The Oilpatch, the Environment, and Constitutional Jurisdiction

Concern over the environmental impact of the Alberta oil sands has led to talks of trade bans in the United States, to attempts to place limits on bitumen exports by the Canadian federal government, and to constitutional questions over which order of government is responsible for trade and export of natural resources.

Background: U.S.-Canada Relations

The United States and Canada have one of the most significant trade partnerships in the world.[1] A significant portion of Canada-United States trade involves energy goods and services. Canada exports 1.96 million barrels of oil to the United States every day, with the majority of that amount coming straight from the oil sands in Alberta.[2] 13 percent of American oil imports come from Alberta. For a long time, oil prices were too low to make extraction from the Alberta oil sands lucrative, but recent increases in prices enticed companies to extract as much as 1.3 billion barrels a day from the resource (July 2008).[3]

Conventional oil and oil extracted from the oil sands vary significantly in the amount of energy used to produce one barrel. A barrel from the oil sands requires three times the energy of conventional oil to produce because the oil must first be removed from the tar-like bitumen in which it is saturated.[4] Nevertheless, the life cycle emissions of a barrel of oil sands oil, with an average of 597 kilograms of C02 released per barrel, is still comparable to Saudi Arabia (517 kg), Mexico (528 kg), Nigeria (541 kg), and Venezuela (582 kg).[5]

In addition to the environmental impact of the oil sands, concerns also stem from the significant deforestation associated with its extraction, and the amount of water required in the process. Indeed, over 2.7 billion cubic feet of water per year is required to clean the bitumen during the separation process.[6]

These environmental realities have raised concerns in the United States over the environmental impact of the oil sands, most recently during the 2008 presidential campaign.[7] Barack Obama and John McCain both took a stand against the purchase of oil from areas with relatively high pollution rates, such as the Alberta oil sands. This shared commitment was supported by one thousand mayors across the United States who agreed to reject oil from areas with high emissions rates.[8] As well, Governor Arnold Schwarzenegger of California took it upon himself to sign an agreement to limit imports from regions with poor environmental records.[9] This evolution of United States energy policy suggests

that Canada-United States oil trade may become limited due to environmental concerns.

In 2007, the Government of Alberta reacted by passing legislation — the first of its kind in North America — limiting greenhouse gas emissions produced by "large industrial facilities."[10] Under the legislation's plan $4.7 billion[11] will be invested in cleaning up the Athabasca oil sands, creating more fuel efficient public transportation, and improving carbon capture and storage technology.[12] Despite the intentions of this plan, critics suggest that this legislation will not quell concerns in the United States. In a report issued by the Alberta auditor general in October 2008, the Government of Alberta's strategy lacks cohesion and could cost taxpayers several billion dollars without any guaranteed reduction in pollution.[13]

While the actions of the emerging Obama administration are unknown at this time, the United States will likely choose to continue trading with Alberta, considering its desire to curb dependence on Middle Eastern oil for national security reasons.[14] However, the long term forecast is somewhat more complicated.[15]President-elect Obama has stated his government intends to implement a cap-and-trade system for greenhouse gas emissions, which may include "hard caps."[16] Since this announcement, the Harper government has made a promise to implement a North American cap–and-trade system. Alberta has spoken out about the necessity of involving the provinces in the design of any such system, because the provinces have jurisdiction over natural resources, and shared jurisdiction over the environment. Prime Minister Harper has also committed to banning exports of bitumen to countries with lower carbon emissions standards than Canada's.[17] While Alberta initially showed interest in selling its oil to countries with fewer regulations, Harper's new plan means that Albertans may no longer be able to consider oil exports to countries such as China, and will likely have to meet the more stringent standards being set by the United States.[18] Alberta has spoken out against the proposed bitumen ban on the grounds that it infringes on provincial jurisdiction.

Since the global economic crisis, Alberta's premier Ed Stelmach has admitted that Alberta oil has lost its competitive edge.[19] In order to get on board with climate change champions like California, the province has announced a "Renewable Fuels Standard" that would require gasoline to include 2 percent renewable content and 5 percent ethanol and diesel by the year 2010.[20]

Alberta-Canada Relations: The Constitutional Aspect of Harper's Promise to Ban Exports to Countries with Higher Emissions Standards

When Stephen Harper made his election promise in September 2008 to restrict

the export of raw bitumen, Albertans were surprised.[21] The tactic was said to keep oil companies in Alberta from avoiding Canadian emissions standards, while also encouraging the growth of the Canadian market.[22]

The nagging constitutional question is whether the federal government has jurisdiction over provincial trade of these oil resources.[23] Alberta owns natural resources in the province (section 92A, *Constitution Act, 1867*), while Parliament has jurisdiction over interprovincial and international trade and commerce (section 91(2), *Constitution Act, 1867*).[24] The environment, however, is an area of concurrent jurisdiction. Premier Stelmach and Prime Minister Harper have both suggested that their respective proposed environmental regulations trump those of the other order of government.[25] But Harper has reminded the public that the provinces would have to accept federal environmental targets because interprovincial matters fall under the authority of the federal government.[26]

The announcement on limiting bitumen exports has also made ripples amongst expert trade lawyers. Barry Appleton, a Toronto expert on the North American Free Trade Agreement (NAFTA), has said the policy is in conflict with Canadian obligations under that agreement.[27] Appleton argues that the government is not allowed to take protectionist measures if it is going to justify them on the basis of environmental protection.

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[1] Anna Hopper, "A Crude Reality: Canada's Oil Sands and Pollution" (2008) 30(3) Harvard International Review, online: <http://www.harvardir.org/articles/1788/>.
[2] *Ibid*.
[3] *Ibid*. The price of oil has dropped significantly since July 2008.
[4] *Ibid*.
[5] T.J. McCann and Associates Ltd., "Typical Heavy Crude and Bitumen Derivative Greenhouse Gas Life Cycles in 2007" (Prepared for the Regional Infrastructure Working Group, 19 November 2001), online: <http://www.oilsands.cc/pdfs/GHG%20Life%20Cycle%20in%202007%20-%20Aug.%2012-08.pdf>. at 12
[6] *Supra* note 1.
[7] *Ibid*.
[8] *Ibid*.
[9] *Ibid*.
[10] *Ibid*.
[11] Gillian Steward, "Harper ready to harmonize with U.S. on climate

change" *The Star* (November 9, 2008).
[12] *Supra* note 1.
[13] Auditor General of Alberta, *Report of the Auditor General of Alberta* (October 2008), online: <http://www.oag.ab.ca/files/oag/Oct_2008_Report.pdf >.
[14] *Supra* note 1.
[15] *Ibid.*
[16] *Supra* note 11.
[17] *Supra* note 1.
[18] *Ibid.*
[19] Claudia Cattaneo, "Alberta gets real about oil" *The National Post* (12 December 2008).
[20] *Ibid.*
[21] Dave Cooper and Paula Simons, "Harper to limit bitumen exports" (27 September 2008).
[22] *Ibid.*
[23] *Ibid*.
[24] *Ibid*.
[25] *Ibid.*
[26] *Ibid*.
[27] *Ibid*.