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Prime minister facing moment of truth on Indigenous rights

By John Dillon

Ecological Economy Program Coordinator

As the newly elected Prime Minister, Justin Trudeau handed mandate letters to all cabinet ministers that stated: “No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.” His letter to Dr. Carolyn Bennett, the Minister of Indigenous and Northern Affairs, also included as a first priority “to implement recommendations of the Truth and Reconciliation Commission, starting with the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*.”

From the beginning of the new government’s mandate there was always the potential for conflict between these commitments to Indigenous rights and the Liberal Party platform promising “Our plan will deliver the economic growth and jobs Canadians need, and leave to our children and grandchildren a country even more ... sustainable ... than the one we have now.”¹

The day is fast approaching when Prime Minister Trudeau and his government will have to choose between their promises to respect Indigenous rights and their preference for large resource projects and fossil fuel export pipelines to grow the economy. Is a sustainable environment that contains climate change, as Indigenous peoples so resolutely advocate, even possible if you align yourself with those who insist that “growing the economy” requires pipelines to access

foreign markets for fossil fuels, especially tar sands bitumen?

On both sides of the Canada-U.S. border, Indigenous peoples are increasing pressure on governments to respect their rights to free, prior and informed consent when faced with resource projects on their lands. At the same time, lobbyists for extractive industries and their political allies are demanding quick project approvals, regardless of the federal government’s promises for new and effective consultation processes.



Tsleil-Waututh spokesperson Rueben George, Councillor Charlene Aleck, and manager of cultural relations Gabriel George open the signing ceremony for the Treaty Alliance Against Tar Sands Expansion in Vancouver, B.C. on September 22, 2016.

Indigenous peoples work together to defend their rights

In recent years, Indigenous peoples and their allies have become increasingly active in resisting resource extraction and transportation projects that endanger lands, waters and the global climate. In 2012, 130 First Nations from British Columbia, Alberta and the Northwest Territories signed the Save the Fraser Declaration in opposition to Enbridge's Northern Gateway pipeline from Alberta to Kitimat on the Pacific coast.

There was hope that the pipeline's economic viability had ended in November 2015 when newly-elected Prime Minister Trudeau called for a moratorium on crude oil tanker traffic for B.C.'s North Coast. He directed the new Transport Minister, Marc Garneau, to formalize the agreement with three other ministries: fisheries, natural resources and environment.²

A few months later, however, the moratorium seemed to be weakened with talk of exemptions for certain types of petroleum products or tankers.³ Nevertheless, the efforts of Indigenous peoples were rewarded when the project was effectively halted after a federal court ruled that the former government's approval of the pipeline violated eight First Nations' rights to be consulted.

In April 2015, Indigenous leaders from across Canada met in Quebec City to lead 25,000 people in a march to demand action on climate change. Also in 2015, the Yinka Dene Alliance, representing First Nations from central B.C., embarked on the West Meets East Tour through dozens of Indigenous communities along the route of TransCanada's Energy East pipeline from Alberta to New Brunswick.

Recently several B.C. First Nations who opposed the expansion of Kinder Morgan's Trans Mountain pipeline from Alberta to a terminal in Burnaby made an alliance with the Lummi Nation in Washington State. Similarly, the Assembly of Manitoba Chiefs allied with the White Earth Nation in Minnesota when it launched a legal challenge against Enbridge's Line 3 that would replace an older pipeline running south from Alberta through Manitoba and into the U.S.

Treaty Alliance Against Tar Sands Pipelines

On September 22, 2016, more than 50 Indigenous nations from across North America signed an historic treaty of mutual solidarity, united as the Treaty Alli-

ance Against Tar Sands Expansion. Invoking their long history of treaty-making that predates the arrival of colonizers, they pledged to stop all pipeline, tanker and rail projects on their lands and waters that risk hazardous spills of toxic oil products. Moreover, they oppose projects that "will unquestionably fuel catastrophic climate change ... [that] has already started to endanger our peoples' way of life and now threatens our very survival."⁴

Just prior to this signing, a group of Mohawk chiefs who are resisting the Energy East pipeline through Quebec travelled to North Dakota to offer solidarity with the Standing Rock Sioux who have waged a valiant defense of their lands against the Dakota Access pipeline. When the Treaty Against Tar Sands Expansion was signed, the Standing Rock Sioux added their signature, as did the Lummi and White Earth Nations whose lands lie south of the border.

The signing ceremonies for the Treaty were held on Musqueam territory in Vancouver and on Mohawk land in Montreal. Those who signed the Treaty pledged collectively to "resist the use of our respective territories and coasts in connection with the expansion of the production of the Alberta Tar Sands, including for the transport of such expanded production, whether by pipeline, rail or tanker." The inclusion of rail transportation reflects a struggle by three Mi'kmaq communities in New Brunswick who have asked a federal court to reverse approval of the Chaleur crude-by-rail export terminal at Belledune in northern New Brunswick on the grounds that the approval was made secretly last October without consultation.

The Treaty signers also pledged "to protect our respective territories from threats to our lands, waters, air and climate ... knowing full well that it is in the best interest of all peoples, both Indigenous and non-Indigenous, to put a stop to the threat of Tar Sands expansion."

The Treaty ends on a hopeful and conciliatory note with a pledge, "to work in collaboration with all peoples and all governments in building a more equitable and sustainable future, one that will produce healthier and more prosperous communities across Turtle Island and beyond, as well as preserve and protect our peoples' way of life."⁵

As of September 28, the treaty has been signed by 88 chiefs or traditional leaders representing their nations, bands or councils. A list of signers and an open invitation to other Indigenous peoples to sign can be found on the Treaty Alliance web site.⁶

Standing Rock Sioux gather world-wide solidarity

The Standing Rock Sioux established a prayer camp at Cannonball, North Dakota, to protect their sacred sites and the waters from the Dakota Access pipeline. Over a thousand people representing more than 100 Indigenous nations and their allies have joined the camp, with thousands more present on week-ends. One hundred and eighty Indigenous nations have sent messages of solidarity. Campers engage in prayer and ceremonies, vowing to protect their waters from a pipeline under the Missouri River whose rupture would destroy the Standing Rock Sioux water supply and that of 18 million people downstream.

The Standing Rock Sioux have received strong solidarity from around the world, including from Indigenous peoples north of the border. “What’s happening at Standing Rock is extraordinary and possibly transformative for native rights, Sioux history, and the intersection of the climate movement with Indigenous communities,” historian Rebecca Solnit wrote in [The Guardian](#) after spending two days among Indigenous and other pipeline resisters at the Sacred Stone Camp.⁷

The Dakota Access pipeline would carry crude oil extracted by hydraulic fracturing (fracking) from North Dakota to Illinois. The Standing Rock Sioux and their allies stood up to bulldozers that were destroying sacred sites and burial grounds. Some chained themselves to machinery in peaceful protests that remained non-violent despite provocations by private guards with attack dogs were biting protesters.

The Standing Rock Sioux struggle has caught the attention of the mainstream media. A [remarkable commentary](#) by Lawrence O’Donnell on MSNBC candidly admitted that U.S. history includes genocide against Indigenous peoples. Now many of the descendants of the settlers who committed atrocities are acting in solidarity with the Standing Rock Sioux. On September 13, over 100 solidarity events took place around the world from London to Kyoto, including mobilizations in Toronto, Washington and at the Houston headquarters of Energy Transfer Partners, the corporate sponsors of the pipeline.⁸

Serge Simon, Grand Chief of the Kanesatake Mohawks in Quebec, calls the movement, “inspiring because it’s not only a native issue. We’re seeing non-natives that are joining on board ... we’re seeing a mobilization of humanity, not just the First Nations.”⁹



On September 9, a U.S. District Court in North Dakota turned down a request by the Standing Rock Sioux for an injunction to stop the construction of the pipeline. Within an hour of the release of the court judgment, however, the U.S. departments of Justice, the Army and the Interior, issued an extraordinary joint statement. It says: “The Army will not authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Policy Act (NEPA) or other federal laws.”¹⁰

The statement calls on the company to suspend construction near Lake Oahe. It goes on to say: “Furthermore, this case has highlighted the need for a serious discussion on whether there should be nationwide reform with respect to considering tribes’ views on these types of infrastructure projects. Therefore, this fall, we will invite tribes to formal, government-to-government consultations on two questions: (1) within the existing statutory framework, what should the federal government do to better ensure meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights; and (2) should new legislation be proposed to Congress to alter that statutory framework and promote those goals.”¹¹

The significance of this unprecedented statement, which must have been authorized at a high political level, possibly by President Obama himself, should not be underestimated. Brigham McCown, an acting administrator of the Pipeline and Hazardous Materials Safety Administration under President George W. Bush, told the Associated Press that the Obama administration’s involvement has “changed the lay of the land forever. This could bog down or delay every single infrastructure project moving forward.”¹² Energy Transfer Partners has reacted with plans to “take the battle ... to Washington” where they will intensify their lobby for permission to complete the pipeline.¹³

Pressure mounting on Prime Minister Trudeau to live up to his promises

These actions by the Obama administration will inevitably put pressure on Prime Minister Justin Trudeau to live up to the promises made in his mandate letters to cabinet ministers cited in the introduction.

Recent events in Canada have thrown this commitment into doubt. In July, just two months before the West Moberly and Prophet River First Nations' legal challenges to the Site C dam on the Peace River in B.C. were to be heard by a federal court, the federal ministers of fisheries and transport issued permits allowing construction of the dam to proceed. No decision has yet been announced by the court after a hearing was held in Montreal on September 12.

When members of these two First Nations travelled from Northern B.C. to Montreal for the hearing, many Indigenous people and settlers came out in support at stops along the way. In a sign that frustration with the government's failure to respect Indigenous rights is growing within the Liberal party, Robert Falcon Oullette, the Member of Parliament for Winnipeg Centre, publicly expressed his disagreement with the decision to issue the fisheries permit. Oullette, who is himself Indigenous, spoke with those who were on the cross country caravan and came away convinced that the two First Nations were not properly consulted as is required by the *UN Declaration on the Rights of Indigenous Peoples*, which Trudeau has pledged to uphold.¹⁴

The government's decision to issue permits for the Site C dam puts Justice Minister Jody Wilson-Raybould in a difficult position. In 2012, when she was B.C. regional chief for the Assembly of First Nations, she said "The country's reputation is at stake with the approval of these projects like Site C ... [which run] 'roughshod' over Indigenous rights." West Moberly Chief Roland Willson has been particularly critical of Wilson-Raybould's current silence saying: "She paddled with us on the Peace River. I don't believe she's choosing not to speak. I believe she's been told, 'You have to toe the Liberal line.'" ¹⁵

Similarly, the government's decision to grant conditional approval to the Pacific Northwest project for exporting liquefied natural gas (LNG) from a terminal near Prince Rupert, B.C., is being challenged by First Nations whose rights and livelihoods are threatened by the project. For over a year, members of the Lax Kw'alaams nation have camped on Lelu Island where the LNG terminal would be built. Last year, members of the Lax Kw'alaams voted overwhelmingly to reject an offer of one billion dollars over 40 years from Petronas, the Malaysian firm sponsoring the project.

Millions of juvenile salmon congregate each year on the Flora Bank near Lelu Island to feed and grow. A peer-reviewed study by Jonathan Moore and colleagues at Simon Fraser University, published in the journal *Science* describes how the Flora Bank supports 25 times more salmon than 25 other locations. Disruption of its ecosystem threatens juvenile salmon from "more than 40 [salmon] populations that are harvested by at least 10 First Nations ... throughout the Skeena watershed and beyond," according to Moore.¹⁶

Another study, published as early as 1973, warned that construction of a port near Flora Bank would destroy much of this critical salmon habitat. Yet the project sponsors won approval from the Canadian Environmental Assessment Agency by submitting studies they paid an engineering firm to produce.¹⁷

While scientific evidence is important, so is the daily experience of the Indigenous peoples who have lived off the salmon for many generations. Speaking from the camp on Lelu Island, Ken Lawson, a Lax Kw'alaams house leader, explained: "The people depend on the fish, ... on the halibut, the crab." He predicted "all kinds of legal battles" and that the project would be "tied up in the courts" for years.¹⁸

Already six First Nations from the Skeena corridor have vowed to challenge the project in court because it "does not meet the test" for respecting Indigenous rights. Donald Wesley, a hereditary chief from the Gitwilgyoots nation, endorsed the legal action, adding, "I think Mr. Trudeau made the biggest mistake of his career."¹⁹

The Right to Free, Prior and Informed Consent

In her study *The Right to Free, Prior and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress*, Andrea Carmen, a member of the Yaqui nation, describes how the concepts of free, prior and informed consent contained in the *UN Declaration*, are meant to be implemented:

- ♦ **“Free”** necessarily includes the absence of coercion and outside pressure, including monetary inducements ... and “divide and conquer” tactics. Indigenous people must be able to say “no,” and not be threatened with or suffer retaliation if they do so.
- ♦ **“Prior”** means that there must be sufficient lead time to allow information-gathering and sharing processes to take place, including translations into traditional languages and verbal dissemination as needed, according to decision-making processes of the Indigenous peoples in question. This process must take place without time pressure or time constraints.
- ♦ **“Informed”** means that all relevant information reflecting all views and positions must be available for consideration by the Indigenous peoples concerned. This includes the input of traditional elders, spiritual leaders, traditional subsistence practitioners, and traditional knowledge holders. The decision-making process must allow adequate time and resources for Indigenous peoples to find and consider impartial, balanced information as to the potential risks and benefits of the proposal under consideration.
- ♦ **“Consent”** involves the clear and compelling demonstration by the Indigenous peoples concerned. The mechanism used to reach agreement must itself be agreed to by the Indigenous people concerned, and must be consistent with their decision-making structures and criteria.²⁰

Indigenous people have been careful to clarify that the requirement for consent is not the same as having a veto which implies unilateral decision-making without taking into account how others would be affected. Kenneth Deer, a member of the Mohawk Nation at Kahnawake, was involved in the negotiation of the *UN Declaration*. As he explains: “Free, prior and informed consent is not automatically a veto, since our human rights exist relative to the rights of others. Nor is there any reference to a veto in the *Declaration*. Free, prior and informed consent is a means of participating on an equal footing in decisions that affect us.”²¹

In Canadian jurisprudence, the right to consent has not been interpreted as having a veto over a project regardless of the circumstances. In interpreting Indigenous peoples’ constitutional right to be consulted on resource development projects, the Supreme Court of Canada ruled in the 2004 *Haida Nation versus British Columbia* case: “The content of the duty [to consult varies] with the circumstances: from a minimum ‘duty to discuss important decisions’ where the ‘breach is less serious or relatively minor’; through the ‘significantly deeper than mere consultation’ that is required in ‘most cases’; to ‘full consent of [the] aboriginal nation’ on very serious issues.”

In short, the Supreme Court has not ruled that Indigenous peoples have an automatic veto but that there is always a duty to consult and that “on very serious issues” the “full consent” of Indigenous peoples is required.

Additional Emissions from Export Pipelines Would Imperil Global and Canadian Emission Reduction Goals

A new study by Oil Change International analyzes how much of the world's known fossil fuel reserves could be burned without increasing global temperatures beyond the goals set by the Paris Agreement signed by Canada and 194 other nations last December. At Paris, world governments agreed to limit "the increase in the global average temperature to well below 2⁰C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5⁰C."

According to the Oil Change study, 68% of known reserves of oil, gas and coal must remain in the ground to have a 66% chance of limiting global warming to below 2⁰C. If the world consumes fossil fuels at the current rate for 21.5 years, emissions will push temperatures above 2⁰C. To have a 50% chance of limiting warming to 1.5⁰C, 85% of reserves must not be extracted and burned. If greenhouse gas emissions from fossil fuels continue at their current rate, the available carbon budget for keeping warming under 1.5⁰C would be surpassed in 10 years.

These findings are consistent with earlier analysis, including that of the Carbon Tracker Initiative. What makes the Oil Change International study different is that it compares the remaining carbon budget with the emissions that would result if current (or under construction), oil and gas fields and coal mines were allowed to continue producing over their expected lifetimes. It shows that the potential emissions from these fields and mines would be larger than the available carbon budget for keeping temperatures within 2⁰C and two and a half times larger than the budget for 1.5⁰C.

Accordingly, the study's authors conclude: "No new oil fields, gas fields, or coal mines should be developed anywhere in the world... Similarly no new transportation infrastructure – such as pipelines, export terminals and rail facilities – should be built."²² In fact, some existing mines or wells would have to be shut down before reaching the end of their potential lifetime. Applying this analysis to Canada means that neither new tar sands projects nor new pipelines for exporting bitumen should be constructed.

Canadian analysts come to the same conclusion through studies of the greenhouse gas emission potential of new tar sands projects that would be needed to fill the export pipelines currently under consideration.

According to Environment Canada, additional greenhouse gas (GHG) emissions from the production of enough tar sands oil to fill the Trans Mountain pipeline could be between 14 and 17 megatonnes (million metric tonnes or Mt) per year. A study by the Pembina Institute, points out that another 30 to 32 Mt of emissions would result from increased tar sands production to fill the Energy East pipeline. Together these increased emissions would make it much more difficult to meet Canada's official emission reductions target without drastic measures affecting the rest of the country.

Prior to the Paris climate conference, the former federal government set a target of reducing Canadian GHG emissions to 30% below their 2005 levels by 2030. Although the current government once talked about treating that target as a floor upon which they would build a more ambitious target, they now admit it will be a challenge to meet that goal which would require Canada to reduce its total emissions from 747 Mt in 2005 to 524 Mt in 2030.

A study by Sawyer and Bataille projects that policies¹ in place as of September 2015 (mostly provincial government initiatives) could reduce emissions by 2030 but still miss the target by 254 Mt.²³ They also project that new policies² announced since September 2015 could lower the gap further to around 110 Mt above the target – still a very large amount. Hopefully new federal and provincial initiatives, including a national price on carbon emissions, will, at a minimum, close that gap entirely.

Even if Canada met its target and all other countries met theirs, the results will fall far short of the global goals incorporated into the Paris Agreement. Carbon Action Tracker estimates that if every country meets its target – an optimistic assumption – there is only a 50% chance of holding the global temperature increase to 2.7°C above pre-industrial levels by the end of the century. Under policies in existence at the time of the Paris Conference, temperature increases were on track to reach 3.6°C or more by 2100.

Adding 14 to 17 Mt of GHGs to the atmosphere through new production in order to fill the Trans Mountain pipeline and another 30 to 32 Mt to fill the Energy East pipeline would make it that much more difficult to meet the Canadian target. Add to that the emissions from burning the fuel carried by the Trans Mountain and the Energy East pipelines, even though they would not count as Canadian emissions when they occur abroad. If these pipelines were to operate at 80% capacity, the combustion of the fuel carried by the Trans Mountain pipeline would add another 74 Mt of GHGs to the atmosphere every year and Energy East's contents would add another 138 Mt.

The government's decision in September to grant conditional approval to the Pacific Northwest LNG project is more bad news. An environmental assessment of the impact of the project released last February estimates that the LNG facility would release the equivalent of 5.3 Mt of carbon dioxide each year for 30 years. Furthermore another 6.5 to 8.7 Mt would be emitted every year upstream in northeastern B.C. where the gas would be extracted.²⁴ These estimates do not include the GHGs that would be released by combustion of the gas once it reached markets in Asia. Whether emissions occur in Canada or abroad the consequences for the global climate are equally grave.



¹ Existing policies include the B.C. carbon tax; Alberta's Specified Gas Emitter Regulation; Saskatchewan's Boundary Dam carbon capture and storage project; Ontario's coal phase-out; Quebec's cap-and-trade system, and Nova Scotia's program promoting renewable energy.

² New policies include Alberta's Climate Leadership Plan; Ontario's cap-and-trade system; Saskatchewan's plan for 50% renewable capacity, and Canada-U.S. plans for methane emission reductions.

Tsleil-Waututh First Nation loses appeal but court puts politicians on notice

Indigenous peoples' appeals to Canadian courts regarding the federal government's constitutional duty to consult have had mixed results. In June 2016, a federal appeal court upheld a claim by eight First Nations in northern British Columbia that they had [not been properly consulted](#) before the former government issued a permit for Enbridge's Northern Gateway pipeline. In that case, the court found that a process led by the National Energy Board (NEB) had fallen far short of the requirements for consultation as established under the Canadian constitution. The judgment said "Many impacts of the project ... were left undisclosed, undiscussed and unconsidered. It would have taken Canada little time and little organizational effort to engage in meaningful dialogue on these and other subjects of prime importance to Aboriginal peoples. But this did not happen."²⁵

In the same week that the Standing Rock Sioux failed to win a court injunction in the U.S., a federal court of appeal in Canada rejected a challenge by the Tsleil-Waututh First Nation to Kinder Morgan's Trans Mountain Pipeline. The Tsleil-Waututh Nation objected to the failure of the government to properly consult them on a project that endangers their lands and waters. Reportedly, the court found that the Tsleil-Waututh had failed to take advantage of opportunities to engage in consultations conducted by the National Energy Board.²⁶

However, the adverse decision in the Tsleil-Waututh's legal appeal is far from the end of the story. They have launched a second court case against Kinder Morgan concerning the significant adverse environmental effects that were not considered by the NEB. In the first case, the court also noted that before the federal cabinet makes a final decision on the project, due December 19, 2016, the government "will have to assess whether its duty to consult was met."²⁷ The court said the Tsleil-Waututh can revisit the issue and make the same arguments about the government's duty to uphold its obligations under the constitution and abide by the *UN Declaration on the Rights of Indigenous Peoples* before a final decision is made.

The Tsleil-Waututh enjoy strong solidarity from large numbers of British Columbians, including the

mayors of Burnaby and Vancouver. More than 800 people risked arrest last May by taking to the water in a flotilla of kayaks surrounding Kinder Morgan's marine terminal while others held a sit-in at its gates. Canadian youth are organizing a march in Ottawa on October 24 that may include acts of civil disobedience to drive home the message that building the Trans Mountain pipeline is incompatible with defending Indigenous rights and fighting climate change.²⁸

The courts' contradictory judgments are themselves an indication that the issue of what constitutes adequate consultation and the opportunity to exercise free, prior and informed consent as required by the *UN Declaration* won't be resolved by the legal appeals alone. The ball is now squarely back in the government's court.

Fossil fuel industry and its allies politicize the issue

Even as more Canadians rally to the side of Indigenous peoples, the federal government is also feeling the heat from the fossil fuel industry and its political allies. Records kept by the Office of the Commissioner of Lobbying show that Kinder Morgan lobbyists met with senior government officials 31 times since the October federal election. The Canadian Association of Petroleum Producers has had at least 50 meetings since October.

In response to the release of the Treaty Alliance Against Tar Sands Expansion, Kinder Morgan issued a statement saying it has 40 letters from Indigenous communities and associations that support the Trans Mountain pipeline, and has signed 18 benefit agreements with 22 unnamed communities in British Columbia and Alberta.²⁹

This initiative comes as no surprise as Enbridge used a similar tactic by offering inducements, including an ownership stake in the Northern Gateway pipeline, to some Indigenous groups upstream from its coastal terminus in order to divide them from the project's opponents. Unfortunately, this divide and conquer tactic led to conflicts within some First Nations. For example, in August the Haida Nation held an elaborate ceremony to strip titles from two hereditary clan chiefs for secretly supporting the Northern Gateway pipeline.³⁰

Prime Minister's office signals approval of Trans Mountain expansion likely

In a trial balloon floated to a corporate news service in mid-September, the prime minister's office allowed anonymous "people familiar with [the prime minister's] plans" to tell Bloomberg.com that, "Trudeau plans to approve at least one new oil pipeline project in his first term, with Kinder Morgan Inc.'s Trans Mountain expansion to the Pacific Coast the most likely candidate."³¹

When Bloomberg asked for a response, former Alberta premier and federal environment minister Jim Prentice, now a Calgary-based advisor on energy issues for an investment firm, declared: "We need pipelines. We need pipelines to the West Coast, and most advantageous for Canada of course are pipelines into the Asia-Pacific basin and Trans Mountain would certainly be helpful. But we also need to bear in mind that Trans Mountain won't solve the problem."³² Prentice explained that by itself the Trans Mountain expansion would be inadequate because the tankers that can navigate from the terminal near Vancouver are too small to carry up to two million barrels a day of oil exports for Asian markets.

The Bloomberg story emerged just as the prime minister was preparing to travel to China for high level talks on the possibility of a free trade agreement. The Chinese have said they would like to see Canada build pipelines to the Pacific coast and loosen restrictions on investments by their state enterprises in Canadian energy resources before agreeing to a trade agreement. When Chinese Premier Li Keqiang paid a return visit to Canada later that month, he and the prime minister announced that exploratory talks towards the negotiation of a free trade agreement will indeed commence.

Prime Minister Trudeau has reaffirmed that he wants to get Canadian oil to international markets "in safe and reliable ways." But when he claims "the way that happens ... is up to a process that quite rightly shouldn't be about politics,"³³ he sounds disingenuous. His attempt to delink pipeline approvals from politics appears especially farfetched after former Prime Minister Brian Mul-

rony weighed into the debate by calling on Trudeau "to take personal charge" of winning approval for the Energy East pipeline.³⁴

Commentators discussing pipeline approvals are saying that not only are these decisions political but they are also tied into federal provincial negotiations on climate policy. Columnist Gary Mason, writing in *The Globe and Mail*, asserts: "The decisions that Prime Minister Justin Trudeau's government faces with regard to the Kinder Morgan and Energy East pipelines were always going to be more about politics than so-called social licence."³⁵

Mason asserts that the decision to allow the Pacific Northwest LNG project to go ahead was meant to persuade B.C. Premier Christy Clark to cooperate in a national carbon pricing strategy by showing a willingness to allow B.C.'s carbon tax to increase over time. At the same time the decision on the Pacific Northwest LNG project would soften Premier Clark's questioning of the Kinder Morgan pipeline whose approval would in turn favour the survival of Alberta Premier Rachel Notley's government. According to Mason even though she leads a rival political party, the New Democrats, Trudeau wants "to help Ms. Notley in her fight against right-wing forces" who would roll back the measures she has taken to contain climate change.

Toronto Star columnist Gillian Steward agrees that Trudeau's decision on the Pacific Northwest LNG project sends a signal to Premier Notley that the Trans Mountain pipeline will also likely be approved. Steward concludes "It's clear Trudeau would rather alienate First Nations and environmentalists than premiers of powerful provinces he wants to be able to court as allies."³⁶

If these speculations on high level political trade-offs over pipelines and climate policies are correct, it indicates that the deal making is proceeding with little regard for either Indigenous rights or the threat to the climate posed by expanded gas and oil extraction. The analysis by Oil Change International and others described on pages 6 and 7 above makes it

clear that any expansion of natural gas or bitumen extraction beyond the wells and mines already in use jeopardizes our chances to keep the rise of global temperatures below two degrees Celsius, let alone the 1.5 degree target that the Trudeau government endorsed in Paris.

Conclusion

The government has attempted to buy time, and perhaps appease critics, by delaying its decision on the Trans Mountain pipeline by four months while a special panel held public consultations. Over 90% of those who attended panel hearings opposed the pipeline. As explained in our [Briefing Paper](#) *Interim Pipeline Review Measures Fall Short*, the short-term consultation process is no substitute for a permanent regulatory approval process that includes an explicit commitment to free, prior and informed consent as required by the *UN Declaration on the Rights of Indigenous Peoples*.

An Expert Panel charged with examining how to reform the environmental assessment review process will travel across the country from mid-September to mid-December “to hear the views of Indigenous Peoples, stakeholders and all Canadians” before drafting a report. Its recommendations will be submitted to the Minister of the Environment and Climate Change in January 2017. After that the minister and her cabinet colleagues will have to decide on a new consultation process to replace the flawed reviews that have taken place in recent years under the 2012 amendments to the Canadian Environmental Assessment Act.

Similarly, the government has announced plans to appoint an expert panel to review ways to modernize the National Energy Board.³⁷ The panel would look at how the NEB consults Indigenous peoples and the public and how it makes decisions on major projects. This review would occur parallel to the review of the environmental assessment process. Although it is supposed to be completed by

January 31, 2017 when a report and recommendations would be submitted to the Minister of Natural Resources, it appears to be behind schedule.

The NEB is also in turmoil after hearings into the Energy East pipeline had to be suspended when it was revealed that two panel members had met secretly with former Quebec Premier Jean Charest while he was a paid lobbyist for TransCanada Pipelines. An NEB report on the Energy East pipeline is not due until March 16, 2018, after which the federal government will have to decide on its fate.

While it will take time to develop new environmental assessment and NEB processes, Prime Minister Trudeau and his cabinet will have to make some hard decisions before the end of the year. The government must decide by December 19 whether to allow the Kinder Morgan Trans Mountain pipeline to proceed. If it does so and also refuses to rescind the permits allowing construction on the Site C dam, it will pay a heavy political price as its promises to respect Indigenous rights will be exposed as false.

If this happens, Indigenous peoples and their allies will not pack up their tents and go quietly away. Instead, the struggle will enter a new and more confrontational phase. Of course the Prime Minister has another option. He could accept the offer put forward by Indigenous peoples in the Treaty Alliance Against Tar Sands Expansion, “to work in collaboration with all peoples and all governments in building a more equitable and sustainable future, one that will produce healthier and more prosperous communities across Turtle Island and beyond.”

Endnotes

- ¹ Liberal Party of Canada Election Platform. *A New Plan for the Middle Class*. 2015. Page 38.
- ² See www.cbc.ca/news/canada/british-columbia/crude-oil-tanker-traffic-moratorium-bc-north-coast-1.3318086.
- ³ See http://business.financialpost.com/news/energy/enbridges-northern-gateway-resuscitated-as-trudeau-wavers-on-tanker-moratorium?_lsa=5e83-abc0
- ⁴ Cited from the Treaty Alliance Against Tar Sands Expansion. September 2016. <http://www.treatyalliance.org/treaty/>
- ⁵ The text of the treaty is cited in Elizabeth McSheffrey. "First Nations across North America sign treaty alliance against the oil-sands." *National Observer*. September 22, 2016. www.nationalobserver.com/2016/09/22/news/first-nations-across-north-america-sign-treaty-alliance-against-oilsands
- ⁶ See <http://www.treatyalliance.org/treaty/>
- ⁷ Rebecca Solnit. "Standing Rock protests: this is only the beginning." *The Guardian*. September 12, 2016. www.theguardian.com/us-news/2016/sep/12/north-dakota-standing-rock-protests-civil-rights
- ⁸ Lauren McCauley. "'Dreamers and Warriors' Unite for Global Day of Protest Against Dakota Access." *Commondreams.org*. September 23, 2016.
- ⁹ Cited in Elizabeth McSheffrey. "After Dakota pipeline battle, Indigenous people say they share 'unprecedented unity.'" *National Observer*. September 12, 2016.
- ¹⁰ U.S. Department of Justice. *Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*. September 9, 2016. www.justice.gov/opa/pr/justice-department-and-law-enforcement-partners-announce-civil-and-criminal-actions-dismantle
- ¹¹ Ibid.
- ¹² Cited in James MacPherson. "'Unprecedented' Dakota Access Intervention 'Changes the Lay of the Land' for Native Americans." *Star Tribune*. September 16, 2016.
- ¹³ Cited in Meenal Vambrurkar. "Dakota Access Builder Brings Its Lobbying Fight to Washington." *The Energy Mix*. September 19, 2016.
- ¹⁴ Kristy Kirkup. "Indigenous Liberal MP breaks ranks with government on B.C.'s Site C dam." *National Observer*. September 13, 2016.
- ¹⁵ Cited in Ibid.
- ¹⁶ Cited in Emma Gilchrist. "The 40-Year-Old Federal Salmon Study That Should Have Killed Pacific Northwest LNG." *Desmog Canada*. September 29, 2016.
- ¹⁷ Ibid.
- ¹⁸ Cited in "Federal government approves liquefied natural gas project on B.C. coast with 190 conditions." *CBC.ca* September 28, 2014.
- ¹⁹ Ibid.
- ²⁰ Andrea Carmen. "The Right to Free, Prior and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress." In J. Hartley, P. Joffe and J. Preston. Editors. *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action*. Saskatoon: Purich. 2010. Pages 125-126.
- ²¹ Kenneth Deer, "Reflections on the Development, Adaptation, and Implementation of the UN Declaration on the Rights of Indigenous Peoples." In J. Hartley, P. Joffe and J. Preston. Editors. *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action*. Saskatoon: Purich. 2010. Page 27.
- ²² Greg Muttitt et al. *The Sky's Limit*. Washington: Oil Change International. September 2016. Page 20.
- ²³ Dave Sawyer and Chris Bataille. *Still Minding the Gap: An Assessment of Canada's GHG Aspirations after Paris*. Ottawa: Climate Action Network. April 2016.
- ²⁴ Canadian Press. "Liberals approve controversial natural gas project on B.C. coast." *Toronto Star*. September 28, 2016.
- ²⁵ Cited in Jason Proctor. "Northern Gateway pipeline approval overturned." *CBC News*. June 30, 2016.
- ²⁶ Shawn McCarthy. "Court rejects First Nation's claim that rights were violated in NEB review." *The Globe and Mail*. September 13, 2016. B5.
- ²⁷ Ibid.
- ²⁸ See <http://climate101.ca/>
- ²⁹ Kelly Cryderman and Shawn McCarthy. "First Nations divided on energy front." *The Globe and Mail*. September 24, 2016. B3.
- ³⁰ Jeff Lee, "Haida strip two hereditary chiefs of titles for supporting Enbridge." *Vancouver Sun*. August 17, 2016.
- ³¹ Josh Wingrove. "Trudeau Said to Plan Pipeline Approval, Favor Kinder Morgan." *Bloomberg.com*. September 13, 2016.
- ³² Ibid.
- ³³ Cited in Robert Fife. "Mulroney urges PM to take charge of Energy East file." *The Globe and Mail*. September 14, 2016. A5.
- ³⁴ Ibid.
- ³⁵ Gary Mason. "The politics behind the LNG go-ahead." *The Globe and Mail*. September 30, 2016. A13.
- ³⁶ Gillian Steward. "Notley buoyed by Trudeau decision on B.C. LNG project: Steward." *Toronto Star*. Oct. 4, 2016.
- ³⁷ See National Energy Board Modernization at www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/national-energy-board-modernization.html

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