The Hill Times Policy Briefing
Wednesday. December 12, 2018

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Market (in)access for Canadian oil: lessons for other resource sectors?

A company can do everything right and still see a project fail. Why? Because governments need to do everything right as well.

Monica Gattinger

Regulation

The government of Alberta's decision to impose production cuts in the oilsands in an effort to buoy prices is the latest surreal twist in the saga that has become the Trans Mountain pipeline expansion project. Getting Canadian oil to international markets beyond the United States has proven frustratingly elusive for producers.

Are there lessons to be learned for other resource sectors? Definitely.

Start with industry. No company is perfect—most are striving to improve their environmental performance and do better in their relationships with communities. But a proponent can do everything right and still see a project fail.

Why? Because governments need to do everything right as well. That was made clear in the Federal Court of Appeal decision quashing Ottawa's approval of the pipeline. The court didn't call into question the company's actions, just the government's—specifically, how it discharged its duty to consult and how the regulator scoped the project.

This is a concerning lesson. It's especially concerning if we turn our attention to the roles of policy-makers, regulators, and the courts.

The federal government says it supports securing market access for Canadian oil and gas. So what's the problem? The Liberals came to power saying the environment and the economy could be reconciled: not windmills *or* pipelines, but windmills *and* pipelines. They said they'd put a nation-wide price on emissions alongside achieving market access. But this 'grand bargain' hasn't turned out to be so grand after all.

Why? Because it only addresses the climate impacts of energy production, not the local environmental impacts of the transportation infrastructure needed to get energy to market.

Now take regulators. They will increasingly be called upon to scope 'what's in' and 'what's out' in assessing projects. And that task is likely to get far more difficult and contentious if Bill C-69, the government's overhaul of the environmental assessment process, proceeds in its current form.

Alberta Premier Rachel Notley, pictured speaking to reporters after a Canadian Club of Ottawa speech at the Chateau Laurier on Nov. 28, has taken the rare step of imposing production cuts and pledging to buy rail cars to buoy the battered oil industry in her province. *The Hill Times photograph by Andrew Meade*

In the case of Trans Mountain, the National Energy Board scoped out marine shipping, an activity outside its mandate and past project experience—the board regulates cross-jurisdictional pipelines after all. But in hindsight, scoping the project this way left the approval a sitting duck (or whale, as the case may be) for appeal. In the absence of greater clarity from Ottawa over the actions it took to assess and mitigate risks associated with tanker traffic at the policy level, the court had a difficult time piecing it all together.

Which brings us to courts. Will they increasingly become the de facto decision-makers on contentious projects? This may well be the case for matters involving Indigenous communities, where shared understandings of rights, title, and the duty to consult and accommodate are in short supply.

But courts are likely to be the ultimate decision-makers on any matter lacking policy or regulatory clarity—and clarity may be on the downswing. Bill C-69 has been roundly critiqued for failing to provide a clear and predictable process for project decision-making. Will more and more projects find their way into the courts? If so, will approvals (or denials) be decided on increasingly narrow grounds?

All this is grim stuff, most especially for anyone looking to secure market access for Canadian resources. The fact that Ottawa's purchase of the Trans Mountain pipeline seems to have made little difference to its fate in the near term, save avoid the expansion project's outright cancellation, is cold comfort. The Alberta government's production cuts and its pledge to purchase rail cars are understandable in the circumstances, but likewise discouraging.

When governments have to step in with such unprecedented actions, what does that say about the Canadian investment climate? Money walks, but it also talks. One wonders what is being said about Canada in international capital markets. Natural resource development—whether in energy, mining, or forestry—depends on investment and market access.

Perhaps that's the greatest lesson of all for Canada: as a resource economy, producing resources competitively and responsibly is a necessary but insufficient condition. Market access infrastructure—the network of railways, roadways, pipelines, power lines, and ports needed to connect resources to buyers—is pivotal. It must be underpinned by coherent and workable policy and regulatory frameworks. The country needs to keep its eye on this ball, whether in energy or beyond.

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Time to unclog the pipes

Canada can't risk further delays in boosting pipeline export capacity.

Grant Bishop

Oil and gas

Getting Canadian oil to market is a burning platform for policy-makers. With various well-publicized setbacks, increased pipeline export capacity has been kiboshed or delayed.

Facing constrained transport, Alberta has moved on Band-Aid measures to address the stranded supply glut and price discount. However, for the medium and long term, the federal government must get the Trans Mountain project back on track and ensure a coherent and predictable review process for new energy infrastructure.

Through November, the plunge in prices for Western Canadian oil underscored the consequences of lapses in getting pipelines built. Long-lead investments in large-scale oilsands production—for example, Fort Hills—have continued to ramp up. With the winter drilling season pending, firms faced deadlines to plan their capital spending and Alberta foresaw a spiralling downdraft for resource royalties. With backing from the opposition, Alberta's government responded to a historic depression of prices by curtailing production, focusing cuts on larger producers.

Most Alberta policy-makers are uncomfortable with the decision to cut production: facing a gushing wound, the government used the most immediate tool available to stop the bleeding. Spot and future markets for Western production have witnessed a price surge from the mid-November nadir of nearly US$10 per barrel for Western Canadian Select. However, since the cuts only take effect in January, the boost to local prices is anticipatory: open questions remain about whether curtailment will restore the previous discount or if low-cost production that is stranded in the basin will continue to depress local prices.

The amount that the discount costs Canada is somewhat difficult to estimate: shippers who are able to get oil to downstream markets should receive a higher price reflecting the market at the applicable hub. As of Dec. 6, a heavy oil benchmark like Maya from Mexico is trading at roughly US$60 per barrel for Gulf Coast deliveries. For firms with long-term take-or-pay contracts for capacity on pipelines like Keystone or Trans Mountain, there are substantial profits from the local glut of supply. Depressed prices also mean very cheap feedstock for Western Canadian refineries, boosting profit margins on refined products.

However, the situation was untenable for those producers whose supply was trapped locally. Alberta's output has continued to rise, reaching 3.7 million barrels per day in August and then again in October. With export pipelines running at full tilt, oil shipments are pushing onto railways (potentially crowding out shipments of other bulk commodities) and storage for oil inventories are maxed out. An urgent situation metastasized to a crisis.

For uncommitted export capacity, nominations for oil to ship have exceeded available capacity by two-fold. For this uncommitted capacity, shippers are then apportioned the available pipeline capacity as their pro rata share of nominations. This allocation of the uncommitted capacity may distort local pricing by inefficiently trapping low-cost supply in the basin, and the federal natural resources minister has asked the National Energy Board (NEB) to examine the rules for apportioning capacity.

All of this has long been simmering, finally reaching a full boil. The current crisis is a consequence of the federal government's failure to ensure pipelines get built.

The Federal Court of Appeal's August reversal on the Trans Mountain expansion approval took issue with the federal government's failure to adequately consult with Indigenous peoples. Yet, when completing its consultations on Trans Mountain, this federal government had the benefit of the Federal Court of Appeal's 2016 decision concerning the inadequacy of consultation on the Northern Gateway project, among a string of recent jurisprudence on the duty to consult.

The government has now tasked the NEB with redoing the scoping of the Trans Mountain project to account for impacts from tanker traffic by the end of February, and tapped the esteemed former Supreme Court justice Frank Iacobucci to advise on fulfilling the required consultation. To return shovels to the ground by spring, Ottawa has no margin for error.

Looking ahead, the federal push to enact Bill C-69 risks compounding the uncertainty facing project proponents for pipelines and other major infrastructure. Many, including the Canadian Bar Association, have raised major concerns about various confusing procedural and substantive aspects of the legislation. Bill C-69 in its current form risks perpetuating the politicization of project approvals and conflating polycentric policy questions within what should be an administrative, project-specific decision.

Certain opponents of pipelines view Canada's oil as a sunset industry. They ignore the role of an economy-wide carbon price, and the present pricing of greenhouse gases in Alberta, as the efficient tool to reduce economy-wide emissions. This carbon price has encouraged oilsands operators' innovations to reduce emissions intensity, just the same as for producers of steel, cement, and fertilizer. Stranding Canadian oil is not an economically efficient way to reduce our emissions.

The federal government now seems to have a heightened appreciation of the crisis facing Western Canada's oil sector. Canada cannot risk further delays.

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