

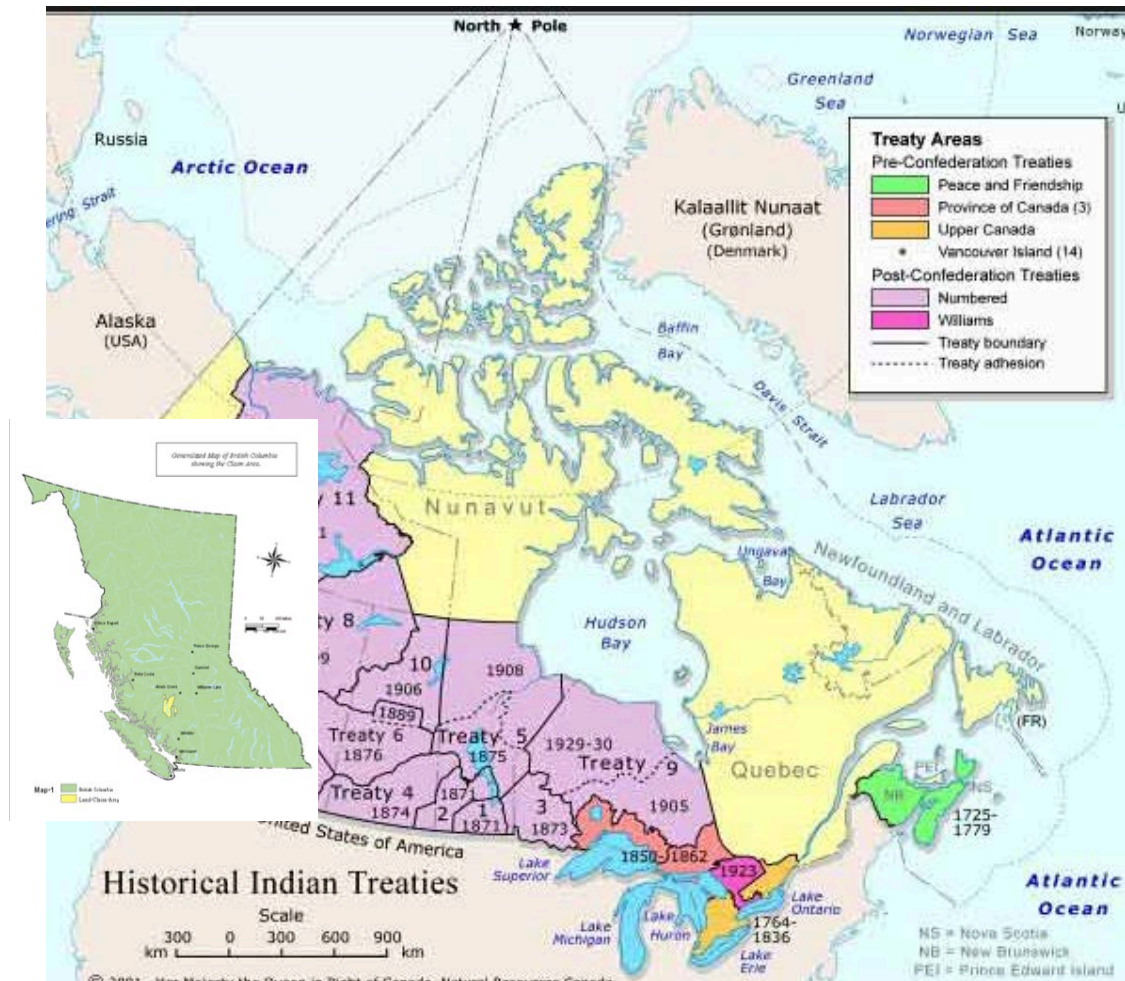


# The Relationship between Energy Infrastructure, The Public Interest and Constitutionally Protected Indigenous Rights

Professor Sharon Mascher, Faculty of Law

1. Brief overview of section 35 Aboriginal rights
2. Rights held by s 35 **Aboriginal title holders**
3. Justifying infringement of s 35 **Aboriginal title**
4. How (if?) this fits with a cost-benefit driven public interest approach to energy infrastructure projects in Canada.

"The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."





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## 2. Rights held by s 35 Aboriginal title holders: *Tsilhqot'in v BC*



### **Content of Aboriginal title – the “positive proposition”**

[73] Aboriginal title confers ownership rights ... including: the right to decide how the land will be used; [...] the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

## **Content of Aboriginal title –the “negative proposition”**

[74] Aboriginal title ... comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be ... developed or misused in a way that would substantially deprive future generations of the benefit of the land ... Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.

## Content of Aboriginal Title

[76] The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s 35 of the *Constitution Act* 1982



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### 3. Justifying infringement of s 35 Aboriginal title: *Tsilhqot'in v BC*

## Justification of Infringement

[77] To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Sparrow*.

## **Justification of Infringement – (1) discharge of procedural duty to consult**

[78] The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title. Where the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right. The duty to consult must be discharged prior to carrying out the action that could adversely affect the right.

[79] The degree of consultation and accommodation required lies on a spectrum .... proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right ... Where consultation or accommodation is found to be inadequate, the government decision can be suspended or quashed.



### 3. Justifying infringement of s 35 Aboriginal title: *Tsilhqot'in v BC*

#### 'More was required of Canada': Ruling shows where Ottawa fell short with First Nations on Trans Mountain



Federal Court of Appeal decision calls out Ottawa on duty to consult



Chantelle Bellrichard · CBC News · Posted: Aug 31, 2018 4:00 AM ET | Last Updated: August 31



#### B.C. government failed to properly consult First Nations on Northern Gateway pipeline, court rules



Gitga'at celebrating 'huge victory' after court rules province failed in duty to consult

CBC News · Posted: Jan 13, 2016 1:12 PM PT | Last Updated: January 14, 2016





## **Justification of Infringement - (2) actions were backed by a compelling and substantial objective**

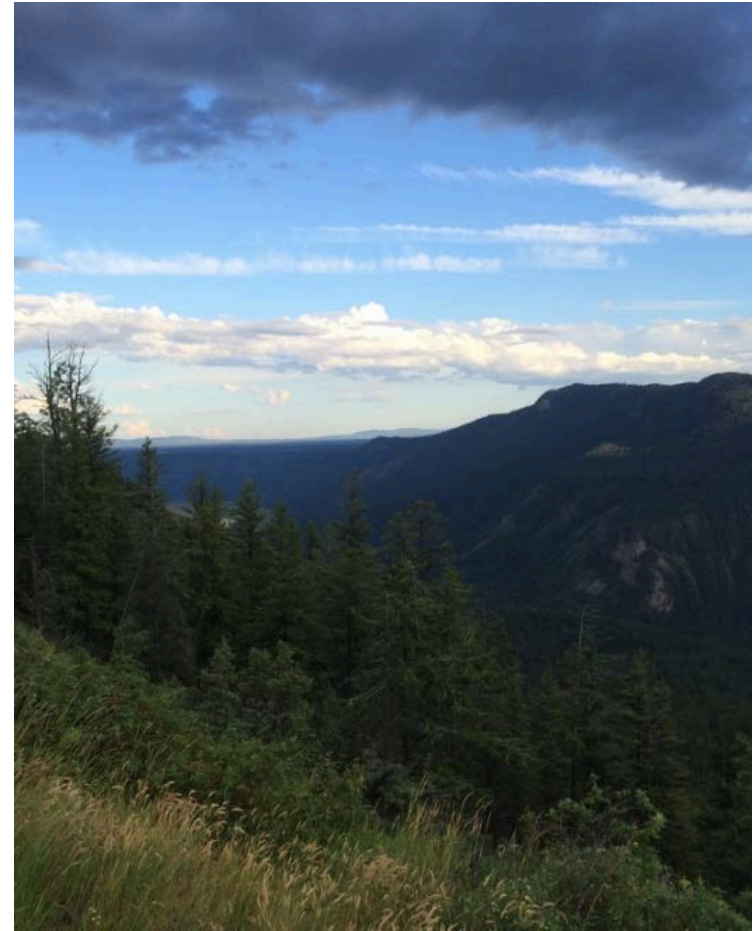
[83] What interests are potentially capable of justifying an incursion on Aboriginal title? In *Delgamuukw*, this Court, *per* Lamer C.J., offered this:

... the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad ... 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.

### 3. Justifying infringement of s 35 Aboriginal title: *Tsilhqot'in v BC*

**Justification of Infringement- (3)  
the government action is consistent  
with the Crown's fiduciary  
obligations to the group**

[85] The Crown's fiduciary duty in the context of justification merits further discussion. The Crown's underlying title in the land is ... constrained by the Crown's fiduciary or trust obligation to the group. This impacts the justification process in two ways.



### 3. Justifying infringement of s 35 Aboriginal title: *Tsilhqot'in v BC*

**Justification of Infringement- (3) the government action is consistent with the Crown's fiduciary obligations to the group**

[86] First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations [...] This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.

### 3. Justifying infringement of s 35 Aboriginal title: *Tsilhqot'in v BC*

#### **Justification of Infringement- (3) the government action is consistent with the Crown's fiduciary obligations to the group**

[87] Second, the Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (*rational connection*); that the government go no further than necessary to achieve it (*minimal impairment*); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (*proportionality of impact*) ...



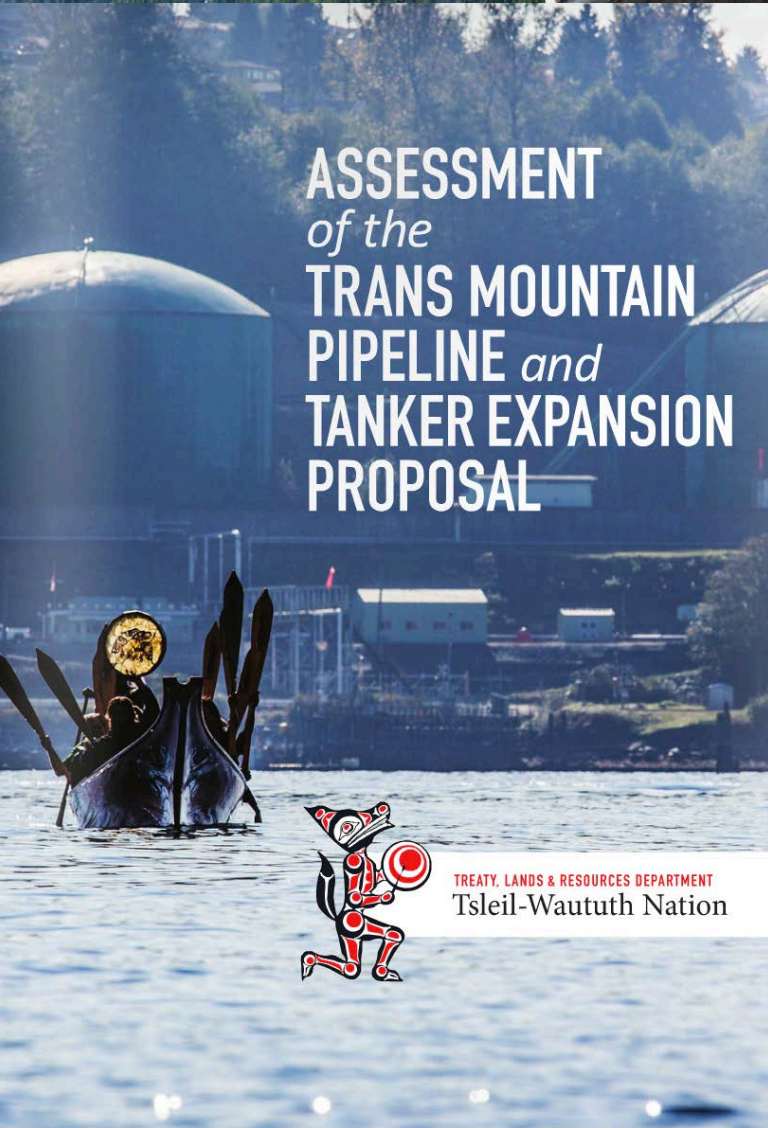
## What about claimed but unproven Aboriginal title?

[92] Once title is established, it may be necessary for the Crown to reassess prior conduct ... if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing.



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# ASSESSMENT of the TRANS MOUNTAIN PIPELINE *and* TANKER EXPANSION PROPOSAL



TREATY, LANDS & RESOURCES DEPARTMENT  
Tsleil-Waututh Nation



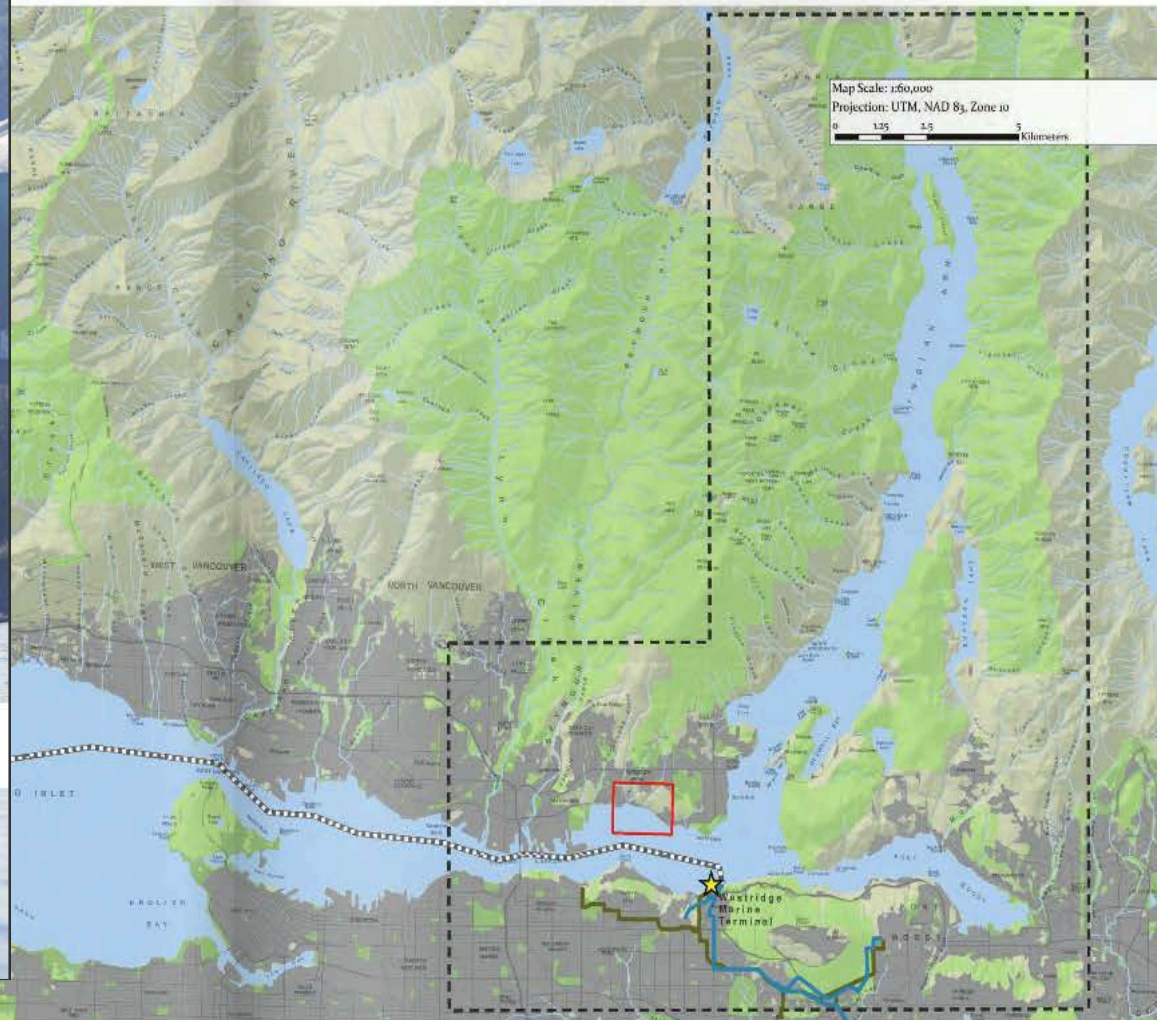
**TSLEIL-WAUTUTH NATION**  
BURRARD INLET

## MAP 2: ASSESSMENT STUDY AREA BOUNDARY

### Legend

- ★ Westridge Marine Terminal
- Tanker Route
- KMC Existing Infrastructure
  - Trans Mountain System
  - Jet Fuel System

- - - - - Tsleil-Waututh Assessment Boundary
- Tsleil-Waututh Nation Reserve
- Greenspace
- Developed Area





# **TSLEIL-WAUTUTH NATION**

*People of the Inlet*



## **TWN Band Council Resolution**

*Passed unanimously on May 21, 2015*

### **Resolution in respect of Tsleil-Waututh Nation's Stewardship Policy decision about the Trans Mountain Pipeline and Tanker Expansion Proposal**

**NOW THEREFORE TSLEIL-WAUTUTH NATION, AT A DULY CONVENED BAND COUNCIL MEETING AT WHICH QUORUM IS PRESENT, HEREBY RESOLVES THAT:**

1. The conclusions reached by TLR in the report about the potential for the TMEX Proposal to cause adverse impacts in Burrard Inlet and on Tsleil-Waututh's title, rights, and interests are hereby accepted and adopted.
2. Because the Project fails the first lens test of the Stewardship Policy:
  - (a) Kinder Morgan Canada shall not be granted the legal authority under Tsleil-Waututh law for the TMEX Proposal to proceed in Tsleil-Waututh territory; and
  - (b) The Tsleil-Waututh Nation does not consent or authorize the TMEX Proposal to proceed in Tsleil-Waututh territory.



# Summary of Recommendation



## Canadian public interest

The National Energy Board (NEB or Board) finds that the Trans Mountain Expansion Project (Project) is in Canada's public interest, and recommends the Governor in Council (GIC) approve the Project and direct the Board to issue the necessary Certificate of Public Convenience and Necessity (CPCN) and amended CPCNs. Should the GIC approve the Project, the associated regulatory instruments (Instruments) issued by the Board would come into effect.

Benefits associated with:	Brief description	Burdens associated with:	Brief description	Type of Impact	Report chapter(s)
<b>Market diversification</b>	The Board finds there would be a <b>considerable</b> benefit gained providing Canadian shippers with more flexible and diverse ability to manage risk associated with competing in multiple ability to manage development and operational risk, and a likelihood of discounts to Canadian crude.	<b>Southern resident killer whales</b>	The Board finds that the operation of Project-related marine vessels would likely result in <b>significant</b> adverse effects to the Southern resident killer whale. Although the effects from Project-related marine vessels on the Southern resident killer whale would be a small fraction of the total cumulative effects, the Board recognizes that the increase in Project-related marine vessels would further contribute to cumulative effects that are already jeopardizing the recovery of the Southern resident killer whale.	Local Regional National	14
<b>Jobs</b>	The Board finds a <b>considerable</b> benefit in the form of jobs created across Canada: <ul style="list-style-type: none"> <li>• Pipeline construction - 400-600 workers per spread</li> <li>• Tank construction - between 60 and 370 workers</li> <li>• Westridge Marine Terminal construction - 95 workers</li> <li>• Over the first 20 years of operation - 443 jobs/year (313 in B.C., with remainder in AB)</li> </ul>	<b>Aboriginal cultural use associated with Southern resident killer whales</b>	The Board finds that the operation of Project-related marine vessels would likely result in <b>significant</b> adverse effects on Aboriginal cultural use associated with Southern resident killer whales. The Board acknowledges concerns raised by a number of Aboriginal groups about the social and cultural effects that would result from impacts of Project-related marine shipping on the Southern resident killer whale.	Local Regional	14
		<b>Marine greenhouse</b>	The Board finds that greenhouse gas emissions from Project-related marine vessels would likely be <b>significant</b> . Given that there are no regulatory reporting thresholds or specific requirements for marine greenhouse gas emissions in Canada, and that the modelled emissions would result in measurable per cent increases, the magnitude of these	Regional	14

In weighing the benefits and residual burdens, the Board placed significant weight on the economic benefits of the Project, many of which would be realized throughout Canada, particularly in British Columbia, Alberta, Ontario and Quebec. This national perspective was critical in the Board's finding the Project would be in the Canadian public interest.

<b>materials</b>	Canada and spending within the regions where the Project is				
<b>Community Benefit Program</b>	The Board finds a <b>modest</b> benefit to local communities and the environment along the Project from the establishment of a Community Benefit Program, including: <ul style="list-style-type: none"> <li>• local emergency management capacity enhancements</li> <li>• improvements to community parks and infrastructure;</li> <li>• support for events and educational programs; and</li> <li>• Environment Stewardship Program.</li> </ul>	<b>Aboriginal groups' ability to use the land and water during construction and operation</b>	The Board finds that there would be <b>modest</b> burdens sustained by Aboriginal groups as their ability to use the lands, waters and resources for traditional purposes would be temporarily impacted by construction and routine maintenance activities, and that some opportunities for certain activities such as harvesting or accessing sites or areas of traditional use would be temporarily interrupted. For activities directly affected by the WMT, the Board finds that these effects would persist for the operational life of the Project, as traditional activities would not occur within the expanded water lease boundaries. The Board finds that while the effects would be long term in duration, they would be reversible in the long term and would be confined to the water lease boundary for the WMT.	Local	11
<b>Enhanced marine spill response</b>	The Board finds there would be a <b>modest</b> benefit from the enhanced marine spill response planning for and capacity to respond to vessels not associated with the Project (e.g., fuel spills from ships and cruise ships).	<b>Landowners' and land users' ability to use the land and water during construction and operation</b>	The Board finds that there would be <b>modest</b> burdens sustained by landowners and land users as their ability to use the land and water would be affected by construction and routine maintenance activities during operations. Construction and routine maintenance activities will cause temporary, limited effects on recreational and commercial hunting, fishing, agricultural practices and access to property, and will cause nuisance disturbance, such as noise.	Local	11
<b>Capacity development</b>	The Board finds that a <b>modest</b> benefit from local economic and educational opportunities, and the development of capacity for Aboriginal individuals, communities and businesses.	<b>Project spill (i.e., from pipeline, tank terminals, pump stations, or Westridge Marine Terminal)</b>	The Board finds that there is a very low probability of a Project spill (i.e., from pipeline, tank terminals, pump stations, or WMT) that may result in a significant effect (high consequence). The Board finds this level of risk to be <b>acceptable</b> .	Local Regional	2 9 10 11
<b>Government revenues</b>	The Board finds that direct Project expenditures will likely result in <b>considerable</b> revenues to various levels of government.	<b>Spill from a Project-related tanker</b>	The Board finds that there is a very low probability of a marine spill from a Project-related tanker that may result in a significant effect (high consequence). The Board finds this level of risk to be <b>acceptable</b> .	Local Regional	2 14

## **Referral to Governor in Council**

**61** After taking into account the report with respect to the impact assessment of a designated project that the Minister receives under section 55 or that is submitted to the Minister under section 59, the Minister must refer to the Governor in Council the matter of determining whether the adverse effects within federal jurisdiction — and the adverse direct or incidental effects — that are indicated in the report are, in light of the factors referred to in section 63, in the public interest.



## Factors — public interest

**63** The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors:

- (a) the extent to which the designated project contributes to sustainability;
- (b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are adverse;
- (c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;
- (d) 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*; and
- (e) 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.



Questions?