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Uncertainty and Confusion in Canada's Natural Resource Development

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From the time of the fur trade, Canada (and before 1949 Newfoundland) depended on its bounty of natural resources. Before this dependance, of course, Indigenous peoples had lived off the bounty of the land, and taught newcomers many skills they needed to survive here.

Today, in a vastly more economically-diversified country, natural resources play a less important role, but they remain significant. Canada's balance of trade would be horrible without them. The multiplier effect of exploiting and shipping them to other parts of Canada and overseas is immense. We generate huge amounts of hydro power. We are among the world's leading producers of minerals. We have 0.5 percent of the world's population but 4.7 percent of the world's natural gas supplies and 4.8 percent of its oil. Two years ago, the Boston Consulting Group reported that oil and natural gas accounted for 18 percent of the country's gross national product, 12 percent of its jobs and 27 percent of its exports. Today, those numbers would be lower because capital investments in oil and gas have been declining for about five years.

A decade ago, resource revenues accounted for roughly a third of provincial revenues in Alberta, Saskatchewan and Newfoundland. Today, they account for about 10 percent. Canadian oil is being sold in the United States at a deep discount; indeed, the US has become a competitor with Canada on energy, owing to fracking and its newly abundant supplies of oil and gas – alongside its ability to get liquified natural gas (LNG) facilities up and running. Canada, by contrast, struggles to get pipelines built and LNG projects off the ground.

If you believe, as some of our citizens do, that all fossil fuels are bad all the time, and that regardless of what the rest of the world is doing Canada should no longer produce or use them, then the struggle of the fossil fuels industries is terrific news. If you believe, however, that fossil fuels will be in demand here and abroad

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for a very long time, even while the world very slowly transitions away from them, then this is bad news for employment, government revenues, economic growth and the Canadian dollar. And although there are people and groups that believe clean energy is the way of the future, with a clear path to its adoption ahead, ask people in certain parts of Canada how they like wind turbines in their backyard. Fury would be an understatement. Indeed, in the Lower Mainland of British Columbia, political heartland of the Green Party, one wonders about the public reaction were a company to propose large wind farms in the Strait of Juan de Fuca and the Georgia Strait – wind farms like those that are common off the shores of Denmark, Germany, Britain and Ireland.

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Green energy is the way of the future, but the future is a long way off. According to the International Energy Agency (IEA), power from solar and wind is increasing rapidly in many parts of the world. And yet, even with a continuation of this growth pattern or its acceleration, by 2040 the IEA predicts "fossil fuels will still account for 77 per cent of world energy use." Non-hydro renewables will grow from 5 percent of world supply of energy today to 14 percent in 2040. Maybe these trajectories are too low, given the reduced costs for solar panels and accelerating investments in electric cars and batteries that store power. Technological disruptions are hard for predictive economic models to measure. Even if 15 percent is too low, let's assume the 2040 worldwide figure will be 25 percent. That's still 25 percent.

One of the world's most profound thinkers about energy is a little-known Canadian economics professor, Vaclav Smil at the University of Manitoba. He is publicity-shy but Bill Gates describes Professor Smil as one of the most profound thinkers about energy in the world. Anyone who has read his books would likely agree. Smil strongly favours conservation and a reduction in energy use, but he also believes that those who think renewables can supply the world's electricity peddle a "fairy tale."

Speaking of fairy tales, Canadians have a misguided view of the world, and their country's place in it. A slogan in Chapters/Indigo stores proclaims that "The world needs more Canada." It sounds so enticing and morally uplifting, but the statement is false. It is instead a self-comforting myth that Canadians need to shed but cannot. Ingrained in Canada is the misguided idea that the world loves and respects us and will wait on Canada while we figure out what is best for us before deciding what is best for the world. We also believe, all evidence to the contrary, that the world welcomes our moral lectures.

The world, alas for us, is not like that. Other nations do not wait on Canada, nor frankly pay much attention to what happens here, unless it benefits them. While we have dithered and killed off most of our LNG industry on the West Coast – there remains only one project in sight – the Americans and Australians have been building LNG terminals and locking up long-term contracts in Asia. US oil is being exported to markets we might have penetrated. Canada has apparently decided to create so many domestic difficulties that moving more of its oil and natural gas offshore is not happening. This offers excellent news to Houston and Perth, Australia where fossil fuels are exported. The same goes for mining. As we make it hard for exploration and exploitation, capital goes elsewhere: to Latin America or Africa or the US.

There are many ways to highlight our self-imposed natural-resource constraints, so let's begin with the most publicized natural resource issue and go from there.

From October 2 to 5, 2017, the Federal Court of Appeal heard a case brought against the Government of Canada, the National Energy Board and Kinder-Morgan, the proponent of the Trans-Mountain Pipeline. The case spun around twinning an existing pipeline from Alberta bitumen resources to the Pacific Ocean at Burnaby. The project would have expanded oil shipments from 300,000 to 898,000 barrels a day, and increased tanker traffic carrying diluted bitumen.

It would have provided an outlet to Asia for Alberta oil, allowing the province and country a way of diversifying exports away from the Unites States where Canadian oil has been selling at a significant discount. To environmental critics, the project would have a doubly deleterious effect on greenhouse gas emissions by encouraging more bitumen oil development and the burning of that oil by recipient countries in Asia. Other critics worried about the potential for a shipping disaster, although there has not been a major tanker spill anywhere in the world since 1974.

The plaintiffs were six First Nations groups, and the municipalities of Burnaby and Vancouver. Judgment was rendered on August 30, 2018, approximately eleven months after the hearing. The judgment was lengthy and detailed, so perhaps it is not surprising that it took almost a year to produce. It was thought by most observers that this legal action would fail. It did not.

The media reporting of the decision was predictably superficial. It highlighted the areas where the court found the National Energy Board and Canadian government had not fulfilled their duty of consultation toward the Indigenous plaintiffs or paid enough attention to the effect of tanker traffic on a species of whales. Most of the media reporting quickly focused on the predictable reaction from victorious plaintiffs, delighted or angry provincial politicians, happy opponents of any fossil fuel development, and a confused federal government.

It is worth examining the decision in more depth for the light it sheds on how developing natural resources now is so ensnared in contradictions and confusions that the sector is a bad place to invest.

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Among the confusions are: what constitutes the "duty to consult and accommodate" and the "honour of the Crown;" the definition (if one exists) of "social licence;" the meaning in practice and law of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) that asserts their right to "free, prior and informed consent" for lands over which they claim title; the respective powers of the federal and provincial governments; the contested credibility of regulatory bodies; the influence of environmental interest groups; and the vagueness of court rulings and the unfettered access to court appeals by those who wish to stop or alter projects.

These confusions and contradictions are increasingly noted beyond our borders. Companies have plenty of options on where to invest their money around the world. They are doing so by investing elsewhere or, as Kinder-Morgan did, by giving up and selling the entire pipeline project to the government of Canada, netting a

tidy profit in the process. Headlines are made when companies leave. Nothing is usually said when investments are not made. However, data reported by the C.D. Howe Institute and the Organization for Economic Cooperation and Development track the marked decline in business investment in Canada, especially in resources.

Canadians are apparently conflicted about how to weigh economic benefits and environmental protection. What would a foreigner make, for example, of a federal government that bans oil tankers off British Columbia's upper west coast, where few people live, thereby killing one pipeline project, but encourages another pipeline that will expand tanker traffic in Burrard Inlet where tens of thousands of people live.

Or, how would they measure the "duty of consult" with some Indigenous groups who claim they were not adequately consulted and therefore oppose the Trans-Mountain pipeline; whereas in another part of BC other Indigenous leaders complain Ottawa did not consult them at all before killing a pipeline project they wanted to take oil to Prince Rupert for export to Asia, or stopping oil and gas development in the Arctic. Still with Trans-Mountain, how would they view a project that had four different lawsuits against it?

Or, what would they think of New Brunswick, a province with a rapidly aging population that is flat on its fiscal back. Governments once dreamed of expanding the deep-water port of Saint John for an LNG terminal and creating a trans-shipment point for oil but then placed a ban on seismic testing in their province to determine what natural gas lies beneath its own soil. Or, what about Quebec, where tankers ply the tricky St. Lawrence River daily bringing oil from Venezuela or the Middle East to refineries in Quebec City but where the population apparently does not want Alberta oil shipped through the province by pipeline? Oil by tankers and rail, but not pipelines. Go figure.

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Oil and natural gas projects are frequently the most ensnared by the confusions and contradictions but forest projects, transmission lines, roads, mines and dams can be caught too. Every country has processes for determining the conditions under which resource projects should proceed. There is nothing unusual about that. Projects, properly conceived and executed, must be subjected to reviews for land use, environmental protection, remediation where necessary, impact on nearby communities, and so on. What is unusual and hurtful is the degree to which in Canada we have added to these necessary conditions, excessive litigiousness, Indigenous legal claims, widespread definitional confusions, regulatory uncertainty and political controversy. The Trans-Mountain saga brought all these factors into sharp relief, but they are variously present elsewhere.

When Ottawa first assessed its responsibilities for determining which Indigenous groups might be adversely affected by the Trans-Mountain project, they identified 130 of them, according to the Federal Court of Appeal ruling.

Notice was sent to all that they could participate in the National Energy Board (NEB) hearings. Those who launched the appeal against the NEB's final decisions received funding, although they complained of its inadequacy. The Tsleil-Waututh Nation, for example, asked for $766,047 but received $40,000 plus travel costs. The Squamish Nation applied for $293,000 but received $44,720. Other groups were awarded sums ranging from tens of thousands of dollars up to $300,000. Nor were Indigenous litigants alone in receiving public funding.

The Raincoast Conservation Foundation got $111,100; Living Oceans $89,100. Each also received travel costs for two people to attend the court case. It would be argued by these recipients that since the Government of Canada has unlimited money and the proponents had plenty that taxpayers should pay to make the proceedings fair. All that can be said it that launching litigation is not as onerous financially as some might suspect.

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

Of the 130 First Nations apparently affected in some fashion by the pipeline, six participated in this appeal. They opposed the pipeline from before it was presented to the NEB, during the hearings and afterwards. It's hard to imagine, notwithstanding the court's finding that Ottawa had not consulted them sufficiently, what additional consultations would have convinced them to support what they vigorously opposed in principle and practice.

The court believed that more consultation was a constitutional requirement. Maybe it was, although this is doubtful, but even so it would likely not have changed the minds of any of the plaintiffs for whom the appeal was another stage in a long and sincere campaign of flat-out opposition. Procedural complaints, in other words, were not at the heart of their objections, although the judges obviously believed that they were.

Some particular complaints were of pressing concern to them. But they sought not to modify the project but to kill it. This dynamic appears repeatedly. Opponents, Indigenous or non-Indigenous, express outrage at process, flay the regulators, denounce the fairness of hearings, and hang their position on the inadequacies of procedures, whereas their true motivation is opposition in principle not method.

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Other First Nations undoubtedly supported the plaintiffs in spirit. On the other hand, 33 First Nations publicly declared their support for the project, five times more than took up the legal appeal. These supporters did not participate in the appeal. Judges are required to deal with the case before them, and not consider what other parties to the dispute might think. Support from Indigenous groups for the pipeline was ignored, and this is the way matters are when judges make decisions. They rule on certain elements of a matter brought before them, not on the matter in the round.

The court decided that the Canadian governments had not adequately respected the "honour of the Crown" in its consultations with the First Nations at bar. What kind of consultations, or opportunities for consultations, had been afforded interested parties, including Indigenous interests?

Kinder-Morgan, the proponent, had engaged in a long process of consultation up and down the Fraser River before presenting the project for NEB approval. Kinder-Morgan had learned from the opposition Enbridge had encountered for its Northern Gateway project in northern BC and wished to head off opposition, if it could, by much more extensive consultation. Of course, this consultation did not count for those opposed to the project, and it carried no weight in court.

Then there were the NEB hearings themselves. The Board granted participation status to 400 intervenors and 1250 commentators. The hearings were extremely lengthy, as befitted the complexity and importance of the project, as well as the number of intervenors. The Board concluded "with the implementation of Trans-Mountain's environmental protection procedures and mitigation measures, and the Board's recommended conditions, the project is not likely to cause significant adverse environmental effects." It said the "likelihood of a spill … would be "very low in light of the mitigation and safety measures to be implemented." It added "the project would be in the Canadian public interest."

The board affixed 157 conditions that dealt with safety, emergency preparedness, and ongoing consultations with "affected entities, including Indigenous communities." That 157 conditions were attached to the approval, the fulfilment of which would be required before the project could proceed, ought to have suggested the Board was no pushover. Of course, that was not what opponents believed. Their public relations campaign against the legitimacy, fairness and competence of the NEB which had begun during hearings continued within minutes of the release of the board's report.

Shortly after the board's decision, the Trudeau government organized an unusual, and not legally necessary, additional consultation. It appointed a three-person ministerial panel that included a former Yukon premier Tony Penikett, himself quite experienced in Indigenous matters and deeply sympathetic to their perspective, and Kim Baird and Sophie Pierre, two prominent Indigenous leaders in British Columbia to hold meetings with Indigenous and civic leaders in BC and Alberta. After listening extensively, the panel sent a report to the government about what it had heard concerning the pipeline and identified six "high-level" questions that "remain unanswered."

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

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The court rejected Indigenous complaints that the consultation process used by the government was inadequate. Said the jurist who authored the judgment, "I am satisfied that the consultation framework selected by Canada was reasonable." Nor did the court accept arguments that the level of public funding for litigants was inadequate.

(As an aside, the court roundly rejected the procedural and substantive objections to the board's rulings from Burnaby whose mayor had waged a prolonged public relations campaign against the pipeline. The court was impressed by how the NEB had handled complaints raised by Burnaby. Burnaby not only struck out, it had a no-hitter pitched against it.)

The court said the Indigenous consultation process for the project was "generally well-organized." There was "no reasonable complaint that information was withheld or that requests for information went unanswered." Cabinet ministers were "available and engaged in respectful conversations and correspondence with representatives of a number of Indigenous applicants."

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Additional funding had been provided for plaintiffs. A four-month extension of the consultation process was implemented. The Crown Consultation Report provided detailed information about Indigenous concerns and Canada's conclusions.

A reasonable person, upon reading how much consultation had occurred, how many opportunities to be heard had been afforded, how much money and time had been spent might have concluded that enough was enough. But this is Canada, and all this was apparently not enough. The government might have thought so; previous court rulings might have suggested it. But no said the court, more was required. There had not been adequate "two-way dialogue." This dialogue would show that the government had given serious consideration to Indigenous concerns, thought about accommodation measures and explained how Indigenous concerns "impacted" Canada's decision to approve the project."

This reasoning might make sense if indeed either there had not already been extensive consultations or, more critically, if the points raised by Indigenous peoples were about specific matters (as they were, in fairness, with one litigant group) that could be addressed by certain changes, as opposed to lock-and-stock opposition to the entire project. Apparently where the government fell short of its legal obligations, as the court defined them, was in not just having officials convey Indigenous concerns to decision-makers but not having decision-makers themselves negotiate with Indigenous leaders.

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

Before drawing lessons from the Trans-Mountain case, consider a very different one involving the Eabametoong First Nation in remote central Northern Ontario. The nearest road is 155 kilometres away. The reserve can only be reached by air. In 2014, according to a report from the Poverty Action Research Project, there were

approximately 2,400 band members, but only 1,300 lived on the reserve. The Eabametoong is a signatory to Treaty 9, and therefore finds itself in a very different place than those nations in British Columbia without treaties. Because of the treaty, and because the territorial claim that the band made was weak, the judges who heard the case said the "duty to consult and accommodate" was far less onerous than in the BC case.

The band has admitted to many problems. In 2014, of 157 young people who should have been in Grade 9, only 23 attended, with another 43 attending off-reserve in far-away Thunder Bay. A significant number of children were living off-reserve under the care of a Child and Family Services organization. Housing was sub-standard with over-crowding and poor maintenance. Thirty-five percent of the dwellings needed major repairs. The employment rate on the reserve was 63 percent; median family income after tax was $22,7210, one-third the Ontario average. Thirty-seven percent of family incomes came from government transfers. In October 2010, problems grew so grave that the Chief and Council declared a State of Emergency, because in addition to these problems, there had been numerous arsons, three murders, several other violent incidents, widespread prescription drug abuse, no ambulance service, environmental contamination, an over-stretched sewage system and a longstanding boil-water advisory.

The State of Emergency was lifted in March 2011. According to the Poverty Action report, important progress was made in alleviating some of the social problems. A nursing centre was established. A Community Development Centre opened. And a new Chief was elected. Better still, the band won an award for creating a gardening project that provided fresh vegetables in hard terrain. This band, in other words, showed resilience. But the reserve is quite isolated. It lacks own-source revenues and a sustaining economic base for a wage economy.

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An opportunity for employment, training and money did appear on the horizon when, eight years ago, a company received a permit to begin exploring for gold. By 2014, at a meeting with the company, band members expressed concerns about developments because although the area under exploration was 40 kilometres from the band site, seven families from two of the community's 12 clans used the land for rabbit trapping, hunting geese and fishing.

Some time after that meeting, and after receiving a letter from the band council, the minister sent the First Nation a letter responding to concerns. The band replied that the letter was not adequate. Their concerns had not been met, but the government issued a permit for proceeding, a decision that sparked a legal challenge against development that was successful. Not enough consultation ruled the court. No development will be happening, as the company has apparently lost interest, at least for now.

In northern Ontario, an area of chronic high unemployment for Indigenous and non-Indigenous alike, there lies one of the world's largest chrome deposits – the so-called Ring of Fire. Nine First Nations claim traditional lands in and around the deposits, access to which will require a network of roads. Roads, in theory, would be of great benefit to isolated, roadless communities, but negotiations between the provincial government and the nine nations have been going slowly for many years.

The Ontario government of Liberal premier Kathleen Wynne did sign a preliminary agreement with some of the nations, but others, including Eabamatoong, bitterly condemned the government for proceeding without their assent. Exasperated, Ms. Wynne, an extremely pro-Indigenous politician, sent chiefs of the nine nations a letter saying the province's patience was being tried by the delays. The initial proponent of developing the chrome deposits, a US company, gave up. All of which raises the question: Which companies, if any, might want to submit themselves to what will be an arduous, lengthy and quite-possibly litigious process to get roads built, and presumably transmission lines, let alone get the mines developed?

This Ontario case did not involve oil and natural gas; the band's claim was of limited force; the "duty to consult and accommodate" was at the lower end of the spectrum of Crown obligations; the government in power was well-disposed to Indigenous rights and presumably thought it had discharged its consultative duties; but the courts thought much more needed to be done. Very little is now happening. When something might happen is anyone's guess.

Ken Coates, Munk Senior Fellow at the Macdonald-Laurier Institute and a professor at the University of Saskatchewan who studies Crown-Indigenous economic relations, said this after the Ontario Superior Court decision: "This is part of a work in progress that shows up for every single right that is defined by the courts. Even when you get a victory that says you have a duty to consult and accommodate, unless you have a handbook that comes with it, these kinds of decisions are going to be inevitable."

This comment is accurate and disconcerting. A "work in progress" means there is no settled law, no clearly defined precedent, no certainty, no "handbook." Apparently, therefore, this abiding uncertainty is "going to be inevitable," which begs the question who wants to start a process and commit money to developing a project under these circumstances of prevailing uncertainty and confusion in Canadian law and practice?

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The two cases, different as they are, have common threads. In each case the company, the initiating actor, becomes a bystander, even if it has consulted with indigenous groups, because the "honour of the Crown" requires government-to-Indigenous consultations/negotiations. It is unclear to the company what the government is negotiating; or if it is negotiating – that is making commitments – or rather just consulting. Nor is it clear whether the "accommodations" the court requires will be satisfactory to the company, such that a project can proceed financially or practically, or whether it must be abandoned.

Time is money, and the more time that is spent consulting and negotiating, the greater the chance that the company will walk away or, looking at precedents, decide not to invest. From the Indigenous communities' perspective, of course, time means getting a deal that respects their rights and interests, since they must live with the consequences, up close and for a long time. Their time-line, therefore, might well clash with that of the proponent. Some First Nations are eager to do business, because their leaders and populations are painfully aware of poverty, social ills, poor health and low formal educational standards. They see natural resource projects as a way of creating a serious wage economy, with less dependency. But others are wary of this kind of modernity, fearing its impact on traditional ways of life. They prefer, as the Eabametoong, to value rabbit-

snaring and geese hunting, which some of their members have done for a very long time, to the intrusiveness and disruption of gold exploration and mining.

There is another hugely consequential factor of immense complexity and latent fierce debate, about which some discussion is now occurring and more will certainly come. Until the debate is resolved – if it can be resolved – any company thinking of investing, or any government wishing to promote investment, must tread very warily.

UNDRIP is a long and platitudinous document, typical of the UN with its almost two hundred members, replete with many clauses and multiple high-sounding principles. One clause speaks about the requirement for UN member-states to "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."

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The Harper government approved the *Declaration* but entered a caveat of non-approval for this clause. The Trudeau Liberals in the last campaign promised that if elected they would endorse the entire *Declaration* including this clause. Then, they got elected, and reality of what they had promised was made known to them by the justice department and other sources.

The Oxford dictionary defines "consent" as "permission for something to happen." In plain English, therefore, "free, prior and informed consent," the key word being "consent," means the right to "give permission" or to say no, in other words a veto. But, faced with the reality of what a veto would mean in practice, the federal government began to prevaricate, arguing that the UNDRIP's approval did not confer a veto on First Nations. It meant something else, rather than the actual meaning of the words. Just what it means remains unclear to this day.

Indigenous leaders believe they know what it means. The Tsilhqot'in decision of the Supreme Court has been subject to various interpretations. The First Nation in question argued that it had title – and therefore rights – over a sizeable territory in central British Columbia over which its people had moved over the centuries. The court said indeed they did have title, that is ownership, over a small portion of that land and lesser rights over the rest. At least that is one interpretation, one favoured by the previous BC Liberal government.

The three major Indigenous organizations in BC said, no, the judgment affirmed Aboriginal title everywhere in province, thereby giving First Nations the right to determine what would happen over the entire province. This difference of opinion has not been reconciled. All that can be said is that the Supreme Court in recent rulings, and now the Federal Court of Appeal, have asserted that Indigenous peoples have many special rights but not a veto.

Their leaders, of course, do not agree. They point to the plain meaning of the words of UNDRIP and the Trudeau government's many statements that it approves of the *Declaration.* Sadly, the Trudeau Liberals talked before they thought. The confusion is complete therefore around the UNDRIP, its meaning and applicability. Its impact on Canada's future is unknown. It is likely as time passes to be the subject of ongoing litigation. It will

be even more consequential if, as promised, the NDP government in BC enshrines UNDRIP in BC law, in which case any company wishing to do anything in British Columbia that involves use of land had better buckle up.

Having underscored the confusions and contradictions around natural resource policy, it is important to stress that there are dozens of examples where mutually satisfactory arrangements between the Crown, Indigenous peoples and project proponents have been made and projects are proceeding. These arrangements don't receive the media attention that the conflicts do. For example, Cameco has developed good working relations with Indigenous peoples in northern parts of Saskatchewan where uranium is mined. Several weeks ago, the Fort McKay and Mikisew Cree First Nations invested in Suncor's Fort Hills, Alberta bitumen project. The Athabaska Chippewa, who had opposed bitumen oil developments while participating in the sector, have announced they will become a partner with Teck Resources in developing a bitumen mine – if it is ever developed. In heavily-forested parts of Canada, First Nations have partnered with forestry companies to cut and process wood. A nifty three-way deal in BC sees Indigenous people cutting wood on their traditional lands, a BC company turning the wood into pellets for shipment by a South Korean company to that country for use in generating energy.

> "The challenge of reconciling Indigenous, governmental and private sectors interests and rights is but one complication in getting resource projects done."

The Haisla First Nation has thrown its weight behind Trans-Canada Pipeline's planned natural gas link from northeastern BC to Kitimat. The Haisla's support means that every First Nation along the route now supports the pipeline. Th consortium, led by Shell, has given the green light. So have the governments of Canada and British Columbia, the latter having poured lots of subsidies into the project. The town of Kitimat is cock-a-hoop with joy.

This being Canada, not so fast. Here come the courts. Here come the environmentalists. Here come the protestors. This summer, a prominent BC environmental lawyer, Mike Sawyer, applied for a federal review of the project from the National Energy Board. The gas link was already approved in 2014 by the BC Environmental Assessment Office, but he argues a federal review is now required. And, as often happens, protestors have set up camp objecting the project, despite approval by the elected Indigenous groups along the route. The Sierra Club and others are vocally opposed to the project, arguing the greenhouse gas emissions from the LNG facility would prevent BC from meeting its already "weak" GHG reduction targets. So even when every Indigenous group's elected councils are in favor, and the provincial regulatory authority has okayed the project, there are still legal and political challenges. To paraphrase Yogi Berra, "it ain't over 'til it's over, and then it ain't over."

Here come, too, challenges are coming from hereditary chiefs who claim that they, and not elected band councils, speak for their people. The councils were established under the "colonial" *Indian Act* whereas they, as descendants of hereditary leaders, represent the people. Where else in the world does this assertion apply? How many tens of millions of people lost their lives in China, Russia, Japan, throughout Western Europe and in the revolutions in the western hemisphere fighting against the notion that hereditary kings and queens, chiefs and potentates, shoguns and czars, emperors and shoguns, princes and nobles should rule over their populations? These hereditary rulers, like the ones in Canada, justified their power with appeals to history and lineage, insisting that hereditary rule had always been present, and so should always be. History, however, is

littered with the examples of the end of hereditary rule, or its transformation into symbolic heads of state. Yet hereditary rule lingers in corners of Aboriginal Canada, an affront to democracy and a form of government one hopes Indigneous nations themselves will join the rest of the world, and all of Canada, in replacing.

The challenge of reconciling Indigenous, governmental and private sectors interests and rights is but one complication in getting resource projects done. There can be, of course, constitutional arguments between levels of government, as we see in Mr. Sawyer's argument, or between provincial governments, as evidenced in the dispute between Alberta and BC over Trans-Mountain.

There is also complete confusion over what is called "social licence." Prime Minister Justin Trudeau uses this phrase all the time, usually in the context of saying the government cannot approve projects unless they have "social licence." Many non-governmental groups use this phrase, too, without anybody knowing what the phrase means. It has no legal meaning; that much is clear. No court, one thinks, would rest a decision on a phrase so vague as to defy precise meaning.

In a democratic society, one might think that the government decides what should be done after considering all sorts of factors, and then suffers the consequences or accepts the accolades between and during elections. Instead, the vague notion of "social licence" suggests other entities or institutions than government must be satisfied before government can act.

> "One might think that the government decides what should be done after considering all sorts of factors, and then suffers the consequences or accepts the accolades between and during elections. Instead, the vague notion of "social licence" suggests other entities or institutions than government must be satisfied."

How do we determine what is "social licence?" Do we take polls before every decision to determine what the population thinks? Do we just take them among people living near a project? If so, how near? And what about people in the rest of the province or the country? Do they count? Does Not in My Backyard constitute "social licence?" Do we hold public hearings, knowing from vast experience that those who speak at public hearings are often unrepresentative of the entire society? They speak usually because they have strong views, which might or might not reflect those of the general population. (For example, various polls have shown the Trans-Mountain pipeline to have majority support across Canada, except in Quebec, and throughout British Columbia outside the Lower Mainland.) Does "social licence" offer a veto, and if so by whom? Or is "social licence" just a generalized sense of what the public wants?

Those who espouse "social licence" believe they, or their group, define the public interest and the government, although democratically elected, is obliged to accept their definition. The prime minister seems to be agreeing with this definition of "social licence," or else he would not be using so frequently this charged and elastic phrase. He has said, for example, that there is no "social licence" for the Canada East pipeline through Quebec, as if that represents the end of the matter. And how does he fit "social licence" into his desire for reconciliation with Indigenous peoples when, as we have seen, Indigenous peoples themselves are sometimes sharply divided on projects? If "social licence" presumes some sort of consensus that will emerge if only there is enough consultation, the prime minister is going to be

sadly disappointed. So is Canadian society.

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

The government killed the Northern Gateway pipeline by banning tanker traffic off the northern BC coast – a decision not contested by First Nations in the area because it was made without any consultation with them. The government got very cold feet when opposition grew to the Canada East project to take Alberta oil to New Brunswick through Quebec, heartland of Liberal support. The company promoting the project pulled the plug, one reason being it could see nothing but trouble ahead, and no support from Ottawa. Having laid down a marker that it would see one pipeline built, as evidence that its balanced approach between environmental protection and natural resource development was working the government pushed for the Trans-Mountain project, to the point where it now owns the project, which means it owns all the problems associated with it.

"What it most certainly will not do is convince environmental groups opposed to a project to drop or dilute their opposition since, as argued before, their objections are not technical or procedural but fundamental."

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

The legislation replaces the Canadian Environmental Assessment Agency with the Impact Assessment Agency of Canada and the National Energy Board with the Canadian Energy Regulator. The government is giving these new agencies $1-billion over five years to get started.

The regulators, under the proposed new laws, will be asked to judge projects in relation to their impact on climate change, including upstream emissions. They must consider any adverse impact on Indigenous peoples. They must consider traditional Indigenous knowledge and weigh it along with scientific evidence. They must analyse "any alternative" to a project as well as any "alternative means" for carrying it out. This is a recipe for

complete confusion, since the regulators can hardly assess other possibilities if no party is presenting them. The board members, to fulfill the expanded mandate, will have to be familiar with anthropology, sociology, and other social sciences, since these will be necessary to judge projects according to the new criteria. Far from streamlining the regulatory process, Bill C-69 will elongate it, thereby making it less likely that projects will be approved in a timely fashion, if at all.

These confusions, and the inadequate attempts to clarify them as evidenced by the flawed Bill C-69, will have – indeed already are having – political consequences. Many natural resource projects are found in what we might call "hinterland" Canada, far from the big cities where most of the population resides. In these "hinterland" areas, there are few alternatives for employment to natural resource projects. High-tech companies or real estate companies or manufacturing plants are unlikely to establish themselves in Kapuskasing, Lac La Biche or Prince George. If natural resource projects are persistently blocked by confusions in law or practice, then people there will understandably feel resentful of those who prevented jobs from being created and revenues being generated. They will blame the confusions on city-slickers, judges with their fancy reasoning about somebody else's "rights," elites and others far away who would know how to drive a Lexus but not a bulldozer.

"The sense of being forgotten is growing, and it will grow more if the best, maybe even the only, chances for economic growth are snuffed out by the confusions surrounding natural resources.

In BC, the pro-business Liberals swept the "hinterland." Conservative (we might now say "populist") forces dominate "hinterland" prairies and rural and small-town Ontario. The sense of being forgotten is growing, and it will grow more if the best, maybe even the only, chances for economic growth are snuffed out by the confusions surrounding natural resources.

Courts do no see the big picture, only the plaintiffs before them, and so questions of public policy in court cases become channeled into "rights talk," the Charter and process. Environmental groups are not for balance between development and the environment, because compromise is not part of their vocabulary. Governments have shied away from being precise. They use loose language such as "free, prior and informed consent," "social licence," "inclusiveness." In Ottawa, the government tries to square all circles, including favoring a robust oil and gas industry and new taxes and stiffer environmental and regulatory obligations. It had hoped that "inclusiveness" and touching every political base would produce a home run of policy success. Instead, it has added to what is already an all-pervasive and threatening set of confusions around natural resource development in Canada.

About the Author

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

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