FORT McKAY
FIRST NATION

COMMENTS CONCERING BILL C-48

Fort McKay First Nation submission to the Senate Standing Committee on Transport and Communications

SUMMARY

The Government of Canada conceived of a suite of initiatives to, among other goals, support the sustainable development of energy projects originating in Alberta and the access to new markets, including Bill C-48, Bill C-69 and the purchase of the Trans Mountain pipeline. To consider any one of these in isolation is to frustrate the overriding intention, which is to ensure that sustainable energy development continues to contribute to the overall prosperity of the nation, as it has for the past four decades.

May 2019

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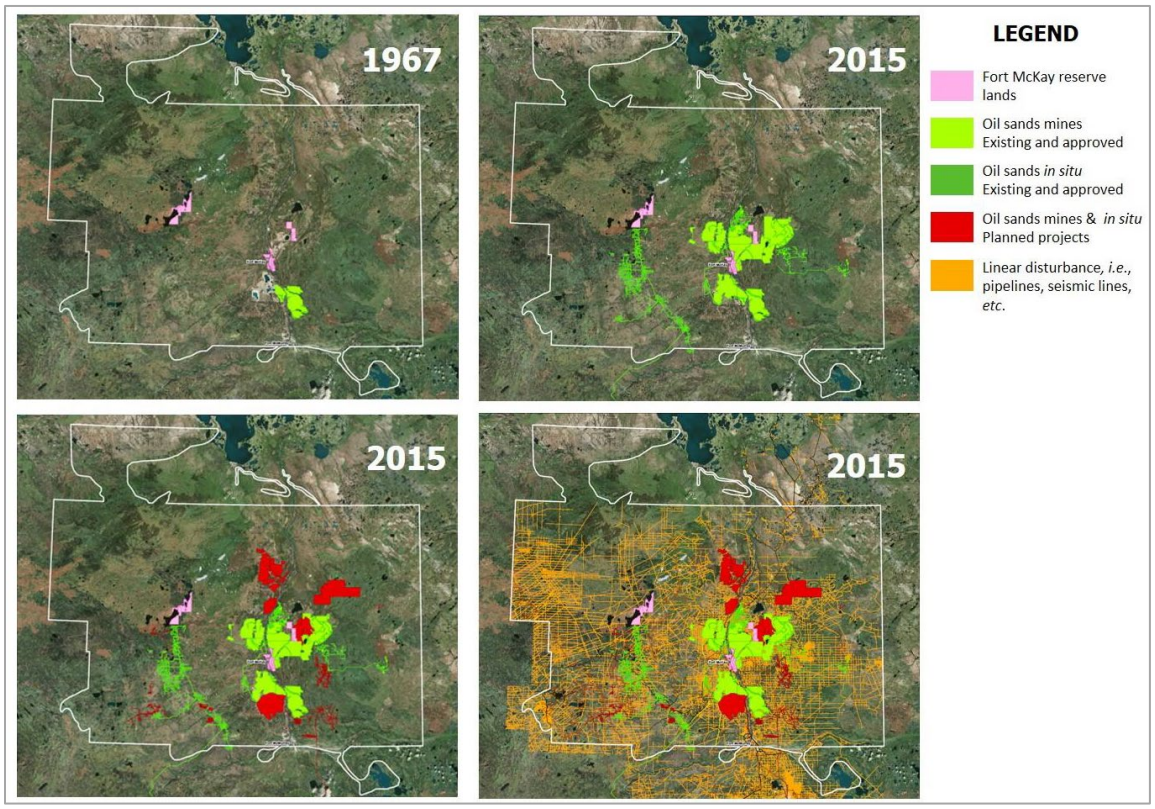
Introduction

The Fort McKay First Nation is located approximately 60 kilometres north of Fort McMurray on Highway 63 in the very heart of the Athabasca oil sands. Since the late 1960s, Fort McKay has seen the emergence of an oil sands industry has created one of the most heavily impacted landscapes in the world. Fort McKay is surrounded on three sides by oil sands mines and *in situ* projects that, at their closest, are within three kilometres of its principle reserve (see Figure 1 below).

Figure 1: Oil sands growth in proximity to Fort McKay First Nation reserve lands, 1967-2015



Fort McKay, more than any other Indigenous community – more than *any* community – lives with the impacts of oil sands development on its doorstep. We have seen the transformation of our traditional territory by intense industrial development, and we have also benefited through economic partnerships from that development. Fort McKay is not anti-development, but it is staunchly in favour of responsible, sustainable development.

Fort McKay also favours using the best data available whenever assessing risk and making recommendations for mitigation and accommodation consistent with our constitutionally guaranteed s. 35 rights. Fort McKay has perhaps the most experience of any First Nation to assess the impacts of oil sands development and cumulative effects on Treaty rights and the environment. We maintain our own independent monitoring program in addition to participating the in the joint federal-provincial Oil Sands Monitoring Program.

It is our hope that the Senate, whose Standing Committee on Transport and Communications has sent the Bill C-48: *An Act respecting the regulation of vessels that transport crude oil or persistent oil to or from ports or marine installations located along British Columbia's north coast* back to the Senate with a recommendation that it not be passed, will find our contribution helpful in its deliberations. .

Canada's integrated approach to energy

It is important that this committee approach its deliberations on Bill C-48 with the explicit recognition that the bill is only one element in an overall national strategy to restore the public trust in the approval process for sustainable energy development. The combined elements include the following.

1. Bill C-69: *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*.
2. Canada's decision *not* to appeal the appellate court decision to overturn the approval for the Northern Gateway pipeline, which was supported by "more than 30 of the 42 bands on the Alberta-to-West Coast pipeline's right-of-way"[1], which focuses future west coast exports exclusively on the Trans Mountain pipeline expansion (TMX).
3. The federal purchase of Trans Mountain and the renewal of both First Nations consultation and more targeted environmental impact assessment.
4. Bill C-48: *An Act respecting the regulation of vessels that transport crude oil or persistent oil to or from ports or marine installations located along British Columbia's north coast*.

These elements were designed in the context of several events that have had a direct negative effect on the Canadian energy sector and Canada's energy strategy.

From four pipelines to one

One of TMX's opponents, Conversations for Responsible Economic Development (CRED), recognized in 2013 the interrelated elements of the strategy:

> The Trans Mountain Expansion Project is part of a larger oil sands expansion strategy. The proposed Enbridge Northern Gateway project is the other main proposal on the table in British Columbia. Both pipelines would allow oil sands products to reach the coast for export to foreign markets, and both would involve significant risk to local communities and BC's coastal waters. There are also pipelines proposed along routes through the US (Keystone XL) and to the east coast via Montreal (Line 9).[2]

[1] "'We are very disappointed': Loss of Northern Gateway devastating for many First Nations, chiefs say," *Financial Post*. https://business.financialpost.com/commodities/energy/we-are-very-disappointed-loss-of-northern-gateway-devastating-for-many-first-nations-chiefs-say. Accessed 8 May 2019.
[2] "Assessing the Risks," Conversations for Responsible Economic Development. http://credbc.ca/assessing-the-risks/ Accessed 8 May 2019.

CRED identified four pipelines, all of which were intended to expand markets for Canadian crude, as part of an "expansion strategy." However, Enbridge reversed the decision to reverse Line 9 – the "Energy East" project – that would have shipped oil to Montreal based refineries in Montreal. Energy East was aggressively opposed by the government of Quebec, despite the fact it stood to benefit from refining revenues. TransCanada's Keystone XL continues to be frustrated by American intransigence. Northern Gateway's approval was quashed. Public and private decisions have reduced the possible avenues for Canadian crude to reach tidewater and, thus, secure more competitive pricing, to one. *One*.

It must be noted that initial approvals for both the Northern Gateway and TMX projects were overturned in court for failure to adequately consult First Nations. In the case of the former, Canada chose to discontinue its support for Northern Gateway to Kitimat and the approval was effectively withdrawn. With respect to TMX, the federal government responded to the court decision by re-engaging with affected First Nations and more comprehensively assessing the impact of the project on the west coast killer whale population. And, it must also be noted, at least three First Nations driven initiatives have been launched across the country to acquire an Indigenous equity interest in TMX.

Referring back to the bullet points on the previous page, decisions with respect to Bill C-48 cannot be made in isolation.

1. Its effectiveness is contingent upon Bill C-69 preserving the enhanced First Nations consultation that is under attack from the oil lobby. Other deficiencies in Bill C-69, such as the failure to list *in situ* projects among those that require a federal review, must be addressed in the appropriate forum for that debate. But, given the fate of Northern Gateway and TMX, the importance of First Nations consultation in Canada's regulatory system cannot be underestimated.
2. This bill would restrict any future west coast energy exports except from the Port of Vancouver, the terminus of the TMX project. However, TMX's fate is still unknown and this bill could, if TMX fails, close the entire west coast to energy exports. TMX must be approved prior to any decision about the fate of tanker traffic elsewhere on Canada's west coast, whether that be Northern Gateway, which was proposed to terminate in Kitimat, or Eagle Spirit, proposed for Prince Rupert and which, according to its chief advocate, has the unanimous approval of the 35 First Nations whose territories it would cross.
3. TMX is also burdened with uncertainty as simple business project. In the wake of the court decision that overturned its approval, Kinder Morgan announced in April 2018 it was halting the project, forcing Canada to purchase the project for $4.5 billion in August of the same year. Canada does not want to own or operate a pipeline, but its intervention was essential to save the only access to the west coast left for Canadian crude oil given earlier policy decisions.
4. Bill C-48 cannot be allowed to close the door on alternatives to the Port of Vancouver until Bill C-69 is adopted and TMX completed. Completion does not

mean the federal government must successfully sell its interest; privatization should not be a necessary precondition.

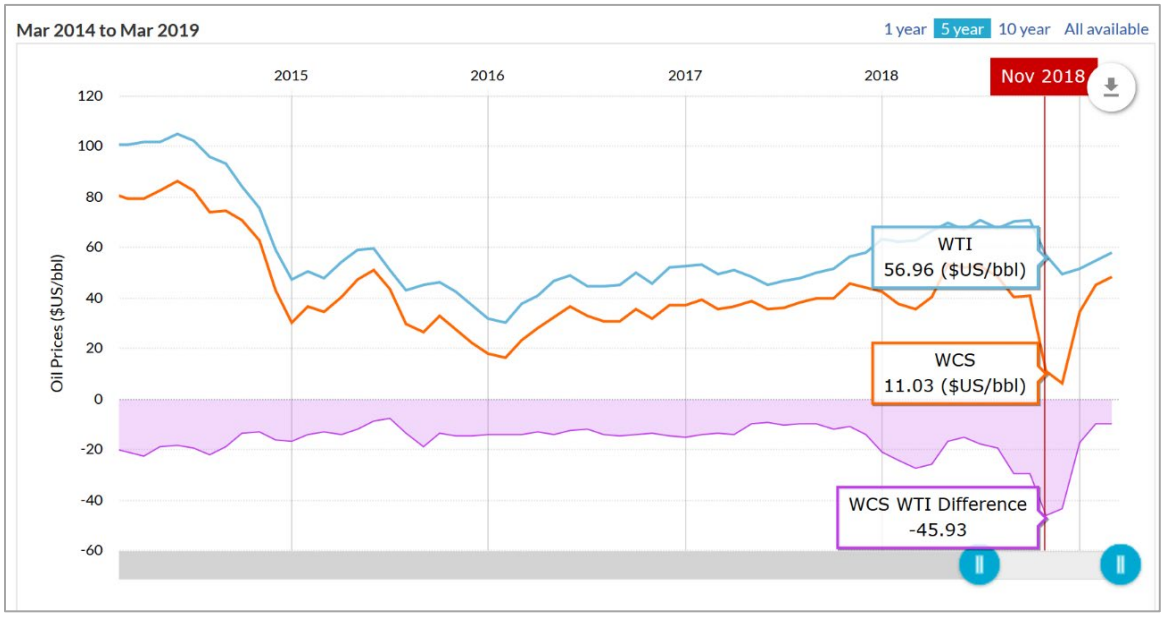
Other factors this committee must consider arise out of the opposition to TMX. Though that project is not affected by this bill, support for the bill and opposition to TMX have taken similar form with respect to arguments made against other pipelines, and so it is useful to look at the argument against TMX in order to determine whether or not *any* pipeline can be safely operated to support energy exports from Canada's west coast.

Fort McKay then, will, in brief, consider the arguments proposed for and against any pipelines to the west coast as exemplified by the opposition to TMX; these arguments apply directly to Canada's larger energy strategy. It is Fort McKay's hope that this submission will clarify the essential questions before this committee.

Lost revenues

Advocates for pipelines to the west coast have noted the fact Canada exports energy to a single market has had a chilling effect on the sector's revenues. According to Statistics Canada, Canada exports 3.3MM bpd of crude oil, 98 percent of which is destined for American refineries.[3] In November 2018, the price differential between Western Canada Select (WCS) and West Texas Intermediate (WTI) was $45.93 USD per barrel, representing a revenue difference of just under $150 million USD *a day*.

Figure 2: Oil price differential, WTI to WCS in USD[4]

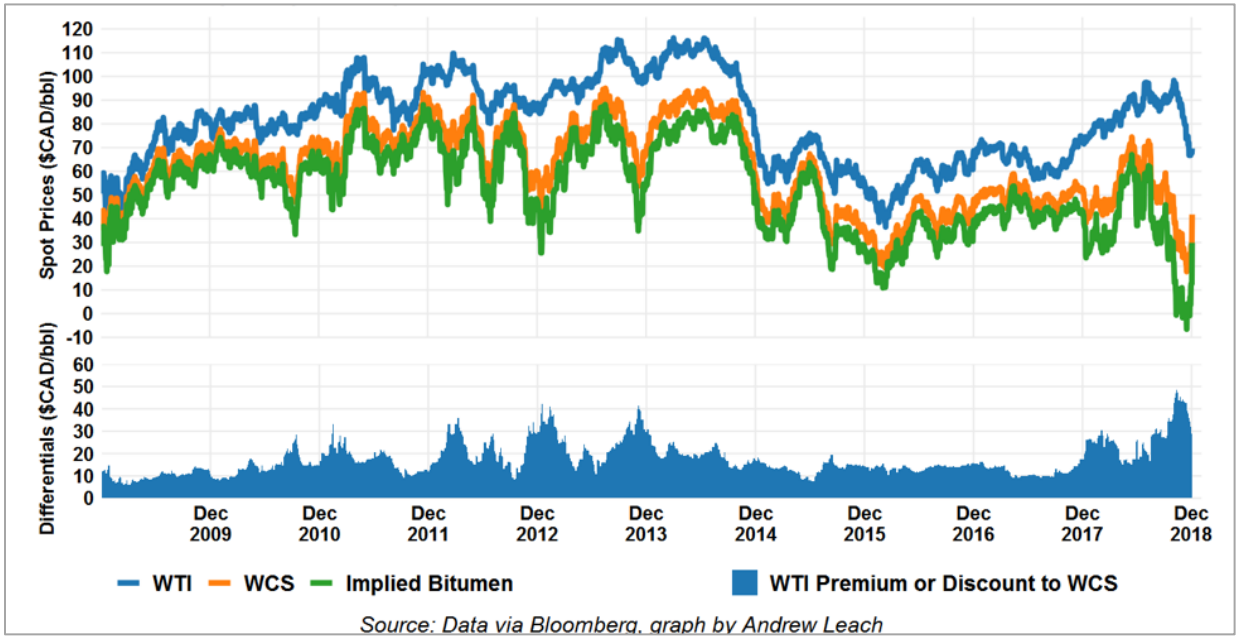


[3] "Crude oil facts," Natural Resources Canada. https://www.nrcan.gc.ca/energy/facts/crude-oil/20064. Accessed 8 May 2019.
[4] "Oil prices," Alberta Government. https://economicdashboard.alberta.ca/OilPrice. Accessed 8 May 2019.

Figure 2 above shows a peak differential at the end of 2018 and by March 2019 the differential shrank to just $9.94 USD; but it should also be noted that, over the past decade, shown in Figure 3 on the next page, the price differential has approached or exceeded $40 USD eight times for extended periods.

These discounts reverberate across Canada and affect the profitability of private enterprise, benefit agreements with First Nations, provincial and federal tax revenues, transfer payments, government programs, investment returns and Canadians' wages.

Figure 3: Spot oil prices, implied bitumen values, and Alberta diluted bitumen differentials – the "bitumen bubble" [5]



If Canada must acknowledge the loss of revenues – which affect its bottom line, too – and not choose to close its own doors to energy exports from the west coast for reasons that are not defensible, especially when the tanker ban does not apply to liquefied natural gas (LNG) or identical shipments originating on the east coast.

First Nations consultation

Though Fort McKay has very fruitful partnerships with oil sands developers that have brought unprecedented prosperity to our community, we are in no way disappointed by the court decisions regarding Northern Gateway and TMX. Any evolution of case law that heightens the importance of First Nations consultation meets with our approval. This is precisely the reason Fort McKay has been a vocal supporter of Bill C-69 and why it worked

[5] "Can Alberta get fair value for its oil?" Maclean's. https://www.macleans.ca/economy/economicanalysis/the-most-important-charts-to-watch-in-2019/. Accessed 8 May 2019.

with other Athabasca oil sands region First Nations to secure resolutions of support for the bill from the Assembly of Treaty Chiefs (Alberta) and the Assembly of First Nations in late 2018.

Members of the Senate transport committee who also sit on the Senate's environment committee may have noticed the principle flaw in Canada's regulatory system has been the failure to adequately consult First Nations, which Bill C-69 seeks to redress and which has not received due attention. Fort McKay believes that opponents of Bill C-69 have failed utterly to understand that its consultation requirements will enhance the likelihood that projects will achieve approval, thereby improving investor confidence. Assuming Canada can also adopt measures to support accommodations – on which the bill is silent – approving Bill C-69 will ensure that projects that have been approved *stay* approved. However, as an element of the entire edifice of a national energy strategy, Bill C-69, too, must be amended to support accommodation, a potential outcome that has been repeatedly emphasized by Canadian courts.

Lack of a business case

Opponents of TMX say there is no need to increase the pipeline's capacity because proponents cannot point to executed contracts that 'prove' Canadian crude will be sold to Asian markets or anywhere else beyond the United States. That's not an argument as much as an admission of the current state of export affairs: no one would enter into a contract that cannot be fulfilled. Without additional capacity that is not possible. It would be facile to suggest that 'if Canada builds it, they will come'; but it is also true that Canadian crude is not even a competitor in the international market because it cannot participate.

Risk of a pipeline spill

Ideally, any pipeline should proceed with the free, prior and informed consent of stakeholders along the route, including a comprehensive monitoring and maintenance plan to detect risks prior to a leak, and an equally comprehensive emergency response plan to minimize negative impacts in the event of a leak. However, "informed consent" also presumes a *well*-informed discussion that is not overrun by either irrational fears or ideological arguments that discount evidence-based analysis.

Opponents have voiced concerns over pipeline spill risk and cite the safety record of the pipeline's previous owner, Kinder Morgan, as evidence that TMX will inevitably compromise the environment. However, regulatory statistics show the vast majority of oil shipped by pipeline safely reaches its destination; just one tenth of one percent, one one-*thousandth*, is released through pipeline failure, shown in Figure 4 on the next page. Further, as seen in Figure 5, the frequency of pipeline releases of all types – most dramatically for water but also for hydrocarbons – has decreased significantly even as total volumes have increased.

Figure 4: Total volume of oil released annually from federally regulated pipelines[6]

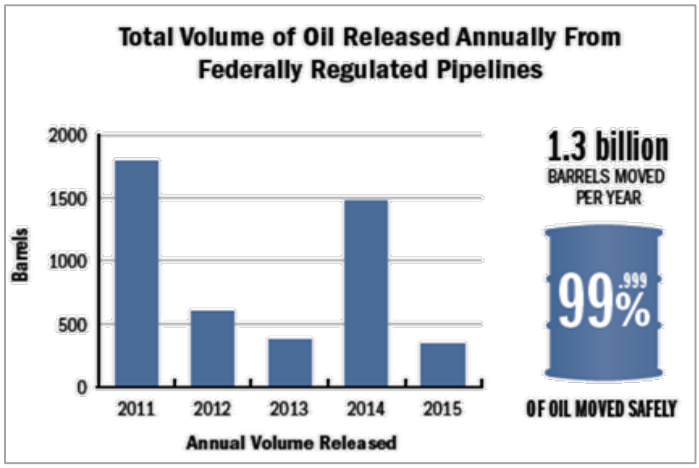
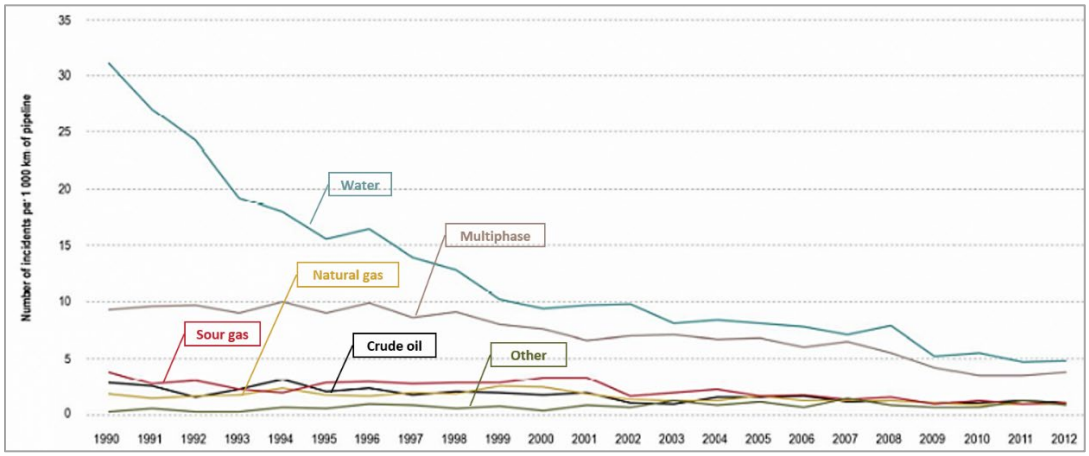


Figure 5: Average frequency of pipeline incidents by year and substance in Alberta[7]



Finally, whatever one thinks of private pipeline companies, it's important to remember that TMX is currently federally owned and that Indigenous communities want to purchase an equity stake in the project. As former Chief Jim Boucher said at an event held during the Assembly of First Nations gathering in Vancouver in July 2018, Indigenous ownership would ensure that TMX is operated to the highest possible standard and that emergency response measures, if required, would be best-in-class. It is also clear that pipeline safety far exceeds rolling stock and rail safety, the present alternative embraced by several oil sands companies and endorsed by the previous Alberta government.

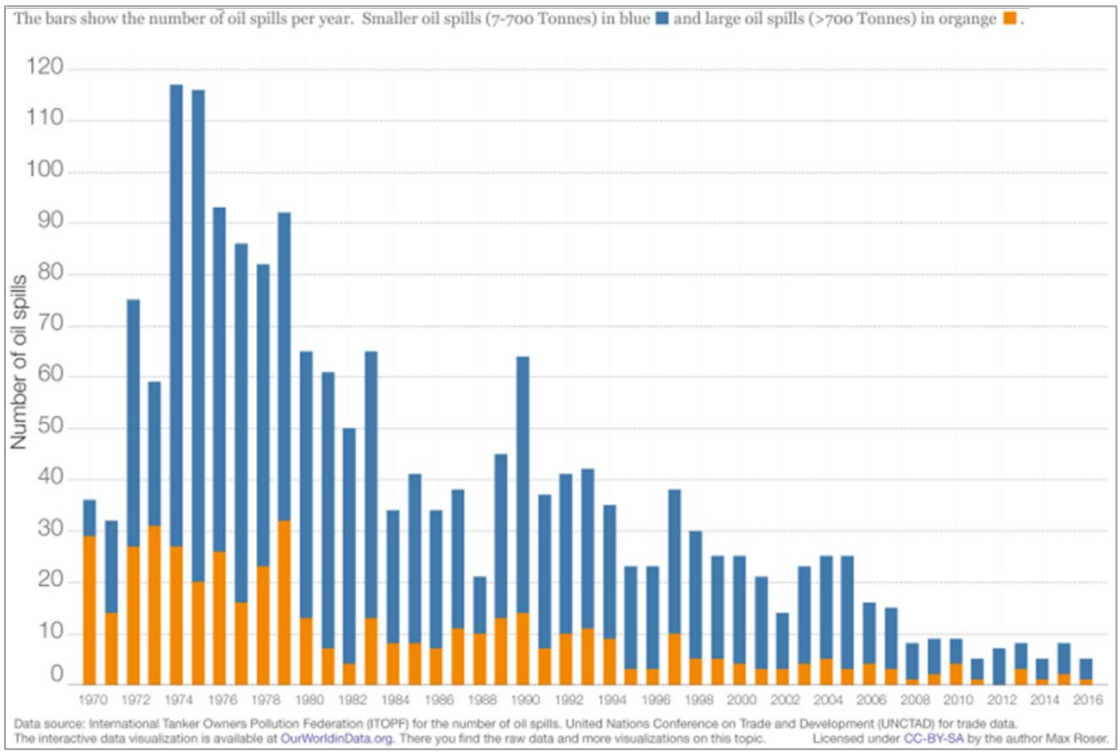
[6] "Despite an outstanding track record, Canadian pipeline licensees can still do more," BOE Report. https://boereport.com/2016/08/02/despite-an-outstanding-track-record-canadian-pipeline-licensees-can-still-do-more/. Accessed 8 May 2019. The data to build this graph was provided by the National Energy Board.

[7] *Ibid*. The data to build this graph was provided by the Alberta Energy Regulator.

Risk of a tanker spill

Pipeline opponents have also pointed to tanker safety to justify suspending *all* pipelines to the west coast. It cannot be denied that horrendous oil spills, not least the Exxon Valdez, arising from human error have been burned into our collective memories. And it is true that TMX would increase oil tanker traffic four-fold out of Burrard Inlet. However, it is also true that the number of tanker spills and the amount of crude oil spilled have declined dramatically worldwide, shown in Figure 6 below and Figures 7 and 8 on the next page, as new technologies and enhanced operational procedures have improved tanker safety. An even better measure is the decline in tanker incidents charted against the increase in crude oil shipped, as shown in Figure 8 on page 10. While not insignificant, the risk of a tanker spill has been overstated by opponents to tanker traffic off British Columbia's coast.

Figure 6: Number of spills from tankers worldwide, 1970-2016[8]



In any case, new tanker traffic would depart from an existing port that already loads more than 3,100 vessels each year. The Port of Vancouver has made the following prediction.

> Based on our 2016 analysis, we forecast the number of vessel calls to the Port of Vancouver may increase to about 12 ships per day by 2026. Others are forecasting much higher numbers, but our analysis

[8] "Oil Spills," Our World in Data. https://ourworldindata.org/oil-spills. Accessed 8 May 2019.

Figure 7: Quantity of oil spilled from tankers worldwide, 1970-2016[9]

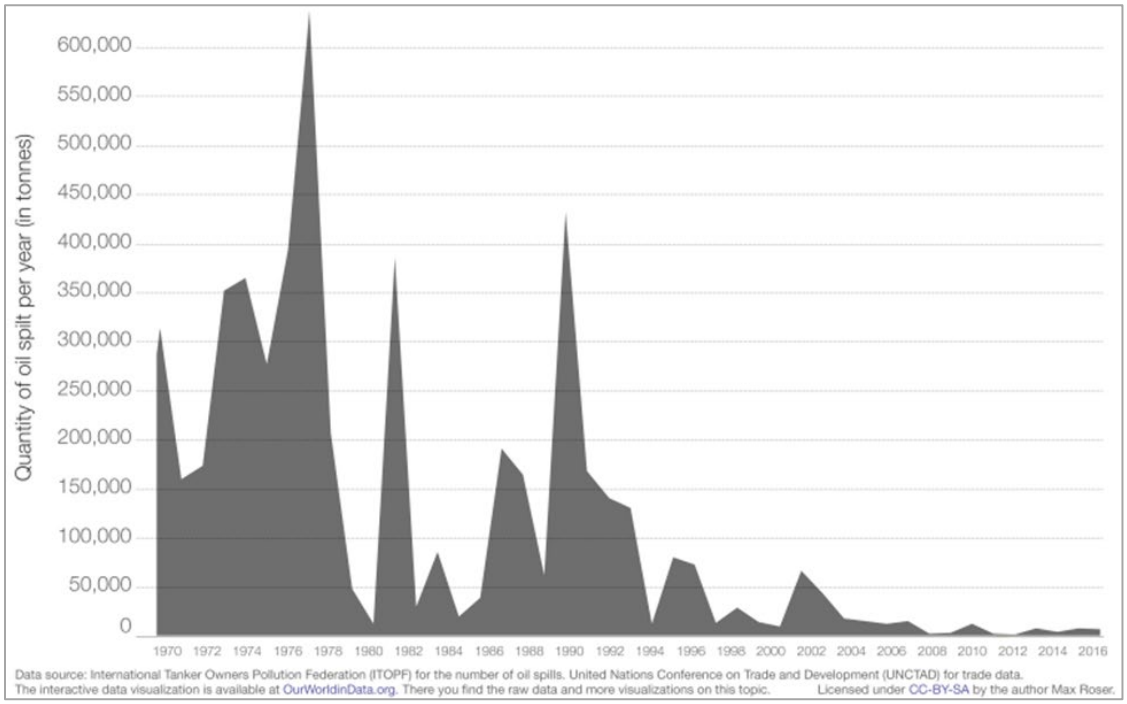
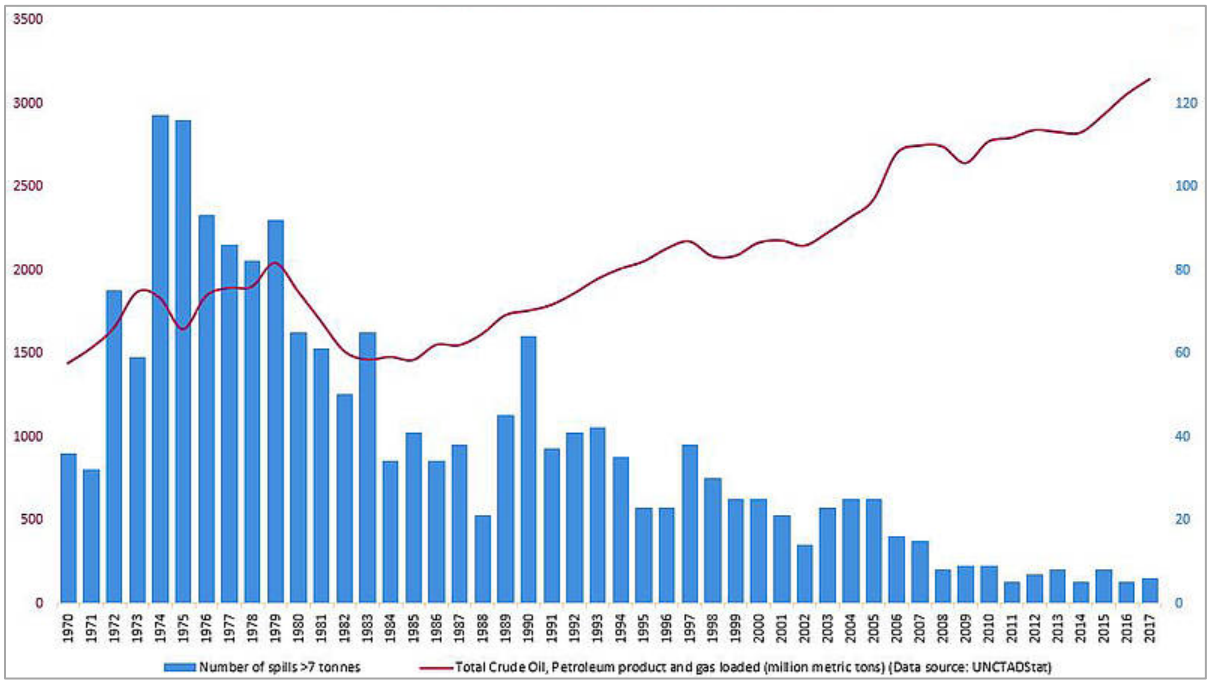


Figure 8: Decline in number of tanker spills v. growth in crude, petroleum and gas loaded, 1970-2017[10]

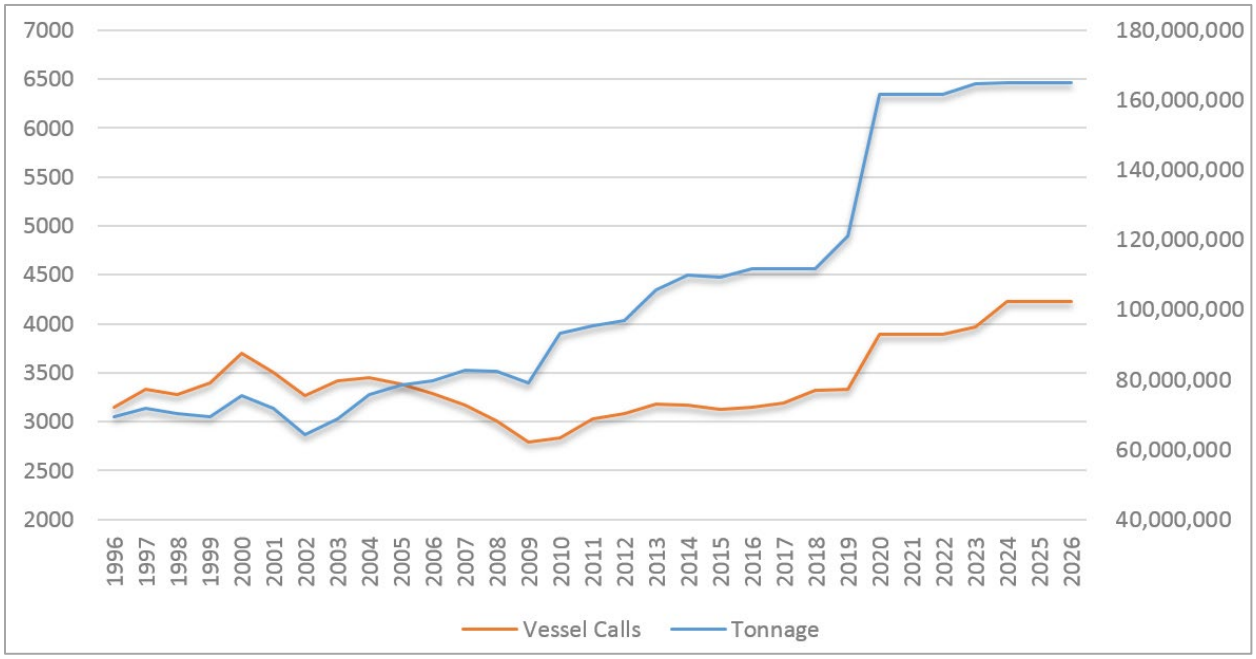


[9] *Ibid.*
[10] "Oil Tanker Spill Statistics 2018," International Tanker Owners Pollution Federation (ITOPF). https://www.itopf.org/knowledge-resources/data-statistics/statistics/. Accessed 8 May 2019.

> suggests they are not accounting for the fact that ships are getting larger and more efficient, so the growth rate in the number of ships is far less than the anticipated growth rate in trade overall.[11]

In other words, the Port of Vancouver anticipated in 2016 a 30 percent increase by 2026 from nine vessels per day to 12, for a total of roughly 4,400 per year, shown in Figure 9 on the next page. According to the estimates of TMX's previous owner, Kinder Morgan, the twinned TMX would result in shipments of about 444 tankers per year, or just ten percent of the total tanker traffic out of Vancouver. Economic activity of all kinds and market diversification will increase tanker traffic out of the Port of Vancouver that is not restricted to crude oil and that increased traffic will yield significant economic benefit for British Columbia.

Figure 9: Historical and projected vessel activity, Port of Vancouver[12]



[11] "How is the port authority managing increased marine traffic through the port?" Port of Vancouver. https://www.portvancouver.com/about-us/topics-of-interest/vessel-numbers-now-and-into-the-future/. Accessed 8 May 2019.

[12] "How is the port authority managing increased marine traffic through the port?" Port of Vancouver. https://www.portvancouver.com/about-us/topics-of-interest/vessel-numbers-now-and-into-the-future/. Accessed 8 May 2019.

Conclusion

The federal government's pipeline anxiety – which is politically motivated rather than arising out of a careful consideration of the facts – has constrained crude oil exports to the extent that the owner of Canada's only pipeline to the west coast preferred to sell the asset to the federal government than try to see the project to completion. Constricted markets for Canadian crude exports have already had a measurable effect on Fort McKay, its businesses, its members and their businesses. Other First Nations have also expressed to this and other Senate committees their concern regarding falling resource revenues and consequent impact on their communities.
Market access issues have resulted in the loss of hundreds of millions of dollars in revenue that would accrue to oil companies, transport companies, the federal and provincial governments, First Nations and ordinary Canadians.

Canada cannot capitulate to unreasonable fears regarding pipelines and tanker traffic on the west coast when considering legislation with such far-reaching effects. Any individual element has to be balanced with the others within the context of Canada's national energy strategy. Failure to achieve any one of the four elements of the national energy strategy would destabilize the remainder, effectively rendering the entire strategy meaningless.

Therefore, we recommend that:

1. Canada cannot make any decision concerning Bill C-48 without first adopting Bill C-69 and resisting the calls for change originating in the oil industry that would weaken First Nations consultation.
2. Canada cannot make any decision concerning Bill C-48 without first completing the TMX project.
3. When TMX is complete, Canada should consider Bill C-48 or similar legislation in the context of a larger national energy strategy, which may still require additional capacity, though passing Bill C-69 with a stable TMX approval could also render such considerations moot.