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Canadian public policy

A MANDATE FOR CANADA



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In advance of the 2019 federal election, MLI has released a new series designed to offer practical public policy recommendations for the post-election government. Titled “**A Mandate for Canada**,” this series of short analyses will cover a range of pressing issues that any incoming government will need to address, including Indigenous affairs, foreign and security issues, and economic and fiscal policy.

Breaking the Pipeline Logjam

Joseph Quesnel and Ken Coates

Introduction

Building additional oil and gas pipelines should be a top national priority, particularly given the commitments of the Liberal government and the other federal parties to job creation and general economic development. Canadians are well aware of this problem and want government to do something to break the “pipeline logjam.”

Canadians from across the country – including those living in provinces with reputations for being critical of the energy sector – realize that the lack of pipeline capacity in this country is a critical issue. In short, Canadians care about pipelines. This is so despite a tremendous amount of negative commentary about the oil sands over the last few decades, including protests on the West Coast, high-profile visits from celebrities and other public figures to the Fort McMurray region, and intense social media criticism of energy development.

Even so, the countervailing interventions of the oil and gas sector, energy workers, and the provinces of Alberta and Saskatchewan have to some extent helped Canadians develop a much broader understanding of this issue, and generally speaking they have become much more well-disposed to pipeline and related development.

In January 2019, the polling firm Angus Reid Institute released new public opinion data showing that most Canadians (fully 60 percent) felt that the lack of pipeline capacity was a “national crisis.” Polls show that half of the respondents felt that the Trudeau government had done “too little” to ensure the construction of new pipeline

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capacity. Also, about half of Canadians (53 percent) support the cancelled Energy East pipeline, the Enbridge Line 3 expansion that has been postponed for another year, and the stalled and now federally-owned Trans Mountain pipeline. The number who outright oppose the projects is quite low – less than 20 percent of respondents. Moreover, two-thirds of Canadians (65 percent) identified oil and gas as a critical national industry among a list of seven industries provided.

While the polling data identified the expected regional variation in opinion – Alberta and Saskatchewan are most likely to view the lack of pipeline capacity as a crisis – 40 percent of residents of Quebec, a province that played a significant role in the demise of the Energy East pipeline, also felt it constituted a crisis. Surprisingly, over half (53 percent) of the people in British Columbia, the focus of public protest about the Trans Mountain Expansion, felt likewise.

Canadians are beginning to understand what is at stake with the current pipeline logjam. They need to see how this issue affects more than just workers and economies in the West. Delayed and stalled pipelines affect us all. With this paper we aim to provide some guidance to all federal parties grappling with these issues.

Canadians increasingly understand that the lack of pipeline capacity has effects on all Canadians in terms of lost job opportunities (many multiples of the exaggerated potential job losses associated with SNC-Lavalin’s potential criminal prosecution), government revenues, and royalties. Tim McMillan, CEO of the Canadian Association of Petroleum Producers (CAPP), argues that the lack of pipeline capacity has been costing the Canadian economy \$100 billion per year. The loss is coming from the flight of investment capital and the discounted prices that oil and gas producers must accept as a consequence of their being cut off from global markets (Healing 2018). At present, 99 percent of all Canadian crude oil and equivalent exports go to the United States (Natural Resources Canada 2017). Without new pipeline capacity, Western-based oil companies are forced to sell to American markets at lower rates than their product would command had they access to the world market. Journalist Dan Healing explained it this way:

Canadian grain farmers experienced that situation in 2013 and again last winter when their harvest outstripped the transport capacity of Canada’s rail companies. Western Canada’s oil companies are now in the same boat thanks to production gains that have not been matched by export pipeline capacity gains. Like those farmers, oil producers have filled storage units to bursting while they experiment with partial solutions. The price discounts or “differentials” that had mainly affected heavy oil have spread to light oil and upgraded synthetic oilsands crude as pipeline space tightens. (Healing 2018a)

Alberta and Saskatchewan are land-locked and must transport their oil to marine terminals to get it to foreign markets, especially in Asia. The industry and western governments have been aggressive in responding. More than three million barrels of petroleum liquids reach international markets daily from Canada via pipeline (Hume 2016). Existing transmission pipelines reach tidewater in British Columbia and Eastern Canada. Moreover, more than 600,000 barrels a day were transported by railway tank car in 2014. The issue, journalist Stephen Hume (2016) has argued, is one of “rate of expansion for exports, about preferred modes of transport and about preferred routes.”

This is a Canadian issue and not just an Alberta-specific one or simply a Western concern. It is also an issue that affects Indigenous communities – particularly in the West. These communities are increasingly reliant on

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contracts, procurement deals, and various revenue-sharing arrangements with resource companies that operate on or near their traditional territories.

MLI program manager Joseph Quesnel highlighted the impact on First Nation and Métis communities if the pipeline projects do not proceed (Quesnel 2019). Drawing on CAPP data, he noted that almost 12,000 workers in the oil and gas sector identify as Indigenous. Moreover, substantial sums have been transferred to Indigenous communities. For example, these companies paid out \$55 million to Indigenous governments between June and December 2017 alone, from conventional oil and natural gas activity. In addition, oil sands companies spent \$3.3 billion on procurement deals for related services from Indigenous-owned companies. And oil sands producers have had a major social impact with their investments in Indigenous communities. For example, they distributed \$48.6 million between 2015 and 2016, allowing these communities to invest in priorities such as language and cultural revitalization.

However, over the last several years, Indigenous and non-Indigenous Canadians watched as pipeline project after pipeline project has been obstructed, delayed, or scuttled. Two pipelines that were intended for crude oil transportation have been killed. The first was the Northern Gateway pipeline, which was to transport 525,000 barrels of crude a day over 1,777 kilometres of pipeline, ending in Kitimat, BC. The government of Canada unilaterally killed the project in November 2016, ironically without extensive consultation with affected Indigenous communities, in a move that cost these communities economic opportunities. Energy East would have brought 1.1 million barrels of crude a day over a 4,600 kilometre route, ending at the Irving refineries in Saint John, NB. That project was cancelled by the proponent in October 2017 due to frustration over regulatory delays, including downstream emissions requirements. In this context, downstream emissions refer to what happens after the oil has left the pipeline and is consumed by its end users.

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Apart from the cancellations, one major project was stalled. The Keystone XL project would have transported 830,000 barrels of oil a day over 1,897 kilometres, ending at Steele City, Nebraska, but connecting to various US-based pipeline networks. That project was stalled when US President Barack Obama denied the project a presidential permit, even though it passed an environmental assessment. The portion from Kansas to Texas has been built. US President Donald Trump revived the \$8 billion project through executive order, but it remains stalled in the courts.

The Trans Mountain pipeline expansion project would transport 590,000 additional barrels in added crude oil capacity to reach tidewater in Burnaby, BC. The 1,150 kilometre pipeline, now owned by the government of Canada, is also awaiting resolution following a decisive National Energy Board ruling that quashed an attempt by the city of Burnaby to stop the project. The city attempted to appeal this ruling to the Federal Court of Appeal, but it dismissed the claim. In August 2018, the Supreme Court declined to hear Burnaby's appeal. This follows a 2018 Federal Court of Appeal decision to halt the Trans Mountain Expansion Project based, in part, on inadequate consultation with Indigenous groups. The National Energy Board endorsed the project on February 22 and gave the federal government a 90-day window to make a final decision about the project. Ottawa took more time than the 90-day period and is expected to make a decision on June 18.

Thus far, two pipeline projects are proceeding. The first is the Enbridge Line 3 expansion, which will see 350,000 barrels of crude a day in additional capacity, ending in Wisconsin, but then proceeding along US networks. That project, slated to be completed in late 2019, has been delayed for at least a year. In early June, the Minnesota Court of Appeals ruled the environmental impact statement was inadequate because it found it did not address the possibility of an oil spill into the Lake Superior watershed. This has some concerned about delays to the project (Dosser 2019). Coastal GasLink will see a 670 kilometre pipeline, to be finished by 2023, end in Kitimat, BC. That project made headlines when internal debates among the Wet'suwet'en community threatened to derail the signed agreements, although some last-minute negotiation smoothed out relations and enabled the project to proceed.

Identifying the Costs of Pipeline Delays

Governments and industry must identify the costs to various parties that come from delaying these projects. In fact, the Alberta government has already produced an effective advertising campaign to highlight the revenue that has been lost to Canada due to delays in the Trans Mountain pipeline expansion project. The Alberta government estimated that these delays cost Canadians \$40 million per day (Antoneshyn 2018). The federal government must become a forceful advocate for oil and gas pipelines. Timid and guarded support will not serve. Canadians should know the costs of the pipeline logjam.

Cost to the industry and jobs

Pipeline delays are costing Canada's energy sector billions of dollars. Discounted oil prices from multiple pipeline projects undermine the viability of the energy sector on which many other industries depend. This impact extends well beyond Alberta, British Columbia, and Saskatchewan. MLI Munk Senior Fellow Philip Cross has pointed out that natural resources provide a strong foundation for the entire Canadian economy. In fact, in 2010, the most recent year for which figures are available, natural resource industries directly contributed \$260 billion or 16.6 percent of GDP to the Canadian economy, with mining and oil and gas leading the way (Cross 2015). Cross also found that natural resources have become the predominant industry for business investment in Canada, particularly the energy sector. In 2013, natural resources accounted for \$144.5 billion, or 61 percent, of all business investment in plant and equipment in this country, up from 38.2 percent in 1999.

Oil and gas are a significant part of the resource mix and affect almost all other industries, or, as Cross put it in 2015: "It is important to understand that the production of natural resources affects all industries in Canada."

Cross also noted that record low prices for Alberta's oil will affect all of Canada, not just the province, as energy is the country's leading export and 7.5 percent of Alberta's labour force comes from outside the province, by far the most in Canada (Cross 2015). He cited recent data from Statistics Canada showing that an average of 130,000 Canadians from outside Alberta earned income from working in Alberta between 2011 and 2015, by far the most of any province as a share of employment.

Jobs in Canada's oil and gas sector are expected to fall by more than 12,000 this year, according to a new report from PetroLMI, the labour statistics information division of Energy Safety Canada. The number of workers is forecast to drop to about 173,300 in 2019, a decline of 23 percent from the 226,500 people in the workforce in 2014, according to the 2019 labour market update (PetroLMI 2019).

Clearly, less Alberta is bad for Canada. All Canadians should care about employment figures in Alberta.

Costs to our international competitiveness

The United States is Canada's biggest export customer for crude oil and natural gas – but it is now also in the position of being our largest competitor. Amidst Canada's declining oil prices and price differential, the United States has stepped in with its America First Energy Plan (Quesnel 2017). The plan calls for “American energy dominance” as a “strategic economic and foreign policy goal of the United States” and seeks to “unleash an energy revolution” by tapping into “\$50 trillion in shale, oil and natural gas reserves, plus hundreds of years in clean coal reserves.” And most importantly, the plan aims to make the US “totally independent of any need to import energy from OPE” or “any nations hostile to US interests” (Quesnel 2017).

Great advancements in hydraulic fracturing (also called “fracking”) technology and the discovery of vast American shale reserves are spurring what many have called the “shale gas revolution” in the United States. The Trump presidency has been very good at tapping the country's energy reserves.

Meanwhile, Canada has introduced stifling regulations on pipelines and crude oil shipping. They include Bill C-69 (adding regulatory requirements for pipelines) and C-48 (banning tanker traffic on BC's northern coast). Furthermore, a few provinces have imposed moratoria on fracking activity. Canada, formerly known as an energy superpower, has fallen behind the United States. Breaking the pipeline logjam will go a long way towards restoring Canada's lost status. Americans are not dependent on our oil because they now have their own plentiful domestic supply. That fact changes the dynamics of the pipeline debate.

Cost to Western Canada and Canadian federalism

Insufficient pipeline capacity can have long-lasting political effects. The current approach is increasing Western alienation – something the country ignores at its peril. If Westerners begin to perceive – again – that the Canadian federation does not work for them, they will turn inward and begin to be less co-operative with federal institutions. Angus Reid polls from March 2019 point to growing Western alienation and frustration with Ottawa over killed or delayed pipeline projects (Bennett 2019).

At the very worst, federal pipeline strategies embolden Western separatist sentiment. Canada has never faced a realistic existential threat from a West that wants out, like it did with Quebec on different issues. However, Canada does not want to maintain or exacerbate the conditions that would heighten such a sentiment. The newest fault line in the battle of Canadian federalism is an economic one. There was a bitter and nasty fight between Alberta and British Columbia when the latter province vowed to place five conditions on “accepting” Alberta oil (Meissner 2017). In retaliation, then Alberta Premier Rachel Notley announced that Alberta would pass a new law cutting oil shipments to British Columbia (Morgan 2018b). This pledge has been carried over to the new United Conservative Party government in Alberta.

Quebec has also created tensions with other provinces over its arguably very hard-line position on Energy East. At a premier's meeting in December 2018, newly elected Quebec premier François Legault threw cold water on New Brunswick's plans for Energy East when he reportedly stated: “There is no social acceptability for a pipeline that would pass through Quebec territory” (Valiante 2018). Quebec – along with many of its municipalities – has long opposed pipelines coming from the West. This decision shattered the hopes of the remaining Maritime provinces, which were supportive of Energy East and other pipeline projects. This obstructionism pits provinces against each other and inflames often ingrained anti-Quebec sentiment.

Canada's federation does not need inter-provincial trade wars or tensions. The federal government should also not stay removed from these battles. As will be discussed later, Ottawa must exercise its federal power intelligently to prevent these battles from undermining the Canadian federation.

Challenges to getting pipelines built

Eco-colonialism and picking on the oil sands

Thus far, the debate surrounding Canadian responsibility for climate change has been focused on resource producers, not consumers. This is a brilliant strategy by the environmental movement as it allows Canadians to focus on the oil and gas sector without reflecting deeply on their individual and collective contributions to carbon production. It is true that resource companies are large emitters within Canada's overall small carbon emissions contribution, but most emissions are not created at the level of extraction. Oil and gas is the largest single contributor of greenhouse gases, but much of it is emitted when it is burned as fuel. Chart 1 below shows the greenhouse gas emission breakdown of all major economic sectors. Chart 2 breaks down emissions for the transportation sector alone.

There are better, more efficient means of reducing greenhouse gas emissions than targeting the oil and gas sector; those means would tackle the real culprit – Canadian consumers from all regions. Certainly, pricing carbon is preferable to allowing pipelines to die. These are better ways to reduce emissions at the consumer level. After all, pipelines by themselves don't really contribute to emissions except by allowing greater investments in the oil sands by helping to ensure the product gets to market.

Focusing blame and the national climate change response on resource producers increases the costs on the companies that want to build additional pipelines. The debate has somehow left the impression that Alberta oil is “dirtier” than other sources and less worthy of foreign export. Prejudice and misunderstanding surrounding Alberta's oil sands has distorted the policy discussion and misdirected legislators to take a negative view of additional pipelines.

Natural Resources Canada has documented how the oil sands have a long history of technological innovation that has led to improvements in energy efficiency and associated emissions reductions. From 2000 to 2016, the emission intensity of oil sands operations dropped by approximately 29 percent as a result of technological and efficiency improvements, fewer venting emissions and reductions in the percentage of crude bitumen being upgraded to synthetic crude oil (Natural Resources Canada 2018). It is expected emissions per barrel will continue to decline over the coming years (Natural Resources Canada 2016).

Canadians are, by and large, in the moderate middle on this issue. As mentioned earlier, they see the value of the oil and gas sector to the Canadian economy. They also believe in protecting the natural environment. Coming from a large country of forests and mountains teeming with wildlife and freshwater resources, this is hardly surprising.

Those who intensely oppose the energy sector and additional pipeline capacity are a very small minority, albeit a very loud one. Many of these elements are funded by foreign foundations, largely from the United States. Many are motivated solely by authentic concern for the planet and the environment. However, some of this foundation support is suspect. Independent researcher Vivian Krause has highlighted how some groups have adopted a clear strategy of land-locking the “tar sands” to ensure that Alberta crude cannot reach the international market (Krause 2018). They use inflammatory and erroneous slogans such as “Tars sands oil is blood oil” to motivate donors and activists to their cause. Government must inform the public about the realities of our energy sector and shine a large spotlight on these foreign-funded environmentalist campaigns.

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Chart 1: Greenhouse gas emissions by economic sector, Canada, 1990 to 2016

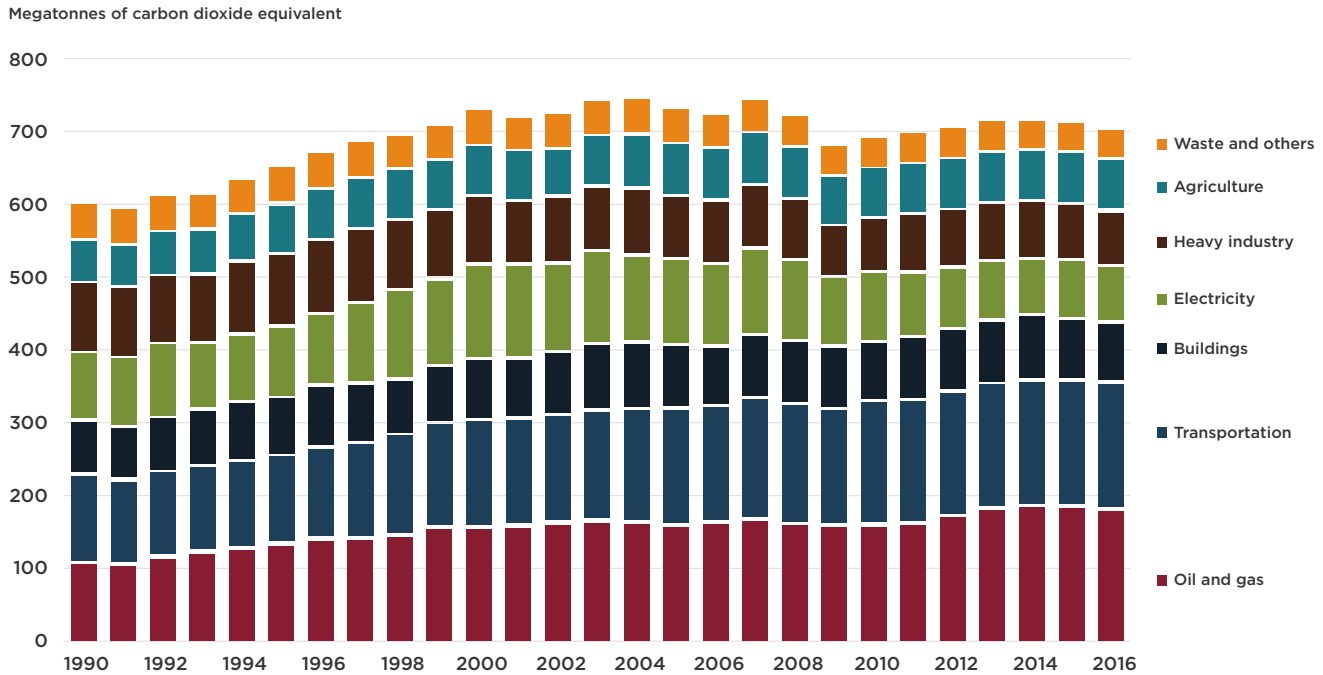
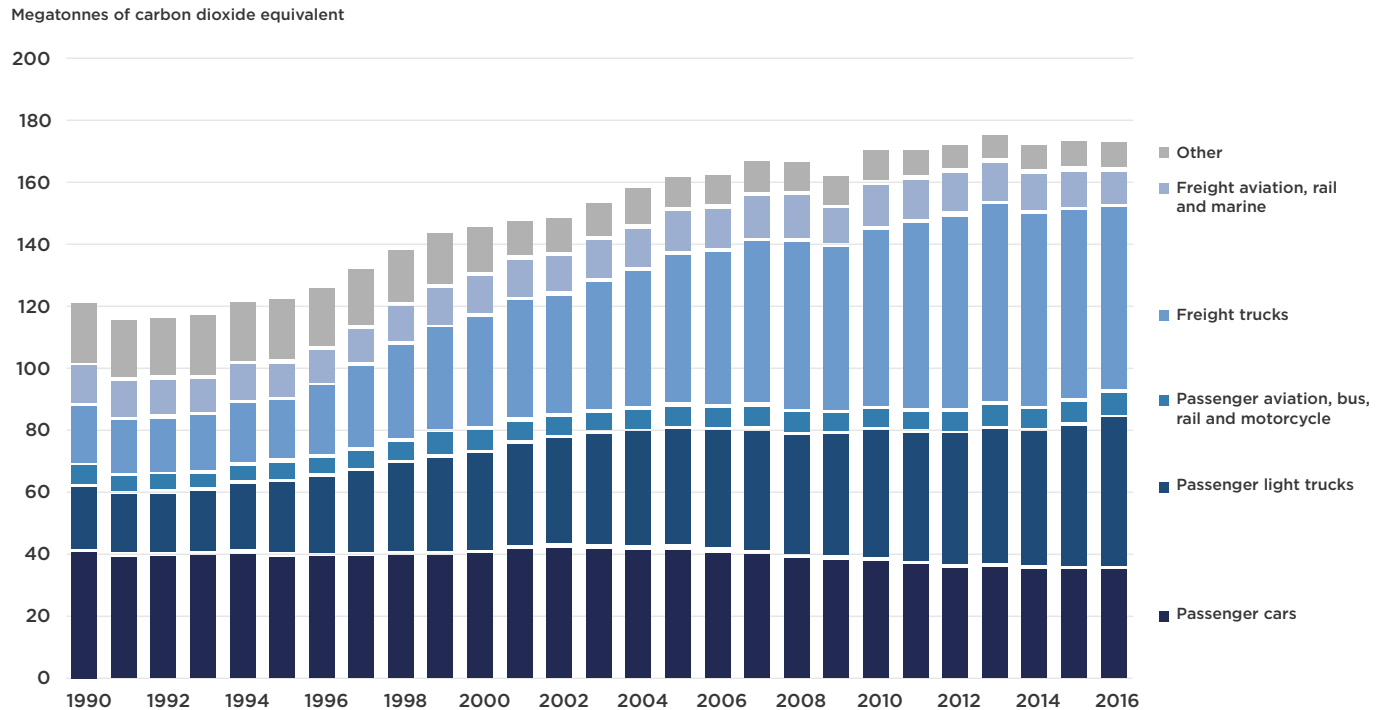


Chart 2: Greenhouse gas emissions from the transportation sector, Canada, 1990 to 2016



Source Figures 1 and 2: Natural Resources Canada 2016.

A growing number of pro-development Indigenous organizations, including the Indian Resource Council (IRC), First Nations Major Project Coalition, the First Nations LNG Alliance, and many individual communities, have become alarmed at the tone of the discussion. Unfortunately, the media is drawn to conflict and controversy. This has resulted in a disproportionate focus on pipeline opponents. First Nation blockades make for more interesting headlines than formal collaborations. The media have started to give some attention to the Indigenous side that is supportive of pipelines and the energy sector. But pipeline opponents still often get far more public attention than pipeline supporters.

Stephen Buffalo, CEO of the IRC, has described the activity of environmental activists in Indigenous communities as a form of “environmental colonialism,” in the sense that these environmentalist non-governmental organizations are trying to control First Nations communities and impose an anti-development agenda on them. Calvin Helin, the prominent First Nation author and businessman from British Columbia, has criticized these organizations for using First Nations as “props” in their fundraising campaigns to stop pipelines.

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Questions over consulting Indigenous peoples

Indigenous communities are not the problem when it comes to delayed pipelines. First Nations, by and large, are supportive of the projects, as mentioned above. Indigenous opposition is largely, though not exclusively, focused on the BC coast. The evidence for support is the long trail of signed benefit agreements and equity partnerships between resource companies and First Nations along the pipeline route. First Nations and modern resource company proponents are aware of the duty to consult and accommodate First Nations and what that generally entails. After all, the legal requirement for the duty to consult is triggered more than 100,000 times annually and generally works well (Baines and Ishkanian 2016).

Much of the controversy in the Indigenous world surrounds the legality and constitutionality of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), particularly the articles dealing with a “free, prior, and informed consent” for resource development (the so-called FPIC section). The federal government deserves a large portion of the blame for the continuing confusion. When the Trudeau government declared its strong support for UNDRIP, many First Nation leaders and activists began to interpret this to mean that FPIC granted First Nations a virtual legal veto over projects they did not support. However, legal and constitutional experts – including MLI’s own Dwight Newman – have stated clearly that the duty to consult does not equal a veto or a requirement for full consent or unanimity (Newman 2017).

Of course, in its policies the government always has the option of going further than the duty to consult requires. The legal duty to consult and accommodate is involved whenever a Crown decision could affect an Indigenous right or treaty right. It often requires the Crown – through its resource proponent – to mitigate the negative effects of the project in question. It requires the Crown through its proponents to engage in good faith negotiations with Indigenous communities. However, the Indigenous side must not frustrate those engagement processes.

The federal government (and the provinces and territories) need to clarify the policies related to duty to consult so that project proponents know exactly what meaningful consultation means. If the proponents (the companies involved) have clear guidelines they can follow, there is less chance for legal action later on, which would greatly enhance the chance for timely pipeline approval.

The other Indigenous issue that needs to be addressed is which rights-bearing communities should be consulted in the process. Dwight Newman addressed this point in his 2018 paper on pipelines when we wrote:

In particular, some of the communities that have signed agreements with Kinder Morgan along the pipeline in southeastern British Columbia, which did so through band councils under Indian Act governance structures, are within an area over which rights claims are also being asserted by the larger Secwepmc Nation governance structures claiming to encompass these communities within the Nation. The question of whether Indian Act First Nations or Nations defined through a different traditional governance structure has priority as rights-bearing communities has significance to this case. (Newman 2018b)

Newman proposed that Indigenous communities themselves should clarify among themselves and between communities who the right-holders are. Clear, knowable protocols need to be developed. Without clear agreements and protocols, First Nations, industry, and governments will need to ask the courts to clarify these issues - a costly and time-consuming process.

Adding new burdens - Bill C-69, and heightened environmental regulation

Despite all the difficulties with pipeline approvals to date, and despite declaring repeatedly that it wants to see pipelines built, the Liberal government continues to add to barriers to the process. A new suite of initiatives in the form of Bill C-69 is likely to make it even more difficult and cumbersome to approve infrastructure projects.

Bill C-69 has been almost universally opposed by pipeline interests as being unnecessarily obstructionist and adding potential delays. Indigenous groups - especially those involved in the oil and gas sector - are becoming increasingly vocal about the bill's problematic aspects (Quesnel 2019). For example, the removal of a "standing test" enables outside interests, potentially far removed geographically from the project, to participate and unnecessarily prolong assessment hearings. The bill mentions UNDRIP in the preamble without defining any limits to it or adopting any qualifying language. Also, the addition of gender, health, and climate change to the assessment criteria would make the approval process much more onerous. Many of the areas included in the bill are nebulous and difficult to measure. As well, it could be argued that carbon policies do not belong in an individual project assessment process but belong with wider regulatory and fiscal issues.

Many were disappointed in early June 2019 when the federal government announced it would oppose most of the amendments to Bill C-69 brought forward by the Senate energy and environment committee. This also comes after six premiers sent a letter to the prime minister urging him to change his position on C-69, mentioning that federal unity was at stake (Villani 2019). Despite these amendments, many industry representatives, especially from the energy sector, believe the accepted changes do not address their core concerns (Pipeline News 2019).

Federal authority over pipelines and Canada's courts

National Post columnist Andrew Coyne, in a February 2018 commentary, reminded us that Confederation was enacted to create a larger economic union in British North America. Or, as he put it, "Not just a free trade area, limited and contingent, such as might be negotiated between sovereign states, but a single economic space, within which capital, labour, goods and services could move freely" (Coyne 2018). To oversee that economic union, the framers of Confederation created a federal government with power over trade and commerce between provinces, and over inter-provincial infrastructure, including the authority to declare any public work "for the general advantage of Canada." The Macdonald-Laurier Institute has written widely in support of the economic rights of Canadians, and the need for the federal government to assert itself in defending those rights (Crowley, Knox, and Robson 2017).

The federal power, however, was significantly challenged when a political war erupted between Alberta and British Columbia, particularly over the Trans Mountain pipeline. As mentioned above, Alberta and BC traded blows over an attempt by BC to impose conditions on the acceptance of the Trans Mountain expansion, something it had no right to do (Newman 2018b). BC's then-Premier Christy Clark also demanded that project proponent, Kinder Morgan, pay the province \$1 billion over 20 years. Then-Alberta Premier Rachel Notley subsequently suspended talks on purchasing BC electricity. Later, the Alberta government discussed boycotting BC wine (Bickis 2018). Albertans are now openly discussing whether they are truly "welcome" in British Columbia, where they spend large sums in recreation and tourism. In late May 2019, BC's top court ruled unanimously that BC cannot restrict the transportation of diluted bitumen within its borders because this falls within federal jurisdiction.

These trade wars invariably end up hurting provincial industries and, by extension, consumers. The federal government should never be a bystander in inter-provincial trade wars over an issue that is clearly within federal jurisdiction. Federal government inaction is affecting the ability of the federation and the federal government itself to function properly.

Moreover, some municipalities are also attempting to subvert pipeline projects through bylaws and local government regulation. The most prominent example is the city of Burnaby, BC. The National Energy Board ruled that the city of Burnaby could not impede the Trans Mountain expansion by delaying consideration of municipal permits and licences related to pipeline construction activity (Newman 2018b). When that decision was appealed, the appellate court said that there was no reason at all to listen to Burnaby's case. The case of jurisdiction was a simple open and shut case.

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Moving Forward: How Do We Break the Logjam?

The federal government must stand up for the national interest by taking a robust and direct approach towards supporting the pipeline projects. It needs to recognize that most Canadians support the oil and gas industry and understand that the delays have created a national crisis. The government of Canada must immediately abandon its tepid, non-confrontational approach and embrace its proper position as a leader in building inter-provincial pipelines.

As Dwight Newman has argued, as part of the deliberate federal design of Canada, the federal government has constitutional power over national infrastructure projects. The building of the inter-continental railway offers just one example. The federal government was given strong powers to build Canada's economic union. Section 91 (10) of the *Constitution Act*, 1867 provides for important federal power within the list of listed provincial powers in section 92. In 1954, the Supreme Court clearly ruled that pipelines count as a form of interprovincial transport for certain products. That ruling has been affirmed repeatedly. Moreover, no municipal bylaw or policy can defeat this federal power, as shown with the city of Burnaby.

The Liberal majority in the House of Commons defeated Bill S-245, *An Act to declare the Trans Mountain Project and related works to be for the general advantage of Canada*. The bill asserted federal authority and authorized federal action on the project. Many Canadians noted the Liberal government defended jobs and corporate interests in the SNC-Lavalin affair, but refused to act similarly on Trans Mountain, which would have a much greater impact on employment and general economic development.

Newman argued that the **federal Parliament can insulate these pipelines from delay by passing legislation to better facilitate pipeline construction**. This kind of legislation would see the federal government take over provincial government regulation. This legislation could also establish exclusion zones around pipeline construction activities to make it an offence to interfere with such projects. Ottawa must insist upon adherence to the rule of law and not allow itself to be deterred by civil disobedience or attacks on government authority.

The legislation could also create an Indigenous advisory committee for each project to ensure that Indigenous claims related to the project are addressed. These assertions of authority are also appropriate for provinces and territories, as well as municipalities. Just to be clear, this legislative remedy does not include Indigenous governments, who by and large are not obstructing pipelines on jurisdictional lines as some of the provinces, such as British Columbia and Quebec, are.

Ottawa must develop, in direct consultation with Indigenous organizations, clear protocols on the duty to consult with, and accommodate, Indigenous peoples on development projects. As academic Tom Flanagan argues, only the federal Parliament can fix Canada's pipeline impasse (Flanagan 2018). He points out that the Honour of the Crown has no clear definition. It is, therefore, ultimately, whatever the courts say it is. Parliament has passed no legislation that better defines the duty to consult. In this legislative vacuum, the courts act in the only way they can, reviewing specific cases retrospectively. Project opponents manipulate this legal environment to their advantage. Ottawa must step in and fill this legislative void with clear language outlining and clarifying the duty to consult and accommodate.

“The federal government must delay Bill C-69 for at least three years to allow for improvements to the legislation.”

Drawing on the lessons from the modern treaty agreements in Canada, Ottawa's language on duty to consult and accommodate must be consistent with the Supreme Court's decisions and with the principles of UNDRIP, while being completely consistent with Canada's constitution.

Ottawa must also work with Indigenous communities on establishing governance protocols that make it clear who speaks for the community on resource development. Indigenous communities need to work out their governance structure and consultation processes internally before engaging with resource proponents. By doing so, they can help avoid conflict during the critical consultation phase and avoid future litigation.

These arrangements should also outline how Indigenous authority is to be determined; ideally it would arise from consultations with the various Indigenous groups. To increase Indigenous support and buy-in for pipeline projects, **the federal government must support Indigenous engagement with pipeline development, including ownership and environmental oversight, in part by providing access to equity capital.** For instance, the Eagle Spirit pipeline project would have engaged about 35 First Nations in building an alternative pipeline route in place of Trans Mountain. However, the federal oil tanker moratorium bill killed that project. First Nations must be encouraged, and perhaps in some cases given incentives, to support pipelines or even build their own. Pipelines and the energy industry generally are also part of Indigenous economic reconciliation. Indigenous communities, coordinated by the Indian Resource Council, have also expressed an interest in buying a stake in the Trans Mountain pipeline expansion (Randy Shore 2019). These sorts of initiatives should be encouraged.

The federal government must delay Bill C-69 for at least three years to allow for improvements to the legislation and to permit the industry to rebound from current difficulties. The government must also scrap Bill C-48. The additional legislative interventions represented by these bills have the potential to add to current industry difficulties and are already seen as deterring investment in the sector. The Canadian government's delay in exercising its current authority over pipelines is a serious problem; adding to the legislative burden imposed on the energy industry would only exacerbate the problems. If the government appreciates the degree to which its actions - and inactions - are harming the Canadian economy and creating serious employment problems, it should act quickly to forestall the imposition of additional legislative barriers.

Finally, **Canadian supporters of the energy sector must make sure that Canadians understand the forces that are influencing national debates and conversations. The federal government needs to take an active role in exposing the foreign-funded groups that are undermining our economic interests.** At one extreme, supporters might determine if there are legal means of preventing foreign-funded foundations and environmental organizations from undermining Canada's pipeline projects, while ensuring that all actions are consistent with Charter protections on freedom of expression.

It would also be beneficial to understand the attempts that foreign interests have made to interfere with the governance processes in Canada's Indigenous communities, particularly as they relate to pipeline approvals. **On a national scale, the federal government could consider creating a parliamentary inquiry committee to investigate these matters as quickly as possible.** If legal or legislative options are not available, government, industry, and Indigenous partners should ensure that Canadians are made aware of these interventions so they understand the degree to which external influences are shaping the national debate on the oil and gas industry.

All political parties running in the 2019 election must indicate that they understand the critical importance of pipeline projects to Canada's national economy and vital national interests. The pipelines issue has implications for the future of our federation and for the time-sensitive matter of Indigenous reconciliation. This paper has attempted to provide a comprehensive look at the issues surrounding the pipeline capacity impasse and outline a reasonable roadmap for any political party to examine and adapt to its political reality. All communities - Indigenous and non-Indigenous - will benefit from the increased pipeline capacity that comes from approved projects. We hope the politicians get it right for everyone's sake.

About the Authors



Joseph Quesnel is a program manager with MLI's Aboriginal Canada and the Natural Resource Economy project. A Northern Ontarian by background, Joseph is Quebec Metis by heritage and is interested in various Indigenous issues, especially Indigenous governance and economic development. A graduate of McGill University, he majored in political science and history, specializing in comparative American and Canadian constitutional law. He holds a master of journalism degree from Carleton University where he focused on political and public policy reporting.

For over 10 years, Joseph worked as a policy analyst with the Prairie-based Frontier Centre for Public Policy, where he specialized in Indigenous policy, but also property rights and water market issues. Joseph also led the Frontier Centre's flagship Aboriginal Governance Index, an annual barometer of perceptions of quality of governance and services on Prairie First Nations. He also led a 2010 study on the self-governing Nisga'a Nation in

British Columbia. He has produced Canada's only national property rights index, measuring property rights protections in all provinces and territories. Joseph has appeared as an expert witness on Aboriginal legislation in both House and Senate committees.

Joseph was a research associate with the Atlantic Institute for Market Studies (AIMS), where he argued for responsible shale gas development. Joseph was also recently a senior fellow with the Fraser Institute where he worked on Indigenous issues alongside Prof. Tom Flanagan and where he co-authored a major paper on Indigenous custom code election systems.



Ken Coates is MLI's Munk Senior Fellow in Aboriginal and Northern Canadian Issues. He is the Canada Research Chair in Regional Innovation in the Johnson-Shoyama Graduate School of Public Policy at the University of Saskatchewan. He has served at universities across Canada and at the University of Waikato (New Zealand), an institution known internationally for its work on Indigenous affairs. He has also worked as a consultant for Indigenous groups and governments in Canada, New Zealand, and Australia as well as for the United Nations, companies, and think tanks. He is the author of *Treaty Peoples: Finding Common Ground with Aboriginal Canadians*. He has published on such topics as Arctic sovereignty, Aboriginal rights in the Maritimes, northern treaty and land claims processes, regional economic

development, and government strategies for working with Indigenous peoples in Canada. His book, *A Global History of Indigenous Peoples: Struggle and Survival*, offered a world history perspective on the issues facing Indigenous communities and governments. He was co-author of the Donner Prize winner for the best book on public policy in Canada, *Arctic Front: Defending Canada in the Far North*, and was short-listed for the same award for his earlier work, *The Marshall Decision and Aboriginal Rights in the Maritimes*. Ken contributes regularly, through newspaper pieces and radio and television interviews, on contemporary discussions on northern, Indigenous, and technology-related issues

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