



# The Role of Historical and International Movements in Determining the Social Licence

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**Abstract**

Gaining and maintaining a social licence to locate, build, and operate a resource extraction project involves political considerations as much as stakeholder relationship building and collaborative community development. This paper presents two case studies from Canada related to oil and gas pipelines. The 40-year evolution of the Mackenzie Valley natural gas pipeline project illustrates the importance of local, national, and international history and culture in gaining a social licence. The controversies surrounding pipelines to deliver product from the Alberta oil sands illustrate how the level of social licence can depend on the national and international policy narratives about energy more than operational practices of the industry that address opponents' criticisms. Industry leaders who relied on legal rights and institutions created in a bygone political era were outmaneuvered by activists who played by new rules based on narratives that challenge established law. The lesson for the oil and gas industry is that a stable and durable social licence capable of facilitating project advancement or continuance requires multiple levels of interlocking support based on sociopolitical narratives that build more influential political coalitions.

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**Keywords**

Social licence · Social acceptance · Pipelines · Alberta · Oil sands · Social movements · Stakeholder relations · Sociopolitical narratives

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**1 Introduction**

The term “social licence” began as a metaphor to facilitate comparison and contrast with the legal licences and regulatory requirements for primary industries. W. Henson Moore used the term in a paper industry magazine in late 1996.<sup>1</sup> Jim Cooney, in charge of external affairs at a gold mining company, used it in a meeting with the World Bank in early 1997.<sup>2</sup> Moore imagined the social licence to be granted by the general public, while Cooney saw social acceptance by affected communities as the critical factor. More than 20 years later, various theorizations of the concept have recognized the importance of both and of the political and social movements that surround any business.<sup>3</sup> Morrison reasoned that all organizations ought to enjoy social acceptance for their activities, including governments and civic sector

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<sup>1</sup>W H Moore, ‘The social license to operate’ (1996) October PIMA Mag 22.

<sup>2</sup>James Cooney, ‘Reflections on the 20th anniversary of the term ‘social licence’ (2017) 35 J. Ener Nat Resour. Law 197.

<sup>3</sup>Sara Bice, Martin Brueckner, Christof Pforr, ‘Putting social license to operate on the map: A social, actuarial and political risk and licensing model (SAP Model)’ (2017) 53 Resource Policy 46; Robert Boutilier ‘Narratives and networks model of the social licence’ (2020) 69 Resources Policy 101869.

organizations.<sup>4</sup> Indeed, the continuing trend towards democratic elections<sup>5</sup> is proof that governments fare better when they have a social licence.

The lack of a social licence causes financial losses for businesses. The oil and gas industry provides some excellent examples. Fracking has been banned in many jurisdictions around the world owing to a lack of public acceptance.<sup>6</sup> In the mining industry, Franks and others found that mining projects with capital costs of between US\$3 billion and \$5 billion lost “roughly US\$20 million per week of delayed production in net present value terms as a result of community conflict”.<sup>7</sup> They also found that an energy project in the Middle East reported losing US\$20,000 per day owing to a supply route blockage by stakeholders. In addition to lost production, Davis and Franks found the sources of the losses coming from many other line items, like staff time dedicated to conflicts, legal costs and penalties, increased security costs, and difficulty raising new capital.<sup>8</sup> In terms of financial amounts, the biggest estimated source of loss was “lost opportunity for future expansion and/or for new projects.” In other words, losing the social licence hobbles growth prospects.

The financial consequences of a low or lost social licence require management attention. Unfortunately, business leaders sometimes accept uncritically, even credulously, the definition of the social licence they hear from activists. As Boutillier argued, political actors from the private, civic, and public sectors will each try to define the term in a way that maximizes their own freedom and denigrates their opponent’s definition.<sup>9</sup> There is political competition to dominate the narrative about who can legitimately define social acceptability. Nonetheless, beyond these Machiavellian political gambits, getting a valid and durable social licence remains a

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<sup>4</sup>John Morrison, ‘The Social License, How to Keep Your Organization Legitimate’ (Palgrave Macmillan 2014).

<sup>5</sup>Drew Desilver, ‘Despite global concerns about democracy, more than half of countries are democratic’ (FactTank News in the Numbers, 14 May 2019) <<https://www.pewresearch.org/fact-tank/2019/05/14/more-than-half-of-countries-are-democratic/>> accessed 14 April 2021.

<sup>6</sup>Hillary Aidun, Tristana Giunta, ‘Prohibiciones y moratorias al fracking: legislación comparada’ (La Asociación Interamericana para la Defensa del Ambiente 2019) <<https://app.box.com/s/hqt8prv0ru3nmaiuvfytl30yejlc8vyf>> accessed on 15 April 2021; Dina Townsend, ‘The legal status of fracking worldwide: An environmental law and human rights perspective’ (The Global Network for Human Rights and the Environment 2020) <<https://gnhre.org/2020/01/06/the-legal-status-of-fracking-worldwide-an-environmental-law-and-human-rights-perspective/>> accessed 4 August 2020.

<sup>7</sup>Daniel Franks and others, ‘Conflict translates environmental and social risk into business costs’ (2014) Proceedings of the National Academy of Sciences <<http://www.pnas.org/cgi/doi/10.1073/pnas.1405135111>> accessed 15 April 2021.

<sup>8</sup>Rachel Davis and Daniel Franks, ‘Costs of Company-Community Conflict in the Extractive Sector’ (2014) Corporate Social Responsibility Initiative Report No. 66, Harvard Kennedy School <<https://www.csr.uq.edu.au/publications/costs-of-company-community-conflict-in-the-extractive-sector>> accessed 15 April 2021.

<sup>9</sup>Robert Boutillier, ‘From metaphor to political spin: Understanding criticisms of the social licence’ [2020] The Extractive Industries and Society <<http://www.sciencedirect.com/science/article/pii/S2214790X20301805>> accessed 15 April 2021.

fundamental goal of responsible management. Achieving that goal, however, can often mean engaging the political narratives about one's industry and one's project.

In this paper, we consider two related cases in which oil and gas pipeline projects failed to get a social licence. The aim is to learn from these failures and suggest what, if anything, could have been done better. The projects were the Mackenzie Valley Pipeline (MVP) and the Northern Gateway Pipeline (NGP). The cases highlight three general categories of challenges in obtaining social acceptance for any business activity but especially for oil and gas projects. First, delays are easy to create, and their legitimization narratives detract from the social licence. Second, existing laws and regulatory frameworks are often overridden by international policy narratives and campaigns aimed at entire industries. Third, unlike their opponents, targeted industries have not been innovators in narratives and campaigns for long-term cultural change at the international level. Getting this right requires building durable, multi-sectoral, international policy coalitions on an industry-wide scale. We begin with a brief review of the social licence concept itself. Then, we consider the MVP case and end with a summary of the lessons that can be learned from it. Next, we consider the case of the NGP and again draw lessons from it. The paper then states the lessons in a more general way and notes their significance for gaining and maintaining a social licence.

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## 2 The Social Licence Concept Today

Although the modern meaning of the "social licence" began as a metaphorical comparison with the legal licence, it has been elaborated into a framework for managing sociopolitical risk by gaining social acceptance from key stakeholders. Like all risk management, sociopolitical risk requires enumerating the hazards (i.e., negative events) and multiplying them by the probability of their occurrence. Sociopolitical hazards include things like boycotts, blockades, wildcat strikes, higher financing and insurance costs caused by reputation damage, spurious legal challenges launched as delay tactics, and any type of social movement putting pressure on politicians to impose more restrictive conditions for operation.

With sociopolitical risk, the hazards do not come from inanimate objects. They come from stakeholders. The concept of "stakeholders" comes from Edward Freeman's stakeholder theory of strategic management.<sup>10</sup> He defined stakeholders as those groups, or sometimes individuals, who either could be or are impacted by the company's activities or who chose to, or could choose to, have an impact upon it. To gauge the probability of the hazard, the sociopolitical influence of the stakeholder has to be estimated. Thomson and Boutilier recommend doing this by conducting a census of the a priori most important stakeholders and asking them about their network connections.<sup>11</sup> Those with higher centrality scores in the

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<sup>10</sup>R Edward Freeman, *Strategic Management: A stakeholder Approach* (Pitman 1984).

<sup>11</sup>Ian Thomson and Robert Boutilier, 'The social licence to operate' in Peter Darling (ed), *SME Mining Engineering Handbook* (Society for Mining, Metallurgy and Exploration 2011) 1779.

stakeholder network have more influence<sup>12</sup> and therefore have a higher probability of realizing their hazard potential.

Elaborating on Thomson and Joyce's step-like model of the social licence,<sup>13</sup> Thomson and Boutilier proposed four levels separated by three criteria that the stakeholder uses for deciding what level of social licence to grant to the company and its projects.<sup>14</sup> The bottom level is a withdrawn or withheld social licence. At this level, the stakeholder sees the activity as illegitimate and wants it stopped. If sufficiently motivated and influential, the stakeholder will take action to make that happen. If the focal organization makes changes to convince the stakeholder that it is legitimate, the activity will be granted a low level of social licence labelled as "acceptance" or "tolerance." If project managers come to be perceived as credible, the stakeholder will grant a higher level of social licence labelled as "approval." At this level, the stakeholder will actually defend the project against critics. Finally, suppose the relationship deepens enough to create a perception of trust. In that case, the stakeholder may come to psychologically identify with the activity, as has happened in towns that describe themselves as fishing villages or mining towns. Thomson and Boutilier described several community engagement principles that can foster legitimacy, credibility, and trust. The primacy of developing legitimacy through procedural fairness and mutual trust was corroborated independently by Moffat and Zhang.<sup>15</sup>

Social licence models that emphasize the development of trusting relations have been criticized as lacking important political elements.<sup>16</sup> Boutilier introduced a model of the social licence that includes consideration of the "sociopolitical churn" constituted by the interaction of networks of policy narratives with networks of stakeholders and their coalitions.<sup>17</sup> His "networks and narratives" model portrays the social licence as an emergent property of such churn.

The cases described in this paper corroborate the importance of policy narratives in determining the level of social licence for projects. The MVP case was dominated by an anti-colonial aboriginal rights narrative that provided guiding principles for regulatory requirements very early in the process. The case illustrates the importance of understanding the state of the social capital in the stakeholder network. The NGP

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<sup>12</sup>Noah Friedkin, 'Theoretical Foundations for Centrality Measures' (1991) 96 *American Journal of Sociology* 1478.

<sup>13</sup>Ian Thomson and Susan Joyce, 'The Social Licence to Operate: What It Is and Why It Seems So Hard To Obtain' (2008 Prospectors and Developers Association of Canada Convention, Toronto, 3 March 2008).

<sup>14</sup>Thomson and Boutilier (n 11).

<sup>15</sup>Kieren Moffat and Airong Zhang, 'The paths to social licence to operate: An integrative model explaining community acceptance of mining' (2014) 39 *Resources Policy* 61.

<sup>16</sup>Martin Brueckner and others, 'The Civic Virtue of Developmentalism: On the Mining Industry's Political Licence to Develop Western Australia' (2014) 32 *Impact Assessment and Project Appraisal* 315; Morrison (n 4); Bice (n 3); Markku Lehtonen and others, 'The Roles of the State and Social Licence to Operate? Lessons from Nuclear Waste Management in Finland, France, and Sweden' (2020) 61 *Energy Research and Social Science* 101353.

<sup>17</sup>Boutilier (n 3).

case was dominated by a coalition comprised of proponents of the climate change metanarrative and proponents of aboriginal self-rule in Canada. Together these cases suggest that skills that are increasingly essential to the success of extractive projects today are not only missing from executive teams and corporate boardrooms but also missing from collective industry action in international politics.

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### **3 Mackenzie Valley Pipeline**

#### **3.1 Chronological History**

The headwaters of the Mackenzie River watershed lie on the eastern slope of the Rocky Mountain Range in the Province of Alberta, Canada. The Athabasca River runs east and north across Alberta to Fort McMurray, where it joins with the Clearwater River. Then it flows north to Lake Athabasca and onward further north to Great Slave Lake in Canada's Northwest Territories. Finally, the river flows over 1,700 km to the northwest, down the Mackenzie Valley, to the Arctic Ocean. Alexander Mackenzie made that journey in 1788. He was looking for a passage to the Pacific Ocean and was so discouraged to find that it emptied into the "Frozen Ocean" that he named it the "River of Disappointment." That remains an apt name for those who dreamt of building a natural gas pipeline along its banks.

During Mackenzie's voyage from Great Slave Lake northwest to the sea, down the river that was later given his name, he encountered a native population that, successively, belonged to the Dene, Sahtu, and Gwich'in nations and the Inuit (Inuvialuit) living on the coast of what was subsequently called the Beaufort Sea. He noted abundant wildlife and also the presence of a "bituminous" substance seeping from the banks of the river.<sup>18</sup>

Geological studies in the 1950s pointed to an undeveloped oil and gas potential in the Arctic regions of Canada and Alaska. Drilling in the delta of the Mackenzie River started in 1962 and quickly established the presence of substantial reserves of natural gas and minor quantities of oil. By the early 1970s, wells were being drilled offshore, and multiple gas fields had been discovered. The companies saw an economic opportunity if the gas could be transported to markets. They pushed for a pipeline down the Mackenzie Valley to link with established pipeline networks in Alberta.

The successful oil and gas exploration and the proposal for a pipeline to deliver the product to markets in the south attracted the attention of the indigenous people of the area concerned about possible negative environmental and social impacts. In 1969, the Dene groups in the southern part of the Mackenzie Valley participated in forming the Indian Brotherhood of the Northwest Territories (IBNT). Within the same period, the Inuvialuit began organizing under the umbrella of the Committee for Original People's Entitlement (COPE). Both groups sought to assert a claim to the land over which any pipeline would be constructed.

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<sup>18</sup> AH Skolrood and others, *Pioneers of the Athabasca Oil Sands* (Synchrude Canada 1978).

In March 1973, a group of 16 chiefs representing IBNT submitted a caveat claiming an interest in a million square kilometers of the Northwest Territories as an expression of aboriginal rights. The caveat was rejected by the Registrar of Land Titles, and the question of the legality of the caveat referred to the Supreme Court of the Northwest Territories, where the case was heard by Justice Morrow. Here, the federal government argued that the signing of Treaty 11 in 1921 had extinguished the Dene interest in their traditional lands. Justice Morrow took the court to the communities across the north to hear from the Dene who had participated in the Treaty's negotiation. In reaching his decision, Morrow accepted the argument of the Dene that the treaty was a peace agreement and not a surrender of land. He found that the Dene "are the *prima facie* owners of the lands covered by the caveat – they have what is known as aboriginal title" and allowed the caveat to proceed. The Morrow Decision was the birth of land claims in the NWT.

The caveat was overturned on appeal to the higher federal court without questioning the ruling that the Dene had aboriginal rights to the land. The Morrow Decision made it obvious that land rights in the NWT needed clarification and provoked a series of land claims. In 1976, the nations put forward a comprehensive land claim and signed an agreement to enter into negotiations with the government for a Comprehensive Land Title Agreement. In 1978, the IBNT changed its name to the Dene Nation. Negotiations continued but broke down in 1988.

In 1974, the government of Canada faced a dilemma. Oil and gas exploration had successfully proven commercial quantities of gas in the Mackenzie Delta and offshore. Pipeline proponents had given notice that they would apply to build a pipeline to bring these resources south to market. To resolve the potential for conflict with the indigenous population, the government, in March 1974, appointed Justice Thomas Berger of the Supreme Court of British Columbia to lead the Mackenzie Valley Pipeline Inquiry. The Inquiry was charged to investigate the social, environmental, and economic impact of a proposed gas pipeline. In organizing the Inquiry, Berger took what was then a novel approach of providing funding to environmental and aboriginal organizations to present their own expert witnesses. The Inquiry also travelled to the small communities across the region, allowing Dene, Inuit, and non-aboriginal residents to testify.

The resulting two-volume report, entitled *Northern Frontier – Northern Homeland*, widely regarded as the first social impact assessment, revealed the tensions created by development in this region and a clash of world views. For example, Berger writes that "Those who represent the industrial system have a complete and entire commitment to it, as a way of life and source of income based on ideas of growth and expansion." On the other hand, "the native people see their land as unbounded in its ability to fulfil their deepest needs (both material and spiritual), a storehouse from which they can take what they need." In summary, Berger states that "white people are, in general, driven by economic and social values that are quite different from those that motivate native society."

The final report of the Inquiry, published in May 1977, notes that the Mackenzie Valley is a natural transportation corridor that had already seen many decades of development. Further, the evidence indicated that it is feasible to build a pipeline and establish an energy corridor along the Mackenzie Valley from an environmental point of view. However, before a pipeline could be built, it was necessary to resolve

the land claims made by the native population, create the administrative capacity to manage these lands, and also create a land planning framework within which development and conservation could be managed. Berger recommended that the pipeline should be delayed for ten years for these to take place. For its part, the National Energy Board, the “legal licence” regulator, rejected the Mackenzie Valley Pipeline route and recommended building along the so-called Alaska Highway route through the Yukon and BC.<sup>19</sup>

Resolution of the land claims took more than ten years and in the case of the Dene remains unresolved. The Inuvialuit of the lower Mackenzie Delta and Beaufort Sea coast reached a comprehensive agreement in 1984, the Gwich’in in 1992, and the Sahtu Metis in 1994. These agreements included provision for revenue sharing with the government. For example, under Clause 9 of the Gwich’in Comprehensive Agreement, the Gwich’in receive 7.5% of royalties received from the government in a year and 1.5% of any additional royalties. Also, in 1984, the government issued the necessary permits to build a pipeline from Norman Wells south to Alberta across the ground subject to an unresolved land claim by the Dene.

Legal recognition of land claims advanced over the next two decades, but with each expansion of rights and each possibility of expanded rights, there arose differences of opinion among the Dene about how to exercise them and discharge the corresponding responsibilities. For example,<sup>20</sup> in 1990, the Supreme Court of Canada protected unextinguished aboriginal rights from “unjustifiable” federal laws and regulations. The same year, there was a split in the Joint Dene/Metis Assembly with the Mackenzie Delta delegates rejecting a resolution to have Aboriginal and Treaty Rights affirmed in the land claims agreement. In 1993, the Gwich’in and Sahtu and Dogrib peoples withdrew from the Dene Nation. In 1997, the Supreme Court of Canada handed down the Delgamuukw decision, which explicitly recognized Aboriginal title in the Canadian legal system. This contributed to the 1998 decision by the Akaitcho Territory to support the Deh Cho moratorium on any new development in the territory.

Despite the delay imposed by the Berger Inquiry, exploration continued in the Mackenzie Delta and offshore in the Beaufort Sea, and by 1995 a substantial gas resource had been defined, and the proposal for a pipeline resurfaced. With the first round of land claims settled, negotiations began between oil and gas companies and the local populations. These were successful, and in 2001, a Memorandum of Understanding was signed between a consortium of oil and gas companies and the Aboriginal Pipeline Group, formed to represent the Inuvialuit, Sahtu, and Gwich’in. Subsequently, a further agreement was signed in June 2003, giving the aboriginal groups one-third ownership of the pipeline project.

The Mackenzie Valley Pipeline was granted federal approval and a Certificate of Public Acceptance in March 2011, clearing the way for construction. However, by 2016, the joint venture faced escalating construction costs, changing market conditions, and ongoing regulatory delays. In 2017, it announced that the project was being abandoned.

<sup>19</sup> <<https://denenation.com/about/history/>>.

<sup>20</sup> These examples are all from <<https://denenation.com/about/history/>>.



## **3.2 Lessons About SL to Be Learned from the MVP Case**

### **3.2.1 Seeking Social Acceptability Across Differences in Cultural Values**

In his report, Berger foreshadowed by 30 years the findings of the World Values Survey that distinguished traditional survival values from the more secular-rational, self-expressive values of the Canadian public.<sup>21</sup> In the World Values Survey (WVS) terms, Berger was saying that the First Nations of the Mackenzie Valley had traditional values while the rest of Canada had modern values. Impact assessments that made sense from only one of these values perspectives could not do justice to the other.

Berger resolved the dilemma by advocating “both-and” instead of “either-or.” Usher notes that, in reconciling the two-value systems, Berger found a balance by affirming both criteria related to economic well-being, as measured by income and employment, and traditional aboriginal criteria related to cultural values and social institutions.<sup>22</sup>

### **3.2.2 The Postcolonial Land Reform Process Is Not Finished**

Complicating the values incongruence was the question of land rights and ownership. Land claims are an issue in many countries outside of Europe and East Asia. Legal frameworks have often favored postcolonial elites who took over the land tenure institutions from colonial powers. In Latin America, the land reform movements of the nineteenth and twentieth centuries solved some problems related to surface rights but left problems related to subsoil rights to fester. Now with the expansion of mineral exploration, they have to be dealt with. Canada has been a leader in recognizing indigenous land claims.

### **3.2.3 The Need to Get a Social Licence as a Requirement for a Legal Licence Varies and Evolves**

The Morrow Report, the Berger Inquiry, and the Delgamuukw decision were milestones in making the social licence a prerequisite for a legal licence. In general, the legitimacy of any legislation rests heavily on its social acceptability.<sup>23</sup> Where Canadian First Nations are concerned, the law and the political climate coevolved to make social acceptance (i.e., social licence) an explicit prerequisite for legal licencing. The MVP project was both a driver of that increasingly tight coupling between the social and legal licences and a recipient of its implications. As Canadian law and politics evolved, the criteria for legal approval underwent a series of corresponding shifts. The

<sup>21</sup>Ronald Inglehart and Christian Welzel, *Modernization, Cultural Change and Democracy* (CUP 2005) 63.

<sup>22</sup>Peter Usher, ‘Northern Development, Impact Assessment and Social Change’ in Noel Dyck and James Waldram (eds), *Anthropology, Public Policy and Native Peoples in Canada* (McGill-Queens University Press 1993).

<sup>23</sup>Morrison (n 4); Mark Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20 *Academy of Management Review* 571

degree of coupling between the social and legal licences varies across jurisdictions. Sometimes instead of overlap, one can trump the other. In all cases, however, it is important to know if the political climate is shifting and, if so, in which direction.

### **3.2.4 Communities with a High Social Capital Are More Capable of Making and Honoring Agreements**

However, with rights come responsibilities, including the development of a unified position regarding resource development. This process involves not only learning about resource development but also forming internal social capital required for collaboration towards a shared future. In the MVP case, this turned out to be a multigenerational task. Bridging and bonding social capital had to be developed.

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## **4 Northern Gateway Pipeline**

Alberta's Athabasca Oil Sands are estimated to be the third-largest petroleum deposit in the world after Venezuela and Saudi Arabia.<sup>24</sup> However, the petroleum is mixed with sand and occurs in a very viscous state known as bitumen. This makes it more expensive to process into a state acceptable as input to refineries. It took most of the twentieth century to develop the technology and find the financing to bring the oil sands into commercial production.

As production expanded through the 1990s, the need for a new generation of pipelines to markets increased. In 2002, the NGP was the first to be proposed.<sup>25</sup> The proposal was to build it westward across northern British Columbia to a saltwater port at either Prince Rupert or Kitimat. The land in northern British Columbia is controlled by an adjoining series of First Nations who historically have never signed a treaty with the Crown. They did, however, have favorable court rulings laying out a possible legal path to self-rule. The Supreme Court's Delgamuukw decision of 1997, mentioned in the Mackenzie Valley case, was brought by the Gitksan and Wet'suwet'en First Nations. The NGP would have passed through their territory in Northern BC. However, the Delgamuukw decision only established that a collective claim to an unspecified area of land exists. Further evidence and rulings would be needed to draw boundaries, as actually happened with the Tsilhqot'in First Nation in central BC in the Supreme Court's 2014 Williams decision.<sup>26</sup> The First Nations on the NGP route were eager to use whatever leverage possible to define, expand, and fund self-rule.

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<sup>24</sup>Central Intelligence Agency, *The World Factbook* (CIA 2011).

<sup>25</sup>Global News, 'Northern Gateway: Timeline (Toronto, updated 1 October, 2015) <<https://globalnews.ca/news/1384346/northern-gateway-timeline/>> accessed 16 April 2021.

<sup>26</sup>Nelson Bennet, 'Delgamuukw Did Not Settle the Question of Wet'suwet'en Title' *Prince George Citizen* (Prince George BC, 27 February 2020) <<https://www.princegeorgecitizen.com/news/local-news/delgamuukw-did-not-settle-the-question-of-wet-suwet-en-title-1.24085622>> accessed 19 April 2021.

## 4.1 The Continental View of the Pipeline Proposals

The NGP is only one facet to a much broader and more complex controversy. There were three other pipelines also proposed to carry oil sands bitumen to market. Every one of them was just as controversial as the NGP. Moreover, there was a long-standing controversy over oil tanker traffic on Canada's Pacific Coast.<sup>27</sup> The NGP, of course, would have generated such traffic. Moreover, while the legal licence for the NGP would have been granted by the Canadian federal government, the social licence became an international affair, which is to say that the federal government faced both domestic and international pressure to withhold permits. If that were not complicated enough, the social licence of the federal regulatory body, the National Energy Board, was called into question to such an extent that the body was suspended after it rendered its decision.

There has been much written about the oil sands and the proposals for pipelines to transport bitumen from the region. The NGP alone has inspired more than a dozen books.<sup>28</sup> Therefore, what follows here must be considered only an outline. We have tried to focus on the events that yield the most important lessons about the social licence. We begin with thumbnails of the other related controversies before considering a chronology of the NGP case.

### 4.1.1 Coastal Tanker Moratorium and Bill C-48

Assuming that any oil sands bitumen could be delivered to the north coast of British Columbia, the two most feasible ports would be Kitimat and Prince Rupert. However, any crude petroleum arriving there would be blocked from moving further. In

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<sup>27</sup> Gavin Smith, 'Support for Oil Tanker Moratorium has History on its Side' (Policy Options Politiques, 4 June 2019) <<https://policyoptions.irpp.org/magazines/june-2019/support-for-oil-tanker-moratorium-act-has-history-on-its-side/>> accessed 16 April 2021.

<sup>28</sup> Greg Brown and others, *Opening the Door for Oil Sands Expansion: The Hidden Environmental Impacts of the Enbridge Northern Gateway Pipeline* (Pembina Institute 2009); Matthew Boulton, *Financial Vulnerability Assessment: Who Would Pay for Oil Tanker Spills Associated with the Northern Gateway Pipeline?* (University of Victoria Environmental Law Centre 2010); Nathan Lemphers, *Pipeline to Nowhere? Uncertainty and Unanswered Questions about the Enbridge Northern Gateway Pipeline* (Pembina Institute 2010); J David Hughes, *The Northern Gateway Pipeline: An Affront to the Public Interest and Long Term Energy Security of Canadians* (Forest Ethics Canada 2011); Marc Lee, *Enbridge Pipe Dreams and Nightmares: The Economic Costs and Benefits of the Proposed Northern Gateway Pipeline* (Canadian Centre for Policy Alternatives 2012); Zoey Walden and Jon Rozhon, *Oil Spills and First Nations: Exploring Environmental and Land Issues Surrounding the Northern Gateway Pipeline* (Canadian Energy Research Institute 2012); Kenny Bruno, *Enbridge Over Troubled Water* (Sierra Club of Canada 2016); Shafak Sajid, *A Matter of Trust The Role of Communities in Energy Decision-Making: Northern Gateway Energy Pipeline* (Canada West Foundation and University of Ottawa 2016); Jeffrey Church, *Defining the Public Interest in Regulatory Decisions* (CD Howe Institute 2017); Dennis McConaghy, *Can Canada Restore a Functional Regulatory Process for Major Infrastructure Projects?* (Canadian Global Affairs Institute 2017); Bram Noble, *Getting the Big Picture* (Macdonald-Laurier Institute for Public Policy 2017); Marla Orenstein, *What Now? The Fate of Projects* (Canada West Foundation 2018); Tom Flanagan, *How First Nations Benefit from Pipeline Construction* (Fraser Institute 2019).

June 2019, Canadian government's Bill C-48 became law.<sup>29</sup> It entrenched the ban on crude oil tanker traffic that had been hitherto a de facto "moratorium" for nearly 50 years. In the early 1970s, the parliaments of British Columbia and Canada passed motions banning oil tankers from Canada's northwest coast.<sup>30</sup> In the late 1970s, a commission of inquiry rejected Kitimat as a suitable site for an oil port. A voluntary Tanker Exclusion Zone was negotiated when the Valdez terminal was constructed in Alaska. The Exxon Valdez oil spill occurred in 1989. By the time Enbridge proposed the NGP in 2002, an anti-tanker coalition had grown in cohesiveness for over three decades. Smith notes that it included "the BC government, the Coastal First Nations Alliance, the Union of BC Indian Chiefs, the Union of BC Municipalities, the United Fishermen and Allied Workers' Union-UNIFOR and over 30 community and environmental groups in northern BC and throughout Canada".<sup>31</sup> The existence of this coalition was a flashing red warning light about social licence problems to come.

#### 4.1.2 Keystone XL

The original Keystone pipeline, running from Alberta to Illinois, began operating in 2010. In 2008, TransCanada Corporation (now TC Energy) proposed a larger, more direct route known as Keystone XL. By 2009, payments had already begun to flow from US foundations to what became a loose coalition of over 100 environmental protest groups in Canada, the USA, and the UK opposed to the Keystone XL pipeline.<sup>32</sup> In terms of US approvals, President Obama cancelled the Keystone XL project, but President Trump restarted it. In January 2021, President Biden revoked the permit for the pipeline.

#### 4.1.3 Energy East

In August 2013, TransCanada Pipelines proposed a pipeline to the east coast of Canada called Energy East and filed its application with the NEB in October 2014. Starting in Alberta, it would have crossed Saskatchewan, Manitoba, Ontario, Quebec, and New Brunswick.

As the hindsight provided by the 2015 federal election shows, Canada's geography correlates with its political rivalries, and these in turn correlated with the level of social licence granted to pipelines in general.<sup>33</sup> The West, particularly Alberta, has

<sup>29</sup>Transport Canada, 'Oil tanker moratorium on British Columbia's north coast' (Government of Canada, 21 June 2019) <<https://tc.canada.ca/en/marine-transportation/marine-safety/oil-tanker-moratorium-british-columbia-s-north-coast>> accessed 16 April 2021.

<sup>30</sup>Smith (n 27).

<sup>31</sup>ibid.

<sup>32</sup>Vivian Krause, 'The Tar Sands Campaign: >400 Payments via Tides to 100 Organizations in Canada, USA & Europe' (Rethink Campaigns, 1 August 2020) <[https://fairquestions.typepad.com/rethink\\_campaigns/tar-sands-campaign-400-payments.html](https://fairquestions.typepad.com/rethink_campaigns/tar-sands-campaign-400-payments.html)> accessed 16 April 2021; UK Tar Sands Network, 'What Are Tar Sands?' (*UK Tar Sands Network*, undated) <<https://www.no-tar-sands.org/what-are-tar-sands/>> accessed 19 April 2021.

<sup>33</sup>Wikipedia, '2015 Canadian federal election' <[https://en.wikipedia.org/wiki/2015\\_Canadian\\_federal\\_election](https://en.wikipedia.org/wiki/2015_Canadian_federal_election)> accessed 2 April 2021.

been the stronghold of the Conservative Party. In the 100 years from 1921 to 2020, 28 years have seen Conservative Prime Ministers for the whole year or the majority of it.<sup>34</sup> In 86 percent of those years, the Prime Minister represented a riding in Western Canada. Ontario and Quebec have been the strongholds of the Liberal Party. In the past 100 years, 72 years saw Liberal Prime Ministers. The Liberal Party has been in power for more years than the Communist Party of China for the same period (i.e., 71). Moreover, 89 percent of those Liberal Prime Ministers were from Ontario or Quebec. The vast majority of the votes has always been in Ontario and Quebec, particularly Montreal, Ottawa, and Toronto. These urban centers are the core of the Liberal Party's support. The political dominance of these cities has delivered so many electoral victories that the Liberal Party of Canada holds the record among political parties in developed countries for years of governing. As a result, pundits refer to the Liberal Party as "the natural governing party".<sup>35</sup>

The Conservative Party was rejuvenated in the late twentieth century with a rallying cry of "The West wants in." Eventually, the West did get in, with the national election of a Conservative Party government under Prime Minister Stephen Harper in both 2006 and 2011. For Ontario and Quebec Liberals, this hardened the consensus view that Alberta was a political enemy. Since Harper was from Alberta and supported the oil sands industry, defeating Harper included defeating Alberta's oil. The climate change narrative, and the heavy funding it was receiving from foundations in the USA,<sup>36</sup> offered the Liberals a ready-made opportunity to unify urban voters and Central Canadians against Harper and his "dirty oil." Thus, party politics played an important role in diminishing the social licence of the Energy East pipeline proposal and the whole oil sands industry.

In 2015, 57 percent of Quebecers polled opposed the Energy East proposal in response to a question that raised doubts about the adequacy of the regulatory review process.<sup>37</sup> Even after the Liberal Party's electoral victory in late 2015, protests and petitions against the Energy East proposal continued in the context of assaults on the social licence of the National Energy Board, the interprovincial pipeline regulator.<sup>38</sup>

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<sup>34</sup>Wikipedia, 'List of prime ministers of Canada' <[https://en.wikipedia.org/wiki/List\\_of\\_prime\\_ministers\\_of\\_Canada](https://en.wikipedia.org/wiki/List_of_prime_ministers_of_Canada)> accessed 2 April 2021.

<sup>35</sup>Patrick James and Mark Kasoff, *Canadian Studies in the New Millennium* (University of Toronto Press 2007); Kenneth Carty, *Big Tent Politics: The Liberal Party's Long Mastery of Canada's Public Life* (UBC Press 2015)

<sup>36</sup>Vivian Krause, 'Anti-Alberta oil sands campaign heavy on funding, light on facts' *The Financial Post* (Toronto, 31 October 2013) <<http://opinion.financialpost.com/2013/10/31/anti-alberta-oil-sands-campaign-heavy-on-funding-light-on-facts/>> accessed 17 April 2021.

<sup>37</sup>Greenpeace, 'Majority of Quebecers oppose the Energy East pipeline and want the review process stopped' ([www.newswire.ca](http://www.newswire.ca), 26 November 2015) <<https://www.newswire.ca/news-releases/majority-of-quebecers-oppose-the-energy-east-pipeline-and-want-the-review-process-stopped-554734721.html>> accessed 17 April 2021.

<sup>38</sup>Charles Adler, 'COMMENTARY: Montreal mayor dances on the graves of Alberta jobs' (Montreal, 7 October 2017) <<https://globalnews.ca/news/3790690/commentary-denis-coderre-energy-east/>> accessed 17 April 2021; Brent Patterson, 'Trudeau's NEB Energy East review process derails' (Council of Canadians, 2017) <Trudeau's NEB Energy East review process derails> accessed 17 April 2021.

The regulator, in August 2017, expanded the criteria to include impacts caused by the pipeline's customers when they used the oil and impacts caused by the pipeline's suppliers when they extracted it. TransCanada withdrew its application two months later.<sup>39</sup>

#### 4.1.4 Kinder Morgan/Trans-Mountain Expansion

Another proposal for a pipeline to the west soon followed. It was to expand the existing Kinder Morgan pipeline from Alberta to the port in metropolitan Greater Vancouver. Vancouver was the birthplace of Greenpeace and a focal center of environmentalism, including the coalition against oil tankers on the West Coast. The position of the BC government shifted over time depending on the party in power, raising a number of environmental concerns. Municipal governments took a harder environmental stance. Protestors, including prominent politicians, physically blocked construction work. Because the project was owned by a US company and had met all regulatory criteria at the time of its application, the federal government was potentially liable for violations of international investment agreements if it stopped the pipeline. In a surprise move, the Trudeau government bought the project for CAD\$4.5 billion, a price that was potentially less than the compensation that would have been paid if the international investment tribunal had ruled against Canada.<sup>40</sup> As of this writing, the TMX appears to be moving ahead. In a July 2020 decision, the Supreme Court of Canada rejected an attempt to stall the project on claims of insufficient consultation with three First Nations.<sup>41</sup>

## 4.2 Oil Sands History up to the NGP Proposal

The Alberta oil sands first came to the attention of Europeans in 1791, when a Cree trader brought samples of bituminous sand found on the banks of the Athabasca River to the Hudson's Bay Company post at York Factory. In the late nineteenth century, geological studies demonstrated that the bitumen-bearing sands were regionally extensive and described them as the Athabasca tar sands. For the next hundred years, the bituminous sands remained largely a geological curiosity before the technology to extract the bitumen in commercial quantities was developed.

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<sup>39</sup>BBC News, 'TransCanada abandons Energy East, Eastern Mainline projects' (London, 5 October 2017) <<https://www.bbc.com/news/world-us-canada-41488956>> accessed 17 April 2021.

<sup>40</sup>John Paul Tasker, 'Ottawa may have overpaid for Trans Mountain by up to \$1B, parliamentary budget officer says' (CBC News, 31 January 2019) <<https://www.cbc.ca/news/politics/trans-mountain-pbo-1.5000212>> accessed 4 April 2021.

<sup>41</sup>Natural Resources Canada, 'Statement by Minister O'Regan in response to the Supreme Court of Canada Decision on the Trans Mountain Expansion Project' (Ottawa, 7 July 2020) <<https://www.canada.ca/en/natural-resources-canada/news/2020/07/statement-by-minister-oregan-in-response-to-the-supreme-court-of-canada-decision-on-the-trans-mountain-expansion-project.html>> accessed 18 April 2021.

In 1967, the Great Canadian Oil Sands company, later Suncor, began commercial production near Fort McMurray.<sup>42</sup> At this time, and with the encouragement of the industry, the bitumen-bearing sands were rebranded as the Alberta oil sands. Over a decade later, Syncrude Canada began operations at Mildred Lake.<sup>43</sup> In 1985, Imperial Oil opened an in situ operation at Cold Lake.<sup>44</sup> The nearby Fort McKay First Nation realized that an enormous industry was about to affect them. Since changing consumer sensibilities had deprived them of income from fur-trading, they decided to seek ways to participate in the oil sands opportunities while protecting traditional culture and values. Chief Jim Bouchard was encouraged by the apparent sincerity of Syncrude to work with their indigenous neighbors.<sup>45</sup>

The major producers had relatively good relations with their main stakeholders in the decades before and after the turn of the century. The main stakeholders were the local First Nations, regional environmental groups, the Province of Alberta, and the municipality of Fort McMurray. The social licence was not in question.

The petroleum companies helped the local First Nations transition from a subsistence economy into participants in the global economy. Suncor Energy partnered with a local college to prepare local First Nations members for oil sands employment.<sup>46</sup> Syncrude Canada trained aboriginal businesses in the bidding process for becoming suppliers to the industry.<sup>47</sup> In 1996, Suncor alone was doing 96 million dollars' worth of business with aboriginal firms.<sup>48</sup> The Fort McKay First Nation built a successful industrial park outside Fort McMurray. Today the Northeastern Alberta Aboriginal Business Association lists 114 members on its website,<sup>49</sup> offering everything from waste removal to engineering consulting. First Nations businesses have expanded into heavy equipment rental, construction, contracting, and catering.

The government stakeholders, especially the municipality of Fort McMurray, were heavily impacted by a rapid expansion period that started around 1995. The growth began to place strains on existing infrastructure and services, and concerns were raised about the cumulative environmental impacts. Up to this point, each project's environmental impact was evaluated separately.<sup>50</sup> In 1997, two forums emerged to address cumulative impacts. One was an industry group called Athabasca Regional Issues

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<sup>42</sup> Marc Humphries, *North American Oil Sands: History of Development, Prospects for the Future* (Congressional Research Service 2008).

<sup>43</sup> Harry Spaling and others, 'Managing Regional Cumulative Effects of Oil Sands Development in Alberta, Canada' (2000) 2 *Journal of Environmental Assessment Policy & Management* 501.

<sup>44</sup> Energy Resources Conservation Board of Alberta (ERCB). *History of Oil Sands Development*. (ERCB, 2012).

<sup>45</sup> William McIntosh, *Building Sustainable Relationships: A Compendium of Leadership Practices in Aboriginal Engagement and Sustainability*. (Canadian Business for Social Responsibility 2005) 9.

<sup>46</sup> Stelios Loizides and David Greenall, *Creating value through corporate-aboriginal economic relationships* (Conference Board of Canada 2001) 8.

<sup>47</sup> *ibid* 11.

<sup>48</sup> Brian Calliou, *Final Activity Report: A Forum to Explore Best Practices, Policy and Tools to Build Capacity in Aboriginal Business and Economic Development* (The Banff Centre 2007).

<sup>49</sup> <https://naaba.ca/members/certified-members-directory.html>

<sup>50</sup> Spaling (n 43).



Working Group (RIWG). The other was a multi-stakeholder forum known as the Cumulative Effects Assessment Working Group (CEAWG). In 2000, the latter evolved into the Cumulative Environmental Management Association (CEMA). CEMA included First Nations, environmental groups, regulators, and companies. It was a forum for sharing expertise and information. CEMA identified priorities for the application of regulatory and management muscle supplied by the regional division of Alberta Environment.<sup>51</sup> The industry acknowledged the need to manage cumulative impacts in order to maintain its social licence, and CEMA was the forum for multi-lateral collaboration needed to put that management into practice.

### 4.3 Foreign-Funded Anti-Tar Sands Stakeholders

#### 4.3.1 Tar Sands Campaign Strategy

In 2008, the environmental group known as the Pembina Institute and two other environmental groups abruptly pulled out of CEMA, claiming that the process was broken.<sup>52</sup> They demanded the suspension of new approvals, the identification of new environmental limits, and less industry influence in a reconstituted CEMA. This was a turning point for the industry's social licence – the result of previously unseen forces operating at an international level.

While the oil sands industry was building trust with its established stakeholders from roughly 1998 to 2008, a new set of stakeholders was emerging. Recall that, by definition, a stakeholder of an industry is any individual or organization that is either affected by the industry or that chooses to affect the industry.<sup>53</sup> These new stakeholders met the latter condition. They were the US-based philanthropic foundations and their advisors and consultants. The first foundations to anchor the coalition were the Gordon and Betty Moore Foundation, the William and Flora Hewlett Foundation, and the David and Lucile Packard Foundation.

From 2000 to 2010, this loose network became increasingly cohesive. It coherently focused on a plan to keep Alberta's oil in the ground, ostensibly to help steer China and other developing countries who would be potential customers of the oil sands onto a non-carbon path of energy development. The best articulation of the plan that has become publicly available comes from presentations made to the Rockefeller Brothers Fund in 2008.<sup>54</sup> The basic idea was to covertly fund hundreds

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<sup>51</sup> *ibid.*

<sup>52</sup> Carol Christian, 'Pembina pulls out of CEMA' *Fort McMurray Today* (Fort McMurray AB, 8 August 2008); Pembina Institute, 'Environmental group pulls out of multistakeholder oilsands process. Press Release' (Pembina Institute 18 August 2008) <<https://www.pembina.org/media-release/1678>> accessed 19 April 2021.

<sup>53</sup> Freeman (n 10).

<sup>54</sup> Susan Casey-Lefkowitz, 'Drawing a Line in the Sand on the Canadian Tar Sands: US Campaign Strategies' (Presentation to Rockefeller Brothers Fund, New York, July 2008); Michael Marx, 'The Tar Sands Campaign: Strategy and Structure' (Presentation to Rockefeller Brothers Fund, New York, July 2008); Michael Northrop, 'The Tar Sands Campaign' (Presentation to Rockefeller Brothers Fund, New York, July 2008).



of organizations in Canada, but also in the USA and UK, that appeared to be a grassroots movement against the “Tar Sands.” One of the specific tactics identified by Marx was to stop or limit pipelines and refinery expansion.<sup>55</sup>

Woynilowicz,<sup>56</sup> then a Director with the Pembina Institute, describes the elements of a strategic plan for the Canadian context, which included:

- (a) Dampening the future demand for Alberta oil through the conscious use of the historic term “Tar Sands” linked with the slogan “dirty oil” and in the UK “blood oil”
- (b) Strongly participating in the regulatory process
- (c) Forming an alliance with First Nations to mount delay inducing legal challenges, particularly land claims in British Columbia
- (d) Influencing public opinion in Ontario and Quebec and increasing polarization of political party loyalties

The network grew from 2004 to at least 2012, drawing together groups whose narrative had similarities to and overlaps with the narrative of the grant foundations and their advisors.<sup>57</sup> Building a solid opposition network was done slowly and had setbacks.<sup>58</sup> However, reliable funding assured that it could continue and expand. In 2012, Vivian Krause used legally required public records to estimate that “since 2000, US foundations had granted at least US\$300 million to various environmental organisations and campaigns in Canada, especially in BC,” with most of this funding funnelled through Tides Canada.<sup>59</sup>

For more details about the spectrum of anti-Tar Sands campaigns, the groups involved, and their funding, see Libin,<sup>60</sup> Krause,<sup>61</sup> Stockwatch Business Reporter,<sup>62</sup>

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<sup>55</sup> Marx (n 54).

<sup>56</sup> Dan Woynilowicz, ‘Tar Sands and the Canadian Context’ (Presentation to Rockefeller Brothers Fund, New York, July 2008).

<sup>57</sup> Casey-Lefkowitz (n 54).

<sup>58</sup> E.g., Claudia Cattaneo, ‘Oil Sands Foes Ignore the Facts as Cancer Claims Dealt a Blow by Study’ *The Financial Post* (Toronto, 24 March 2014) <<https://financialpost.com/commodities/energy/oil-sands-foes-ignore-the-facts-as-cancer-claims-dealt-a-blow-by-study>> accessed 18 April 2021.

<sup>59</sup> Vivian Krause, ‘Oil Sands Money Trail’ *The Financial Post* (Toronto, 17 January 2012) <<https://financialpost.com/opinion/vivian-krause-oil-sands-money-trail>> accessed 18 April 2021.

<sup>60</sup> Kevin Libin, ‘A Charity with Plenty of Very Long Tentacles’ *The National Post* (Toronto, 19 November 2010).

<sup>61</sup> Vivian Krause (n 59; n 36; n 32).

<sup>62</sup> Stockwatch Business Reporter, *TransCanada Opponents Not As Poor As They Pretend* (Canjex Publishing 2014) <<https://www.stockwatch.com/News/Item.aspx?bid=Z-C%3aTRP-2212175&symbol=TRP&region=C>> accessed 18 April 2021.

Corbella,<sup>63</sup> Corcoran,<sup>64</sup> and Morgan.<sup>65</sup> For a sampling of communications that were part of the campaign, see Nikiforuk,<sup>66</sup> Lemphers,<sup>67</sup> Annis,<sup>68</sup> O’Neil,<sup>69</sup> Paquet and MacDuffee,<sup>70</sup> Weber,<sup>71</sup> Greenpeace,<sup>72</sup> Heck,<sup>73</sup> Leahy,<sup>74</sup> and Hislop.<sup>75</sup>

### 4.3.2 Tar Sands Campaign Strategy

Different justifications have been given for the extraordinary focus on Alberta oil to the exclusion of oil from other sources. One was that somehow the oil was destined for China and that by keeping it in the ground, China would be forced to choose

<sup>63</sup>Licia Corbella, ‘Millions in Foreign Funds Spent in 2015 Federal Election to Defeat Harper Government, Report Alleges’ *The National Post* (Toronto, 23 May 2017) <<https://nationalpost.com/news/politics/millions-in-foreign-funds-spent-in-2015-federal-election-to-defeat-harper-government-report-alleges>> accessed 18 April 2021.

<sup>64</sup>Terence Corcoran, ‘The Ugly Pipeline War is No Accident. It was the Plan’ *The Financial Post* (Toronto, 9 February 2018) <<https://financialpost.com/opinion/terence-corcoran-the-ugly-pipeline-war-is-no-accident-it-was-the-plan>> accessed 18 April 2021.

<sup>65</sup>Gwyn Morgan, ‘Talk About ‘Collusion’: How Foreign-Backed Anti-Oil Activists Infiltrated Canada’s Government’ *The Financial Post* (Toronto, 14 March 2019) <<https://financialpost.com/opinion/gwyn-morgan-talk-about-collusion-how-foreign-backed-anti-oil-activists-infiltrated-canadas-government>> accessed 18 April 2021.

<sup>66</sup>Andrew Nikiforuk, *Tar Sands: Dirty Oil and the Future of a Continent* (Greystone Books and David Suzuki Foundation, 2008).

<sup>67</sup>Lemphers (n 28).

<sup>68</sup>Roger Annis, ‘A Movement Against Tar Sands Oil, Pipelines and Tankers is on the Rise in Canada’ (*SP The Bullet*, 2 November 2012) <<https://socialistproject.ca/2012/11/b720/>> accessed 18 April 2021.

<sup>69</sup>Peter O’Neil, ‘How the Conservatives’ brief love affair with environmentalism came to an ugly end’ *Vancouver Sun* (Vancouver, 4 June 2021) <<http://www.vancouversun.com/business/Conservatives+brief+love+affair+with+environmentalism+came/6728822/story.html>> accessed 18 April 2021.

<sup>70</sup>Paul Paquet and Mistry MacDuffee, ‘Climate Change Missing in Enbridge Northern Gateway Assessment’ (*Huffington Post The Blog*, 6 June 2013) <[http://www.huffingtonpost.ca/chris-genovali/climate-change-ignored-in\\_b\\_3857443.html](http://www.huffingtonpost.ca/chris-genovali/climate-change-ignored-in_b_3857443.html)> accessed 18 April 2021.

<sup>71</sup>Bob Weber, ‘Desmond Tutu Visits Fort McMurray, Alberta for Conference on Climate Change, First Nations’ *The National Post* (Toronto, 30 May 2014) <<https://nationalpost.com/news/canada/desmond-tutu-visits-fort-mcmurray-alberta-for-conference-on-climate-change-first-nations>> accessed 18 April 2021.

<sup>72</sup>Greenpeace (n 37).

<sup>73</sup>Alexandra Heck, ‘David Suzuki thinks Stephen Harper should serve prison time for ‘wilful blindness’ to climate change’ *The National Post* (Toronto, 2 February 2016) <<https://nationalpost.com/news/canada/david-suzuki-thinks-stephen-harper-should-serve-prison-time-for-inaction-on-wilful-blindness-to-climate-change>> accessed 18 April 2021.

<sup>74</sup>Derek Leahy, ‘Montreal Formally Opposes TransCanada’s Energy East Pipeline’ *The Narwhal* (21 January 2016) <<https://thenarwhal.ca/montreal-opposes-transcanada-energy-east-pipeline/>> accessed 18 April 2021.

<sup>75</sup>Markham Hislop, ‘Debunked: Vivian Krause’s Tar Sands Campaign Conspiracy Narrative’ (*EnergiMedia*, 14 May 2019) <<https://energi.media/deep-dives/debunked-vivian-krauses-tar-sands-campaign-conspiracy-narrative/>> accessed 18 April 2021.

greener alternatives. The historical facts reveal this to be a fantasy narrative. During the campaign that actually *did* keep Alberta oil landlocked, China's consumption of oil increased steadily.<sup>76</sup> During the same period, US energy production increased, as did US pipeline construction.<sup>77</sup> Again, if diverting China from a high-carbon path were the real motive, it is difficult to see why the granting foundations did not put as much or more emphasis on US sources of oil.

Similarly, in 2014, Saudi Arabia's state-controlled oil company Aramco, the world's biggest producer, lowered the oil price, thereby harming the cost competitiveness of alternative non-carbon energy sources.<sup>78</sup> Presumably, Aramco's unilateral actions would have harmed any plan to divert China to alternative energy sources too. Yet while Canadian oil was being vilified, Saudi oil sabotaged the alternative energy sector without any protests in the USA or elsewhere. Again, it becomes difficult to match the actions and omissions of the anti-oil sands campaign funders and operatives with their stated goal of a low-carbon future.

These considerations are presented only to point out that the motives behind protest campaigns seemed to promote the goal of public opinion change more than the goals related to transitioning to a low-carbon economy. The gap between stated objectives and observable outcomes is so great that protest campaigns like this can be reasonably be interpreted as culture change initiatives. The implication is that the oil sands were simply an opportune stage prop in a sociopolitical performance aimed at changing attitudes. The possibility of the industry "earning" a social licence would not appear in such a script.

### 4.3.3 Tar Sands Campaign Strategy

With the pipeline proposals, the Alberta oil industry had to deal with the approximately 50,000 persons who comprised the 40 First Nations and Metis groups of northern British Columbia. Historically, these First Nations had no land treaties with the Crown. The absence of historic treaties created opportunities and incentives that made the priorities of British Columbia's First Nations more political and legal than economic. Despite these distinct motives, the pipeline builders tried to use the same "economic development" approach that worked with the First Nations in Alberta, albeit augmented with incentives provided by ownership in the projects.<sup>79</sup> Cattaneo

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<sup>76</sup> Adam Sieminski and others, *China's Net Oil Import Problem* (Centre for Strategic and International Studies, 2017) <<https://www.csis.org/analysis/energy-fact-opinion-chinas-net-oil-import-problem>> accessed 18 April 2021.

<sup>77</sup> CEIC, *China Oil Consumption: 1965 – 2019* (CEIC, New York, 2020); Steve Goreham, 'Protesters aren't stopping us pipeline network growth' (Master Resource, 27 June 2018) <<https://www.masterresource.org/pipeline-obstructionism/protesters-arent-stopping-us-pipeline-network-growth/>> accessed 19 April 2021.

<sup>78</sup> Steven LeVine 'Saudi Arabia has Declared an End to Its Oil War with the US' (Quartz, 23 June 2016) <<https://qz.com/714622/saudi-arabia-has-declared-an-end-to-its-oil-war-with-the-us/>> accessed 19 April 2021; Wikipedia, 'Cape Wind' (*Wikipedia*, 2 March 2021) <[https://en.wikipedia.org/wiki/Cape\\_Wind](https://en.wikipedia.org/wiki/Cape_Wind)> accessed 19 August 2020.

<sup>79</sup> Claudia Cattaneo, 'The National Post' (Toronto, 13 February 2011) <https://nationalpost.com/news/wooing-the-aboriginals>

notes that British Columbia's First Nations rejected "more than \$1.5 billion in cash, jobs, business opportunities over the next 30 years and a 10% stake in one of Canada's most strategic infrastructure projects."<sup>80</sup>

#### 4.4 Northern Gateway Regulatory Approval Process

The regulatory filing for the NGP is of importance for understanding the social licence because the opposition was so strong that it overwhelmed the regulatory process and caused that process to also lose its social licence. Although classic jurisprudence claims that laws need legitimization through popular consent, this is a clear contemporary case of a social licence withdrawal delegitimizing the legal licencing process.

In early 2010, the Minister of Environment and the National Energy Board established an independent body to review the NGP application under the Canadian Environmental Assessment Act and the National Energy Board Act. It was called the Joint Review Panel (JRP).<sup>81</sup> Starting in January 2012, the JRP held a public hearing over the next year and a half.

At this point, the social licence of the NEB and its review processes started to be questioned. Two distinct views of the purpose of the review process began to emerge. The government, the industry, and the legal profession seemed to view it as a review by the top experts available to assess the project's economic, environmental, and social impacts. The inclusion of visits to First Nations communities in Northern BC followed the effort at inclusiveness established in the Mackenzie Valley Pipeline review process. There was never any question that the NEB had the duty and the capacity to make the best decision for the well-being of Canada. That decision could range from outright rejection to conditional acceptance.

By contrast, opponents began to interpret the inclusion of presentations from community groups, First Nations, and environmental groups as a quasi referendum, with the force of a veto legitimized by the majority opinion of the intervenors. For example, Veltmeyer and Bowles said about the JRP, "despite the fact the overwhelming majority of presentations which it heard were opposed to the project," the JRP conditionally recommended the project.<sup>82</sup> The clear implication is that the majority should overrule the experts.

The Joint Review Panel "... heard from over 1,450 participants in 21 different communities at various locations in Alberta and British Columbia, reviewed over 175,000 pages of evidence and received 9,000 letters of comment."<sup>83</sup> The JRP

<sup>80</sup> *ibid.*

<sup>81</sup> Government of Canada, *Joint Review Panel for Northern Gateway Project* (Government of Canada, 2014) <<https://www.canada.ca/en/news/archive/2014/06/joint-review-panel-northern-gateway-project.html>> accessed 19 April 2021.

<sup>82</sup> Henry Veltmeyer and Paul Bowles, 'Extractivist Resistance: The Case of the Enbridge Oil Pipeline Project in Northern British Columbia' (2014) 1 *The Extractive Industries and Society* 59.

<sup>83</sup> Government of Canada (n 81).

finally issued a decision in December of 2013 approving the pipeline project subject to 209 conditions.<sup>84</sup> History showed that the cost of compliance would eventually kill the project. Nonetheless, the approval process rather than the approval itself became the target of complaints from pipeline opponents. By 2015, environmentalists were joined by the opposition political parties of the day in direct attacks on Prime Minister Harper and his Conservative Party. These contributed to the defeat of the government in the 2015 national election. The newly elected Liberal government vowed to “modernize” the NEB and began subjecting it to “special” audits.<sup>85</sup> The result was that the Liberal Party government of Justin Trudeau suspended the work of the NEB<sup>86</sup> and introduced new legislation to govern interprovincial project regulation under Bill C-69 passed in June 2019.<sup>87</sup> In summary, the anti-pipeline campaign was so successful in shaping public opinion that it not only withdrew the social licences of five pipeline proposals but also contributed to the replacement of the pipeline regulator.

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## 5 Lessons About SL to Be Learned from the NGP Case

There are four main lessons to be taken from the NGP case regarding managing sociopolitical risk by earning and maintaining a social licence.

### 5.1 Some Stakeholders Do Not Want to Develop Mutual Trust

First, high-trust relations with local stakeholders are necessary but not sufficient conditions for a social licence. Thomson and Boutilier wrote as if trusting stakeholder relations would usually be sufficient.<sup>88</sup> Now it appears that trusting relations are always necessary but also often insufficient. What is also necessary is either dominance of the public policy narrative<sup>89</sup> or alignment with geopolitical policies of the dominant countries in one’s most important trading bloc or both.

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<sup>84</sup>Canadian Press, ‘How the Northern Gateway Oil Pipeline Saga Has Played Out So Far’ *The Financial Post* (Toronto, 17 June 2014); Jeremy van Loon, ‘Enbridge Northern Gateway Pipeline Gets Canada Approval’ *Bloomberg News* (19 December 2013) <<http://www.bloomberg.com/news/articles/2013-12-19/enbridge-northern-gateway-pipeline-approved-with-conditions>> accessed 19 April 2021.

<sup>85</sup>Mike De Souza, ‘Canadian Pipeline Regulator Oversight Inadequate, Says Audit’ (National Observer, 26 January 2016) <<https://www.nationalobserver.com/2016/01/26/news/canadian-pipeline-regulator-oversight-inadequate-says-audit>> accessed 19 April 2021.

<sup>86</sup>Nigel Bankes, ‘Pipelines and the Constitution: A Special Issue of the Review of Constitutional Studies’ (2018) 23 *Review of Constitutional Studies* 1.

<sup>87</sup>Jesse Ferreras and Emily Mertz, ‘Senate passes Bill C-69, which overhauls review of major projects, like pipelines’ (Global News Online, 21 June 2019) <<https://globalnews.ca/news/5415294/bill-c-69-passes-senate/>> accessed 19 April 2021.

<sup>88</sup>Thomson (n 11).

<sup>89</sup>Boutilier (n 3).

## 5.2 There Are Now International Policy Platforms, Even Without International Elections

Second, international political movements operating in Canada, the USA, and, to a lesser extent, the UK were all involved in the NGP controversy. A well-financed, coordinated campaign promoted a specific resource policy, namely, keeping oil sands production out of international markets. The policy campaign found an opponent in the Conservative Party of Canada and an ally in the Liberal Party of Canada. However, given the stated objective of diverting China off a high-carbon development path, the policy campaign cannot be characterized as a disguised form of the policy platform of either party at the time. Instead, it was closer in appearance to a policy platform of an unelected political movement operating at an international trading bloc level.

## 5.3 Some Opponents Value Public Opinion Change More Than the Satisfaction of Their Criticisms

Third, environmental protest as an activity had become institutionalized to the point where it could prioritize long-term public opinion change. One of the strategic goals that Woynillowicz proposed to the Rockefeller Brothers Fund was to “Leverage the Tar Sands Debate for Policy Victories in the US and Canada.”<sup>90</sup> A sub-point included “Public mobilisation in Ontario and Quebec.” Over 60 percent of Canada’s population lives in Ontario and Quebec. Alberta has less than 12 percent.<sup>91</sup> The campaign proponents apparently intended to stoke the existing tensions between Albertans and Central Canadians in order to win support for their positions in future policy battles. Public opinion change was one of the main strategic objectives, and, as Boutilier argued, public opinion is a prime determinant of the social licence.<sup>92</sup>

This shift from project-specific policy goals to societal level goals for public opinion change is observed in social movements worldwide.<sup>93</sup> Therefore, any approach to the social licence that relies on operational enhancements to meet protestors’ objections would have dubious effectiveness in cases where the protest campaign is really a drama played out to influence public opinion.

<sup>90</sup>Woynillowicz (n 56).

<sup>91</sup>Wikipedia, ‘Demographics of Canada’ (*Wikipedia*, 6 December 2020) <[https://en.wikipedia.org/wiki/Demographics\\_of\\_Canada](https://en.wikipedia.org/wiki/Demographics_of_Canada)> accessed 10 December 2020.

<sup>92</sup>Boutilier (n 3).

<sup>93</sup>Cary Conglianese, ‘Social Movements, Law, and Society: The Institutionalization of the Environmental Movement’ (2001) 150 *University of Pennsylvania Law Review* 85; Donatella della Porta and Mario Diani, *Social Movements: An Introduction, 2nd Edition* (Wiley-Blackwell, 2009); Suzanne Staggenborg, ‘Institutionalization of Social Movements’ in David Snow and others (eds), *The Wiley-Blackwell Encyclopedia of Social and Political Movements* (Wiley-Blackwell, 2013); Saki Ichihara Fomsgaard, *A Comparative Perspective on Organic Agriculture Organisations in Denmark and Japan* (Aalborg University, 2014).

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## 5.4 Boards and Executives Need Additional Skill Sets

Fourth, given that the social licence is increasingly affected by policy narratives and campaigns within trading blocs, the set of skills required in executive suites and board rooms has radically shifted. Financial, legal, and operational expertise continue to be needed, but they are increasingly insufficient for meeting the challenges of being adaptive and proactive in discourse contests and turbulent geopolitical environments.

An important lesson to be drawn is that approaches to the social licence based on quasi-legal negotiation and mediation skills are not effective in many cases. In these approaches, one assumes that if the opponents were to have their goals met using a different approach, they would be flexible about the policies they advocate for reaching those goals. As a corollary, if they had hard evidence that their policies would not meet their goals, they might again be flexible about the policies. The mistake in this approach is a failure to recognize that the stated objections at the project level are not genuine goals but rather narrative elements in a performance aimed at changing public opinion.

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## 6 Discussion

Although both cases came from the same geographical region, one dealt with isolated rural stakeholders often living off the land. In contrast, the other dealt with international networks of stakeholders well financed by private foundations. Nonetheless, both cases pointed to some common lessons that can be learned about gaining and maintaining a social licence.

### 6.1 Delay Is As Good As Defeat

Both companies and project opponents agree that delay is as good as defeat. In the MVP case, the delay was so long that the demand for the project's product disappeared. In the NGP case, two delays affected the project. First, the 209 conditions collectively imposed delays on the project completion that created financial fragility for the project. Second, attempts to delay the regulatory process provoked countermeasures to avoid delays, which in turn caused a loss of the social licence for the regulatory process.

In both cases, the question of delay tactics became entangled with contrary demands for "adequate" consultation. Project proponents and opponents disagreed on what constituted adequate consultation. Moreover, there was even more serious disagreement about whether those who were consulted could claim the right to veto the project and, if so, on what grounds.

The lesson for project planners and managers is to plan for more delays in the first place and carefully document all consultation activities in case their adequacy is challenged. Moreover, a case has to be made in the court of public opinion that legitimizes avoiding delays.

## **6.2 National and International Politics Can Be Decisive for the Social Licence**

In both cases, the differences in values and livelihoods between Canada's majority urban population and its minority rural population posed obstacles to gaining a social licence. In the MVP case, the very definition of what would constitute a better way of life for indigenous people affected the pace of the negotiations. In the NGP case, existing political rivalries between rural conservatives and urban liberals were deliberately amplified. Moreover, the international anti-colonialism narrative is endorsed by aboriginal rights movements that aim to protect or enhance indigenous control of traditional lands. In countries where the majority of the population identifies as indigenous, this overlaps with and reinforces resource nationalism narratives. Questions about who has legal rights to land and resources are increasingly being complicated by questions about who ought to have legal rights to them. The former questions are legal, but the latter are social. This means that the legal licencing process is increasingly limited and eclipsed by the social licencing process.

More generally, however, companies are increasingly being used as chess pieces in a complex rivalry to dominate international policy discourses. The days of being sheltered from the politics of public opinion by greater supply-chain distance from final consumers are coming to an end. The public policies that lead to laws and regulations are now debated by and decided by political movements that ignore national borders. This is a new arena in which the social licence must be sought.

## **6.3 Industry-Wide Cooperation on Standards and Narratives**

To survive and thrive in a much more politicized environment, extractive industries must sharpen their narratives about what exactly legitimizes and justifies the rights and responsibilities they want to bear in the rapidly evolving social contract with the broader society of their trading bloc or blocs.

Many executives may not be able to articulate their industry's current narrative. Those who can increasingly find that the current narratives are falling hopelessly out of touch with both public opinion and industry practice. For example, the mining industry's promise of jobs to rural stakeholders is increasingly unfulfillable owing to the automation and digitalization of operations. The oil industry's promise of providing low-cost mobility to masses of consumers falls flat in the face of the declining affordability of private vehicles for younger generations. The social contract between each industry and its respective society or societies needs to be reconstructed with a new master discourse. A new positive role for business has to be expressed as a story and disseminated.



## **7 Conclusions**

The American novelist and playwright James Baldwin once said, “People are trapped in history and history is trapped in them.” The extractive industries are just as stuck in history as everyone else. Movements and trends that started centuries ago still determine the range of socially and politically open options today. The Mackenzie Valley Pipeline (MVP) case showed that the decolonization narrative arising from the independence movements of the nineteenth and twentieth centuries is still rewriting the rules for resource extraction in Canada’s north. The Northern Gateway Pipeline (NGP) case and its associated projects showed that the latest urban trends in planning the global future, both environmentally and geopolitically, set extra-legal limits on the options open to extractive companies. Therefore, companies in developed countries like Canada must simultaneously act to correct the injustices of colonialism and advance a global transition to a carbon-neutral economy. In other words, they have to correct the past and plan the future, all the while getting minerals out of the ground and balancing the separate sociopolitical realities of indigenous people living off the land and highly educated, cosmopolitan arbiters of global policy directions. It is no wonder they sometimes fail.