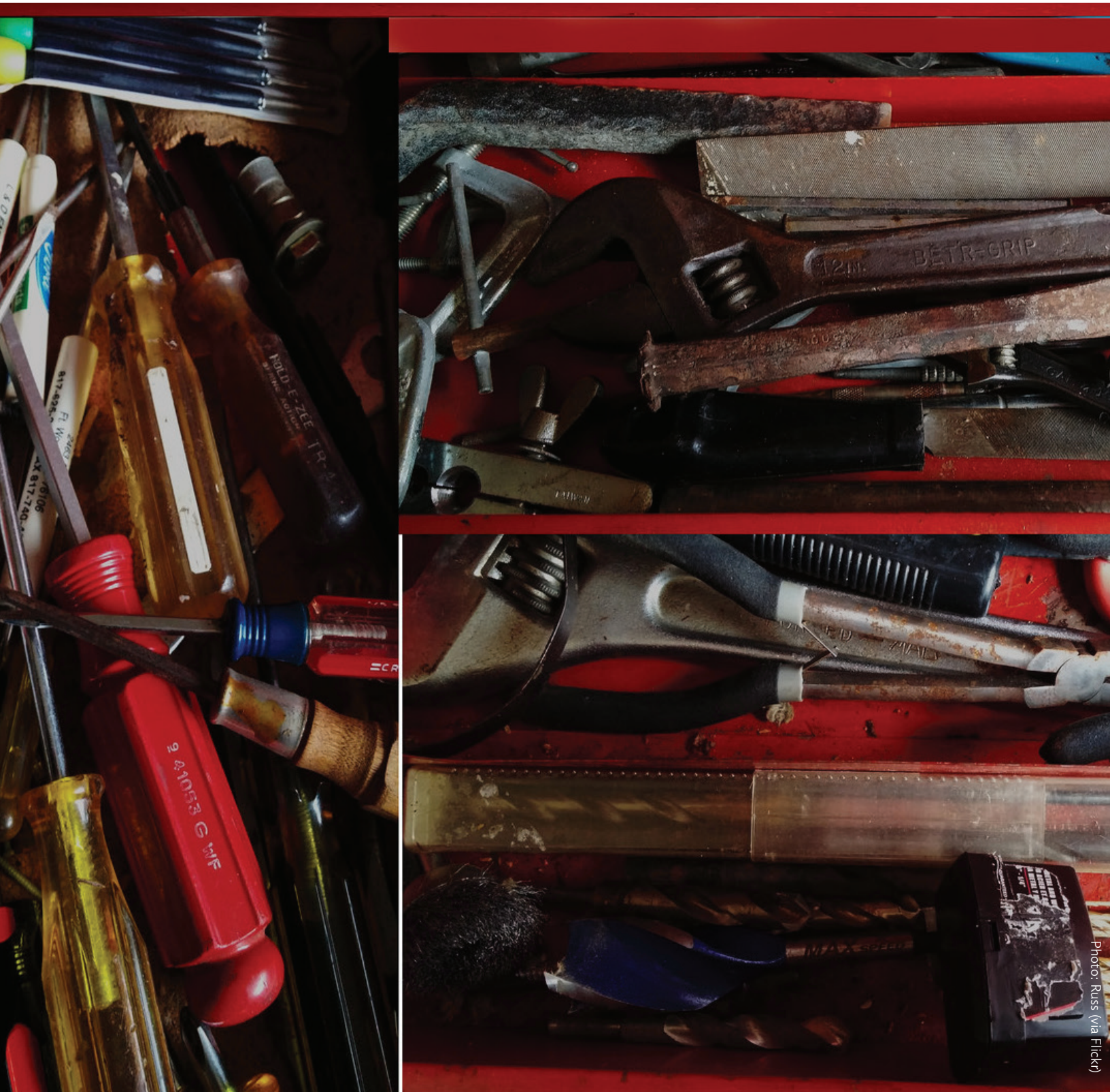
WEST COAST
environmental law

# A LEGAL TOOLBOX TO DEFEND BC

## from the Kinder Morgan Trans Mountain Pipeline & Tankers Project

June 2017



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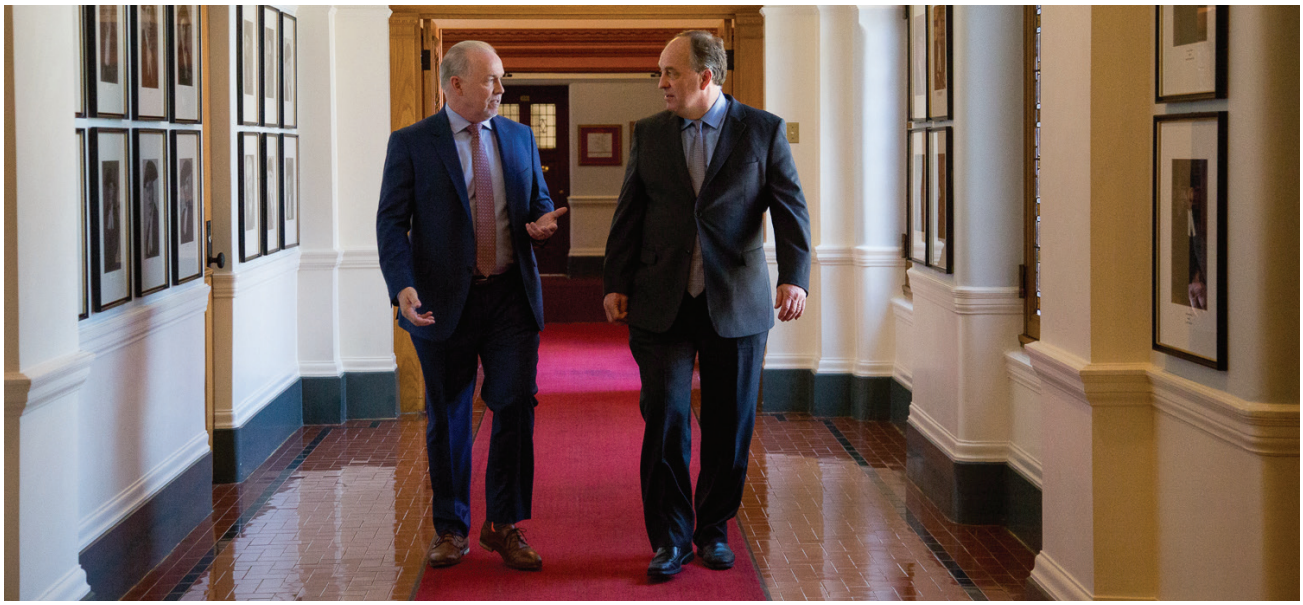

Photo: BC NDP

The historic NDP/Green alliance in British Columbia, which is poised to form BC's next provincial government, has committed to:

> ***Immediately employ every tool available to the new government to stop the expansion of the Kinder Morgan pipeline, the seven-fold increase in tanker traffic on our coast, and the transportation of raw bitumen through our province.***[1]

In light of this commitment, many people have been asking: "What can BC do about Kinder Morgan?"

This question raises important issues that in many ways eclipse a single pipeline and tanker project: global climate change, Indigenous rights and reconciliation, and Canadian federalism, to name a few.

In our opinion, the relevant question is not: "Does BC have tools to stand up to Kinder Morgan?" Rather, it is: "What are the *best* tools for BC to stand up to Kinder Morgan?"

This brief outlines concrete legal options that a new government could use with respect to Kinder Morgan's Trans Mountain pipeline and tankers project. It is not a laundry list – while there are many tools available, we have focused here on what we believe are the best tools that are:

a) available immediately; and

b) in our view the most likely to withstand legal and political challenges.

[1] 2017 Confidence and Supply Agreement between the BC Green Caucus and the BC New Democrat Caucus, at 2.c.

## LEGAL BACKGROUND

1) The Province of British Columbia has the constitutional authority to:

- conduct its own studies and assessment(s) of projects like the Trans Mountain pipeline and tankers project, even if the process requirements imposed have the potential to result in a "no"; and,
- attach conditions related to areas of provincial authority that go beyond those imposed by the federal government in its approval of the project.[2]

2) The Province of British Columbia also has a constitutional and moral obligation to fulfill its duties to consult and accommodate potentially affected First Nations before issuing provincial approvals and permits required for the Trans Mountain project.[3]

3) Furthermore, the Province of British Columbia: (i) cannot authorize an unjustifiable infringement of Aboriginal title or rights; and (ii) must, where a claim is particularly strong take steps to preserve the underlying Aboriginal interest pending final resolution of the claim.[4]

- In this context, proceeding with the BC approval – which was granted in January 2017 – could make BC vulnerable to further legal challenges.

4) The Province can set aside existing provincial approvals and prohibit future provincial approvals until additional process steps and/or conditions – related to areas of provincial authority – are fulfilled. Such legal steps can, in our opinion, be taken without offending constitutional provisions related to the division of powers between the federal and provincial governments.

- This is particularly relevant because of the high-profile problems with the federal National Energy Board (NEB) process, and the federal Crown's failure to meet its constitutional duties to First Nations, as set out in 10 legal challenges brought by First Nations to the federal approval and NEB recommendation.[5]

5) An outright final rejection or prohibition of the Trans Mountain project by the provincial government could result in a legal challenge by the federal government on division of powers grounds,[6] which would then take many years to resolve in the courts.

- However, we note that if multiple legal challenges[7] to the federal approval of the Trans Mountain project by First Nations and others are successful in setting the federal approval aside, then the operational conflict between the federal and provincial decisions would be removed. This would eliminate one basis for a potential legal challenge by the federal government.
- The potential of a future legal challenge, which may not occur, should not discourage BC from taking principled steps to safeguard matters squarely within provincial jurisdiction (such as drinking water, health and safety, provincial lands and resources etc.), and to meet its own constitutional duties to First Nations.

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[2] *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34 at paras 51-56, 71-74.
[3] In *R v. Sparrow* [1990] 1 SCR 1075, the Supreme Court of Canada recognized that section 35 is a limit on both federal and provincial powers. More recently, *Grassy Narrows First Nation v. Ontario (Natural Resources)*, [2014] 2 SCR 447 and *Coastal First Nations, supra* have confirmed that a province must satisfy the duty to consult First Nations.
[4] See *Tsilhqot'in v. British Columbia*, 2014 SCC 44 at para 91.
[5] See: https://www.neb-one.gc.ca/pplctnflng/crt/index-eng.html.
[6] See e.g., *Canadian Western Bank v. Alberta*, 2007 SCC 22; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, 2007 SCC 23, *Coastal First Nations, supra.*
[7] See: https://www.neb-one.gc.ca/pplctnflng/crt/index-eng.html.

## LEGAL TOOLBOX

The provincial government has the authority and obligation to meet its duties to First Nations, and to protect the interests of British Columbians from this risky project. Below we have set out four high-potential legal approaches for doing so. They are not mutually exclusive and in some cases may be mutually enforcing.

Regardless of which legal approach is used, we recommend that the provincial government:

a) Add further processes and conditions related to matters within provincial jurisdiction;

b) Prohibit the issuance of any provincial approvals or permits to Trans Mountain, and include a provision that any such approvals (i.e., that may have already been issued) are without effect until the processes and conditions have been satisfied; and,

c) Establish a requirement, with reference to the United Nations Declaration on the Rights of Indigenous Peoples, that the proponent demonstrate to the Province's satisfaction that every First Nation whose territory is potentially impacted by the Trans Mountain project, including by the risks of spills or malfunctions from either pipelines or tankers, has provided its free, prior and informed consent for the project (FPIC).

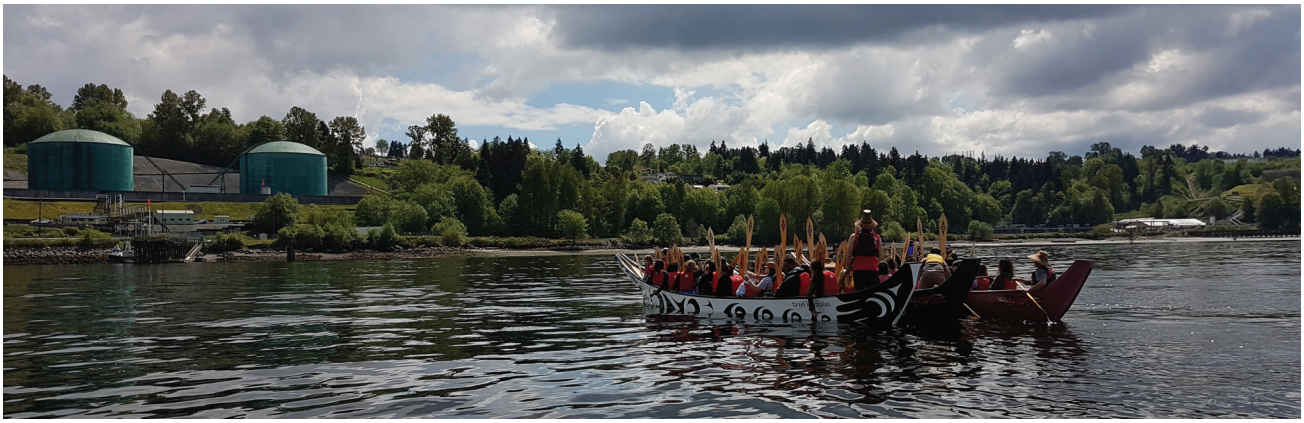

Photo: Eugene Kung, WCEL

### Approach 1:

### Cabinet order under section 7 of the *Environment and Land Use Act* encompassing points a-c above

Section 7 of the *Environment and Land Use Act* empowers Cabinet to make any order considered "necessary or advisable respecting the environment or land use." Such an order applies despite any other Act, and a Minister, ministry or agent of the Crown specified in the order may not exercise its power under any other Act or regulation except in accordance with the order.

- Action: Make a Cabinet order establishing additional conditions and processes, beyond those currently set out in Trans Mountain's environmental assessment certificate, which must be satisfied before relevant provincial permits can be granted.
- Effect: This approach does not depend on overturning the existing environmental assessment certificate per se, but could suspend it until further conditions are met and processes occur. A condition requiring FPIC from potentially impacted nations is particularly relevant, as it aligns with commitments also made by the federal government.

### Approach 2:

### Court order setting aside the provincial environmental assessment certificate

This approach would involve reviewing the current legal challenges to BC's Trans Mountain approval, and issuing new instructions to Crown counsel, on the basis that the former government did not meet its constitutional duty to consult and accommodate, cannot justify potential infringements of Aboriginal title and rights from the project, and must take steps to preserve underlying Aboriginal interests while claims are resolved.

- Action: Instruct counsel for British Columbia in *Squamish Nation v British Columbia (Minister of Environment)*[8] to review the application filed and relief sought by the Squamish Nation, in light of the position of the new government. If the Province of BC concludes that the previous government did not fulfill its constitutional duties, then consider seeking a court order based on points of agreement with the Squamish Nation. Relief sought by Squamish includes overturning the provincial environmental assessment certificate on the basis that the Province did not meet its duty to consult and accommodate, and prohibiting further permitting or approvals until the duty is met.
- Effect: Trans Mountain would likely oppose such an order, potentially requiring the parties to present arguments to a judge before a decision is made. However, given that consultation and accommodation is an issue between the Crown and First Nations, if the provincial Crown and the Squamish Nation agree that the environmental assessment certificate should be set aside, this would provide a highly compelling basis for the Court to make such an order.

This option has the potential to judicially set aside Trans Mountain's existing provincial approval, and could result in a judicial prohibition on issuance of further provincial permits or approvals. Even if pursuing this option does not immediately overturn the Trans Mountain approval (because the court wishes to hear argument from Trans Mountain first), it would swiftly signal the new government's intention to take seriously the provincial Crown's constitutional obligations to First Nations impacted by the project.

In our view, this would greatly increase the likelihood that the environmental assessment certificate would be set aside by the Court following argument. This approach would open up opportunities for BC to engage meaningfully with First Nations, undertake additional review processes and make a new decision on the environmental assessment certificate with additional conditions, if required.

### Approach 3:

### Order under section 31 of the BC *Environmental Assessment Act* to vary provisions of the Act as they apply to the Trans Mountain project

This approach would involve using an existing variation provision in the *Environmental Assessment Act* to enable changes to Trans Mountain's environmental assessment certificate by order.

- Action: Make an order under section 31 of the *Environmental Assessment Act*, which allows the Minister to order a variation of one or more provisions of the *Environmental Assessment Act* or its regulations "in respect of a specified reviewable project" if "there is or will be an emergency or other circumstance that warrants or will warrant the variation" and "the variation is in the public interest."

[8] Supreme Court of British Columbia Registry Number S-173649.

- Effect: There are a number of different ways this provision could be employed. For example, the Minister could order a variation of section 37(2) of the Act, which could broaden the scope of reasons for which the Minister may (by order) amend, suspend or cancel the Trans Mountain environmental assessment certificate. This would, for instance, enable the Minister to make further orders adding conditions to the Trans Mountain certificate as per points a-c above (or even suspending or canceling the certificate). As another example, the Minister could order a variation of sections 18 and 37 of the Act to enable the Minister to order that the certificate be amended to significantly shorten its expiry date. Such orders could be made under the existing *Environmental Assessment Act* without the need to introduce legislation.

### Approach 4:

### After existing permits have been altered, suspended or expired, collaboratively develop the details of further processes and conditions that must be met before provincial permits can be granted to Trans Mountain

- Existing assessment and review processes in BC are not up to the task of fully assessing potential impacts on areas of provincial concern from the Trans Mountain project, nor can they ensure that the Crown's duties to First Nations met. Both the NDP and Green Party have recognized the deficiencies in the current BC environmental assessment (EA) process and have pledged to fix them. New legislation will ultimately be required to ensure that things are done right in reviewing not just the Trans Mountain project but future proposed developments. A new BC environmental assessment of the Trans Mountain project, if required, should ideally occur under the revitalized EA process, following the enactment of new EA legislation.
- Impacts on health, safety and drinking water have not been fully assessed in relation to the Trans Mountain project to date. To do so, one option would be to pass a law requiring an additional in-depth process reviewing impacts of the Kinder Morgan project on community health and safety before any relevant provincial permits can be granted. This approach could enable a detailed and in-depth review of Trans Mountain outside of the current environmental assessment process.
- In general, we recommend that the time be taken to "get it right" in relation to the way in which proposed projects like the Trans Mountain pipeline and tanker project, and the cumulative effects of multiple human activities, are assessed in future in BC. However, flexible tools such as those discussed above (e.g., under the *Environment and Land Use Act*) or the *Public Inquiries Act* could be used to design special review processes in the short term.

West Coast has been deeply engaged in all four environmental law review processes currently ongoing at the federal level: environmental assessment law and processes, National Energy Board, *Navigation Protection Act*, and *Fisheries Act*. We look forward to contributing to similar BC processes to strengthen our environmental laws and decision-making processes.

## A note regarding BC's protected areas and the Trans Mountain project

We note that, to accommodate Kinder Morgan, the provincial government has already removed land from Finn Creek Provincial Park and weakened protective designations for Finn Creek and Lac Du Bois Grasslands Protected Areas in order to allow the granting of park use permits for construction of the Trans Mountain pipeline.[9] There are indications that Trans Mountain may be seeking to have lands removed from the North Thompson River and Bridal Veil Falls Provincial Parks as well.[10]

Parks are important and receive a very high level of legal protection under BC law. Indeed, the *Park Act* does not allow the government to approve industrial development within the boundaries of a Class A or C provincial park.[11] To the extent that Trans Mountain may request that the BC government pass legislation removing further land from provincial parks to accommodate its pipeline, the Province has no legislative obligation to do so.[12]

The federal government arguably has the legal power to authorize the taking up of Crown land in a provincial park by Trans Mountain under s. 77 of the *National Energy Board Act*, but such an action needs to be authorized by the federal Cabinet.[13] Thus, if Trans Mountain seeks to have further land legislatively removed from provincial parks and BC does not change its existing laws to allow it, federal Cabinet would need to address the protected status of the lands explicitly and would presumably have an obligation to consult impacted Indigenous nations before doing so.

## Conclusion

It's time for BC to hit the 'pause' button on Kinder Morgan, uphold its obligations to Indigenous peoples, and properly assess the project's impacts – before it's too late. The legal approaches laid out here are, in our view, the most reasonable, logical and moral options to ensure that Trans Mountain does not jeopardize the environment, Indigenous rights and public health.

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[9] Lands were removed from Finn Creek Provincial Park by amending the *Protected Areas of British Columbia Act*, through Bill 25 of 2016, the *Miscellaneous Statutes Amendment Act 2016*. Through Order in Council 216/2017 (March 6, 2017), the lands removed were then made subject to an order under the *Environment and Land Use Act* that provides that the lands will be managed as park-land, subject to the powers of the Lieutenant Governor in Council to approve the construction and operation of the Trans Mountain Pipeline through a future park use permit. At the same time, in order in Council 117/2017, the government amended an existing *Environment and Land Use Act* Order related to Lac Du Bois Grasslands Protected Area to make similar provision for the future issuance of a park use permit to Trans Mountain.

[10] Carol Linnitt, "Kinder Morgan asks B.C. to Remove Land from Provincial Parks to Make Way for Trans Mountain Pipeline Construction" (September 11, 2014), *DeSmog Canada,* online: <https://www.desmog.ca/2014/09/11/kinder-morgan-asks-b-c-remove-land-provincial-parks-make-way-trans-mountain-pipeline-construction>.

[11] Park Use Permits are required for activities within a park: *Park Act*, R.S.B.C. 1996, c. 344, ss. 8 -9. In relation to Class A and C parks, Park Use Permits to disturb natural resources may only be issued where the Minister finds that it is "necessary for the preservation or maintenance of the recreational values of the park involved" (s. 9).

[12] Note that the approaches set out above would position the provincial government to refuse, for the time being at least, park use permits for the pipeline until further processes and conditions are addressed. Ideally, the provincial government would also permanently restore removed lands to Finn Creek Provincial Park by legislation, and make an order restoring the pre-existing level of protection to Lac Du Bois Grasslands Protected Area by removing the ability to grant park use permits to Trans Mountain. However, this may more directly raise constitutional issues similar to those discussed in *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2015 BCSC 2140 in which Burnaby unsuccessfully sought to restrict pipeline related activities in a local protected area.

[13] *National Energy Board Act*, R.S.C. 1985, c. N-7, s. 77, requires Cabinet to authorize the taking up of Crown land.


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