

Pipelines and the Politics of Structure: A Case Study of the Trans Mountain Pipeline

George Hoberg
Liu Institute for Global Issues
UBC

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Abstract

Oil sands pipelines have been one of the most divisive issues in Canadian politics during the past decade. This paper uses the case of Kinder Morgan's Trans Mountain Pipeline proposal to illuminate the political dynamics of energy in Canada in the 2010s. The Harper era was characterized by aggressive pressure for resource development, weakening environmental protection, and intensive resistance from environmentalists and First Nations. Like the Northern Gateway Pipeline, Kinder Morgan's project is also opposed by environmentalists and many First Nations, and municipal governments. In November 2014, on the ground resistance resulted in the arrest of over 100 protesters. Despite the election of the Liberal government in Ottawa and an NDP government in Alberta, controversy continues to rage.

The politics of this pipeline has in large part been "the politics of structure," or the struggle over defining the institutional rules of the game. Major political, legal, and physical conflicts have erupted over what issues should be under consideration and who gets to decide. This paper will use process tracing and a review of government documents, opinion polls, and media content analysis, to document how this case reveals the larger politics of energy that have characterized Canadian energy and environmental policy in the 2010s.

Overview

Oil sands pipelines have been one of the most divisive issues in Canadian politics during the past decade.¹ This paper will use the case of Kinder Morgan's Trans Mountain Pipeline proposal to illuminate the political dynamics of energy in Canada in the 2010s. The Harper era was characterized by aggressive pressure for resource development, weakening environmental protection, and intensive resistance from environmentalists and First Nations. Increasing access to Pacific tidewater for the oil sands was a critical component of Harper's agenda, accentuated once the Keystone XL pipeline to the Gulf Coast began to founder. The Harper government and the energy sector turned their attention to the Northern Gateway Pipeline at first, but as it became increasingly political toxic, expectations increased for the Trans Mountain Pipeline. In short order, however, the Trans Mountain proposal ended up in a virtually identical political dynamic.

Like the Northern Gateway Pipeline, Kinder Morgan's project is also opposed by environmentalists and many First Nations. Municipal governments in the Greater Vancouver area have also come out strongly opposed to the project. In November 2014, a major conflict erupted between the NEB, the pipeline company, and the city of Burnaby about seismic testing for the consideration of routing the pipeline through Burnaby Mountain, culminating in the arrest of over 100 protesters. Despite the election of the Liberal government in Ottawa and an NDP government in Alberta, controversy continues to rage.

The Trans Mountain controversy emerged in the distinctive institutional environment of Canada's remarkably decentralized federal system (Harrison 1996), and the distinctive timing of a majority federal government by Harper's Conservative Party of Canada. Despite his clear commitment to enable oil sand expansion and market access, Harper refused to mediate conflicts among the provinces over energy policy. Initiatives to advance a national energy strategy emerged from the provinces themselves. In particular, the government of Alberta, recognizing the geographical vulnerability of its land-locked oil sands resource, began the 2010s by seeking to forge a national energy strategy that would foster openness to pipeline proposals to both the Pacific and Atlantic coasts (Gattinger 2012; 2016). Their efforts first ran into trouble when BC Premier Christy Clark chose to provoke a conflict with Alberta Premier Alison Redford by demanding a greater share of the benefits from the Northern Gateway pipeline, and threatening to deny timber harvesting permits and even electricity to the pipeline if the decision

¹ Disclaimer: The author has taken public positions against the Trans Mountain Expansion project for its failure to consider upstream and downstream greenhouse gas emissions, and spoke at two anti-pipeline rallies on Burnaby Mountain in November 2014. The author also applied to be an intervenor in the NEB hearing to discuss the climate impacts of the proposal, but was rejected by the NEB.

was made against the province's wishes. Later on, Ontario and Quebec emerged to demand more ambitious climate action. While the provinces succeeded in producing a document called the Canadian Energy Strategy in 2015 (Council of the Federation 2015), it was too vague to provide any guidance on how to resolve the tension between oil sands expansion and responsible climate policy.

The conflict has involved the most powerful economic interests in Canada pitted against a surprisingly formidable resistant movement. One prominent theme that emerges from the analysis is how contested the institutional rules of the game have become. Major political, legal, and physical conflicts have erupted over what issues should be under consideration and who gets to decide. 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).

This paper will use process tracing and a review of government documents, opinion polls, and media content analysis, to document how this case reveals the larger politics of energy that have characterized Canadian energy and environmental policy in the 2010s. The first section describes the analytical framework guiding the analysis. The second section describes the project in more detail and provides a brief overview of the review process and status. The third section describes actors, public and private, and their interests and strategies in the pipeline controversy. It also looks at public opinion on the issue, and a media analysis of issues. The fourth section describes the institutional rules in play in this case, and the conflicts over the rules of the game that erupted around the project. The concluding section places the Trans Mountain Expansion Project in the context of the other oil sands controversies, and emphasizes the political challenges confronting the Trudeau government in deciding whether to act on the NEB regulation.

Analytical Framework

The paper is inspired by actor-centred analytical frameworks. Strategic actors are the central agents of policy. Actors each have their own interests, as well as political resources. They adopt strategies designed to best pursue their interests given their resources. Strategic actors interact within a context of ideas and institutional rules, but also work to change ideas through reframing or institutional rules through venue shifting or other means (Hoberg 2001; Baumgartner and Jones 2010). While an analysis of issues covered by the media is also included, this paper focuses on the institutional rules of the game and the efforts by strategic actors, in and out of government, to change the rules to advance their interests. Institutional design can be pivotal because when the location of authority changes, the balance of policy preferences could also change significantly.

In earlier work I developed a framework for political risk to pipeline project proponents, which can be adapted to analyze the strategic resources of project

opponents (Hoberg 2013). The relative power of project opponents is a function of four variables:

1. *Whether opposition groups have access to institutional veto points.* Veto points are locations of government authority that give a particular organization the ability to block approval of a project or policy (Immergut 1990; Tsebelis 2000). Examples would be the organization granted formal decision-making authority (e.g., an independent regulatory body or the cabinet), whether the decision is subject to judicial review, and whether the approval of different levels of government is required. In some cases, an organization can lack formal political authority but have sufficient power that they are equivalent to a veto point. These are referred to “political veto points.” The section on institutions below describes the particular rules in place for the Trans Mountain Expansion Project.
2. *Whether the project can take advantage of existing infrastructure.* Greenfield projects create more disruption to existing economic and residential patterns than projects that can take advantage of existing infrastructure.
3. *The salience of place-based, concentrated risks and benefits.* The ‘logic of collective action’ (Olson 1965) suggests that mobilization to new projects is easier to organize if there are concrete, focused, place-based values at risk. By this logic, local concerns about risks to precious bodies of water are much more likely to galvanize opposition than more diffuse concerns such as global warming. The economic benefits of a project can be examined through the same lens. Jobs created in facility construction and operation are concrete and place based, whereas tax revenues and corporate dividends are more diffuse.
4. *The geographical separation of risks and benefits.* All projects come with risks and benefits, and if they occur in the same general area, it is more straightforward for affected interests to consider both risk and benefits. The greater the geographic distance between those who benefit economically from those that face environmental risks, the more challenging it is to weigh risks and benefits. This situation is common in energy systems where energy production is distant from its consumption. This challenge is much greater when risk and benefits are separated by jurisdictional boundaries that represent veto points.

For pipeline proponents, the great advantage of the Trans Mountain Expansion Project is that most of the pipeline would be built along an existing pipeline right of way. For pipeline opponents, the mobilization of opposition has been facilitated by the separation across provincial boundaries of the concentrated environmental risks to BC’s waters from the lion’s share of economic benefits that flow upstream to the oil sector in Alberta. Given the provincial boundary dividing the location of the preponderance of risks from the preponderance of benefits, it’s no surprise that the relative decision-making role of the federal government and the province of British Columbia is one of the most critical conflicts in this controversy.

The Project and its Review

Kinder Morgan's Trans Mountain Expansion project would 'twin' an existing pipeline from the Edmonton area to Burnaby, BC and the Vancouver Harbour. The pipeline first began operation in 1953. The expansion project would virtually triple the capacity of the pipeline, from 300,000 to 890,000 barrels per day. The project is projected to cost \$6.8 billion. One potential advantage of the project is 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 right of way (Trans Mountain n.d.)

The project would significantly increase tanker traffic in the Vancouver Harbour. Three new terminal berths would be constructed at the Westridge Marine Terminal in Burnaby, BC, designed to handle Aframax class vessels (245 m in length, with a capacity 750,000 barrels). According to the Trans Mountain application, tanker traffic would increase seven-fold, from 5 per month to 34 per month (TM 2013b, Vol. 2 p. 2-27).

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 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 Harper appointed a Kinder Morgan witness to the NEB, through 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 2016, p. 2-3). The Trudeau government, after two additional reviews described below, has said it will make a decision on the project by December 2016.

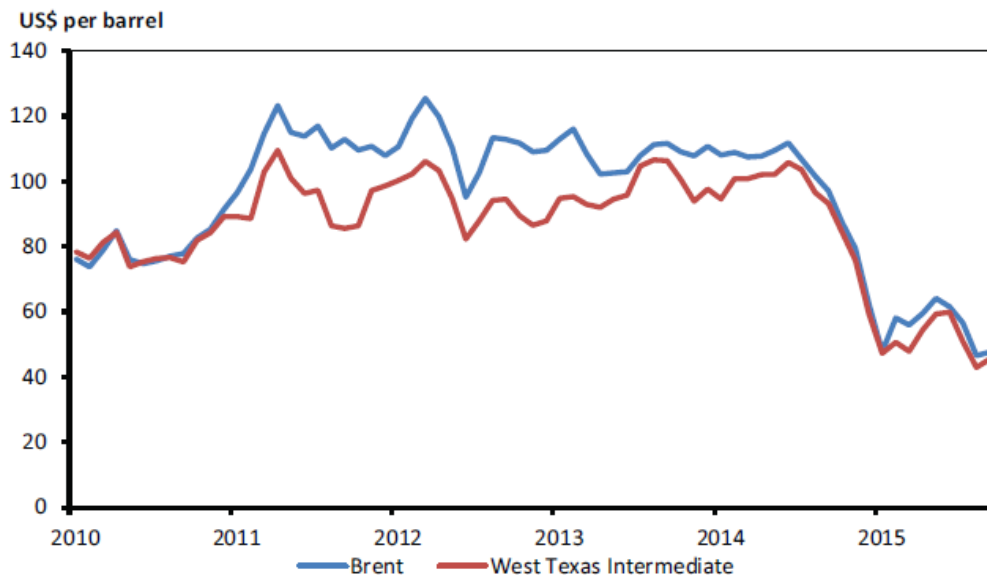
Actors

Industry

The principal proponents 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 refinery companies in export markets. The oil sands companies are the most powerful actor in this group, given their importance to the economies of Alberta and Canada. Their interests in access to tidewater are really two-fold: 1. as the US demand for Canadian oil softens, access to global markets enables expansion of oil sands production and the

associated increase in revenues and profits, and 2. it would reduce the discount oil sands products have faced because of their being confined to the North American market. As shown in Figure 1, in the 2011- 2013 period, the discount between Brent Crude (the world price) and West Texas Intermediate was quite high, typically greater than \$10US a barrel and as high as \$27US per barrel. As oil prices have collapsed, so too has the discount. The latest data show the discount as less than \$1 US per barrel (May 16, 2016 from https://ycharts.com/indicators/brent_wti_spread). Whether or not it will return if oil prices rebound is unknown. But it continues to be used by as a major rationale for the urgency of getting access to tidewater.

FIGURE 2.1
Global Crude Oil Prices



Source: NEB 2016c

These oil sector interests have been supported by campaigns by other business groups and new pro-resource development advocacy groups. For example, the Independent Contractors Association of B.C., a group whose members would benefit enormously from the construction boom, produced a 30 second ad for the Super Bowl in Canada, featuring 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” (ICBA 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 pipelines. The Harper government was a resolute supporter of increasing oil sands access to global markets. Trudeau has taken a more nuanced approach, but still continues to communicate 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).

The Alberta government has been a major champion of pipeline expansion, given the importance of the oil sector to the province’s economy and especially the dependence on government revenues from oil. 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).

The British Columbia government has adopted a position of conditional opposition. As the Northern Gateway joint panel process was proceeding, BC announced its position on heavy oil pipelines, stating that the following 5 conditions need to be met to receive BC support.

1. Successful completion of the environmental review process. In the case of Enbridge, that would mean a recommendation by the National Energy Board Joint Review Panel that the project proceed;
2. World-leading marine oil spill response, prevention and recovery systems for B.C.'s coastline and ocean to manage and mitigate the risks and costs of heavy oil pipelines and shipments;
3. World-leading practices for land oil spill prevention, response and recovery systems to manage and mitigate the risks and costs of heavy oil pipelines;
4. Legal requirements regarding Aboriginal and treaty rights are addressed, and First Nations are provided with the opportunities, information and resources necessary to participate in and benefit from a heavy-oil project; and,
5. British Columbia receives a fair share of the fiscal and economic benefits of a proposed heavy oil project that reflects the level, degree and nature of the

risk borne by the province, the environment and taxpayers (Government of BC 2012).

The province formally took a position against the Trans Mountain project, emphasizing the lack of emergency response preparedness: “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 BC 2016). Media have reported that BC’s position may be open to negotiation with Alberta as part of a deal to get Alberta to purchase electricity from BC’s recently approved Site C Dam on the Peace River (Iverson 2016).

Municipal governments have been highly politicized by recent pipeline controversies. 21 municipal governments in British Columbia, including virtually all of those in the Lower Mainland, have expressed formal opposition to the project. The most active opponents have been the City of Burnaby, who challenged the NEB and Kinder Morgan in court over their plans to perform seismic drilling on Burnaby Mountain (described below). Burnaby Mayor Derek Corrigan has pledged to get arrested if the pipeline gets approved (Morneau 2015). The City of Vancouver, under the leadership of Mayor Gregor Robertson, have been strongly opposed, focusing both on the risks of a tanker accident but also climate change. Their written submission to the NEB was 232 pages long. 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” (Sinowski 2016).

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. Table 1 lists 20 organized environmental groups that are on the record as actively opposing the project. Groups range from large bi-national groups like Stand (former ForestEthics), Canadian sections of large international groups (like Greenpeace and 350.org), multi-issue groups that have chosen TMEP as one of its campaigns (like LeadNow), mainstay BC environmental groups (like Wilderness Committee and Sierra Club of BC), and local groups organized specifically to fight the project (like Tanker Free BC and Burnaby Residents Against Kinder Morgan Expansion or BROKE).

Table 1 Environmental Groups Active on Kinder Morgan TMEP

	facebook likes	twitter followers	intervenor?
350 Vancouver	467	309	
BROKE	506	184	
Georgia Strait Alliance	1736	5105	yes
350 Canada	2,510	2,252	
Tanker Free BC	2529	2230	
Living Oceans Society	4954	4,395	yes
West Coast Environmental Law	5714	11,800	
Wilderness Committee	6,708	8367	
Sierra Club of BC	7354	6490	
Raincoast Conservation Foundation	10,567	7952	yes
Nature Canada	12,186	49,800	yes
Dogwood Initiative	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	
We Love this Coast	2700*	na	
BC Nature	na	273	yes
Force of Nature	na	na	
PIPEUP Network	na	807	

Focused environmental opposition to the project began in the summer of 2012 when the Wilderness Committee, under the leadership of Ben West, launched a campaign in collaboration with Tanker Free BC, initially focused around the risks posted to Vancouver’s Stanley Park, a cherished urban park in the region (Wilderness Committee and Tanker Free BC 2012). The WC 2012 annual report, and the previous four annual reports, makes no mention of Kinder Morgan or Trans Mountain, but the 2013 report describes a series of town halls on the pipeline proposal as one the major accomplishments for the year (Wilderness Committee 2013).

One of the most prominent groups working against oil sands pipelines in BC has been the Dogwood Initiative, a grassroots organization founded in 1999 with the goal of helping British Columbian “take back decision-making power over their land and water” (Dogwood Initiative “About Us”). Its flagship campaign has been the “No Tankers” campaign, designed to keep oil tankers away from the BC coast. Originally it was focused on the Northern Gateway pipeline, but in 2011 the Dogwood Initiative expanded its coverage to include the Trans Mountain project. This change is reflected in the group’s annual reports. The 2009-10 or 2010-11 annual reports contain no mention of the Kinder Morgan proposal. It is first

mentioned in the 2012-13 Annual Report as a redesign of the No Tankers campaign: “we spent the summer of 2011 re-designing the No Tankers campaign. We broadened the 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). Over its history the No Tankers petition was signed by 290,111 British Columbians and about 90,000 other Canadians (personal communication, Dogwood Initiative). In 2014, Dogwood began focusing more directly on forcing the BC government to assert jurisdiction with its “Let BC Decide” campaign. The campaign is designed to mobilize support for a citizen initiative against tankers if “politicians try to force these projects on B.C” (<http://letbcvote.dogwoodbc.ca/>).

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. Much of this opposition has 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 issuing declarations banning the pipeline and tankers from their territories. While the Trans Mountain route doesn’t 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). By far the most active First Nations group on the Trans Mountain proposal has been the Tsleil-Waututh First Nation, whose traditional territory spans the Burrard Inlet, the body of water that is the terminus for the pipeline in Burnaby.

Public Opinion

Public sentiment in BC is generally opposed to the pipeline. Insights West has been surveying British Columbians about the pipeline since January 2013, as shown in Figure 2. Opposition has been greater than support in four of the five surveys taken since then. In January of 2014, support outweighed opposition by 5 percentage points, but in the other four surveys opposition outweighed support by between 4 and 19 percentage points. In the most recent poll in January, 2016, 45% of respondents opposed the pipeline, and 36% supported. In a nationwide sample by Ekos in February 2016, supporters outweighed opponents 47% to 42% (Ekos 2016).

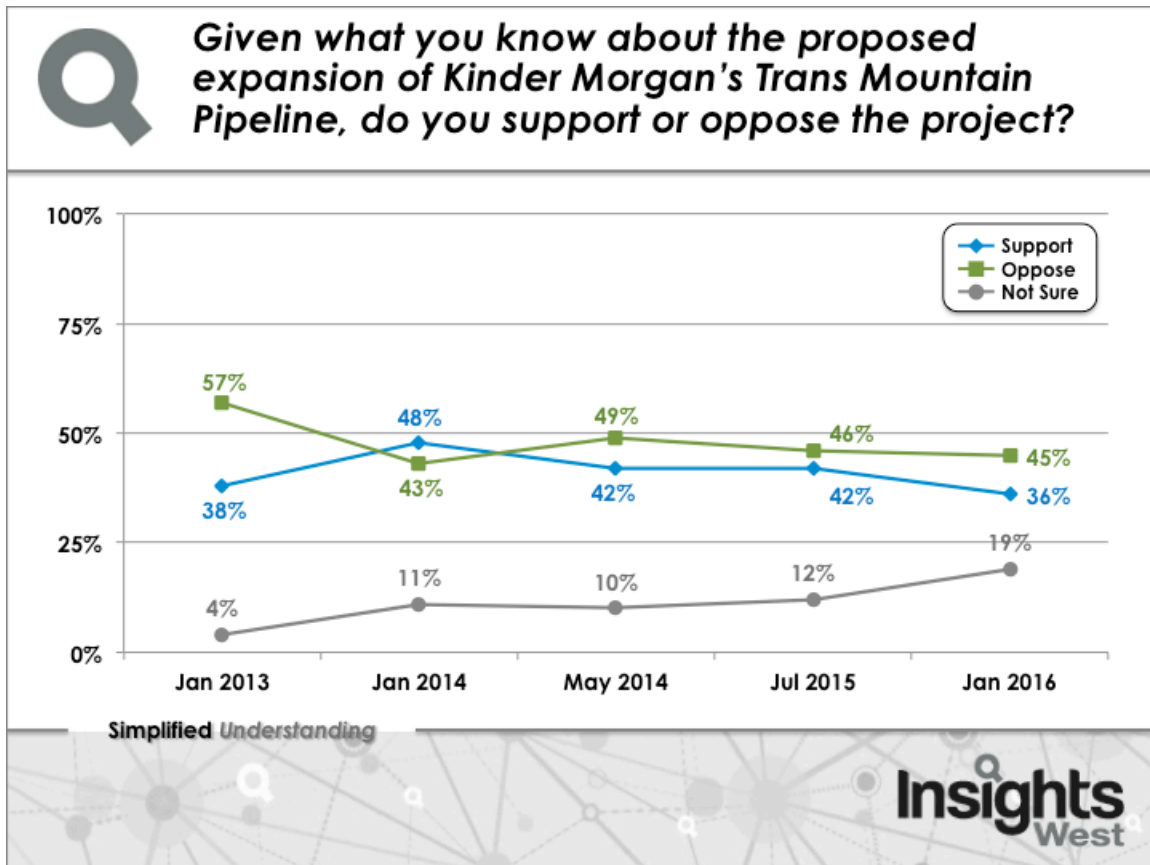


Figure 2. Source: <http://www.insightswest.com/news/fewer-british-columbians-would-endorse-pipeline-projects/>

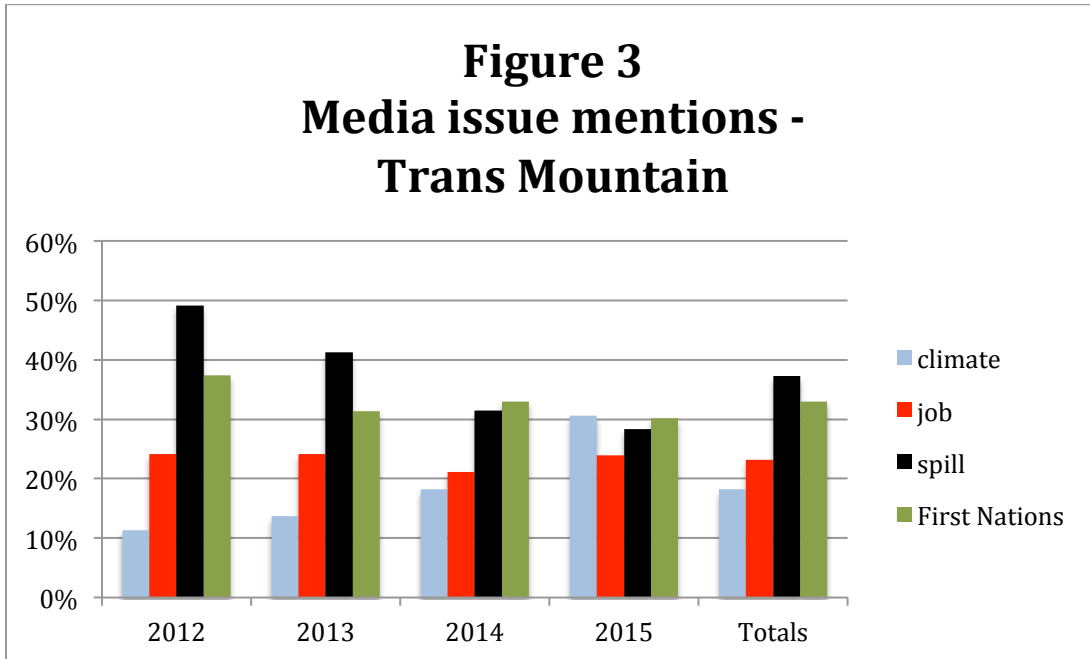
A May 2016 Abacus poll was framed quite differently and got very different results. When respondents are asked whether they are willing to support under certain conditions, in particular “also investing in renewable energy and ways to reduce the amount of pollution the country produces,” the numbers for Trans Mountain in British Columbia show more openness to considering the project: 31% support, 31% can support, and 27% oppose (Abacus Data 2016).

Issue Framing Analysis

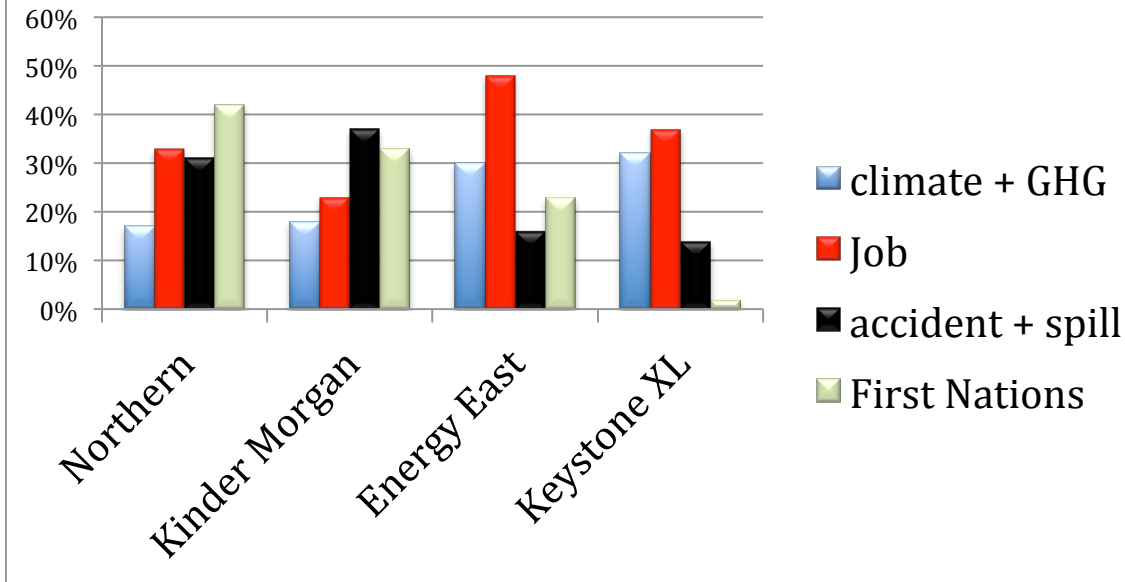
An analysis of media provides some indication of the relative importance given to difference issues in the pipeline dispute. This analysis compares the number of times news articles mentioning the pipeline also mention particular four particular groups of issues: climate change (specifically, “greenhouse” or “climate”), jobs (specifically “job”); risks of pipeline or tanker spills (specifically “accident” or “spill”), and First Nations (specifically, “First Nations”). Data comes from the Canadian Newsstand index. Figure 3 shows that for the 4 years 2012-15, the local accident risks were the most salient issue in the media, followed by First Nations, then jobs, and climate last. As time when on, climate issues increased in importance

and local accident concerns declined to third place after First Nations. This probably reflects the importance of pipeline and especially tanker accidents in the environmental groups' efforts to mobilize opposition and influence the 2013 BC elections. Climate issues received increased attention as the environmental groups and academic critics effectively linked pipeline expansion to climate, and the relative importance of the oil sands and climate change issues in the 2015 federal election. Figure 4 compares the media analysis of the Trans Mountain pipeline to the other three major oil sands pipeline controversies. That comparison shows that local accident risks were distinctively salient in the Trans Mountain case.

Figure 3
Media issue mentions -
Trans Mountain



**Figure 4: Issue mentions by pipeline
2012-15**



Institutions and the Politics of Structure

From the start, the rules of the game governing the Trans Mountain project have been contested. Traditionally in Canada, the decision-making authority to approve inter-provincial pipelines rested with the federal government and its National Energy Board, a quasi-independent regulatory agency (Bankes 2015). Since pipeline and terminal construction and operation affect many areas under provincial jurisdiction, provinces have a potential role to play as well. The BC government, however, was willing to accede authority to the federal government through an equivalency agreement whereby BC agrees to accept the NEB review process as its own environmental assessment process (National Energy Board and BC Environmental Assessment Office 2010). Municipalities have shown considerable interest in pipeline disputes but, as we will see below, don't have any direct institutional authority over pipeline decision-making.

Aboriginal rights and title have become increasingly important issues in Canadian resource development, and perhaps nowhere more so than 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). 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 BC history and specified the conditions under which title could be infringed by Crown government. While much attention has been given to the Court declaration that once title has been granted, First Nations should be accorded the right to consent 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 (Hoberg 2015; 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 Right of Indigenous People.

Harper’s Assertion of Political Control

Part of that institutional conflict over Trans Mountain is a spillover from the Northern Gateway case (Hoberg 2013). The Harper government changed the regulatory review procedures in 2012, in large part as a reaction to the environmental movement’s flooding the Northern Gateway project with its “mob the mic” campaign, which contributed to over a year’s delay in completing the pipeline review (Hoberg 2013; Salomons and Hoberg 2013). Four important changes occurred:

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, have “relevant information and expertise”;
4. Shifted the decision-making authority from the NEB to the federal cabinet, relegating the NEB role to one of a 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, discussed further 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 in a similar environmental assessment, the US State Department’s review of the Keystone XL pipeline, upstream and downstream impacts were considered with the scope of the review.

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. The NEB says it received 2,118 Applications to Participate, and denied 22% of those applications.

- 400 requested intervenor status and were granted intervenor status;
- 798 requested commenter status and were granted commenter status;
- 452 requested intervenor status and were granted commenter status; and
- 468 have been denied (NEB 2014).

A group of those denied their application to participate, led by SFU Professor Lynne Quarmby, renowned Canadian environmentalist Tzeporah Berman, and the group Forest Ethics 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 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. In doing so the Court went so far as to denounce Forest Ethics as a "busybody" (*Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245).

The City of Vancouver also filed suit challenging the NEB's decision exclude from consideration of the upstream and downstream environmental and socio-economic impacts pipeline. It was also dismissed by the Federal Court of Appeal without reasons.

It's important to note that while the pre-2012 rules would have allowed the additional 468 to participate, the number of intervenors (400) and commenters (1250) who were permitted participation in the process was still quite substantial. For comparison, that total of 1650 was just shy of the total of 1790 parties that participated in the more open Northern Gateway Joint Review Process (*Northern Gateway Joint Review Panel 2013*, pp. 14-15).

Forcing Jurisdiction on BC

While the Harper government was intent on asserting more direct political control over the process, the BC government was doing its best to avoid direct signing an equivalency agreement that transferred jurisdiction to the federal government. Environmentalists and First Nations lobbied forcefully to have British Columbia reassert its jurisdiction, and the provincial NDP had a "made-in-BC" environmental assessment process as a core part of its 2013 election platform (*BC NDP 2013*).

Despite having a formidable lead going into the election, Christy Clark's BC Liberals defeated the NDP. The mid-campaign decision by NDP leader Adrian Dix to come out in opposition to the Trans Mountain project is credited with contributing to Clark's remarkable comeback (Hoberg 2013).

The equivalency agreement between BC and federal government was challenged by the Coastal First Nations, who filed suit on the application of this agreement to the Northern Gateway pipeline. The BC Supreme Court ruled that the province had abdicated its decision-making authority under the BC Environmental Assessment Act. The judge ruled that the Act allows the province to defer to the federal government review process, but that it still must still decide whether or not to issue an Environmental Assessment Certificate (*Coastal First Nations v. British Columbia (Environment)*, 2016 BCSC 34). In a new twist on regulatory federalism in Canada, the judge in this case ruled that despite federal paramountcy over interprovincial pipeline approvals, it would be permissible for the provincial government to impose certain conditions on interprovincial pipeline approvals. 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 conditions. The court decision (not appealed by the BC government) shifts the intergovernmental politics of pipelines. For an equivalency agreement to pass muster, BC can defer the assessment process to the federal government, but it would need to issue its own final decision. The current process, where BC submits strenuous objections to the pipeline but then defers the final decision to the federal regulator, is no longer workable.

In response, BC has launched its own environmental assessment process on the Trans Mountain project (BC Environmental Assessment Office 2016). The terms, conditions, and timelines for the review have yet to be established, but it seems highly improbable that the process could be completed by December 2016, the time the federal cabinet is scheduled to decide.

Asserting Local Control

Controversy erupted with Kinder Morgan decided, six months after its submissions, that it wanted to amend its application to change the route of the pipeline through the terminus city of Burnaby. Thinking the route would be less disruptive to Burnaby residents, Kinder Morgan wanted to reroute the pipeline through Burnaby Mountain. The change led to the NEB requesting more information about route design, which required the company to perform seismic testing by drilling on Burnaby Mountain, in a Burnaby park known as the Burnaby Mountain Conservation Area. The City of Burnaby sought to block the drilling by enforcing its bylaws against that type of disruption in the park 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 gives 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 BC Supreme Court. In December 2015 that court rejected Burnaby's argument, concluding that the doctrine of federal paramountcy was properly interpreted and applied by the NEB: "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 there was through the courts, resistance on the ground emerged once Kinder Morgan sought to begin the seismic testing. Protestors disrupted the activities as Kinder Morgan employees began work, and 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 protestors, including several prominent SFU academics (Prystupa 2014). Kinder Morgan went to court to get an injunction preventing protestors from disrupting its testing activities. That is standard in BC environmental controversies, but Kinder Morgan took the additional step to filing civil suit against some of the protestors for damages resulting from project delays and harassment of workers.

While the threat of having significant damages leveled against them was alarming, the protestors also managed to have a bit of fun with what they viewed as overreaction by the company. Part of their claim for damages was based on allegations of assault by protesters on Kinder Morgan workers, including any or intimidating facial expressions. This provoked an amusing 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 for damages against the protesters.

Asserting First Nations Control

The Tsleil-Waututh First Nation, given their location in the Burrard Inlet where the pipeline end and tanker terminal will be expanded, have played the most active role amongst First Nations opposing the project. From the very beginning the Tsleil-Waututh have 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 Nation 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 49th parallel, whose waters may also be affected by increased tanker traffic (Connolly 2016).

Asserting Trudeau Liberal Control

Issues involving oil sands pipelines, both the market access and environmental implications, played a significant role in the 2015 federal election campaign when Justin Trudeau's Liberals ended 9 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 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 2015).

In January 2016, the Trudeau government announced "Interim Measures for Pipeline Reviews". The interim measures were to be guided by the following 5 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; and
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 current obligations under Canada law and a far cry from the platform's apparent commitment to according First Nations 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 additional consultations with indigenous group and other affected communities, and an assessment of the “upstream greenhouse gas emissions associated with this project”. These additional steps necessitated an extension of the deadline for decision on the project from August to December 2016 (Natural Resources Canada 2016b). It was not until the day before the NEB report was released that the government announced its new consultation process in the form a 3-person ministerial that “to create further opportunities for people from potentially affected communities close to the proposed pipeline and shipping route to provide their views on the project.” The panel’s report is due November 1, 2016 (Major Projects Management Office 2016). A draft of the government upstream greenhouse gas estimate was published May 18, 2016 (Canadian Environmental Assessment Agency 2016).

These supplementary processes, while far more modest that pipeline opponents had hoped for, are the mechanism the Trudeau government has chosen to put its stamp on the Trans Mountain Expansion review process. They can provide the basis for a rationale for Trudeau departing from the NEB recommendations, but there’s no guarantee they will be used that way.

Conclusion

Oil sands pipelines have proven to be one of the most controversial issues in Canadian politics in the 2010s. Exacerbated by the absence of federal leadership during the Harper government, they remain extremely divisive despite Harper’s departure. The oil industry, perhaps the most powerful interests in the Canadian economy, continues its aggressive push to get access to tidewater and the markets and prices that would enable. Environmental groups remain adamant about blocking pipelines as a way to contain the expansion of the oil sands and the environmental impacts that would enable. First Nations, especially on the West Coast, remain resolute in their opposition. Local governments from Vancouver to Montreal have launched campaigns to resist oil sands pipeline expansion.

This paper has focused on the politics of structure around the Trans Mountain Expansion Project as 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 BC 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 have 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 garner greater control over decision-making on their traditional territories.

This politics of structure has brought the courts into play more than usual in Canadian policy-making. Even before it filed its May 2016 report recommending approval with conditions, the Trans Mountain case had already attracted 9 separate court cases: one by opponents whose applications for participation were rejected, two over the list issues being considered (one of which was by the City of Vancouver on climate change), one by Tsleil-Waututh First Nation about consultation in establishing the review, one by Kinder Morgan against the protesters, and four by the City of Burnaby and their struggle to prevent drilling on Burnaby Mountain. Thus far, the courts have clarified that the NEB has used its powers to set the scope of issues and hearing participants reasonably. Courts have also clarified that municipal governments lack the legal authority to thwart pipelines, but that provinces have the authority to attach conditions to pipeline approvals. The First Nations cases, arguably the greatest risk to the project, have yet to be decided.

With the issuance of the NEB recommendation on May 19, 2016, the process reflecting the structure created by Harper came to an end. Now it is Trudeau's turn to restructure the process to advance his own agenda. While his add-ons to the Harper review process might provide him the rationale to depart from the NEB recommendation, it won't make the core political choice any easier. Trudeau has committed to a multiple conflicting objectives. He has repeatedly promoted the importance of supporting the Alberta oil sector by diversifying the market for oil sands. But he also ran on the slogan that "governments grant permits, but communities grant permission," and more than a dozen lower mainland municipalities are opposed to the project. Trudeau has also pledged reconciliation with First Nations and the full implementation of the UN Declaration on the Rights of Indigenous People, yet a number of First Nations are vehemently opposed to the project. In Paris, he committed to 30% reduction in greenhouse gas emissions by 2030, and in the Vancouver Declaration he committed to fostering a clean energy transition. Yet the oil sands remain the fastest growing source of greenhouse gas emissions in the country.

The challenge doesn't get any easier when you examine alternative proposals to get oil sands access to tidewater. Keystone XL has been rejected by the US. The Northern Gateway pipeline received conditional approval but is widely thought to be dead as a result of First Nations opposition. The Energy East pipeline, while it is less affected by aboriginal conflicts, is more strongly opposed in Quebec than the Trans Mountain proposal is in BC (Abacus Data 2016). If Trudeau turns West, he will alienate many BC voters critical to his majority status. If he turns East and alienates Quebec voters, the electoral damage would be even higher. If he rejects them both, he breaks the commitment he made to Alberta to atone for the energy policy sins of his father.

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