

KAWASKIMHON NATIONAL ABORIGINAL MOOT 2024

MOOT PROBLEM

Pípsell – Brief Overview

On June 18, 2019, the Government of Canada approved the Trans Mountain Expansion Project¹ which is essentially the twinning of an existing pipeline between Strathcona County, Alberta (near Edmonton) and Burnaby, British Columbia (the “Project”).

On September 25, 2023, Trans Mountain Corporation (“TMC”) received approval from the Canada Energy Regulator (“CER”) for its proposed 1.3 km long deviation² to pipeline routing (the “Deviation”) within the previously agreed to right-of-way. Both the existing right-of-way and the Deviation are located on Stk’emlúpsenc te Secwépemc Nation (“SSN”) lands near Pípsell (also commonly referred to as, Jacko Lake, but hereinafter referred to as “Pípsell”).³ Pípsell⁴ is located near Tkemlúps te Secwépemc (“TteS”) and Kamloops, British Columbia, Canada.

Please refer to the attached - **Appendix A: Maps & Images**.

SSN is a division of the Secwépemc Nation comprised of First Nations: TteS and Skeetchestn. The bands established the SSN, in part, to negotiate matters such as this on their respective behalf.

The SSN has interpreted CER’s approval of the Deviation as the re-opening of an agreement reached in or around October 2019, wherein SSN and TMC negotiated a mutual benefits agreement (“MBA”) regarding the Project.⁵ It was determined that new routing and micro-tunnelling was an acceptable form of trenchless construction in the Pípsell area, which includes the Pípsell Corridor and the broader surrounding areas (the “Pípsell Area”).⁶ However, micro-tunnelling was short lived, as TMC determined it not to be economically and technically feasible.⁷

In submissions to CER, TMC requested the change in route due to construction difficulties encountered during micro-drilling. If the request was not approved, TMC forecasted a change in

¹ Trans Mountain, “Expansion Project”, online: <transmountain.com/project-overview>.

² Aaron Hemes, “Regulatory hearings begin as TMX seeks to dig open trench through sacred Secwépemc site” (18 September 2023), online: <indiginews.com/news/regulatory-hearings-begin-as-tmx-seeks-to-dig-open-trench-through-sacred-secwepemc-site>.

³ Trans Mountain, “Canada Energy Regulator Issues Decision on Trans Mountain’s Deviation Application” (26 September 2023), online: <transmountain.com/news/2023/canada-energy-regulator-issues-decision-on-trans-mountains-deviation-application>.

⁴ Stk’emlúpsenc te Secwépemc Nation (“SSN”), “Honouring Our Sacred Connection to Pípsell - Stk’emlúpsenc te Secwépemc Says Yes to Healthy People and Environment”, online (pdf): <stkemlups.ca/wp-content/uploads/2013/11/2017-03-ssnajaxdecisionsummary_0.pdf>.

⁵ *Supra* note 2.

⁶ *Ibid.*

⁷ *Ibid.*

the operational dates for the pipeline as well as project cost increases.⁸ To date, the project originally purchased by the Federal government at a price tag of around \$4.5 billion has ballooned in cost to \$30.9 billion, with costs still rising.⁹

It is not the first time Pípsell has been proposed as a development site. In 2017, the KGHM-Ajax Copper and Gold Mine was proposed to be developed in the Pípsell Area.¹⁰ On March 4th, 2017, SSN announced that it unequivocally opposed the proposed project. The SSN stated that it did not give its free, prior, and informed consent. Its decision came after a long and considered review of the mine proposal and was backed by over 30 local, provincial, and national organizations, which supported SSN's claims that the mine would cause irreparable harm to Pípsell and the surrounding grasslands.¹¹

Similarly, SSN opposes TMC's recent proposed deviation plan at Pípsell. In a Statement of Opposition, SSN asserted their Aboriginal rights and title to the unceded territory (which includes the area of TMC's proposed deviation to the pipeline routing).¹² SSN was explicit in explaining the spiritual and cultural significance of Pípsell, which includes the broader surrounding Pípsell Area.¹³ SSN is the steward of the Pípsell Area¹⁴ and the people that the SSN represents rely on their ancestral, cultural, and spiritual connection to the Pípsell Area as

⁸ Osler, Hoskin & Harcourt LLP, "Letter to Canada Energy Regulator," (10 August 2023), online (pdf): <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/3781642/3808974/3808419/4398997/C25832-1_Section_211_Deviation_Application_%28PPBoR_M002-PM03011-014%29_-_A8S0Q0.pdf?nodeid=4397153&vernum=-2>.

⁹ Andrew McIntosh, "No deep dive into Trans Mountain Pipeline cost overruns: Canadian regulator" (13 October 2023), online: <globalnews.ca/news/10022611/trans-mountain-pipeline-cost-overruns-canadian-regulator>

¹⁰ Alessia Passafiume, "Trans Mountain pipeline's route change threatens sacred site, says Secwepemc knowledge keeper - Destruction of the site is a continuation of cultural genocide: knowledge keeper" (8 October 2023), online: <cbc.ca/news/canada/calgary/trans-mountain-route-change-1.6990581>.

¹¹ Adam Donnelly, "SSN designates Jacko Lake as heritage site (20 June 2017), online: <cfjctoday.com/2017/06/21/ssn-designates-jacko-lake-as-heritage-site/>.

¹² Sarah Hansen, Miller Thomson, "National Energy Board - Trans Mountain Pipeline ULC ("Trans Mountain") Trans Mountain Expansion Project (the "Project") Statement of Opposition to the Detailed Route (the "Detailed Route") Application" (24 April 2017), online (pdf): <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/3781889/3422725/3421973/3422408/3422231/3253477/A82838-1_SSN_Statement_of_Opposition_Letter_-_A5K7I6.pdf?nodeid=3252985&vernum=-2> at 2.

¹³ Joelle Walker and Hannah Park Roche, "Stk'emlúpsmc te Secwépemc Nation ("SSN") and its constituent First Nations in response to Trans Mountain Corporation's ("Trans Mountain") application pursuant to section 211 of the Canadian Energy Regulator Act" - "Written Response of Stk'emlúpsmc Te Secwépemc Nation to Trans Mountain Corporation's Deviation Application" (28 August 2023), online (pdf): <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/130635/4402542/C25999-2_SSN_Response_to_Trans_Mountain_s_Deviation_Application_-_A8S3E4.pdf?nodeid=4402209&vernum=-2> at para 9.

¹⁴ *Ibid* at para 8.

the basis for their legal and spiritual obligation to protect the area.¹⁵ As such, SSN will not support or consent to any construction that will harm the Pípsell Area.¹⁶

Canadian Energy Regulator (“CER”) - Recent Trans Mountain Pipeline Decision

Counsel for TMC maintained that TMC’s proposed deviation has numerous benefits, including that it represents the best route and construction methodology.¹⁷ Counsel further contended that handing over control to SSN of the pipeline’s route through SSN territory would cause potential delays and, as such, be antithetical to reconciliation.¹⁸ Such delays could have adverse impacts for other Indigenous communities with stakes in the Project.¹⁹

The Federal government’s Crown-Indigenous Relations Minister Gary Anandasangaree said “he doesn't 'want to pass the buck,' but said the decision was not in his purview. He noted government departments and agencies are required to follow the United Nations Declaration on the Rights of Indigenous Peoples.”²⁰

The SSN has taken the proactive approach of bringing parties, stakeholders and advisors together for a without prejudice discussion to implement UNDRIP in a meaningful and accountable manner using Pípsell as a model for future Indigenous governance relations.

¹⁵ *Ibid* at para 10.

¹⁶ *Ibid* at para 29.

¹⁷ Aaron Hemens, Regulator approves TMX plan to trench through ‘extremely sacred’ Secwépemc site (26 September 2023) online: <indiginews.com/features/regulator-approves-tmx-to-trench-through-extremely-sacred-secwepemcsite>.

¹⁸ *Ibid*.

¹⁹ *Ibid*.

²⁰ *Supra* note 10.

Objective of the Moot

SSN is looking for a new governance framework for Pípsell, including the Pípsell Corridor and the Pípsell Area. A proposed governance framework could be more comprehensive for their overall territory.

Recently, the governments of British Columbia and Canada have been working on Tripartite Framework Agreements with Indigenous nations in BC.²¹ In addition, many Indigenous nations have reached or been working on achieving agreements with municipalities and regional public governments.²² SSN is considering any arrangements ranging from sectoral agreements to self-government agreements,²³ or any other potential frameworks²⁴ to advance the recognition and implementation of SSN's Indigenous rights and self-determination.

The objective of the Kawaskimhon Moot (the "Moot") is for the parties to reach consensus. The position paper of each party provides a starting point and foundation on which to begin the negotiations. The position paper needs to consider governance and models for implementation and may consider some of or all the following issues:

- Indigenous Rights & Title including Consultation and Accommodation
- Indigenous laws (Indigenous ways of knowing and being)
- Natural Resources Development: Mining, Oil & Gas, Forestry, etc.
- Land Management
- *UNDRIP Act*, SC 2021, c 14 & the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 ("DRIPA")
- Economic Development
- Reconciliation
- Environmental Rights; Wildlife Rights; Land Rights; Human Rights; Overlapping Territories; Hereditary Chief issues (if any)

The key objective is to negotiate and finalize an agreement with terms that are agreed to by all participating parties. Particular facts may not necessarily satisfy a particular legal test raised, but this does not necessarily preclude a term of agreement that may depart from the parameters of

²¹ For example: Government of Canada, "Tripartite Framework Agreement on Nature Conservation between Canada, British Columbia, and the First Nations Leadership Council," (3 November 2023), online: <canada.ca/en/environment-climate-change/services/integrated-nature-initiatives/nature-agreements/canada-british-columbia-nature-agreement.html>.

²² For example: Lieutenant Governor of British Columbia & BC Achievement Foundation, "Tk'emlúps te Secwépemc and the City of Kamloops", online: <ltgov.bc.ca/tkemlups-te-secwepemc-and-the-city-of-kamloops/>.

²³ Jody Wilson-Raybould & Tim Raybould, *Governance Toolkit: A Guide to Nation Building*, 2nd ed (2014), online (pdf): <bcafn.ca/sites/default/files/docs/Governance-Toolkit.pdf>.

²⁴ Kent McNeil & NCFNG research staff, "A Brief History of Our Right to Self-Governance Pre-Contact to Present" (Centre for First Nations Governance, 2007), online: <issuu.com/fngovernance/docs/brief_history>. For example: Province of British Columbia, "Tsilhqot'in National Government Agreements," *Province of British Columbia* online: <www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/tsilhqot-in-national-government>.

the legal test. Negotiations can involve either compromise or hard-line decisions. These choices should reflect on how moot participants imagine the parties they represent would think, strategize, or negotiate.

Those who reside in Canada, for the most part, live, work and play in a colonial system. Law schools across the country teach the common law and/or civil law, as the case may be, with limited or no incorporation of Indigenous law into their curricula. Many law school moot competitions operate within the same colonial structure. In saying this, the Kawaskimhon Moot is an opportunity to do things differently! The Indigenous peoples who have lived on and cared for these lands since time immemorial were and are governed by their own sacred laws long before the first settler arrived on the shores of what would eventually be referred to as Canada. As such, moot participants are encouraged to reimagine Canadian law and how it is applied to Indigenous peoples in this country. In an effort to restore and revitalize* Indigenous law**, where appropriate and respectful, consider applying and incorporating Indigenous law to the moot problem.

*The words “restore” and “revitalize” are not used to imply that Indigenous law has gone extinct and needs to be brought back to life. Indigenous people across this country continue to use their own unique laws every day. Instead, these words are used to recognize that Indigenous law is rarely applied in the Canadian legal context, and that this Moot offers the opportunity to have Indigenous law as the focus, rather than being a secondary or nonexistent consideration.

**Indigenous law should not be viewed through a pan-Indigenous lens. There are a multitude of different Indigenous groups and nations throughout the country, each with varying and beautiful versions of their own Indigenous legal orders, customs, and traditions. The Kawaskimhon Moot presents a unique opportunity to look at the problem with an eye to Indigenous ways of knowing, being and doing, in an effort to demonstrate how Indigenous law can only serve to better and improve the Canadian legal system.

Counsel will represent the following parties at each table:

1. Stk'émłúpsmc te Secwépemc Nation (“SSN”): initially, began their work in the 1800's with eight tribes. Today, only two of the original eight remain, namely TteS and Skeetchestn.²⁵

The Tk'emlúps, 'the people of the confluence,' now known as TteS are members of the Interior-Salish Secwépemc (Shuswap) speaking peoples of British Columbia. The Band currently has approximately 1,500 members living on and off its 33,000-acre (130 km²) reserve. The reserve supports a variety of uses including residential, industrial, commercial, and agricultural. In 1999, the Kamloops Indian Band (as it was then known) purchased Harper Ranch, now known as Spiyu7ullucw Ranch Corporation, which added 20,000 acres of fee simple land and Crown leases for resource development and other economic opportunities. They have created over 200 direct jobs, generated \$200 million in regional economic activity, and pioneered the development of the First Nations Taxation Commission (FNTC) re-established under the First Nations Fiscal Management Act (FMA).²⁶

For the Skeetchestn peoples, before the establishment of the reserve in 1877, their ancestors wintered in many pit house villages along both sides of Kamloops Lake, and for a distance below the outlet of the Lake. The Band currently has approximately 570 members living on and off its 8,038 hectare reserve. A co-venture agreement with Chai-Na-Ta for the cultivation of ginseng was signed in 1996. The first 50 of a total of 544 acres of ginseng was seeded in the fall of 1996. Property located by Trans-Canada Highway 1 is slated for further ginseng cultivation, as well as a gas outlet and convenience store that have now been established.²⁷

2. Government of Canada - Crown-Indigenous Relations and Northern Affairs Canada (“CIRNAC”): continues to renew the nation-to-nation, Inuit-Crown, government-to-government relationship between Canada and First Nations, Inuit and Métis; modernize Government of Canada structures to enable Indigenous peoples to build capacity and support their vision of self-determination and lead the Government of Canada's work in the North.²⁸ CIRNAC is in charge of bringing Land Governance Agreements into force.

However, the department must balance all Federal government priorities. For example, Natural Resources Canada develops policies and programs that enhance the contribution of the natural resources sector to the economy and is committed to improving the quality of life of Canadians by ensuring the country's abundant natural resources are developed sustainably, competitively, and inclusively.²⁹

²⁵ Tk'émłúps te Secwépemc: Stk'émłúpsmc te Secwepemc, online: <stkemlups.ca/history/>.

²⁶ *Ibid*: <tkemlups.ca/>.

²⁷ Skeetchestn Indian Band, online: <skeetchestn.ca/history/#>.

²⁸ Government of Canada - Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), online: <canada.ca/en/crown-indigenous-relations-northern-affairs.html>.

²⁹ Government of Canada - Natural Resources Canada, online: <natural-resources.canada.ca/home>.

3. Government of British Columbia - Ministry of Environment and Climate Change

Strategy: is responsible for the effective protection, management, and conservation of B.C.'s water, land, air and living resources. It leads work on climate preparedness and adaptation and leads plans to meet greenhouse gas reduction targets.³⁰ However, the department must balance all Provincial government priorities.

4. Blueberry River First Nations (“BRFN”): is a Dane-zaa and Cree community located in the Upper Peace River region in what is now northeastern British Columbia. They are a signatory to Treaty No. 8, 1899 (BRFN's ancestors officially signed on in 1900).³¹ Since adhering to the Treaty, BRFN's territory has been highly impacted by industrial development. Following the B.C. Supreme Court decision (*Yahey v. British Columbia*, 2021 BCSC), the Province and BRFN signed an agreement to better protect Treaty 8 rights and support responsible natural resource development in BRFN's Civil Claim Area.³²

BRFN is at the table to provide knowledge and insights about the cumulative effects of development on their land and other Treaty 8 members' lands, information about Oil & Gas development (Montney Formation), *Yahey v. British Columbia*, 2021 BCSC, but most importantly, provide lessons learned from their new Province of British Columbia, “Blueberry River First Nations Implementation Agreement – 2023,” (Jan 18, 2023).³³ This agreement could provide a framework for SSN, and inform a more comprehensive framework.

5. National Resource Coalition (“NRC”): is a newly formed coalition to advance the interest of resource development throughout Canada. It is made up by a coalition of the mineral industry, including: Association for Mineral Exploration British Columbia,³⁴ Mining Association of BC³⁵ Ontario Mining Association (OMA)³⁶ and Prospectors and Developers Association of Canada;³⁷ and includes the Canadian Association of Petroleum Producers (CAPP),³⁸ and Forest Products Association of Canada (FPAC).³⁹ The NRC is very cognizant of the recent resignations of all twelve members of the CN Indigenous Advisory Council, and the reasons for resigning over

³⁰ Province of British Columbia - Ministry of Environment and Climate Change Strategy, online: <www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/ministries/environment-climate-change>.

³¹ Blueberry River First Nations, “Our Story,” online:<blueberryfn.com/about-us/>.

³² Province of British Columbia, “Blueberry River First Nations Implementation Agreement – 2023” (18 January 2023), online (pdf): <www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/blueberry_river_implementation_agreement.pdf>.

³³ Province of British Columbia, “Blueberry River First Nations Implementation Agreement – 2023” (18 January 2023), online (pdf): <www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/blueberry_river_implementation_agreement.pdf>.

³⁴ Association for Mineral Exploration British Columbia, online: <amebc.ca/about/about-ame/>.

³⁵ Mining Association of BC, online: <mining.bc.ca/about/>.

³⁶ Ontario Mining Association (OMA), online: <oma.on.ca/en/ontario-mining-association/AboutOMA.aspx?_mid_=866>.

³⁷ Prospectors and Developers Association of Canada, online: <pdac.ca/about-pdac>.

³⁸ Canadian Association of Petroleum Producers (CAPP), online: <capp.ca/>.

³⁹ Forest Products Association of Canada (FPAC), online: <fpac.ca/about>.

what they say is the company's failure to acknowledge past wrongs and follow its recommendations for reconciliation.⁴⁰

6. First Nations Alliance (Ontario) - Kitchenuhmaykoosib Inninuwug (KI), Wapekeka, Neskantaga, and Asubpeeschoseewagong Anishinabek (Grassy Narrows): is concerned that the Ontario government is providing miners with “easy access” to their homelands without proper consent.⁴¹ The Alliance is aware of falling into a Pan-Indigenous approach but feels its experiences regarding mining and resource development in eastern Canada can help SSN moving forward, and assist other Indigenous nations across the country.

In light of the recent B.C. Supreme Court decision, *Gitxaala v British Columbia* (Chief Gold Commissioner) has triggered an opportunity to amend the antiquated *Mineral Tenure Act* which governs the province’s mineral explorations.⁴² This ruling addresses a central concern of Indigenous consultation in regard to resource extraction.

Note: the teams are set out to recognize that there are sub-divisions within each one - for example, within Government of Canada there are ministries and departments, Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), Indigenous Services Canada (ISC), Environment and Climate Change Canada, Department of Justice Canada, etc.

While the issue is based on a real-life scenario, you MUST NOT contact the respective parties, nor is your Position Paper a reflection of the current parties’ positions or negotiating strategies.

⁴⁰ “Indigenous advisory council for CN resigns, says railway won't accept responsibility” (11 December 2023), online: <[cbc.ca/news/indigenous/cn-rail-indigenous-advisory-council-resigns-1.7055553](https://www.cbc.ca/news/indigenous/cn-rail-indigenous-advisory-council-resigns-1.7055553)>.

⁴¹ Naimul Karim, “First Nations forge alliance as Ontario's rush for critical minerals sparks alarm” (2 February 2023), online: <[financialpost.com/commodities/mining/ontario-first-nations-alliance-over-mining-concerns](https://www.financialpost.com/commodities/mining/ontario-first-nations-alliance-over-mining-concerns)>.

⁴² *Gitxaala v British Columbia* (Chief Gold Commissioner), 2023 BCSC 29; *Mineral Tenure Act*, RSBC 1996, c 292.

Submissions

Submissions of position papers will be due Friday, February 23, 2024, at 11:59 p.m. PST.

Submissions should be double spaced and should not exceed 30 pages, except for the cover page.

Submissions will be forwarded by email as soon as possible after their receipt to the other teams at the same table and to the facilitator for this table.

The purpose of submissions is to state what the party hopes to achieve at the table and the legal or factual arguments in support of this, with suitable references for an academic exercise.

After the negotiation, if no agreement is reached on Saturday, March 9, 2024, by 3:00 p.m., the tables will set out a statement as to what issues were resolved, understood by both parties and what issues are left outstanding. The statements from all tables will be presented from 3:15 p.m. to 4:00 p.m.

Video Resources

Global News, "First Nations groups oppose new Trans Mountain pipeline expansion route through sacred site," (24 November 2023) online: <globalnews.ca/video/10114876/first-nations-groups-oppose-new-trans-mountain-pipeline-expansion-route-through-sacred-site>.

Global News, "The factors driving up Trans Mountain pipeline costs: "This project has been seriously mismanaged" (9 August 2023), online: <youtube.com/watch?v=7824iovvo2E>.

Stk'emlúpsemc te Secwépemc, "Pipsell - a Secwepemc Nation Cultural Heritage Site," (19 June 2017), online: <vimeo.com/222291883>.

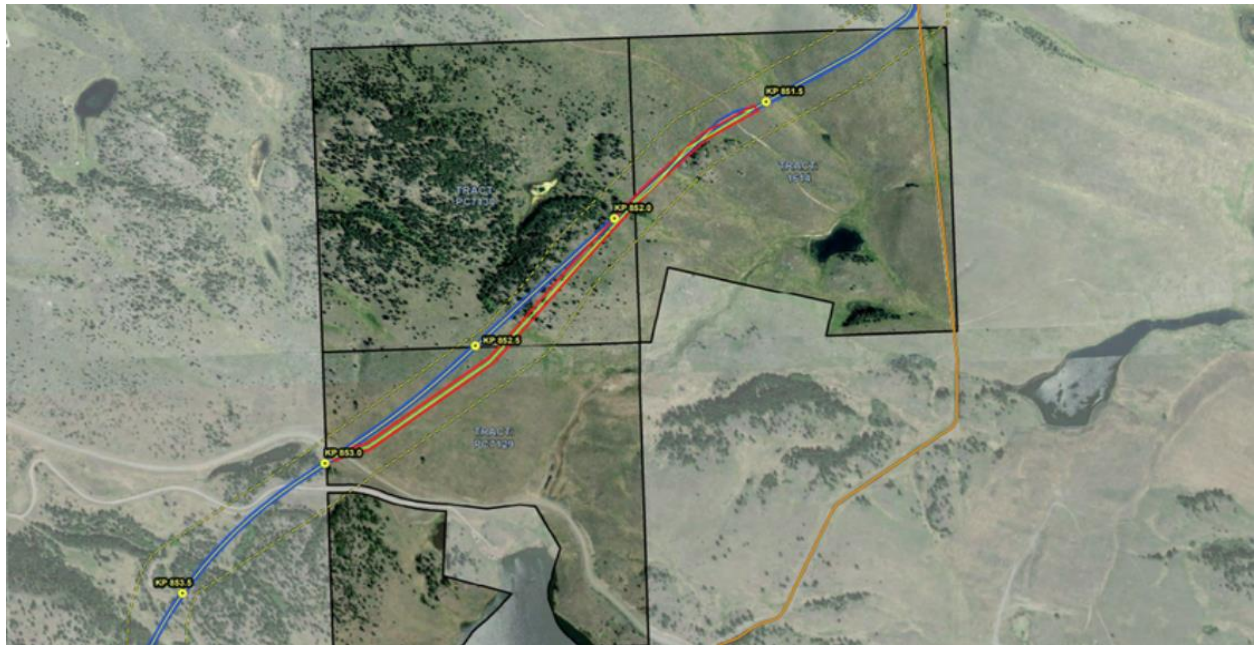
Stk'emlúpsemc te Secwépemc, "Honouring Our Sacred Connection to Pipsell- SSN Pipsell Decision Video" (31 March 2017), online: <vimeo.com/210983969>.

Stk'emlúpsemc te Secwépemc, "Honouring the Vision of Our Ancestors" (6 December 2016), online: <vimeo.com/194534066>.

Kamloops This Week, "Ajax Mine Opponents" (21 July 2011), online: <youtube.com/watch?v=fUtoCofB1rl>.

Appendix A: Maps & Images

TMX Route at Pípsell:



TMX pipeline route at Pípsell. The section in red represents the deviation approved by the Canadian Energy Regulator Monday (Sept 25, 2023) (Image Credit: Canadian Energy Regulator)

Pípsell Area:



Screengrab of the Pípsell (Jacko Lake) area in Secwepemcúl'ecw from Stk'emlúpsemc te Secwépemc Nation's (SSN) 2017 video, "Pípsell – a Secwepemc Nation Cultural Heritage Site." (Image Credit: SSN)

Pípsell & Kamloops:



(Image Credit: Global News)



(Image Credit: Global News)

Secwépemc Territory – Trans Mountain Pipeline:



(Image Credit: APTN National News)