Pipelines and the Politics of Structure: Constitutional Conflicts in the Canadian Oil Sector

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Constitutional conflicts over energy infrastructure are not confined to questions of law. They are also an object of political conflict among strategic actors pursuing their interests. This paper examines how different actors in pipeline disputes have sought to gain strategic advantage by advocating particular positions on constitutional arguments about regulatory jurisdiction, Indigenous rights, and participation in regulatory proceedings. Examples will be taken from the controversies over Line 9, Energy East, Northern Gateway, and the Trans Mountain Expansion Project.

Les conflits constitutionnels quant aux infrastructures énergétiques ne se limitent pas à des questions de droit. Ils font également l'objet de conflits politiques entre les acteurs stratégiques qui défendent leurs intérêts. Cet article examine la manière dont différents acteurs dans des litiges autour des pipelines ont cherché à obtenir un avantage stratégique en défendant des positions particulières sur des arguments constitutionnels concernant la compétence réglementaire, les droits des peuples autochtones et la participation à des procédures réglementaires. Des exemples seront tirés des controverses entourant la ligne 9, le pipeline Énergie Est, le pipeline Northern Gateway et le projet d'agrandissement du réseau de Trans Mountain.

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Overview[1]

Constitutional conflicts over energy infrastructure are not confined to questions of law. They are also an object of political conflict among strategic actors pursuing their interests. Strategic actors work to ensure that issues concerning them are addressed in the institutional venue most conducive to the realization of their interests. Independent regulatory tribunals, cabinets, courts, and different levels of government offer strategic actors different opportunities for and constraints on influencing regulatory outcomes. Actors also adopt rhetorical strategies or discourse that appeals to the values of those in the best position to assist them in successfully achieving their aims.

This article examines how different actors in disputes over pipelines and market access for Canadian oil sands producers have sought to gain strategic advantages by pursuing different venues for decision-making, or advocating particular rhetorical positions, in constitutional conflicts about rights to participation, regulatory jurisdiction, and Indigenous rights. Examples will be taken from four controversial oil sands pipeline decisions: Line 9, Energy East, Northern Gateway, and the Trans Mountain Expansion Project. Competing interests also clash over non-constitutional rules. Canadian pipeline policy has witnessed sharp conflicts over scoping decisions for environmental assessment and review in relation to these projects. For example, between 2014-2016, the credibility and independence of the federal pipeline regulator, the National Energy Board (NEB), came under fire from environmentalists and politicians. In 2012, the Harper government, concerned about expediting pipeline decision-making, shifted the final decision-making power on pipelines from the National Energy Board to the cabinet. These structural choices have been an important part of Canadian pipeline conflicts. This article, however, only examines issues that are constitutional in nature.

The following section provides an overview of the analytical framework guiding the analysis. The article then explores three Canadian constitutional issues involving oil sands pipelines, and picks illustrative examples from the pipelines referenced above. The three issues are: (1) participatory rights and the *Charter*, (2) division of powers and federal-provincial relations and the role of municipalities, and (3) two competing views of Indigenous rights.

1 The author would like to thank Sarah Froese for her invaluable research assistance with this article, and a SSHRC Partnership Development Grant for funding.

The politics of structure

The article is inspired by actor-centred analytical frameworks. Strategic actors are the central agents of policy. Actors each have their own interests and 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, they also work to change ideas through reframing and to change institutional rules through venue-shifting or other means.[2] Institutional rules can be pivotal because when the location or form of authority changes, the balance of policy preferences guiding policy decisions could also change significantly. In many ways, these pipeline conflicts have been about "the politics of structure," or the struggle over defining the rules of the game.[3]

This article examines actor strategies at the nexus of framing and venue-shifting, where institutional rules at play and the discourse over those rules have become the focus of conflict among competing interests. Three types of institutional strategies emerge from the literature: procedural strategies that require agencies to follow specific procedures (e.g. performing an environmental assessment or consulting with affected interests); structural strategies on the organizational design of agencies; and venue-shifting strategies that move the location of authoritative decision-making to a different organization or level of government (for example, from an independent regulator to cabinet or from the federal level to the provincial level).[4] Depending on the circumstance, information resulting from complying with procedural requirements does influence decisions, and organizational structure can shape what information flows to decision-makers.[5] Others have explored the way different organizational structures "might shape learning about problems and solutions, policy choices, and conflict resolution in quite predictable ways."[6] Venue-shifting can influence

2 Frank R. Baumgartner & Bryan D. Jones, *Agendas and Instability in American Politics*, 2nd ed (Chicago: University of Chicago Press, 2010); George Hoberg, "Policy Cycles and Policy Regimes: A Framework for Studying Public Policy" cited in Benjamin Cashore et al, *In Search of Sustainability: British Columbia Forest Policy in the 1990s* (Vancouver: UBC Press, 2001); Sarah Pralle, *Branching Out, Digging In: Environmental Advocacy and Agenda Setting* (Washington, DC: Georgetown University Press, 2006).

3 Terry Moe & Scott Wilson, "Presidents and the Politics of Structure" (1994) 57:2 Law & Contemp Probs at 1-44.

4 Stuart Shapiro, "Structure and Process: Examining the Interaction between Bureaucratic Organization and Analytical Requirements" (2017) 34:5 Rev Pol'y Res at 682-699.

5 *Ibid*.

6 Morten Egeberg, "The Impact of Bureaucratic Structure on Policy Making" (1999) 77:1 Public Admin at 155-170.

policy outcomes because the values of decision-makers can vary from one setting to the next, giving each venue a "decision bias."[7]

Much of the literature focuses on how legislators, acting as principals, use requirements for procedure or structure to influence the outcomes from administrative agents.[8] But, strategic actors outside governments also have large stakes in structure and procedure. According to Moe and Wilson, "all political actors know that structure is the means by which policies are carried out or subverted, and that different structures can have enormously different consequences. As a result, there is inevitably a 'politics of structural choice.'"[9] In this structural politics, strategic actors in and out of government will advocate for rules and venues that give them the greatest likelihood of achieving policy outcomes that reflect their interests.

This politics of structure incentivizes various actors in pipeline conflicts to promote quite different procedural and structural rules. Proponents' interests are in a stable, certain process of manageable scale and duration, generally controlled by a single decision-maker, so that they can minimize process costs in project approval. These incentives create pressures for minimal process requirements, but this is balanced by proponents' interests in gaining sufficient public legitimacy to minimize political risks to their projects. Opponents obviously have quite different incentives. They prefer comprehensive information requirements, widespread public access to decision-making processes, consultation procedures, lengthy proceedings, multiple veto points, and clear rights to appeal unfavorable decisions. Opponents actually have a strategic interest in increasing process costs and delays as a way to discourage proponents.

Politicians designing regulatory processes, in addition to needing to balance these competing demands, have their own policy, budgetary, and, especially, electoral interests to keep in mind. They can be expected to want strong control over decisions where there is an opportunity to claim credit for favorable outcomes, and to keep an arm's length from decisions more likely to involve the imposition of unpopular political decisions.[10] All else being equal, they would

7 Frank Baumgartner & Bryan Jones, "Agenda Dynamics and Policy Subsystems" (1991) 53:4 J Politics at 1047.

8 Mathew McCubbins, Roger Noll & Barry Weingast, "Administrative Procedures as Instruments of Political Control" (1987) 3:2 JL Econ & Org at 243-277.

9 Terry Moe & Michael Caldwell, "The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems" (1994) 150:1 J Inst Theor Econ at 171-195.

10 R. Kent Weaver, "The Politics of Blame Avoidance" (1986) 6:4 J Pub Pol'y at 371-398; Kathryn J. Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy*, (Vancouver: UBC Press, 1996) [Harrison].

prefer to minimize process time and costs, but they also need to be attentive to political legitimacy. The political influence of interests opposed to or skeptical of new infrastructure projects leads both politicians and proponents to prefer regulatory processes that are more time-consuming, elaborate, and costly than they would ideally prefer. The remainder of this article explores how this politics of structure plays out in disputes over Canadian oil sands pipelines.

Participatory rights and the *Charter*

The first important dimension of the politics of constitutional structure in pipeline regulation is the set of interrelated issues of who can participate and what the scope of environmental assessment is. In attempting to influence the outcome, proponents used changes in procedural rules, while opponents attempted venue-shifting. In 2012, the Harper government changed regulatory review procedures in response to the political escalation over the Northern Gateway pipeline, among other developments.[11] One of the changes narrowed the right of participation in the process from the general category of "interested parties" to those who are "directly affected" or have, in the review panel's judgment, "relevant information and expertise."[12] Because the scope of project review is frequently contested, another important aspect of the politics of structure is the list of issues that are determined to be within the scope of the regulatory review. In the case of the Trans Mountain project, 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.[13]

A number of individuals applied to participate for the express purpose of discussing climate impacts, with the expectation that they would be rejected by the NEB. Indeed, they were. The NEB says it received 2,118 Applications

11 George Hoberg, "The Battle Over Oil Sands Access to Tidewater: A Political Risk Analysis of Pipeline Alternatives" (2013) 39:3 Can Pub Pol'y at 371-391 [Hoberg, "The Battle"]; George Hoberg, "Unsustainable Development: Energy and Environment in the Harper Decade" cited in Jennifer Ditchburn & Graham Fox, *The Harper Factor: Assessing a Prime Minister's Policy Legacy* (Montrial: MQUP, 2016) 253, online: <www.jstor.org/stable/j.ctt1gsmw38> [Hoberg, "Unsustainable Development"].

12 Geoff Salomons & George Hoberg, "Setting Boundaries of Participation in Environmental Impact Assessment" (2013) 45 Envtl Impact Assess Rev at 69-75.

13 It is worth noting that in a similar environmental assessment, the United States' State Department's review of the Keystone XL pipeline, upstream and downstream impacts were considered with the scope of the review.

to Participate and denied 22% of those applications.[14] While issues about scope and rights of participation in regulatory tribunals would normally be considered administrative matters, environmentalists tried, unsuccessfully, to transform them into a *Charter* issue of freedom of expression. Thus, pipeline opponents tried to combat the restrictions on participation and scope by shifting the venue from the NEB hearing process to the courts.

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,[15] challenged the NEB decision 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 denied a further application for leave, also without reasons. In October 2014, three months before the Federal Court of Appeal dismissed the case, that Court had ruled on a very similar *Charter* claim challenging the NEB's decision to deny standing to parties who sought to talk about climate change with respect to Enbridge's Line 9 application. In that case, the Court did issue a written decision that dismissed the application for judicial review. The court ruled that it was within "the margin of appreciation" for a regulatory tribunal like the NEB to exclude upstream and downstream greenhouse gas impacts in its assessment. It also found the board's decision to deny standing was reasonable, given the amended provisions of the *NEB Act*. The court rejected the argument that denial of standing was a violation of the applicants' right to freedom of expression because the plaintiffs had not brought the *Charter* issue to the NEB when it rejected their application to participate. The Court went so far as to denounce Forest Ethics as a "busybody."[16]

Strategic actors are always searching for better approaches to advance their interest. The Harper government, frustrated with delays from mass participation in the Northern Gateway case, narrowed the range of eligible participants. For environmentalists, it was very important to force a climate lens onto pipeline decision-making. When frozen out of NEB hearings by scoping rules and the new limits on participation, they attempted to shift the venue to the

14 Canada, National Energy Board, "Ruling on Participation, Hearing Order OH-001-2014", (Ottawa: National Energy Board, 2 April 2014), online: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/130635/2445932/Letter_-_Application_for_Trans_Mountain_Expansion_Project_-_Ruling_on_Participation_-_A3V6I5.pdf?nodeid=2445819&vernum=-2>.

15 The group changed its name to Stand.earth in 2016.

16 *Forest Ethics Advocacy Association v Canada (National Energy Board),* 2014 FCA 245, [2015] 4 FCR 75.

courts. They did this by attempting to constitutionalize the issue: turning the NEB's decision to deny them standing to discuss climate issues into a *Charter* challenge. The results demonstrate clearly that not every strategic choice will be successful. With the *Charter* challenge rejected by the courts on procedural grounds, pipeline opponents shifted to other strategies.

Division of powers: federal-provincial relations

While the venue-shifting effort to constitutionalize the right to participate failed, conflicts over the division of powers has been an important part of all the major pipeline conflicts. In Canada, the decision-making authority to approve inter-provincial pipelines rests with the federal government and its National Energy Board, a quasi-independent regulatory agency.[17] However, since pipeline and terminal construction and operation affects many areas under provincial jurisdiction, provinces have a potential role to play in assessment and permitting as well. As a result, pipeline conflicts have been disputes over venues — the relative balance of authority between the federal and provincial governments.

The industry and the Harper government were particularly concerned about reducing jurisdictional overlap and conflict, and promoted a one-project, one-process approach to regulatory reviews where feasible. The Harper government, with its strong pro-development orientation, was understandably reluctant to devolve regulatory authority to provinces with strong environmental sentiments. Because the pipelines at issue were all interprovincial, they preferred that the one process be a federal process.[18]

Normally, a provincial government is expected to be reluctant to give up any source of authority to influence the regulatory process. But the BC Liberal government, being pro-development generally but keenly aware of the strong environmental movement in the province, was happy to "pass the buck" to the federal government to avoid blame for making contentious decisions.[19] The province ceded authority to the federal government through an equivalency agreement whereby BC agreed to accept the NEB review process as its own

17 Nigel Bankes, "BC Court Confirms That a Municipality Has No Authority With Respect to the Routing of an Interprovincial Pipeline", *ABlawg* (17 December 2015), online: <https://ablawg.ca/2015/12/17/bc-court-confirms-that-a-municipality-has-no-authority-with-respect-to-the-routing-of-an-interprovincial-pipeline/> [Bankes, "BC Court Confirms"].

18 Hoberg, "Unsustainable Development", *supra* note 11.

19 Harrison, *supra* note 10.

environmental assessment process.[20] The two west coast pipelines, Northern Gateway and Trans Mountain, were both covered by this agreement but there were no such agreements with the relevant provinces that would cover the Energy East project.

Federal-provincial conflicts on Northern Gateway and Trans Mountain

The existence of the agreement did not reduce federal-provincial conflict over Northern Gateway and Trans Mountain. The equivalency agreement shifted the BC government from sharing regulatory authority to playing the role of an intervener in the regulatory proceedings. During the hearings over Northern Gateway, the British Columbia government adopted a position of conditional opposition, which it later extended to apply to Trans Mountain. In 2012, BC announced its position on heavy oil pipelines, stating that the following five conditions needed to be met to receive support from the provincial government:

1. Successful completion of the environmental review process…;
2. World-leading marine oil spill response, prevention and recovery systems for BC'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.[21]

20 Canada, National Energy Board & BC Environmental Assessment Office, "Agreement between the National Energy Board and the Environmental Assessment Office of British Columbia", Environmental Assessment Equivalency Agreement (Ottawa: National Energy Board, 21 June 2010), online: <www.neb-one.gc.ca/bts/ctrg/mmrndm/2010bcnvssssmntffc-eng.html>.

21 Government of British Columbia, News Release "British Columbia Outlines Requirements for Heavy Oil Pipeline Consideration" (23 July 2012), online: <https://news.gov.bc.ca/stories/british-columbia-outlines-requirements-for-heavy-oil-pipeline-consideration>.

Pipeline advocates claimed that BC had no constitutional ability to block the pipeline by establishing conditions.[22] The announcement led to a bitter conflict between BC Premier Christy Clark and Alberta Premier Alison Redford, who interpreted the fifth condition as demanding a share of oil sands royalties. This interprovincial conflict affected Alberta-led negotiations over a Canadian energy strategy, yet Prime Minister Harper studiously avoided involving the federal government either in the inter-provincial pipeline dispute or in the national energy strategy discussions.[23] BC formally took a position against the Trans Mountain project, emphasizing the lack of emergency response preparedness to address the second and third conditions.

Environmentalists and First Nations lobbied forcefully to have British Columbia reassert its jurisdiction over the project, and the provincial NDP adopted a "made-in-BC" environmental assessment process as a core part of its 2013 election platform.[24] Despite a formidable NDP lead going into the election, Christy Clark's BC Liberals defeated the NDP. The mid-campaign decision by NDP leader Adrian Dix to oppose the Trans Mountain project is credited with contributing to Clark's remarkable comeback.[25]

The equivalency agreement between BC and federal government was challenged by the Coastal First Nations in the context of the Northern Gateway pipeline. The BC Supreme Court ruled that the province had abdicated its decision-making authority under the *BC Environmental Assessment Act* by not issuing an Environmental Assessment Certificate. Justice Koenigsberg ruled that while the *Act* allows the province to defer to the federal government review process, it still must decide whether or not to issue an Environmental Assessment Certificate.[26] In a new twist on regulatory federalism in Canada, Justice Koenigsberg 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 had already approved, but it could add new conditions to the federal government's extant conditions.

22 Tom Flanagan, "To Connect the Pipeline, Connect the Dots", *The Globe and Mail* (4 August 2012), online: <www.theglobeandmail.com/opinion/to-connect-the-pipeline-connect-the-dots/article4461040/>.

23 Hoberg, "Unsustainable Development," *supra* note 11.

24 British Columbia, New Democratic Party, "Change for the Better: Practical Steps", (British Columbia: 2013), online: <www.poltext.org/sites/poltext.org/files/plateformes/bcndp2013_plt.pdf>.

25 Hoberg, "The Battle", supra note 11.

26 *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34, [2016] BCJ No 30. For a more detailed discussion of this case see the article by Martin Olszynski in this special issue.

The political implications of the ruling (not appealed by the BC government or Enbridge) were formidable because they shifted the intergovernmental politics of pipelines. For an equivalency agreement to pass muster, BC could allow the federal government the lead in conducting the assessment, but it would still need to make its own final decision on the basis of that assessment, thus forcing the provincial government to share accountability for the final decision. The pre-existing process, where BC submitted strenuous objections to the pipeline but then deferred the final decision to the federal regulator, was unlawful. This gives pipeline opponents another venue to question the legitimacy and validity of the process.

Pipelines and the 2017 BC election

The Trans Mountain pipeline expansion was a major issue in the BC election of 2017 that ended 16 years of BC Liberal Party rule. During the campaign, Premier Christy Clark's BC Liberals proudly used the slogan "Getting to Yes — Responsible Resource Development" — the latter phrase having been the label used by the Harper government. The BC Liberal platform denounced the BC NDP and Green parties for being the "parties of no" and specifically for opposing the Trans Mountain project, in addition to other major infrastructure projects.[27] The BC NDP platform minced no words in their opposition to the project:

> The Kinder Morgan pipeline is not in BC's interest. It means a seven-fold increase in tanker traffic. It doesn't, and won't, meet the necessary conditions of providing benefits to British Columbia without putting our environment and our economy at unreasonable risk. We will use every tool in our toolbox to stop the project from going ahead.[28]

In addition to adamant opposition to the pipeline, the BC NDP pushed the need for an environmental assessment process less deferential to the federal government: "We will update our environmental assessment legislation and processes to ensure that they respect the legal rights of First Nations, and meet the public's expectation of a strong, transparent process that results in the best outcomes as part of a *made in BC* assessment process".[29]

The BC Green Party had long been opposed to the project. Leader Andrew Weaver intervened in the NEB hearings on the project and consistently op-

27 British Columbia, BC Liberals, "Strong BC, Bright Future: Platform 2017", (British Columbia: 2017) online: <www.bcliberals.com/wp-content/uploads/2017/04/2017-Platform.pdf>.

28 British Columbia, BC New Democratic Party, "2017 BC NDP Platform", (British Columbia: 2017) online: <https://action.bcndp.ca/page/-/bcndp/docs/BC-NDP-Platform-2017.pdf> .

29 *Ibid* [emphasis added].

posed it.[30] This position of the two parties was reiterated in the Confidence and Supply Agreement, which was the formal agreement that permitted the Green Party to support a minority NDP government. The NDP committed to "Immediately employ every tool available to the new government to stop the expansion of the Kinder Morgan pipeline, the seven-fold increase in tanker traffic on our coast, and the transportation of raw bitumen through our province."[31]

Once the NDP, with the support of the three members of the Green Party caucus, replaced the BC Liberals as the government of BC, consultations with government lawyers convinced them that committing to "stop the pipeline" created legal risks for the province.[32] Thus, when Premier Horgan sent mandate letters to his cabinet, the phrasing changed from "stopping the pipeline" to the much more vague "defend BC's interest": "Employ every tool available to defend B.C.'s interests in the face of the expansion of the Kinder Morgan pipeline, and the threat of a seven-fold increase in tanker traffic on our coast."[33]

Constitutional conflict between BC and Alberta

Once in power, the BC NDP action appeared tentative at first but soon escalated in dramatic fashion. As the Horgan government unveiled their "tools," they stuck to the rhetoric of either "defending B.C.'s interests" or "protecting the coast." In August 2017, the government took the obvious step of announcing that it would seek intervener status in legal challenges against the project's approval in the Federal Court of Appeal.[34] The province dramatically escalated the conflict, in January 2018, by proposing a regulation to place "restrictions

30 British Columbia Green Party, Media Release, "Andrew Weaver Responds to Kinder Morgan Trans Mountain Approval" (29 November 2016), online: <www.bcgreens.ca/andrew_weaver_responds_to_kinder_morgan_trans_mountain_approval>.

31 Canada, BC Green Caucus & the BC New Democrat Caucus, "2017 Confidence and Supply Agreement between the BC Green Caucus and the BC New Democrat Caucus", (29 May 2017), online: <http://bcndpcaucus.ca/wp-content/uploads/sites/5/2017/05/BC-Green-BC-NDP-Agreement_vf-May-29th-2017.pdf>.

32 George Heyman, the British Columbia Minister of Environment and Climate Change Strategy, stated that the Premier told him, "Stopping the project was beyond the jurisdiction of BC and to talk about it or frame our actions around doing that, as opposed to defending BC's coast through a variety of measures that were within our jurisdiction, would be inappropriate and unlawful."; Natalie Obiko Pearson, "B.C. Premier knows he has no Legal Power to Block Trans Mountain. But that's not stopping him", *Financial Post* (13 April 2018), online <https://business.financialpost.com/commodities/energy/b-c-premier-knows-he-has-no-legal-power-to-block-trans-mountain-but-thats-not-stopping-him>.

33 Letter from John Horgan (18 July 2017) online: <www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/heyman-mandate.pdf>.

34 Government ofBritish Columbia, "Government Takes Action to Protect B.C. over Kinder Morgan Pipeline and Tanker Traffic Expansion", *BC Gov News* (10 August 2017), online: <https://news.gov.bc.ca/releases/2017ENV0046-001417>.

on the increase of diluted bitumen ("dilbit") transportation until the behaviour of spilled bitumen can be better understood and there is certainty regarding the ability to adequately mitigate spills." The press release and backgrounder were careful not to mention the Trans Mountain project, and instead emphasized areas of concern within provincial jurisdiction:

> The potential for a diluted bitumen spill already poses significant risk to our inland and coastal environment and the thousands of existing tourism and marine harvesting jobs. British Columbians rightfully expect their government to defend B.C.'s coastline and our inland waterways, and the economic and environmental interests that are so important to the people in our province, and we are working hard to do just that.[35]

Within a week of this announcement, Alberta Premier Rachel Notley, calling the BC action an "unprovoked and unconstitutional attack", retaliated by banning BC wines from the province. Three days later, Notley stated, "This is not a fight between Alberta and B.C. This is B.C. trying to usurp the authority of the federal government and undermine the basis of our Confederation."[36] A bit later, her criticism intensified: "That is completely unconstitutional, it's a made-up authority, it's a made-up law, it's ridiculous."[37]

After several weeks of heated rhetoric and threats of escalation, Premier Horgan decided to change course and refer the question of whether BC had the constitutional jurisdiction to regulate diluted bitumen to the courts. He stated, "We believe it is our right to take appropriate measures to protect our environment, economy and our coast from the drastic consequence of a diluted bitumen spill. And we are prepared to confirm that right in the courts."[38] Alberta responded by dropping its wine boycott. It took BC two months to prepare the reference question to the BC Court of Appeal, which it announced in April. In making the case for the reference question, Attorney General David

35 Government of British Columbia, News Release, "Additional Measures being Developed to Protect B.C.'s Environment from Spills" (30 January 2018), online: <https://news.gov.bc.ca/releases/2018ENV0003-000115>.

36 Government of Alberta, News Release, "Premier Notley: Further Measures to Defend Alberta" (9 February 2018), online: <www.alberta.ca/release.cfm?xID=52389DF7A690D-0626-F431-10F8D00BBA6AE467>.

37 Mia Rabson, "Canada will do What it Must to Keep B.C. from Blocking Trans Mountain: Carr", *CBC News* (12 February 2018), online: <www.cbc.ca/news/politics/carr-trans-mountain-bc-1.4531962>; Government of British Columbia, News Release, "Province Takes Further Action to Protect B.C. Wine Industry" (19 February 2018), online: <https://news.gov.bc.ca/releases/2018JTT0008-000236> . BC did challenge the wine ban through the Canadian Free Trade Agreement's (CFTA) dispute settlement process.

38 Government of British Columbia, News Release, "B.C. Government Moves Forward on Action to Protect Coast" (22 February 2018), online: <https://news.gov.bc.ca/releases/2018PREM0002-000252>.

Eby stated, "We believe B.C. has the ability to regulate movement of these substances through the province. This reference question seeks to confirm the scope and extent of provincial powers to regulate environmental and economic risks related to heavy oils like diluted bitumen."[39]

Earlier in April 2018, in the midst of this constitutional sparring between BC and Alberta, Kinder Morgan sent shockwaves through the Canadian political system by announcing it would cease all non-essential spending on the Trans Mountain Expansion Project, and gave an ultimatum of May 31 for governments in Canada to resolve their differences in a way "that may allow the Project to proceed." Kinder Morgan's media release stated:

> "… we have determined that in the current environment, we will not put KML shareholders at risk on the remaining project spend," said KML Chairman and Chief Executive Officer Steve Kean. The Project has the support of the Federal Government and the Provinces of Alberta and Saskatchewan but faces continued active opposition from the government of British Columbia. "A company cannot resolve differences between governments. While we have succeeded in all legal challenges to date, a company cannot litigate its way to an in-service pipeline amidst jurisdictional differences between governments," added Kean.[40]

The company squarely put the blame on the Government of BC:

> … Unfortunately BC has now been asserting broad jurisdiction and reiterating its intention to use that jurisdiction to stop the Project. BC's intention in that regard has been neither validated nor quashed, and the Province has continued to threaten unspecified additional actions to prevent Project success. Those actions have created even greater, and growing, uncertainty with respect to the regulatory landscape facing the Project….[41]

While the NDP has been careful to modify its rhetoric somewhat since it took power, pipeline proponents continue to refer back to the NDP's pre-election statement of intent. In its release announcing the ultimatum, the company stated, "since the change in government in June 2017, that government

39 Lauren Boothby, "B.C. Government Takes Pipeline Question to Court", *Burnaby Now* (26 April 2018), online: <www.burnabynow.com/news/b-c-government-takes-pipeline-question-to-court-1.23281968>. There is further discussion of the Reference and questions posed in the Reference in Martin Olyszinski's article in this special issue.

40 Kinder Morgan Canada Ltd., Media Release, "Kinder Morgan Canada Limited Suspends Non-Essential Spending on Trans Mountain Expansion Project" (8 April 2018), online: <https://ir.kindermorgancanadalimited.com/2018-04-08-Kinder-Morgan-Canada-Limited-Suspends-Non-Essential-Spending-on-Trans-Mountain-Expansion-Project>.

41 *Ibid*.

has been clear and public in its intention to use 'every tool in the toolbox' to stop the Project."[42]

In response to the Kinder Morgan ultimatum, Alberta's Premier Notley promised that "Alberta is prepared to do whatever it takes to get this pipeline built — including taking a public position in the pipeline. Alberta is prepared to be an investor in the pipeline."[43] On Twitter, she promised retaliation: "We will be bringing forward legislation giving our gov't the powers it needs to impose serious economic consequences on British Columbia if its government continues on its present course. Let me be absolutely clear, they cannot mess with Alberta."[44] She also suggested the conflict could amount to a constitutional crisis:

> There are those out there who are, at this point, calling this… a constitutional crisis for the country. And I don't know really if that's too far off. If the federal government allows its authority to be challenged in this way, if the national interest is given to the extremes on the left or the right, and if the voices of the moderate majority of Canadians are forgotten, the reverberations of that will tear at the fabric of Confederation for many many years to come.[45]

On April 16, 2018 Notley introduced Bill 12 (entitled *Preserving Canada's Economic Prosperity Act*) that created an export license requirement for crude oil, natural gas, and refined fuels, giving the Minister of Energy the authority to deny the issuance of a license if "it is in the public interest of Alberta to do so."[46] In announcing her intentions to introduce the legislation, Premier Notley declared, "Alberta must have the ability to respond. This is not an action that anyone wants to take. And it is one that I hope we never have to take. And it's not how Canada should work. And it's not how neighbours, frankly, should treat one other."[47] Sarah Hoffman, Alberta Deputy Premier, noted, "Their gov-

42 *Ibid*.

43 Government of Alberta, News Release, "Trans Mountain Pipeline Expansion: Premier Notley" (8 April 2018), online: <www.alberta.ca/release.cfm?xID=557308B866BAB-9A99-C601-19BC-D5A7237ECD71>.

44 Keith Baldrey, "Analysis: The Kinder Morgan Pipeline Row Is about to Get Real", *Global News* (11 April 2018), online: <https://globalnews.ca/news/4139323/analysis-kinder-morgan-pipeline-row/>.

45 Chris Hall, "Does Trudeau have a Trans Mountain Plan that goes Beyond Talk?" *CBC News* (9 April 2018), online: <www.cbc.ca/news/politics/kinder-morgan-pipeline-deadline-1.4611873>.

46 Alberta Bill 12, *An Act to preserve Canada's Economic Prosperity*, 4th Sess, 29th Leg, 2018, online: <www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_29/session_4/20180308_bill-012.pdf>.

47 Kelly Cryderman, Carrie Tait, & Mike Hager, "Notley Threatens to Turn off Oil Taps in Dispute with B.C. over Trans Mountain Pipeline", *The Globe and Mail* (8 March 2018), online: <www.theglobeandmail.com/news/alberta/notley-threatens-to-broaden-dispute-with-bc-over-trans-mountain-pipeline/article38253632/>.

ernment has caused pain to Alberta families. We can certainly do the same, and we've put a bill on the order paper that enables us to do that." Alberta's Minister of Justice, Kathleen Ganley, in a letter to David Eby declining to refer the legislation to the courts, affirmed, "Given B.C.'s transparent attempt to sow legal confusion by claiming constitutional authority it does not have in order to harass the pipeline investors into abandoning the project, the government of Alberta has a responsibility to its citizens to protect the interests of its citizens."[48]

In responding to the announcement, BC's Environment Minister, George Heyman expressed his dismay in these terms: "I see no reason for the government of Alberta to take any action when all B.C. has been doing is standing up for our interests in proposing some regulations that are well within our jurisdiction. We are determined to defend our environment, our economy and our coastline. We have tried to be the adults in the room here."[49] On May 22, 2018, BC launched a constitutional challenge to the Alberta legislation.[50] In justifying the move, BC's Attorney General David Eby decried the Alberta legislation as "blatantly unconstitutional":

> Today's filing came after we repeatedly called on Alberta not to move forward with blatantly unconstitutional legislation. We asked them instead to refer the matter to their courts as we had done with our legislation that they had concerns about. We also proposed that the federal government step in and bring all outstanding legal matters between B.C. and Alberta to the Supreme Court of Canada. This would fast track resolution of the inter-provincial dispute. It would bring finality and it would bring certainty. Unfortunately, both Alberta and Canada refused our proposals.[51]

BC's statement of claim argues that the *Act* is inconsistent with section 91(2) of the *Constitution Act* (giving the federal government exclusive authority over interprovincial trade, except where authorized by section 92A), and not

48 Attorney General of British Columbia, "Statement of Claim", No 1801 (Alberta: 2018), online: https://news.gov.bc.ca/files/Statement_of_Claim_Final.pdf> [Attorney General of BC]. British Columbia's statement of claim challenging the Alberta law contains a number of quotes by Alberta government officials explicitly referring to inflicting economic pain on BC to justify the legislation; Justine Hunter, "B.C. Prepares Court Challenge as Alberta Threatens to Cut off Oil Shipments", *The Globe and Mail* (17 May 2018), online: <www.theglobeandmail.com/canada/british-columbia/article-bc-prepares-court-challenge-as-alberta-threatens-to-cut-off-oil/>.

49 Richard Zussman, "British Columbians Could be Facing Gas at $2 to $3 per Litre without Alberta Oil," *Global News* (8 March 2018), online: <https://globalnews.ca/news/4071934/british-columbians-oil-ban-trans-mountain/>.

50 Attorney General of BC, *supra* note 48.

51 Amy Judd & Richard Zussman, "B.C. Taking Legal Action against Alberta over Bill Allowing Province to Cut off Gas," *Global News* (22 May 2018), online: <https://globalnews.ca/news/4224275/bc-legal-action-against-alberta-bill-cut-off-gas/>.

authorized by section 92A (because it allows discrimination among the provinces in export destination).[52]

The Government of Canada buys out Kinder Morgan Canada

While BC and Alberta clashed over the appropriate balance between federal and provincial venues, the federal government moved more decisively. On April 8, 2018, shortly after Kinder Morgan announced its May 31 ultimatum, federal finance minister Bill Morneau entered into negotiations with the company. After a month of apparently limited progress, he stated publicly that the federal government was prepared to offer Kinder Morgan, and any future owner of the project, an indemnity for any financial losses resulting from political opposition by the BC government.

Then on May 29, 2018, a new chapter in the Trans Mountain conflict began when Morneau made the stunning announcement that the government of Canada was purchasing Kinder Morgan Canada's Trans Mountain assets for $4.5 billion. Alberta would also contribute up to $2 billion to cover costs resulting from "unforeseen circumstances."[53] In response to the federal government buyout, BC Premier John Horgan made it clear that this did not change the province's position:

> It's not about politics. It's not about trade. It is about British Columbians' right to have their voices heard. To do so is squarely within our rights as a province, and our duty as a government. Ottawa has acted to take over the project…. At the end of the day, it doesn't matter who owns the pipeline. What matters is protecting B.C.'s coast — and our lands, rivers and streams — from the catastrophic effects of an oil spill.[54]

In her comments, Notley referred to the project as nation-building three times, and emphasized its pan-Canadian support and benefits: "I believe in Canada, not just as a concept, but as a country."[55] This shift in the project's organizational structure, from private sector to the federal government ownership, increases the Government of Canada's stakes in its success and could bol-

52 Attorney General of BC, *supra* note 48.

53 Canada, Department of Finance, "Backgrounder: Details of Agreement for the Completion of the Trans Mountain Expansion Project", (Ottawa: 29 May 2018), online: <www.canada.ca/en/department-finance/news/2018/05/backgrounder-details-of-agreement-for-the-completion-of-the-trans-mountain-expansion-project.html>.

54 John Horgan, "John Horgan: 'It Doesn't Matter Who Owns the Kinder Morgan Pipeline, the Risks Remain'", *Maclean's* (30 May 2018), online: <www.macleans.ca/opinion/john-horgan-kinder-morgan-op-ed/>.

55 Rachel Notley, "Rachel Notley on Trans Mountain: 'It's Time to Pick Those Tools Back Up, Folks'", *Maclean's* (30 May 2018, online: <www.macleans.ca/opinion/rachel-notley-trans-mountain-op-ed/>.

ster the political image of the project. But it doesn't change the constitutional conflicts over decision venues or how they are being framed by competing interests in the pipeline dispute.

Federal-provincial conflicts on Energy East[56]

Unlike the west coast pipelines, in the case of Energy East, there was no intergovernmental agreement between the federal government and the provinces to clarify the roles of the respective levels of government in the regulatory process. Both Québec and Ontario acted more as one might expect a jurisdiction-conscious province to act in this situation; they both chose to conduct their own reviews of the project. Taking a page from the book of BC Premier Christy Clark, in 2014, the Government of Québec sent TransCanada a list of seven conditions with which it expected the proponent to comply:

1. Compliance with the highest available technical standards for public safety and environmental protection;

2. Have world-leading contingency planning and emergency response programs;

3. Proponents and governments consult local communities and fulfill their duty to consult with Aboriginal communities;

4. Take into account the contribution to greenhouse gas emissions;

5. Provide demonstrable economic benefits and opportunities to the people of Ontario and Québec, in particular in the areas of job creation over both the short and long term;

6. Ensure that economic and environmental risks and responsibilities, including remediation, should be borne exclusively by the pipeline companies in the event of a leak or spill on ground or water, and provide financial assurance demonstrating their capability to respond to leaks and spills; and

7. Interests of natural gas consumers must be taken into account.[57]

56 This section is based on chapter a co-authored with Xavier Deschênes-Philion in a book manuscript in preparation.

57 Government of Ontario, News Release, "Agreements Reached at Québec-Ontario Joint Meeting of Cabinet Ministers" (21 November 2014), online: <https://news.ontario.ca/opo/en/2014/11/agreements-reached-at-quebec-ontario-joint-meeting-of-cabinet-ministers.html>.

Ontario Premier Kathleen Wynne joined Québec following a meeting between the province's two premiers. A month later, the two provinces agreed to remove the fourth condition on evaluating the pipeline's upstream greenhouse gas emissions after a meeting with Alberta premier Jim Prentice.[58]

Despite the display of accommodation, both provincial governments committed to their own reviews of the project, including its greenhouse gas implications.[59] The Ontario government directed the Ontario Energy Board to review the project, and public hearings were held in 2014. The Board's final report was published in 2015. The report expressed concerns about natural gas supply, impacts on aboriginal and other local communities, and the limited economic benefits for the province, but did not make any recommendations.[60] Ontario premier Kathleen Wynne expressed an accommodating position after a January 2016 meeting with Alberta premier Rachel Notley, stating "the people of Ontario care a great deal about the national economy and the potential jobs that this proposed pipeline project could create in our province and across the country."[61]

Due to different stakes, public attitudes, and its nationalist tradition, the government of Québec was less accommodating from the start. The Québec government sent TransCanada a letter in late 2014 informing the company that it was expected to comply with provincial laws and undergo a provincial assessment.[62] This put TransCanada in a challenging position. It wanted to avoid unduly complex procedures resulting from different requirements from different jurisdictions, and it had an interest in defending federal supremacy on pipeline regulation. But, it also understood the significance of gaining support from Québec; formal political opposition from the province could doom the project in the federal cabinet. Initially, TransCanada took the position that the

58 Adrian Morrow, "Wynne Drops Main Climate Change Requirement in Considering Energy East Pipeline", *The Globe and Mail* (3 December 2014), online: <www.theglobeandmail.com/news/politics/ontario-plays-down-climate-change-concerns-of-energy-east-pipeline/article21907743/>.

59 Ontario, Ontario Energy Board, "Giving a Voice to Ontarians on Energy East", (13 August 2015), online: <www.oeb.ca/sites/default/files/uploads/energyeast_finalreport_EN_20150813.pdf> [Ontario Energy Board]; Québec, Bureau d'audiences publiques sur l'environnement, "Greenhouse Gas Emissions and Climate Change Documents," (2016), online: <www.bape.gouv.qc.ca/sections/mandats/oleoduc_energie-est/documents/ges.htm> [BAPE].

60 Ontario Energy Board, *ibid*.

61 Postmedia News, "Kathleen Wynne Gives Tentative Backing to Energy East Pipeline as Rachel Notley Faces Criticism over Project", *Financial Post* (22 January 2016), online: <http://business.financialpost.com/news/economy/kathleen-wynne-gives-tentative-backing-to-energy-east-pipeline-as-rachel-notley-faces-criticism-over-project>.

62 BAPE, *supra* note 59.

supremacy of federal jurisdiction over pipelines meant that the company was not required to comply with provincial review requirements.[63]

In response, Québec decided to initiate a review of the project through the Bureau of Environmental Public Hearings (Bureau d'audiences publiques sur l'environnement — BAPE), with a starting date of January 2016. The province also decided to formally initiate the environmental assessment process under the *Environmental Quality Act*. At this point, TransCanada's refusal to participate in the provincial process became the subject of legal action. A coalition of environmental groups filed for an injunction that would require TransCanada to participate. Two weeks later, on March 1, 2016, Québec Environment Minister David Heurtel filed for an injunction to force TransCanada to comply with the provincial environmental assessment process. In justifying the action, Heurtal made a clear declaration of Québec's view of its jurisdiction:

> Today's motion is very simple and very clear: It signifies that whoever seeks to build a project in Québec must comply with all Québec laws and regulations. I clearly informed TransCanada Pipelines that it needed to table a project notice for Energy East. In the face of its inaction, the government has taken action. This is not only a matter of respect, but equally a question of fairness towards all companies that wish to do business in Québec.[64]

At this point, TransCanada reversed course and decided to comply with Québec's environmental assessment procedures, and committed to submitting an impact statement for the Québec portion of the pipeline. In exchange, Québec withdrew its application for an injunction.[65] But the company ran into numerous problems with the review, including its initial refusal to submit documents in French as required by Québec law. The assertion of Québec authority was an irritant to TransCanada, and one of a number of contributing factors which led the company to withdraw its application and terminate the project in

63 Daniel Gralnick, "Constitutional Implications of Québec's Review of Energy East", online: (September 2016) 4:3 Energy Reg Q, online: <www.energyregulationquarterly.ca/articles/repercussions-constitutionnelles-de-lexamen-du-projet-energie-est-par-le-quebec#sthash.KF4zKr4o.jrdlvHVC.dpbs>.

64 Québec, Bureau d'audiences publiques sur l'environnement, Press Release, "Energy East Pipeline – Motion for an Injunction against TransCanada: The Government Takes Action to Ensure Compliance with Québec Law" (1 March 2016), online: <www.mddelcc.gouv.qc.ca/infuseur/communique_en.asp?no=3398>.

65 Daniel Gralnick, "Constitutional Implications of Quebec's Review of Energy East", online: (September 2016) 4:3 Energy Reg Q <www.energyregulationquarterly.ca/articles/repercussions-constitutionnelles-de-lexamen-du-projet-energie-est-par-le-quebec>.

October 2017, four years after it was first proposed.[66] In its media release, the company was notably terse in explaining the decision: "After careful review of changed circumstances, we will be informing the National Energy Board that we will no longer be proceeding with our Energy East and Eastern Mainline applications."[67] One of those circumstances was unquestionably the persistence of public and governmental opposition in Québec.

The division of powers between the provinces and the federal government on energy and environmental policy has been highly contentious at different points in Canada's history. Pipeline opponents have worked to mobilize all potential tools to delay or block new oil sands pipelines, and have pushed sympathetic provincial governments to mobilize politically and legally against the pipeline. BC's reference case will provide greater clarity about the extent of provincial authority over interprovincial pipelines.

Division of powers: the role of municipalities

In addition to some provinces, local governments also tried to shift decision venues to grant them a great share of pipeline decision authority. In the Northern Gateway case, Kitimat, the city that would host the terminal on the BC coast, held a plebiscite that resulted in a vote against the project.[68] In the Energy East case, the 82 municipalities of the Montréal Metropolitan Community (MMC) unanimously voted to oppose the Energy East pipeline. It is the Trans Mountain case, however, that has addressed the issue of the legal, constitutional authority of municipalities to play a significant role in pipeline regulation. Before addressing the City of Burnaby case directly, it is useful to review how different actors sought to frame the political discourse about the role of local communities.

Community consent in pipeline conflict discourse

The issue of consent by affected communities has been a vital part of the discourse in pipeline conflicts. Indigenous groups have used the UN Declaration on the Rights of Indigenous Peoples, discussed below, to bring consent into the

66 Ron Wallace, "The Tortuous Path to NEB 'Modernization'", online: (2018) 6:2 Energy Reg Q <www.energyregulationquarterly.ca/articles/the-tortuous-path-to-neb-modernization#sthash.gWqr19I7.n6CVHL72.dpbs>.

67 TransCanada Corporation, "TransCanada Announces Termination of Energy East Pipeline and Eastern Mainline Projects", (5 October 2017), online: <www.marketwired.com/press-release/transcanada-announces-termination-energy-east-pipeline-eastern-mainline-projects-tsx-trp-2236161.htm>.

68 Paul Bowles & Fiona MacPhail, "The Town that Said 'No' to the Enbridge Northern Gateway Pipeline: The Kitimat Plebiscite of 2014" (January 2017) 4:1 Extractive Indus Soc'y at 15-23.

discourse. For non-Indigenous communities, the discourse has been dominated by a slogan introduced by Justin Trudeau well before the October 2015 election. Trudeau first used the phrase in public in October 2013 in a speech on energy policy to the Calgary Petroleum Club. Criticizing Prime Minister Stephen Harper for his inability to get new pipelines approved and built, Trudeau argued that Harper "needlessly antagonized" both the Obama administration and the Canadian public: "Times have changed, my friends. Social license is more important than ever. Governments may be able to issue permits, but only communities can grant permission."[69]

Despite knowing that, if transformed into an actual procedural rule, governance would be virtually unworkable, Trudeau adopted the slogan as a flagship frame for his energy policy from the start. This phrase was used frequently when talking to voters during the campaign about pipelines.[70] The Liberal Party of Canada's 2015 election platform clearly articulated the institutional rule with respect to decision venues: "While governments grant permits for resource development, only communities can grant permission."[71]

While this phrase was a "go to" slogan for the Liberals during the 2015 campaign, it virtually disappeared from their communications as soon as they were elected. In fact, after the election, there is only one instance where Trudeau seems to have used a version of the phrase in public, in March 2016:

> I think there is a desire by provinces across the country, understandably, that they want to ensure that they're acquiring the kind of social license that hasn't been acquired in the past. And that's where we're looking at working constructively and collaboratively with jurisdictions across the country for projects in the national interest in a way that understands that even though governments grant permits, ultimately only communities grant permission. And drawing in from voices and a range of perspectives, is going to lead us to a better number of, better kinds of solutions, and better outcomes for everyone across the country.[72]

The statement was not in prepared remarks, but in response to a reporter's question about his reaction to the government of Québec seeking an injunction

69 Liberal Party of Canada, "Liberal Party of Canada Leader Justin Trudeau's Speech to the Calgary Petroleum Club", (30 October 2013), *Liberal Party of Canada* (blog), online: <www.liberal.ca/liberal-party-canada-leader-justin-trudeaus-speech-calgary-petroleum-club/>.

70 Amy Minsky, "Fact Check: Did Justin Trudeau Break His Word by Approving Pipelines?", *Global News* (30 November 2016), online: <https://globalnews.ca/news/3097871/fact-check-justin-trudeau-break-promise-approving-pipelines/>.

71 Liberal Party of Canada, "Environmental Assessments", (2015), *Liberal Party of Canada* (blog), online: <www.liberal.ca/realchange/environmental-assessments/>.

72 CBC News, Trudeau: "Governments Grant Permits, Communities Grant Permission", *CBC News* (1 March 2016), online: <www.cbc.ca/player/play/2684686536>.

against the Energy East pipeline. The phrase cannot be found using the search function on the Prime Minister of Canada's news page (https://pm.gc.ca/eng/news). The phrase is also absent from the Government of Canada website, according to the search function. Searching Hansard for the 42nd Parliament beginning with the first Speech from the Throne of Trudeau's government, the phrase has been not used in Parliament by any member of Trudeau's government.[73] Given that the Trudeau government has taken a number of actions that are inconsistent with the slogan, it is a perfect case study of how rhetorical incentives differ when political parties are in campaign mode and when they are in governing mode.

While the slogan disappeared — other than Trudeau's one impromptu slip — from the Liberal government's discourse once in power, it has become a staple of opposition discourse. Not only does it clearly articulate a standard requiring community support, but it also punctuates the hypocrisy of the Trudeau government. In response to the Trudeau government's approval of the Trans Mountain pipeline in November 2016, Burnaby Mayor Derek Corrigan employed the slogan directly: "Prime Minister Trudeau said 'Governments grant permits; ultimately only communities grant permission.' We agree. He does not, however, have our permission and we will continue to make that clear."[74]

Burnaby vs Trans Mountain and the NEB

In the Trans Mountain case, the authority of municipalities to influence pipeline regulation through zoning or permitting authority became a major issue. While a number of Lower Mainland BC municipalities have taken positions against the project, the cities of Vancouver and Burnaby have been most active in fighting it. The City of Vancouver has taken a very vocal opposition role. It created an elaborate website that hosts 12 research reports supporting its position,[75] acted as a formal intervenor, and challenged several federal decisions

73 The Canadian House of Common's Parliamentary webpage enabled a keyword search of Hansard publications by "parliament", "session", and "speaker", among other categorical search tags. Searches in English and French for "grant permission" and "accordent la permission" returned zero related results for members of the Trudeau government. It was used three times by two different Liberal backbenchers but never by a member of cabinet.

74 City of Burnaby, News Release, "Mayor Derek Corrigan Statement in Response to Federal Government Approval of Kinder Morgan Pipeline Proposal" (29 November 2016), online: <www.burnaby.ca/About-Burnaby/News-and-Media/Newsroom/Mayor-Derek-Corrigan-Statement-in-Response-to-Federal-Government-Approval-of-Kinder-Morgan-Pipeline-Proposal_s2_p5957.html>.

75 "It's not worth the risk," online: City of Vancouver, <https://notworththerisk.vancouver.ca>.

in court. For the most part, it has acted like other interested parties in the sense that the project's physical location is not within the city's boundaries and thus it was not involved in any permitting decisions.[76]

The role of Burnaby, where the pipeline ends at the tanker terminal, has been the most controversial and involved the most jurisprudence. The conflict between Kinder Morgan and Burnaby erupted when the company decided, six months after its initial submission to the NEB, to amend its application to change the route of the pipeline through Burnaby. Thinking the route would be less disruptive to Burnaby residents, Kinder Morgan wanted to reroute the pipeline through Burnaby Mountain. The change led the NEB to request more information about route design, which in turn required the company to perform seismic testing by drilling on Burnaby Mountain in a 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 gave 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, without providing reasons. In response, Burnaby sought to shift the venue and appealed to the BC Supreme Court. In a December 2015 ruling, the court was clearly of the view that the case did not belong before it, and called Burnaby's application "an abuse of process." It gave reasons regardless, rejecting the city's argument and 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."[77]

76 The city of Burnaby did challenge the BC government's decision to issue an Environmental Assessment Certificate in court, which was rejected by the BC Supreme Court. *Vancouver (City) v. British Columbia* (Environment), 2018 BCSC 843, [2018] BCJ No 970. For further discussion of this decision see Martin Olszynski's contribution in this special issue. The city was also among the plaintiffs challenging the federal government's approval of Trans Mountain in the Federal Court of Appeal.

77 *Burnaby (City) v Trans Mountain Pipeline ULC*, 2015 BCSC 2140, [2015] BCJ No 2503; Bankes, "BC Court Confirms", *supra* note 17.

Despite protests and the arrest of over 100 demonstrators in November and December 2014, the conflict quieted for over a year until the Trans Mountain Expansion Project was approved with conditions in November 2016, and the company began preparing for preliminary construction activities around the terminal in mid-2017. One condition of the approval is that the company is required to "to apply for, or seek variance from, provincial and municipal permits and authorizations that apply to the Project."[78] Conflict quickly developed over whether or not the City of Burnaby was deliberately delaying the issuance of the necessary permits. Kinder Morgan applied to the NEB to be exempted from the requirement to obtain permits, and requested the establishment of a "process for Trans Mountain to bring similar future matters to the Board for its determination in cases where municipal or provincial permitting agencies unreasonably delay or fail to issue permits or authorizations in relation to the Project."[79]

In another major blow to municipal powers in influencing pipeline decision-making, the NEB ruled that, despite there being no evidence of "political interference or improper motives," Burnaby's processes "were not reasonable, resulting in unreasonable delay." That delay "constitutes a sufficiently serious entrenchment on a protected federal power," thus having the effect of being an impairment on federal power. As a result, the NEB declared the Burnaby bylaws in question "inapplicable."[80] Burnaby and the Government of BC applied for leave to appeal to the Federal Court of Appeal, but that application was dismissed, again without reasons given. In responding to this decision, Mayor Derek Corrigan took issue with the decision and announced an appeal to the Supreme Court of Canada:

> The federal court has refused to review the decisions made by the National Energy Board. They're not giving consideration to the arguments being made by the City and the provincial government that oppose the NEB ruling. The Court System should be the body that decides whether or not this is fair and just, but they dismissed our application without reasons. Very clearly, it's something the court should have dealt with and given reasons why it's not allowing the provincial government to exert its

78 Nigel Bankes & Martin Olszynski, "TMX v Burnaby: When do Delays by a Municipal (or Provincial) Permitting Authority Trigger Paramountcy and Interjurisdictional Immunity?" *ABlawg* (24 January 2018), online: <https://ablawg.ca/2018/01/24/tmx-v-burnaby-when-do-delays-by-a-municipal-or-provincial-permitting-authority-trigger-paramountcy-and-interjurisdictional-immunity/>.

79 Canada, National Energy Board, "Order MO-057-2017. Reasons for Decision", Trans Mountain Pipeline ULC (Ottawa: 2017), online: <https://apps.neb-one.gc.ca/REGDOCS/File/Download/3436250>.

80 *Ibid*.

> authority to protect the environmental interests of the province. We will, therefore, now ask the Supreme Court of Canada to perform this function.[81]

The city's news release emphasized that the NEB "found that there was no evidence of political interference or deliberate obstruction."[82]

Pipeline opponents have worked hard to mobilize affected communities against pipelines. For the most part, that opposition has been expressed politically, taking advantage of the ethic of community consent as well as the influence of local political leaders in swaying votes in elections in senior jurisdictions. The legal powers of municipalities are limited to local zoning and permitting authority; Burnaby's efforts to use those powers to throw a wrench in the gears of the Trans Mountain project have been resoundingly rejected by the NEB and the courts. But they have contributed to delays and cost increases for the project, and contributed to the political risks that forced Kinder Morgan to sell the project to the Government of Canada.

Indigenous rights: two competing visions

One of the most divisive conflicts on procedural rules in pipeline decision-making is the issue of what role Indigenous groups have in resource decision-making. Indigenous rights are protected by Section 35 of the Constitution, but there is still significant disagreement about the content of those rights. This disagreement is being played out in the court rooms, cabinets, and in public discourse about pipelines. The oil sands pipeline conflicts, like many other natural resource policy issues in Canada, reflect two competing visions of the appropriate role of Indigenous groups in decision-making on projects that potentially affect their rights and title. The establishment frame, employed by pipeline advocates, is based on current Canadian jurisprudence, and emphasizes a duty to consult Indigenous groups but explicitly stops short of according them a veto. The consent frame is based on the "free, prior, and informed consent" provisions of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In circumstances in which there is opposition from Indigenous groups, the two visions imply markedly different procedural rules with direct implications for the relative power of pro- and anti-pipeline coalitions. The

81 City of Burnaby, News Release, "Burnaby to Appeal NEB Decision on City Bylaws to the Supreme Court of Canada"(27 March 2018), online: <www.burnaby.ca/About-Burnaby/News-and-Media/Newsroom/Burnaby-to-Appeal-NEB-Decision-on-City-Bylaws-to-the-Supreme-Court-of-Canada_s2_p6446.html>.

82 *Ibid.* The Supreme Court of Canada denied leave August 23, 2018 online: <https://scc-csc.lexum.com/scc-csc/scc-l-csc-a/en/17240/1/document.do>.

establishment frame clearly authorizes governments to proceed with projects over the opposition of Indigenous groups so long as they can satisfy courts that their consultation process was sufficient. The consent frame accords authority to Indigenous groups to determine the outcome of resource decision-making related to their rights and title.

The establishment frame

The establishment frame has its roots in the 2004 *Haida*[83] and *Taku*[84] decisions by the Supreme Court of Canada. The *Haida* case built on the Court's 1997 ruling in *Delgamuukw*[85]:

> The Court's seminal decision in *Delgamuukw*,… in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation" on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.[86]

The *Haida* decision then went on to address an issue on which *Delgamuukw* was silent.

> This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.[87]

In *Haida,* the government did not consult the First Nation. The less celebrated *Taku* case, however, offers an example where the Court concluded that government consultation was adequate despite the continued opposition from the Taku First Nation. The case involved a mine in northern British Columbia and, in particular, a road to the mine that crosses lands of concern to the Taku River Tlingit First Nation (TRTFN). In this case, the government incorporated the TRTFN in the project committee that guided the environmental assessment. It also altered the control of access to the road in an effort to address the

83 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*].
84 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].
85 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997] SCJ No 108 [*Delgamuukw*].
86 *Haida*, *supra* note 83 at 24.
87 *Ibid* at 48.

concerns raised. These accommodation measures did not alter the opposition of the TFTRN, but the Court ruled that the measures were sufficient:

> …Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process. In this case, the Province accommodated TRTFN concerns by adapting the environmental assessment process and the requirements made of Redfern in order to gain project approval.[88]

The standards articulated by these 2004 case have been applied in a number of cases most recently in the 2017 *Chippewas of the Thames*[89] decision where the Court also reached the conclusion that the Crown (through the NEB) had met its duty to consult:

> …A decision to authorize a project cannot be in the public interest if the Crown's duty to consult has not been met. Nevertheless, this does not mean that the interests of Indigenous groups cannot be balanced with other interests at the accommodation stage. Indeed, it is for this reason that the duty to consult does not provide Indigenous groups with a "veto" over final Crown decisions (*Haida*, at para. 48). Rather, proper accommodation "stress[es] the need to balance competing societal interests with Aboriginal and treaty rights" (*Haida*, at para. 50).[90]

In the establishment vision, good faith consultation is sufficient, consent is not required. Pipeline proponents have emphasized the importance of consultation but also emphasize that First Nations are not accorded a veto. Shortly after approving Trans Mountain in late 2016, Prime Minister Trudeau spoke of the role of First Nations opposing the project: "No, they don't have a veto."[91] BC Premier Christy Clark, once she had come to support the pipeline, gave a perfect depiction of the establishment frame: "If we work hard to get consent and work to accommodate, we can move ahead with projects without it at the end of the day."[92]

88 *Taku River*, *supra* note 84 at 2.

89 *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 SCR 1099 [*Chippewas*].

90 *Ibid* at 59.

91 Postmedia News, "Trudeau Says First Nations 'Don't Have a Veto' over Energy Projects", *Financial Post* (20 December 2016), online: <http://business.financialpost.com/news/trudeau-says-first-nations-dont-have-a-veto-over-energy-projects>.

92 The Canadian Press, "Engage Early to Avoid First Nations Veto, Perry Bellegarde Tells Energy Conference", *CTV News* (6 October 2016), online: <www.ctvnews.ca/politics/engage-early-to-avoid-first-nations-veto-afn-chief-tells-energy-conference-1.3105035>.

Establishment cases on pipelines

This doctrine can be seen in four cases involving oil sands pipelines. The 2016 *Gitxaala Nation*[93] decision of the Federal Court of Appeal, involving the Northern Gateway Pipeline, established a standard for the type of consultation the courts would find inadequate. The 2017 *Chippewas of the Thames* Supreme Court of Canada case, involving the Line 9 reversal project, provided a guidepost for getting court endorsement of consultation processes despite the absence of consent. The 2018 *Squamish Nation* decision of the BC Supreme Court, involving the Trans Mountain project, reinforces the establishment doctrine.[94] And finally in the 2018 *Tsleil-Waututh Nation* case, the Federal Court of Appeal applied *Gitxaala* to quash the approval of the Trans Mountain Expansion Project.[95]

Gitxaala Nation

The Northern Gateway pipeline proposal experienced its greatest setback in June 2016. The Federal Court of Appeal, in reviewing eighteen challenges to the government's decision from First Nations and environmental groups, consolidated into one decision, quashed Enbridge's certificate of public convenience and necessity for the project. The decision reflected a stunning victory for pipeline opponents, but the legal reasoning underlying the decision contained quite mixed ammunition for critics of pipelines and other large infrastructure projects.

The Federal Court of Appeal's decision was based on its conclusion that the Harper government engaged in a deeply flawed consultation process with First Nations that did not meet the government's obligations. Aboriginal engagement for the project was guided by a framework document issued by the federal government in February 2009. The process outlined five phases of the consultations: (1) a preliminary phase of consultation about the terms and conditions of the review process; (2) a pre-hearing phase to inform Aboriginal groups about the process and encourage their participation; (3) the hearing phase where Aboriginal participation was encouraged and supported; (4) the post-hearing phase to consult groups after the release of the Joint Review Panel but before the cabinet's final decision; and (5) the permitting stage where additional consultations would be conducted on implementing the conditions

93 *Gitxaala Nation v Canada*, 2016 FCA 187, [2016] 4 FCR 418 [*Gitxaala*].

94 *Squamish Nation v British Columbia (Environment)*, 2018 BCSC 844, [2018] BCJ No 971 [*Squamish*].

95 *Tsleil-Waututh Nation v. Canada (Attorney General),* 2018 FCA 153 [*Tsleil-Waututh]*. These four cases are all discussed in more detail in David Wright's contribution to this special issue.

and other legal requirements for authorization.[96] While it lauded the federal government's consultations during the first three phases, it was the fourth, the post-hearing stage, where the Federal Court of Appeal found major flaws in the government's performance.

Two paragraphs from the decision effectively summarize the Court's rationale:[97]

> Based on our view of the totality of the evidence, we are satisfied that Canada failed in Phase IV to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations. Missing was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report, or to provide meaningful feedback in response to the material concerns raised. Missing was a real and sustained effort to pursue meaningful two-way dialogue. Missing was someone from Canada's side empowered to do more than take notes, someone able to respond meaningfully at some point.
>
> We have applied the Supreme Court's authorities on the duty to consult to the uncontested evidence before us. We conclude that Canada offered only a brief, hurried and inadequate opportunity in Phase IV — a critical part of Canada's consultation framework — to exchange and discuss information and to dialogue. The inadequacies — more than just a handful and more than mere imperfections — left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored. Many impacts of the Project — some identified in the Report of the Joint Review Panel, some not — were left undisclosed, undiscussed and unconsidered. It would have taken Canada little time and little organizational effort to engage in meaningful dialogue on these and other subjects of prime importance to Aboriginal peoples. But this did not happen.

While these passages show the court was quite critical of the Harper government's consultation approach, the court emphasized it was merely applying existing law: "[I]n reaching this conclusion, we have not extended any existing legal principles or fashioned new ones. Our conclusion follows from the application of legal principles previously settled by the Supreme Court of Canada to the undisputed facts of this case."[98] The court did not see itself as advancing the duty of the Crown any closer to the "free, prior, and informed consent" advocated by many First Nations.

96 *Gitxaala*, *supra* note 89 at 14-15.
97 *Ibid* at 279, 325.
98 *Ibid* at 9.

The decision had the effect of putting the Trudeau government in the position of either accepting that pipeline certificates were quashed or restarting the phase 4, post-Joint Review Panel consultations with First Nations. Given his commitments in the 2015 election campaign and the lack of reasons to believe the position of any First Nation had changed since the Harper government process, it really was not much of a decision at all. The government declined to take any further steps.

Chippewas of the Thames

In a case involving Enbridge's Line 9, the Supreme Court of Canada's 2017 decision in *Chippewas of the Thames* reached a different conclusion while affirming "that the duty to consult does not provide Indigenous groups with a 'veto' over final Crown decisions (*Haida*, at para. 48). Rather, proper accommodation 'stress[es] the need to balance competing societal interests with Aboriginal and treaty rights' (*Haida*, at para. 50)."[99]

The Supreme Court described the Board's consultation practices in *Chippewas* as follows:[100]

> …the Chippewas of the Thames were given a sufficient opportunity to make submissions to the NEB as part of its independent decision-making process (consistent with *Haida*, at para. 44). Here, the NEB held an oral hearing. It provided early notice of the hearing process to affected Indigenous groups and sought their formal participation. As mentioned above, the Chippewas of the Thames participated as an intervener. The NEB provided the Chippewas of the Thames with participant funding which allowed them to prepare and tender evidence including an expertly prepared "preliminary" traditional land use study (C.A. reasons, at para. 14). Additionally, as an intervener, the Chippewas of the Thames were able to pose formal information requests to Enbridge, to which they received written responses, and to make closing oral submissions to the NEB.

In the Court's view, these practices met the constitutional standard:[101]

> …The NEB reviewed the written and oral evidence of numerous Indigenous interveners and identified, in writing, the rights and interests at stake. It assessed the risks that the project posed to those rights and interests and concluded that the risks were minimal. Nonetheless, it provided written and binding conditions of accommodation to adequately address the potential for negative impacts on the asserted rights from the approval and completion of the project.

99 *Chippewas*, *supra* note 86 at 59.
100 *Ibid* at 52.
101 *Ibid* at 64.

Squamish Nation

In the wake of the *Coastal First Nations* ruling (discussed above) that rejected BC's deferral to the federal government decision on Northern Gateway, the provincial government responded to the change in assessment requirements by launching its own environmental assessment process of the Trans Mountain project.[102] Having negotiated financial contributions to the province's budget from the proponent Kinder Morgan to satisfy her fifth "fair share" condition, Premier Clark's government issued an Environmental Assessment Certificate in January 2017. The Squamish Nation challenged that decision in court due to insufficient consultation, focusing in part on a number of uncertainties in the NEB's 2016 report.

The 2018 decision of the BC Supreme Court in *Squamish Nation* reinforces the establishment doctrine elaborated by *Chippewas of the Thames*. The Court declared that the precedents referred to by the Squamish should not be seen "as establishing as a principle of law that adequate consultation requires the resolution of all uncertainty before a decision is made".[103] The court concluded that the province had considered the Squamish's concerns in good faith and accommodate them appropriately:

> The question is not whether, for instance, British Columbia did everything possible to protect the marine and land environments from the risk of catastrophic spills. The question is whether, viewing the process as a whole, British Columbia adequately considered Squamish's concerns arising from the process in coming to its decision. I find that it did. Squamish was afforded ample opportunity to communicate those concerns, and to comment on the EAO's responses. The conditions recommended by the EAO after consultation, adopted by the Ministers, included a number addressing the marine environment, oil spill preparedness, access through traditional territory, land uses for cultural and spiritual purposes and requirements for ongoing consultation reports from Trans Mountain.[104]

The court took note of the Squamish Nation's continued strong opposition to the project, but endorsed the province's consultation nonetheless: "I must concern myself not with the result but with the process".[105] Hence, in the establishment frame and current doctrine, the ruling standard is good faith consultation, not consent.

102 British Columbia, Environmental Assessment Office, "Trans Mountain Expansion", (accessed 22 June 2018), online: <https://projects.eao.gov.bc.ca/p/trans-mountain-expansion/detail>.

103 *Squamish*, *supra* note 94 at 167.

104 *Ibid* at 172.

105 *Ibid* at 198.

Tsleil-Waututh Nation

In the primary court challenge to the Trans Mountain Expansion Project's approval, the Federal Court of Appeal again quashed the certificate of a pipeline to the west coast.[106] This outcome surprised many, because the Trudeau government claimed to have learned from, and be applying the principles of, the *Gitxaala* case involving the Northern Gateway Pipeline. In its decision, the court noted that the federal government had taken some specific steps to ensure "that the flaws identified by the Court in *Gitxaala* were remedied and not repeated…."[107] And the court agreed that there were "…significant improvements in the consultation process…."[108]

Nonetheless, the court found the consultation was "…unacceptably flawed and fell short of the standard prescribed by the jurisprudence of the Supreme Court…."[109] In making the finding, the court emphasized the importance of "meaningful two-way dialogue":

> I begin the analysis by underscoring the need for meaningful two-way dialogue in the context of this Project and then move to describe in more detail the three significant impediments to meaningful consultation: the Crown consultation team's implementation of their mandate essentially as note-takers, Canada's reluctance to consider any departure from the Board's findings and recommended conditions, and Canada's erroneous view that it lacked the ability to impose additional conditions on Trans Mountain. I then discuss Canada's late disclosure of its assessment of the Project's impact on the Indigenous applicants. Finally, I review instances that show that as a result of these impediments the opportunity for meaningful dialogue was frustrated.[110]

The *Gitxaala* and *Tsleil-Waututh* cases show that the establishment doctrine, while falling short of providing the right to consent favoured by the advocates of the consent doctrine, can be applied by courts with a sufficiently "hard look" to be extremely demanding.

The consent frame

In contrast to the establishment frame, the consent frame is based on the ethic of consent that asserts a different procedural rule. It derives from a vision of traditional Indigenous law under which First Nations governed their

106 *Tsleil-Waututh*, *supra* note 91.
107 *Ibid* at 551.
108 *Ibid* at 552.
109 *Ibid* at 557.
110 *Ibid* at 562.

own territories, endorsed by the modern day UNDRIP.[111] UNDRIP uses the standard "free, prior, and informed consent" (FPIC) to describe the role of Indigenous groups in decision-making related to their own territories. For example, Article 32 on resource and land development reads: "States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources…." The FPIC standard is referenced in five other UNDRIP articles.[112]

Canadian governments have increasingly expressed support for UNDRIP. When the Harper government reluctantly endorsed the Declaration in November 2010, the Government of Canada took pains to note that it objected to the provision of "free, prior and informed consent when used as a veto." The statement declared, "We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework."[113] Federal government discourse about UNDRIP changed with the election of the Trudeau Liberal administration in 2015. In his mandate letters to the Minister of Indigenous and Northern Affairs, as well as other ministers, Trudeau directed them to implement UNDRIP. In May of 2016, the Minister of Indigenous and Northern Affairs proclaimed that "Canada is now a full supporter, without qualification, of the declaration."[114] Yet, federal ministers continue to argue that it is permissible for projects to proceed without the consent of affected First Nations. Referring to the Trudeau government's purchase of the pipeline in May, 2018, Indigenous and Northern Affairs Minister Carolyn Bennett stated flatly, "We have been very clear that FPIC is not a veto."[115]

111 While Indigenous discourse in Canada tends to emphasize the links to UNDRIP in advocating consent, the consent has been referred to in Canadian jurisprudence as well. See *Delgamuukw*, *supra* note 85 at 161; *Haida*, *supra* note 83; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.

112 UNDESA Division for Inclusive Social Development Indigenous Peoples, "United Nations Declaration on the Rights of Indigenous Peoples" (September 2007), online: <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

113 Canada, Indigenous and Northern Affairs Canada, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples", (Ottawa: 10 May 2016), online: <www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html>.

114 *Ibid.*

115 Jorge Barrera, "Buying and Expanding Trans-Mountain Pipeline not a Violation of Indigenous Rights, Says Minister", *CBC News* (29 May 2018), online: <www.cbc.ca/news/indigenous/trans-mountain-pipeline-bc-first-nations-1.4682395>.

Yet, Indigenous leaders and their allies argue that "free, prior, and informed consent" means what it seems to mean. This standard of consent has become a core part of the opposition discourse. Referring to Trans Mountain, Assembly of First Nations Chief Perry Bellegarde argued, "Free, prior and informed consent means First Nations have the right to say yes or no and to determine conditions for development in their territories."[116] In talking about Energy East, Ghislain Picard, Regional Chief of the First Nation Chiefs of Québec-Labrador, stated: "Now that our Chiefs have decided to reject the pipeline, we will be asking that Québec and Canada respect such decision if they are to fulfil their Constitutional obligations and if they are to respect the United Nations *Declaration on the Rights of Indigenous Peoples*."[117] In early 2018, the House of Commons passed a private members bill, *An Act to Ensure that the Laws of Canada are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples*. Referring to that bill, Grand Chief Stewart Phillip of the Union of British Columbia Indian Chiefs maintained, "Bill C-262 further validates what we already know: Kinder Morgan cannot proceed without the consent of the First Nations along its path, so many of which oppose it."[118]

While pushing for the right to consent, pipeline opponents seem to scrupulously avoid the use of the term "veto" in their framing. For example, Roshan Danesh, a lawyer who works with Aboriginal peoples, argued: "'Consent' and 'veto' are distinct. The interchangeable use of the terms — whether out of ignorance, or as a deliberate attempt to create fear or confusion — is wrong and should stop."[119] Paul Joffe sets out key differences in these terms: "'Veto' implies an absolute power, with no balancing of rights. This is neither the intent nor interpretation of the UN Declaration [United Nations Declaration on the Rights of Indigenous Peoples], which includes some of the most comprehensive balancing provisions in any international human rights instrument." These balancing provisions include the "principles of justice, democracy, respect

116 Rachel Gilmore, "Bellegarde Breaks Silence on Kinder Morgan", *iPolitics*(10 April 2018), online: <https://ipolitics.ca/2018/04/10/bellegarde-breaks-silence-on-kinder-morgan/>.

117 Assembly of First Nations of Quebec and Labrador, "First Nations of Quebec Officially Oppose Energy East Pipeline", *Canadian Newswire* (15 June 2016), online: <www.newswire.ca/news-releases/first-nations-of-quebec-officially-oppose-energy-east-pipeline-583165411.html>.

118 Union of British Columbia Indian Chiefs, News Release, "As Trudeau Ramps Up Pressure to Build, First Nations from Across Canada Stand in Solidarity against Kinder Morgan Pipeline" (8 February 2018), online: <www.ubcic.bc.ca/nokm2018>.

119 Rosha Danesh, "Opinion: Understanding the Relationship between Consent and Veto," *Vancouver Sun* (24 December 2016), online: <http://vancouversun.com/opinion/opinion-understanding-the-relationship-between-consent-and-veto>; See also Jason Tockman, "Distinguishing Consent from Veto in an Era of Reconciliation", *Policy Note* (10 April 2017), online: <www.policynote.ca/distinguishing-consent-from-veto-in-an-era-of-reconciliation/>.

for human rights, equality, non-discrimination, good governance and good faith. These are core principles of both the Canadian and international legal systems."[120]

Tockman defines consent when speaking of free, prior, and informed consent as outlined in UNDRIP: "FPIC is defined as both a process and an endpoint that involves the 'cooperative agreement' of relevant parties. For consent to be obtained, affected Indigenous peoples must be brought in as partners early in the process and at various stages, and their agreement with the project or policy must be secured, free of any coercion." He continues: "… if an affected Indigenous nation withholds consent, consent has not been reached."[121] Regardless of what terms different parties prefer, the core question remains under what conditions, if any, settler governments might proceed in the absence of consent.

Indigenous groups in Canada have made significant strides in advancing their rights by focusing on the institutional venue of the courts. While their consent frame has been increasingly influential in political discourse about resource projects, it has not yet been adopted by Canadian courts. Until Canada either changes its legislation or Constitution, or the Supreme Court of Canada has a radical shift in doctrine, those advocating the paradigm of consent face an uphill battle in the courts.

Conclusion

This analysis has shown the politics of structure at work in the conflicts over Canadian oil sands pipelines. The most prevalent institutional strategies in this case have been venue-shifting among levels or branches of government, and procedural rules with respect to who can participate in hearings and the role of Indigenous groups in resource decision-making. While not a constitutional issue, changes in organizational structure also came to play a significant role in the Trans Mountain case when the federal government purchased the project from Kinder Morgan.

The two most divisive and challenging institutional conflicts have been over provincial rights and Indigenous rights. Opposition from the Government

120 Paul Joffe, "'Veto' and 'Consent' — Significant Differences"(31 July 2015) Unpublished Paper, online: <www.afn.ca/uploads/files/2015_usb_documents/veto-and-consent-significant-differences-joffe-final-july-31-15.pdf>.

121 Jason Tockman, "Eliding Consent in Extractivist States: Bolivia, Canada, and the UN Declaration on the Rights of Indigenous Peoples" (6 October 2017) 22:3 Intl JHR at 325-349.

of Québec, in combination with others, contributed to TransCanada's decision to terminate the project. BC's specification of conditions for support on pipelines put it sharply at odds with neighbouring Alberta and complicated efforts to develop a national energy strategy. After the 2017 election, the anti-pipeline NDP in BC significantly increased the political risks to proponent Kinder Morgan, so much so that it chose to sell the project to the Government of Canada.

On Indigenous rights, there remains a considerable gap between the establishment doctrine of consultation and accommodation and the aspirations of some Indigenous leaders to have the right to consent on projects affecting their rights and title. Clearly, law as interpreted by the courts constrains certain types of strategies. Without a change in legislation that enshrines consent principles in law, it is hard to see how a new political equilibrium could emerge.

The inability of advocates of an Indigenous right to consent to have that standard respected by governments and project proponents is an indicator of the ultimate power of law over discourse. Rhetorical strategies adopted by strategic actors can appeal to broad values and motivate activists, but their power is rarely a match for the hard reality of substantive and procedural rules in legal doctrine. This proposition is demonstrated clearly in the cases of participation rules and municipal jurisdiction. Pipeline opponents' attempts to transform their frustration with decisions on scoping and decisions limiting participation into a *Charter* case were quickly and decisively shut down by multiple court rulings. Burnaby's efforts to assert jurisdiction have been treated dismissively by reviewing courts, either in actual rulings or in their rejection of appeals. Trudeau's campaign promise that "only communities can grant permission" might have contributed modestly to his 2015 election victory, but it was merely a campaign slogan, not the policy of his government and certainly not reflected in constitutional law.

When not well grounded in legal rules, those asserting jurisdictional authority resort to political arguments. BC Premier Christy Clark expressed this view very well in talking about provincial power in the context of Northern Gateway in 2012. Speaking about the federal power of disallowance to override provincial opposition, she said:

> The reason [disallowance] is so rarely used is because citizens and provinces will no longer tolerate that kind of intrusion into provincial decisions. The thing is, this project can only go ahead if it has the social licence to do so. It can only get the social

> licence from the citizens of British Columbia. And that's what I'm representing as Premier.[122]

The constitutional conflicts over Canadian pipelines have created some strange political bedfellows. Much of the environmental opposition to the pipelines is founded on concerns about greenhouse gases. Yet, in advocating for strong provincial powers on environmental matters in relation to pipelines their arguments may be at odds with a broader Canadian climate strategy that, if it is to be successful, will inevitably have to rely on effective assertions of federal powers over reluctant provinces. The province of Alberta, traditionally only second to Québec in its defence of strong provincial powers, has teamed up with a Trudeau government to vigorously defend federal authority. The implications for the fate of provincial and federal political parties, and indeed the evolution of federalism in Canada, are immense.

122 Gary Mason, "B.C. Premier Christy Clark Warns of National Crisis over Pipeline", *The Globe and Mail* (22 October 2012), online: <www.theglobeandmail.com/news/british-columbia/bc-premier-christy-clark-warns-of-national-crisis-over-pipeline/article4627532/>.