critical, must be meaningful, but is not limitless – and by no means provides a veto: *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 determined that notwithstanding the duty to consult, governments can still infringe proven Aboriginal title, provided they meet the established tests for "justification".[6] *Gitxaala Nation v. Canada*, 2016 FCA 187 (Northern Gateway); *Clyde River (Hamlet) v. Petroleum Geo-Services Inc,* 2017 SCC 40; and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc,* 2017 SCC 41, all provided detailed guidance on what constitutes consultation. On this point, **the federal court did not create further delay; the federal government knew what to do, but simply didn't do it.**

Phase IV[7] was "Canada's first opportunity – and its last opportunity before the Governor in Council's decision – to engage in direct consultation and dialogue with affected First Nations on matters of substance, not procedure, concerning the Project."[8] **Importantly, the majority offered its view that a "short extension of time – in the neighbourhood of four months – might have been enough to solve the problems faced in Phase IV"**[9] [emphasis added]. The court provided encouragement that the decision could be redetermined after fulfilling the duty to consult by redoing its Phase IV consultation, "a matter that, if well-organized and well-executed, need not take long."[10]

However, the federal government decided not to fulfill this duty, thus denying Northern Gateway the chance to proceed. Had the federal government followed, for TMX, the direction of the court from the Northern Gateway decision, TMX would not now be facing this additional delay.

Among other things, the Northern Gateway decision was also a missed opportunity for the federal government to move closer to achieving its oft-stated desire for reconciliation with Indigenous peoples – particularly because the duty to consult requires consultation with all, not just those opposing a particular project but those in favour as well. Economic benefits and participation will be a critical part of true reconciliation. Well-planned, responsible resource projects are the biggest, best and most proximate opportunities for that kind of economic engagement – and those opportunities are lost every time a project does not proceed.

**Confidence for proponents**

From a project proponent's perspective, the court's commentary on both the NEB and duty to consult should give confidence, rather than cause the current hue and cry. The goalposts are now much clearer. The likelihood of future long-drawn out court delays is now diminished because the court was so specific with its judgement and its recommendations. Regarding duty to consult, this decision did not expand it – rather, the federal government failed to do its job. The requirements had already been specifically laid out in prior court decisions. Subsequent courts will be bound by this decision, and if the parameters set out here are met by the various stakeholders, projects will be able to proceed. Environmental activists, Indigenous communities and those worried about never-ending protests now have much less to complain of. Indeed, much of the commentary post-TMX decision has been just that: "Finally, we've been heard!" But for them as well, the court has clarified the parameters of engagement in order to move projects forward. They cannot simply say "no" anymore.

Most investors in major infrastructure or related projects are not afraid of firm environmental regulations or of engaging in successful partnerships with Indigenous communities. Indeed, in this case the proponent, Kinder Morgan, engaged extensively with Indigenous communities. The fault lay with the federal government. What proponents need more than anything now is certainty, clarity as to what is expected, confidence that the federal government will fulfill its own duty – and that the courts will not allow unending protest. This decision goes a long way to accomplishing that.

At the Canada West Foundation, we support the construction of the infrastructure needed to get the resources that we have, and that the world wants, to market. We support getting the Trans Mountain pipeline expansion built. We support investment in new projects and in much-needed transportation infrastructure. But we also support that it be done well, as respectfully, as cost-effectively and in as environmentally sustainable a way as possible. Despite the naysayers, this decision makes it even clearer that all are possible, at the same time, with explicit instructions as to how it can be done.

## Why does the TMX decision make it even more important to stop Bill C-69?

By replacing the current processes – much analyzed, much-challenged and now refined, as confirmed by our courts – Bill C-69 would throw out all of the hard-won certainty that this confirmation has finally provided.

Just at the time when we have achieved clarity with respect to what constitutes the federal duty to consult, and clarity on (and approval of) the NEB's processes, passing Bill C-69 – entirely new, untested legislation, particularly with so many new vague and untested concepts[11] – will take the whole major project approval process back to square one, reopening the entire process of project approvals to huge delays from new protests and court challenges.

## What is so wrong with Bill C-69, and why can't it just be 'fixed'?

Bill C-69 would replace the National Energy Board with a new Canadian Energy Regulator and replace the federal *Environmental Assessment Act* with a new *Impact Assessment Act*, creating a new Impact Assessment Agency. We applaud the government's intentions. We absolutely need to harness our resources in an environmentally sustainable way – and we can. Unfortunately, despite these good intentions, the bill would create more problems than it hopes to solve. And these problems will affect far more than energy projects.

Recent high-profile examples are pipelines, but this proposed legislation will affect "clean" electricity transmission lines, wind farms, hydro installations, natural gas plants, port expansions – anything that the federal government decides should be "on the list" – and the opportunity for, and effectiveness of, political pressure means far more will be "on the list" than not.

Both Canadian and foreign investors are already going elsewhere. Long seen as reliable and attractive for investment, Canada's reputation as a place to invest in big projects has, in recent years, deteriorated. Foreign direct investment into Canada in 2017 was lowest since 2010.[12] Bill C-69 will make things worse – just at a time when the TMX decision will make things better.

We outlined our initial concerns in a major report, Unstuck: Reforming Canada's regulatory process for energy projects. Then, disappointed that the House of Commons Committee studying the bill refused most of the recommended amendments and added some that may be even more problematic, we issued a "What Now?" policy brief, Rebooting Bill C-69, recommending a full reboot for Bill C-69.

**We are now issuing an even stronger appeal to the Senate, because of what the TMX decision has given us.**

The backbone of the Canadian economy has always been, and will be for a long time to come, natural resources. Mining, forestry and energy alone account for 1.82 million jobs and 17% of our national economy.[13] Our resource-based economy is now also incredibly high-tech. Science, technology, digital innovations are combining to allow us to grow, harvest, extract, produce, process and transport all of our resources ever-more efficiently, competitively and environmentally sustainably. But, we can't do all of this without investment. And investors won't invest if we can't get critical infrastructure built. The government's own Economic Strategy Tables have now put forth concrete, actionable and achievable ideas to help Canada improve its competitiveness, such as a program to enhance innovation, make our regulations more agile, and grow our infrastructure and talent.[14] The Resources of the Future Table's work is particularly relevant here – and is exactly what needs to come *before* drafting such critical legislation, not after.

Despite the good intentions of the government, this is NOT the time for Bill C-69. Let us instead use the excellent work of the Resources of the Future Table, and the extensive commentary on and suggestions for Bill C-69 that were never properly considered in the limited House of Commons review, and create legislation that in fact, does it all.

1 Tsleil-Waututh v. Canada 2018 FCA 153 para 770

2 Ibid para 321

3 Ibid para 215-217

4 Ibid para 372 and para 374

5 Ibid para 771-772

6 "What interests are potentially capable of justifying an incursion on Aboriginal title? In Delgamuukw, this Court, per Lamer C.J., offered this: In the wake of Gladstone, the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that 'distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community' (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis." (Tsilhqot'in Nation v. British Columbia, 2014 SCC 44 para 83)

7 Phase IV consultation in Gitxaala is equivalent to Phase III in the Trans Mountain case.

8 Gitxaala Nation v Canada, 2016 FCA 187 at paras 242.

9 Ibid at para 329.

10 Ibid at para 335.

11 "The regulators, under the proposed new laws, will be asked to judge projects in relation to their impact on climate change, including upstream emissions. They must consider any adverse impact on Indigenous peoples. They must consider traditional Indigenous knowledge and weigh it along with scientific evidence. They must analyse "any alternative" to a project as well as any "alternative means" for carrying it out. This is a recipe for complete confusion, since the regulators can hardly assess other possibilities if no party is presenting them. The board members, to fulfill the expanded mandate, will have to be familiar with anthropology, sociology, and other social sciences, since these will be necessary to judge projects according to the new criteria. Far from streamlining the regulatory process, Bill C-69 will elongate it, thereby making it less likely that projects will be approved in a timely fashion, if at all." Jeffrey Simpson, lecture September 25, 2018, Johnson-Shoyama Graduate School of Public Policy, University of Regina.

12 Statistics Canada. Table 36-10-0025-01 Balance of international payments, flows of Canadian direct investment abroad and foreign direct investment in Canada, quarterly (x 1,000,000)

13 http://nrcan.gc.ca/sites/www.nrcan.gc.ca/files/files/pdf/10_key_facts_NatResources_2018_e.pdf

14 See, for example, the Resources of the Future Economic Strategy Table report, published in September 2018



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ISBN 978-1-927488-94-2