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The Resistance Dilemma

Place-Based Movements and the Climate Crisis

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6 The Trans Mountain Expansion Project: The Politics of Structure

Overview

Pipeline resistance in British Columbia was initially focused on the Northern Gateway Pipeline. Ben West, an activist with the Wilderness Committee, based in Vancouver, first got wind of another plan to get increased oil sands production to the West Coast when he got a call from Rex Weyler, a cofounder of Greenpeace, in early 2011. Weyler had noticed an increase in tanker traffic through the Burrard Inlet and was interested in taking action to stop it. Weyler and West knew effective action would require the support of area First Nations, and they were soon introduced to Reuben George of the Tsleil-Waututh Nation in spring 2011. George invited West to join him in spiritual ceremonies before they got down to discussing political strategies. Before long, West found himself a “fire keeper” for George’s sweat lodge, and George was pressing his chief and council to take a strong stand against the nascent Trans Mountain Expansion Project. From that meeting, a formidable resistance coalition of environmentalists and First Nations was born to fight the project (West 2016).

Kinder Morgan’s Trans Mountain Expansion Project would “twin” an existing pipeline from the Edmonton area to Burnaby, British Columbia, and Vancouver’s harbor. The pipeline began operation in 1953 (Kheraj 2013). The expansion project would virtually triple the capacity of the pipeline, from 300,000 to 890,000 barrels per day. One potential advantage of the project was that 74% of the new pipeline would be along the existing pipeline right-of-way, 16% would follow other rights-of-way established by utilities, and only 11% would be new rights-of-way. The project was originally expected to cost \$6.8 billion (Trans Mountain, n.d.). When it was

formally proposed, Kinder Morgan was expecting to start construction in 2015, with an in-service date of 2017 (Hoekstra 2013).

The project would significantly increase tanker traffic in Vancouver's harbor. Three new terminal berths would be constructed at the Westridge Marine Terminal in Burnaby, British Columbia, designed to handle Aframax class vessels (245 meters in length, with a capacity of 750,000 barrels). According to the Trans Mountain application, tanker traffic would increase sevenfold, from 5 per month to 34 per month (Trans Mountain 2013, vol. 2, 2–27).

The timeline for the Trans Mountain Expansion Project is presented in figure 6.1. The project was formally proposed in December 2013 (National Energy Board [NEB] 2016a) and became engulfed in protests in late 2014. Despite considerable controversy, on November 29, 2016, Prime Minister Justin Trudeau approved it, subject to 157 conditions. As part of the same announcement, his government rejected the Northern Gateway Pipeline.

Like Northern Gateway, Kinder Morgan's project has also been opposed by environmentalists and many First Nations. Municipal governments in the Greater Vancouver area also strongly opposed the project. That anti-pipeline coalition confronted a similar oil sands coalition, but the proponent was Texas-based Kinder Morgan rather than Enbridge. This meant that a similar geographical distribution of risks and benefits across the Continental Divide between Alberta and British Columbia was in play. But there were two critical differences with Trans Mountain. Unlike the greenfield Northern Gateway, the bulk of the Trans Mountain route would follow the existing pipeline's right-of-way. While the terminus of Northern Gateway would have been in the remote northern coastal town of Kitimat, Trans Mountain's terminus was in Burnaby, adjacent to Vancouver, a city that is aspiring to be "the greenest city in the world."

Trudeau's decision hardly brought finality to the case. The election of an anti-pipeline NDP government in British Columbia in summer 2017 led to a chain of events that heightened modern Canada's sustainability dilemma and challenged the core of the Canadian federation. British Columbia proposed to restrict increases in the shipment of oil sands through the province. Alberta retaliated by temporarily banning wine imports from British Columbia and then by enacting legislation authorizing the province to restrict oil and gas shipments to British Columbia. The Trudeau government then nationalized the pipeline project, altering the structure of the pipeline policy regime. Shortly thereafter, the Federal Court of Appeal struck down the

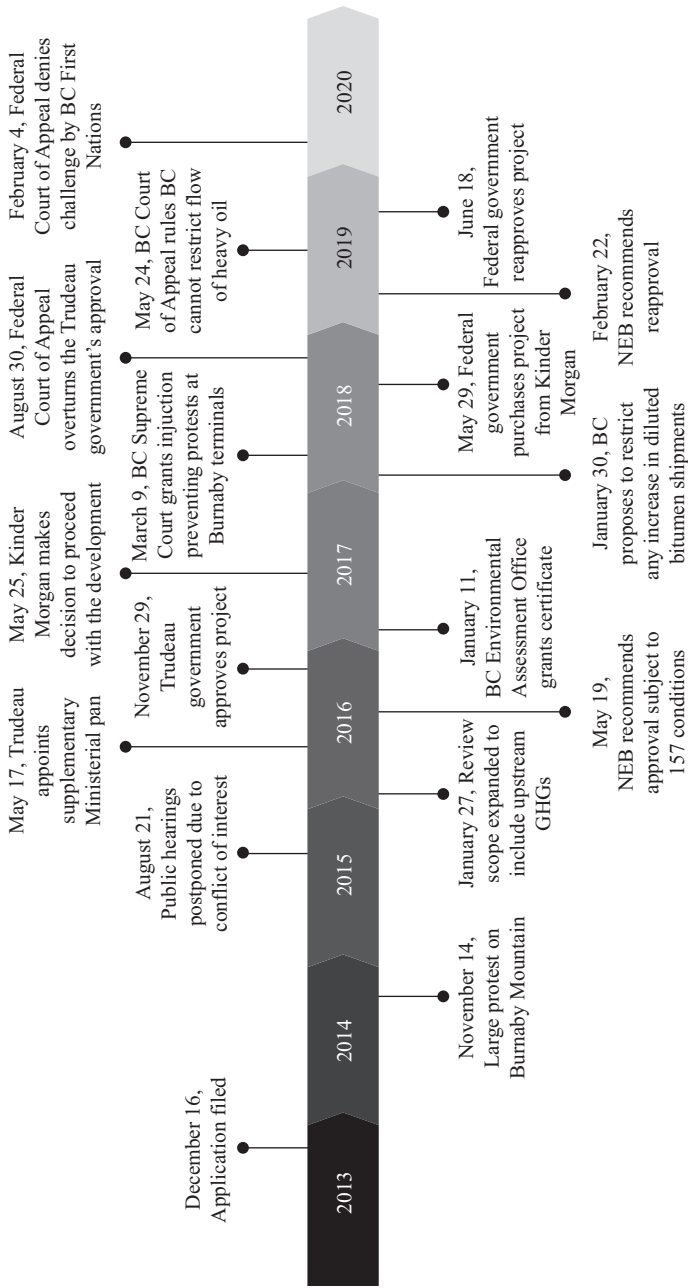


Figure 6.1
Trans Mountain Expansion Project timeline.

approval decision for failing to adequately address tanker risks and engage in meaningful consultations with First Nations. This led to a reconsideration by the National Energy Board and a second approval by the Trudeau government. That second decision survived legal challenges in the federal courts. Three years after it was originally supposed to come into service, the pipeline was in the early stages of construction.

The conflict has pitted the most powerful economic interests in Canada against a surprisingly formidable resistance movement. A prominent theme that emerges from the analysis is that the institutional rules of the game have been highly contested. Major political, legal, and physical conflicts have erupted over the scope of issues that should be considered and where decision-making authority lies. As a result, the politics of this pipeline has in large part been “the politics of structure,” or the struggle over defining the rules of the game (Moe and Wilson 1994; Hoberg 2018).

The next section describes the public and private actors and their interests and strategies in the pipeline controversy, focusing on how they differ from those of the Northern Gateway case described in chapter 5. The second section looks at public opinion on the issue and presents a media analysis. The third section describes the institutional rules at work and conflicts that erupted over the rules of the game. These sections will allow us to test our four behavioral hypotheses. The fourth section builds on chapter 5 to elaborate on the aftermath of Trudeau’s approval, including the bitter jurisdictional conflict unleashed after the May 2017 election in British Columbia.

Actors—The Oil Sands Coalition

The Private Oil Industry

The principal industry supporters of the Trans Mountain Expansion Project have been the parent company, Kinder Morgan, a Texas-based energy pipeline company, their shippers among the oil sands companies in Alberta, and the refinery companies in export markets.

These oil sector interests have been supported through campaigns by other business groups and new advocacy groups favoring resource development. For example, the BC-based Independent Contractors and Businesses Association, a group whose members would benefit enormously from construction

associated with the pipeline, produced a 30-second ad for the Super Bowl in Canada. The ad featured a young family man whose ability to work is thwarted by protesters. The voiceover states, “Our province is being held hostage by a loud few with too much free time and very few facts. We’re tired of a promising future constantly being blocked by no” (Independent Contractors and Businesses Association of 2016). Resource Works is a new group designed to counter the resistance movement by “communicat[ing] with British Columbians about the importance of the province’s resource sectors to their personal well-being” (Resource Works, n.d.).

Governments

Governments have expressed a variety of interests in the pipeline. The Harper government was a resolute supporter of increasing oil sands access to global markets. Trudeau has taken a more nuanced approach but has also consistently expressed the importance of increasing access to global markets. In his February 2015 speech in Calgary, he emphasized the importance of regaining public trust in the regulatory process in order to improve market access: “Getting our resources to market is a priority for Canada, and we know that our economic success depends on keeping our word on the environment” (Trudeau 2015). Once it approved the Trans Mountain project in late 2016, the Trudeau government vigorously defended it. On numerous occasions, Trudeau himself declared resolutely that “this pipeline will be built” (Hall 2018). The strongest indication of that commitment was the Trudeau government’s nationalization of the project in May 2018.

The Alberta government has been a major champion of pipeline expansion, given the importance of the oil sector to the province’s economy and the government’s dependence on oil revenues. Once she became premier in 2015, Rachel Notley also became an enthusiastic champion of pipeline expansion. In her address to Albertans in April 2016, Notley emphasized the importance of pipelines to the provincial economy: “Every Canadian benefits from a strong energy sector. But we can’t continue to support Canada’s economy, unless Canada supports us. That means one thing: building a modern and carefully-regulated pipeline to tidewater. We now have a balanced framework to develop our industry and every government in Canada understands this issue must be dealt with. But I can promise you this: I won’t let up. We must get to ‘yes’ on a pipeline” (Notley 2016).

Actors—The Anti-pipeline Coalition

Environmental Group Resistance

Along with the Northern Gateway Pipeline, the Trans Mountain Expansion Project has been one of the core issues for the vast and diverse environmental movement in British Columbia. Again, much of the concern driving larger environmental groups was climate change, but for the same reasons described in the previous chapter, resistance to this project focused largely on place-based risks, particularly spills along the pipeline route but especially the risks of tanker spills in the coastal waters around Vancouver, particularly early in the campaign. As described in the section on media coverage, greater attention was given to climate issues after 2014, when 350.org became more involved in this conflict.

Table 6.1 lists 20 organized environmental groups that actively opposed the project. They range from large binational groups such as Stand (formerly ForestEthics), Canadian sections of large international groups (e.g., Greenpeace and 350.org), multi-issue groups that have chosen Trans Mountain as one of their campaigns (such as LeadNow), mainstay British Columbia environmental groups (such as Wilderness Committee and Sierra Club of BC), and local groups organized specifically to fight the project (such as Tanker Free BC and Burnaby Residents against Kinder Morgan Expansion, or BROKE).

Focused environmental opposition to the project began in summer 2012, when the Wilderness Committee, under the leadership of Ben West, launched a campaign in collaboration with Tanker Free BC. The campaign initially focused on the risks to Vancouver's Stanley Park, a cherished urban park in the region (Wilderness Committee and Tanker Free BC 2012). The Wilderness Committee's 2012 annual report and its previous four annual reports make no mention of Kinder Morgan or Trans Mountain, but the 2013 report describes a series of town halls on the pipeline proposal as one of the year's major accomplishments (Wilderness Committee 2013). The centrality of place-based risks in the campaign is clearly signaled in the headline of the Wilderness Committee's first major publication on this pipeline: "Want to Help Stop an Oil Spill?" The early focus on Stanley Park—an iconic urban park on a peninsula directly between the tanker terminal and more open Pacific Ocean shipping lanes—was critical in galvanizing concerns about the project among the local populace and municipal politicians (West 2016).

Table 6.1

Environmental groups active on the Trans Mountain Expansion Project
(July 2018)

Group name	Facebook likes	Twitter followers	Intervenor?
350 Vancouver	467	309	
BROKE	506	184	
Georgia Strait Alliance	1,736	5,105	Yes
350 Canada	2,510	2,252	
Tanker Free BC	2,529	2,230	
Living Oceans Society	4,954	4,395	Yes
West Coast Environmental Law	5,714	11,800	
Wilderness Committee	6,708	8,367	
Sierra Club of BC	7,354	6,490	
Raincoast Conservation Foundation	10,567	7,952	Yes
Nature Canada	12,186	49,800	Yes
Dogwood BC	24,144	10,788	
Ecojustice	52,460	22,700	
LeadNow	55,474	17,100	
Greenpeace Canada	176,935	38,000	
Stand	183,601	18,100	
BC Nature	NA	273	Yes
Force of Nature	NA	NA	
PIPEUP Network	NA	807	

Dogwood BC's (previously the Dogwood Initiative) "No Tankers" campaign was originally focused on the Northern Gateway Pipeline, but in 2011 the group expanded its coverage to include the Trans Mountain project. This change is reflected in the group's annual reports. The 2009–10 and 2010–11 annual reports contain no mention of the Kinder Morgan proposal. It is first mentioned in the 2012–13 annual report, where the group states: "We spent the summer of 2011 re-designing the No Tankers campaign. . . . to include opposition to Kinder Morgan's oil tanker proposal on B.C.'s south coast, and began focusing on the role of the government of British Columbia in the debate" (Dogwood Initiative 2013). In 2014, Dogwood focused on forcing the British Columbia government to assert jurisdiction over the

project with its “Let BC Decide” campaign. The campaign was designed to mobilize support for a citizen initiative against tankers if “politicians try to force these projects on B.C.” (Dogwood BC, n.d.).

First Nations Resistance

Oil sands pipelines have been a major issue for British Columbia’s First Nations. While some First Nations are open to oil sands pipelines and have signed impact benefit agreements with pipeline companies, a large number of First Nations have taken a principled stance in opposition to them. Much of this opposition originally focused on the Northern Gateway Pipeline, and in 2010 two large coalitions of First Nations, the Coastal First Nations and the Yinka Dene Alliance, appealed to their ancestral laws in banning the pipeline and tankers from their territories. While the Trans Mountain route does not directly affect the territories of the Coastal First Nations, the geographical scope of the Yinka Dene Alliance’s Save the Fraser Declaration is much larger and has been signed by many First Nations along the Trans Mountain route. The declaration makes it clear that the Kinder Morgan project is also covered: “We will not allow the proposed Enbridge Northern Gateway Pipelines, or similar Tar Sands projects, to cross our lands, territories and watersheds, or the ocean migration routes of Fraser River salmon” (Save the Fraser Gathering of Nations 2013).

Some First Nations along the pipeline route have been very active in opposing the pipeline, most notably the Tsleil-Waututh Nation, whose traditional territory encompasses the terminus for the pipeline in Burnaby (see the section on legal action by First Nations). The Union of British Columbia Indian Chiefs (UBCIC) has also been a vocal opponent of Trans Mountain. Referring to a bill that would bring Canadian law into harmony with the UN Declaration on the Rights of Indigenous Peoples, former UBCIC president Grand Chief Stewart Phillip argued that “Bill C-262 further validates what we already know: Kinder Morgan cannot proceed without the consent of the First Nations along its path, so many of which oppose it” (UBCIC 2018).

On the other hand, according to Kinder Morgan, 43 Aboriginal groups signed mutual benefit agreements with Kinder Morgan, and approximately 100 agreements were made in total, including memoranda of understanding, capacity funding agreements, integrated cultural assessments, and relationship agreements. The financial value of the mutual benefit agreements

was over C\$400 million (Trans Mountain 2018). A database put together by Discourse, APTN, and HuffPost Canada lists 41 groups that signed agreements with Kinder Morgan. They also noted that the company's own information about affected First Nations listed a total of 140 groups, of which 41 have agreements, 14 initially challenged the project in court, and an additional 85 groups do not have agreements (Owen 2018).

From the start of the campaign against Trans Mountain, First Nations worked closely with environmentalists. As the project moved into the on-the-ground stage in spring 2017, new initiatives and coalitions were created to coordinate resistance. Coast Protectors was an initiative of the Union of BC Indian Chiefs. As of July 2018, the group's pledge, "Whatever it takes, we will stop the Kinder Morgan pipeline and tanker project," had 25,630 signatures online (Coast Protectors, n.d.). A related group, Protect the Inlet, or Kwekwecnewtxw, describes itself as an Indigenous-led initiative, supported by allied organizations (Protect the Inlet, n.d.).

Municipal Governments

Municipal governments have been highly politicized by recent pipeline controversies. In British Columbia, 21 municipal governments, including virtually all those on the lower mainland, expressed formal opposition to the project. The most active opponent has been the city of Burnaby, which challenged the NEB and Kinder Morgan in court over their plans to perform seismic drilling on Burnaby Mountain (to be discussed). Burnaby mayor Derek Corrigan pledged to get arrested if the pipeline was approved (Morneau 2015). The city of Vancouver, under the leadership of Mayor Gregor Robertson, has been strongly opposed to the pipeline. (When Robertson declined to run for reelection in the 2018 municipal election, he was replaced by Kennedy Stewart, who, as a sitting member of Parliament, was actually arrested for civil disobedience against the Trans Mountain project (Larsen 2018). The city's 23-page submission to the NEB focused on the risks of a tanker accident and climate change. The day the NEB announced its recommendation to approve the pipeline, Robertson called the decision a "call to action" and launched a campaign to convince his friend the prime minister to reject it (Hunter and Hume 2016). The following day, Mayor Corrigan committed to a "mass citizen campaign" (Sinoski 2016). More details on Burnaby's anti-pipeline efforts will be given later in the chapter.

Government of British Columbia

The British Columbia government, under BC Liberal premier Christy Clark, first adopted a position of conditional opposition. Relying on the five conditions introduced during the Northern Gateway proceedings (Government of British Columbia 2012b), the province emphasized the lack of emergency response preparedness in its rationale, stating, “During the course of the NEB review the company has not provided enough information around its proposed spill prevention and response for the Province to determine if it would use a world leading spills regime. Because of this the Province is unable to support the project at this time, based on the evidence submitted” (Government of British Columbia 2016). Changes in emergency preparedness policy, particularly those supported by Trudeau’s Oceans Protection Plan, allowed Clark to reconsider the government’s position and issue the required environmental assessment certificate.

But British Columbia’s position changed with the May 2017 election, which resulted in the anti-pipeline British Columbia New Democratic Party forming a minority government, supported by three Green Party Members of the Legislative Assembly (Shaw and Zussman 2018). The defeat of the pro-development BC Liberal Party changed the formal position of the government of British Columbia, triggering the intensified political conflict described here.

The anti-pipeline coalition arrayed against Trans Mountain was broad and deep. Resistance strategies support the first two behavioral hypotheses. Environmentalists allied themselves with local environmental groups, Indigenous groups, and municipal and provincial governments. They focused their communications on place-based concerns, most importantly the risk of a tanker spill. As the next section shows, these concerns strongly influenced media reporting.

Ideas—Public Opinion and Media Issue Framing

Nationwide public opinion polls have shown that support for the pipeline generally exceeded opposition. In a nationwide sample by Ekos in February 2016, supporters outweighed opponents 47% to 42% (Ekos 2016). Many polls showed sharp differences among provinces, with support being highest in Alberta (Angus Reid Institute 2016; IPSOS 2018c).

Public sentiment in British Columbia was initially opposed to the pipeline. Insights West has been surveying British Columbians about the pipeline since January 2013, as shown in figure 6.2. Opposition was greater than

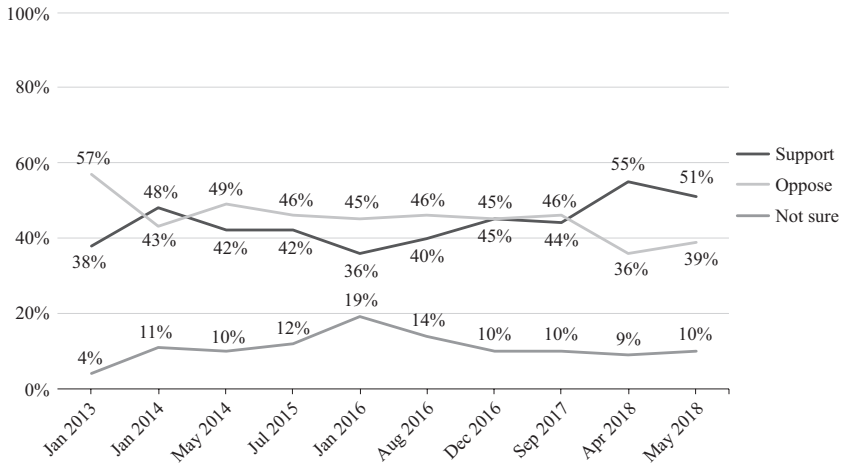


Figure 6.2

British Columbia poll results for the following question regarding support for the Trans Mountain Expansion Project: “Given what you know about the proposed expansion of Kinder Morgan’s Trans Mountain pipeline, do you support or oppose the project?”

Source: Insights West (2018).

support in all but one of the polls prior to April 2018, but that month’s poll showed a sharp spike in support to 55% before dropping down to 51% in the May poll following the federal government’s purchase of the pipeline. An April 2018 Angus Reid poll showed that 54% supported the pipeline, while 38% opposed it (Angus Reid Institute 2018b). A July 2018 IPSOS poll showed that 59% of British Columbians supported (strongly or somewhat) the pipeline, while 35% opposed it (IPSOS 2018c).

An analysis of media coverage provides some indication of the relative importance given to different issues in the pipeline dispute. This analysis compares the number of times news articles mentioning the pipeline also mention four particular issues: climate change, jobs and the economy, risks of pipeline or tanker spills, and First Nations.¹ Figure 6.3 shows the dominance of the economy-jobs frame. It also provides insight into the hypothesis that pipeline opponents will adopt framing that emphasizes place-based risks. While the anti-pipeline coalition’s communications have not been measured directly, the figure shows that through 2015, place-based environmental risks outweighed climate risks, but that changed in 2016. Over the entire 2012–2019 period, climate risks received more attention than place-based risks.

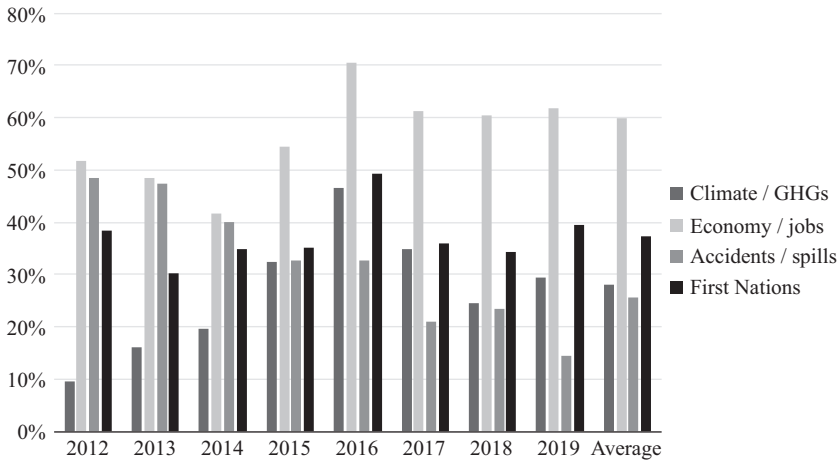


Figure 6.3
Trans Mountain pipeline keyword mentions.

This shift was clearly related to a change in the tone of environmental discourse. Campaigns initially focused on a “no tankers” message, but the relative attention to climate shifted as time went on. This change can be credited, at least in part, to the emergence of 350.org in the pipeline controversy in 2014, as well as the emergence of nationwide strategies to use climate concerns to undermine the credibility of the regulatory process in the leadup to the 2015 federal election (Fenton 2017a).

Institutions and the Politics of Structure

Kinder Morgan submitted its project description in May 2013 and its full application to the NEB in December 2013 after two years of advanced consultations through public meetings. After the NEB determined that the application was complete and initiated the process, Kinder Morgan notified the NEB that it wanted to change the route through Burnaby. This led to a seven-month “suspension” of the hearing time clock so that the company could do additional testing of the proposed route. Hearings began in August 2014 and continued, with an additional delay because of a conflict of interest created when Prime Minister Stephen Harper appointed a Kinder Morgan witness to the NEB, until February 2016. On May 19, 2016, the NEB released its final report. It found “that the Project is not likely to cause significant

adverse environmental effects” and that it was in the public interest. It recommended that the federal cabinet approve the pipeline, subject to 157 conditions (National Energy Board 2016b, 2-3). The Trudeau government, after three additional reviews described later in this chapter, approved the project with conditions in November 2016.

The third behavioral hypothesis is that actors will focus their strategies on the institutional venues most favorable to their interests. These strategic incentives frequently create conflict among competing interests about the allocation of decision-making authority across different institutions. The rules of the game governing the Trans Mountain project have been contested along three dimensions: horizontally at the federal level, over whether final decision-making authority rests with an independent regulatory agency or elected officials in the cabinet; vertically among federal, provincial, and municipal governments; and finally between colonial governments and First Nations.² The horizontal conflict emerged in response to efforts by environmental groups to overwhelm the regulatory review process with demands for participation, but the even bigger political-institutional conflicts have been about federalism and Aboriginal rights.

Harper’s Assertion of Political Control

Part of the institutional conflict over Trans Mountain is spillover from the Northern Gateway case, as described in chapter 3, which precipitated four important changes:

1. Regulatory review authority for pipelines was consolidated in a single organization, the NEB, eliminating the need for a Joint Review Panel with the Canadian Environmental Assessment Agency as was the case for the Northern Gateway Pipeline.
2. More stringent timelines were imposed; for pipelines, the NEB hearing process was limited to 18 months.
3. Participation was narrowed from the original language of “interested parties” to those who are “directly affected” or have, in the review panel’s judgment, “relevant information and expertise.”
4. Decision-making authority was shifted from the NEB to the federal cabinet, relegating the NEB’s role to one of project review and recommendation.

These changes were designed to streamline the decision-making process and give the elected political arm of government more direct control. The

change that became the most controversial in the Trans Mountain case was the new restrictions on participation, which are discussed in the following section.

The Struggle over Scope

One critical aspect of political structure is the issues that are determined to be within the scope of the regulatory review. From the start, the NEB determined in its list of issues that it would consider only the greenhouse gas emissions resulting from construction and operation of the pipeline and not the upstream emissions from the oil sands or downstream emissions when the products were refined and combusted. It is worth noting that the US State Department considered upstream and downstream impacts in its review of the Keystone XL pipeline.

Pipeline opponents tried to combat the restrictions on participation and scope by shifting the venue to the courts. A number of individuals, including a group of academics, applied to participate for the express purpose of discussing climate impacts, with the expectation that they would be rejected by the NEB. And indeed they were (National Energy Board [NEB] 2014a).

A group of those who were denied their application to participate, led by Simon Fraser University (SFU) professor Lynne Quarmby, renowned Canadian environmentalist Tzaporah Berman, and the group ForestEthics Advocacy, challenged the NEB's action in the Federal Court of Appeal with the novel claim that their charter right to freedom of expression had been violated. The Federal Court of Appeal dismissed the appeal without giving reasons, and the Supreme Court of Canada took the same action when that dismissal was appealed. In October 2014, three months before the Federal Court of Appeal dismissed the case, it ruled on a very similar charter claim made about the NEB's decision to deny applicants who sought to talk about climate change with respect to Enbridge's Line 9 application. In that case, it did issue a written decision that dismissed the application for judicial review because the plaintiffs had not brought their charter claim to the NEB before seeking judicial review. In doing so, the court went so far as to denounce ForestEthics as a "busybody" (*ForestEthics Advocacy Association v. Canada* (National Energy Board, 2014 FCA 245)).

The city of Vancouver also filed suit challenging the NEB's decision to exclude from consideration the upstream and downstream environmental

and socioeconomic impacts of the pipeline. Its suit was also dismissed by the Federal Court of Appeal without reasons.

The NEB says it received 2,118 applications to participate and denied 22% of those applications, or 468 participants. While the pre-2012 rules would have allowed the additional 468 to participate, the number of intervenors (400) and commenters (1,250) who were permitted to participate in the process was still quite substantial. For comparison, the total of 1,650 was just shy of the 1,790 parties that participated in the more accessible Northern Gateway joint review process (Northern Gateway Joint Review Panel 2013, 14–15).

Strategic actors are always searching for better approaches to advance their interests. The Harper government, frustrated with delays from mass participation in the Northern Gateway case, narrowed the range of eligible participants. For environmentalists, it was very important to force a climate lens onto pipeline decision-making. When frozen out of NEB hearings by scoping rules and the new limits on participation, they attempted to shift the venue to the courts, but that effort failed. Clearly, not every strategic choice will be successful. With the charter challenge rejected by the courts on procedural grounds, pipeline opponents shifted to other strategies.

Forcing Jurisdiction on British Columbia

Traditionally in Canada, the decision-making authority to approve inter-provincial pipelines has rested with the federal government and the NEB (Bankes 2015; Olszynski 2018). However, since pipeline and terminal construction and operation affect many areas under provincial jurisdiction, provinces also have a role to play. The British Columbia government, however, was willing to cede authority to the federal government through an equivalency agreement whereby British Columbia agreed to accept the NEB review process as its own (National Energy Board and British Columbia Environmental Assessment Office 2010).

The equivalency agreement under which the British Columbia government deferred to the review and decision-making by the federal government was the result of an intergovernmental compromise. The industry and the Harper government were particularly concerned about reducing jurisdictional overlap and conflict, and they promoted a one-project, one-process approach to regulatory reviews, where feasible. The Harper government, with its strong pro-development orientation, was understandably

reluctant to devolve regulatory authority to provinces with strong environmental sentiments.

Normally, a provincial government would be expected to be reluctant to give up its authority over regulatory processes, but the pro-development BC Liberal government, although keenly aware of the strong environmental movement in the province, was happy to use the equivalency agreement to “pass the buck” to the federal government and avoid blame for contentious decisions (Harrison 1996). The agreement shifted the role of British Columbia’s government from sharing regulatory authority to being an intervenor in the federal regulatory proceedings.

Environmentalists and First Nations lobbied forcefully to have British Columbia reassert its jurisdiction over the project, and in the 2013 election campaign, the provincial NDP had a “made-in-BC” environmental assessment process as a core part of its election platform (British Columbia New Democratic Party 2013). Despite a formidable NDP lead going into the election, Christy Clark’s BC Liberals defeated the NDP. The midcampaign decision by NDP leader Adrian Dix to come out in opposition to the Trans Mountain project is credited with contributing to Clark’s comeback (Hoberg 2013).

Having lost that political battle, the anti-pipeline coalition turned to fighting the agreement in court. The Coastal First Nations challenged the equivalency agreement in the context of Northern Gateway. As described in chapter 4, the British Columbia Supreme Court ruled that the province could defer to the federal government review process but that it must still decide whether to issue an environmental assessment certificate. The province could not use its regulatory authority to deny an approval to a pipeline that the federal government approved, but it could add conditions to the federal government’s condition (*Coastal First Nations v. British Columbia (Environment)*, 2016 BCSC 34).

The political implications of the ruling were formidable because they shifted the intergovernmental politics of pipelines. For an equivalency agreement to pass muster, British Columbia could allow the federal government the lead in conducting the assessment, but it would still need to make its own final decision on the basis of that assessment. This forced the provincial government to share accountability for the final decision. The pre-existing process, where British Columbia submitted strenuous objections to the pipeline but then deferred the final decision to the federal regulator, was unlawful. This ruling gave pipeline opponents another opportunity to

question the legitimacy of the decision and another potential veto point to access.

In response, British Columbia launched its own environmental assessment process on the Trans Mountain project (British Columbia Environmental Assessment Office 2016). In January 2017, Clark announced that Kinder Morgan had fulfilled the province's five conditions. Therefore, she issued an environmental certificate for the British Columbia portion of the expansion, with 37 conditions (British Columbia Office of the Premier 2017). Days earlier, she had announced a deal with Kinder Morgan for the province to receive C\$1 billion over 20 years. This secured British Columbia's fifth "fair share" condition in an unprecedented way (Cryderman 2017). The role of the British Columbia government following the 2017 election will be discussed in more detail.

Asserting First Nations Control

Aboriginal rights and title have become increasingly important to Canadian resource development, particularly in British Columbia. Since the 1970s, courts have increasingly acknowledged that First Nations in untreated areas must be consulted and, in some cases, accommodated about resource developments proposed for their lands, even if their title claims have not been recognized by Crown governments (Christie 2006; Wright 2018). The latest advance for Aboriginal rights was the 2014 Supreme Court decision *Tsilhqot'in Nation v. British Columbia*, which granted title for the first time in British Columbia's history. While much attention has been given to the court's declaration that once title has been granted, First Nations should be accorded the right to consent to development on their title lands, the decision still permits the Crown to infringe on First Nations title lands so long as the Crown goes through a careful justification process (Coates and Newman 2014). As a result, current Canadian law still falls short of the "free, prior, and informed consent" doctrine of the UN Declaration on the Rights of Indigenous Peoples (Hoberg 2018; Wright 2018).

Among First Nations, the Tsleil-Waututh and, more recently, the Squamish and Coldwater have played the most active roles in opposing the project. The Tsleil-Waututh carefully established their position to challenge an eventual government approval of the pipeline. They filed a lawsuit in the Federal Court of Canada to appeal the NEB's hearing order establishing the terms of the review process, charging that the government had not

sufficiently consulted and accommodated the First Nations on the procedures. They performed their own independent assessment of the project and in May 2015 rejected the pipeline according to their own laws (Tsleil-Waututh First Nation 2015). The Tsleil-Waututh also formed an alliance with Indigenous groups on the Salish Sea from across the forty-ninth parallel, whose waters may also be affected by increased tanker traffic (Connolly 2016). More details about asserting First Nations control are provided in the discussion of the Federal Court of Appeal's August 2018 decision.

Trudeau Asserting Liberal Control

Market access and environmental implications associated with pipelines played a significant role in the 2015 federal election campaign when Justin Trudeau's Liberals ended nine years of Conservative Party rule under Stephen Harper. Throughout the campaign, Trudeau sent mixed signals about his support for pipelines, arguing both that oil sands needed greater market access and that the NEB's process for regulating pipelines was flawed and needed to be reformed to regain the trust of Canadians: "Canadians must be able to trust that government will engage in appropriate regulatory oversight, including credible environmental assessments, and that it will respect the rights of those most affected, such as Indigenous communities. While governments grant permits for resource development, only communities can grant permission" (Liberal Party of Canada 2015a).

This statement that "only communities can grant permission" became a core part of the Liberal campaign of 2015. Trudeau first used the slogan in public in October 2013 in a speech on energy policy to the Calgary Petroleum Club. Criticizing Prime Minister Stephen Harper for his inability to get new pipelines approved and built, Trudeau argued that Harper "needlessly antagonized" both the Obama administration and the Canadian public: "Times have changed, my friends. Social license is more important than ever. Governments may be able to issue permits, but only communities can grant permission" (Liberal Party of Canada 2013).

Despite its prominent role in the campaign, the slogan disappeared from the Trudeau government's communications as soon as it was elected. In fact, since the election, there has been only one instance in the public record where Trudeau seems to have used a version of the phrase in public.³ The phrase cannot be found using the search function on the prime minister of Canada's news page.⁴ The phrase is also absent from the government

of Canada's website, according to the search function. Searching Hansard for the 42nd Parliament beginning with the first Speech from the Throne of Trudeau's government, the phrase has not been used in Parliament by any member of Trudeau's government.⁵ Given that the Trudeau government has taken a number of actions that are inconsistent with the slogan, it is a perfect case study of how rhetorical incentives when political parties are in campaign mode differ from those when they are in governing mode.

In January 2016, the Trudeau government announced "Interim Measures for Pipeline Reviews" as it geared up to initiate the promised review of environmental assessment and regulatory processes. The interim measures were to be guided by the following five principles:

1. No project proponent will be asked to return to the starting line—project reviews will continue within the current legislative framework and in accordance with treaty provisions, under the auspices of relevant responsible authorities and Northern regulatory boards.
2. Decisions will be based on science, traditional knowledge of Indigenous peoples and other relevant evidence.
3. The views of the public and affected communities will be sought and considered.
4. Indigenous peoples will be meaningfully consulted, and where appropriate, impacts on their rights and interests will be accommodated.
5. Direct and upstream greenhouse gas emissions linked to the projects under review will be assessed. (Natural Resources Canada 2016a)

It's revealing that their commitment to addressing First Nations concerns is a rather tepid restatement of obligations under Canadian law and a far cry from the platform's apparent commitment to accord the right to consent: "This will ensure that on project reviews and assessments, the Crown is fully executing its consultation, accommodation, and consent obligations, in accordance with its constitutional and international human rights obligations, including Aboriginal and Treaty rights and the United Nations Declaration on the Rights of Indigenous Peoples" (Liberal Party of Canada 2015).

For the Trans Mountain project, they committed to an assessment of the "upstream greenhouse gas emissions associated with this project" and to additional consultations with Indigenous groups and other affected communities. Environment and Climate Change Canada's assessment of upstream greenhouse gas emissions found that "the upstream GHG emissions could range from 13 to 15 megatonnes of carbon dioxide equivalent per year" (Environment and Climate Change Canada 2016).

The government also created a three-person ministerial panel “to create additional opportunities for communities close to the proposed pipeline and shipping route to share views on the project” (Major Projects Management Office 2016). The ministerial panel’s process was not intended to repeat the NEB hearing process or make recommendations. The government recognized that the NEB hearing process was surrounded by a lack of public confidence and that the conditions under which it gave its recommendation in 2016 were very different from those when the project was proposed in 2013. With the mandate to address gaps that may have been left out of the NEB process, the panel held a series of 44 public meetings and considered 20,000 email submissions and 35,000 survey responses. Its November 2016 report represented the positions and concerns of the public on marine impacts, earthquake risk, pipeline routing, rail transport, diluted bitumen characteristics and behavior, aging infrastructure, economic arguments, climate change, and public confidence in the regulatory process. In lieu of specific findings or recommendations, the panel concluded with six pointed questions that illustrated key controversies for further consideration:

1. Can construction of a new Trans Mountain Pipeline be reconciled with Canada’s climate change commitments?
2. In the absence of a comprehensive national energy strategy, how can policy-makers effectively assess projects such as the Trans Mountain Pipeline?
3. How might Cabinet square approval of the Trans Mountain Pipeline with its commitment to reconciliation with First Nations and to the UNDRIP principles of “free, prior, and informed consent?”
4. Given the changed economic and political circumstances, the perceived flaws in the NEB process, and also the criticism of the Ministerial Panel’s own review, how can Canada be confident in its assessment of the project’s economic rewards and risks?
5. If approved, what route would best serve aquifer, municipal, aquatic and marine safety?
6. How does federal policy define the terms “social licence” and “Canadian public interest” and their interrelationships? (Ministerial Panel 2016)

The federal government also conducted a separate consultation process with First Nations. It was deliberately designed to avoid the procedural errors the Harper government made that led the Federal Court of Appeal to strike down the permit for Northern Gateway (see chapter 5).

These supplementary processes, while far more modest than pipeline opponents had hoped for, were the mechanisms the Trudeau government

chose as a way to put its stamp on the review process and build sufficient social acceptance.

Asserting Local Control

In the Trans Mountain case, the authority of municipalities to influence pipeline regulation through zoning or permitting authority became a major issue. While a number of lower mainland British Columbia municipalities took positions against the project, the cities of Vancouver and Burnaby have been the most active opponents. Vancouver created an elaborate website that hosts 12 research reports supporting its position, acted as a formal intervenor, and challenged several federal decisions in court (City of Vancouver, n.d.). For the most part, it has acted like other interested parties in the sense that the project's physical location is not within the city's boundaries and thus the city was not involved in any permitting decisions.

The role of Burnaby has been the most controversial and has involved the most jurisprudence. Controversy erupted when Kinder Morgan decided to reroute the pipeline through Burnaby Mountain rather than a more residential area. The change led the NEB to request more information about route design, which required that the company perform seismic testing by drilling in the Burnaby Mountain Conservation Area. When Burnaby sought to block the drilling by enforcing its bylaws against that type of disruption without a permit, conflict erupted in the regulatory tribunal, in the courts, and on the ground.

Kinder Morgan appealed to the NEB, and the NEB, referring to the doctrines of federal paramountcy and interjurisdictional immunity, ruled that the National Energy Board Act clearly gave Kinder Morgan the authority to perform the testing without the consent of the local government. Burnaby appealed that ruling to the Federal Court of Appeal, but that court refused to grant leave to appeal several times. In response, Burnaby also appealed to the British Columbia Supreme Court. In December 2015, that court rejected Burnaby's argument. The court was clearly of the view that the case did not belong before it and called Burnaby's application "an abuse of process." Nevertheless, it gave reasons for its rejection, concluding that the doctrine of federal paramountcy was properly interpreted and applied by the NEB, stating: "Where valid provincial laws conflict with valid federal laws in addressing interprovincial undertakings, paramountcy dictates that the federal legal regime will govern. The provincial law remains valid, but becomes

inoperative where its application would frustrate the federal undertaking” (*Burnaby (City) v. Trans Mountain Pipeline ULC*, 2015 BCSC 2140).

As these cases were winding their way through the courts, resistance on the ground emerged once Kinder Morgan sought to begin the seismic testing. Protesters disrupted the activities as Kinder Morgan employees began work, and they established an encampment around Bore Hole 2, including a “sacred fire” being nurtured by local First Nations. For nearly a month, Burnaby Mountain became the site of daily protests against the pipeline and, eventually, the arrest of over 100 protesters, including several prominent SFU academics (Prystupa 2014). Kinder Morgan went to court to get an injunction preventing protesters from disrupting its testing activities and took the additional step of filing a civil suit against some of the protesters for damages resulting from project delays and harassment of workers.

While the threat of having significant damages leveled against them was alarming, the protesters also had a bit of fun with what they viewed as overreaction by the company. Part of the claim for damages was based on allegations of assault by protesters on Kinder Morgan workers, including any intimidating facial expressions. This provoked a social media campaign where numerous anti-pipeline advocates posted their own “#KMface” to express their anger at the prospects of pipeline construction (Burgman 2014). When it was revealed in court that the GPS coordinates for the work site given to the court and used as the basis for the injunction were incorrect, the judge threw out the charges against the protesters (Keller 2014). At that point, Kinder Morgan decided that it would not continue its case against them. Despite protests and the arrest of over 100 demonstrators in November and December 2014, the conflict quieted for over a year until Trans Mountain was approved in November 2016 and the company began preparing for construction around the terminal in mid-2017.

The Decision and Its Aftermath

Trudeau’s Announcement

In Trudeau’s approval speech of November 29, 2016, he emphasized his core rhetoric about the compatibility of environmental protection and economic growth. He pointed to the fact that his government “created a policy to put a price on pollution, and an Oceans Protection Plan to preserve our coasts.” In emphasizing the economic benefits, he said the project “will

give much needed new hope to thousands of hard-working people in Alberta's conventional energy sector, who have suffered a great deal over the past few years." But he also emphasized environmental protection, saying, "We approved this project because it meets the strictest of environmental standards, and fits within our national climate plan" (Trudeau 2016). He went out of his way to link the decision to Alberta's new climate plan: "And let me say this definitively: We could not have approved this project without the leadership of Premier Notley, and Alberta's *Climate Leadership Plan*—a plan that commits to pricing carbon and capping oilsands emissions at 100 megatonnes per year" (Trudeau 2016). He also spoke directly to those concerned with environmental values in British Columbia: "But to them—and to all Canadians—I want to say this: if I thought this project was unsafe for the BC coast, I would reject it. This is a decision based on rigorous debate, on science and on evidence. We have not been and will not be swayed by political arguments—be they local, regional or national" (Trudeau 2016).

More Conflict with Burnaby

One condition on the approval was that the company be required "to apply for, or seek variance from, provincial and municipal permits and authorizations that apply to the Project" (Bankes and Olszynski 2018). Conflict quickly developed over whether Burnaby was deliberately delaying the issuance of necessary permits. Kinder Morgan applied to the NEB to be exempted from the requirement to obtain certain permits, and requested the establishment of a "process for Trans Mountain to bring similar future matters to the Board for its determination in cases where municipal or provincial permitting agencies unreasonably delay or fail to issue permits or authorizations in relation to the Project" (National Energy Board 2017f).

In another major blow to municipal powers, the NEB ruled that, despite no evidence of "political interference or improper motives," Burnaby's processes "were not reasonable, resulting in unreasonable delay." That delay "constitutes a sufficiently serious entrenchment on a protected federal power." As a result, the NEB declared the Burnaby bylaws in question "inapplicable" (City of Burnaby 2018). Burnaby and the government of British Columbia applied for leave to appeal to the Federal Court of Appeal, but its applications were dismissed, again without any reasons given. In responding to this decision, Mayor Derek Corrigan took issue with the decision and announced that they would appeal to the Supreme Court of Canada:

The federal court has refused to review the decisions made by the National Energy Board. They're not giving consideration to the arguments being made by the City and the provincial government that oppose the NEB ruling. The Court System should be the body that decides whether or not this is fair and just, but they dismissed our application without reasons. Very clearly, it's something the court should have dealt with and given reasons why it's not allowing the provincial government to exert its authority to protect the environmental interests of the province. We will, therefore, now ask the Supreme Court of Canada to perform this function. (City of Burnaby 2018)

The city's news release emphasized that the NEB "found that there was no evidence of political interference or deliberate obstruction" (City of Burnaby 2018).

While the "only communities grant permission" slogan disappeared from the Trudeau government's discourse once it was in power, it became a staple of opposition discourse. It not only clearly articulates a standard requiring community support but also punctuates the hypocrisy of the Trudeau government. In response to the Trudeau government's approval of the Trans Mountain pipeline in November 2016, Burnaby mayor Derek Corrigan employed the slogan directly: "Prime Minister Trudeau said 'Governments grant permits; ultimately only communities grant permission.' We agree. He does not, however, have our permission and we will continue to make that clear" (City of Burnaby 2016).

Pipeline opponents have worked hard to mobilize affected communities against pipelines. For the most part, that opposition has been expressed politically, taking advantage of the ethic of community consent as well as the influence of local political leaders in swaying votes in elections in senior jurisdictions. The legal powers of municipalities are limited to local zoning and permitting authority. Burnaby's efforts to use those powers to throw a wrench in the gears of the Trans Mountain project have been resoundingly rejected by the NEB and the courts (Olszynski 2018), but they have contributed to delays and cost increases for the project and contributed to the political risks that forced Kinder Morgan to sell the project to the government of Canada.

The 2017 Election in British Columbia

Trudeau's decision marked what should have been the formal end to the political stage of this pipeline conflict. While at first it looked like Trudeau's announcement had ended the political stage, everything changed with the chaotic May 2017 provincial election in British Columbia. With Clark's

issuance of the environmental assessment certification in January 2017, the BC Liberals became enthusiastic champions of the pipeline project and denounced their opponents as “the parties of no.” The provincial NDP opposed the pipeline, promising in its platform to “use every tool in our toolbox to stop the project from going ahead” (British Columbia New Democratic Party 2017). The province’s Green Party also opposed the project.

The 2017 election failed to produce a majority government. The BC Liberals won 43 seats, one short of the 44 needed to form a majority. The NDP won 41, and the Greens won 3. Clark was given the opportunity to form a government, but the NDP and Greens teamed up to bring her party down in a nonconfidence motion. The two parties had agreed to a Confidence and Supply Agreement that committed them to cooperation so the NDP could govern with a minority (Shaw and Zussman 2018). The agreement committed the two parties to working together to “immediately employ every tool available to the new government to stop the expansion of the Kinder Morgan pipeline, the seven-fold increase in tanker traffic on our coast, and the transportation of raw bitumen through our province” (BC Green Caucus and the BC New Democrat Caucus 2017).

Once the NDP, with the support of the three members of the Green Party caucus, replaced the BC Liberals as the government of British Columbia, consultations with government lawyers convinced them that a commitment to “stop the pipeline” created legal risks for the province.⁶ Thus, when Premier Horgan sent mandate letters to his cabinet, the phrasing changed from “stopping the pipeline” to the much vaguer “defend BC’s interest” and “Employ every tool available to defend B.C.’s interests in the face of the expansion of the Kinder Morgan pipeline, and the threat of a seven-fold increase in tanker traffic on our coast” (Horgan 2017).

Constitutional Conflict between British Columbia and Alberta

Once they were in power, the BC NDP’s actions appeared tentative at first. As they unveiled their “tools,” they stuck to the rhetoric of either “defending BC’s interests” or “protecting the coast.” In August 2017, the government took the obvious step of seeking intervenor status in legal challenges against the project’s approval in the Federal Court of Appeal (British Columbia Ministry of Environment and Climate Change Strategy 2017).

However, the politics of structure escalated dramatically in January 2018, when British Columbia proposed a regulation to place “restrictions on the

increase of diluted bitumen ('dilbit') transportation until the behaviour of spilled bitumen can be better understood and there is certainty regarding the ability to adequately mitigate spills." The press release and background information were careful not to mention the Trans Mountain project and instead emphasized areas of concern within provincial jurisdiction: "The potential for a diluted bitumen spill already poses significant risk to our inland and coastal environment and the thousands of existing tourism and marine harvesting jobs. British Columbians rightfully expect their government to defend B.C.'s coastline and our inland waterways, and the economic and environmental interests that are so important to the people in our province, and we are working hard to do just that" (British Columbia Ministry of Environment and Climate Change Strategy 2018).

Within a week of this announcement, Alberta premier Rachel Notley, calling British Columbia's action an "unprovoked and unconstitutional attack," retaliated by banning British Columbia wines from the province. Three days later, Notley stated, "This is not a fight between Alberta and B.C. This is B.C. trying to usurp the authority of the federal government and undermine the basis of our Confederation" (Notley 2018a). A bit later, her criticism intensified: "That is completely unconstitutional, it's a made-up authority, it's a made-up law, it's ridiculous" (Rabson and the Canadian Press 2018).

After several weeks of heated rhetoric and threats of escalation, Premier Horgan decided to change course and refer the question of whether British Columbia had constitutional jurisdiction to regulate diluted bitumen to the courts. He stated, "We believe it is our right to take appropriate measures to protect our environment, economy and our coast from the drastic consequence of a diluted bitumen spill. And we are prepared to confirm that right in the courts" (British Columbia Office of the Premier 2018). Alberta responded by dropping its wine boycott. It took British Columbia two months to prepare the reference question to the British Columbia Court of Appeal, which it announced in April. In making the case for the reference question, Attorney General David Eby stated, "We believe B.C. has the ability to regulate movement of these substances through the province. This reference question seeks to confirm the scope and extent of provincial powers to regulate environmental and economic risks related to heavy oils like diluted bitumen" (Boothby 2018).

Earlier in April, in the midst of this constitutional sparring between British Columbia and Alberta, Kinder Morgan sent shock waves through the

Canadian political system by announcing it would cease all nonessential spending on the Trans Mountain Expansion Project. It issued an ultimatum giving governments in Canada until May 31 to resolve their differences in a way “that may allow the Project to proceed.” Their media release stated: “[We] have determined that in the current environment, we will not put KML shareholders at risk on the remaining project spend,” said KML Chairman and Chief Executive Officer Steve Kean. “The Project has the support of the Federal Government and the Provinces of Alberta and Saskatchewan but faces continued active opposition from the government of British Columbia. A company cannot resolve differences between governments. While we have succeeded in all legal challenges to date, a company cannot litigate its way to an in-service pipeline amidst jurisdictional differences between governments,” added Kean” (Kinder Morgan Canada 2018).

The company put the blame squarely on the government of British Columbia, saying, “Unfortunately BC has now been asserting broad jurisdiction and reiterating its intention to use that jurisdiction to stop the Project. BC’s intention in that regard has been neither validated nor quashed, and the Province has continued to threaten unspecified additional actions to prevent Project success. Those actions have created even greater, and growing, uncertainty with respect to the regulatory landscape facing the Project” (Kinder Morgan Canada 2018).

While the government under the BC NDP has been careful to modify its rhetoric somewhat since coming into power, pipeline proponents continue to refer back to the NDP’s preelection statement of intent. In its release announcing the ultimatum, Kinder Morgan stated, “Since the change in government in June 2017, that government has been clear and public in its intention to use ‘every tool in the toolbox’ to stop the Project” (Kinder Morgan Canada 2018).

In response to the ultimatum, Notley promised that “Alberta is prepared to do whatever it takes to get this pipeline built—including taking a public position on the pipeline. Alberta is prepared to be an investor in the pipeline” (Notley 2018b). On Twitter, she promised retaliation, stating, “We will be bringing forward legislation giving our gov’t the powers it needs to impose serious economic consequences on British Columbia if its government continues on its present course. Let me be absolutely clear, they cannot mess with Alberta” (Baldrey 2018). She also suggested that the conflict could amount to a constitutional crisis, saying, “There are those out there

who are, at this point, calling this . . . a constitutional crisis for the country. And I don't know really if that's too far off. If the federal government allows its authority to be challenged in this way, if the national interest is given to the extremes on the left or the right, and if the voices of the moderate majority of Canadians are forgotten, the reverberations of that will tear at the fabric of Confederation for many many years to come" (Hall 2018).

On April 16, 2018, Notley introduced Bill 12 (Preserving Canada's Economic Prosperity Act), which created an export license requirement for crude oil, natural gas, and refined fuels. It gave the minister of energy authority to deny the issuance of a license if "it is in the public interest of Alberta to do so" (Alberta Ministry of Energy 2018). In announcing her intention to introduce the legislation, Notley stated, "Alberta must have the ability to respond. This is not an action that anyone wants to take. And it is one that I hope we never have to take. And it's not how Canada should work. And it's not how neighbours, frankly, should treat one another" (Cryderman, Tait, and Hager 2018). Sarah Hoffman, Alberta's deputy premier, stated, "Their government has caused pain to Alberta families. We can certainly do the same, and we've put a bill on the order paper that enables us to do that" (Braid 2018). In a letter to David Eby, Alberta's minister of justice, Kathleen Ganley, declined to refer the legislation to the courts and stated, "Given B.C.'s transparent attempt to sow legal confusion by claiming constitutional authority it does not have in order to harass the pipeline investors into abandoning the project, the government of Alberta has a responsibility to its citizens to protect the interests of its citizens" (Attorney General of British Columbia 2018; Hunter 2018).⁷

In responding to the announcement, British Columbia's environment minister, George Heyman, expressed his dismay, saying, "I see no reason for the government of Alberta to take any action when all BC has been doing is standing up for our interests in proposing some regulations that are well within our jurisdiction. We are determined to defend our environment, our economy and our coastline. We have tried to be the adults in the room here" (Zussman 2018). On May 22, 2018, British Columbia launched a constitutional challenge to the Alberta legislation. In justifying the move, Eby decried the Alberta legislation as "blatantly unconstitutional" (Judd and Zussman 2018).

The legal confrontation between the provinces deescalated somewhat in May 2019, when the British Columbia Court of Appeal forcefully rejected British Columbia's reference question (Reference re Environmental Management Act [British Columbia]). The decision essentially ripped away the

legal foundation of British Columbia's capacity to block the pipeline, but before that legal question was settled, other events shifted the fate of the pipeline back to the federal government and federal courts.

The Government of Canada Buys Out Kinder Morgan Canada

Shortly after Kinder Morgan announced its ultimatum, Canada's finance minister, Bill Morneau, entered into negotiations with the company. After a month of apparently limited progress, he stated publicly that the Canadian government was prepared to offer Kinder Morgan, and any future owner of the project, indemnity for any financial losses resulting from political opposition by British Columbia's government.

Then, on May 29, 2018, the entire political economy of the oil sands policy regime underwent a seismic shift. Morneau made the stunning announcement that the government of Canada was purchasing Kinder Morgan Canada's Trans Mountain assets for \$4.5 billion. Alberta would also contribute up to \$2 billion to cover costs resulting from "unforeseen circumstances" (Department of Finance Canada 2018).

In her comments, Notley referred to the project as nation building three times and emphasized its pan-Canadian support and benefits, saying, "I believe in Canada, not just as a concept, but as a country" (Notley 2018c). With the project now government owned, the government of Canada's stakes in its success increased, which could bolster the political image of the project. But it didn't change the constitutional conflicts or how they were being framed by competing interests in the pipeline dispute.

In response to the federal government's buyout, Premier Horgan made it clear that this did not change British Columbia's position: "It's not about politics. It's not about trade. It is about British Columbians' right to have their voices heard. To do so is squarely within our rights as a province, and our duty as a government. Ottawa has acted to take over the project. . . . At the end of the day, it doesn't matter who owns the pipeline. What matters is protecting B.C.'s coast—and our lands, rivers and streams—from the catastrophic effects of an oil spill" (Horgan 2018).

Courts Grant Anti-pipeline Coalition Major Victory

The judicial stage was formally initiated with a series of legal challenges from First Nations, environmentalists, and municipalities. In total, there were 15 challenges to the adequacy of the NEB review process and the

Trudeau government's order in council. The challenges were filed by 10 separate plaintiffs: seven First Nations,⁸ Raincoast Conservation Foundation and Living Oceans Society, and the cities of Burnaby and Vancouver. The Federal Court of Appeal chose to consolidate the challenges and consider them together. Hearings were held in October 2017. Reflecting the complexity of the case, the hearings were the longest in the court's history (West Coast Environmental Law 2017). The previous record was held by the case involving Northern Gateway, *Gitxaala v. Canada*.

The oil sands coalition received another fundamental shock in *Tsleil-Waututh Nation v. Canada (Attorney General)*. In a decision released August 30, 2018, the Federal Court of Appeal again quashed the certificate of a pipeline to the West Coast. This outcome surprised many because the Trudeau government claimed to have learned from, and be applying the principles of, the *Gitxaala* case involving the Northern Gateway Pipeline. In its decision, the court noted that the federal government had taken some specific steps to ensure "that the flaws identified by the Court in *Gitxaala* were remedied and not repeated," and the court agreed that there were "significant improvements in the consultation process" (*Tsleil-Waututh Nation v. Canada (Attorney General) 2018*).

Nonetheless, the court found that the consultation was "unacceptably flawed and fell short of the standard prescribed by the jurisprudence of the Supreme Court." In making the finding, the court emphasized the importance of "meaningful two-way dialogue":

I begin the analysis by underscoring the need for meaningful two-way dialogue in the context of this Project and then move to describe in more detail the three significant impediments to meaningful consultation: the Crown consultation team's implementation of their mandate essentially as note-takers, Canada's reluctance to consider any departure from the Board's findings and recommended conditions, and Canada's erroneous view that it lacked the ability to impose additional conditions on Trans Mountain. I then discuss Canada's late disclosure of its assessment of the Project's impact on the Indigenous applicants. Finally, I review instances that show that as a result of these impediments the opportunity for meaningful dialogue was frustrated (*Tsleil-Waututh Nation v. Canada (Attorney General) 2018*).

In addition to the flaws in the First Nations consultation, the court also ruled on the NEB's choice to exclude marine shipping issues in its definition of the project: "The Board unjustifiably defined the scope of the Project under review not to include Project-related tanker traffic. The unjustified

exclusion of marine shipping from the scope of the Project led to successive, unacceptable deficiencies in the Board's report and recommendations. As a result, the Governor in Council could not rely on the Board's report and recommendations when assessing the Project's environmental effects and the overall public interest" (*Tsleil-Waututh Nation v. Canada (Attorney General)* 2018).

The year 2018 was a tumultuous one for the Trans Mountain project. The political obstacles created by the anti-pipeline coalition forced Kinder Morgan, the original proponent, to abandon the project. The federal government stepped in to take it over. Now the project's approval had been quashed by the Federal Court of Appeal. Having doubled down on the project by nationalizing, the Trudeau government did not believe it could afford to walk away.

Reconsideration and Reapproval

The federal government acted quickly to start a new process. On September 20, 2018, the government referred the project back to the NEB for reconsideration of project-related marine shipping, including its effects on southern resident killer whales. The reconsideration was an accelerated review, and the NEB issued a new recommendation on February 22, 2019. The NEB concluded that the project "is likely to cause significant adverse environmental effects on the Southern resident killer whale" but recommended the project be approved, again, because it believes those effects "can be justified in the circumstances, in light of the considerable benefits of the Project and measures to minimize the effects" (National Energy Board 2019). While the NEB reviewed the marine impacts, Trudeau appointed a former Supreme Court justice, Frank Iacobucci, to oversee the consultation process with Indigenous groups.

As expected, the Trudeau government reapproved the project on June 18, 2019. The announcement of the decision came with an interesting political twist: the approval announcement contained the commitment "that every dollar the federal government earns from this project will be invested in Canada's clean energy transition" (Trudeau 2019). As expected, Indigenous groups and environmentalists challenged the decision in court, so the project was sent back into another legal stage.

The reapproval decision was challenged again in the courts. The Federal Court of Appeal refused to hear the challenge from environmental groups, but it did hear the challenge from four First Nations about the adequacy

of consultation. In a major victory for the oil sands coalition, the court rejected the First Nations' complaints and upheld the reapproval decision. The court ruled that the government's purchase of the pipeline project did not create any conflict of interest that undermined its capacity to deliberate fairly, saying that "there is no evidence that the Governor in Council's decision was reached by reason of Canada's ownership interest rather than the Governor in Council's genuine belief that the Project was in the public interest" (*Coldwater et al. v. Canada (Attorney General) et al.*, 2020 FCA 34, paragraph 23). The court held that the government had clearly met its obligations: "In this case, the Governor in Council's key justifications for deciding as it did are fully supported by evidence in the record. The evidentiary record shows a genuine effort in ascertaining and taking into account the key concerns of the applicants, considering them, engaging in two-way communication, and considering and sometimes agreeing to accommodations, all very much consistent with the concepts of reconciliation and the honour of the Crown" (*Coldwater et al. v. Canada (Attorney General) et al.*, 2020 FCA 34, paragraph 76).

The court reiterated that the Crown's consultational obligation was not equivalent to the right to consent: "Canada was under no obligation to obtain consent prior to approving the Project. That would, again, amount to giving Indigenous groups a veto" (*Coldwater et al. v. Canada (Attorney General) et al.*, 2020 FCA 34, paragraph 194). The decision has been appealed to the Supreme Court of Canada, but the Supreme Court declined to hear the case, bringing apparent legal finality to the dispute (Supreme Court of Canada 2020).

Conclusion

The Trans Mountain Expansion Project was the third, and ultimately most explosive, of the oil sands pipeline controversies that emerged in the United States and Canada in the 2010s. Of the four, it was the one that faced the fewest apparent political risks. There was no international border in question, as with Keystone XL, and most of the project followed an existing right-of-way, unlike Northern Gateway. Yet a stark separation of risks and benefits across a provincial boundary, and significant place-based concerns, helped mobilize opposition.

The controversy has altered the policy regime and created some unusual bedfellows, given historical federal-provincial conflict over energy policy in Canada. The core antagonists in the conflict over the 1980 National Energy

Program were the federal government of Pierre Trudeau and the government of Alberta. The curious politics of Trans Mountain turned the government of Alberta into an enthusiastic champion of the national interest and federal authority and, for a time at least, a pivotal ally with the federal government of the elder Trudeau's son.

Justin Trudeau's nationalization of the Trans Mountain project was more than just a victory for the oil sands coalition. It was a transformation of the political economy of the oil sands policy regime. The government of Canada moved from being a regulator to an owner of a major oil sands asset. Because the federal government now has a much more direct financial interest in the profitability not just of the project but of the Albertan oil sector, it has shifted its core incentives with respect to regulation. The Canadian government's financial interest will likely make it even more reluctant to take regulatory actions that increase costs of production. This includes environmental protection measures needed to improve the sustainability of the oil sands, such as actions to reduce GHGs, protect caribou habitat, or reduce and clean up tailings ponds. With its purchase of the pipeline, the federal government of Canada is now at the core of the pipeline oil sands coalition.

Even more so than the other cases, Trans Mountain provoked a contentious politics of structure, as predicted by the third behavioral hypothesis. Multiple strategic actors competed for institutional authority, with courts frequently acting as the ultimate arbiter. Harper sought to advance his pro-industry agenda by restructuring regulatory reviews, tightening deadlines, and narrowing participation. Environmentalists sought to challenge these restrictions in court, but to no avail. While Harper sought to exert more direct political control, the government of British Columbia worked to evade direct responsibility by deferring to the federal process. A lawsuit by First Nations provoked a court to strike down that equivalency agreement and hand some decision-making authority back to the provincial government. Local governments in the Vancouver area tried to use their zoning and bylaw powers to assert jurisdiction, but that effort was also rebuffed by the courts. First Nations seem intent on leveraging pipeline resistance to acquire greater control over decision-making on their traditional territories.

The 2017 election of a BC NDP government opposed to the pipeline challenged the extent of federal authority over pipeline decision-making and provoked a political and constitutional conflict with the government

of Alberta. Interprovincial tensions have calmed, legally at least, with the British Columbia Court of Appeal's forceful rejection of British Columbia's authority to block increases in shipments of diluted bitumen. The Federal Court of Appeal's rejection of challenges to the reapproval decision, and the Supreme Court's apparent validation of that decision, was a major breakthrough for the oil sands coalition. As of the end of 2020, the pipeline is in the early stages of construction. More of the policy and political consequences of the Trans Mountain Expansion Project will be described in chapter 8, after the fourth and final pipeline case study is presented.