PRIVATIZING UNCERTAINTY AND SOCIALIZING RISK: INDIGENOUS LEGAL AND ECONOMIC LEVERAGE IN THE FEDERAL TRANS MOUNTAIN BUY-OUT

Shiri Pasternak & Nicole Schabus*

Introduction

In an interview in early-September 2018 shortly after the federal buy-out of the Trans Mountain Pipeline Expansion Project (TMEP), Prime Minister Justin Trudeau proclaimed that this project would be dead if it were not for the higher risk tolerance of the federal government compared to that of previous owner, Kinder Morgan, Inc. (KM).[1] In other words, the federal government could guarantee completion where a private corporation had failed to make the project viable – perhaps even *because* the project no longer needed to be economically viable to succeed. This statement of the sitting Prime Minister is troubling for many reasons, central among which because he implies that governments have a higher risk tolerance vis-à-vis abrogating Aboriginal title and rights, when indeed they have a constitutional obligation to maintain them and the honour of the Crown. Opposition to the pipeline, led by First Nations and environmental groups, was after all one of the reasons KM cited for selling off this asset.[2] International environmental, Indigenous, and human rights obligations apply directly to governments, so if anything, the government of Canada should commit to implementing *higher* standards than industry.

Given the widespread Indigenous opposition to the TMEP, the Prime Minister's statement must be understood to suggest that the federal government is prepared to override inherent Indigenous rights. It also flies in the face of higher international standards to which states may be held as compared to private industry. The Prime Minister's statement reflects the approach that the federal government has employed for decades in regard to Aboriginal title and rights. Rather than engaging with Indigenous peoples as nations with inherent responsibilities to govern their territories, a risk management strategy is deployed to manage the uncertainty of Indigenous land rights and broader territorial authority in Canada.

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* Shiri Pasternak is an Assistant Professor in Criminology at Ryerson University in Toronto. Nicole Schabus is a lecturer at the Thompson Rivers University Faculty of Law.

[1] Zi-Anne Lum, "Trans Mountain Expansion Would Be 'Dead' if Feds Didn't Buy Pipeline: Trudeau. He Said the Government has 'A Greater Tolerance for Risk'" *Huffington Post* (5 May 2018), online: <huffingtonpost.ca>.

[2] John Gibson, "With Project in Doubt, Kinder Morgan Shareholders Vote to Sell Trans Mountain Pipeline to Ottawa" *CBC News* (30 August 2018), online: <cbc.ca/news>.

This paper will examine the failure of governments to implement the broader territorial use-based concept of Aboriginal title and the resulting legal and economic risks posed in the context of the TMEP buy-out. This critical intervention considers Supreme Court of Canada decisions and Indigenous legal understandings of jurisdiction as territorially-based, revealing the precarious risk mitigation strategies of the federal government to gain social license for TMEP. The risk management approaches we will examine here include the British Columbia Treaty Commission (BCTC) process, which is a joint federal-provincial process under the federal Comprehensive Land Claims Policy (CLCP) that contradicts the Supreme Court on the territorial use-based concept of Aboriginal title; the off-loading of fiduciary responsibilities and undermining of Indigenous territorial authority through private law instruments, such as Mutual Benefit Agreements (MBAs); and the socialization of risk through the buy-out itself.

The economic uncertainty caused by Indigenous land interests in Canada is a perpetual risk for Crown corporations and industry undertaking major resource infrastructure projects.[3] In this paper, we focus on Secwepemc (Shuswap) responses to the twinning of the Trans Mountain pipeline because the pipeline is proposed to run through more than 500 kilometers of their land and waters – the longest contiguous territory the pipeline would traverse if built – in the South-Central Interior of British Columbia (BC). Furthermore, the federal government has failed to engage with the Secwepemc people collectively, as the proper title and rights holder, to the proposed TMEP, let alone obtain their *consent*. In Secwepemc territory, some Indian band leadership have signed MBAs to allow for construction through their reserves in small spots along the pipeline route. Other bands, grassroots people, and alliances on the territory have vigorously opposed the expansion of the pipeline, arguing that these reserves are a fractional representation of the broader Indigenous territory (Secwepemcúl'ecw) and cannot be used to pretend that Secwepemc consent regarding access to their territory has been obtained. Without weighing in on internal Secwepemc differences themselves, we seek to examine the federal government's engagement process and risk management approach. Here, we find an ideal case study to study Canada's cunning misinterpretation of "consent" and examine whether it is consistent with Indigenous, constitutional, and international law.

We draw out this argument by first examining the broad territorial use-based concept of Aboriginal title articulated in the *Tsilhqot'in v. British Columbia* decision.[4] Then we trace this "Aboriginal title risk" back to the *Delgamuukw v. British Columbia*[5] decision and demonstrate through Freedom of Information requests on internal provincial government responses to *Delgamuukw* the internal policy responses and risk management approaches to constrain First Nations' legal

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[3] Martin Lukacs & Shiri Pasternak, "Aboriginal Rights A Threat to Canada's Resource Agenda, Documents Reveal" *The Guardian* (2 March 2014), online: <theguardian.com>; Shiri Pasternak & Tia Dafnos, "How Does A Settler State Secure the Circuitry of Capitalism?" (2018) 36:4 Environment & Planning D: Society & Space 739.

[4] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in*].

[5] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 220 NR 161 [*Delgamuukw* cited to SCR).

interest in land following this landmark legal decision on Aboriginal title.[6] Internal documents obtained from the Ministry of Indigenous Relations and Reconciliation and the Ministry of the Attorney General Office reveal a single-minded focus on mitigating the risk of Aboriginal title and securing "economic certainty" by accelerating the British Columbia Treaty Process. We argue that these records, along with contingent liability accounting procedures that emerge post-*Delgamuukw*, provide critical context for the Trans Mountain pipeline expansion because they reveal the wheels in motion to foreclose the jurisdiction of Indigenous nations asserting and exercising their inherent rights and Aboriginal title.

From here, we show how this risk is not only managed through public policy development, but also through the privatization of uncertainty and the socialization of risk. This risk management approach involves contractual agreements signed by the proponent with Indian Bands. Kinder Morgan reported signing 33 MBAs with Indigenous people in BC that would redistribute $400 million to First Nations communities. Often these agreements are made with Indian Bands, who legally only have delegated authority from the federal governments on Indian reserves. They do not address the issue of access to the larger territory. Therefore, we ask, regarding these private agreements: where does the territorial aspect of Aboriginal title come into play? How do private mutual benefit agreements line up with the legal obligations to the land under Indigenous law, or under the settler law of Aboriginal title?

On the one hand, governments and proponents obscure the risk of Aboriginal title through fragmented agreements that would not meet constitutional standards of consent. On the other hand, through Canada's pipeline purchase, the federal government is attempting to "socialize" this risk by passing it on to all Canadians. Canada has taken on Kinder Morgan's obligations under the MBAs and other private instruments, when they should maintain a higher standard and implement the human and Indigenous rights obligations that apply directly to the state. We argue that with regards to the TMEP the federal government has cunningly misinterpreted consent to undermine Indigenous decision-making regarding access to their larger territories.

Secwepemc Territorial Authority

Secwepemcul'ecw, the territory of the Secwepemc, covers 180,000 square kilometres and spans the interior plateau of south-central BC. It extends from the Western shore of the Fraser River, covering much of this larger watershed, including the South and North Thompson Rivers, and reaches all the way to the Rocky Mountains in the East. The proposed TMEP route follows much of the North Thompson River; and therefore, any spill stands to impact the larger Fraser River watershed – home to some of the largest remaining salmon runs in the world.

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[6] British Columbia, *Indigenous Relations and Reconciliation IRR-2018-80628* (17 July 2018), online: (pdf) < docs.openinfo.gov.bc.ca/Response_Letter_IRR-2018-80628.pdf>; British Columbia, *Minister of the Attorney General Office MAG-2018-80625* (23 April 2018), online: (pdf) <docs.openinfo.gov.bc.ca/Response_Letter_MAG-2018-80625_.pdf>.

This territory not only belongs to the Secwepemc, it has been governed by the Secwepemc nation for thousands of years. As noted by Teit in 1909, the Secwepemc shared a concept of land tenure with other interior nations that was collectively-minded: "All the land and hunting grounds were looked upon as tribal property all parts of which were open to every member of the (Secwepemc) tribe. Of course, every band had its common recognized hunting, trapping, and fishing places, but members of other bands were allowed to use them whenever they desired."[7] This territorial concept was also elaborated in the Memorial to Sir Wilfred Laurier (1910), when the Interior chiefs articulated their grievances to Canada in the form of a letter to the then Prime Minister.

In the letter, the Interior chiefs explained that "the principle of collective land tenure [is] at the level of the 'tribe,' or nation, as opposed to land ownership resting with the village group or with families, let alone with individuals."[8] Knowing and having delineated the defined boundaries of Secwepemcúl'ecw (Shuswap territory) with neighboring nations, they maintained an internal coherence of Indigenous nationhood within their territory. As Ron Ignace and Marianne Ignace describe: "[t]heir words conveyed the concept of the Secwépemc, Nlaka'pamux, St'at'imc, Syilx (Okanagan), and others as distinct nations, thus refusing to surrender to the nucleation of these nations into 'bands' imposed by the Canadian government in the 1876 Indian Act."[9] Though, of course, the Secwepemc nation changed with colonization and the imposition of colonial governance structures onto Indigenous nations. The Laurier Memorial demonstrates how the colonial government arbitrarily resorted to limiting not only the land base of bands to reserves, but also their ability to practice their laws and governance within Secwepemcúl'ecw at large.

Secwepemc leader Arthur Manuel presented us with a powerful analysis of some of the indicators of colonialism starting with dispossession, pointing out that "Indian Reserves just account for 0.2 of our territory. Canada claims 99.8 per cent of our land"[10] He continued to explain that the resulting dependency is not an accident of history, but [it is] at the heart of the colonial system, resulting in Indian Bands whose delegated authority is limited to Indian Reserves, administering this poverty.[11] It is also in this context that MBAs with Indian Bands have to be viewed. They cannot grant access to the larger territory and the funds provided are not in the least commensurate to the profits gained by the corporation. If anything, Manuel would

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[7] James Teit, *The Jesup North Pacific Expedition: Memoir of the American Museum of Natural History* (New York: Leiden EJ Brill Ltd Printers and Publishers, 1909) at 572.

[8] "Memorial to Sir Wilfrid Laurier, Premier of the Dominion of Canada From the Chiefs of the Shuswap, Okanagan and Couteau Tribes of British Columbia presented at Kamloops, BC" (25 August 1910), online (pdf): <skeetchestn.ca/files/documents/Governance/memorialtosirwilfredlaurier1910.pdf>.

[9] Ron Ignace & Marianne Ignace, *Secwépemc People, Land, and Laws: Yerí7 Re Stsq'ey's-Kucw* (Montreal: McGill-Queen's University Press, 2017) at 281–82.

[10] Arthur Manuel, *Reconciliation Manifesto: Recovering the Land, Rebuilding the Economy* (Toronto: James Lorimer and Company, 2017) at 69.

[11] *Ibid* at 70–71.

maintain that they are benefitting yet again off the deliberately created dispossession and dependency of Indigenous peoples.

In 1951, four decades after the powerful Laurier Memorial was presented, the federal government unilaterally approved the original Trans Mountain pipeline through Secwepemc territory without engaging with the Secwepemc people. This was still the time Indigenous peoples were prohibited under the *Indian Act* from organizing around land issues, and lawyers who worked for them on such issues could be disbarred.[12] The original Trans Mountain pipeline, whose capacity the federal government is now trying to triple, went into operation in 1953 without the Secwepemc people's consent and effectively without their input. This time, in regard to the TMEP, the Secwepemc people were clear that they not only had to be heard, but that they should be decision-makers regarding access to their territory, especially in light of the risk the proposed project poses to their Indigenous economies and ongoing uses of their lands and waters. It was Secwepemc land and water defenders who stepped up first raising concerns about the proposed TMEP and started to monitor its impacts, including the illegal installation of mats that block salmon spawning in waters proposed to be crossed by the pipeline.[13]

In June 2017, Secwepemc grassroots activists hosted an assembly on development impacting Secwepemcúl'ecw, from which they issued the "Secwepemc Peoples Declaration on Protecting Our Land and Water against the Kinder Morgan Trans Mountain Pipeline." The statement reads in part:

> Secwepemcúl'ecw is the largest indigenous territory that the Kinder Morgan pipeline expansion project is proposed to pass through, covering up to 518 km of the pipeline route. The federal and provincial governments and Kinder Morgan have failed to engage with the Secwepemc collectively, as the proper title and rights holders. Their infringement of our laws, our spirituality, and our relationship to the land can never be accepted or justified […] We the Secwepemc have never provided and will never provide our collective consent to the Kinder Morgan Trans Mountain Pipeline Project. In fact, we hereby explicitly and irrevocably refuse its passage through our territory.[14]

This is not just idle talk. Many of the grassroots land defenders, joined together as the Tiny House Warriors, have put 5 tiny houses in the pathway of the proposed pipeline route (with one more currently on the way at the time of this writing) and the proposed site for a "man camp" where labourers are to be housed during the

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[12] John Leslie, "The Indian Act: An Historical Perspective" (2002) 25:02 Can Parliamentary Rev, online (pdf): <revparl.ca/25/2/25n2_02e_Leslie.pdf>.

[13] Canadian Press and National Observer, "NEB Cracks Down on Kinder Morgan for Disrupting Streams on Pipeline Route" (26 September 2017), online: <nationalobserver.com>.

[14] Secwepemcul'ecw Assembly, "Secwepemc Peoples Declaration on Protecting Our Land and Water against the Kinder Morgan Trans Mountain Pipeline" (4 June 2017), online: <secwepemculecw.org>.

construction phase.[15] The Tiny House Warriors are currently raising money to build 4 more houses and have set up a base blockading the construction of the Blue River "man camp" settlement.

Complex relations of consent are represented in the Secwepemc Peoples Declaration: they invoke the need for collective consent among the Secwepemc nation as well as the legal obligations of the Secwepemc people to protect the land as a matter of consensual relations with all the living beings on their territory. Indigenous legal orders are not a positive law tradition amongst human beings; non-human beings have agency within Secwepemc law.[16] Therefore, consensus building is an ongoing relational process, where Indigenous peoples must ensure they have all the necessary information to take into account potential impacts of environmental change on their kin. Connected to the first principle of consent – its collective, national form – the Indigenous legal authority of the Secwepemc is the nation, which embodies for them jurisdiction and responsibility over their lands and water. For example, in their stories that carry law (stsptekwll) these relationships are described, as set out in this commentary on the story of Coyote (Skelep) and salmon:

> […] the stsptekwll, beyond explaining natural events and geographic features, cast events in the framework of social relationships, thus providing us with lessons about the historical and continuing interconnection of the Secwepemc and the Nlaka'pamux as connected through kinship and intermarriage. It also gives us lessons about the relationship between humans and salmon, mediated by Skelep's actions.[17]

While the Declaration asserts Secwepemc opposition to the pipeline expansion, embodied in Secwepemc law, activism against it started much earlier through formal challenges within and to the consultation process. Secwepemc leader and former Neskonlith chief Arthur Manuel testified to the National Energy Board in 2014, stating that the expansion of Trans Mountain reflects "unfinished business" between

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[15] Justin Brake, "Tiny House Warriors Establish New Village to Resist Pipeline, Assert Secwepemc Sovereignty" *APTN National News* (19 July 2018), online: <aptnnews.ca>; see also Tiny House Warriors, online: <secwepemculecw.org/tiny-house-warriors>.

[16] This commonality in Indigenous national legal systems is evident throughout these lands. See, for example, Wapshkaa Ma'iingan, "Aki, Anishinaabek, kaye tahsh Crown" (2010) 9:1 Indigenous LJ 107; John Borrows, *Canada's Living Constitution* (Toronto: U of T Press, 2010); Val Napoleon, "Thinking About Indigenous Legal Orders," Research Paper for the National Centre for First Nations Governance (18 June 2007), online (pdf): <fngovernance.org/ncfng_research/val_napoleon.pdf>; Sarah Morales, "a 'lha'tham:* The Re-Transformation of s. 35 through a Coast Salish Legal Methodology" (2017) 37:2 NJCL 145; Fred Metallic, "Treaty and Mi'gmewe," in Marie Battiste, ed, *Living Treaties*: *Narrating Mi'Kmaw Treaty Relations* (Sydney, NS: Cape Breton University Press, 2016), at 42–51; Sylvia McAdam, *Nationhood Interrupted: Revitalizing Nêhiyaw Legal Systems* (Vancouver: Purich Press, 2015); Sue Hill, *The Clay We Are Made Of* (Winnipeg: University of Manitoba Press, 2017); Lucien Ukaliannuk, "Inuit Traditional Law: Perspectives from an Elder," in *Building Capacity in Arctic Societies: Dynamics and Shifting Perspectives (Proceedings of the Second IPSSAS Seminar)* (Iqaluit, NU, 2003) 171, online (pdf): <alaskacollection.library.uaf.edu/monos/Building_capacity_in_Arctic_Societies_Dynamics_Shifting.pdf.

[17] Ignace & Ignace, *supra* note 9.

Canada and the nation.[18] Below, we detail the encounters between Indigenous and settler law as the approval process for the TMEP unfolded, and the ways in which the terms of Indigenous consent – based on territorial authority – were sidelined through the state's manipulation of its meaning to Secwepemc communities who refused the project.

Settler Recognition of Indigenous Territorial Authority

As set out above under Secwepemc law, the Secwepemc people collectively are "the proper title and rights holder," which is consistent with the Supreme Court of Canada's decisions in *Delgamuukw* and *Tsilhqot'in Nation.* But here it is important to foreground that this settler legal holding confirms inherent Indigenous law, rather than creates this governance process. Aboriginal Title is a *sui generis* right, and the proper title and rights holder has to be defined by Indigenous law, with the respective Secwepemc law set out above.

The Supreme Court of Canada long recognized that Aboriginal title has an "inescapable economic aspect,"[19] which, along with a jurisdictional dimension, are integral parts of the right to self-determination, which serves as a remedy for colonialism under international law. When rendering its decision in *Tsilhqot'in*, the Supreme Court of Canada was well aware of its implications for other Indigenous peoples, especially in BC, noting from the outset that, "there are hundreds of Indigenous groups in British Columbia with unresolved land claims."[20] The Supreme Court of Canada, explicitly rejected a site-specific approach to Aboriginal title that provincial and federal governments continued to bring forward. It stated:

> There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.[21]

It went even further in pointing to one of the main sources of uncertainty and the fundamental flaw of the province's argument before it. The court stated, that "[m]ost of the Province's criticisms of the trial judge's findings on the facts are rooted in its erroneous thesis that only specific, intensively occupied areas can support Aboriginal title." [22] The failure to implement the territorial-use based concept of Aboriginal title,

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[18] Arthur Manuel, "Neskonlith Indian Band" (Oral presentation delivered at the National Energy Board Hearing in Kamloops, BC, 18 November 2014).

[19] *Delgamuukw*, *supra* note 5 at para 166.

[20] *Tsilhqot'in*, *supra* note 4 at para 4.

[21] *Ibid* at para 42.

[22] *Ibid* at para 60.

reaffirmed by the Supreme Court of Canada in *Tsilhqot'in* and previously set out in *Delgamuukw*, causes significant economic uncertainty.[23]

The loss of investment due to the failure to address Indigenous land rights, especially in the vast Indigenous territories in the Interior of British Columbia where historically no treaties were signed, has been well documented.[24] Only the implementation of a territorial concept of Aboriginal Title, which the Supreme Court of Canada maintained in *Tsilhqot'in*, can help overcome this uncertainty and implement Indigenous peoples' right to self-determination to freely pursue their economic, social, and cultural development.

The right to self-determination is the international remedy for colonization. Canada is a party to and bound to implement the International Covenant on Civil and Political Rights (ICCPR)[25] and the International Covenant on Economic Social and Cultural Rights (ICESCR).[26] These treaties, also known as the decolonization covenants, share the same first overarching provision on self-determination. Article 1, para 1, of both covenants states that: "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." The same wording is replicated in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[27] confirming that the right applies to Indigenous peoples. This further verifies a clear consensus of the community of nations that has emerged in endorsing UNDRIP, with no nation state remaining opposed.

Furthermore, multi-lateral environmental agreements (MEAs) recognize the key role Indigenous Peoples play in ensuring economically, culturally, and environmentally sustainable development in their traditional territories, and prior informed consent is required prior to accessing traditional knowledge or genetic

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[23] As the Court stated: "Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land" (*Tsilhqot'*in, *supra* note 4 at para 73). Further, "[t]he right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act*, *1982*" (*Tsilhqot'*in, *supra* note 4 at para 76).

[24] Price Waterhouse, "Economic Value of Uncertainty Associated with Native Claims in British Columbia" (30 March 1990), online: (pdf) <publications.gc.ca/collections/collection_2018/aanc-inac/R32-362-1990-eng.pdf >; BC Treaty Commission, Press Release, "Treaties Will Boost BC Economy by Vver $10 billion" (18 November 2009), online: <newswire.ca/news-releases/treaties-will-boost-bc-economy-by-over-10-billion-538987511.html>.

[25] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR].

[26] *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [ICESCR].

[27] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st SESS, A/RES/61/295, (2007) [UNDRIP].

resources of Indigenous peoples. MEAs and UNDRIP[28] stipulate Indigenous prior, informed consent to developments that could impact their traditional territories. Hence, the implementation of the principle of prior informed consent requires a territorial approach, and anything short of it will exacerbate economic uncertainty.

The legal and economic uncertainty has been further leveraged by Indigenous peoples from Canada, including the Secwepemc, who have long taken violations of their Indigenous rights to international bodies, including before United Nations (UN) human rights bodies and international trade tribunals. Tribunals of both the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA) accepted *amicus curiae* submissions of the Secwepemc and Okanagan logging case litigants, providing further recognition of the economic dimension of Aboriginal title.[29] Canada's failure to provide effective domestic remedies for Indigenous peoples to exercise their inherent rights and self-determination opens the way for direct complaints to international tribunals and human rights bodies. For example, the Hul'qumi'num Treaty Group were successful in proving the lack of effective national remedies in dealing with Aboriginal Title in their complaint to the Inter-American Commission on Human Rights (IACHR) outlining the failure of the courts to address issues related to Aboriginal Title in a timely and effective manner, as well as the failure of the BCTC to provide an effective remedy.[30]

Still, following the *Tsilhqot'in* decision, the provincial and federal governments did not take the necessary steps to implement the broader territorial-use based concept of Aboriginal Title. In regard to the TMEP, they continued to maintain a site-specific approach, focusing on dealing with Indian Bands along the pipeline route, who only have delegated authority on Indian Reserves. Instead, the governments continue to maintain their impoverished and rejected "postage-stamp" concept of Aboriginal title, which had already been rejected by the trial judge in *Tsilhqot'in* by Justice Vickers,[31] whose findings on Aboriginal title and a broader territorial concept of Aboriginal Title were made legally binding by the Supreme Court of Canada. Despite all these decisions, the governments still fail to engage with Indigenous peoples as decision-makers regarding access to their lands and resources beyond narrow reserve boundaries. Through their processes, they violate not only Canadian Constitutional law, but also international human and Indigenous rights obligations, including Indigenous peoples' right to self-determination and to economically, socially, and culturally sustainable development in their territories.

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[28] *Ibid*; see also *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 art 3 (entered into force 29 December 1993); *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization*, 2 February 11 (entered into force 12 October 2014); and, *Akwe:Kon Guidelines* (Montreal, QC: Secretariat of the Convention on Biological Diversity, 2004).

[29] Arthur Manuel & Nicole Schabus, "Indigenous Peoples at the Margin of the Global Economy: A Violation of International Human Rights and International Trade Law" (2005) 8 Chap L Rev 229.

[30] IAHRC, "Report No. 105/09, Petition 592-07, Admissibility Hul'qumi'num Treaty Group Canada*"* (30 October 2009), online: <cidh.oas.org/annualrep/2009eng/Canada592.07eng.htm>.

[31] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 610.

From Aboriginal Title to Risk Mitigation

Nowhere is the government's strategy of mitigating the risk of Indigenous territorial authority more evident than in its approach to land claims policy. The Comprehensive Land Claims Policy (CLCP) was introduced by the federal government in response to the *Calder* decision in 1973.[32] In the first decision since the prohibition on organizing around land rights had been lifted, the court split on the continued existence of Aboriginal title, and the case was dismissed on a technicality. The government set out to address the resulting uncertainty regarding Indigenous land rights through a blanket extinguishment policy, and only a small number of nations across Canada entered into the negotiation process.

In British Columbia, the British Columbia Treaty Commission (BCTC) process was only established in 1992 to implement negotiations based on the federal Comprehensive Claims Policy. Then, when the *Delgamuukw* decision came down on December 11th, 1997, it offered a much different conception of the extent of Aboriginal land interests than those recognised in the negotiating parameters of the BCTC. The appellants in *Delgamuukw* were Gitxsan and Wet'suwet'en hereditary chiefs who brought the case to court on behalf of 71 governing Houses, claiming ownership and jurisdiction over 58,000 kilometers of their territory in Northern BC. Although remitting the substantive decision back to trial, *Delgamuukw* affirmed the concept of Aboriginal title as an Indigenous interest in the land that is *sui generis*, distinct from other forms of land title, proprietary, and held communally by the nation.[33] Though the burden of proof for Aboriginal title and the cost of bringing a case to court remain substantial barriers, the *Delgamuukw* case made it clear that Indigenous peoples can no longer be ignored by the resource industry; their land rights have to be taken into account.[34] As such, the decision sent shockwaves through the country, coalescing around fears of "economic uncertainty."

It is helpful then to understand how governments sought to manage this legal and economic uncertainty at this historical moment. To ascertain this internal response to the decision, Freedom of Information (FOI) requests were submitted to BC for "[a]ll records, including internal reports, memos, briefing notes and emails, that offer response / analysis/ assessment/ commentary to the Supreme Court of Canada decision *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 – in particular, any policy changes, policy assessments and evaluations, and any other mechanisms designed or adapted to respond to implications of the legal decision to the Ministry. (Date Range for Record Search: From 12/01/1997 to 12/01/2000)." This request was sent to the Ministry of the Attorney General (MAG), the Ministry

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[32] *Calder v British Columbia (AG)*, [1973] SCR 313, 34 DLR (3d) 145 [*Calder*].

[33] Respectively, *Delgamuukw, supra* note 5 at para 190, 115, 140. While in the latter case, the Court distinguishes Aboriginal title from fee simple property, Lamer CJ states that it is "a right to the land itself," and clearly a proprietary interest.

[34] Nonetheless, there are still substantial issues with the decision. See e.g. John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia"* (1999) 37 Osgoode Hall LJ 537; Gordon Christie, "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw And Haida Nation" (2005) 23 Windsor YB Access Just 17.

of Indigenous Relations and Reconciliation (MIRR), the Ministry of Energy, Mines, and Petroleum Resources, and the Ministry of Environment and Climate Change Strategy. Of these, we will focus on responses returned from MAG and MIRR.

Among the immediate post-*Delgamuukw* reactions was a course of action that involved convening a "Certainty Working Group" by the Treaty Negotiations Advisory Committee (TNAC), which is a province-wide consultation process that allows third-parties to advise the government on negotiations with First Nations. At the December meeting, participants strongly recommended risk mitigation strategies to reign in the powers of First Nations to assert jurisdiction over their territories.[35] For example, Marlie Beets, representing the Council of Forest Industries, captures the anxiety of the group when she states:

> I am late this afternoon because I have spent the last hour talking to our CEOs and trying to calm them down. This decision concerns the forest industry greatly. It remains to be seen what effect it will have on our licenses and tenures, and for the investment our members have made in BC. This has only created more uncertainty and we are very concerned by how governments will react to the Court's findings. The decision makes the need for certainty *through surrender* all the more clear. We see no other alternative.[36]

The solution of Indigenous land "surrender" emerges as the consensus within the group to secure certainty and mitigate the risk of Aboriginal title. A representative of the BC Cattlemen's Association, Mary McGregor, calls the *Delgamuukw* decision "totally detached from the economic realities that exist in British Columbia" – simultaneously erasing the economic hardship of those dispossessed from their lands due to these provincial "realities," while implying the question of Indigenous rights should "attach" subordinately to the property rights of settler populations. McGregor then insists that *the treaty process* be used to "clearly surrender all claims of Aboriginal rights and title throughout a First Nations claimed traditional territory."[37] Like that proposed by Beets, the only solution is to eliminate immediately and expediently the newly acknowledged rights in *Delgamuukw* through pre-existing policy. Chris Harvey, legal counsel at Russell and Dumoulin, concurs at the meeting that, "[w]hat is needed is *a clear exchange* and *an end of Aboriginal rights and title* for a defined set of treaty rights."[38] The only path to economic certainty for the province, as far as the working group representatives seem to be concerned, is the *elimination* of Aboriginal title.[39]

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[35] Treaty Negotiations Advisory Committee, "Meeting Notes from Certainty Working Group" (12 and 13 December 1997), obtained through FOI request to MAG-2018-80625.

[36] *Ibid* [emphasis added].

[37] *Ibid*.

[38] *Ibid* [emphasis added].

[39] These fears went beyond BC, as well, as reported in the *North Shore News*: "[I]t is clear that our unelected judicial legislators, in approving the notion of 'aboriginal rights to the occupation and use of the land' have, to put it mildly, thrown into question not only the ownership of the lands comprising 110% of

The "surrender" these committee members refer to is a specific kind of "exchange" of rights within the BCTC. Since its establishment, the BCTC has been promoted as the key to economic certainty in BC. Its terms of settlement require groups to "exchange" section 35 rights for an exhaustive, circumscribed set of rights that extinguish or *modify* Aboriginal title out of existence.[40] Though many First Nations support the process, from the province's perspective, it is far preferable to litigation on Aboriginal title. When the *Delgamuukw* decision came down, Geoff Plant, BC Liberal MLA and former counsel to the Crown on the case at the BC Supreme Court, stated to local media: "[i]n terms of British Columbia, [*Delgamuukw*] is breathtaking. This judgement has undermined certainty of title for virtually all lands in British Columbia."[41] He too argued for, and later as Attorney General implemented, a referendum to reconsider BC's treaty negotiation mandates that included a principle that self-government "should have the characteristics of local government, with powers delegated from Canada and British Columbia" – a move away from a territorial authority approach.[42]

To compare the terms of negotiation under the BCTC to the legal protection of Aboriginal title, we can look to the *Tsilhqot'in* decision of 2014, which resulted in the first declaration of Aboriginal title in Canadian history to have met the evidentiary thresholds affirmed in *Delgamuukw*. The *Tsilhqot'in* nation brought forward the case to prove their land rights in a core traditional and current use area where the province was issuing commercial logging licences over the objections of community members. When the decision came down, Hupacasath member Judith Sayers analyzed how *Tsilhqot'in* (and Aboriginal title declarations more generally) could more effectively protect Indigenous jurisdiction than the BCTC. She compared the massive loss of lands that result from the land selection process under the BCTC to the underlying title recognized by the courts over potentially *all* of a nation's territory.[43] Under the BCTC, through the Land Selection process, negotiating groups tend to be awarded on average 5 percent of their total traditional land base.[44] In addition, according to the courts, the nation "hold[s] an exclusive right to decide how

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the province of BC, but also that of other western provinces too" (Charles MacLean, columnist, *North Shore News*, 17 December 1997).

[40] Arthur Manuel & Ronald M Derrickson, *Unsettling Canada: A National Wake-Up Call* (Toronto: Between the Lines, 2014); see also Carole Blackburn, "Searching for Guarantees in the Midst of Uncertainty: Negotiating Aboriginal Rights and Title in British Columbia." (2005) 104:7 American Anthropologist 586.

[41] Geoff Plant (BC Liberal MLA), *Richmond News* (17 December 1997).

[42] British Columbia, Auditor General, *2006/2007 Report 3 Treaty Negotiations in British Columbia* (November 2006) at 13, online (pdf): <bcauditor.com/sites/default/files/publications/2006/report3/report/treaty-negotiations-british-columbia.pdf>.

[43] Judith Sayers, "Treaties and Tsilhqot'in-Treaties at Risk? First Nations in BC Knowledge Network" (4 July 2014), online: <fnbc.info/blogs/judith-sayers/treaties-and-tsilhqot-treaties-risk>.

[44] Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake Against the State* (Minneapolis: UMP, 2017), especially "Conclusion: A Land Claim Is Canada's Claim: Against Extinguishment."

to use and control the land, and to benefit from those uses."[45] This territorial authority and the uncertainty over which lands in BC are subject to Aboriginal title are precisely what governments and industry fear will grind economic development in the province to a halt.

The BCTC captures through policy what the state calls "legal risk." Legal risk is when legal decisions, actions, and "potential litigation and contingent liabilities" can have a "significant impact on the activities of the Department."[46] According to Indigenous Affairs' assessment, current policy frameworks could also be threatened by the development of legal precedents.[47] But according to First Nations' legal assessment of the *Delgamuukw* decision vis-à-vis the modern land claims policy, there was a very real threat to the province that *Delgamuukw* principles, if applied, would require the entire BCTC process to be overhauled to align with the acknowledgement of Aboriginal title, challenging (among other things) the Land Selection process.[48]

The assessment also takes a strong position where it asserts that the CLCP and the BCTC are no longer based on a recognition of rights unless reformed: "[t]he model is an exchange model where aboriginal rights are extinguished in exchange for specific treaty rights. This is contrary to the recognition and affirmation language of section 35."[49] Other legal discrepancies of the land claims policies following *Delgamuukw* include the "the right to exclusive use and occupation," the right to "chose to what uses the land can be put," and the "inescapable economic component" that should have challenged third party rights on Aboriginal title territory, ushered in acknowledgement of Indigenous commercial rights, and gave Indigenous peoples a greater say over land use in the territory, though these implications were largely shouldered aside.

Arthur Manuel also astutely noticed that one consequence of *Delgamuukw* was that the Province of British Columbia soon after had to incorporate into its annual audit report under the category of "Contingencies and Contractual Obligations" the burden of "Aboriginal Land Claims."[50] What is remarkable about this provincial reporting practice is that it took effect relatively shortly after the *Delgamuukw* decision through its incorporation into international financial accounting standards. Further, BC was reporting to manage its Aboriginal title

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[45] *Ibid*.

[46] Indigenous and Northern Affairs Canada, *2017-2018 Corporate Risk Profile*, online: (pdf) <aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AEV/STAGING/texte-text/ss_crp_1488913411934_eng.pdf>.

[47] *Ibid.*

[48] Assembly of First Nations, Delgamuukw Implementation Strategic Committee (DISC), "Legal Review of Canada's Comprehensive Land Claims Policy" (15 February 2002) at 11.

[49] *Ibid*.

[50] Manuel & Derrickson, *supra* note 40; see also Canada, *Public Accounts of Canada, 2005*, "Vol I: Summary Report and Financial Statements" (Ottawa: Minister of Public Works and Government Services Canada, 2005), specifically 2.26, "Financial Statements of the Government of Canada".

liabilities through negotiations under the Comprehensive Land Claims policy and therefore the BCTC. In other words, the province used the suggested future event of settled land claims to cover up its failure to implement Supreme Court of Canada decisions and a broader territorial concept of Aboriginal Title.

For those First Nations who have refused to negotiate under the policy, even the province had to admit that "[t]he amount of any provincial liability is not determinable at this time."[51] Therefore, the uncertainty remains, indeed it has continuously increased, especially since the first declaration of Aboriginal Title in Canadian history in the *Tsihlqo'tin* decision. The BCTC has now been in operation for almost three decades, more than two decades have elapsed since the *Delgamuukw* decision, and very few land claims settlements have been settled under the BCTC, certainly none in the large Indigenous territories in the interior of British Columbia. This shows the lack of effectiveness of the governments' risk mitigation strategies, especially the BCTC, and the increasing uncertainty that results from this failure.

Nonetheless, it appears from internal records that following the *Delgamuukw* decision both federal and provincial levels of government sought the modern treaty process as a mechanism of certainty. Internal documents show that INAC officials immediately began to work together on a strategy to accelerate the BCTC. In one letter, a Regional Director General of INAC in BC seeks assurance from the federal department that funding would be put in place to remedy some of the financial costs and implications of the *Delgamuukw* decision, to which Scott Serson, Deputy Minister of INAC, replies: "our best response to the *Delgamuukw* decision may be to get offers on the table sooner […] the objective is that acceleration of the process will help First Nations meet their social and economic objectives sooner, and provide the reassurance of certainty necessary for land and resource users."[52] In another letter, the Regional Director General of INAC BC reassures the provincial First Nations Summit – a treaty-friendly First Nations coalition – that, "[b]oth governments are under tremendous pressure to ensure that we achieve the level of certainty required to reassure business and other third parties."[53] Throughout 1998, the federal government commits to support the BC treaty process through new financial investments.[54]

Officials within the province, in particular, expressed anxiety about direct assertions of jurisdiction on the ground and further litigation that expands the scope

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[51] British Columbia, *Public Accounts of the Government of the Province of British Columbia for the Fiscal Year Ended March 31, 2015* (Office of the Comptroller General, 2015) at 76.

[52] Letter from Scott Serson, Ministry of Indian Affairs, to Tony Penikett, Deputy Minister, Negotiations, Ministry of Finance and Corporate Relations, BC, Subject: "Post-*Delgamuukw* Issues of Mutual Concern", obtained through FOI request to IRR-2018-80628.

[53] John Watson, Regional Director General, BC Region, addressed to legal counsel for the First Nations Summit, Subject: "Informal Certainty Working Group" (16 April 1998), obtained through FOI request to IRR-2018-80628.

[54] Federal Minister of Indian Affairs, Jane Stewart, "Canada Demonstrates Commitment to Revitalizing BC Treaty Process", press release and backgrounder (7 July 1998), obtained through FOI request to IRR-2018-80628.

of Aboriginal title. In a confidential memo that discusses BC's proposed strategy to respond to the *Delgamuukw* decision, a bureaucrat suggests an incremental approach of "interim measures" in order to entice groups into the process who would otherwise be deterred by the decades-long process to reach a Final Agreement. The constraining conditions of the "interim measures" strategy, however, is that these agreements are contingent upon "First Nations agreeing to support economic stability in British Columbia by refraining from direct action or litigation."[55] The process itself explicitly restricts any assertions of rights outside of the government-set terms of negotiation.

Other coercive strategies are outlined, as well. One outrageous memo suggests that money for "healing" from Indian Residential Schools should be prioritized for bands in the treaty process:

> It would be disturbing (although not surprising) if this initiative were not related in any way to treaty making in British Columbia. Were the federal government to be strategic in how this money were spent in British Columbia, then they would prioritize those First Nations with which they are having treaty negotiations as the major beneficiaries of this program. In addition, the money could be made available as a 'down payment' on an eventual treaty and given credit accordingly. This would serve to 'sweeten the deal' when it comes to the cash component of treaties and avoid 'double counting' which would otherwise inevitably occur. While it may be too late, it is to be hoped that the federal government could be asked to reflect on this before final decision on allocations are made.[56]

There is no indication that this approach was widespread or adopted, but its offensive content conveys the panic to incentivize First Nations into the modern treaty process.

While early Aboriginal title jurisprudence could have triggered a restructuring of the modern treaty process and the regulatory regimes for resource extraction impacting Indigenous lands, it galvanized the opposite response from government and industry. Eager to frame the uncertainty of Aboriginal title as a result of the risky implications of Indigenous proprietary interests, rather than the historical problem of the province's ownership claims, the BCTC was further marketed as a risk mitigation strategy along with other strategies of containment to restrict exercises of Indigenous territorial authority. Yet, the past decades have shown that these risk mitigation strategies have not proven to be effective, and legal and economic uncertainty has only increased.

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[55] Ministry of Indigenous Relations and Reconciliation, Draft Briefing Note, "British Columbia's Proposal for Accelerated Lands, Resources and Cash Negotiations" (labeled "For Discussion Purposes Only. Strictly Confidential. Shared between Governments and with First Nations Summit), obtained through FOI Request to IRR-2018-80628. The brief introduces measures to expedite process of treaty negotiation, with an emphasis on Interim Measures and Table-Specific Negotiations (at 314).

[56] Letter from Murray Rankin, Treaty Negotiator, Vancouver Island Team and Heinz Dyck, Assistant Negotiator, Vancouver Island Team to Christie Brown, Assistant Deputy Minister, Negotiations Division, BC, and Patrick O'Rourke, Assistant Deputy Minister, Policy, Planning and Implementation Division, Subject: "Ideas Regarding Treaty Process" (8 January 1998), obtained through FOI request to IRR-2018-80628.

Privatizing Uncertainty and Socializing Risk

In the documents reviewed in the section above, the shared focus of the provincial and federal governments to mitigate the uncertainty of Aboriginal title was to focus on the modern treaty process. From the outset, about 40 percent of British Columbia's Indigenous peoples, especially those nations with large territories in the interior of British Columbia, have not engaged in the BCTC, believing that it stands to undermine their territorial authority. For example, Indigenous nations in the south central interior that form the Interior Alliance of Indigenous Nations are almost entirely out of the process and include the Secwepemc, Syilx (''Okanagan''), Nlaka'pamux (''Thompson''), and St'át'imc (''Lillooet'').[57] At the National Energy Hearing board meeting on Trans Mountain, Arthur Manuel of the Neskonlith Indian Band put this refusal to negotiate in no uncertain terms:

> Neskonlith will not sit down with the federal government under the British Columbia Treaty process. We will not negotiate with the federal government on comprehensive -- under the Federal Comprehensive Land Claims Policy, not because we don't want to negotiate, not because we don't want to talk, not because we don't want to come to some mutual agreement on development in our area. No, we won't sit down with the federal government when their policy is to extinguish our Aboriginal title and rights. We just will not sit down with anybody whose idea is to kill us, to commit genocide against us. We won't sit down with you. That's it.[58]

Therefore, the primary risk mitigation strategy deployed following the *Delgamuukw* decision – the BCTC – failed to manage risk in the region.[59]

Of course, modern treaty groups can also reject development and conflict with provincial and federal authorities; however, they tend to have their own resource revenue-sharing and co-management arrangements determined within the modern treaty settlement. Whereas for communities outside of these state policies, negotiations are more likely to unfold on a case-by-case basis. When the *Tsihlqot'in* decision came down, for example, the Ministry of Aboriginal Relations and Reconciliation listed as a "Pre-treaty Approach," "Revenue-sharing provides sector or project certainty."[60] Similarly, legal contracts between Kinder Morgan and First Nation communities served as a key form of risk mitigation along the pipeline route. But this privatization of risk was only possible through the public claim to authorize

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[57] *The BC Treaty Negotiating Times* (2007), online (pdf): <cathedralgrove.eu/media/03-1-inet.pdf>.

[58] Arthur Manuel, Neskonlith Indian Band, "Oral Presentation", *National Energy Board Hearing Order OH-001-2014, Trans Mountain Pipeline ULC, Trans Mountain Expansion Project* (18 November 2014) at para 7595.

[59] There is one exception to this generalization about the Secwepemc. The Northern Shuswap Tribal Council (NSTC), which includes 4 Northern Secwepemc te Qelmucw communities (NStQ), Tsq'escen' (Canim Lake), Stswecem'c-Xgat'tem (Canoe-Dog Creek), Xat'sūll-Cm'etem (Soda-Deep Creek) and T'exelc (Williams Lake) is currently in the final phase of signing an Agreement-in-Principle under the BCTC: see "NStQ Treaty Group", online: <nstqtreaty.ca> for more details.

[60] British Columbia, Ministry of Aboriginal Relations and Reconciliation, *William Decision – Initial Response* (July 2014) [unpublished].

development along the pipeline route by state agencies, from parks permitting to land title registration. Privatization and socialization go hand-in-hand. The risk was then further socialized by Canada when it bailed out Kinder Morgan in the 2017 purchase.

Beginning with privatized risk mitigation, when Kinder Morgan was proponent they reported that they signed 43 Mutual Benefit Agreements (MBAs) with Indian Bands in BC and Alberta and that these agreements totalled $400 million.[61] Beyond MBAs, which secured what they called "big-ticket" items like resource revenue sharing deals and employment commitments, Kinder Morgan claimed to have entered into over 100 other kinds of commitments that included Letters of Memorandum or Letters of Understanding for capacity funding agreements, integrated cultural assessments, or participation in company-funded Land and Marine Use, and Traditional Ecological Knowledge studies.[62] All of these agreements are confidential so there is no way to verify them or to know what methodology was used to calculate the total $400 million figure.

One source of ambivalence, in addition, is that Natural Resources Canada (NRCAN), which now oversees the pipeline, assigned a different numerical value to these agreements. On NRCAN's website on the TMEP, they write that there is over "$300 million committed to Indigenous groups by proponent under mutual benefit and capacity agreements."[63] Another $64.7 million was committed to an Indigenous advisory and monitoring committee. Even added together, this barely amounts to Kinder Morgan's asserted $400 million in deals with Indigenous peoples, which pegged at the value of purchase would still only amount to around 6.7 percent of revenue if the correct figure is closer to $300 million. This is rather insignificant compensation compared to the astronomical expense of the pipeline ($4.5 billion and rising[64]) and its expected revenues, therefore a relatively cheap risk mitigation strategy. The job numbers promised by Canada were also misleading. While Canada repeated consistently that the TMEP would create 15,000 construction jobs, independent economist Robyn Allan calculated "the more realistic figure is less than 20 percent that size."[65] When questioned by Allan, the governments pointed back to the proponent's figures, having never verified the calculation themselves.

While proponent-led, private agreements can offer limited financial benefits to specific Indian Bands and conditional job promises, they are private law contracts that do not rise to the level required for consent at the public law or nation-to-nation

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[61] Trans Mountain, "43 Indigenous Groups Have Signed Agreements in Support of the Trans Mountain Expansion Project" (19 April 2018), online: <transmountain.com/news>.

[62] *Ibid*.

[63] Government of Canada, T*rans Mountain Expansion Project*, online: <nrcan.gc.ca/energy/resources/19142>.

[64] "Cost to Twin Trans Mountain pipeline $1.9B Higher than Expected, Kinder Morgan Documents Show", *Toronto Star* (7 August 2018), online: <thestar.com>.

[65] Robyn Allan, "The Search for Trans Mountain's 15,000 Construction Jobs", *The Record* (11 September 2017), online: <therecord.com/opinion-story/7549132-the-search-for-trans-mountain-s-15-000-construction-jobs/>.

level because they do not engage with the proper title and rights holder and do not require collective decision-making. They also tend to overemphasize "economic incentives and impact mitigation, but tend to circumvent broader, more complex questions about the social acceptability of projects and their cultural, social, and economic cumulative impact."[66] The requirement of collective decision-making as discussed above, is grounded in both Indigenous law and governance, as well as in the jurisprudence on Aboriginal title which points to Indigenous laws and governance systems for determining the proper title and rights holders.

But in public statements, federal politicians rarely failed to mention either the agreements or the employment numbers when courting social license for the project,[67] particularly in times of intense public opposition, such as when the BC provincial government came to power and vowed to stop the pipeline and when First Nations led massive demonstrations against it.[68] Furthermore, the misappropriation of the concept of the proper "title and rights holder" became material in what could be called a public relations war as a form of risk mitigation. When Prime Minister Justin Trudeau and Alberta Premier Rachel Notley first declared publicly that they would spend public money to purchase the pipeline, Trudeau stated, "Canada has completed the deepest consultations with *rights holders* ever on a major project in this country. And working with our indigenous partners has been paramount. All of the private contracts were adopted by the federal government."[69] Trudeau emphasized that the proponent secured permission for the pipeline from Indian Bands and by adding that these agreements are with "rights holders," suggested that the duties to engage in meaningful consultation and consensus-building had been dispensed.

Such statements also dangerously set the scene for criminalizing Indigenous land and water defenders. Marginalizing those who contest the pipeline as individual "protestors" who do not have legal rights to contest the development denies the collective, territorial use-based understanding of title held by the Supreme Court and Secwepemc law. Nonetheless, land defenders are well aware of their rights as inherent title holders. As Secwepemc-Ktunaxa activist Kanahus Manuel stated to the

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[66] Martin Papillon & Thierry Rodon, "Proponent-Indigenous Agreements and the Implementation of the Right to Free, Prior, and Informed Consent in Canada" (2017) 62 Environmental Impact Assessment Rev 217.

[67] According to an ATIP document requesting "[a]ll briefings, memos, and correspondence relating to Kinder Morgan between January 1, 2016 to February 21, 2017," nearly all Question Period, Media, and Briefing Notes after the federal buy-out were focused on a few main talking points, including the promise of "15,000 jobs for middle class Canadians" and the evidence of "consent" from Indigenous peoples through signed agreements with Kinder Morgan (A-2016-00831).

[68] British Columbia, Attorney General, "Statement on Trans Mountain Pipeline" (1 September 2017), online: <news.gov.bc.ca/releases/2017AG0017-001516>; Rhianna Schmunk, "B.C. Going to Province's Highest Court in Attempt to Fight Trans Mountain Pipeline", *CBC News* (18 April 2018), online: <cbc.ca/news>; and CBC News, "Indigenous Groups Lead Protest against Kinder Morgan's Trans Mountain Pipeline Plan", *CBC News* (10 March 2018), online: <cbc.ca/news>.

[69] Prime Minister Justin Trudeau, "Statement on the Trans Mountain Pipeline Project" (15 April 2018), online: <pm.gc.ca/en/news/speeches/2018/04/15/prime-ministers-statement-trans-mountain-pipeline-project> [emphasis added].

press: "[t]his is no airy fairy modified-rights based approach, give the natives their berry picking and they're happy. No. It's full, 100 percent control over every inch of our territory."[70] She added, "They want to move a rock? We have an economic interest in that. They want to take a tree down? We have an economic interest."[71] The eviction of the Tiny House Warriors, with whom Manuel is affiliated, and her arrest from North Thompson River Provincial Park[72] indicates the criminal implications of this narrow approach to title.[73] The province-wide injunction that Kinder Morgan secured to limit disruption to pipeline construction has not been lifted since the change of ownership.[74]

Yet the Prime Minister has clung petulantly to these low-level private contractual agreements that do not meet the threshold for consent, especially when pretending to engage on a nation-to-nation basis as a government. At the AFN Special Chiefs Assembly, he scolded Chief Judy Wilson for asking a question about how her Secwepemc community and the larger opposition of the Secwepemc people to TMEP would be factored into the international standard of consent set by UNDRIP, which Trudeau's Liberals re-endorsed:

> Chief Judy Wilson (Neskonlith): When you're talking about the United Nations and you're going to go with the self-determination and the consent, why wasn't that applied with the Trans Mountain pipeline that's going through 513 kilometres of our territory?
>
> There was no consent on that, and you can't count a few IBAs that you've done with some of the communities as consent, because it's the proper title-holders of those nations that hold the title, and it's the bands that might have been under duress — or whatever reasons they did that — but it's not a proper process at all.
>
> Prime Minister Justin Trudeau: I would be careful about minimizing or ascribing reasons for people who take positions that disagree with you… I don't think we should be criticizing them, just because they disagree with you, Judy.[75]

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[70] Hilary Beaumont, "Trudeau's Trans Mountain Fight Isn't with B.C., It's with First Nations" *Vice News* (13 April 2018), online: <news.vice.com>.

[71] *Ibid*.

[72] Justin Brake, "Tiny House Warriors Establish New Village to Resist Pipeline, Assert Secwepemc Sovereignty", *APTN National News* (19 July 2018), online: <aptnnews.ca>.

[73] See e.g. Canada, Aboriginal Affairs, *Aboriginal Civil Disobedience: Lessons Learned*, by Michael Hudson, Deputy Attorney General of Aboriginal Affairs Portfolio, in consultation with the Business and Regulatory Affairs Portfolio (DFO Legal Services), the Citizenship, Immigration and Public Security Portfolio (Public Safety Legal Services), and the National Security Group, Civil Litigation Portfolio (30 April 2007). See also Shiri Pasternak, Tia Dafnos & Sue Collis, "Criminalization at Tyendinaga: Securing Canada's Colonial Property Regime Through Specific Claims" (2013) 28:1 CJLS 65.

[74] Dylan Waisman, "Kinder Morgan Injunction Expanded Across B.C.", *National Observer* (3 June 2018), online: <nationalobserver.com>.

[75] Carl Meyer, "Trudeau Urges First Nation Chief to Respect Trans Mountain Supporters", *National Observer* (4 December 2018), online: <nationalobserver.com>.

Rather than address the problem Chief Wilson raises about whether due legal process was followed in obtaining Indigenous consent for the pipeline, the Prime Minister warns her not to ascribe intention to other First Nations. But Chief Wilson's point is that what Trudeau is calling "agreement" is not consent, because those he referred to publicly as "title and rights holders" are not the nation and therefore not the proper title and rights holder.[76]

We must also read Trudeau's comments in light of the Federal Court of Appeal's decision in *Tsleil-Waututh Nation v. Canada (Attorney General)*,[77] which actually reversed the same federal government's approval of the proposed TMEP in light of failure to properly consult and accommodate Indigenous peoples. The federal government had not even met the lesser standard of consultation, and yet was still maintaining they had gained consent. More particularly, in August 30, 2018, the Order in Council by federal Cabinet approving the TMEP was quashed, partly as a result of a lack of meaningful consultation with Indigenous peoples. The nations along the pipeline, the Tsleil-Waututh, Squamish, Musqueam, Coldwater, Sto:lo, Stk'emplumpsemc Te Secwepemc, Upper Nicola Indian Band, Tulalip Tribes, and the Squamish Tribe all filed for judicial reviews of the National Energy Board's report on TMEP and the Order in Council to approve it. These cases were consolidated into *Tsleil-Waututh* and resulted in a victory for the appellants.

The Minister of Crown Indigenous Relations, Carolyn Bennett, also indicated that divisions among Indigenous peoples would be the focus of her Ministry's strategy to obtain "consent" for the pipeline project. On May 29, 2018 – one day before Canada announced the purchase of the Trans Mountain pipeline from Kinder Morgan – Minister Bennett appeared before a Parliamentary committee on Indigenous Affairs. She was asked, "[a]s the minister for crown relations, what are you going to do to de-escalate the tension and potential for perhaps even violence as you move this project forward?"[78] The Minister responded: "I think it's really important that people understand that the First Nations do have different views on this, and people like Chief Ernie Crey have been clear about the advantage that would take place for his people."[79] Here, consent is sidelined to make room for a diversity of opinions on the pipeline. The Minister dodges the question of consent again when the issue comes up directly soon after.

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[76] The Prime Minister was further chastised by the Union of British Columbia Indian Chiefs for addressing Chief Wilson's by her first name – unprecedented in any of his interactions with male chiefs that day; see Ellen Neel, "UBCIC, OPEN LETTER: UBCIC Demands Apology from PM Trudeau for Comments to Secretary-Treasurer Kukpi7 Judy Wilson" (5 December 2018), online: <ubcic.bc.ca/demands_apology_from_pm_trudeau>.

[77] *Tsleil-Waututh Nation v Canada (Attorney General),* 2018 FCA 153 [*Tsleil-Waututh*].

[78] House of Commons, Standing Committee on Indigenous and Northern Affairs), *Evidence*, 42-1, No 110 (29 May 2018) (Hon Cathy McLeod).

[79] *Ibid*.

> Cathy McLeod (Kamloops-Thompson-Cariboo, CPC): I would like to ask you if you think it's fair that you have failed to be clear in what your definition was of FPIC because the decision today clearly demonstrated what your definition of FPIC actually is.
>
> Hon. Carolyn Bennett: I think we've been very clear that FPIC is not a veto and a consensus does not mean unanimity, and that in so many areas—particularly in this one—33 Indian Act bands agreed to participate in the decision that twinning an existing pipeline was a better option than other options, and that their people would benefit from it in terms of jobs and other things.[80]

The Minister then doubles-down on private agreements, stating, "[e]ven today there is probably going to be an offer of a First Nations-led consortium on having equity and being part of, perhaps, owning the pipeline…"[81] In this statement, Minister Bennett floats the possibility of an even deeper investment by First Nations into the pipeline in the form of equity ownership. In January 2019, the Indian Resources Council of Canada (IRCC) held a meeting to develop a proposal to Ottawa to acquire the pipeline project.[82] Then the frontline of opposition, as the federal government well understands, will be First Nation against First Nation. Most recently, though, the Alberta government raised the stakes by announcing its intent to enact legislation that would create a Crown corporation to backstop First Nations' ownership of the pipeline.[83]

But it will not be so easy. As Squamish Nation councillor and spokesperson Khelsilem Rivers stated to the press, "[t]he reality is, if they want to build this pipeline they have to come through our titled land. That is our land. They don't have the right to say anything about what happens on our territory just like we don't have the right to say what happens to theirs."[84]

Conclusion: Subverting Consent

A friend pointed out recently that the public conversation about First Nations' consent to resource extraction in Canada is absurd if you think about it like sex.[85] For while the right to "consent" is rhetorically granted to First Nations by the current federal government, it is always qualified by politicians who hasten to add that this

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[80] *Ibid*.

[81] *Ibid*.

[82] Kyle Bakx & Geneviève Normand, "More than 100 First Nations Could Purchase the Trans Mountain Expansion Pipeline: 4 Ownership Models are Under Consideration to Boost Bitumen Shipments for Export", *CBC News* (15 January 2019), online: <cbc.ca/news>.

[83] "Alberta Government to Bring in Bill to Help First Nations Invest in Energy Projects", *CTV News (*10 June 2019), online: <ctvnews.ca>.

[84] *Ibid*.

[85] Thanks to Eugene Kung for this helpful analogy.

right does not constitute a "veto" power.[86] However, what if we thought about this qualification in an analogous way: if a woman did not consent to sex, would we call this a "veto" power? Would this not indicate that she has the right to say yes, but not the right to say no? In effect, this is the situation for First Nations in Canada today. The discourse of consent is powerfully shaped by qualifications and forms of interpretation that produce something akin to a rape culture of Indigenous lands.[87]

While Indian bands should have autonomy to determine the fate of their communities, governments must understand the legal definitions of consent as conceptualized by the courts, Indigenous peoples, and international law. Falling back on politically motivated and manufactured concepts of consent will only escalate the risk of disruption to projects where Indigenous peoples refuse to consent. The federal government, though, simply *refuses* to acknowledge that when consent is not forthcoming, and they persist, they are in fact engaging in violent force. Just recently, this denial was showcased in opposition to a proposed bill to legislate the UNDRIP, which includes several clauses to protect Indigenous peoples consent, into Canadian law.[88] In response, the assistant deputy minister in the implementation sector for Crown-Indigenous Relations stated, "[t]here is no international or domestic agreement on the meaning of the principle of free, prior and informed consent," agreeing however that it was about "building consensus."[89] And if consensus cannot be built?

Then you build the pipeline anyway. As a coda to this article, the Liberal government recently announced its decision to approve the TMEP. The Prime Minister stated, "[w]e have made the decision to buy the pipeline based on […] de-risking the pipeline. There were political risks that the private sector wasn't willing to take on so we had to purchase the pipeline, but we have no intention of being the lone operator of that pipeline that's why we will eventually sell it and that's why we are looking at Indigenous participation."[90] There, in one statement, the purchase of

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[86] Tonda McCharles, "Ottawa Says Indigenous Groups Hold No Veto over Trans Mountain Pipeline Expansion", *Toronto Star* (3 October 2018), online: <thestar.com>; Richard Zussman, "First Nations Will Be Further Consulted for Major Resource Projects but Won't Get a Veto", *Global News* (5 November 2018), online: <globalnews.ca>.

[87] This analysis builds on the scholarship of Indigenous women. See e.g. Sarah Deer, "Toward an Indigenous Jurisprudence of Rape" (2010) 14:121 Kan JL & Pub Pol'y; Audra Simpson, "The State is a Man: Theresa Spence, Loretta Saunders and the Gender of Settler Sovereignty" (2016) 19:4 Theory & Event; and Megan Scribe, "Pedagogy of Indifference: State Responses to Violence against Indigenous Girls" (2017) 32:1-2 Can Woman Studies. See also the important work by Emma Jones, "'No Free, Prior and Informed Consent': Rape Culture in Boom and Bust Towns", and "Women Voice Site C Concerns as Impacts Stay Hidden", *The Discourse* (8 November 2017), online: <thediscourse.ca>.

[88] UNDRIP, *supra* note 27, e.g. Article 10: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return" (Articles 11, 19, 28, & 29 also explicitly use the term).

[89] Jorge Barrera, "UNDRIP Bill Won't Alter Canada's Legal Framework, Federal Officials Tell Senate Committee", *CBC News* (28 May 2019), online: <cbc.ca/news>.

[90] Canada, "Trudeau Announces TransMountain Decision", *Livestream from Parliament Hill*, 18 June 2019.

the pipeline is explicitly linked to the risk posed by Indigenous territorial authority and jurisdiction. By encouraging Indigenous investment and participation, the federal government may mitigate the risk of opposition by those who oppose its development and refuse to consent. When pushed, though, by one journalist to define free, prior and informed consent in relation to Indigenous participation, the Prime Minister responded: "[it] is what we engaged in doing with Indigenous communities over the past number of months. It is engaging, looking with them, listening to the issues they have, and responding meaningfully to the concerns they have *wherever possible*."[91] The "*wherever possible*" here is key. Because the possibilities are alarmingly narrow when the government wants its way; and it clearly does not mean consent.

[91] *Ibid* [emphasis added].