



True North in
Canadian public policy

Straight Talk

April 2016

Straight Talk: Gaétan Caron

For the latest instalment in its *Straight Talk* series of Q & As, MLI spoke with former National Energy Board Chair and CEO Gaétan Caron, now an Executive Fellow at the School of Public Policy of the University of Calgary, about pipelines, politics, and how to ensure the environmental assessment process serves the best interests of Canadians



Gaétan Caron joined the School of Public Policy of the University of Calgary as an Executive Fellow in July 2014. His current areas of work at the School are Indigenous consultation and engagement best practices and public interest

determination of energy infrastructure. He lectures on energy policy and regulation and contributes to international partnerships, notably with Mexico. He speaks publicly and responds to media queries on a range of policy matters on behalf of the School. In addition to his work at the School, he provides independent consulting services on energy and regulatory matters. This follows his seven-year tenure (2007 to 2014) as Chair and CEO of the National Energy Board (NEB) of Canada. Prior to his role as Chair and CEO, he served as Vice-Chair (2005 to 2007), Board Member (2003 to 2005) and member of the executive in various staff functions throughout the NEB.

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MLI: What are the most important barriers to the approval of energy infrastructure projects in Canada today, and can they be overcome?

Caron: Perhaps it's better to ask: What is the most important barrier to fair consideration of projects? Because sometimes the public interest would require that the project be denied. But the main obstacle to these determinations being made I think is the fact that the regulatory processes have become politicized before their completion. When federal politicians take a stand on projects being assessed by a federal regulatory body like the National Energy Board (NEB), they're saying they've made up their mind before the regulatory review has been completed, or in some cases before it has even started. Understandably, this is seen by many as an expression of indifference or distrust towards the regulatory process, making people believe the regulatory review does not matter or its outcome has been pre-decided.

Federal politics has a role to play after the federal government has received the final report from the regulator, that is, the National Energy Board in the case of pipeline projects. Provincial politics is something else, as provinces want to prepare their intervention before the NEB in advance of the NEB process. This is why the OEB, and now the Quebec BAPE, have examined or are examining the Energy East Project from the standpoint of the provincial public interest. The report of the NEB, and the federal government's final decision, however, will be made on the basis of the national public interest. Following the independent and transparent regulatory process in place, and forming opinions based on the facts and the evidence presented to the regulator, and eventually the regulator's decision and its reasons for the decision, would go a long way towards restoring trust in the overall process.

Perhaps in previous times federal ministers would actually express opinions on the merits of pipeline projects, especially if they were deeply in favour of them, but this might have worked against their own purposes. As a result, people are saying "Why is the federal government having opinions while their own regulatory agency is assessing the pros and cons of the project, undermining the process itself?" This is despite the fact that the process itself was administered fairly by a bunch of competent people working in the public interest. So, I'd say politicization is a key obstacle.

Another barrier is the very unfinished journey of reconciliation with Canada's Indigenous people. There is no shortcut there. Deeper and better engagement with Indigenous peoples affected by infrastructure projects is necessary. I will discuss this in further detail as we go along.

MLI: Given that pipelines are an issue of national interest, how do you regard the notion that Ontario and Quebec can somehow extract conditions from the western provinces for allowing pipelines through their territories?

Caron: Well, they could try and do that in exchange for their support, but in the end it's not a bargaining exercise between provinces. It's really between the pipeline proponent and the National Energy Board and then the federal cabinet to decide whether the project is a go or not. Now, the NEB and the federal government will take into account the views expressed by provinces, but the NEB is not running a plebiscite asking itself how many people are supporting it and how many people are against. If the overriding social, environmental and economic factors in support of a project are positive for the nation, the NEB would still approve a project even if a province was against it.

This is part and parcel of democracy in action in Canada. That's the way the federation works. Provinces are entitled to voice their opinions especially when they do so on the basis of evidence and analysis and arguments in an NEB hearing. And, they are obviously entitled to have a political say in the political process which follows the NEB process. What I'm saying is that an obstacle to the proper development of natural resources and infrastructure is the mixture of political and regulatory considerations in one bundle, which make people believe that the regulatory process is political, which it is absolutely not, especially in the case of the NEB process which is quasi-judicial, independent and relying on the fundamentals of the case before the board members.

MLI: We've been hearing that Canadians have lost faith in the review process for pipeline projects and that reform of the National Energy Board is required. It has been criticized both for failing to get projects approved and for being too supportive of industry. How should we properly regard the NEB?

Caron: What we are hearing mostly is that they have lost faith in the environmental assessment process, as acknowledged by the Liberals during the election campaign, and then acknowledged by the new government. In my view, the loss of faith comes from the Canadian Environmental Assessment (CEA) Agency and the NEB faithfully implementing Parliament's wishes as expressed in the *Jobs, Growth and Long Term Prosperity Act*, known as Bill C-38, in 2012. Changes implemented in Bill C-38 included the imposition of a 15-month time limit for the NEB process, and a legal requirement that parties to be heard by the NEB must be "directly affected", or have expertise of value to the NEB. Earlier, as part of the *Budget Implementation Act*, Parliament decided that the CEA Agency would no longer be involved in the administration of environmental assessments conducted by the NEB and the Canadian Nuclear Safety Commission.

While these changes were democratically passed and implemented, several politicians and many NGOs became very vocal and very organized about condemning them, and spared no efforts to criticize the government of the day and the agencies involved. Some went so far as to indicate that the government had "gutted" the environmental assessment process. This is perhaps fair game in politics. What was not fair was the criticism aimed at the 400 or more people working at the NEB who choose every day to invest their professional career in the promotion of the public interest. They cannot respond to this criticism, which is not about concrete and specific examples of failures or errors on their part, but an overall judgment on the wisdom of democratic changes to legislation. Their work has included environmental assessments ever since the creation of the NEB in 1959. None of the legislative changes passed by Parliament since has had any impact on the independent work conducted by the people at the NEB in safety and environmental protection. As a result of their professional work, not a single member of the general public has been hurt by a federally-regulated pipeline since 1959, and not even a square metre of land has been irreversibly affected by a leak or a rupture, given the NEB's practices in environmental remediation.

Many people, from various backgrounds, who have observed or participated in the work of the NEB over the years, find it is an example of a very competent, evidence-based, independent and public interest-oriented institution. Inevitably, the tough decisions on complex matters they must make all the time make some people happy and some people unhappy, just like our courts of law. This is the normal thing. One does not work for a regulatory agency to receive universal praise, or in fact any praise at all. Doing the best they can every day, one day after the other, having in mind the public interest, is the best approach to provide Canadians with the regulatory services they deserve in a modern democracy.

Few if any people have come up with concrete suggestions as to how to reform the NEB. As a start, perhaps one could ask Parliament to undo the changes it made with Bill C-38, make sure the NEB is well resourced with good people as it was has always been, keep federal, provincial and municipal politics out of their work, and see what happens.

MLI: What do you think of the interim measures placed on the Trans Mountain and Energy East pipeline projects?

Caron: I really like them. In both cases, the price to pay for those waiting for the decision is a few months and that's after years of preparing for the application and the application itself and the hearings, final arguments, deliberation by the NEB and the NEB's final report. It takes years to get to the start of a hearing and it takes up to 15 months once the application is complete for the NEB to deliver its final report. So, to add a few months here and there for the Trudeau government to – in the case of Kinder Morgan – consult outside the regulatory process with Indigenous people is a very wise investment. To appoint a special representative and go deeper into what Indigenous people have to say, with an attitude

of listening, is a good idea. Something of the same nature is being considered for Energy East. So that's a good thing. In both cases, also the government is giving itself more time than the three months the NEB legislation allows them to take to respond to the final report. Again, if the Trudeau government wishes to do its political work after the NEB process in a more orderly and inclusive way I can only applaud that.

And I am very pleased that the upstream greenhouse gas emission test will be conducted by the department of Environment and Climate Change, outside of the NEB regulatory process. I am confident that the department will conclude, like the NEB has done several times on the basis of the evidence before it, that a particular pipeline has limited, if any, impact on the way provinces make decisions on the development of their natural resources, or the way consumers consume energy products at the other end of the pipeline.

There is a connection between climate change and pipelines if you take all pipelines together, of course, and you say let's choke the flow through all the pipelines the federal government regulates so that provinces produce less oil, but that would be a blatant intrusion into provincial jurisdictional matters under the Constitution and really a backdoor policy action as opposed to asking the provinces to do more. So, we have now a federal government who we see as a leader on the international scene, coming back from Paris; we have provinces praised by the Prime Minister for the actions they are taking, notably Alberta which is developing a carbon pricing formula and a maximum cap on total accumulative emissions per year – this is the proper policy vehicle to deal with climate change. We do it at the policy level, in policy circles not through the backdoor in a regulatory environment where the regulator itself has found that any particular pipeline has no bearing on climate change upstream or downstream of a pipeline it regulates.

MLI: So, what principles should the government keep in mind as it reviews the environment assessment process in general?

Caron: I'll keep it simple: make sure it remains evidence-based. The Prime Minister has been very clear that he wants environmental assessments to be evidence-based. Keep politics out of it and be faithful to the fundamental concept of sustainability, which was framed initially by the Brundtland Commission in their 1987 report known as *Our Common Future*. That was the seed of the concept of sustainable development. The Brundtland Report made it clear that sustainability is the integration of social, environmental and economic considerations. Yes, we can develop natural resources, but not at any environmental or social cost. We must respect the environment, but we must also take our resources to market. So, I think the direction that the nation is taking now on environmental assessment is very sound and very much grounded in the fundamentals of sustainability.

MLI: You mentioned earlier the importance of consulting Aboriginal people and how reconciliation is an unfinished journey. How can Aboriginal people be better engaged in the environmental assessment process?

Caron: It takes time – lots of time to make progress in our journey towards reconciliation with Indigenous peoples. We need to be patient, we need to be respectful of one another and most importantly – and I'm repeating for emphasis even though it sounds funny – most importantly, listen, listen and listen with sincerity and authenticity, leaving those we listen to, on both sides, with the belief that we are prepared to change our minds based on what we are hearing. And, I'd say that the history of Canada and the Indigenous governments and communities of this land over the years are more examples of how not to listen than examples of how to listen and how to get us together, treating each other as equals and taking the time to do it right. There is no short cut. We have deepened our hole ourselves by sometimes cutting corners on consultation, accommodation and the journey of reconciliation. It's not a pipeline project that will accelerate that long journey. So, it's going to be difficult, complicated, but it's got to be done and there's no way around it and it's a good thing for all Indigenous communities and the broader Canadian society.

MLI: There have been a few instances where a proposal has been designed in consultation with the affected Aboriginal community which led to much more successful passage through the environmental assessment process. Would you say that involving Aboriginal communities early and incorporating their concerns into the project design rather than consulting when the design is more or less complete can be beneficial?

Caron: I totally agree. I would add to that also the opportunity offered to Indigenous people to participate in the economic space created by a pipeline project or a dam or a mine. For instance, have them own equity or be debt holders in the investments for the projects and share the benefits from the investment over the years. That could be facilitated, for instance, by the federal government offering loan guarantees to Indigenous people. That's one example of the things that perhaps can happen when people listen to the aspirations of Indigenous people when they are being asked to form an opinion on a project crossing their land.

MLI: What are the prospects for some of those high-profile projects being completed such as Northern Gateway and Energy East?

Caron: On Northern Gateway, I believe the decision to pursue it or not is in the hands of the leadership and Board of Directors of Enbridge Pipeline Corporation. They have a federal permit and they have said publicly that they are prepared to satisfy all of the conditions attached to the permit. So, they have what it takes legally to proceed. But, they know that if they proceed now they would face a degree of opposition which is well organized and vocal and resourced, and they probably expect there would be further legal action. There might be civil disobedience, there could be delays, contributing to reduced value of their investment. The fact that there is a moratorium proposed against the movement of tankers on the West Coast also creates a major impediment to the project. So, we'll have to wait and see how it unfolds.

As for Energy East, it will depend on how the NEB and federal government see the national interest and the future of our nation with and without the project. It is way too early and I would invite all Canadians to not form a final opinion on Energy East until they've read some of the application and considered the evidence. Don't pre-judge the outcome until you know what the facts are. That's what the Trudeau government has been saying. I like that. That's what the NEB will do. The NEB never begins to form an opinion on anything until the last word has been offered in final argument by the last party.

MLI: How do you respond to concerns about Energy East from mayors and premiers in Ontario and Quebec?

Caron: Mayors have to look after their constituents' interests and pipeline projects run through many, many municipalities. Mayors have a legitimate role to play in having opinions on things that affect them. Mayors also understand that it is not their decision. The mayors around Montreal have been clear that it's obviously for the NEB to decide, but they will say what they think. Provinces will do the same and have done the same.

The best thing they can do moving forward to contribute to the debate is to have their teams study the application, contribute to the hearing, find evidence, ask questions, and form a final argument based on the evidence at the end of the public hearing. Mayors and their teams of officials at City Hall have a very important role to play because cities, like provinces and the federal government, have a difficult task integrating social, environmental and economic considerations in their jurisdiction. They are in the business of making decisions that are in keeping with the sustainable path for their future. And, that's the precise question the NEB asks itself on behalf of, not the city or province, but on behalf of the entire nation. So, their work is comparable and of the same scope, so while the NEB is not bound by a sustainability assessment made by a city or province, it is doing a sustainability assessment for the nation and anything that it can hear from provinces and territories and cities is a good thing because it contributes to their thinking process.

MLI: How has the use of this term ‘social licence’ evolved and what impact do you think it has on the pipeline debate?

Caron: I find the concept of social licence very unhelpful in the discussion of merits and demerits of infrastructure projects. It is not defined in a measurable way, and people using the phrase seem to use it at cross-purposes, like ships passing in the night. It means very different things to different people. Other similar phrases such as social acceptance and social acceptability have the same difficulties.

MLI: Do you think the pipelines have become a kind of proxy for environmentalists or opposition to oil sands? What impact has that had on the debate?

Caron: I would say that the assessments of the merits of pipeline projects have become a place where Canadians have tried to have broader policy debates like the development of natural resources, the fight against climate change, and other broad discussions that are beyond the project-specific assessment that regulatory and environmental assessment bodies are required to conduct under their enabling legislation. While these are important issues in today’s society, these bodies have validly determined that these broad policy questions are not relevant to the project-specific determinations they must make, and the courts to date have agreed with them. The absence of a public space to debate these broad questions has caused a great deal of frustration among some members of the public.

We would be well served by a public place where citizens can go and be heard on these broad issues. The new government has talked about renewal of Parliament. What Canadians want, in my view, is the recognition, through genuine listening by their governments, of the diversity of views Canadians hold on key policy topics from coast to coast to coast. They want to feel that they are being heard, with respect, and without judgment. And if they are part of the silent majority, they want to know that people who are vocal about issues they care about, social, environmental or economic issues, are being heard with respect. Perhaps we need to strengthen our parliamentary committees. By that, I include both House of Commons Committees and also Senate Committees which by their nature tend to be less partisan in their work, even more so today than in the past with the appointment of non-partisan Senators. We could invest more resources to help Parliamentary Committees better listen to Canadians, through a more varied set of tools, such as Internet-based tools, so the views of more Canadians can be more comprehensively reflected in Committees’ reports. We may then see that Parliamentary committee reports make a difference.

In some cases, it may be helpful for key topics of general interest to a large proportion of Canadians to go back to the practice of holding Royal Commissions, or their equivalent, such as Commissions of Enquiry, to gather a wide range of views and suggestions, and make recommendations to Parliament.

We have so many tools already. Let us simply re-learn how to use them effectively, helping the nation find its path towards a sustainable future for our children and grandchildren, and beyond.



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