

June 15, 2016

The Right Honourable Justin Trudeau, Prime Minister of Canada
Office of the Prime Minister
80 Wellington Street
Ottawa, ON K1A 0A2

The Honourable Rachel Notley, Premier of Alberta
Office of the Premier
307 Legislature Building
10800 - 97 Avenue
Edmonton, Alberta T5K 2B6

The Honourable Christy Clark, Premier of British Columbia
Office of the Premier
West Annex, Parliament Buildings
Victoria, BC V8V 1X4

**Attention: The Right Honourable Justin Trudeau, The Honourable Rachel Notley and
The Honourable Christy Clark**

Dear Mr. Trudeau, Ms. Notley and Ms. Clark,

Re. Consultation, Indigenous Consent and the Trans Mountain Expansion Project

We are a collective of Indigenous leaders representing Nations impacted by Kinder Morgan's Trans Mountain Expansion Project (TMX). As you know, on May 19, 2016, the National Energy Board recommended the conditional approval of TMX subject to 157 conditions.

We are writing to advise you that engagement of our Nations with respect to TMX has been woefully inadequate and not in line with your respective governments' constitutional and international obligations.

Domestic Law

Based on *Haida Nation* and other related court decisions, the law in Canada is clear that prior to proof of Aboriginal rights and title, your governments have an obligation to consult with our Nations whenever you *contemplate* a decision that *may* impact our asserted Aboriginal rights and title. The content of this duty varies with the circumstances, but the evidence is clear that TMX could have a significant adverse effect on our strong claims of Aboriginal rights and title, and therefore your governments are at a minimum required to engage our Nations in "deep consultation".

Based on *Tsilhqot'in* and other related court decisions, the law in Canada is also clear that following proof of Aboriginal rights and title, in the absence of Aboriginal consent, your governments must justify any infringement of our proven interests. Where there is no Aboriginal consent, and where the infringement cannot be justified, projects that have been previously approved may be required to be cancelled.

The federal government has recently commenced what it calls “consultation” by sending representatives of Natural Resources Canada to attend meetings in some of our communities along the pipeline. We have also learned of the potential for further meetings with a newly constituted “Ministerial panel”. These meetings may be an avenue to open discussions, but they do not, in our view, come close to satisfying the federal government’s obligations with respect to the very serious question of whether TMX should be approved.

British Columbia has only recently (and reluctantly) begun its own engagement process on TMX following prompting from the BC Supreme Court in the recent *Coastal First Nations* decision. We fully expect British Columbia to meet its legal obligations in good faith and to carry out a meaningful engagement process. Thus far, British Columbia’s efforts in this respect have been insufficient.

Alberta has been completely absent from consultation efforts to date. It is important for Ms. Notley to understand that the constitutional obligation of provincial governments to consult with Aboriginal people does not stop at provincial borders. Alberta has and continues to routinely make decisions about the extraction of bitumen and other petroleum products knowing full well that those products will pass through our territories and potentially impact our rights and title. Despite this, not one of our Nations has ever been approached by Alberta seeking to understand and mitigate the potential impacts of Alberta’s decisions on our rights and title. We are putting you on notice that this illegal action needs to stop.

Finally, all actual and proposed consultative activities that have been proposed to date have been in a pre-determined, one-size-fits-all form. Good faith engagement of Aboriginal people with respect to TMX must involve input from us regarding format, terms of reference and content. In order for your governments to make a legally defensible decision regarding TMX, you must first discuss with our Nations exactly what form consultation on that decision should take. This very preliminary step has yet to happen in a meaningful way.

International Obligations

In addition to the requirements established by Canadian courts, the federal government has recently adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In the words of Indigenous Affairs Minister Carolyn Bennett, Canada is “now a full supporter of the declaration, without qualification.” In some cases, full and good faith implementation of UNDRIP requires the federal government to seek or work in good faith to obtain the free, prior and informed consent (FPIC) of Indigenous people.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 32.2

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

Importantly for TMX, which will involve the transportation and storage of hazardous materials on our territories, Canada's obligations under Article 29.1 of UNDRIP go further than a mere need to "seek" or "consult and cooperate in good faith ... to obtain" our consent. Article 29.1 of UNDRIP requires you to take effective measures to ensure that bitumen and other petroleum products are not stored on our territories without our consent.

Article 29.1

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

All of these consent requirements are prospective: in order for Canada and the Provinces to issue any approvals for TMX, you must first seek and obtain our consent. However, there is also the issue of the development of the original Trans Mountain Pipeline, which occurred without our consent. In this regard, these historic confiscations and use of our lands require redress, restitution and compensation:

Article 28.1

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

This Article is consistent with the law of Canada: *Rio Tinto*, *Haida* and other related cases clearly state that damages may be an appropriate remedy for past infringements of an Aboriginal group's title and rights, including past failures to consult and accommodate asserted title and rights.

To date, no level of government in Canada has sought or obtained our free, prior and informed consent to TMX. Moreover, there has been no redress, restitution or compensation for historic confiscation and use of our lands.

Correcting the Process

To be clear: in our view, approval of TMX by any Canadian government requires our free, prior and informed consent. Yet not only have Canadian governments failed to obtain our consent, they have failed to discharge even the most basic of their obligations under Canadian law regarding consultation with Aboriginal groups. On this basis, if the *status quo* continues, we do not see how any decision regarding TMX can withstand any sort of judicial scrutiny.

We have grave concerns about both TMX and the existing Trans Mountain pipeline. These concerns have not been appropriately canvassed to date. These concerns are as unique to each Nation as is that Nation's connection to the land, and cannot be appropriately canvassed in one-size-fits-all meetings with Natural Resources Canada or the Ministerial Panel, which have been unilaterally designed and scoped by Canada.

Accordingly, the first step to correcting the TMX engagement process is to meet with us as a collective to discuss the format, terms of reference and content of the consultative process.

Without this foundation being laid, any subsequent consultation process is indefensible. As part of these discussions, the role of UNDRIP must be addressed, including how free, prior and informed consent will be reflected in any approval of TMX. FPIC involves not only obtaining our consent, but also a process that is guided by our needs and interests, with detailed information provided to us about the proposed project on timelines that are respectful of our values and institutional requirements.

At this stage, we have held preliminary internal discussions on strategies for mitigating the impacts of both the existing pipeline and the TMX throughout our territories. For example, given the Auditor General of Canada's recent findings that the NEB has failed to adequately track implementation of approval conditions or ensure regulatory compliance, we intend to propose creating an Indigenous led independent safety and environmental oversight body with participation from all Nations affected by the existing pipeline and the TMX. It is clear to us that the NEB cannot be entrusted to protect our Nations' interests and there are ample precedents for successful Indigenous led oversight throughout various industries and jurisdictions.

This concept of Indigenous oversight is presented on a without-prejudice basis, and you should not infer that accepting it will result in our consent or that it, in and of itself, will be acceptable to our constituents. Rather, we include it in this letter to demonstrate the type of potential mitigation initiatives that could begin to satisfy your constitutional and international obligations to our Nations.

For the purposes of this initial engagement, please address all communication to the leaders listed below who have been identified as the initial members of our engagement working group:

Chief Aaron Sam
Lower Nicola Indian Band
181 Nawishaskin Lane
Merritt, BC V1K 0A7

Chief Ernie Crey
Cheam First Nation
52130 Old Yale Road
Rosedale, BC V0X 1X1

We look forward to hearing from you on or before July 29, 2016.


Yours Truly,

LOWER NICOLA INDIAN BAND

Per: 

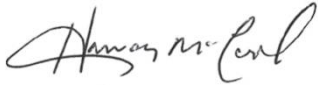
Chief Aaron Sam

CHEAM FIRST NATION

Per: 

Chief Ernie Crey

UPPER NICOLA BAND

Per: 
 Chief Harvey McLeod

OKANAGAN INDIAN BAND

Per: 
 Chief Byron Louis

ADAMS LAKE INDIAN BAND

Per: 
 Chief Robin Billy


NICOMEN INDIAN BAND

Per: 
 Chief Ursula Drynock


CHEMAINUS FIRST NATION

Per: 
 Chief Ray Harris


SKIDEGATE BAND

Per: 
 Councillor Trent Moraes

NESKONLITH INDIAN BAND

Per: 
 Chief Judy Wilson

LOWER SIMILKAMEEN INDIAN BAND

Per: 
 Chief Keith Crow


KWAKIUTL FIRST NATION

Per: 
 Chief Leslie Dickie

COOK'S FERRY INDIAN BAND

Per: 
 Chief David Walkem


SHACKAN INDIAN BAND

Per: 
 Chief Percy Joe


BONAPARTE INDIAN BAND

Per: 
 Chief Ryan Day


MOWACHAHT/MUCHALAHT FIRST NATION

Per: 
 Chief Ben Jack

NADLEH WHUT'EN FIRST NATION

Per: 
 Chief Larry Nooski

LYACKSON FIRST NATION

Per: 
 Chief Richard Thomas

LIL'WAT NATION

Per: 
 Chief Dean Nelson


YAKWEAKWIOOSE FIRST NATION

Per: 
Chief Frank Malloway


SISKA INDIAN BAND

Per: 
Chief Fred Sampson

XENI GWET'IN FIRST NATION

Per: 
Councillor and former Chief Marilyn Baptiste

KLAHOOSE FIRST NATION

Per: 
Chief James Delorme


KWIKWASUT'INUXW HAXWA'MIS FIRST NATION

Per: 
Chief Robert Chamberlin

SUMAS FIRST NATION

Per: 
Chief Dalton Silver

SKEETCHESTN INDIAN BAND

Per: 
Chief Ron Ignace

STZ'UMINUS FIRST NATION

Per: 
Chief John Elliott

TS'KW'AYLAXW FIRST NATION

Per: 
Chief Francis Alec

SHXW'OWHAMEL FIRST NATION

Per: 
Councillor Clara Anne Paull

NOOAITCH INDIAN BAND

Per: 
Chief Marcel Shackelly

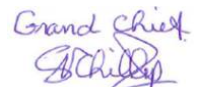
GWAWAENUK TRIBE

Per: 
Chief Charlie Williams


LHOOSK'UZ DENÉ NATION

Per: 
Chief Liliane Squinas


OKANAGAN INDIAN ALLIANCE

Per: 
Grand Chief Stewart Phillip


SNUNEYMUXW FIRST NATION

Per: 
Chief John Wesley

NANOOSE FIRST NATION

Per: 
Councillor Cheryl Jones


LOWER KOOTENAY BAND

Per: 
Chief M. Jason Louie

CHAWATHIL FIRST NATION

Per: 
Chief Rhoda Peters

SQUAMISH NATION

Per: 
Chief Richard Williams


SONGHEES FIRST NATION

Per: 
Councillor Garry Albany

TOBACCO PLAINS INDIAN BAND

Per: 
Councillor Corey Letcher

WET'SUWET'EN FIRST NATION

Per: 
CHIEF NA'MOKS
Chief Na'moks (John Ridsdale)

SPLATSIN FIRST NATION


Per: 
Chief Kukpi7 Christian

Per: 
Sub Chief George William

KWANTLEN FIRST NATION

Per: 
Councillor Les Antone


KATZIE FIRST NATION

Per: 
Chief Susan Miller

MORICETOWN BAND

Per: 
Deputy Chief Sheri Green

NAK'AZDLI WHUT'EN FIRST NATION

Per: 
Chief Fred Sam


LAKE BABINE NATION

Per: 
Chief Wilf Adam

QUATSINO FIRST NATION

Per: 
Chief James Nelson

TL'ESQOX FIRST NATION

Per: 
Chief Francis Laceese

Per: 
Ambassador Peyal Laceese