

STANDING ROCK OF THE NORTH

THE KINDER MORGAN
TRANS MOUNTAIN PIPELINE EXPANSION
SECWPEMC RISK ASSESSMENT

Prepared by the Indigenous Network
on Economies and Trade

STANDING ROCK OF THE NORTH

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Executive Summary

This report lays out the flawed valuation that Kinder Morgan Canada has projected regarding the Kinder Morgan Trans Mountain Expansion Project (TMEP). The company has failed on multiple bases in crucial areas to account for the lack of political, legal, and proprietary certainty surrounding the pipeline.

Core to its misleading projection is Kinder Morgan's claim to have secured the land base for the pipeline, which runs through 518 km of Secwepemc (pronounced Se-KWEP-muk) territory in the South-Central Interior of British Columbia (BC). Secwepemcul'ecw is the largest Indigenous territory across which the Kinder Morgan TMEP is proposed to travel. It is unceded land — that is, the proper title and rights holders are the Secwepemc people, according to both the Supreme Court of Canada and to the Indigenous laws of the territory — and the Secwepemc have rejected the TMEP in absolute terms.

In this report, we examine the historical, legal, economic, political, reputational, regulatory, and climate risks that undermine the valuations of both Kinder Morgan (KMI) and Kinder Morgan Canada (KML).

In **Section 1**, we examine Secwepemc land defense in the context of unwanted development that has encroached upon their lands. This history includes their involvement in armed standoffs, years-long blockades against development, and disruption at corporate mining offices concerning environmental impacts on their land.

When the federal government unilaterally approved the original Trans Mountain pipeline through Secwepemc territory in 1951, the local community was not legally in a position to oppose the development because the Indian Act prohibited Indigenous peoples in Canada from organizing on land issues and hiring lawyers. The original Trans Mountain pipeline went into operation in 1953 without the Secwepemc people's consent. The Secwepemc are now determined that history will not repeat itself. At a recent assembly hosted on the territory they released a *Secwepemc Declaration on Protecting Our Land & Water Against the Kinder Morgan Trans Mountain Pipeline*, which stated: “we hereby explicitly and irrevocably refuse its passage through our territory.”

In **Section 2**, we document the under-reporting of KMI's legal exposure in relation to the TMEP. This legal risk poses serious obstacles for Kinder Morgan because the Secwepemc people retain territorial authority and the consent of the nation must be obtained for development to proceed. The Secwepemc maintain inherent land rights and Aboriginal Title to their land, which the Supreme Court of Canada recognizes as a collective right that is held by the nation.

The governments and Kinder Morgan failed to meet the most basic legal requirements with the Secwepemc people to discharge constitutional obligations. The legal risk to the company and to investors is that KMI have failed to engage with the Secwepemc collectively, as the proper title and rights holders, and therefore have not cleared access or proprietary interest to construct the pipeline.

Secwepemc assertions of jurisdiction will further be direct and material, intervening in the construction and development of the pipeline at every stage. Under Secwepemc law, the nation is obligated to protect their territory.

Canada is further bound by international obligations. Both the Canadian and the British Columbian governments have committed to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), meaning the consent of Indigenous Peoples to access to their lands and resources is required under the provision for Free Prior Informed Consent (FPIC). International law has been an effective avenue for dispute resolution for the Secwepemc People. They have successfully asserted their indigenous proprietary interests at the international level, including before international trade tribunals that have accepted their submissions, recognizing the macro-economic dimension of Indigenous rights. Failure to recognize Indigenous proprietary interests results in increased economic and legal certainty.

In **Section 3**, we examine the economic risk that Secwepemc resistance will successfully stop the pipeline, eliminating an expected source of revenue needed to sustain and grow Kinder Morgan Canada Limited's (KML) dividend.

We also examine the economic risk that Secwepemc resistance will make accessing capital more difficult and costly because Secwepemc assertions of jurisdiction will delay building efforts, increasing expenses, and lead to premium borrowing costs. We situate this risk within the broader pipeline divestment campaigns that are aimed at financial institutions and exerting increasingly effective pressure to divert capital from pipelines.

We find the economic risk of direct action by the Secwepemc to be of particular significance. The first of ten "Tiny Houses" has already been built to be placed along the proposed pipeline route. Directly addressing investors, a leader with the Tiny House Warriors and the Secwepemc Women Warrior's Society, stated: "As we assert our legal rights and title, pipeline financiers will face tremendous pressure, greater risk and uncertainty. We advise major pipeline funders, including TD Canada and JPMorgan Chase, to get out of the pipeline business now."¹

1. "First Nation's tiny house symbolizes resistance to pipeline," *Toronto Star*, Sun. Sept. 10, 2017.

If the Canadian government makes good on their threat of militarized action against Indigenous land protectors, a growing coalition of civil society allies and Indigenous nations on both sides of the U.S.-Canada border are preparing for the fight. The spectre of a “Standing Rock of the North” looms large.

The financial risks associated with the pipeline stemming from commodity supply and demand, market volatility, capital access and corporate debt are magnified by the increased likelihood of conflict, delays and the possibility of outright cancellation that emerge from Secwepemc assertions of jurisdiction.

We also examine the substantive risks of the TMEP to the Secwepemc economy: the cumulative risk of environmental contamination, potential spills, loss of lands due to displacement, danger to women of proximity to “man camps,” and shrinking an already compromised land base.

In **Section 4**, we examine the substantial political risk of the TMEP. The current provincial government in British Columbia comprises two political parties that oppose the pipeline, recently joining a lawsuit against KMI, and vowing to use “every tool at our disposal” to stop the construction of TMEP.²

When the governing parties partner with Indigenous peoples, as they have stated their intention to do, the political risk increases, in relation to approval delays, restrictions to permits, and right-of-ways. It will become more likely that the KML will be rejected at various points of provincial authorization.

In **Section 5**, we examine KMI’s reputational risk. Kinder Morgan Canada’s IPO prospectus acknowledges that Reputational Risk “cannot be managed in isolation from other forms of risk.” However, they do not connect reputational risk to the risks associated with Indigenous rights. Indigenous rights, the Alberta tar sands, climate change, and pipelines are all controversial, high profile, and divisive issues both in Canada and internationally. Kinder Morgan’s plan to build a pipeline that passes through Indigenous territory and through a densely populated city known globally for its environmental conscience puts the company at the centre of these conflicts. By doing so, it has become one of a handful of pipeline companies that are household names. This brings much greater scrutiny to all of its undertakings, whether or not they are related to Trans Mountain.

In **Section 6**, we look at uncertainties related to an ongoing review of federal environmental regulatory and assessment processes. This review is significant and should be a red flag to Kinder Morgan and to investors with respect to the economic viability of this expansion. The federal review covers all legislation affecting Indigenous peoples passed by the previous administration, including the National Energy Board and Environmental Assessment Acts that were instrumental to TMEP approval. Regulatory risk exists via the comprehensive federal review that calls into question the

2. Justine Hunter, “**Kinder Morgan Pipeline looms large in B.C. Election**,” *Globe and Mail*, April 12, 2017; Rob Shaw, “**NDP asked to form next B.C. government after Liberal defeat**,” *Vancouver Sun*, June 30, 2017; Derrick Penner, “**B.C. joins legal battles against Trans Mountain pipeline expansion**,” *Vancouver Sun*, Aug. 10, 2017

legitimacy (including constitutional legitimacy) and authority of the TMEP approval and related conditions.

Related regulatory uncertainties arise from the very strong likelihood that going forward:

- Projects will be assessed broadly in relation to their climate impacts (especially CO₂ emissions);
- Impact assessments will play what the CEAA review panel called a “critical role” in supporting Canada’s efforts to address climate change, and;
- Impact assessments will be cumulative and address the impacts of projects (such as pipelines) in relation to broader energy considerations (such as the decision to expand or restrict overall oil and gas production).

There are substantial risks related to proposed federal removal of the NEB as an “Authority” in oil and gas, including pipeline approvals, to be replaced by an independent quasi-judicial EA authority (housed within the Environmental Assessment Agency) to conduct all reviews and guide subsequent approvals processes. This change will likely make approvals for pipelines and oil and gas developments much less certain. This results in increased public scrutiny and vulnerability of the TMEP route approval process putting in question its legitimacy. The future role of Indigenous peoples, enhanced engagement with Indigenous rights and jurisdiction, and federal commitment to implement UNDRIP/FPIC in Environmental Assessments mean that it is likely that approvals processes will likely take longer, and that oil and gas proponents will need to expend significantly more resources, time, and energy making their case.

In **Section 7**, we examine how KMI fails to consider the climate risk of this undertaking, exposing investors to further financial risk. We consider how the Kinder Morgan Trans Mountain Expansion Project depends on an expansionary pattern of crude oil flows from the tar sands in order to be profitable. Without this expansion, the pipeline will be devalued. The cost of tar sands expansion, however, will be borne by communities downstream to the tar sands and in the Athabasca region. The increase of global carbon emissions released by this expansion will contribute to the devastating impact of climate change to communities around the world.

Climate risk will manifest as both stranded assets of inaccessible, expensive oil production, and financial disclosure to global markets of the pipeline’s impact on climate. For example, the global Task Force on Climate-Related Financial Disclosures developed a framework of voluntary recommendations designed to provide “consistent climate-related financial risk disclosures for use by companies in providing information to investors, lenders, insurers, and other stakeholders.”³ In response, Canadian security regulators pledged in March 2017 to undertake their own review of climate disclosure in Canada, which could have substantial effects on oil and gas infrastructure projects.

3. Keith Stewart, “**Oil companies and the financial risk of climate change,**” *Policy Options*, March 31, 2017. See also: **Task Force on Climate-related Financial Disclosures.**

In conclusion, this risk assessment analyzes the implications of Secwepemc jurisdiction for Kinder Morgan's valuation of the Trans Mountain Expansion Project. We undertake a comprehensive risk analysis of the investment stage and the operational stage of construction and offer solid evidence that the pipeline cannot be built without Indigenous consent. The Indigenous nations living along the proposed pipeline route have voiced their absolute opposition to the project.

1. Secwepemc Land Defense Risk

The Secwepemc are the title-holders of their territory in the South-Central Interior of British Columbia (BC), Canada. Secwepemcul'ecw, the territory of the Secwepemc (or Shuswap) Nation, spans approximately 180,000 square kilometres, across the interior plateau of south central BC. It extends from the western shore of the Fraser River, beyond the Columbia River in the east, and to the South Thompson River and Arrow Lakes in the south (see Figure 1).

The Secwepemc border the Dunne-za and Dakelh to the north; Tsilhqot'in to the west; St'át'imc, Nlaxa'pamux, Syilx, and Ktunaxa to the south, and Nakoda to the east. Historically, there have been powerful alliances among and between many of these nations, including the Okanagan-Shuswap Confederacy (between the Secwepemc and the Syilx) and the Interior Tribes of British Columbia. The Interior Alliance of Indigenous Nations is active today and the Secwepemc are members, along with three other Interior Salish peoples, Syilx ("Okanagan"), Nlaka'pamux ("Thompson"), and St'át'imc ("Lillooet").

The proposed pipeline route follows major watersheds in British Columbia, including the North Thompson River and the larger Fraser River watershed, home to some of the world's largest remaining sockeye salmon runs. Hence the project stands to have an even greater impact than other pipeline projects, which were criticized for crossing rivers, but did not follow major watersheds. In the Lower Mainland the proposed pipeline route runs alongside the main stem of the Fraser River that all the Interior salmon populations must travel through. It reaches the ocean at Tsleil-Waututh, where the Westridge Marine terminal is located and has already caused great impacts, which would only be multiplied by its expansion. In 2016, Rueben George, sundance chief and spiritual leader of the Tsleil-Waututh Nation and Spokesperson for the TWN Sacred Trust Initiative, attended an Interior Alliance meeting and Interior Alliance leaders lent their support to his coastal nation's fight against the pipeline, renewing an historic alliance between nations.

Unlike much of the rest of Canada, the British Crown assumed sovereignty over British Columbia without signing treaties with Indigenous Nations in most of the Province. According to the Royal Proclamation of 1763, all "Indian lands" had to be *ceded* to the Crown in order to legally transfer possession to the state. The Royal Proclamation is enshrined as law in the Constitution Act, 1982. The Indigenous Nations of the Interior of British Columbia, including the Secwepemc, have never ceded, released or surrendered their land. They also maintain their jurisdiction over

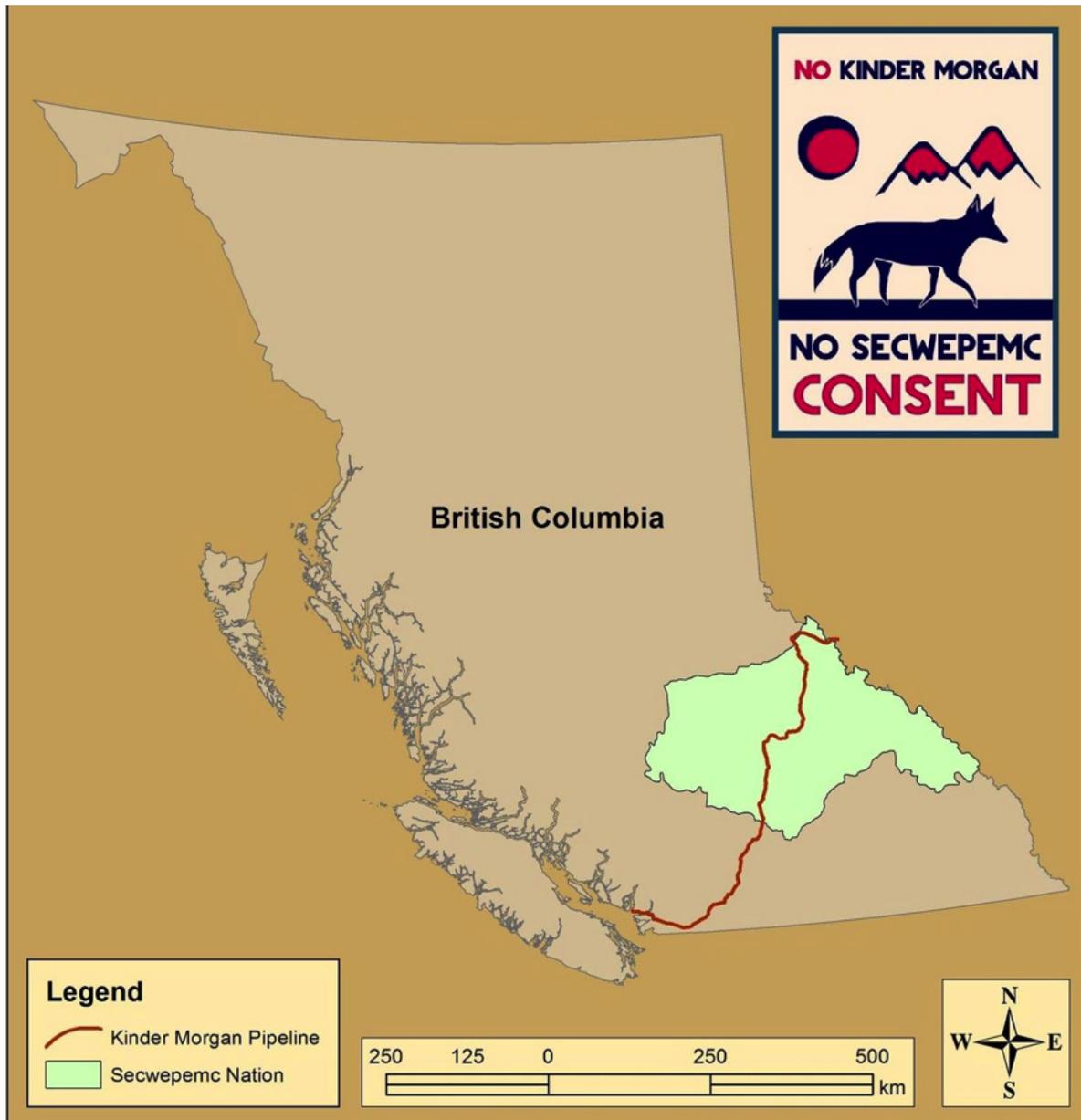


Figure 1
Map of Secwepemcul'ecw showing proposed pipeline route.

The province of British Columbia never properly obtained title to the land and resources. Indigenous lands are *unceded* to the state, and Indigenous land rights have to be recognized. The Supreme Court of Canada has recognized that Aboriginal Title can be established on a territorial basis, as a *sui generis*, collective, proprietary interest in the land.

The Secwepemc maintain *inherent* jurisdiction over their lands, which, in light of the Crown's assertions of jurisdiction, creates significant contestation and uncertainty. *Inherent jurisdiction* means that in addition to judicial rights, the Secwepemc maintain their interest in the land stems from Indigenous law. The Secwepemc have a long history of defending their lands from encroachment from outsiders — the state and private interests — by exercising their jurisdiction on the ground.

Since first contact, the Secwepemc defended their territory from encroachment. They are a fearsome nation that has suffered the impacts of disease and the railway that crossed through their territory, bringing settlement and industrial development like hydro dams, mills, and other destructive infrastructure. The Laurier Memorial of 1910 — a letter addressed to the Prime Minister of Canada — asserted the boundaries, laws, and integrity of Secwepemc territory and other Interior Salish Nations.

There are countless examples throughout the twentieth century of Secwepemc land defense. But by far the most striking happened in 1995 at Ts'Peten (Gustafsen Lake) on Secwepemc territory. There was a standoff between the Royal Canadian Mounted Police (RCMP) and a group of Sundancers who had been conducting a religious ceremony on an unceded area of their land. It was the largest paramilitary operation in Canadian history with 400 RCMP officers, armored personal carriers, and land mines deployed to remove the Ts'Peten Defenders from the area. The standoff lasted 30 days as the Secwepemc refused to surrender.

The Secwepemc Nation reaffirmed their sovereignty in their fight against the expansion of the Sun Peaks ski resort at Skwelkwek'welt, the high alpine region of Secwepemc hunting and gathering ground north of Kamloops, in the core of Secwepemc territory. The Skwelkwek'welt Protection Centre was established by the Secwepemc in October 2000 and became a site of massive opposition to the ski hill expansion. The protection camp persisted until 2010, during the Winter Olympics that year, with calls for boycotts of the Sun Peaks resort and Delta Hotels, which has since pulled out of the location. Arrests and criminalization of land defenders made headline news, mirroring the project in delays and bad press for years. BC and Sun Peaks' violations of Secwepemc jurisdiction were also reported at the international level, including through a submission to the United Nations Committee for the Elimination of Racial Discrimination in 2006.

The Imperial Metals tailings pond spill at Mount Polley in Secwepemcul'ecw led the Secwepemc Women Warrior Society to set up a camp in 2015. A year later they blocked access roads to the mine on the second anniversary of the spill after the company had been granted a permit to resume operations. The Secwepemc Women Warrior Society also disrupted the Annual General Meeting of Imperial Metals that year and activists occupied Imperial Metals' head office in Vancouver, drawing attention

to the company's failure to ameliorate and address the devastation of the spill.

In June 2017, the Secwepemc People's Assembly was held, bringing Secwepemc people together to discuss the potential impacts of the proposed Kinder Morgan TMEP. They agreed that under Secwepemc law, this proposed pipeline cannot be allowed to pass through their territory due to the direct and potential impacts. They released the *Secwepemc Declaration on Protecting Our Land & Water Against the Kinder Morgan Trans Mountain Pipeline*, where they stated:

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.

The Secwepemc's inherent jurisdiction gives rise to people taking actions to fulfill their collective responsibility to protect the territory. With the strength of their legal rights accruing recognition through the Canadian courts and their powerful new alliances with Indigenous and non-Indigenous groups, Secwepemc power to control development on their territory only continues to grow.

2. Legal Risk

i. Territorial Basis of Aboriginal Title and the Proper Title and Rights Holder

The Secwepemc (Shuswap) People have never ceded, surrendered, or given up their sovereignty, and title and rights over the land, waters, and resources within Secwepemcul'ecw (Secwepemc/Shuswap territory). They have never signed treaties or released their land to the Crown, as such they maintain their inherent rights to their territory and governance over it.

Secwepemul'ecw is the largest indigenous territory measuring over 180,000 square km,⁴ that the Kinder Morgan Trans Mountain Expansion Project (TMEP) is proposed to pass through, covering 518 km, or almost half of the proposed pipeline route.

The key here is that the Secwepemc people *collectively* hold title and governance regarding Secwepemcul'ecw, though they have not been engaged at the scale of their nation by the government or by Kinder Morgan.

Relying on historic evidence and interviews with elders, Dr. Ron Ignace, Kukpi7 (Chief) of the Skeetchestn Indian Band clarified that there is a "principle of collective land tenure at the level of the 'tribe,' or nation, rather than village group, or land ownership resting with individuals." He maintains, "in referring to distinct territories of tribes with recognized external boundaries, along with a system of 'tribal' or common land tenure, the chiefs of the Interior strongly invoke the concept of Aboriginal nationhood, thinking of the Secwepemc, Nlakapamux, St'at'imc, Ts'wenemc (Okanagan), Pesxixlemc (Tsilhqot'in) and others as distinct nations, and refusing to

4. Ronald Ignace, *Our Oral Histories are our Iron Posts* (Doctoral Thesis, Simon Fraser University, 2008) [unpublished], p. 101.

surrender to the nucleation of our nation into ‘bands’ imposed by the government during that time.”⁵

This means that deals Kinder Morgan has made with individual bands do not replace the need for engagement with the nation as the proper title and rights holder on a territorial basis. Thus this company runs the high risk of failing to obtain consent from the appropriate jurisdictional authority.

The federal and provincial governments and Kinder Morgan also have failed to engage with the Secwepemc People collectively, as the proper title and rights holders. Instead they have engaged mainly with elected Indian Band councils, who only have delegated authority over Indian reserves under the federal Indian Act. According to Secwepemc law — which is what the courts look to in order to determine the proper title and rights holder — it is the Secwepemc people *collectively* who hold Aboriginal title and rights on a territorial basis. Therefore, the governments and Kinder Morgan have failed at the most *basic* and *primary* threshold when it comes to negotiating with the proper title and rights holders to discharge constitutional obligations, both in regard to the “duty to consult” and impacts on Aboriginal title and rights. By failing to talk to the right people, namely the Secwepemc People collectively, the proponent and the governments will never get the certainty they need for the project, even if they sign minor agreements.

The federal government unilaterally approved the original Trans Mountain Pipeline in 1951, when Indigenous Peoples were prohibited from organizing on land issues. The original pipeline went into operation in 1953 without the consent of the Secwepemc. In November 2016, the federal government again unilaterally approved the proposed expansion of the Trans Mountain Pipeline without the consent of the Secwepemc.

The Supreme Court of Canada in its recent *Tsilhqot’in Nation v. British Columbia* (2014) decision maintained a territorial concept of Aboriginal title,⁶ or the collectively held land rights of Indigenous Peoples, which along with Aboriginal and Treaty rights, are protected under s. 35 of the Constitution Act, 1982.

The Supreme Court of Canada further ruled that:

- Aboriginal title can be established based on a territorial land use based approach;
- The Crown does not retain any beneficial interest in Aboriginal title land;
- Aboriginal title includes the right to pro-actively use and manage the land.⁷
- Land management is an incident of Aboriginal title, and thereby includes (1) Indigenous jurisdiction over these lands and (2) Indigenous self-government.

Still, the federal and provincial governments continue to employ processes and legislation that fail to take into account the territorial nature of Aboriginal title. The Supreme Court of Canada was very clear. Yet current provincial and federal legislation

5. Ibid, p.107

6. *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256

7. Ibid at para 73

remain rooted in the very same erroneous theory, as have been all the federal and provincial approval processes regarding the TMEP. They failed to take into account the importance of the larger Secwepemc territory that the pipeline is proposed to pass through and that is proposed to be subject to construction activity and the impacts on Secwepemc current and traditional uses, otherwise the project would have never been approved. This ongoing infringement of Secwepemc Aboriginal Title and Rights cannot be justified.

The Save the Fraser Declaration, the Salish Sea Treaty, and the Treaty Alliance against Tar Sands Expansion have all made the Kinder Morgan TMEP illegal under Indigenous law and open to enforcement. The territories of those nations cover the vast majority of the pipeline route.

ii. From the Local to the International Level

The Secwepemc and Okanagan logging cases were initiated in 1999, when the respective nations went logging without a provincial permit, in order to demonstrate their Aboriginal title over the forest and to exercise jurisdiction regarding access to their territory and resources. The province of British Columbia used various motions and strategies to delay the litigation for nearly two decades, so the Secwepemc and other Interior Salishan people took the case international in the context of the US Canada Softwood Lumber Dispute. The case and the successful international interventions before international trade tribunals serve as a reminder to investors that failure to take Indigenous rights and proprietary interests into account will threaten projects.

The NAFTA Chapter 19 panel hearing the Softwood Lumber dispute opted to accept the independent Indigenous submissions submitted jointly by Indigenous Peoples from across Canada under the umbrella of the Indigenous Network on Economies and Trade (INET). This was despite Canada's arduous opposition,⁸ which presented its sole claim to sovereignty as a nation state, which was countered by the Indigenous submissions. The NAFTA panel's acceptance⁹ of the independent Indigenous submissions, in light of these arguments was a recognition that Indigenous rights have to be taken into account when it comes to international trade and Indigenous Peoples have to be taken into account in international trade proceedings. Failure to do so can result in economic uncertainty for investors and potentially even *international trade remedies*.

Canada is bound by international obligations. Canada is a signatory to the International Covenants on Civil and Political Rights (ICCPR) and Economic Social and Cultural Rights (ICESCR), which includes the right to freely determine their political status and freely pursue our economic, social and cultural development. The

8. Weil, Gotshal & Manges LLP, Washington, D.C., Joint Opposition of Canadian Parties to the Motions of the Indigenous Network on Economies and Trade and the Natural Resources Defense Council for Leave to Participate as Amicus Curiae, November 25, p. 20

9. *In the matter of Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, Order granting the motion of leave to participate as amicus curiae on behalf of INET, Secretariat File No. USA-CDA-2002-1904-03, NAFTA Article 19.04 Binational Panel Review (Mar. 5, 2003).

Secwepemc have the inherent right to self-determination, which is also recognized under international human rights law. The proper Title and Rights holder is to be determined by the Secwepemc people themselves and according to their law. They also have to be recognized as decision-makers regarding all developments on their territory. This is also reflected in the UN Declaration on the Rights of Indigenous Peoples through the principle of Indigenous Free, Prior and Informed Consent, to which both the provincial and federal government have agreed.¹⁰

iii. Consent and the Duty to Consult

In the watershed Supreme Court of Canada case *Tsilhqot'in Nation* there are numerous references to consent. The court states that, “the 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 holder.*”¹¹ The court also advised that *consent is the best avenue to avoid legal and economic uncertainty* whether there is a declaration of Aboriginal Title or not.¹²

The Supreme Court of Canada sent a clear message to the federal government in that regard, when it released its *Tsilhqot'in Nation* decision less than 10 days after former Prime Minister Stephen Harper’s government had unilaterally approved the Northern Gateway Pipeline Project on June 17, 2014, despite Indigenous opposition. It clarified to the government that it is not the only decision-maker — that Indigenous Peoples have an important role to play in approval processes — otherwise government decisions can be quashed. Indeed, the Order in Council regarding the Enbridge Northern Gateway Pipeline Project has since been defeated¹³ and the project will not proceed despite initial federal approval.

There are similar judicial reviews currently underway by Indigenous Nations affected by the federal TMEP pipeline approval. Arguably they have an even better likelihood of success, because the process employed by the National Energy Board and the following consultation were more fundamentally flawed. Unlike in the Northern Gateway review process, the Kinder Morgan review process allowed no direct cross-examination of the proponent, scarcer funding for Indigenous intervenors, and the process was accelerated and streamlined in favour of the proponent.

This all further undermines “the honour of the Crown.” This constitutional principle underlies the “duty to consult” as per the *Haida Nation* (2004) decision and judicial review proceedings based on it. The Supreme Court of Canada in *Haida Nation* stated, “The controlling question in all situations is what is required to maintain the

10. **United Nations Declaration on the Rights of Indigenous Peoples, 2007.** [UNDRIP] Free Prior Informed consent (FPIC) is the international law principle relied on by countries to control access to lands and resources, but it is also used internationally to refer to Indigenous Peoples’ decision-making power over access to their lands and resources. See article 28 in particular.

11. *Ibid* at para 76.

12. *Ibid* at para 97.

13. *Gitxaala Nation v. Canada*, 2016 FCA 187

honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.”¹⁴ This requirement has not been met under the federal review and unilateral decision-making processes regarding the proposed Kinder Morgan TMEP project where Indigenous interests were not taken into account, let alone meeting the Indigenous consent standard.

Currently, there are 18 separate legal proceedings against the Project: six cases challenging the National Energy Board recommendation; nine cases challenging the Federal Cabinet approval; and three cases challenging the BC Provincial approval. In addition, two Indian Tribes based in Washington State have launched a legal challenge against the U.S. Coast Guard related to the impact of tanker traffic on endangered southern resident orcas.¹⁵ The first suite of cases is being heard in Federal Court of Appeal, starting October 2, 2017. In late August 2017, the Federal Court of Appeal granted the province of British Columbia intervener status in these proceedings against the TMEP. It is important to note that the province is intervening on the side of Indigenous nations, thereby recognizing that they are in the strongest position to stop the project.

In addition to the logging cases, there is a second Aboriginal Title claim in Secwepemcul’ecw, filed to protect Pipsell (Jacko Lake) subject to a proposed Ajax mining project. Pipsell is an important cultural keystone area for the Secwepemc people. The proposed TMEP and the current Trans Mountain pipeline also pass through the area that is subject to the Aboriginal Title claim. The S’tkemplups te Secwepemc, who are the caretakers of the area are also participating in the judicial review proceedings against the TMEP.

The previous British Columbia government recognized at the National Energy Board hearing that the proposed project is not safe on land or water, yet it still issued the environmental certificate on January 11, 2017. This provincial decision is currently also under judicial review, including by the Squamish Nation.

The legal risks for the proposed Kinder Morgan TMEP therefore are extremely high, ranging from issues related to failure to engage with the proper Title and Rights holder and failure to take into account the territorial nature of Aboriginal Title; to economic uncertainty from the local to the international level due to failure to meet consent standards and to discharge constitutional duties, resulting in increased risk that unilateral federal and provincial approvals for the TMEP will be quashed.

14. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 S.C.R. 511, at para 45.

15. For more information see: West Coast Environmental Law, “**Kinder Morgan Canada Limited: Brief on Legal Risk for Trans Mountain,**” May 29, 2017.

Table 1
Legal Proceedings against the Trans Mountain Expansion Project

Applicant	Federal Court of Appeal	Supreme Court of BC	Other	Total
Tsleil-Waututh Nation	NEB and Canada	BC		2
Squamish Nation	NEB and Canada			3
Coldwater Indian Band	NEB and Canada			2
Sto:lo (Aitchelitz et al)	Canada			1
Stk'emlupsemc Te Secwepemc Nation	Canada			1
Upper Nicola Indian Band	Canada			1
Tulalip Tribes and the Suquamish Tribe			Tulalip Tribes v. Kelly, 17-cv-652, U.S. District Court, Western District of Washington (Seattle)	1
City of Vancouver	NEB	BC		2
City of Burnaby	NEB and Canada			2
Raincoast Conservation Society and Living Oceans Society	NEB and Canada			2
TOTAL	14	23	1	17

Source: Tsleil Waututh Nation Sacred Trust Initiative and West Coast Environmental Law Association, “**Kinder Morgan Canada Limited: Brief on Legal Risks For Trans Mountain,**” May 29, 2017, updated by INET.

3. Economic Risk

i. Instability in the Oil Sector

The risk associated with Indigenous resistance to the pipeline needs to be placed in the context of a changing, and uncertain, market assessment of pipelines generally, and Kinder Morgan specifically. Figure 2 displays the quarter-over-quarter annual returns of Kinder Morgan Inc's (KMI) shares, an aggregate of other major pipeline companies, and the S&P 500. After market-beating returns from 2012 through the first quarter of 2015, pipeline companies under-performed through the first half of 2016. Specifically, Kinder Morgan's extraordinary returns from the fourth quarter of 2014 until the third quarter of 2015 were followed by large losses for the next four quarters.

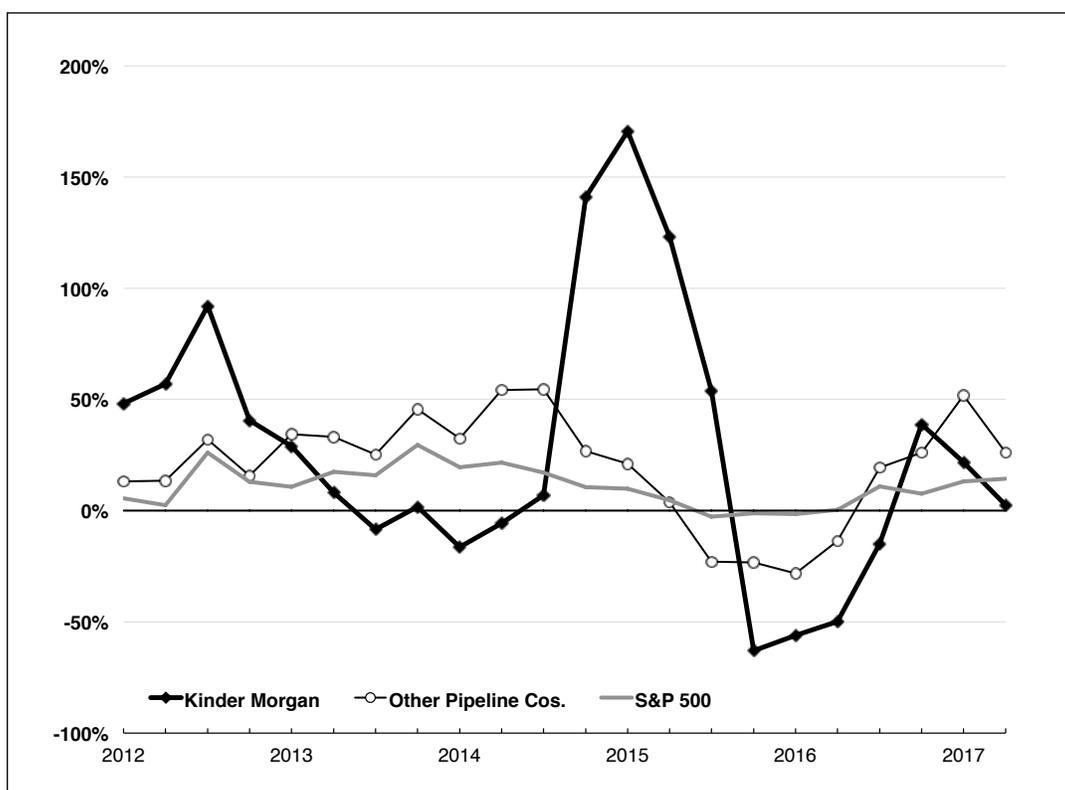


Figure 2

Market Turmoil: Quarter-over-quarter Annual Growth, 2012-7

Source: Bloomberg

NOTE: Data for Other Pipeline Cos. is the sum of market capitalization. 'Other Pipeline Cos.' are those other than KMI classified as such by Bloomberg.

Historically, pipeline companies have been considered relatively safe, stable investments. However, since 2015, the market has treated pipelines as a riskier investment. Figure 3 charts the quarterly beta value of Kinder Morgan and the same aggregate of other pipeline companies.¹⁶ The movement above one in the fourth quarter of 2015 was unprecedented. Kinder Morgan broke through that barrier over one year earlier, hovering around one until the second quarter of 2015. This increased volatility suggests the future for pipelines has grown murkier. Resistance to new pipeline projects only adds to the uncertainty.

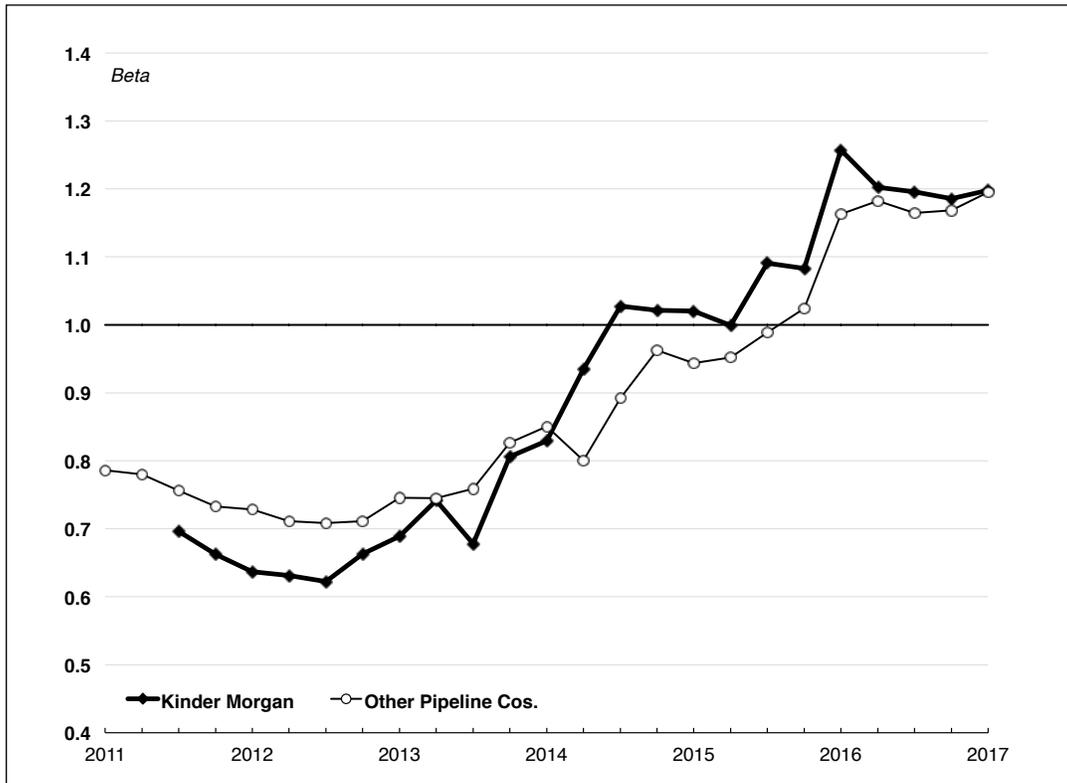


Figure 3
 Changing Assessment of Pipeline Risks: Beta Values, 2011-7

DATA: Bloomberg

NOTE: Data for Other Pipeline Cos. is the sum of beta values, weighted by market capitalization.

‘Other Pipeline Cos.’ are those other than Kinder Morgan classified as such by Bloomberg.

Beta values compare the volatility of an asset’s price with the volatility of a benchmark, often the S&P 500.

16. Beta is a standard proxy for measuring systemic risk in the market. It compares the volatility of an asset price with that of the market, which is proxied by some benchmark, such as the S&P 500. A value of less than one indicates that the asset is considered less risky than the benchmark while a value above one indicates greater relative risk. In order to focus on Kinder Morgan, the chart begins in 2011. The pipeline companies had an aggregate beta less than one extending back to 2000.

The fluctuating returns and increased volatility express market uncertainty about how falling and stagnant oil prices will affect pipeline revenue and earnings. The terms of pipeline contracts are longer than the short-term fluctuations of oil spot prices, and therefore offer more certainty. However, the 2014 fall in oil prices resulted in an estimated \$80 billion in bankruptcies among 123 oil and gas producers from the beginning of 2015.¹⁷ As seen in the table below, that same year, Kinder Morgan and other pipeline companies had a sharp fall in earnings, with a lesser fall in revenues. The next year came with a recovery in earnings that fell short of returning the companies to 2014 values, while revenues continued to decline.

Table 2: Earnings and Revenues

Year	Earnings (000,000 USD)		Revenue (000,000 USD)	
	Kinder Morgan	Other Pipeline Cos. (Average)	Kinder Morgan	Other Pipeline Cos. (Average)
2011	\$594	\$249	\$7943	\$5091
2012	\$315	\$264	\$9973	\$5321
2013	\$1193	\$235	\$14070	\$6586
2014	\$1026	\$329	\$16226	\$6517
2015	\$337	\$78	\$14403	\$4130
2016	\$708	\$228	\$13058	\$3933

Source: Bloomberg

The entire oil industry is undergoing significant changes, which is in turn producing a great deal of volatility and uncertainty. Among the structural shifts with which the market is grappling is increased resistance to pipelines as part of the movement against climate change. In Canada, that movement is also associated with opposition to the Alberta tar sands. Indigenous rights are an indelible aspect of the resistance that magnifies this volatility and uncertainty.

ii. Failing to Understand the Risk of Aboriginal Relationships

There are two sides to the economic risks associated with the pipeline and the Secwepemc opposition. First, there are the risks generated for Kinder Morgan, Inc., Kinder Morgan Limited (KML) Canada and their investors, lenders and other financial backers. Some of these are described in Kinder Morgan Canada's recent IPO prospectus under the risk factors heading 'Aboriginal Relationships.' However, the description demonstrates an inadequate understanding of Indigenous rights, sovereignty and jurisdiction, as well as the means Indigenous nations may employ to protect their rights. Further, discussions of Indigenous rights are completely absent from Kinder Morgan, Inc.'s annual management discussion and analysis of the TMEP.

17. Haynes and Boone, LLP. April 27, 2017. *Oil Patch Bankruptcy Monitor*.

Both KMI and KML fail to understand how the risks associated with Indigenous rights will impact economic risks, especially access to capital. This failure includes an overly narrow understanding of oppositional forms. KML's prospectus identifies the courts as the sole method that Indigenous and other opposition groups might use. The consequences of this blinkered view come into sharp relief when juxtaposed with the Secwepemc's assertion that they will defend their land, and the recently launched Tiny Houses campaign. This latest tactic to occupy the land is part of a well-established history of the Secwepemc land defences, including the high-profile standoff at Gustafsen Lake (see Section 1).

Second, there are the risks to the economic wellbeing of the Secwepemc posed by the pipeline (outlined in subsection vi), which are not acknowledged by either Kinder Morgan Canada or its parent. These risks make understandable the staunch opposition of the Secwepemc to the pipeline expansion.

Given Kinder Morgan's assessment of the risks associated with what they term "Aboriginal relationships" is so narrow, questions arise about their ability to properly manage those risks. As stated in the prospectus, the company's sole strategy for managing and mitigating the risks associated with Indigenous rights is to ensure 'Aboriginal groups' derive 'benefits' from the project. Authors of filings for Kinder Morgan and its Kinder Morgan Canada subsidiary either do not understand the diverse realities of Indigenous rights in Canada or they are wilfully ignoring the consequences of those rights for the project. Either way, it should be a major red flag for investors, lenders, and other financial backers.

iii. Direct Action

Dubbed "The Great Canadian Pipeline Battle" and "Standing Rock North" by observers, the oil industry's biggest risk has been identified by economic analysts as a "long, costly and painful" battle "pitting capitalists against environmentalists against politicians against First Nations."¹⁸

The lengthiest sub-section of the 'Risk Factors' section of the KML prospectus is devoted to the possibility that 'Major Projects, Including the Trans Mountain Expansion Project, May Be Inhibited, Delayed or Stopped.' This section is connected with risks identified with 'Aboriginal Relationships.' However, the company solely identifies court and permitting challenges as possible sources of delay. There is no consideration of blockades, encampments or other types of direct action. The construction of the Dakota Access Pipeline encountered various degrees of resistance along its length.¹⁹ With greater awareness of pipeline opposition, there is a high likelihood of similar, if not greater, opposition to the Trans Mountain expansion. The possibility

18. Jeffrey Jones, "The oil industry's biggest risk in the pipeline wars: time," *The Globe and Mail*, B1, July 5, 2017; Kyle Bakx, "Kinder Morgan Bracing for Standing Rock-type protests," *CBC News*, Nov 5, 2016.

19. Gregor Aisch and K.K. Rebecca Lai. "The Conflicts Along 1,172 Miles of the Dakota Access Pipeline." *New York Times*, March 20, 2017

is greatest in Secwepemcul'ecw, although other Indigenous nations, including the Kwantlen and Tsleil-Waututh, have declared their intention to physically prevent the pipeline.²⁰

In Kinder Morgan's 2012 annual report, it estimated the pipeline would be in operation by late 2017. In its 2016 report, this had been extended to December, 2019, with construction estimated to begin in September 2017. Instead, the National Energy Board have already "cracked down" on Kinder Morgan for installing mats in streams to discourage salmon spawning where the pipeline is supposed to be built without having obtained the necessary permits.²¹

The projected completion in the company's June 2017 credit agreement with 24 lenders is April 30, 2020. There are probable delays with the recent B.C. election as discussed in the Political Risk section below. However, the opposition of the Secwepemc increases the probability further. The Dakota Access Pipeline (DAPL) crossed about 50 km of Sioux territory, encountering high profile resistance that cost Energy Transfer Partners millions of dollars. The planned route of the Trans Mountain expansion traverses more than 10 times that distance of Secwepemc territory.

The Secwepemc plan to disrupt the construction of the Kinder Morgan pipeline by any means necessary.

The first of 10 "tiny houses" has already been built in Secwepemc territory. Directly addressing investors, a leader with the Tiny House Warriors and the Secwepemc Women Warrior's Society, stated: "As we assert our legal rights and title, pipeline financiers will face tremendous pressure, greater risk and uncertainty. We advise major pipeline funders, including TD Canada and JPMorgan Chase, to get out of the pipeline business now."²² Asserting their sovereignty to the land, and their inherent decision-making powers over their territory, the Tiny House Warriors vowed to stand against the pipeline.

In an affidavit files with the B.C. Supreme Court, a Trans Mountain representative stated that each month of delay directly costs the company \$5.643 million.²³

Beyond the *direct* costs incurred, *delays* create uncertainty about future costs. Kinder Morgan's projected costs for pipeline construction have remained the same from 2012 to 2016: US\$5.4 billion. This creates the impression that 1) the expected cost had not changed despite the five-year time span from initial proposal; 2) the company has a very solid estimate of the construction costs, and 3) any additional delay

20. The Kwantlen have called for volunteers to join a confrontation of the pipeline. They have declared that they will "do what it takes" to stop the Trans Mountain expansion. See their website: <http://standwithkwantlen.org/>. Read the critical Tsleil-Waututh Kinder Morgan Assessment here: <https://twnsacredtrust.ca/assessment-report-download/>

21. *National Observer*, "NEB cracks down on Kinder Morgan for disrupting streams on pipeline route," September 26, 2017.

22. "First Nation's tiny house symbolizes resistance to pipeline," *Toronto Star*, Sun. Sept. 10, 2017.

23. Affidavit, Carey Johannesson, Supreme Court of British Columbia, Trans Mountain Pipeline ULC v. Gold et al, Oct. 30, 2014, at para 100.

starting the project is unlikely to have an impact on the cost. However, when the Canada-U.S. exchange rate is taken into account, the unchanging US dollar estimate represents a 32 percent increase from CDN\$5.4 billion in 2012 to CDN\$7.15 billion in 2016. In KML's 2017 credit agreement the cost estimate is CDN\$7.4 billion. The costs will likely increase further if the start of construction is delayed. The increase will be even greater if delays occur after construction has begun.

Cambridge political anthropologist Donald Bray has noted in his work with mining companies around the world that half of mining risks globally are not due to technical issues, but rather due to socio-political and community risks that can add tens of millions of dollars a week to project costs.²⁴

Delays are inevitable. There are a number of concurrent nation-wide planning processes currently underway to stop the pipeline.

The NoDAPL Standing Rock solidarity movement has also continued to build momentum, creating cross-border inter-national alliances between Indigenous communities. In June 2017, a delegation of Chiefs from First Nations across Canada traveled to the sacred Black Hills of the Great Sioux Nation in South Dakota at the invitation of U.S. Tribal leaders. These Chiefs represent a delegation from over 120 First Nations and Tribes who signed the Treaty Alliance Against Tar Sands Expansion. The list of projects they oppose includes the Kinder Morgan Trans Mountain Expansion Project.

The protests will not be geographically bound to Secwepemc territory. Tar sands activist and Cree climate justice organizer Clayton Thomas-Muller was arrested on Parliament Hill in Ottawa for protesting Trans Mountain's impending approval, he stated to the media:

We know that they're just trying to test the waters for tar sands pipelines to get that controversial tar sands oil that's been killing Dené, Cree and Métis people in Northern Alberta with cancer, poisoning their food systems, poisoning their water systems, spreading climate chaos across the planet. Justin Trudeau is not the Disney prince that the media has been painting him out to be. He is in collusion with Big Oil. And we're here today to support these young people, these brave warriors, for the sacredness of Mother Earth, to let him know that he needs to reject the Kinder Morgan pipeline.²⁵

There are a number of powerful coalitions of Indigenous and non-Indigenous peoples organizing joint opposition to the Kinder Morgan Trans Mountain Expansion. For example, Burnaby Residents Opposing Kinder-Morgan Expansion involves a broad-based alliance including the Tsleil-Waututh and Musqueam First Nation, Orca Sounding, Dogwood Initiative, Kwantlen First Nation, Burnaby Mayor, Social En-

24. Cecilia Jamasmie, "Mining industry can now predict opposition to projects before it's too late," *Mining.com*, Aug. 7, 2017

25. *Global Justice Ecology Project*, "Watch: Clayton Thomas Mueller on expansion of Trans Mountain Pipeline," October 26, 2016.

vironmental Alliance, Union of British Columbia Indian Chiefs, Coldwater First Nation, and the PIPE UP Network.

In November 2014, in response to geotechnical work related to the KM Trans Mountain pipeline, over 100 protesters were arrested on Burnaby Mountain for blocking and occupying the path of machinery to access the test drilling sites. Some protesters blocked trucks from climbing the mountain to reach the test sites. Others were arrested for refusing to leave the mountain after Kinder Morgan secured an injunction against them. However, due to a wildly inaccurate disclosure of the GPS coordinates of the drilling sites marked for injunctive protection, an extension to the injunction was denied and KM was encouraged to drop all civil contempt hearings for the demonstrators, with which they complied.²⁶

Representatives of the Canadian government have implied their intent to use military force against those opposing the pipeline. Natural Resources Minister Jim Carr stated that the government would use “defense forces” or police in the case of pipeline protests. Speaking at the Canadian Progressive Contractors Association, Carr stated: “If people determine for their own reasons that that’s not the path they want to follow, then we live under the rule of law.”²⁷ As witnessed in South Dakota, the militarized policing of Standing Rock Sioux protesters and their allies cost the state millions of dollars and brought further attention to the situation, rallying supporters across the country and the world. Far from providing a quick solution, heavy-handed policing at Standing Rock was followed by lengthy and costly delays for the pipeline project.

iv. Pipeline Divestment Campaign

Among the means being used by opponents to stop the pipeline is confrontation with lenders and investors. The Union of B.C. Indian Chiefs has launched a campaign calling on banks not to finance Trans Mountain.²⁸ More broadly, a campaign called Mazaska Talks is targeting the financial backers of pipelines with a boycott.²⁹ This increases the risks associated with Kinder Morgan Canada’s access to capital. Capital access is identified as a risk in the KML prospectus, but it is never associated with pipeline resistance. Lenders will base their decisions on financial calculations. However, a widespread and vociferous campaign against the pipeline will be included in those calculations.

Financial institutions are more aware than ever of the potential for reputational harm to and divestment from financial entities associated with such projects. Secwepemc opposition and action against construction of the pipeline will demand unforeseen

26. “Kinder Morgan Halts Drilling and readies to leave Burnaby Mountain,” *National Post*, November 28, 2014

27. Kim Trynacity, “‘Rule of law’ will prevent violence on pipeline routes, says natural resources minister,” *CBC News*, Dec 01, 2016

28. See Union of B.C. Indian Chiefs, “28 major banks warned not to finance Trans Mountain pipeline expansion,” June, 2017

29. See the Mazaska Talks website here: <https://mazaskatalks.org/the-boycott/>

time and effort by the company, including that required to assuage lenders that have been targeted as part of a broad-based opposition campaign.³⁰ One Trans Mountain expansion backer, Desjardins Credit Union has announced that it may no longer fund pipelines. Dutch bank ING has also announced that it will not fund pipeline construction, including Trans Mountain.³¹

The Kinder Morgan Canada Limited (KML) IPO prospectus acknowledges risks associated with the high levels of indebtedness it is expected to incur building the pipeline. These include increased costs of borrowing and delays to the completion of the pipeline. Delays that result from Indigenous opposition, whether undertaken through the courts or other means, amplify these risks.

Early in its history as a publicly traded company, Kinder Morgan enjoyed a borrowing cost advantage over other pipeline companies. It averaged a 1.3 percentage point lower effective interest rate on its long-term debt through 2012. However, that advantage has been largely eliminated as the borrowing costs of other pipelines have fallen (Figure 4). For the first quarter of 2017, its effective interest rate was actually 0.4 percentage points higher than other pipeline companies.

Delays associated with Indigenous resistance to the pipeline project mean borrowing needs will extend further into the future, when there is greater likelihood that historically low interest rates will have risen. The Bank of Canada twice recently increased its key interest rate and Canada's Big Five banks followed with increases in their prime lending rate.

Any difficulties borrowing, or increased borrowing costs, will bring additional scrutiny on the company beyond that directly generated by the opposition campaign of the Secwepemc and their allies. Higher borrowing costs will demand more of the company's earnings, which are made uncertain by the Secwepemc's firm rejection. If contention around the project reduces KML's expected earnings, the company's credit rating could suffer, making borrowing even more onerous.

v. Dividend Crisis

Pipeline companies have historically offered relatively high and stable dividends. However, this has recently changed, with the dividend reduction of KML's parent perhaps the highest profile shift. KML has stated its intention to offer a \$0.65 per share dividend. This is 70 percent of the company's distributable cash flow (DCF) in 2016, which is in line with other companies in the industry. However, it is 82 and 152 percent of the company's DCF in 2015 and 2014, respectively. Kinder Morgan, Inc. reduced its dividend when it hit a 75 percent DCF ratio in 2015. Without the added revenue from the TMEP, it is unlikely that KML can meet or sustain its projected div-

30. This effort links the Trans Mountain expansion with the campaign against development of the Alberta tar sands. It follows on a similar effort that was deployed as part of the highly contentious opposition to the Dakota Access Pipeline.

31. Ethan Lou, "ING bank says it will not finance major Canadian pipeline projects," *Reuters*, June 28, 2017

idend payout. In a B.C. Supreme Court filing, a Trans Mountain representative stated that, in addition to the \$5.6 million in direct costs, each month of delay will lose the company \$88 million in revenue. Annually, this is 1.6 times Kinder Morgan Canada’s 2016 revenue. Based on an average DCF to revenue ratio of 40 percent, the expansion revenue would reduce the dividend payout to 30 percent of DCF, which is close to the ratio Kinder Morgan, Inc. adopted when it cut its dividend in the fourth quarter of 2015. It is reasonable to assume that Kinder Morgan Canada is relying heavily on the earnings from the Trans Mountain expansion to sustain its dividend.

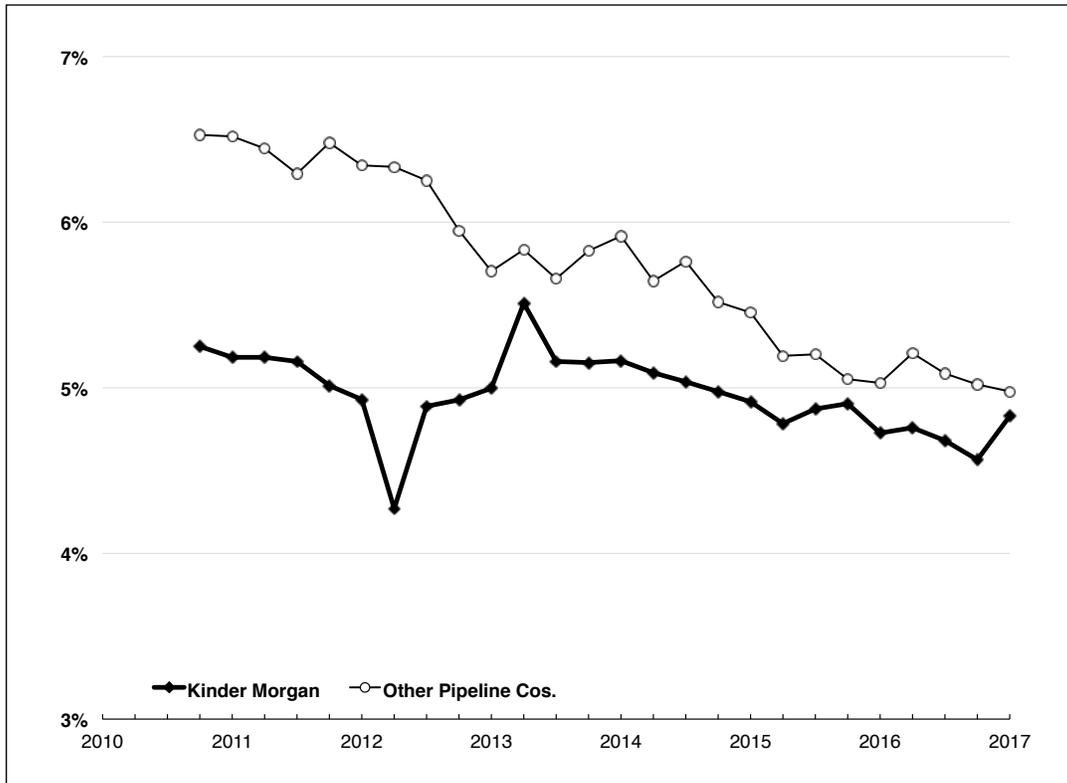


Figure 4

Closing the Gap: Effective Cost of Debt of Pipeline Companies, 2010-7

DATA: Compustat/Capital-IQ.

NOTE: Effective Cost of Debt calculated as the annualized ratio of quarterly interest payments to long-term debt. Both series are smoothed as trailing four quarter moving averages. Other Pipeline Cos. uses the sum of quarterly interest payments and the sum of long-term debt. The category includes all publicly traded corporations classified as pipeline companies by Bloomberg for which quarterly interest and long-term debt data was available from Compustat.

vi. Reduction of Capacity Demand for Oil

Delays in building the pipeline mean more uncertainty around projected oil prices. Several experts have suggested that prices will fall further following recent dramatic

fluctuations.³² Although the expansion is fully subscribed for the near future, and Kinder Morgan touts the stability of its customers, Alberta's oil industry is in a state of great turbulence. That turbulence contributed to the downgrading of Alberta's credit rating. Lower prices lead to less production and reduced demand for pipeline capacity.

The Canadian and Alberta governments are facing pressure over tar sands operations and climate change. The Secwepemc have connected their opposition to Trans Mountain to these broader issues. The union of concerns for Indigenous rights, climate justice, and environmental issues amplifies the potential for a broad based, vocal opposition demanding government action on tar sands extraction. Any success by these movements could make extraction of Alberta bitumen costlier. This would put downward pressure on demand for tar sands oil, squeezing the margins of midstream operators like Kinder Morgan.

vii. Pipeline Risks to the Secwepemc Economy

The economic activity of Indigenous peoples is rarely acknowledged, largely due to the conflation of economic activity with market activity. The under-appreciation of Indigenous economies affects the calculation of benefits from resource extraction and transportation on Indigenous territory. Those projects, in as much as they threaten various aspects of Indigenous life, including economic activity, externalize risks onto the local Indigenous communities.

The Secwepemc territory covers 180,000 square kilometers, with a wide variety of terrains. Current and traditional land use activities including hunting, fishing, trapping and gathering are all practiced in varying forms. These activities are part of both market and non-market economies, even as they also constitute cultural and spiritual practices. There are a wide variety of economic development plans among the communities that comprise the Secwepemc. However, few of those plans are commensurable with the Trans Mountain pipeline expansion.

The existing pipeline has not been free from spills. These spills threaten the land and the water that many Secwepemc land use activities depend on. Defenders of the pipeline expansion contend that it will be the safest and most environmentally sound ever built. However, the threat of a spill carries excessive risk for the Secwepemc opponents of the expansion. More importantly, accepting the pipeline would change the relationship of the Secwepemc with the land. Indigenous peoples hold the land as a vital component of self-determination and as a means to lift themselves out of poverty and economic dependency. The cumulative effects illustrated in Figure 1 show that the KM pipeline expansion is not an isolated development on Secwepemc lands, but constitutes a new accretion of toxic materials built into the lands and waters they seek to protect.

The proposed Blue River Camp site also poses a threat to Indigenous land users who

32. On oil price projections, see for example, "Oil prices will remain flat for foreseeable future, Deloitte forecasts," *CBC News*, July, 2017

will be displaced from traditional harvest areas of the Secwepemc people. The danger to women in the community of a “man camp” of 1000 workers is also of great concern to members of nearby reserves and towns. In the Bakken oil fields, Sari Horowitz reports that, “The arrival of highly paid oil workers living in sprawling ‘man camps’ with limited spending opportunities has led to a crime wave — including murders, aggravated assaults, rapes, human trafficking and robberies — fueled by a huge market for illegal drugs, primarily heroin and methamphetamine.”³³ She describes how “especially hard hit” are nearby Indigenous communities. An Amnesty International report found negative consequences of oil and gas extraction in the Peace River Valley, recommending that governments “require that reviews and approvals of resource development projects, and other decision-making and programming processes, be informed by a comprehensive gender-based analysis, conducted in consultation with women’s rights and Indigenous organizations, including an intersectional analysis of the specific impacts on Indigenous women and girls.”³⁴

4. Political Risk

The Secwepemc do not recognize the authority of the B.C. Government to permit construction on their lands. They also do not recognize the authority of the Federal Government to approve construction of the pipeline on their lands.

The Canadian federal government unilaterally approved the Kinder Morgan Trans Mountain Expansion in November 2016. Since the pipeline undertaking falls under federal jurisdiction, provincial opposition to the pipeline will need to rely on strong cooperation with Indigenous Nations that have the underlying title and proprietary interest to challenge federal jurisdiction to refuse the pipeline on their unceded lands. In coordination with Indigenous Nations, the province can delay, restrict, and deny approval for the pipeline to be built.

The B.C. Government has recently come out against the Kinder Morgan Pipeline Expansion. There are approximately 50 preliminary permits KM must secure to do everything from build a road, widen existing right-of-ways, test and dispose water with additives, make changes to streams, burn and blast permits, and more.³⁵ Since Indigenous peoples hold proprietary rights to the land their opposition can empower the province to challenge the federal approvals process and throw a wrench in the works of construction by denying necessary permits and right-of-ways.

The political terrain is shifting rapidly in the province and Indigenous peoples are positioned to play a central role. In June 2017, BC Liberal Premier Christy Clark’s

33. Sari Horowitz, “**Dark Side of the Boom,**” *The Washington Post*, September 28, 2014.

34. Amnesty International, *Out of Sight, Out of Mind: Gender, Indigenous Rights, and Energy Development in Northeast British Columbia, Canada*, 2016, p. 9.

35. For a full list of permits the province must grant in right of ways for the pipeline expansion see: <https://projects.eao.gov.bc.ca/api/document/5888e529817b85ae43cf7954/fetch>

government was defeated on a vote of no confidence in the Legislature, in part due to her support for the pipeline expansion. New Democratic Party (NDP) Leader John Horgan and Green Party leader Andrew Weaver entered into a power-sharing accord to pool their seats and defeated the Liberals. The current governing parties won on platforms that opposed the construction of the Kinder Morgan pipeline and shored up their coalition partially on this basis. Upon their recent win, the parties re-committed to cooperate on opposition to the TMEP. George Heyman, Minister of Environment and Climate Change in the NDP/Green government, vowed to use “every tool at our disposal” to defeat the pipeline.³⁶ The key tool in their disposal is a strategic alliance with the title-holders of the land.

On August 10 2017, the BC Government announced that they would be seeking intervenor status in current legal challenges to the Kinder Morgan pipeline expansion. They have since been granted intervenor status. The Province emphasized its intention to fulfill its legal duties to Indigenous peoples, “including consultations regarding potential impacts to Aboriginal rights and title — a responsibility that has been identified in a number of court cases.”³⁷

The Province also committed to implement the United Nations Declaration on the Rights of Indigenous Peoples — to which Canada is a signatory — as a matter of serious consideration since it insures Free Prior and Informed Consent to Indigenous peoples regarding development on their lands. Thomas Berger, one of the most esteemed and effective lawyers in Canada who has defended Indigenous interests against massive oil exploration projects in the Mackenzie Delta, has been secured as external counsel on the matter.

5. Reputational Risk

Kinder Morgan Canada’s IPO prospectus acknowledges that reputational risk “cannot be managed in isolation from other forms of risk.” However, they do not connect reputational risk and the risks associated with Indigenous rights. Indigenous rights, the Alberta tar sands, climate change and pipelines are all controversial, high profile and divisive issues in Canada. Kinder Morgan’s plan to build a pipeline that passes through Indigenous territory, and also a densely populated city known for its environmentally conscience citizens, puts the company at the centre of these conflicts. By doing so, it has become one of a handful of pipeline companies that are household names. This brings much greater scrutiny to all of its undertakings, whether related to Trans Mountain or not.

36. Justine Hunter, “**Kinder Morgan Pipeline looms large in B.C. Election,**” *Globe and Mail*, April 12, 2017; Rob Shaw, “**NDP asked to form next B.C. government after Liberal defeat,**” *Vancouver Sun*, June 30, 2017; Derrick Penner, “**B.C. joins legal battles against Trans Mountain pipeline expansion,**” *Vancouver Sun*, Aug. 10, 2017

37. Elsie Ross, “**B.C. Government Taking ‘Initial Action’ On Kinder Morgan Expansion,**” *Daily Oil Bulletin*, Aug. 10, 2017

This reputational risk cannot be contained in Canada, either. Activists in the San Francisco Bay area made headlines in July 2017 by locking themselves to steel barrels and blocking three gates of the Kinder Morgan Richmond Terminal. This was the second time in two weeks that activists blockaded the terminal. Each time they demanded the company halt its new Trans Mountain pipeline in Canada in solidarity with Indigenous peoples of these lands. The arrests of the activists made national news.³⁸

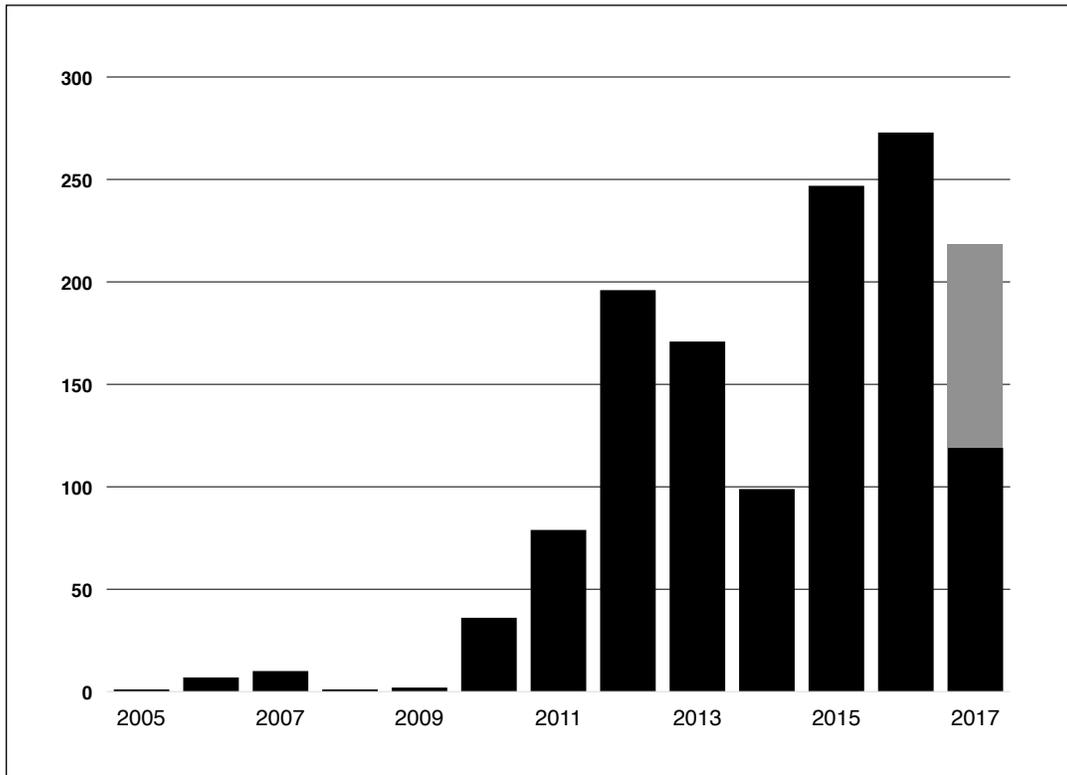


Figure 5

Increasing Scrutiny: Canadian Media Coverage of Pipeline Spills, 2005-7

DATA: Factiva

NOTE: Values are the yearly count of articles containing the phrase ‘pipeline spill’ from all sources in the Factiva database classified as ‘Newspapers: Canada’ or ‘Major News and Business Sources: Canada’. The gray portion of 2017 is the imputed value based on the rate of coverage through June, 2017.

With increasing public concern about climate change and pipelines has come increased media attention. This has resulted in much greater coverage of pipeline incidents, such as spills, as seen in Figure 5. Between 2010 and 2016, coverage of pipeline spills by Canadian media increased more than 7.5 times. For that same time period, the Transportation Safety Board has offered figures suggesting that pipeline incidents that released petroleum fell considerably. Yet the overall quantity released

38. Ayşe Gürsöz, “Two Arrested After Shutting Down Kinder Morgan Terminal in Escalating Protests Against Major Tar Sands Oil Pipeline,” *Alternet*, July 31, 2017.

per incident increased over time, and the number of incidents affecting ‘line pipe’ has also risen considerably, with the number more than doubling between 2015 and 2016.³⁹

As various Canadian environmental policy researchers have stressed, overlapping provincial and federal jurisdiction for issues such as pipeline monitoring and spill remediation shapes lax accountability. Yet the public is more attentive of pipeline safety and the potential harm from accidents. It is telling that 25 percent of the media coverage of pipeline spills mentions Indigenous people.⁴⁰ Public scrutiny has raised the costs of building, operating and maintaining pipelines, as companies try to reduce incidences and negative publicity. It also demands greater money and effort to try and assuage public concerns.

The Secwepemc’s staunch opposition to the pipeline, and the heightened probability of direct action to confront the construction process raises the possibility that building the expansion will be associated with violence, as happened with the Dakota Access Pipeline. Federal Resources Minister Jim Carr invoked the military when discussing the possibility of responding to direct action against the pipeline, raising the spectre of a standoff. Kinder Morgan risks having its name associated with another Oka or Ipperwash or Gustafsen Lake — the most highly militarized and infamous standoffs between the state and Indigenous peoples in recent memory.

6. Regulatory Risk

Regulatory risk due to uncertainties related to the ongoing review of the federal environmental regulatory and assessment regime is significant and should be a red flag to Kinder Morgan and to investors with respect to the economic viability of this expansion. These risks include of reviews of related fisheries and water protection legislation and the National Energy Board (NEB) Act.

In June 2016, the Government of Canada began a comprehensive review of current environmental and regulatory processes in line with its policy to “decolonize” Canada.⁴¹ Pending completion of the review, “Interim Review principles” have been put in place to guide federal decision-making. TMEP was conditionally approved under this “interim” process. Changes to legislation are expected sometime in the fall of 2017 and there is evidence to suggest that they will have a significant influence on subsequent decision-making and licencing processes related to the TMEP and route approval process — especially where Indigenous rights, title, jurisdiction, and consent are involved.

While the interim principles state that “no proponent will be asked to return to the

39. “**Statistical Summary, Pipeline Occurrences 2016.**” Transportation Safety Board of Canada, 2016.

40. Calculations based on Factiva search results.

41. Mike De Souza, “**Trudeau to proceed with wide federal review to ‘decolonize’ Canada,**” *National Observer*, December 12th, 2016.

starting line” in relation to potential regulatory and legislative changes, the extent to which a new process would have bearing on previously rendered decisions (and related conditions) is unclear. There is a distinct possibility the review itself could call into question the political and constitutional legitimacy of the federal government’s conditional approval of the expansion. These questions are of particular concern as they relate to the mandate and authority of the NEB, and ways in which the constitutionally protected rights of Indigenous peoples were addressed in project consideration and approval. There are many risks and uncertainties associated with the current overall regulatory review, status of the interim principles, and direction in which the ongoing review itself is moving. The most critical of these are summarized below.

i. Uncertainty related to Expected Changes to Regulatory Processes

- Risks associated with future role of Indigenous peoples, enhanced engagement with Indigenous rights and jurisdiction, and federal commitment to implement UNDRIP/FPIC in Environmental Assessments.

There exists a strong possibility that the outcome of this review could lead to major transformations of the regulatory and approvals process to provide a stronger and expanded role for Indigenous peoples and communities. The federal government have clearly expressed their intent to use newly designed environmental assessments to “advance reconciliation with Indigenous peoples.” Especially concerning are measures currently discussed and proposed to bring environmental assessment practices in line with UNDRIP including implementation of the principles of Free Prior Informed Consent (FPIC) for Indigenous nations in the approvals process.

Proposals point to an enhanced decision-making role for Indigenous peoples, recognition of Indigenous jurisdiction in the context of establishing relevant decision-making authorities, and in some cases joint decision-making authority with Indigenous nations to approve or reject major projects. UNDRIP gives considerable rights to Indigenous nations and affects all areas of resource governance and jurisdiction and it is unclear how these will play out in legislation. Most importantly, however, the review process thus far suggests a widespread consensus that going forward project approvals will require the consent of Indigenous nations.

Given the current level of Indigenous opposition to the expansion, and to route access across unceded territories, the near-certain likelihood that environmental assessments will include enhanced requirements for Indigenous consent, participation, and decision making authority calls into question the very future of the TMEP, and certainly calls into question its economic viability and value to KM and to investors.

ii. Risks related to removal of the NEB as an “Authority” in Oil and Gas Infrastructure

Expert panel reports and federal discussion papers are unanimous that the mandate of the NEB be reconfigured so that it no longer be considered an “authority” with respect to major project approvals. There is unanimous support for establishing a single, independent quasi-judicial EA authority (housed within the Environmental As-

assessment Agency) to conduct all reviews and guide subsequent approvals processes. Consideration is being given to the possibility for “Joint” assessments between Indigenous nations and the agency, provinces and the agency, or in certain specified circumstances between the NEB and the agency as joint partners. It is expected that this change will make approvals for pipelines and oil and gas developments much less certain. This is likely to significantly affect the TMEP route approval process. It is likely that approvals processes will take longer and that oil and gas proponents will need to expend significantly more resources, time, and energy making to make their case.

Taken in the context of the current low oil prices, likely implementation of FPIC, and renewed federal commitment to addressing climate impacts in assessment processes, it is becoming increasingly apparent that Canada no longer provides the attractive investment environment for oil and gas development that it once did.

- Additional risk to the viability of the TMEP for investors and KM related to other aspects of the review include regulatory uncertainties related to the very strong likelihood that going forward:
 - Projects be assessed broadly in relation to their climate impacts (especially CO₂ emissions);
 - Impact assessments play what the CEAA review panel called a “critical role” in supporting Canada’s efforts to address climate change, and;
 - Impact assessments be cumulative and address the impacts of projects (such as pipelines) in relation to broader energy considerations (like expansion of oil and gas production).

iii. Risk that the Comprehensive Federal Review Undermines the Legitimacy of TMEP approval

There is significant risk given the tone and extent of the review and the priority placed on reconciliation by the current Liberal government that issues considered in the current review — especially as they relate to whether or not within the current (CEAA 2012) process Indigenous peoples were adequately consulted and accommodated, Aboriginal Title, Rights and jurisdiction respected, and Indigenous concerns and knowledge adequately considered — call into question the legitimacy of the process under which TMEP was approved (including the authority of the NEB to conduct the review).

Review Panels heard considerable evidence that assessments conducted under CEAA 2012 (especially of pipelines) and the amended NEB Act (2012) did a woefully inadequate job of addressing Indigenous rights and concerns; chronically marginalized and misrepresented Indigenous knowledge; and failed to be on the right side of Canadian and international law in relation to respecting Indigenous rights. The possibility exists that after such a thorough airing of concerns associated with the legally and constitutionally protected rights of Indigenous peoples the government is compelled to either reconsider its conditional acceptance of TMX, reopen the decision by requir-

ing additional consultation and accommodation hearings with Indigenous peoples, or impose additional conditions on the existing acceptance. Similar risks exist with respect to the way in which the review has undermined the authority of the NEB in relation to its role in approving TMX.

Given that TMX was granted conditional approval by a process and an authority whose legitimacy have both been publicly called into question, especially for the ways in which it failed to address the constitutionally protected rights of Indigenous peoples, there is a significant degree of uncertainty surrounding the stability of the TMX approval. There is significant risk the federal government will reverse or modify approval of the project until Crown-Indigenous relations are appropriately managed.

iv. Regulatory Uncertainty due to Inadequate Crown Management of Indigenous Rights

In January 2016, pending the comprehensive review, the federal government announced four “interim review principles” that in addition to the NEB decision would guide federal approval of the TMX. These included that decisions be “based on traditional knowledge of Indigenous peoples,” that “consideration be sought and given to affected communities (including Indigenous communities),” and that “Indigenous peoples be meaningfully included, and where appropriate impacts on their rights and interests accommodated.”

The Crown completed its review of these considerations, including of Indigenous concerns and claims in relation to the TMX in November of 2016. Analysis of this report and reaction from Indigenous nations suggests Indigenous peoples were not adequately consulted, that their concerns met with little analysis, consideration, or were consistently downplayed, and that Indigenous rights, jurisdiction, and title were not respected.

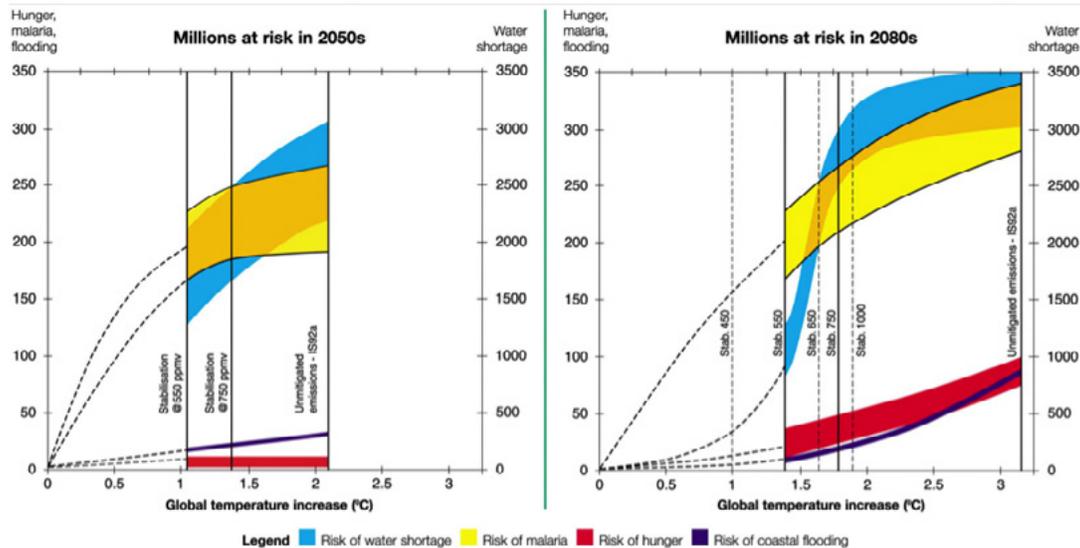
In addition to the threat of ongoing legal proceedings (the inadequacy of Crown consultation and accommodation process is one of the many reasons several Indigenous nations have started court proceedings against the expansion), continued opposition by Indigenous groups on the grounds that Crown duties to “consult and accommodate” were not met through this process are likely to result in one of several scenarios: that the Order in Council will be quashed, reversal of conditional federal approval until a process is put in place to adequately consult and consider Indigenous issues (resulting in project uncertainty and lengthy development and production delays including to route approval); imposition of additional conditions that create similar delays while Indigenous rights are addressed; significant delays to route selection and approval while Crown-Indigenous relations are addressed; and direct action and opposition on behalf of Indigenous groups which may block access to development sites and the pipeline route and lead to significant delays.

7. Climate Risk

The Kinder Morgan Trans Mountain Expansion depends for profitability on an expansionary pattern of crude oil flows from the tar sands. Without this trajectory, the pipeline will be further devalued and the capital will be lost. The cost of tar sands expansion will be felt by future generations. This cost will be borne by communities downstream to the tar sands and in the Athabasca region, but also in global carbon emissions released that could devastate communities around the world.

At the United Nations Climate Change Conference meeting in Paris (COP21) in 2015, Canada joined numerous countries supporting an aspirational goal of limiting global climate change to a target of 1.5 degrees above pre-industrial temperatures. To meet this goal, Canada must commit to reducing emissions by 90-95 percent over the next 15 years.⁴² The Kinder Morgan Trans Mountain Expansion will have the opposite effect of decreasing carbon emissions at a time when the survival of communities around the world is in peril.

Climate change is already affecting communities around the world and will continue to increase the severe weather patterns we are beginning to witness. Storms have increased in severity and will continue to intensify in regions, which can affect food, shelter, transportation, and health provisions for societies throughout the globe. Access to water resources will also be affected as drought results from extreme heat levels, and on the other extreme, flooding will increase, in some cases requiring widespread evacuation from cities, ports, and entire island nations.



Source: Parry, M. et al, "Millions at Risk: Defining critical climate change threats and targets," Discussion of the figures from *Global Environment Change* 11:3(2001): 1-3.

42. Simon Donner, "What Do the Temperature Targets Mean for Canada?" *Policy Options*, March 29, 2016

Meanwhile, Canada's commitment to transition to a low-carbon economy puts fossil fuel assets and infrastructure at a risk of devaluation. As a recent report concludes: "As climate policy action, rapid technological advances in renewables and peak demand for fossil fuels collide with abundant low cost supplies from the Middle East and Russia, stranded assets risk is increasing."⁴³

The Governor of Bank of England, Mark Carney, spoke to Lloyd's of London in 2015, stating that serious financial risk was posed by climate change. Governor Carney warned investors that policies to address climate "would render the vast majority of reserves 'stranded' — oil, gas and coal that will be literally unburnable."⁴⁴ S&P Global warns that up to US\$2.2 trillion over the next decade will be wasted by fossil fuel companies due to stranded assets that require abandonment due to international action to limit climate change.⁴⁵

In December 2016, the Task Force on Climate-Related Financial Disclosures published by the Financial Stability Board developed a framework of voluntary recommendations designed to provide "consistent climate-related financial risk disclosures for use by companies in providing information to investors, lenders, insurers, and other stakeholders."⁴⁶ This publication was the culmination of several other high profile efforts to account for climate risk, including:

- International Integrated Reporting Framework published by the International Integrated Reporting Council;
- Global Standards for Sustainability Reporting published by the Global Reporting Initiative;
- Climate Risk Technical Bulletin published by the Sustainability Accounting Standards Board.

In response, Canadian security regulators pledged in March 2017 to undertake their own review of climate disclosure in Canada. In addition to existing disclosure requirements, it was reported that:

reporting issuers are required to disclose material risks in their periodic disclosure, including climate-related risks. In 2010, the CSA published CSA Staff Notice 51-333 *Environmental Reporting Guidance*, which provided guidance to reporting issuers (other than investment funds) on existing continuous disclosure require

43. The BC Investment Management Corporation: Canada's Fossil-Fueled Pensions and the Climate Leadership Deficit, CCPA. See also: James Rowe, "**Black Swans and Black Gold,**" *Corporate Knights*. May 26, 2016

44. Mark Carney, "**Breaking the tragedy of the horizon: Climate Change and Financial Stability,**" *Lloyd's of London*, 29 September 2015.

45. S&P Global, "**Fossil fuel sector seen risking \$2.2 trillion on stranded assets,**" London (Platts) 24 Nov 2015

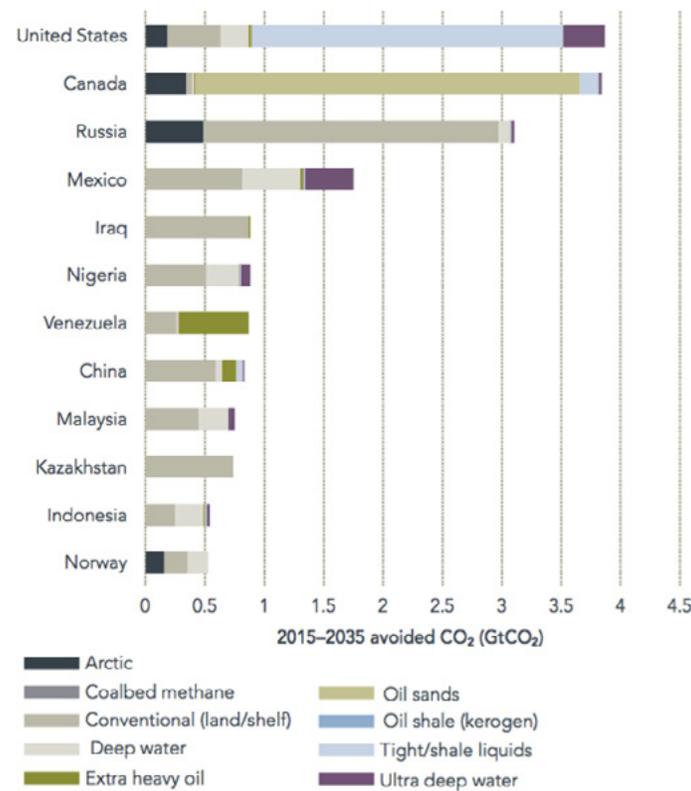
46. Keith Stewart, "**Oil companies and the financial risk of climate change,**" *Policy Options*, March 31, 2017

ments relating to environmental matters under securities legislation in Canada.⁴⁷

When Canada gets serious the Kinder Morgan TMEP will never pass inspection if run through the climate change global and national commitments necessary to save the planet as an inhabitable place for all.

Further, the Kinder Morgan pipeline is not simply a threat to Secwepemc land: it is a threat to the entire planet. It carries bitumen from the Alberta tar sands, which are one of the largest greenhouse gas emitter and the largest construction project in the world. This commercial industrial megaproject has had devastating impacts beyond its provincial or national borders. The proposed KM TMEP pipeline stands to accelerate the extraction and climate change impacts. If the proposed Kinder Morgan Pipeline Expansion project goes through, tar sands exploitation could increase by 40 percent. The world cannot afford this destructive increase in capacity. The only way to avoid further climate change impacts is to keep the tar sands buried in the ground. The Secwepemc stand in solidarity with other Indigenous Peoples, Spiritual Peoples, environmental groups, organizations, municipalities, international supporters, land and water defenders and people opposed to tar sands extraction and the proposed Kinder Morgan Trans Mountain Pipeline Expansion project.

Figure 8: Avoided oil emissions by supply country and type under 450 Scenario 2015–35



Source: Carbon Tracker & ETA analysis of Rystad UCube

47. Canadian Security Administrators, “Canadian Securities Regulators Announce Climate Change Disclosure Review Project.”