

# The Trans Mountain Expansion Project: A Policy Case Study

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Sarah Froese and George Hoberg<sup>1</sup>

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## Introduction

The Trans Mountain Expansion Project proposed to expand the capacity of the existing Trans Mountain oil pipeline between Edmonton, Alberta (AB) and Burnaby, British Columbia (BC). It was one of four large pipeline proposals that would have improved market access for Canadian oil resources. However, the other three projects were delayed, cancelled, or rejected. Trans Mountain became the Alberta oil sector's best hope for relieving constraints on pipeline capacity. The project ignited a major controversy revealing three major fault lines in Canadian politics. It reflected the tensions between Canada's economic dependence on extractive resource industries and its aspirations to be a responsible steward of the natural environment. As intense interprovincial conflict emerged, the controversy also revealed the decentralized

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federalism of Canada's political system. Finally, the conflict highlighted the enduring Canadian challenge of reconciling a legacy of colonialism with Indigenous rights.

### Prime Minister Trudeau approves Trans Mountain: "In the national interest"

On November 29, 2016 Prime Minister Justin Trudeau [announced](#) four highly anticipated decisions on oil transportation projects in Canada. The government approved Kinder Morgan's Trans Mountain Expansion Project with the 157 legally binding conditions recommended by the National Energy Board (NEB), as well as Enbridge's Line 3 Replacement Project. Trans Mountain was found to be in the national interest.



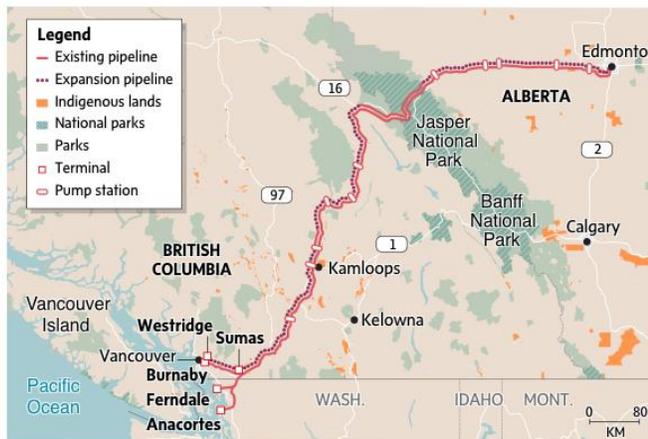
However, it dismissed Enbridge's Northern Gateway Pipelines project, and placed a moratorium on tankers along BC's north coast due to environmental impact [concerns](#) and [shortfalls](#) related to consultation with Indigenous peoples.

### The project proposal

The Trans Mountain Expansion project was proposed by Texas-based oil and gas company Kinder Morgan. The project would `twin` an existing pipeline from the Edmonton area to Burnaby, BC. The original pipeline first began operation in [1953](#) and underwent expansion as late as 2008 with the addition of the [Anchor Loop](#) in Jasper National Park and Robson Provincial Park.

The expansion project would virtually triple the capacity of the pipeline, from 300,000 to 890,000 barrels per day (bpd). The plan was to expand the existing line by 50,000 bpd to 350,000 bpd and add a second line with a capacity of 540,000 bpd. While the original line transported a combination of refined products, light [crude oil](#), and diluted bitumen or "dilbit" (a mixture of heavy crude oil bitumen and natural gas condensates), Line 2 was expressly intended to increase transportation capacity for diluted bitumen.

Three [new terminal](#) berths would be constructed at the Westridge Marine Terminal in Burnaby, BC. The terminal was designed to handle Aframax class vessels (245 m in length, with a capacity 750,000 barrels). According to the Trans Mountain [application](#), tanker traffic would increase seven-fold, from 5 tankers per month to 34 per month.



[The Globe and Mail](#)

73% of the new pipeline [route](#) would be along the existing pipeline right-of-way, 16% would follow other rights-of-way established by utilities, and 11% would be new right of way. The project was initially projected to cost \$6.8 billion.

Kinder Morgan submitted its Project Description to the NEB in May 2013 and its full application in December 2013 after two years of advanced consultations through public meetings. The NEB determined that the application was complete in April 2014 and initiated the required hearing process. Soon after this Kinder Morgan [notified](#) the NEB that it had a new preferred [route](#) to Burnaby's Westridge terminal that bypassed a residential area in favour of tunnelling through Burnaby Mountain. This led to a seven-month "suspension" of the hearing time clock, so that company could do additional testing of the proposed route.

#### **The National Energy Board assessment process**

One component of the NEB's [mandate](#) under the National Energy Board [Act](#) is to regulate international and interprovincial pipelines in the public interest. It must consider technical, economic, social, and environmental factors in considering if, and under what conditions it will grant approval to project proposals. Part of this mandate is derived from the NEB's status as "responsible authority" under the Canadian Environmental Assessment Act (CEAA) 2012. The NEB also regulates pipelines throughout their lifetime and oversees abandonment.

NEB hearings for the Trans Mountain project began in August 2014. The Panel tasked with assessing the project heard from 1600 participants, 400 of whom were formal intervenors. On May 19, 2016, the NEB released its final [report](#). It found "that the Project is not likely to cause significant adverse environmental effects" and that it was in the public interest. It recommended that the federal cabinet approve the pipeline, subject to 157 conditions.

#### **The basis of the decision**

In making its [decision](#) on Trans Mountain the Government considered the NEB's recommendation report. It also took into account the findings of additional review and engagement activities. Because of the "changing circumstances and public concern about the nature and comprehensiveness of the NEB process — the Government of Canada announced that it would direct three new initiatives before making a decision on the pipeline proposal" ([Ministerial Panel](#)). These initiatives were Environment and Climate Change Canada's [Review](#) of Related Upstream Greenhouse Gas Emissions, the views of Canadians and [Indigenous](#) peoples that were gathered through enhanced engagement activities, and a report from the [Ministerial Panel](#).

#### **Questions raised by Trudeau's Ministerial Panel**

With the mandate to address gaps that may have been left from the NEB process, the Ministerial Panel held a series of 44 public meetings, and considered 20,000 email submissions and 35,000 [survey](#) responses. The report represented the positions and concerns of the public on marine impacts, earthquake risk, pipeline routing, rail transport, diluted bitumen characteristics and behaviour, aging infrastructure, economic arguments, climate change, and public confidence in the regulatory process. The panel concluded with six pointed questions that illustrated key controversies for further consideration.

- 1) Can construction of a new Trans Mountain Pipeline be reconciled with Canada's climate change commitments?
- 2) In the absence of a comprehensive national energy strategy, how can policy-makers effectively assess projects such as the Trans Mountain Pipeline?

3) How might Cabinet square approval of the Trans Mountain Pipeline with its commitment to reconciliation with First Nations and to the UNDRIP principles of “free, prior, and informed consent?”

4) Given the changed economic and political circumstances, the perceived flaws in the NEB process, and also the criticism of the Ministerial Panel’s own review, how can Canada be confident in its assessment of the project’s economic rewards and risks?

5) If approved, what route would best serve aquifer, municipal, aquatic and marine safety?

6) How does federal policy define the terms “social licence” and “Canadian public interest” and their inter-relationships?

#### *A project between two assessment regimes*

These reports and related engagement activities were also part of the government’s overhaul of the federal environmental assessment and regulatory review process for major projects. Trudeau had made improving the assessment process a part of his government’s [agenda](#) when it was elected in 2015. In August 2016 Environmental and Climate Change Minister Catherine McKenna established an [Expert Panel](#) to review existing legislation for this purpose. In the meantime, the government established interim [principles](#) to guide ongoing reviews and decision-making on projects. The interim principles included special [measures](#) for Trans Mountain that encompassed Indigenous and public engagement, an assessment of upstream greenhouse gas emission impacts, and an extended decision-making timeframe in order to allow for these activities.

#### *A new balanced approach to environmental and economic interests*

While the economy continued to be a central focus for the government, [polling](#) found that environmental concerns were gaining salience among Canadians. Trudeau used rhetoric of balancing economic and environmental values, rather than pitting them against each other when he finally delivered the federal government’s [decisions](#):

Canadians know that strong action on the environment is good for the economy. It makes us more competitive, by fostering innovation and reducing pollution. Canadians value clean air and water, beautiful coasts and wilderness, and refuse to accept that they must be compromised in order to create growth.

In fact, climate policy was seen as a prerequisite for responsible development of the oil sands resources. As part of Alberta’s Climate Leadership [Plan](#), introduced by Premier Rachel Notley in 2015, Alberta committed to implementing a 100 megatonne cap on annual emissions from its oil and gas sector and to adopting the federal carbon price proposed in the Pan-Canadian [Framework](#) on Clean Growth and Climate Change.

“A strong economy and a healthy environment go hand in hand...” - Prime Minister Justin Trudeau ([Office](#) of the Prime Minister)

This important dynamic was also reflected in Trudeau’s speech:

We said that major pipelines could only get built if we had a price on carbon, and strong environmental protections in place. We said that Indigenous peoples must be respected,

and be a part of the process. We also said that we would only approve projects that could be built and run safely.

And that's how we've come to our decisions today.

... And let me say this definitively: We could not have approved this project without the leadership of Premier Notley, and Alberta's *Climate Leadership Plan* – a plan that commits to pricing carbon and capping oilsands emissions at 100 megatonnes per year.

We want to be clear on this point, because it is important and sometimes not well understood. Alberta's climate plan is a vital contributor to our national strategy. It has been rightly celebrated as a major step forward by industry and the environmental community.

In an effort to bolster its commitment to protecting marine waters the federal government also announced the [Ocean's Protection Plan](#) (OPP) worth \$ 1.5 billion a few days earlier.

The OPP marked a targeted, proactive approach to spill prevention and response.

It proposed a variety of initiatives to help create a “world-leading” marine safety system. This involved improving data availability regarding marine traffic; strengthening the responsibility of industry for incidents; enhanced 24/7 response capacity; baseline data and cumulative effects studies, including new protections for whales; meaningful Indigenous partnerships; and funding for research and innovation in the area of spill clean up and oil behaviour.

### **Environmental Impacts: Too Risky or Worth the Risk?**

The main environmental concerns raised by the Trans Mountain project were the potential impacts of a marine or land oil spill, and oil sands production as a contributor to climate change.

#### **Spill concerns**

Marine tankers operate within a multifaceted regulatory spill prevention and response [regime](#). Vessels associated with the Trans Mountain project would be subject to international, national, regional, and industry-led oversight from authorities like the International Maritime Organization, Transport Canada, and the Vancouver Fraser Port Authority.

However, there was concern that increased marine vessel [traffic](#) through the Salish Sea to accommodate expanded capacity could heighten the risks of an oil spill. A bitumen spill could threaten food sources, industries like tourism and fisheries, Indigenous peoples' rights, and the health of ecosystems. Estimates of the chances of a spill also varied substantially, highlighting the uncertainty and influence of assumptions involved in weighing potential outcomes.

Kinder Morgan estimated the [risk](#) of major spill as a “once-in-473-years event”, while City of Vancouver asserted that the [risk](#) of a spill in the next 50 years to be between 16 to 67 %.

The [Tseil-Waututh Nation](#) and the [Raincoast Conservation Foundation](#) submitted that the risks of a marine spill were too great.

The NEB's recommendation report concluded that there was a very low risk of a high-consequence oil spill, and that the level of risk entailed was acceptable.

Even without a spill, the Raincoast Conservation Foundation said that the increase in noise caused by tankers could contribute to the [extinction](#) of the Southern

Resident killer whales. The NEB also [found](#) that project-related marine shipping would contribute to the cumulative impacts experienced by this species and have a significant adverse effect. They also determined that direct mitigation measures were not available, and that increased traffic would occur regardless of the project unless the appropriate regulatory authorities were engaged.

There was also controversy over the behaviour and characteristics of diluted bitumen if spilled in marine waters. A Government of Canada technical [report](#), a Royal Society of Canada [report](#), and a US National Academy of Science [report](#) was the most recent research at the time of the NEB's review. Anti-pipeline advocates argued that dilbit represented even greater risks than those presented by lighter crude oil because of its denser properties and sulphuric nature. However, some studies found that, while still an environmental impact, a dilbit spill might pose risks comparable to a similar crude oil spill. Some dilbit was predicted to [sink](#) below the surface, and the majority was predicted to remain on the surface, eventually [accumulating](#) on the shore.

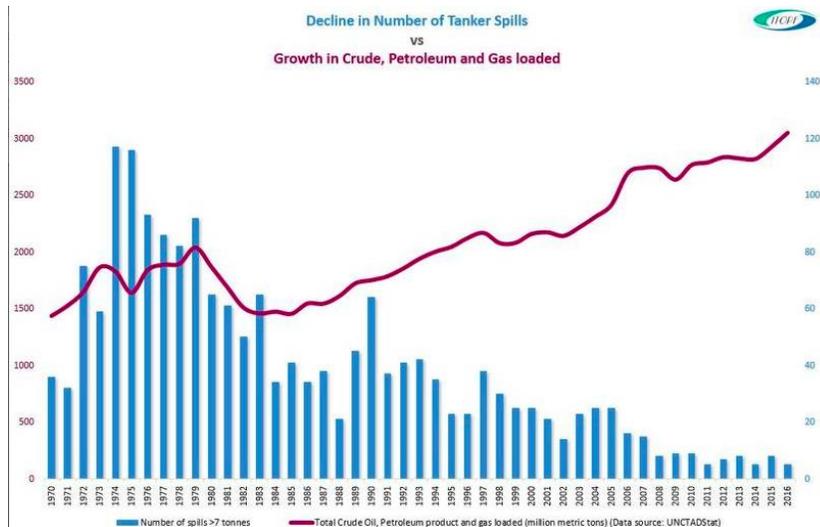
After considering the evidence presented to it the NEB [concluded](#):

The weight of the evidence indicates that any sinking would likely be in limited quantities and only after sufficient weathering over a period of days or interaction with sediment and other organic matter under the right environmental conditions (p 136).

In addition to the OPP, Trans Mountain also [committed](#) to enhancing spill-prevention and response measures in an effort to mitigate risk and reduce concern. This issue of cost recovery was also addressed under the [Pipeline Safety Act](#). Kinder Morgan was expected to hold \$ 1 billion in case of a land spill in its right-of-way, for which it would be held solely accountable. In the case of a marine spill, the polluter-pays [principles](#) also applied, although funds for the clean up could come from a number of sources

“... if I thought this project was unsafe for the BC coast, I would reject it.” – Prime Minister [Trudeau](#)

While some found these risks to be unacceptable, the federal government was confident they could be mitigated and minimized in an effort to reap considerable benefits from the project.



Decline in Spills, International Tanker Owners Pollution Federation

### Environmental group mobilization

The Trans Mountain project attracted opposition from a range of environmental groups, from large bi-national groups like [Stand](#) (former ForestEthics), Canadian sections of large international groups (like [Greenpeace](#) and [350.org](#)), multi-issue groups that have chosen the project as one of its campaigns (like [LeadNow](#)), mainstay BC environmental groups (like [Dogwood BC](#), [Wilderness Committee](#), and [Sierra Club](#) of BC), and local groups organized specifically to fight the project (like [Tanker Free BC](#) and Burnaby Residents Against Kinder Morgan Expansion or [BROKE](#)). Dogwood has been one of the most active groups with its “[No Tankers](#)” campaign.

### Climate impacts

There was also disagreement about whether the Trans Mountain Expansion was consistent with climate policies, or would make achieving targets less likely or more expensive.

Environment and Climate Change Canada’s assessment of upstream greenhouse gas emissions found that:

... the upstream GHG emissions in Canada resulting from the production, processing, and refining of products associated with the expanded nominal capacity of the TMPL system could range from 21 to 26 Mt of CO<sub>2</sub> eq per year. Considering only the capacity added by the Project, emissions could range from 13 to 15 Mt of CO<sub>2</sub> eq per year.

And that:

... if oil sands production were to not occur in Canada, investments would be made in other jurisdictions and global oil consumption would be materially unchanged in the long-term in the absence of Canadian production growth.

University of British Columbia’s Simon Donner [pointed out](#) that this logic, if applied broadly to rationalize every pipeline expansion project, would most certainly result in increased GHG emissions in a typical [tragedy of the commons](#).

In the 2016 Energy Futures the NEB had also suggested that increased capacity would lead to faster production growth than if capacity was constrained. It predicted that in the case of [constrained](#) pipeline transport capacity crude oil production would grow slower than under the “Reference case” where sufficient pipeline capacity was assumed. This is because increased transport prices incurred by having to ship by rail would decrease profits. This would result in an overall reduction in production by 8 % relative to the Reference case.

Marc Jaccard from Simon Fraser University led a “[well-to-wheels](#)” analysis and calculated that Trans Mountain would cause an 8.8 megatonne increase in upstream emissions and a 71.1 megatonne increase associated with downstream refining, distribution, and combustion.

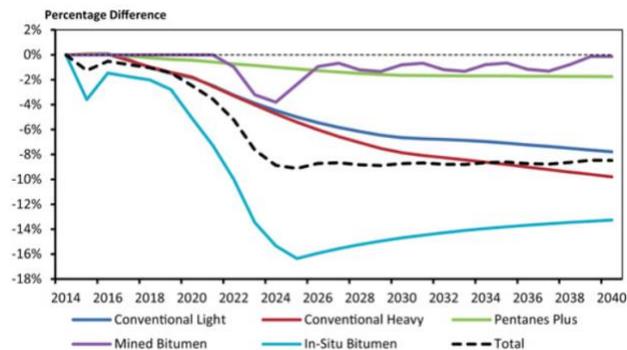
The NEB’s projection that oil production [growth](#) would occur through 2040 was adopted by the ECCC emissions assessment, which also submitted that:

... most oil sands supply growth to the end of the decade can be considered 'locked in', and is unlikely to be reduced by a significant amount.

It also cited contrasting models that suggested the impact of oil sands growth was unclear:

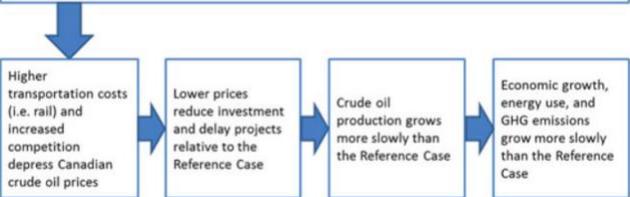
... oil sands production growth is not fully consistent with a world in which global warming is limited to 2o C [Published in [Energy Policy](#) and [Nature](#) journals]

... oil sands production could continue to expand from current levels while still limiting warming to 2o C: for example, the IEA's World Energy Outlook's [450 Scenario](#).



**Constrained Case Assumptions**

- Oil export pipeline capacity constrained at 631 10<sup>3</sup>m<sup>3</sup>/d (4.0 MMb/d)
- Crude-by-rail provides incremental, but more costly, export capacity
- U.S. Gulf Coast is the primary export market for heavy crude, light crude competes for Midwest and East Coast markets



Constrained Case, NEB 2016

And maintained that future technological developments could help reduce the emissions of oil sands growth. It did not, however, directly address whether the project was consistent with climate change goals.

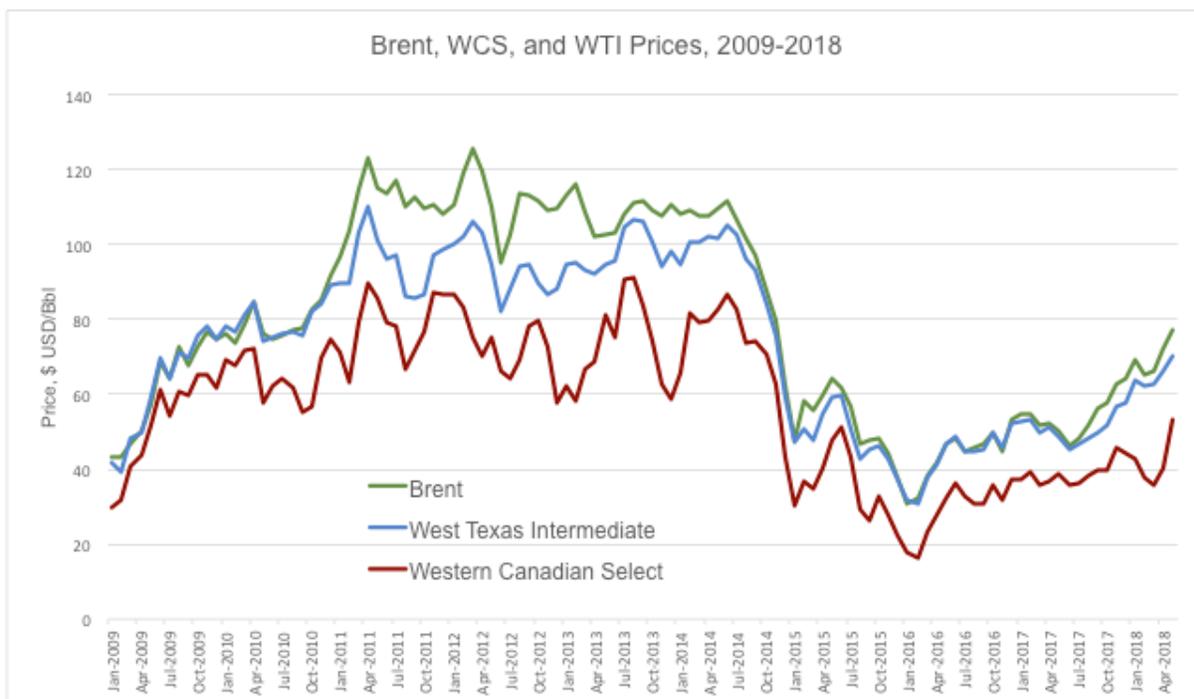
Donner [determined](#) that expanding oil sands production would make it very challenging for Canada to reach its Paris Agreement commitment to reduce GHG emissions by 30 % below 2005 levels by 2030. The Pan-Canadian [Framework](#) on Clean Growth and Climate Change set out how governments in Canada planned to accomplish this. A major component of the Framework was a national carbon tax. Some thought that the successful implementation of this policy was more indicative of whether Canada would meet its goals. Theoretically, a [carbon tax](#) would incentivize market actors to abate enough emissions to do so, and do so in the most economically efficient manner, as opposed to a project-by-project approach.

Climate Action Tracker [rated](#) Canada's policy action and practices as "highly insufficient".



The geography of North American energy production and transportation created a distinctive problem for the oil sands. Petroleum products receive different prices depending on their quality and location. Alberta's bitumen is priced as part of the Western Canada Select (WCS) index. Most North American oil gets the West Texas Intermediate (WTI) price, and international oil is typically priced according to the Brent crude index. WSC has always faced a price [discount](#) because it is heavier and needs to be upgraded to have the characteristics of "sweet, light" crude oil. But the price differential can vary depending on market conditions. The bigger driver of concern to the oil sands industry has been the differential between WTI and Brent prices.

In Canada pipelines companies generate revenue by charging fees for crude oil producers to transport oil through their pipelines



While the two benchmarks historically tracked each other closely, in the early 2010s a substantial discount for WTI emerged relative to [Brent](#). For 2007-2010, the WTI and Brent benchmarks were, on average, less than a dollar per barrel apart. Between 2011-2014, the price discount averaged [\\$13 dollars](#). The inability to get oil sands products the global price resulted in lost revenues to the sector of billions of dollars per year, creating a sense within the industry that getting access to tidewater was an imperative. The Trans Mountain pipeline would open up markets in northeast Asia and Washington State, allowing Canada's crude oil to capture international markets.

Find current [Brent](#) and [WTI – WCS Prices](#).

## Jobs

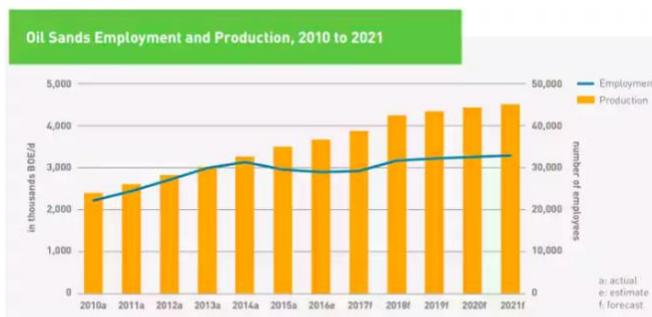
The NEB [estimated](#) that Trans Mountain would generate 15,000 jobs during construction, 440 permanent jobs for each year of operation, and \$ 4.5 billion in government revenues.

Unemployment and economic conditions were a top priority for [two thirds](#) of Albertans in the fall of 2016 as the province had yet to emerge from a [recession](#) brought on by the decline of oil prices in 2015.

Changes in the [Albertan economy](#) and a [report](#) on the reduced competitiveness of fossil fuels in a low carbon future also suggested that reliance on the oil sands might pose an economic risk. By spring 2018 the Albertan economy had emerged from the recession and it was looking more diverse, with major employment gains in manufacturing, retail and wholesale trade, financial insurance, and real estate. The 2015 oil price crashed had forced companies to become leaner and lay off considerable numbers of people and it looked like these efficiency-oriented trends would continue.

Job creation and economic interests were not confined to Alberta. The connection between development opportunities and jobs was highlighted by groups in BC as well. Trans Mountain received [support](#) from the Canadian, BC, and Albertan Chambers of Commerce, and a variety of industry organizations such as the Greater Vancouver Board of Trade, the Business Counsel of British Columbia, the Canadian Building Trades Unions, and the Independent Contractors and Businesses Association.

[Resource Works](#) also emerged to counter the anti-pipeline movement by “communicat[ing] with British Columbians about the importance of the province's resource sectors to their personal well-being”.



Oilsands output (shown in the yellow bars) has grown and is expected to continue to grow faster than employment in the sector (shown in the blue line) as productivity increases. (PetroLMI)

[CBC News \(PetroLMI\)](#)

On the other hand, there remained some concern that a potential spill would [threaten](#) businesses that relied on ecosystem services, such as fisheries and tourism. Other economists [argued](#) that job creation estimates base on the input-output [model](#) were overblown.

## First Nation's Authority in Resource-Development Decisions

The role of Indigenous peoples in resource development decision-making was undergoing evolution as the Trans Mountain project unfolded. While Aboriginal rights have been enshrined in Canada's legal system for over 35 years through [Section 35](#) of the Constitution Act, Indigenous peoples have often had to fight in court to define and uphold these rights. Costly, adversarial legal battles have strained efforts toward reconciliation. Trudeau's Liberal government took steps to change this. He often said that the federal government's most important relationship was that with Indigenous peoples, and committed to establishing a renewed [relationship](#) based on recognition of rights, respect, co-operation, and partnership.

Canada gave its “[unqualified](#)” [support](#) for the United Nations [Declaration](#) on the Rights of Indigenous Peoples in May 2016, following the [recommendation](#) of the Truth and Reconciliation

Commission. In February 2017 it initiated a review of relevant federal laws, policies and operational practices to ensure they aligned with UNDRIP. They also established [principles](#) to guide Canada's relationship with Indigenous peoples.

Free, prior, and informed consent (FPIC) is a standard included in six UNDRIP articles, the most directly relevant being Article 32:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources...

The Government of Canada has historically been hesitant to endorse UNDRIP given the potential interpretation of FPIC as "veto power". However, a prevailing [perspective](#) maintains that FPIC describes a process of seeking consent in good faith, rather than requiring states to obtain consent to proceed with resource development projects. The anticipated implementation of FPIC in Canada is [complex](#), given considerable [legislation and policy](#) governing consultation and accommodation, the Crown's fiduciary [responsibility](#), and the government's [commitment](#) to reconciliation.

Prime Minister Trudeau seemed to say that applicable decision-making authority would be delegated to Indigenous peoples during the 2015 election campaign. His statement that no meant no "[absolutely](#)" and [platform](#) that "[Governments grant permits. Communities grant permission](#)" caused considerable stir because such an approach would position Indigenous leaders in a place of greater influence over activities that impact their rights than seen since before colonization.

However, Trudeau soon distanced himself from these statements, adopting a "[consensus](#)" [approach](#) to consent. Minister of Indigenous-Crown Relations and Northern Affairs, Carolyn Bennett's statement that "[UNDRIP shouldn't be scary](#)" further aimed to assuage those worried that FPIC might be interpreted as a veto. Supreme court [rulings](#) and [policies](#) reinforced the approach of balancing rights.

## **Constitutional Questions: Federalism and the Role of Local Governance**

First Nations, municipalities, provincial governments, and the federal government were challenged to work within the cooperative framework set out in the Constitution. The role of local authorities to say yes or no, or regulate federally-approved projects was a key focus of attention.

### **Federal Government**

In Canada's federal governance system provinces have jurisdiction over natural resources, but many large energy and infrastructure projects are subject to federal authority. Federally regulated projects include those that involve Aboriginal rights, environmental impacts on federally regulated natural resources (such as anadromous fish), and interprovincial and international [pipelines](#) and electricity transmission lines.

Since pipeline and terminal construction and operation affect many areas under provincial jurisdiction, provinces have a potential role to play as well. In cases like this where provincial and federal jurisdiction are both involved, two levels of government have increasingly agreed to conduct a single project assessment.

Review procedures for the Trans Mountain were governed by the Canadian Environmental Assessment Act ([CEAA 2012](#)). Under this act the Harper government sought to streamline regulatory review. The industry and the Harper government were particularly concerned about reducing jurisdictional overlap and conflict, and promoted a one-project, one-process approach to regulatory reviews where feasible. CEAA 2012 also limited the participation of the public in environmental assessments to those deemed “directly affected”, contributing to the [crisis](#) of confidence in the NEB.

Part of Trudeau’s [review](#) of environment and regulatory processes included broadening public participation opportunities. The NEB would be replaced by the Canadian Energy Regulator, and authority for project assessments would instead be coordinated by the new Impact Assessment Commission. These recommendations were captured in the [report](#), Building Common Ground: A New Vision for Impact Assessment in Canada. The outcome of the overhaul was [Bill C-69](#), which went to the Senate for review on June 20, 2018.

### **Provincial Governments**

Provincial governments were generally expected to issue their own Environmental Assessment Certificate and conditions in relation to projects under joint-review. However, the BC government had acceded this authority to the federal government through an [equivalency agreement](#).

This agreement was [challenged](#) by the Coastal First Nations in the context of the Northern Gateway pipeline – a case that came to have implications for the comparative roles of BC and the federal government in the context of Trans Mountain.

The BC Supreme Court ruled that the province had abdicated its decision-making authority under the BC Environmental Assessment Act by not issuing a certificate. While the Act enabled the provincial government to defer to the federal review, the judge ruled that it still had to determine the issuance of the provincial certificate. The judge also ruled that while the province could not use its regulatory authority to deny an approval to a pipeline that the federal government approved, it could add conditions to the federal government’s conditions.

### **Government of Alberta**

Notley’s NDP government firmly backed a pipeline to tidewater. In her [address](#) to Albertans in April, 2016 Notley said:

Every Canadian benefits from a strong energy sector. But we can't continue to support Canada's economy, unless Canada supports us. That means one thing: building a modern and carefully-regulated pipeline to tidewater. We now have a balanced framework to develop our industry and every government in Canada understands this issue must be dealt with. But I can promise you this: I won't let up. We must get to 'yes' on a pipeline.

This address occurred after the dismissal of Energy East, and while challenges with the Northern Gateway and Trans Mountain projects became increasingly complicated.

### **Government of BC**

BC took up the results of *Coastal First Nations* in their response to Kinder Morgan’s proposal, and formed their own assessment of the project. Initially the province took a formal position [against](#) the Trans Mountain project, emphasizing the lack of emergency response preparedness. Premier Christy Clark reiterated [five conditions](#) for approval set out by her

government in 2012. These conditions stated that the project must complete the environmental review process; approval must be accompanied by a world-leading oil spill and land oil spill prevention and response system; Aboriginal and treaty rights must be addressed and Indigenous peoples given an opportunity to participate in the project; and that BC must receive their fair share of the economic benefit of the project, commensurate to the risk borne.

On January 11 Clark [announced](#) that Kinder Morgan had fulfilled these conditions and issued an environmental [certificate](#) for the BC portion of the expansion with 37 conditions. Days before she announced that she had reached a [deal](#) with Kinder Morgan for the province to receive \$1 billion over 20 years. This secured BC's 5<sup>th</sup> "fair share" condition in an unprecedented way.

However, with the change of government in June 2017, BC's position on the pipeline would change dramatically.

### First Nations Governments

First Nations groups along the pipeline route took diverse positions in relation to the project. While some First Nations are open to the expansion, some have taken a stance in opposition to it. Diverse, and often diverging visions of Indigenous governments' roles in resource development decision-making prompted various expressions of First Nations' engagement with the Trans Mountain project. Groups have appealed to Constitutional law, common law, international law, and ancestral Indigenous laws to assert their authority; and have engaged in unilateral action, alliance formation, protest, negotiation, and participation in proponent and government processes.

### Benefit Agreements and Indigenous stakes in development

In Alberta the pipeline runs through Treaty 6 and Treaty 8 territory, and the Métis Nation of Alberta. In BC it crosses the territories of many First Nations, including 15 reserve lands. Kinder Morgan [engaged](#) in consultations with 133 Indigenous communities and groups in developing the project. [43](#) Aboriginal groups signed mutual benefit agreements with Kinder Morgan, valued at over [\\$400 million](#). Agreements may also provide for employment, capacity building, and procurement benefits. Some Indigenous groups expressed interest in obtaining [equity stakes](#) in the project.

### Legal Action

However, a number of groups remained opposed to the project. Ten First Nations groups<sup>2</sup>, the City of Burnaby, and the Raincoast Conservation Foundation and Living Oceans Society filed various [applications](#) for judicial review of the NEB's Recommendation Report and the Governor in Council's (GIC) decision to approve the project. Four nations discontinued their involvement before the hearing. The remainder were heard in the Federal Court of Appeal in October 2017 under consolidated proceedings.



Grand Chief Perry Bellegarde, Twitter

<sup>2</sup> Tsleil-Waututh Nation; Musqueam Indian Band; Aitchelitz et al; Upper Nicola Band; Squamish Nation; Coldwater Indian Band; Chief Ron Ignace, Stk'emlupsemc Te Secwepemc Nation

Tsleil-Waututh First Nation, whose traditional territory spans the Burrard Inlet, the body of water that is the terminus for the pipeline in Burnaby, has been the most active Nation against Trans Mountain. They filed a lawsuit in the Federal Court of Canada to appeal the NEB's hearing order establishing the terms of the review process, charging that the government had not sufficiently consulted and accommodated the First Nation on the procedures. They performed their own independent [assessment](#) of the project, and in May 2015 rejected the pipeline according to their own laws. The Tsleil-Waututh also joined the [Treaty](#) Alliance Against Tar Sands Expansion in solidarity with Indigenous groups from across Canada and the United States.

Many First Nations along the Trans Mountain route are signatories to the Save the Fraser [Declaration](#), which appeals to inherent, ancestral, and international authority to resist the construction of Northern Gateway and similar oil sands projects across their territories.

The Union of BC Indian Chiefs (UBCIC) president Grand Chief Stewart Phillip has also been a vocal opponent of Trans Mountain. In early 2018, the House of Commons passed a private members [bill](#), "An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples." Referring to that bill, Grand Chief Stewart Phillip [argued](#) that: "Bill C-262 further validates what we already know: Kinder Morgan cannot proceed without the consent of the First Nations along its path, so many of which oppose it".

"No disrespect to the other First Nations that are against the pipeline in B.C. ... From our end — from this northern territory where the oilsands comes from — we would like to see more things happen and hopefully this will go ahead." Chief Archie Waquan, Mikisew Cree First Nation ([CBC News](#))

"I understand we need pipelines. Do I like it? Not particularly so. But it's a necessary evil ... I'd like to tax the crap out of it. Canada is at the table. The province is at the table. Well, they have to move over so the Shuswap can sit at that table. I don't want Canada's money. I want to tax our own resources." — Harold Aljam, Economic Development Coordinator, Coldwater Band ([Ministerial Panel](#))

"I was in a financial place where I had to accept (the Kinder Morgan) money... I literally had my hands tied. I was handed a failed treaty ... it drove us right down into despair... We couldn't afford housing; we couldn't afford food." — Chief Ken Hansen, Yale First Nation ([APTN News](#))

"At the end of the day, we are not really in favour of any pipeline, but we believe it's going to go through anyway," Joseph said. "They will not listen to anybody and that's the history of consultation with First Nations people ... They consult and go ahead and do what they were going to do anyways." — Chief Robert Joseph, Ditidaht First Nation ([Huffington Post](#))

"We're still, at this stage, staunch supporters of this pipeline." — [Chief](#) Ernie Grey, Cheam First Nation ([CBC News](#))

Some also [questioned](#) whether mutual benefit agreements were an appropriate indication of support, as some Nations appeared to enter into agreements because they were not confident their rights would not be otherwise protected, or lacked economic development alternatives. 85 groups that were part of Kinder Morgan's consultations did not sign mutual benefit agreements.

### Municipal Governments

Municipal governments have become highly politicized by recent pipeline controversies and showed considerable interest in the Trans Mountain project even though they don't have direct institutional authority over pipeline decision-making. 21 municipal governments in British Columbia, including virtually all of those in the Lower Mainland, expressed formal opposition to the project. The Alberta Urban Municipalities Association expressed [support](#) for the project, based on a vote "overwhelmingly in favour" of the project by over 1,100 member councillors and mayors. 19 [communities](#) signed Community Benefit Agreements ranging from \$ 75,000 to \$ 1.3 million, and covering 95 % of the pipeline's route.

The most active opponent was the City of Burnaby, who challenged the NEB and Kinder Morgan in court over their plans to perform seismic drilling on Burnaby Mountain in 2014, and over the NEB's suspension of municipal regulations, which allowed Kinder Morgan to proceed with construction in absence of typically required permits in 2017. The City of Vancouver, under the leadership of Mayor Gregor Robertson, was also strongly [opposed](#), focusing on spill risks and climate change.

The mayors of Vancouver, Burnaby, New Westminster, City of North Vancouver, Victoria, Squamish, and Bowen Island put forward a [declaration](#) urging the federal government to address deficiencies with the NEB hearing and review process before proceeding with the Trans Mountain assessment.

Sentiment was not split cleanly between BC and Alberta either. For example, the mayor of Kamloops in BC's interior, Ken Christian expressed [support](#) for the project, citing economic benefits the mitigation of increased rail traffic.

### Protest and Public Opinions

#### Protests on Burnaby Mountain

Controversy erupted with Kinder Morgan decided, six months after its submissions, that it wanted to amend its application to change the route of the pipeline through the terminus city of Burnaby. Thinking the route would be less disruptive to Burnaby residents, Kinder Morgan proposed to [reroute](#) the pipeline through Burnaby Mountain. The change led to the NEB requesting more information about route design, which required the company to perform seismic testing by drilling in the Burnaby Mountain Conservation [Area](#). The City of Burnaby sought to

"It is vital for the economy ... It's vital for Albertans getting a fair price for our resources. It's vital for this country and rebuilding our investor confidence." – Don Iveson, Mayor of Edmonton ([CBC News](#))

"We very rarely hear about the desperate need for safe, clean energy on the other side of those (tankers) ... When we understand that across the world there is a real need and desire for safe, clean energy from Alberta in order to meet people's energy needs, in order to fight poverty, in order to manage the transition to a lower carbon economy ... It's really helpful to get out of our parochial arguments and understand what's really at stake here." – Naheed Nenshi, Mayor of Calgary ([Calgary Herald](#))

block the drilling by enforcing its bylaws against that type of activity in the park without a permit. Conflict erupted in the regulatory tribunal, in the courts, and on the ground.

Kinder Morgan appealed to the NEB, and the NEB, referring to the doctrines of federal paramountcy and interjurisdictional immunity, ruled that the NEB Act clearly gave Kinder Morgan the authority to perform the testing without the consent of the local government. Burnaby [appealed](#) that ruling to the Federal Court of Appeal, but that court refused to grant leave to appeal [several](#) times. In response, Burnaby also [appealed](#) to the BC Supreme Court. In December 2015 that court rejected Burnaby's argument, concluding that the doctrine of federal paramountcy was properly interpreted and applied by the NEB.

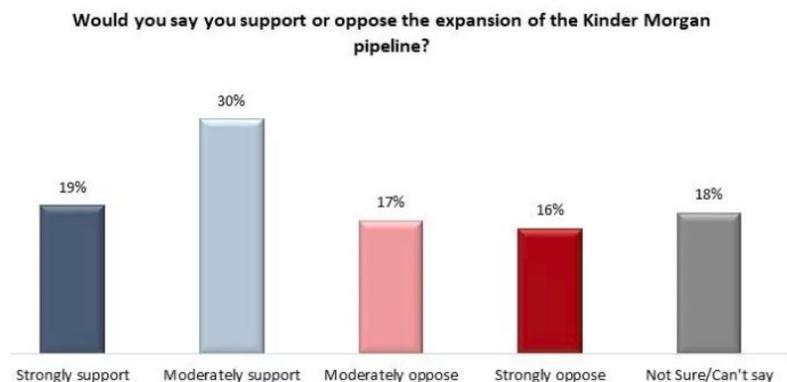
“Where valid provincial laws conflict with valid federal laws in addressing interprovincial undertakings, paramountcy dictates that the federal legal regime will govern. The provincial law remains valid, but becomes inoperative where its application would frustrate the federal undertaking”. – *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2015 BCSC [2140](#)

As these cases were winding through the courts, resistance on the ground emerged once Kinder Morgan sought to begin the seismic testing. Protestors disrupted the activities as Kinder Morgan employees began work, and established an encampment around “Bore Hole 2”, including a sacred fire being nurtured by local First Nations. For nearly a month, Burnaby Mountain became the site of [daily protests](#) against the pipeline and, eventually, the arrest of over 100 protestors.

### Polling

Insights West began [surveying](#) British Columbians about the pipeline in 2013 and found that while public sentiment in BC was generally opposed to the pipeline in 2013, support grew and outweighed opposition by 2018. Differences between region, gender, age, and political affiliation were observed.

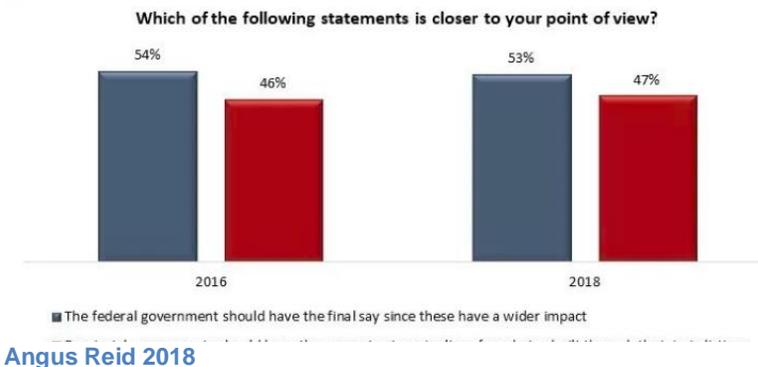
In 2016 a national Angus Reid [poll](#) found that supporters outweighed opponents and in 2018 [found](#) that almost half supported, and one in three opposed the project.



Angus Reid 2018

Between 2016 and 2018 Canadians remained split on how they felt about either federal or provincial governments having the authority to control the outcome of interprovincial pipelines.

### From NEB Recommendation to Government Approval



On May 29, 2016 the NEB delivered its recommendation report. It recommended that the government approve the project with 157 conditions. The federal government would take the next few months to determine whether it would issue a certificate for the project.

When Prime Minister Trudeau approved the project on November 29, 2016 Notley greeted the announcement on Trans Mountain with enthusiasm. In comments to reporters she stated that Trans Mountain would enable the government to support the economic and environmental needs of working families in BC and Alberta, and assist in a just transition toward a more diversified, renewable energy mix.

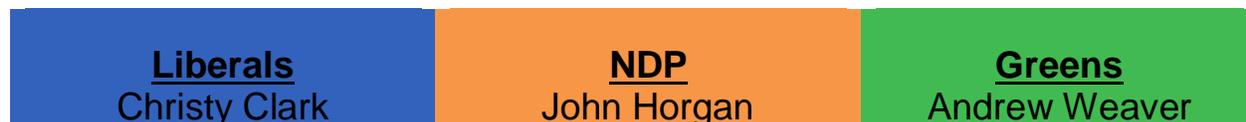
“Quite frankly, as we make the transition to a more diversified economy, to one that's more based on renewable energy, we need to finance that transition. We can't turn it around on a dime. That's not a just transition. And so, I can make that case to people not only in Alberta, but in B.C.” - Alberta Premier, Rachel Notley ([CBC News](#))

Many leaders in BC [reacted](#) negatively to the approval of Trans Mountain, [including](#) NDP and Green Leaders John Horgan and Andrew Weaver, Vancouver and Burnaby Mayors Gregor Robertson and Derek Corrigan.

### Legal and Political Challenges Intensify

#### The Tumultuous May 2018 BC Election

On April 11, 2017 the BC election campaign formally began. It was the start of what would become a 52 day political [drama](#) involving Christy Clark's Liberals, John Horgan's NDP, and Andrew Weaver's Green Party. Each party leader took a different stance in communicating their position on the Trans Mountain project and it became a central, contentious component of the election's debate.



 <p><a href="#">Global News</a> (The Canadian Press/Jonathan Hayward)</p> <p>BC NDP and BC Green are the “Parties of No”</p> <p>BC Liberals will support the development of refineries and pipelines that meet the five criteria we set out.</p>	 <p><a href="#">CTV News</a></p> <p>“The Kinder Morgan pipeline is not in BC’s interest. It means a seven-fold increase in tanker traffic. It doesn’t, and won’t, meet the necessary conditions of providing benefits to British Columbia without putting our environment and our economy at unreasonable risk.</p> <p>We will use every tool in our toolbox to stop the project from going ahead.”</p>	 <p><a href="#">The National Post</a></p> <p>“The B.C. Green Party is the only party that has offered a consistent, principled position, based on evidence: heavy oil tankers have no place on our coast.”</p> <p>“The BC Liberals are beholden to industry and are forsaking their responsibilities to protect the environment and communities.”</p>
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The May 9 [election](#) produced a minority government. The Liberals retained 43 seats, the NDP had 41, and the Greens had 3. 44 were required to hold a majority.

Seven weeks of uncertainty ensued, with [speculations](#) as to whether the NDP and Greens would combine force to form a government, and whether Clark would resign or attempt to pass a Speech from the Throne. Negotiations began immediately, and it was soon evident that the alignment of John Horgan’s and Andrew Weaver’s platforms would draw them together. Among other issues, both opposed the Trans Mountain project. The parties entered into a Confidence and Supply [Agreement](#) that would see 3 Green MPs join in supporting Horgan as head of the new government.

On June 28 Horgan brought a non-confidence [motion](#) against the BC government, and won 44-42 with the support of the Greens. Later that afternoon the Lieutenant Governor, Judith Guichon, [invited](#) John Horgan to form the new government.

#### [Kinder Morgan ups commitment and new BC government takes action](#)

Meanwhile Kinder Morgan continued to proceed with the project, completing its initial public offering ([IPO](#)) of 103 million restricted voting shares on May 30, 2017, totalling approximately \$1.75 billion. The successful IPO gave the company the confidence to proceed with the final [investment](#) decision of \$7.4 billion.

Premier Horgan and Andrew Weaver followed through on their [commitment](#) to oppose Kinder Morgan. However, consultations with government lawyers convinced them that pledging to “stop the pipeline” created legal [risks](#) for the province. Thus, when Horgan sent mandate [letters](#) to his

cabinet, the phrasing changed from “stopping the pipeline” to “defend B.C.'s interests in the face of the expansion of the Kinder Morgan pipeline...”

On August 10, 2017 Environment and Climate Change Strategy Minister George Heyman and Attorney General David Eby announced that BC would seek intervener status in legal challenges against the approval and committed to fulfilling Aboriginal consultation obligations. They retained former judge Thomas [Berger](#) who famously led the Mackenzie Valley Pipeline inquiry, to provide legal advice.

### Court proceedings unfold

In October 2017 15 consolidated [challenges](#) to the federal government’s approval of Trans Mountain were brought before the Federal Court of Appeal. Oral [arguments](#) were made by six First Nations, 2 municipalities, 2 environmental organizations, the government of BC, the government of Canada, and Kinder Morgan. First Nations’ arguments set out how the Crown had not upheld the duty to consult in dealing with them, while Burnaby and Vancouver centred on issues of procedural fairness, siting, and the breadth of environmental impact considerations. Kinder Morgan’s lawyer opted to [focus](#) on the activities Trans Mountain undertook in fulfilling its duties rather than focus on legal arguments.

According to staff lawyer at [West Coast Environmental Law](#), Eugene Kung, the court had two primary questions to consider:

1. Was consultation with First Nations meaningful and adequate, following the *Gitxaala* decision and leading cases from the Supreme Court of Canada?
2. Does the fact that Cabinet made a polycentric decision mean that the Court can’t take a hard look “behind” (or “upstream of”) the decision to see if constitutional & statutory duties were properly met before balancing the interests? Or does the Crown first have to discharge its constitutional duties and statutory requirements before balancing interests?

As an indication of complexity and importance of the case, the hearing was the [longest](#) in Federal Court of Appeals history, breaking the record set previously by the [case](#) overturning the Northern Gateway pipeline approval for inadequate consultation with First Nations.

### Pipeline politics intensifies as Construction begins

Although Kinder Morgan had not received permits from the City of Burnaby the NEB allowed Kinder Morgan to [bypass](#) municipal bylaws and begin construction work on Burnaby Mountain. Minister Heyman expressed his shock to the National Observer’s Mike De Souza, [saying](#) that the NEB had originally stated in its approval that Kinder Morgan would be required to obtain local permits. [BC](#) and [City](#) of Burnaby later appealed the decision, but were [dismissed](#). Burnaby then [appealed](#) the BC Supreme Court’s decision not to review the NEB’s decision.

"It's both a highly unusual and a highly troubling intrusion on a province's right to enforce its own permits, its own regulations and the interests of its own citizens ... We do not take kindly to this intervention." – BC Environment Minister George Heyman ([The Globe and Mail](#))

On January 17, 2018 Kinder Morgan [announced](#) that it would restrict construction activities and expected to spend the spring of 2018 on resolving key permitting issues. This accompanied an

extension of the unmitigated delay from nine months to one year, bringing the in-service projection to December 2020.

### Trade wars between Alberta and BC

On January 30, 2018 the BC Government intensified its opposition by [proposing](#) to restrict any increase in diluted bitumen shipments in BC until it conducted more spill response [studies](#). This announcement elicited strong reactions from a variety of stakeholders including the Greater Vancouver [Board of Trade](#),

Within a week of this announcement, Notley, calling the BC action an “unprovoked and unconstitutional [attack](#)” retaliated by banning BC wines from the province. Three days later, Notley [stated](#), “This is not a fight between Alberta and B.C. This is B.C. trying to usurp the authority of the federal government and undermine the basis of our Confederation”. A bit later, her [criticism](#) intensified: “That is completely unconstitutional, it’s a made-up authority, it’s a made-up law, it’s ridiculous”.

The wine ban was soon lifted when the BC Government changed course and [announced](#) it would refer the question of whether it could constitutionally regulate the increase of oil imports to the courts. While these actions cooled the interprovincial trade war, neither Premier backed down on their position.

### Ongoing protest

[Protests](#) on Burnaby Mountain also continued. On March 16, 2018 the BC Supreme Court granted an indefinite [injunction](#) that prohibited protestors from going within five metres Kinder Morgan’s sites.

A series of [arrests](#) followed as anti-pipeline activists crossed the injunction line. This included Green Party Leader Elizabeth May and NDP MP Kennedy Stewart. May later pled [guilty](#) to contempt.

While protest is legal some protestors believed that breaking the law by crossing the injunction line was also justified.

Critics increasingly [questioned](#) whether the anti-pipeline coalition had respect for the rule of law.

“Our government has every right to consult with British Columbians on the best possible measures to protect our lands and waters from the potential impacts of diluted bitumen spills,” the statement reads in part. “If Alberta disagrees, they can make that argument in the proper venue, in our court system. Our consultation on proposed new regulations hasn’t even begun, but Alberta has seen fit to take measures to impact B.C. businesses.” – BC Premier John Horgan ([Global News](#))



[The Tye](#) (Rogue Collective)

Some who opposed the pipeline also sought to exert influence by communicating the risks of the project to [shareholders](#) and Kinder Morgan's Annual General Meeting.

### Kinder Morgan's Ultimatum

On April 8, 2018 Kinder Morgan made a major [announcement](#), saying it would cease all non-essential spending on the Trans Mountain project. It gave the Canadian federal and provincial governments a deadline of May 31 to broker agreement among stakeholders and give the project enough certainty to proceed.

The political reaction to the announcement was strong, setting off a flurry of activity in Ottawa. Minister of Natural Resources Jim Carr [called](#) on Premier Horgan to "end all threats of delay." A week later Trudeau held an [emergency meeting](#) with Cabinet and then with Horgan and Notley, [interrupting](#) his international schedule to come back to Canada.

I have also informed Premiers Notley and Horgan today that we are actively pursuing legislative options that will assert and reinforce the Government of Canada's jurisdiction in this matter, which we know we clearly have. – Prime Minister Justin Trudeau ([Office](#) of the Prime Minister)

At this time Trudeau confirmed that the federal government was pursuing legislative means to enforce their jurisdiction over the project, and that he had instructed his Finance Minister Bill Morneau to enter into [negotiations](#) with Kinder Morgan to "remove the uncertainty" hanging over the Trans Mountain pipeline expansion.

Notley also released a [statement](#), saying that her government was prepared "to do whatever it takes" to see the pipeline built, including investing in the project. She also said that BC would not be able to continue disrupting progress and not suffer economic consequences.

### Pro-Pipeline Initiatives

Initiatives in support of the project also continued. A key concern for [many](#) was how escalating opposition, in particular from the Government of BC, to an already approved project, would jeopardize investor confidence.

On April 10, 2017 approximately 2,000 people [gathered](#) at a "Rally for Resources" in Calgary to voice their support for the project, chanting "Build it Now". Smaller [rallies](#) also occurred across communities in BC and Alberta in the coming months.



Rally for Resources, Calgary Herald (Darren Makowichuk/Postmedia)

The Canadian Chamber of Commerce lead a “Day of Support” for the project, in which leaders from the business community, labour, Indigenous representatives, and provincial and territorial chamber presidents participated in a [delegation](#) to Ottawa. Their purpose was to express broad-based endorsement of the project.

“This is no longer about a pipeline but whether you can rely on government and the rule of law if you choose to invest.” - Greg D’Avignon, President and CEO of the Business Council of BC ([Vancouver Courier](#))

### The Government of Alberta takes legal and political action

On April 16, 2016 Notley introduced the Preserving Canada’s Economic Prosperity [Act](#). It was designed to give Alberta power to restrict the export of crude oil, natural gas, and refined fuels to BC. This was expected to have a major impact on fuel prices in BC, which were already the [highest](#) of any major North American city.

In announcing her intentions to introduce the legislation, Premier Notley [stated](#):

Alberta must have the ability to respond. This is not an action that anyone wants to take. And it is one that I hope we never have to take. And it’s not how Canada should work. And it’s not how neighbours, frankly, should treat one other.



**Keep Canada Working** @KeepCanWorking · Apr 26  
The @transmtn Pipeline is in the best interests of Canada. It builds our economy, funds the things that matter and is part of the national plan on the economy and environment. Learn more and share your support at [keepcanadaworking.ca](#) #keepcanadaworking



**Keep Canada Working**  
A @YourAlberta initiative to build support for the Trans Mountain Pipeline expansion project. Use #KeepCanadaWorking to join the conversation.  
[keepcanadaworking.ca](#)

Keep Canada Working, Twitter

BC [challenged](#) the [constitutionality](#) of this legislation in court, and Attorney General David Eby called it “[blatantly](#) unconstitutional”. Upon request from BC, Alberta [declined](#) to refer its legislation to the courts.

Alberta also spearheaded the “[Keep Canada Working](#)” awareness campaign in order to educate citizens on the benefits of the project and showcase existing support.

### BC Continues Political Pressure and the Federal Government Takes Drastic Action

#### BC submits its reference question to the courts

BC followed through on its intention to submit its own reference [question](#) to the courts, seeking leave to exercise [jurisdiction](#) over environmental matters in the case of the Trans Mountain project. As it proceeded with consultations on oil spill response legislation the Government of Canada issued an updated [report](#) on diluted bitumen and addressed an open letter to Minister Heyman regarding Canada’s investments in ocean and pipeline safety. The Government of Canada also announced [regulations](#) to reduce methane emissions in the oil and gas sector by 50%.

### Federal government takes steps to increase certainty

On May 16, 2018 Morneau emerged from negotiations with Kinder Morgan to announce that the federal government was prepared to [offer](#) Kinder Morgan – or any other future owner of the Trans Mountain project – indemnity for any financial losses incurred because of the Government of BC’s actions. However, indemnity was not to extend to risks like First Nations’ [litigation](#) against the project’s approval.

### BC Supreme Court rejects cases challenging BC’s environmental assessment certificate

On May 24, 2018 The Supreme Court of British Columbia issued two rulings that upheld the BC Environmental Assessment Certificate. The court [rejected](#) the Squamish Nation’s argument that the province had not adequately consulted with the First Nation. The companion [ruling](#) turned back the City of Vancouver’s claim that the BC EAO did not fulfill their procedural obligations in issuing a permit for Trans Mountain.

### “... an investment in Canada's future” – Morneau

On May 29, 2018 Morneau [announced](#) that the federal government would purchase Kinder Morgan Canada’s Trans Mountain assets for \$4.5 billion. The announcement was a result of intense [negotiations](#) following Kinder Morgan’s deadline. The deal was expected to conclude in August 2018.



In the short-term, the government’s stated intention was to ensure that the project is built.

However, it also aimed to [sell](#) the pipeline to a private entity once risks were reduced sufficiently.

As of May 2018 Kinder Morgan had [submitted](#) 756 permit applications to the BC EAO. 220 had been approved and issued, while the rest were under review. 435 permits were outstanding. By August the NEB [announced](#) that Kinder Morgan had fulfilled NEB pre-construction requirements for certain segments of the pipeline. 72 % of the detailed route had been approved at this point in time and construction was approved to begin in approved areas.

While having the Canadian government as the owner of the pipeline served as a tangible expression of the government’s commitment to see the project built, considerable risk for the Trans Mountain remained, and may have even increased as opposition [cited](#) broken promises. [Criticism](#) also came from pro-pipeline advocates, many of whom thought that the government should never have been [driven](#) to the point of investing public funds. Others like associate professor of Economics at the University of Calgary, Trevor Tombe saw the temporary purchase as a [reasonable](#) way to deal with political uncertainty.

### The Federal Court of Appeal Makes its Decision

On August 30, 2018 the Federal Court of Appeal (FCA) finally [ruled](#) on the applications for judicial review of the NEB’s recommendation report and the federal government’s Order in Council approving the project. It found that the applicant’s challenges to the NEB’s report were without merit. However, it “quashed” the federal government’s approval, and ordered it to remedy two flaws before proceeding.

The FCA found that the NEB's report unjustifiably excluded the impacts of project-related tanker traffic from its review. In the FCA's view this meant that the cabinet did not have all the information needed before them "to properly assess the public interest, including the project's environmental effects – matters it was legally obligated to assess".

Secondly, the FCA found that the federal government did not discharge its duty to meaningfully consult Indigenous peoples. In the last stage of the consultation process "Canada fell well short of the minimum requirements imposed by the case law of the Supreme Court of Canada". In particular, Canada failed to engage in meaningful, two-way dialogue regarding Indigenous peoples' concerns at this stage. The FCA concluded that the NEB (or its successor) must redo this phase of consultation before putting the decision before the federal government again.

The Government may also choose to seek leave to appeal the FCA's decision before the Supreme Court of Canada.

The fallout from this decision began late in the same day when Rachel Notley [announced](#) that Alberta was withdrawing from the Pan-Canadian Framework on Clean Growth and Climate Change.

## Conclusion

Contentious infrastructure projects like Trans Mountain typically go through four stages: the review stage where the project application is reviewed by regulators and stakeholders participate in formal engagement processes; the political stage where authoritative decision-makers issue a formal decision; the judicial stage where the project is reviewed by the courts; and finally the on-the-ground stage of construction, physical demonstrations, and government response. These stages can overlap, as they have in the Trans Mountain case. With the Federal Court of Appeals's August 30<sup>th</sup> decision, the project will have to revisit earlier consultative stages if the Government of Canada decides to proceed.