POLICY Brief

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The confusion afflicting Canada's natural resource economy

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The Role of Resources

Throughout its history, Canada has depended on its bounty of natural resources. Quite simply, natural resources have been the backbone of the nation's economy.

Today, in a vastly more economically-diversified country, natural resources play a less important role, but remain key to economic growth. A few facts: We are among the world's leading producers of minerals. We have two per cent of the world's population, but 4.7 per cent of the world's natural gas supplies and 4.8 per cent of its oil. Two years ago, the Boston Consulting Group reported that oil and natural gas accounted for 18 per cent of the country's gross national product, 12 per cent of its jobs and 27 per cent of its exports. Today, those numbers would be lower because capital investments in oil and gas have been declining for about five years.

A decade ago, resource revenues accounted for roughly a third of provincial revenues in Alberta, Saskatchewan and Newfoundland. Today, they account for about 10 per cent. Canadian oil is being sold in the United States at a deep discount; indeed the U.S. in energy has become a competitor with Canada, owing to fracking and its newly abundant supplies of oil and gas.

If you believe, as some do, that all fossil fuels are bad all the time, then the decline is terrific news. If you believe, however, fossil fuels will be in demand here and abroad for a very long time, even while the world very slowly transitions away from them, then this is bad news for employment, government revenues, economic growth and the Canadian dollar. There are people and groups who believe clean energy is the way of the future, with a clean path to its adoption ahead. But ask people in certain parts of Canada how they like wind turbines in their backyard. Fury would be an understatement.

Green energy is the way of the future, but the future can be a long way into the distance. According to the International Energy Agency, power from solar and wind is increasing rapidly in many parts of the world. And yet, even with a continuation of this growth pattern or its acceleration, by 2040 the IEA predicts "fossil fuels will still account for 77 per cent of world energy use."

A Profound Thinker

One of the world's most profound thinkers about energy is a little-known Canadian economics professor, Vaclav Smil at the University of Manitoba. Bill Gates describes Professor Smil as one of the most insightful thinkers about energy in the world. Anyone who has read

his books would likely agree. Smil strongly favours conservation and a reduction in energy use, but he also believes those who think renewables can supply the world's electricity peddle a "fairy tale."

Speaking of fairy tales, Canadians have a misguided view of the world, and the country's place in it. A slogan in Chapters/Indigo stores proclaims "The world needs more Canada." It sounds enticing and morally uplifting, but the statement is false. It is a self-comforting myth.

The world, alas, is not like that. It does not wait on Canada, nor frankly pay much attention to what happens here, unless it benefits them. While we have dithered and killed off most of an LNG industry on the West Coast, Americans and Australians have been busy building LNG terminals and locking up long-term contracts in Asia.

There are many ways to highlight our self-imposed natural-resource constraints. In October 2017, the Federal Court of Appeal heard a case brought against the Government of Canada, the National Energy Board and Kinder-Morgan, the proponent of the Trans-Mountain Pipeline. The case was based on twinning an existing pipeline from Alberta to the Pacific Ocean at Burnaby. The project would expand oil shipments from 300,000 to 898,000 barrels a day, and increase tanker traffic carrying diluted bitumen. It would provide an outlet to Asia for Alberta oil, allowing a way of diversifying exports away from the Unites States.

The plaintiffs were six First Nations groups, and the municipalities of Burnaby and Vancouver. Judgment was rendered on August 30, 2018, approximately eleven months after the hearing.

Examining the Decision

Media reporting of the decision was predictably superficial. It highlighted the areas where the court found the National Energy Board and Canadian government had not fulfilled their duty of consultation toward the Indigenous plaintiffs or paid enough attention to the effect of tanker traffic on a species of whales.

It's worth examining the decision in more depth to realize how developing natural resources is so ensnared in contradictions and confusions that the sector is a bad place to invest.

Among the confusions are: what constitutes the "duty of consult" and the "honour of the Crown;" the definition (if one exists) of "social licence;" the meaning in practice and law of the United Nations Declaration on the Rights of Indigenous Peoples that asserts their right to "free, prior and informed consent" for lands over which they claim title; the respective powers of the federal and provincial governments; the contested credibility of regulatory bodies; the influence of environmental interest groups; and the vagueness of court rulings and the unfettered access to court appeals by of those who wish to stop or alter projects. These confusions and contradictions are increasingly noted beyond our borders. Companies have many options to invest around the world, or, as Kinder-Morgan did, by giving up and selling the entire pipeline project to the government of Canada.

If Canadians are conflicted about how to weigh economic benefits and environmental protection, so too are investors. How would they measure the "duty of consult" with some Aboriginal groups who claim they were not adequately consulted and therefore oppose the Trans-Mountain pipeline? Yet in another part of B.C. other Aboriginal leaders complain Ottawa did not consult them before killing a pipeline project they wanted to take oil to Prince Rupert for export to Asia. Still with Trans-Mountain, how would they view a project that had four different lawsuits against it? Or, what would they think of New Brunswick, a province on its fiscal back with a rapidly aging population? Governments once dreamed of expanding the deep-water port of Saint John for a liquified natural gas terminal and creating a trans-shipment point for oil but then placed a ban on seismic testing in their province to determine what natural gas lies beneath its soil. Or, what about Quebec, where tankers ply the tricky St. Lawrence River daily bringing oil from Venezuela or the Middle East to refineries in Montreal and Quebec City but where the population apparently does not want Alberta oil shipped through the province by pipeline? Oil by tankers and rail, but not pipelines.

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When Ottawa first assessed its responsibilities for determining which Aboriginal groups might be adversely affected by the Trans-Mountain project, they identified 130 of them. Notice was sent to all that they could participate in the National Energy Board hearings.

These First Nations acquired standing not just because the pipeline came near where their populations resided, but also because they "asserted" Aboriginal title to "traditional territory," land masses far beyond where their populations reside. It's an example of the confused issues of who "owns" land, or has special rights over it, especially in B.C. with its absence of treaties. Elsewhere in Canada, even where treaties do exist, they do not seem to have much meaning.

Of the 130 First Nations apparently affected by the pipeline, six participated in the appeal. They opposed the pipeline from before it was presented to the NEB, during the hearings and afterwards. It's hard to imagine what additional consultations would have convinced them to support what they vigorously opposed in principle.

Other First Nations undoubtedly supported the plaintiffs in spirit. On the other hand, 33 First Nations publicly declared their support for the project, five times more than took up the legal appeal. But these supporters did not participate in the appeal, and judges must deal with the case before them, not consider what other parties to the dispute might think. The court decided the Canadian governments had not adequately respected the "honour of the Crown" in its consultations with the First Nations. What kind of consultations had been afforded interested parties, including Indigenous interests?

Kinder-Morgan had engaged in extensive consultation up and down the Fraser River before presenting the project for NEB approval.

Kinder-Morgan had learned from the opposition Enbridge had encountered for its Northern Gateway project in northern B.C. and wished to head off opposition by much more extensive consultation. This consultation did not count for those opposed to the project, and carried no weight in court.

Extensive NEB Hearings

Then came the NEB hearings themselves. The Board granted status to 400 intervenors and 1,250 commentators. The hearings were extremely lengthy, and the Board concluded "with the implementation of Trans-Mountain's environmental protection procedures and mitigation measures, and the Board's recommended conditions, the project is not likely to cause significant adverse environmental effects." It said the "likelihood of a spill … would be "very low in light of the mitigation and safety measures to be implemented," adding "the project would be in the Canadian public interest."

The Board affixed 157 conditions that dealt with safety, emergency preparedness, and ongoing consultations with "affected entities, including Indigenous communities." That 157 conditions were attached to the approval, the fulfilment of which would be required before the project could proceed, suggested the Board was no pushover. Shortly after the Board's decision, the Trudeau government organized an unusual, and not legally necessary, additional consultation panel. After listening extensively, the panel sent a report to the government about what it had heard concerning the pipeline and identified six "high-level" questions that "remain unanswered."

Throughout, the Canadian government was undertaking direct consultations with Aboriginal groups according to the government's policy guidelines for Phase I, II and III consultations, each stage more intense that the last. The depth of the consultation depends on the strength of the prima facie Aboriginal claim for rights or title, and the potentially adverse effects of a project. It might include the opportunity to make submissions, formal participation in decision-making, provision of written reasons explaining how concerns were addressed. The Federal Court of Appeal said: "the consultation process does not dictate a particulate substantive outcome. Thus, the consultative process does not give Indigenous groups a veto over what can be done pending final proof of their claim…Nor does consultation equate to a duty to agree: rather what is required is a commitment to a meaningful process of consultation."

The court rejected Aboriginal complaints that the consultation process used by the government was inadequate. Said the jurist who authored the judgment, "I am satisfied that the consultation framework selected by Canada was reasonable." Nor did the court accept arguments that public funding for litigants was inadequate. The court said the Indigenous consultation process for the project was "generally well-organized." There was "no reasonable complaint that information was withheld or that requests for information went unanswered." Cabinet ministers were "available and engaged in respectful conversations and correspondence with representatives of a number of Indigenous applicants."

A reasonable person, upon reading how much consultation had occurred, might have concluded that enough was enough. But this is Canada, and it was apparently not enough. The government might have thought so; previous court rulings might have suggested it. But no said the court, more was required. There had not been adequate "two-way dialogue." This reasoning might make sense if there had not already been extensive consultations or, more critically, if the points raised by Aboriginals were about specific matters (as they were, in fairness, with one litigant group) that could be addressed by certain changes, as opposed to lock-and-stock opposition to the entire project. Apparently where the government fell short of its legal obligations was in not just having officials convey Aboriginal concerns to decision-makers but not having decision-makers themselves negotiate with the Aboriginal leaders.

Some of the complaints were, as the court said, "specific and focussed": about re-routing here and there or the lack of Indigenous knowledge incorporated into the project. Others were about much larger matters such as claims of Aboriginal title, failure to consider levying a resource tax, and other matters far beyond the board's purview. So the board's decision was overturned pending additional consultations.

Having underscored the confusions and contradictions around natural resource policy, it is important to stress that there are dozens of examples where mutually satisfactory arrangements between the Crown, Indigenous peoples and project proponents have been made and projects are proceeding. These arrangements don't receive the media attention that the conflicts do. For example, Cameco has developed good working relations with Indigenous peoples in northern parts of Saskatchewan where uranium is mined. Recently, the Fort McKay and Mikisew Cree First Nations invested in Suncor's Fort Hills, Alberta bitumen project. The Athabasca Chippewa, who had opposed bitumen oil developments, have announced they will become a partner with Teck Resources in developing a bitumen mine. The Haisla First Nation has thrown its weight behind Trans-Canada Pipeline's planned natural gas link from northeastern B.C. to Kitimat. The Haisla's support means that every First Nation along the route now supports the pipeline.

Reconciling aboriginal, governmental and private sectors interests and rights is but one complication in getting resource projects done. There can be, of course, constitutional arguments between levels of government, or between provincial governments, as evidenced in the dispute between Alberta and B.C. over Trans-Mountain.

There is also complete confusion over what is called "social licence." Prime Minister Justin Trudeau regularly uses this phrase, usually in the context of saying the government cannot approve projects unless they have "social licence." Many non-governmental groups use this phrase, too, without anybody knowing what the phrase means. It has no legal meaning; that much is clear.

If "social licence" adds to the confusion around natural resource debates, so does the federal government itself. From the day Mr. Trudeau sent mandate letters to his ministers, it was clear that although he had spoken of finding a balance between protecting the environment and seeing projects approved, the first objective was far more important. The mandate letter to the minister of natural resources was more about the environment than developing natural resources, the kind previous prime ministers would have sent to their environment minister.

Bill C-69

Central to the promise to find a new and better balance is Bill C-69, passed by the Liberal majority in the Commons. Bill C-69, politically speaking, is designed to win the favour of environmental and Aboriginal groups and those who have insisted that the National Energy Board was too restricted in mandate, peopled by pro-business members who lacked the credibility of neutrality and did not meet the test of "social licence." The putative aim is to make the hearings more transparent, the board more representative in its composition, with its mandate widened, its hearings faster and its credibility therefore enhanced. Rather, Bill C-69 is likely to lead to greater confusion than what already exists. It is, on its face (we shall see how it works in practice) a law that will lead to unintended consequences. What it most certainly will not do is convince environmental groups opposed to a project to drop or dilute their opposition since, as argued before, their objections are not technical or procedural but fundamental.

The regulators, under the proposed new laws, will be asked to judge projects in relation to their impact on climate change, including upstream emissions. They must consider any adverse impact on Indigenous peoples. They must consider traditional Indigenous knowledge and weigh it along with scientific evidence. They must analyse "any alternative" to a project as well as any "alternative means" for carrying it out. This is a recipe for complete confusion, since the regulators can hardly assess other possibilities if no party is presenting them. The board members, to fulfill the expanded mandate, will have to be familiar with anthropology, sociology, and other social sciences to judge projects according to the new criteria. Far from streamlining the regulatory process, Bill C-69 will elongate it, thereby making it less likely that projects will be approved in a timely fashion, if at all.

These confusions, and the inadequate attempts to clarify them, will have—indeed already are having—political consequences. Many natural resource projects are found in what we might call "hinterland" Canada, far from the big cities where most of the population resides. In these "hinterland" areas, there are few alternatives for employment to natural resource projects. If natural resource projects are persistently blocked by confusions in law or practice, people there will understandably feel resentful of those who prevented jobs from being created and revenues being generated. They will blame the confusions on city-slickers, judges with their fancy reasoning about somebody else's "rights," elites and others far away who would know how to drive Lexuses but not bulldozers. Political polarization will widen beyond where it is now.

Courts do not see the big picture, only the plaintiffs before them, and so questions of public policy in court cases become channeled into "right talk," the Charter and process. Environmental groups are not for balance between development and the environment, because compromise is not part of their vocabulary. Governments have shied away from being precise. They use loose language such as "free, prior and informed consent" "social licence," "inclusiveness." In Ottawa, the government tries to square all circles, including favoring a robust oil and gas industry and new taxes and stiffer environmental and regulatory obligations. It had hoped that "inclusiveness" and touching every political base would produce a home run of policy success. Instead, it has added to what is already an all-pervasive and threatening set of confusions around natural resource development in Canada.

Jeffrey Simpson

Jeffrey Simpson, an Officer of the Order of Canada, was The Globe and Mail's national affairs columnist during which time he wrote about almost all the major Canadian public policy issues, and many international questions. He wrote seven books, one of which won The Governor-General's award; another, on the Canadian health-care system, won the $50,000 Donner Prize for the best book on public policy. He has received eight honorary degrees, lectured at several dozen universities in Canada and abroad, and is a member of the Trilateral Commission and the Board of Governors of the University of Ottawa. He is a senior fellow at the Graduate School of Policy and International Affairs at that university.

People who are passionate about public policy know that the Province of Saskatchewan has pioneered some of Canada's major policy innovations. The two distinguished public servants after whom the school is named, Albert W. Johnson and Thomas K. Shoyama, used their practical and theoretical knowledge to challenge existing policies and practices, as well as to explore new policies and organizational forms. Earning the label, "the Greatest Generation," they and their colleagues became part of a group of modernizers who saw government as a positive catalyst of change in post-war Canada. They created a legacy of achievement in public administration and professionalism in public service that remains a continuing inspiration for public servants in Saskatchewan and across the country. The Johnson Shoyama Graduate School of Public Policy is proud to carry on the tradition by educating students interested in and devoted to advancing public value.

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