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## KINDER MORGAN CANADA LIMITED: BRIEF ON LEGAL RISKS FOR TRANS MOUNTAIN

May 29, 2017

*[T]hese claims, if successful, could result in the total stoppage of the Trans Mountain Expansion Project, which stoppage would have a material adverse effect on the Business.* (Kinder Morgan Canada Ltd. Amended Prospectus at p.38)

*In the event that an applicant is successful at the Federal Court of Appeal, among other things, the NEB recommendation or Governor in Council's [Federal Cabinet] approval may be quashed, permits may be revoked, the Trans Mountain Expansion Project may be subject to additional significant regulatory reviews, there may be significant changes to the Trans Mountain Expansion Project plans, further obligations or restrictions may be imposed or the Trans Mountain Expansion Project may be stopped altogether.* (Kinder Morgan Canada Ltd. Amended Prospectus at p.34)

*We agree to mutually and collectively use all lawful means to prevent any increase in the transport of tar sands crude oil through our territories by pipeline or tankers or other means.* - *International Treaty to Protect the Salish Sea.*

*Today, the courtroom is the battlefield, the boardroom is the trading post, and chiefs (not governors) recite winning proclamations to the losing side. That's because natives have racked-up the most impressive legal winning streak in our resource sector history.*<sup>1</sup> – Bill Gallagher

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### INTRODUCTION: ENBRIDGE REDUX?

This briefing note summarizes some of the legal risks facing Kinder Morgan's Trans Mountain Expansion Project ("the Project"). It includes a summary of ongoing litigation and a discussion about additional legal risks, including developments in Canadian, International, and Indigenous law.

Potential investors should note that legal challenges similar to those filed against the Project resulted in the cancellation of Federal approval of the Enbridge Northern Gateway project in 2016.<sup>2</sup>

The absence of treaties and settled land claims throughout much of the province British Columbia, along with the guarantee of rights in the Canadian Constitution, has resulted in a number of First Nations' legal challenges starting in BC and ending in the Supreme Court of Canada, largely in favour of the First Nations.

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<sup>1</sup> "Resource Rulers: Fortune & Folly on Canada's Road to Resources" Bill Gallagher (2013) accessed May 11, 2017<<http://billgallagher.ca/resource-rulers-book/>>.

<sup>2</sup> *Gitxaala Nation v Canada*, 2016 FCA 187, [2016] FCJ No 705 ("*Gitxaala*"). The Federal Court of appeal said: "While Canada exercised good faith and designed a good framework to fulfill its duty to consult, execution of that framework—in particular, one critical part of that framework known as Phase IV—fell well short of the mark" (*Gitxaala* at 8).

The legal risk set out below is in addition to the political risk resulting from the recent BC election in which the majority of seats were won by parties who oppose the Project. Further, reputational risk from the substantial public opposition, following the Burnaby Mountain standoff in 2014 in which over 100 people were arrested should also be noted. In our opinion, these factors combine to amount to material risk to the Project.

## SUMMARY OF CURRENT LITIGATION

Currently, there are 19 separate legal proceedings against the Project: Seven cases challenging the National Energy Board recommendation (one of which has been withdrawn); nine cases challenging the Federal Cabinet approval; and three cases challenging the BC Provincial approval. In addition, two Indian Tribes based in Washington State have launched a legal challenge against the US Coast Guard related to the impact of tanker traffic on endangered southern resident orcas.

The territories of the Indigenous Peoples who have filed the legal challenges total more than half of the pipeline and tanker route. See map below.

### Current legal challenges to Kinder Morgan Trans Mountain Expansion Project approvals

Applicant	Federal Court of Appeal	Supreme Court of BC	Other	Total
Tsleil-Wauth Nation	NEB and Canada			2
Squamish Nation	NEB and Canada	BC		3
Musqueam Indian Band	Canada			1
Coldwater Indian Band	NEB and Canada			2
Sto:lo (Aitchelitz et al)	Canada			1
Stk'emlupsemc Te Secwepemc Nation	Canada			1
Upper Nicola Indian Band	Canada			1
Tulalip Tribes and the Suquamish Tribe			Tulalip Tribes v. Kelly, 17-cv-652, U.S. District Court, Western District of Washington (Seattle)	1
City of Vancouver	NEB	BC		2
City of Burnaby	NEB and Canada			2
Raincoast Conservation Society and Living Oceans Society	NEB and Canada			2
PIPE UP and Democracy Watch		BC		1
<b>Total</b>	<b>15</b>	<b>3</b>	<b>1</b>	<b>19</b>

On 9 March 2017, the Federal Court of Appeal (FCA) ordered the 16 judicial review proceedings against the NEB and Cabinet decisions to be consolidated under file number [A-78-17](#); legal challenges to the Enbridge Northern Gateway proposal were similarly consolidated.

It is important to note that each First Nation's legal challenge is based on unique facts relating to their specific territory, rights and title; this raises an independent duty to consult and accommodate.<sup>3</sup> In other words, the extent and content of consultation is fact specific, and satisfying the duty to consult and accommodate one First Nation does not guarantee that the duty has been fulfilled for another. Success on any one of the First Nation's legal challenges could delay or stop the Project.

The legal challenges submitted by First Nations highlight issues of constitutional, administrative, procedural, and statutory law. They allege, among other issues, that a) the government failed to address concerns raised repeatedly by First Nations, constituting a breach of the constitutional duty to consult and accommodate; b) the NEB report was flawed due to breaches of the principles of procedural fairness; c) the government unjustifiably infringed claimed Aboriginal rights and title; and d) the government breached its fiduciary duty to the affected First Nations; and (d) that the NEB and Cabinet failed to comply with the statutory requirements of the *Canadian Environmental Assessment Act 2012*.

Each of the First Nation's legal challenges at the FCA argues that the highest level of consultation is required, and that to date, the level of consultation has been inadequate.<sup>4</sup> In many cases, the Federal government has conceded that the duty to consult is at the high end of the legal spectrum. Two of the applicant First Nations have had fishing rights confirmed by the Supreme Court of Canada (SCC) in waters affected by the Project.<sup>5</sup> Most of the legal challenges assert that the First Nation has unextinguished Aboriginal title or rights over the proposed pipeline and tanker route, invoking both the leading SCC case on Aboriginal title, *Tsilhqot'in*,<sup>6</sup> as well as the duty to consult and accommodate.

The Squamish Nation's judicial review of the BC decision follows a successful appeal of the province's equivalency agreement<sup>7</sup> which struck out sections of the equivalency agreement and required the province to engage in consultation. Squamish Nation asserts that this consultation was inadequate for several decision points.

The Raincoast and Living Oceans cases argue, among other things, that the NEB and Federal Cabinet failed to uphold the *Species at Risk Act* with respect to endangered southern resident orca whales.

The Cities of Vancouver and Burnaby argue, among other things, that the NEB process was deficient and could not be relied upon by Cabinet or the BC government.

Finally, the PIPE Up and Democracy Watch case argues that the BC decision was tainted by \$750,000 in political donations by Kinder Morgan and its customers to the BC Liberal Party, whose government issued the approval.

<sup>3</sup> "where the Crown knows, or ought to know, that its conduct may adversely affect the Aboriginal right or title of more than one First Nation, each First Nation is entitled to consultation based upon the unique facts and circumstances pertinent to it." *Gitxaala*, supra note 2 at para 236.

<sup>4</sup> See *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 S.C.R. 511, at para 44.

<sup>5</sup> *R v Sparrow* [1990] 1 SCR 1075, 70 DLR (4th) 385; *R v Vanderpeet* [1996] 2 SCR 507, 137 DLR (4th) 289.

<sup>6</sup> *Tsilhqot'in Nation v. British Columbia* [2014] 2 S.C.R. 256.

<sup>7</sup> *Coastal First Nations v. British Columbia (Environment)*, 2016 BCSC 34

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## LEGAL DEVELOPMENTS

### CANADIAN LAW

Canadian courts have confirmed that the government of Canada must meaningfully consult with First Nations who are affected by Canada's decisions.<sup>8</sup> Meaningful consultation is not just a process of exchanging information – it requires accommodation. The SCC has held that “Consultation is meaningless when it excludes from the outset any form of accommodation.”<sup>9</sup> The SCC has confirmed that the test for adequate consultation is grounded in the honourable treatment of Canada's Aboriginal peoples and Canada's reconciliation with them.<sup>10</sup>

Canadian courts have also ruled that Aboriginal title continues to exist in British Columbia, and is protected by section 35(1) of the Canadian Constitution.<sup>11</sup> In interpreting section 35(1), the SCC has acknowledged that Aboriginal title is not created by the Constitution; rather, it arises from the fact that Aboriginal peoples were prior occupants of Canada and had “pre-existing systems of [A]boriginal law.”<sup>12</sup> Aboriginal title confers upon the holder the right to exclusive use, occupation, and benefit of the land, including the right to choose how the land is used.

In the 2014 *Tsilhqot'in* decision,<sup>13</sup> which has been described as a “game changer for all,”<sup>14</sup> the SCC recognized Aboriginal title over a large area of land for the first time in Canadian history. This shifted the goalposts of the federal government and project proponents from consultation with First Nations towards consent.

The SCC stated in *Tsilhqot'in*:

Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group. [para 97]; and

Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, **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. [para 92, emphasis added]

Over the lifetime of the Project, should it be built, it is almost inevitable that one or more impacted nations will achieve formal recognition of their Aboriginal title through litigation or negotiation. This means that the Project could be cancelled if it resulted in an ongoing infringement – something that is nearly certain for such a large natural resource project which the First Nations' litigants have so vehemently opposed.

Some commenters have discussed the possibility that the Federal government could invoke powers under the constitution to impose ‘works and undertakings’ should a province (ie. BC) reject the Project. This provision has not been used since 1961, and would almost certainly require consultation and accommodation with First Nations,

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<sup>8</sup> *Haida*, supra note 4 at para 42.

<sup>9</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII), [2005] 3 S.C.R. 388, at para 54.

<sup>10</sup> *Haida*, supra note 4 at para 45

<sup>11</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

<sup>12</sup> *Ibid* at para 114.

<sup>13</sup> *Tsilhqot'in Nation v. British Columbia* [2014] 2 S.C.R. 256.

<sup>14</sup> Amber Hildebrandt, "Supreme Court's Tsilhqot'in First Nation ruling a game changer for all," *Canadian Broadcasting Corporation*, 27 June 2014 <<http://www.cbc.ca/news/indigenous/supreme-court-s-tsilhqot-in-first-nation-ruling-a-game-changer-for-all-1.2689140>> accessed 11 Mar 2015.

making it vulnerable to similar legal challenges. In short, legality of this provision has not been confirmed since the introduction of the *Constitution Act, 1982*. Furthermore, the political cost in BC would be significant..

## INTERNATIONAL LAW

The Canadian government has adopted the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration), in addition to numerous binding human right treaties. The Declaration states that governments “shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their free and informed consent prior to the approval of any project affecting their lands or territories or resources” (Article 32). Canada has also committed to implement the Truth and Reconciliation Commission’s 94 calls to action, which includes the full adoption and implementation of the Declaration. This is consistent with the consent standard set out in *Tsilhqot’in*.

The approval of the Project in the absence of First Nations’ consent violates Canada’s international legal obligations, and makes Canada vulnerable to a human rights challenge in an international (e.g., UN Human Rights Committee) or regional (e.g., Inter-American Commission on Human Rights) forum. If a First Nation takes international legal action against Canada for such a decision, there is a significant risk that a finding would be made against Canada, attracting negative global attention and creating further uncertainty for the Project. In addition, international human rights bodies such as the Inter-American Commission can request Precautionary Measures, which may include a request that a project not proceed further until such time as the First Nation’s petition can be heard and decided on its merits.

## INDIGENOUS LAW

Finally, many opposed First Nations have banned the Project in their own, unextinguished Indigenous laws through Indigenous legal orders such as the *Save the Fraser Declaration*,<sup>15</sup> the *International Treaty to Protect the Salish Sea*,<sup>16</sup> and *Treaty Alliance Against Tar Sands Expansion*.<sup>17</sup> These Indigenous legal instruments have been signed by hundreds of First Nations in BC and across North America. In addition, the Tseil-Waututh Nation has conducted its own independent assessment of the Project, grounded in its own laws, and has rejected the Project based on this assessment. A letter by Canadian law professors about the assessment is attached.

The Supreme Court of Canada has recognized that Indigenous legal systems and governance rights were not extinguished by European settlement.<sup>18</sup> Canadian common law recognizes that Indigenous peoples continue to act according to their own laws, and that those laws emanate from a constitutionally-protected governance authority which is distinct from the authority of the federal and provincial governments. In finding that an Aboriginal right to self-government “akin to a legislative power to make laws” survived the division of powers between Parliament and the legislatures in 1867, the British Columbia Supreme Court in *Campbell* was cognizant of the pre-existing legal traditions of Indigenous peoples that continued after contact with Europeans.<sup>19</sup> The question of how Indigenous laws relevant to project approvals will ultimately be reconciled with Canadian law remains outstanding at this stage. However, protracted legal battles can be expected as this question finds its way into the Canadian and perhaps international courts in the coming years.

<sup>15</sup> <https://savethefraser.ca/>

<sup>16</sup> <https://thetyee.ca/News/2014/09/23/Cross-Border-Pipeline-Pact/>

<sup>17</sup> <http://www.treatyalliance.org/>

<sup>18</sup> *Delgamuukw* supra note 12; *Tsilhqot’in* supra note 15; *R v Pamajewon*, [1996] 2 S.C.R. 821.

<sup>19</sup> *Campbell v British Columbia (Attorney General)*, 79 BCLR (3d) 122; 2000 BCSC 1123, [*Campbell*] at para 81

The map below illustrates the territories in BC covered by the *Save the Fraser Declaration*, with an overlay of First Nations currently litigating against the Project.

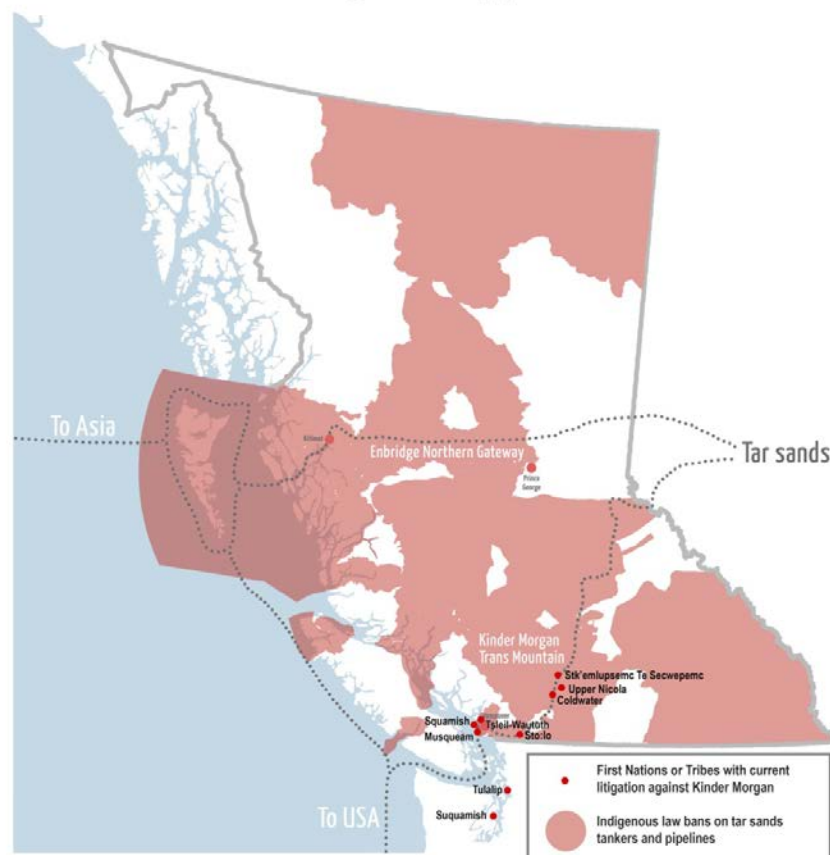
## CONCLUSION

The 19 separate legal challenges filed against the Project by First Nations, municipalities, and organizations create significant uncertainty regarding its ultimate viability. More than half of the pipeline route is disputed by parties claiming procedural, statutory, and constitutional breaches on the part of the Federal and Provincial governments, the NEB, and Trans Mountain. Many First Nations have asserted Aboriginal title over the land through which the proposed pipeline will run. Leading case law holds that where Aboriginal title is claimed, not only is the government required to seek consent of the First Nation asserting the claim, but that any project on claimed land may be halted if Aboriginal title is recognized by a court. Furthermore, this Project is being rejected by the terminus municipality whose cooperation is essential to allow the diluted bitumen to be transferred onto tankers and shipped.

Legal challenges similar to those outlined above contributed to the cancellation of Federal approval for the Enbridge Northern Gateway pipeline in 2016. Investors should familiarize themselves with the developments and precedent in Canadian, International, and Indigenous law and note that pending the final determination of each of the 19 legal challenges, there remains significant uncertainty surrounding the Trans Mountain pipeline project.

In our opinion, the leading jurisprudence suggests that the Project will not get built, and certainly on the schedule that Kinder Morgan is suggesting. Likely outcomes include a permanent rejection if Aboriginal title is recognized, or an interim injunction while a title case is being heard. Combined with significant political and reputational risk, it is our opinion that the Project faces material risk.

### First Nations united in banning tar sands pipelines and tankers from B.C.



Original image: Yinka Dene Alliance