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ENVIROFOR NEWS:

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Three Legal Pitfalls for Trans Mountain to Avoid the Fate of Northern Gateway

Kinder Morgan's Trans Mountain pipeline may have gotten the nod from Ottawa. But proponents would be wise to draw some legal lessons from the dismissal of Enbridge's proposed Northern Gateway Project. In May 2016, the [National Energy Board reported seven court challenges](#) to the Trans Mountain project from environmental groups, municipalities and indigenous communities. The Trans Mountain project may affect different communities and landscapes than Northern Gateway but it is hardly immune to threats that ultimately killed the Enbridge proposal. For starters, the Northern Gateway project was halted due to an improper use of an equivalency agreement between the Government of British Columbia and the National Energy Board. In its decision, the [BC Supreme Court](#) held that while the province could rely on a federal environmental assessment, it still had to issue its' own Environmental Assessment Certificate. As [Roy Millen, Sandy Carpenter and Peter Hogg](#) pointed out at the time, the court effectively was telling the B.C. government that it could impose its own conditions: Read the [full article](#) by Supriya Tandan and published in the CBA National.

Energy Battle Heating up: FortisBC Complains as [Vancouver] Phases out Fossil Fuels FortisBC is protesting green building plans that would reduce energy consumption in Vancouver and cut into its customer base, say city staff

The municipality is trying to phase out the use of fossil-fuel-derived natural gas (and other non-renewable fuels) in the city [by 2050](#) and bring in more biomethane, a renewable natural gas captured from agricultural waste, landfills, waste-water-treatment plants and other sources. To help hit that target, the city had brought in rules for new construction that would require — [by 2030](#) — new buildings to be heated by zero-emission sources, such as district energy, electricity or renewable natural gas. All homes would still be able to use gas ranges and other appliances using natural gas in either form until 2050. Although FortisBC will still be free to deliver product to customers in the city, proven technology is not yet in use to produce enough biomethane in BC to heat the city, and the utility would stand to lose a massive amount of its market share to electrical and district energy utilities as a result of the city's policies. Read *The Vancouver Sun* [article](#).

Legal Challenges Will Not Prevent Kinder Morgan from Moving ahead, Experts Say

Court challenges by First Nations of Kinder Morgan's \$6.8-billion Trans Mountain pipeline could slow the expansion down but are not likely to scuttle the project, say legal experts. There are already seven

challenges of the National Energy Board (NEB) approval of the project at the Federal Court of Appeal – four from First Nations. More are expected now that Prime Minister Justin Trudeau's government has given its approval Tuesday, [November 29th]. First Nations' challenges are considered to hold more heft than those from Burnaby, Vancouver and environmental groups because aboriginal rights are entrenched in Canada's constitution and mounting court cases have increased Canada's need to consult and accommodate First Nations. "It could slow things down – that's really the extent of it," said University of BC law professor Gordon Christie of the First Nation legal challenges. "The kinds of arguments they are making, they don't have, at this point, what counts as a veto," he said. And even if the courts were to rule in First Nations' favour that they were not adequately consulted, it does not mean the government and company could not pay a penalty later with compensation for First Nations, said Christie. There are First Nation court challenges of BC Hydro's \$8.3-billion Site C project, and that project continues to move forward, noted Christie. Robin Junger, a lawyer and co-chair of McMillian LLP's aboriginal and environmental practice in Vancouver, said litigation does not suspend the decision on Kinder Morgan's pipeline project, from the NEB or the federal government. Read *The Vancouver Sun* [article](#).

Act or Regulation Affected	Effective Date	Amendment Information
Administrative Penalties Regulation (35/2011)	Nov. 7/16	by Reg 267/2016
Oil and Gas Activities Act	Nov. 28/16	by 2015 Bill 24, c. 18, section 333 only (in force by Reg 216/2015), Societies Act
Petroleum and Natural Gas Drilling Licence and Lease Regulation (10/82)	Nov. 7/16	by Reg 268/2016

Forest and Environment News:

Visual Quality Objectives and the Rule of Law

This past summer the Forest Appeals Commission (FAC) released its decision in the appeal of *Interfor Corporation v. Government of British Columbia*. The appeal considered a contravention determination under the [Forest and Range Practices Act](#) (FRPA) that the appellant did not achieve the intended results specified in its forest stewardship plan (FSP) in relation to visual quality objectives (VQO), contrary to [Section 21\(1\) of FRPA](#). The case is interesting from a legal perspective given the almost impossibly subjective standards the FAC was called upon to apply in order to dispose of the appeal. At issue was whether the appellant achieved a VQO of partial retention after completion of its harvesting activities in a particular cutblock (as required in the FSP), or whether the appellant, instead, achieved a VQO of modification. Without getting bogged down in the legislative linkages, the requirements of the various categories of VQOs for altered forest landscapes are defined in [Section 1.1](#) of the [Forest Planning and Practices Regulation](#) (FPPR) from the lowest degree of alteration preservation) through to the highest (maximum modification). In between these two poles exist retention, partial retention, and modification. In large measure, these VQOs are defined in terms of scale within the altered forest landscape, and in terms of visibility. So, already, one might suggest that a problem exists insofar as scale and visibility are closely linked. In this respect, the FAC determined that visibility is assessed with reference to human perception (literally, an eyeball test) and scale is, instead, assessed relative to the landscape. Read the [full article](#) by [Jeff Waatainen](#) of DLA Piper and published in the latest November-December issue of the *BC Professional Forest Magazine*.

Fisheries Act to be Replaced January 1st

BC's new [Fish and Seafood Act](#) is scheduled to come into force on January 1, 2017. The new Act will consolidate and replace the [Fish Inspection Act](#) and the [Fisheries Act](#), and will modernize the licensing and regulation of the buying, selling, handling, storing and processing of fish, shellfish and aquatic plants. The *Fish and Seafood Act* will increase the need for licences, data collection, and traceability and would boost enforcement and penalties.

Will Climate Litigation Come to Canada?

So Canada has ratified the Paris climate agreement. Now what? The accord, designed to spur action on cutting CO₂ emissions, though unlike the Kyoto deal not "legally binding," has been hailed as a triumph for advancing the fight against climate change. Some uncertainty for the deal notwithstanding – U.S. President-elect Donald Trump has offered mixed messages about the deal and, indeed, whether he believes in climate change at all – the legal community is already honing in on what the international deal means for Canada. And there's good reason to prepare the briefs. In 2015, before the Paris deal was struck, a Dutch court ordered the government to reduce CO₂ emissions by a quarter in a landmark civil case initiated by climate activists. More recently, 21 children beat an effort to quash their lawsuit against the American government in a federal court, where they plan to argue that the government is impacting their right to live in a clean and safe environment. Environmental and youths groups are also suing Norway's government for violating the climate treaty by awarding drilling licenses to oil companies in the Arctic. Canada's history with climate litigation is more scant. An attempt to force Ottawa to adhere to its own legislation, implementing the Kyoto Accord, [was tossed out of a federal court in 2008](#). The Paris Agreement, in theory at least, was designed explicitly to prevent litigation against laggard governments. Read the [full article](#) by Justin Ling and published in the *CBA National*.

Environmental Appeal Board Decisions

The following Environmental Appeal Board decisions were released in the month of November:

[Water Act](#)

- [West Moberly First Nations; Prophet River First Nation; Clara London v. Deputy Controller of Water Rights](#) [Application to Postpone Hearing – Granted]
- [5997889 Manitoba Ltd. v. Acting Regional Executive Director](#) [Final Decision – Appeal Allowed; Application for Costs – Denied]

Visit the Environmental Appeal Board [website](#) for more information.

Act or Regulation Affected	Effective Date	Amendment Information
Administrative Penalties Regulation (Environmental Management Act) (133/2014)	Nov. 1/16	by Reg 218/2016
First Nation Tenures Regulation	Nov. 28/16	by Reg 211/2016
Forest Act	Nov. 28/16	by 2015 Bill 24, c. 18, sections 309 and 310 only (in force by Reg 216/2015), Societies Act
Hunting Regulation (190/84)	Nov. 10/16	by Reg 270/2016
Motor Vehicle Prohibition Regulation (196/99)	Nov. 10/16	by Reg 270/2016
Park, Conservancy and Recreation Area Regulation (180/90)	Nov. 28/16	by Reg 211/2016
Range Regulation (116/2004)	Nov. 28/16	by Reg 211/2016
Sole Proponent Fees Regulation (224/2013)	Nov. 7/16	by Reg 264/2016
Solid Fuel Burning Domestic Appliance Regulation (218/2016)	NEW	see Reg 218/2016

(replaces B.C. Reg. 302/94)	Nov. 1/16	
Solid Fuel Burning Domestic Appliance Regulation (302/94)	REPEALED Nov. 1/16	by Reg 218/2016
Transfer Regulation (351/2004)	Nov. 28/16	by Reg 211/2016
Weed Control Act	Nov. 28/16	by 2015 Bill 24, c. 18, section 362 only (in force by Reg 216/2015), Societies Act
Wildlife Act	Nov. 28/16	by 2015 Bill 24, c. 18, section 363 only (in force by Reg 216/2015), Societies Act
Wildlife Management Areas Regulation (12/2015)	Nov. 16/16	by Reg 272/2016

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