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The Resistance Dilemma

Place-Based Movements and the Climate Crisis

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5 The Northern Gateway Pipeline: The Continental Divide in Energy Politics

Jess Housty is a member of the Heiltsuk First Nation from Bella Bella, a remote community on Campbell Island near the central coast of British Columbia, in the heart of the land that has become known as the Great Bear Rainforest. The community was strongly opposed to the proposed Northern Gateway Pipeline because of their concerns that a tanker spill would affect their way of life. Housty worked with other community members to help organize the response to the visit of the three-member Joint Review Panel, which was scheduled to hold hearings in the community on April 3, 2012. A formal delegation of hereditary leaders was poised on the tarmac to greet the panel members. Traditional dancers and drummers were outside the airport, supporting the chiefs. The road from the airport to town was lined by children from the community holding signs of opposition.

Rather than allow themselves to be greeted by the elders, panel members were whisked into the airport and to a waiting van. They drove straight to the town dock and boarded a water taxi to a nearby island, where they were staying. The panel abruptly canceled its planned hearing for that afternoon and the following day, saying they were concerned about their ability to “conduct the hearings in a safe and secure environment.” Media reports give no reason for the panel members to fear for their safety, including assurances from the Royal Canadian Mounted Police that the protest was “very peaceful” (Hager 2012; CBC 2012a). But clearly, the vehemence of the opposition spooked the panel. In Housty’s words, “Honestly, I was shocked to hear that they perceived that group of children standing at the roadside as a threat to their bodily safety. But there it is” (Housty 2017).

In many ways, the scene typified the Northern Gateway conflict. Touted by the oil industry and the governments of Alberta and Canada as a critical, even “nation-building,” energy infrastructure project, it was met with

well-organized and sustained opposition in British Columbia. While the review panel downplayed the depth and breadth of opposition and found the project to be in the national interest, by the time the Harper government approved the pipeline in June 2014, it was widely considered unviable, even by many of its strongest early supporters. Northern Gateway was defeated by sustained opposition that reverberated through provincial and federal elections and has proven to be a major setback for the oil sands coalition.

With respect to the analytical framework, Northern Gateway had a major advantage over Keystone XL in that it did not cross a national boundary and therefore was subject only to Canadian jurisdiction. It did, however, cross a provincial boundary. In this case, the border between British Columbia and Alberta proved to be much more than a separation of subnational jurisdictions within a federation. It became more like a Continental Divide of energy politics between the oil sands coalition and the anti-pipeline coalition.

When interest in the Northern Gateway Pipeline grew as Keystone XL stalled, what few members of the oil sands coalition knew is that a well-developed opposition movement had already been organizing in British Columbia, just waiting for the right project to elevate their combination of environmental, First Nations, and community control objectives in the political arena. Their focus on the risks of a tanker spill along British Columbia's rugged coast, as well as First Nations rights and title, ensured that place-based issues were front and center in the opposition campaign. The anti-pipeline coalition succeeded in mobilizing enough influence to induce the pro-business British Columbia government of Christy Clark to oppose the pipeline and eventually kill the project through political and legal opposition despite the Harper government's conditional approval.

The Northern Gateway Pipeline was the first of the Canadian oil sands pipelines to explode into the national media spotlight as the result of bitter political and regional conflict. The conflict intensified in early 2012, when Obama's decision to postpone acting on the Keystone XL pipeline alarmed the oil sands coalition, which was anxious to expand market access. Obama's reluctance strengthened the impulse to diversify away from the US market, and the Northern Gateway proposal was the most mature proposal to increase access to growing markets in Asia.

The timeline for the Northern Gateway case is depicted in figure 5.1. Enbridge, a Canadian pipeline company, proposed to build a 1,178-kilometer pipeline corridor from Bruderheim, Alberta, to Kitimat, a small community

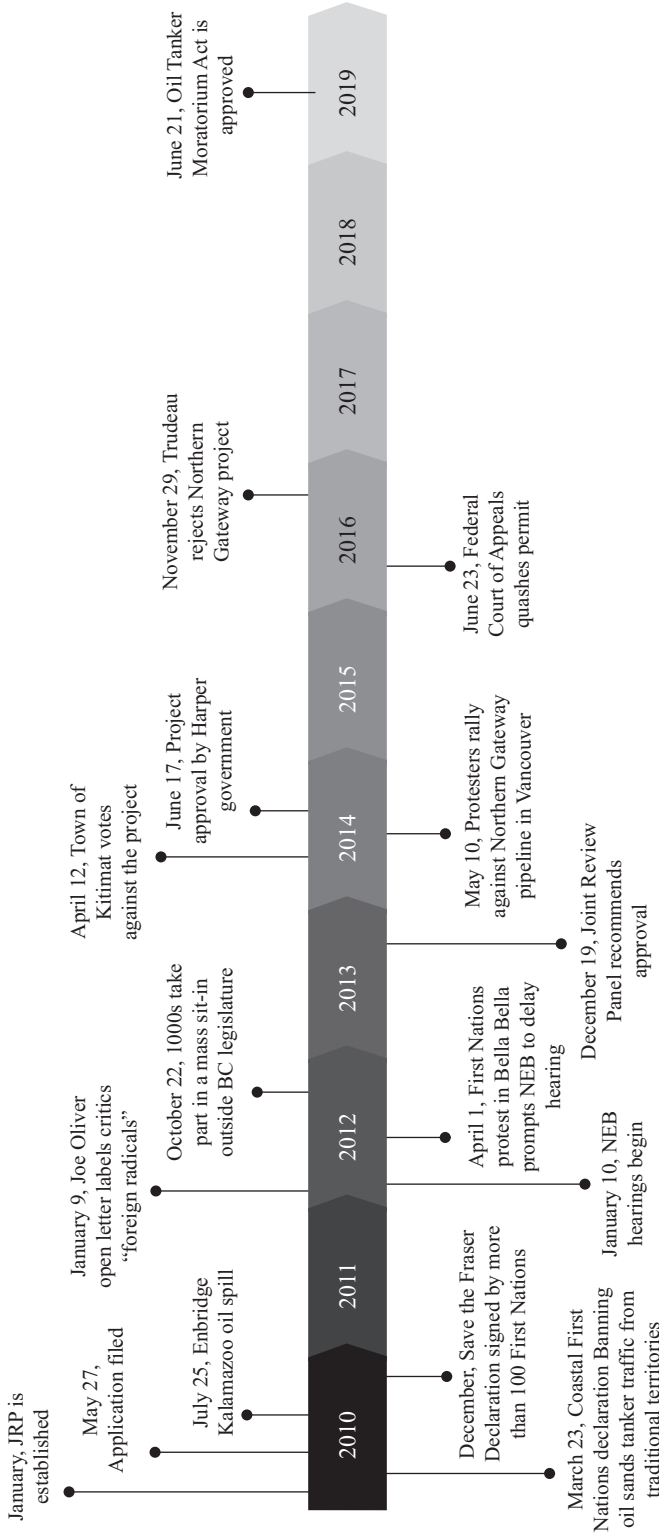


Figure 5.1
Northern Gateway Pipeline timeline.

on the northwest coast of British Columbia. The pipeline would carry diluted bitumen to Kitimat, and a parallel pipeline would transport condensate (a natural gas by-product used to dilute bitumen) from Kitimat back to the Edmonton area. The pipeline proposal was submitted for regulatory review in May 2010. After a protracted and adversarial hearing process, the Harper government ultimately approved the project, with 209 conditions, in June 2014. When the Federal Court of Appeal struck down the permit authorizing the pipeline in June 2016, the Northern Gateway Pipeline chapter finally seemed to be closed. Justin Trudeau nailed the coffin closed when he formally rejected the pipeline in November 2016 and promised to keep it closed by committing to a legislated moratorium on oil tanker traffic on British Columbia's North Pacific coast.

Actors—The Oil Sands Coalition

The core members of the oil sands coalition in support of the Northern Gateway Pipeline were the project proponent, Enbridge; the oil companies and their workers, who would benefit from improved market access; the government of Alberta; and the government of Canada under Prime Minister Stephen Harper (2006–2015). Enbridge is a Calgary-based company that is involved in a wide array of energy projects, from oil and gas pipelines to renewable energy generation and electricity transmission, but its core business is pipelines, and it is the largest oil pipeline company in the world. Its interest in the US\$5.5 billion project is straightforward: increased revenues and profits from an expanded oil pipeline network.

Enbridge pursued a wide range of strategies toward this goal. It engaged in extensive consultations with First Nations and local communities in an effort to build support for, or at least reduce opposition to, the project. Those efforts included offering loans to First Nations so they could gain equity in the project. It invested a great deal in public relations, including a widespread print and video advertising campaign that, at times in 2013 and 2014, seemed to be everywhere in British Columbia—from Facebook, to movie theaters, to televised hockey games. It founded a community-based organization in 2009, the Northern Gateway Alliance, a coalition of northern British Columbia community leaders designed to build public support for the project. The company also lobbied political leaders and donated to political parties.

For the oil sands producers, Northern Gateway promised convenient access to growing Asian markets, an imperative that grew as the sector faced a pipeline capacity crunch. With American demand floundering and Keystone XL on the rocks, the oil companies' need for access to markets for growing oil sands production had become very intensely felt. The concern was greatly amplified when pipeline capacity constraints led to the emergence, in early 2011, of the widening difference between world prices (represented by Brent) and North American prices (West Texas Intermediate—WTI). Alberta academics, financial advisory firms, and the Alberta government began to produce estimates of the forgone revenues resulting from this price gap. One estimate suggested that oil companies could lose US\$8 billion per year from 2017 to 2025 if the pipeline was not built (Wood MacKenzie Inc. 2011).

While companies such as Suncor, CNRL, and Cenovus represented themselves in regulatory proceedings, much of the political work for the sector was led by its trade association, the Canadian Association of Petroleum Producers (CAPP). CAPP played a very active role politically, including lobbying the Harper government to reform regulatory procedures, an initiative that bore fruit with the dramatic changes described in the institutions section later in the chapter. CAPP was also very involved in public relations and public education about the benefits of increased market access, focusing its message particularly on how widespread the economic benefits would be for Canada (described in more detail in the ideas section in this chapter).

The government of Alberta and Stephen Harper's government in Ottawa were also intensely interested in the Northern Gateway Pipeline's ability to expand market access and increase the oil sector's revenues and profits. The Alberta government had the most direct stake, with provincial revenues highly dependent on activity in the oil and gas sector. Until May 2015, the Alberta government was controlled by the Progressive Conservative Party, an aggressively pro-business, pro-oil party that unabashedly promoted increased market access for the landlocked province through new and expanded pipeline capacity. In 2012, Premier Alison Redford launched an effort to create a national energy strategy, in large part to smooth the way to increased access to tidewater through other provinces (Gattinger 2012).

In May 2015, as chapter 2 described, a political earthquake in Alberta brought Rachel Notley's leftist New Democratic Party to power. During the election campaign, Notley said she opposed Northern Gateway because of the extent of environmental concerns and First Nations opposition

(CBC 2015). She began to reconsider her opinion, however, when, as part of the broader discussions of national energy and climate policy, the issue of expanding British Columbia's electricity exports to Alberta emerged. Notley's government saw this as an opportunity to bargain Northern Gateway back into the picture (Bennett 2016). But as Trudeau's grand compromise, centered around getting British Columbia on board by approving the rival Trans Mountain expansion project, began to emerge, the deal linking Northern Gateway and British Columbia's electricity exports died.

The Harper government was unquestionably a part of the oil sands coalition, committed to using oil sands expansion as an engine of prosperity for the Canadian economy. Expanded access to tidewater with new pipelines was considered a critical ingredient in that strategy (Hoberg 2016). Once Obama's resistance to Keystone XL became apparent, Harper's focus shifted to championing Pacific coast access with the Northern Gateway Pipeline. While the government's talking points usually emphasized the importance of gaining access to the Pacific coast without specifying support for individual projects, at times it seemed like Harper's natural resources minister, Joe Oliver, could barely contain his enthusiasm for the project, saying in July 2001 that "Gateway, in our opinion, is in the national interest" (Vanderklippe 2011).

As opposition to the project escalated throughout 2011, the Harper government began a systematic effort to delegitimize Northern Gateway opponents. In a January 2012 interview, Prime Minister Harper characterized the pipeline resistance movement as foreign-funded groups seeking to hijack Canadian processes: "We have to have processes in Canada that come to our decision in a reasonable amount of time and processes that cannot be hijacked. In particular, growing concern has been expressed to me about the use of foreign money to really overload the public consultation phase of regulatory hearings, just for the purpose of slowing down the process" (Weber 2012).

These criticisms were ramped up by Natural Resources Minister Joe Oliver in an open letter to Canadians released the day before the commencement of the Northern Gateway Pipeline hearings. Oliver wrote:

Environmental and other radical groups seek to block this opportunity to diversify our trade. . . . These groups threaten to hijack our regulatory system to achieve their radical ideological agenda. They seek to exploit any loophole they can find, stacking public hearings with bodies to ensure that delays kill good projects. They use funding from foreign special interest groups to undermine Canada's national economic interest. . . . We believe reviews for major projects can be accomplished in a quicker and more streamlined fashion. We do not want projects that are safe,

generate thousands of new jobs and open up new export markets to die in the approval phase due to unnecessary delays. Unfortunately, the system seems to have lost sight of this balance over the past years. It is broken. It is time to take a look at it. (Oliver 2012)

The efforts to delegitimize opponents were augmented several months later when allegations of inappropriate use of charitable status by environmental groups were combined with concerns about inappropriate foreign influence. In a May 2012 CBC interview, Environment Minister Peter Kent accused environmental groups of “laundering” money: “There are allegations—and we have very strong suspicions—that some funds have come into the country improperly to obstruct, not to assist in, the environmental assessment process” (CBC 2012b).

As the pipeline’s opponents grew in strength and the Northern Gateway deathwatch began, the Harper government started dialing back their project promotion in late 2012. In a speech to industry leaders, Joe Oliver acknowledged, “If we don’t get people on side, we don’t get the social licence—politics often follows opinion—and so we could well get a positive regulatory conclusion from the joint panel that is looking at the Northern Gateway, but if the population is not on side, there is a big problem” (Cattaneo 2012). Nonetheless, it was still clear which side the Harper government was on.

Actors—The Anti-pipeline Coalition

Environmental Groups

British Columbia’s environmental community was deeply opposed to the pipeline and had strong support from environmental allies across Canada and in the United States. Organized opposition emerged from two converging sources. The first came from groups focused on environmental, First Nations, and community issues in British Columbia. Prior to around 2005, the primary focus of British Columbia’s environmental community was forests, with a focus on opposition to clear-cut logging, preservation of old growth forests, and increasing the control of local communities. Environmentalists made significant progress in improving policy when the provincial NDP held power from 1991 to 2001 (Cashore et al. 2001), but the election of the “free market” government of BC Liberal Gordon Campbell threatened to roll back much of that progress, and environmental groups (and First Nations) organized to resist those changes (Hoberg 2010; Hoberg 2017).

A group of environmentalists and First Nations teamed up to form the Coalition for Sustainable Forest Solutions to oppose privatization of public lands and promote stronger environmental protection, reduced corporate control and increased community control, and respect for Aboriginal rights and title (BC Coalition for Sustainable Forest Solutions 2001). The issue of Aboriginal title became a meeting point between environmentalists and First Nations. Given the many unresolved title claims in the province, demands for consultation and the prospect of litigation served as potential veto points against industry-oriented forest policy reforms. British Columbia First Nations banded together to confront these changes with the Title and Rights Alliance, formed in 2003, and environmental groups, including the Dogwood Initiative and West Coast Environmental Law, provided strategy and legal support (Clogg 2017; Horter 2016).

One of the most prominent groups working against oil sands pipelines in British Columbia was the Dogwood Initiative, a grassroots organization founded in 1999 with the goal of helping “everyday British Columbians to reclaim decision-making power over the air, land and water they depend on” (Dogwood Initiative 2013). Its flagship campaign has been the “No Tankers” campaign, designed to keep oil tankers away from the British Columbia coast. The original focus of the campaign was the Northern Gateway Pipeline. Launched in spring 2007, over its history the No Tankers petition was signed by 290,111 British Columbians and about 90,000 other Canadians (personal communication, Dogwood Initiative).

In addition to a desire for greater environmental protection, what these groups had in common was a strong commitment to empowering local communities to make resource and environmental decisions. Several leaders in the coalition, including Dogwood’s Will Horter, West Coast Environmental Law’s Jessica Clogg, and Grand Chief of the Union of BC Indian Chiefs Stewart Phillip, began strategizing about how to build a strong movement within British Columbia. When the Enbridge Northern Gateway Pipeline proposal first appeared in 2005, they soon realized that pipeline resistance might become a powerful weapon in advancing their mutual objectives. In recounting discussions with First Nations, Will Horter explains the birth of the idea: “I said that they need a focal point that would get them out of the limitations of the forestry campaign, which was that one individual nation going against both Crowns. I said energy is the place where the fights of the

future are going to happen, and the nature of energy infrastructure means that it will impact on multiple First Nations. So we should take on a pipeline" (Horter 2016).

While those groups based in British Columbia were mobilizing against Northern Gateway, a second source of opposition came from groups concerned about the impact of oil sands expansion. The pipeline resistance strategy began to take form when a group of environmentalists began meeting in 2005 under the name Upstream Strategy Working Group, whose activities and proposals were discussed in chapter 2.

When the Northern Gateway Pipeline proposal first emerged in 2005, the opposition to it was from the British Columbia-based coalition described earlier, but by the time the pipeline was formally proposed in 2010, the resistance movement had expanded dramatically. Opponents began to directly engage the pipeline in 2011. The broad coalition representing the resistance movement was illustrated by the authorship of one of the first major environmental group reports opposing Northern Gateway.¹ Published in November 2011 and titled *Pipeline and Tanker Trouble: The Impact to British Columbia's Communities, Rivers, and Pacific Coastline from Tar Sands Oil Transport*, the report was researched and written by members of Canada's Pembina Institute and Living Oceans Society, as well as the Natural Resources Defense Council, a highly influential US group. The report also listed numerous groups that had endorsed the report, essentially a who's who of the British Columbia environmental movement: the Dogwood Initiative, Douglas Channel Watch, ForestEthics, Friends of Wild Salmon, Headwaters Initiative, Pacific Wild, Raincoast Conservation Society, Sierra Club of BC, and West Coast Environmental Law. These groups, along with the Wilderness Committee, Ecojustice, and Toronto-based Environmental Defence, formed the environmental coalition in opposition to the Northern Gateway Pipeline (Swift et al. 2011).

The report focused on four issues that came to dominate the framing of the anti-pipeline coalition:

- the environmental impacts of oil sands production in Alberta on water quality and quantity, habitat health, air pollution, and climate change;
- the potential for a pipeline spill and the resulting risks to environmental values;
- the risks of a tanker spill along the coast; and
- First Nations concerns. (Swift et al. 2011)

These environmental risks were central to the argument against the pipeline and were fortified by strong opposition from First Nations.

For many of the environmental groups involved in the issue, most notably the Pembina Institute, West Coast Environmental Law, the Wilderness Committee, and Environmental Defence, climate concerns were a large part of the justification for mobilizing against the pipeline (as they told me in confidential interviews), but from the beginning, they understood the importance of allying with place-based concerns to broaden their coalition and strengthen their arguments. These links can be seen in the choice by environmentalists to tie their campaign so directly to advancing Indigenous rights and title, and their emphasis on place-based environmental risks. Climate risks were mentioned in reports, but the core framing for advocacy was built around spill risks and especially tanker accidents. This choice was driven by the belief, pushed strongly by Dogwood, that emphasizing the risk of tanker spills was critical to mobilizing opposition. As Horter put it:

My gut feelings were pipelines are a difficult battle because no one has an opinion on them. But lots of people have opinions about tankers. . . . We put people on the streets with a petition. For pipelines, it would be a 15 minute conversation and it would be 55%–45% whether people would sign the thing. Asking about oil tankers we could get 100 signatures per hour with a team of two people. . . . Exxon Valdez was the only thing that was relevant really. It's an iconic idea that was locked in there. You didn't need to convince anybody. You just had to trigger it. So the frame was set, we just had to trigger it. (Horter 2016)

First Nations

From the beginning, the Northern Gateway Pipeline has faced resolute opposition from a large number of First Nations. The pipeline route would cross the territories of scores of First Nations. While in Alberta and the northeastern section of British Columbia First Nations are covered by treaty agreements, in British Columbia much of the route goes through unceded First Nations territory. First Nations opposition, especially west of Prince George, has been intense. The coalition between environmentalists and First Nations was critical to the defeat of Northern Gateway. In addition to the Coalition for Sustainable Forest Solutions mentioned earlier, the seeds for cooperation in the battle against the pipeline were also sown by the collaboration between environmental groups, First Nations, and US foundations over efforts to preserve the Great Bear Rainforest. The success of that forest conservation campaign, through the provincial land-use planning process and other initiatives

(Cullen et al. 2010), was an essential ingredient in the success of the campaign against Northern Gateway. It is noteworthy that several of the environmental leaders (Tzeporah Berman and Karen Mahon among them) who worked with First Nations leaders in the Great Bear Rainforest campaigns played leading roles in the Northern Gateway and other anti-pipeline battles (Berman 2011).

A core partner in that alliance was the Coastal First Nations, an alliance of nine First Nations on British Columbia's north and central coasts and Haida Gwaii, which was founded in 2003 (as the Turning Point Initiative Society) to represent regional interests (Smith and Sterritt 2016). In March 2010, the Coastal First Nations issued a declaration banning oil sands tankers and pipelines from their traditional territories and waters.² The declaration reads, in part:

As nations of the Central and North Pacific Coast and Haida Gwaii, it is our custom to share our wealth and live in harmony with the broader human community. However, we will not bear the risk to these lands and waters caused by the proposed Enbridge Northern Gateway pipeline and crude oil tanker traffic. . . .

Therefore, in upholding our ancestral laws, rights and responsibilities, we declare the oil tankers carrying crude oil from the Alberta tar sands will not be allowed to transit our lands and waters.

To those who share our commitments to the well-being of the planet we invite you to join us in defending this magnificent coast, its creatures, cultures, and communities. (Coastal First Nations 2010)

In December 2010, the Yinka Dene Alliance joined a group of 61 First Nations in signing the Save the Fraser Declaration, stating that: "We will not allow the proposed Enbridge Northern Gateway Pipelines, or similar Tar Sands projects, to cross our lands, territories and watersheds, or the ocean migration routes of Fraser River salmon" (Save the Fraser Gathering of First Nations 2013). Both declarations state that they were made according to the authority of First Nations Ancestral Laws, Rights and Title.

Not all First Nations along the pipeline route are opposed to the project. Enbridge's engagement strategy was to offer First Nations an opportunity, collectively, to own up to 10% of the pipeline. Some First Nations accepted the offer and have become supporters of the pipeline. According to the *Gitxaala* decision, Enbridge has agreements with 26 Aboriginal equity partners. In January 2016, in the late stages of this pipeline controversy, a group calling itself Aboriginal Equity Partners published an op-ed in the *Vancouver Sun*

and put up a website on behalf of 31 First Nations and Metis communities that support Northern Gateway (Aboriginal Equity Partners 2016).

First Nations opposed to the pipeline engaged in a wide variety of strategies in their efforts to block the project. They lobbied policymakers directly; engaged in discussions with Enbridge, the review panel, and governments; built coalitions formally with each other and informally with environmentalists and labor groups; conducted public information campaigns; protested extensively; and even sought to influence Enbridge shareholders. In the end, they also challenged government decisions in court, and it was the legal strategy that was ultimately the most effective in blocking the project.

Efforts to engage First Nations in the project review and decision process were conducted by the proponent, Enbridge, the Joint Review Panel, and the government of Canada. From the early days of the project consideration process in 2005, Northern Gateway was engaged in extensive consultations with First Nations groups. In 2005, the company began discussions and to offer protocol agreements to potentially affected First Nations. By the end of 2009, the company had entered 30 relationship agreements involving 36 First Nations (Joint Review Panel 2013, 28). Enbridge says that it engaged with 39 First Nations in Alberta and 41 in British Columbia (Joint Review Panel 2013, 31–33). Despite this level of activity, Enbridge was not successful at establishing effective relationships with a significant number of First Nations in British Columbia.

A number of First Nations also participated intensively as intervenors during the panel process, although the Coastal First Nations partially withdrew from the proceedings in February 2013. Information about the Canadian government's engagement with First Nations is contained in the discussion of the *Gitxaala* case later in the chapter.

Government of British Columbia

The British Columbia government had conflicting interests in the Northern Gateway proposal. On the one hand, British Columbia's Liberal Party, which dominated the province from 2001 to 2017, first under Gordon Campbell (2001–2011) and then under Christy Clark (2011–2017), was generally considered in favor of resource development, so under most circumstances it would have been open to this major resource development. But the government also needed to be sensitive to the intense opposition the pipeline had

engendered and the political risks entailed in backing a project that risked becoming politically toxic.

During the early stages of the Northern Gateway controversy, Premier Christy Clark adopted a decidedly “wait and see” attitude toward the federal assessment of the pipeline (O’Neil 2011b). This stance is striking, given the enthusiastic support for the project by the previous premier and Clark’s aggressive strategy of creating jobs through resource projects. But by summer 2012, the position of the government began to turn sharply against the pipeline. In addition to negative public opinion and the looming May 2013 election, pipeline politics were dramatically affected by a series of oil spills and their aftermath. The Deepwater Horizon accident on the Gulf Coast occurred in April 2010. Three months later, an Enbridge pipeline carrying diluted bitumen from the oil sands ruptured and created a major spill into Michigan’s Kalamazoo River. In April 2011, just nine months later, there was another major pipeline accident in northern Alberta (Hoberg 2013).

Each of these spills heightened public concern over tanker and pipeline risks, but the development that broke the back of the Clark government’s “wait and see” position was a US regulator’s report on the Enbridge Kalamazoo spill. The National Transportation Safety Board’s report, issued in July 2012, criticized Enbridge for a “culture of deviance” and “pervasive organizational failure” (National Transportation Safety Board 2012). Even more damaging were the remarks of the chair of the NTSB when releasing the report: “When we were examining Enbridge’s poor handling of their response to this rupture you can’t help but think of the Keystone Kops” (Shogren 2012). These phrases were a body blow to Enbridge’s safety image and extremely damaging to elite and public perceptions of the Northern Gateway Pipeline. One columnist claimed the NTSB report was a “death knell” for the pipeline (Yaffe 2012). Another columnist pronounced the pipeline “dead and buried” (Palmer 2012). Just over two years after Enbridge submitted its application, and three and a half years before it was finally rejected, the Northern Gateway deathwatch began.

The Clark government announced its new position in July 2012. In a document titled *Requirements for British Columbia to Consider Support for Heavy Oil Pipelines*, the government outlined five conditions for its support:

1. Successful completion of the environmental review process
2. World-leading marine oil spill response, prevention and recovery systems

3. World-leading practices for land oil spill prevention, response and recovery systems
4. Legal requirements regarding Aboriginal and treaty rights are addressed
5. British Columbia receives a fair share of the fiscal and economic benefits of a proposed heavy oil project that reflects the level, degree and nature of the risk borne by the province, the environment and taxpayers. (Government of British Columbia 2012b)

This change in position reflected a far more adversarial approach by the province. The website linking to the formal document contained provocative pie charts highlighting the skewed distribution of risks and benefits between British Columbia and Alberta.

The fifth condition immediately became the most divisive. Clark demanded that the government of Alberta find a way to share economic benefits: “If Alberta doesn’t decide they want to sit down and engage, the project stops. It’s as simple as that.” Alberta premier Alison Redford responded that, “We will not share royalties, and I see nothing else proposed and would not be prepared to consider anything else. . . . We will continue to protect the jurisdiction we have over our energy resources” (Fowlie 2012a). Redford accused Clark of trying to “renegotiate Confederation” (Bailey and Wingrove 2012). Clark theatrically left a Halifax meeting of premiers to develop a national energy strategy over the conflict. Clark characterized an October meeting between the two premiers as “short and frosty” and stated that, “As it stands right now, there is absolutely no way that British Columbia will support this proposal” (Fowlie 2012b). Clark also threatened to use sources of provincial leverage, such as control of electricity through BC Hydro and provincial permitting authorities, to thwart pipeline construction if the five conditions were not met (Fowlie 2012a).

Oil sands pipelines were a major issue in British Columbia’s provincial election on May 14, 2013 (Hoberg 2013), but because Clark has taken a strong (if conditional) stance against Northern Gateway, the flashpoint was Kinder Morgan’s Trans Mountain Expansion Project (see chapter 6), on which the two main political parties sharply differed. Clark’s surprising come-from-behind victory in that election may have left the oil sands coalition feeling like they’d dodged a bullet, but the British Columbia Liberal Party’s victory did not change the political logic on Northern Gateway.

On May 31, 2013, the provincial government submitted its final argument to the Joint Review Panel, and it took a very strong position against the Northern Gateway Pipeline. The submission focused most of its attention

on whether Enbridge had demonstrated “world-leading spill response, prevention and recovery systems,” the language of the second and third conditions for approval. The document was especially critical of the vagueness of Enbridge’s spill response plans:

The Project before the JRP is not a typical pipeline. For example, the behavior in water of the material to be transported is incompletely understood; the terrain the pipeline would cross is not only remote, it is in many places extremely difficult to access; the impact of the spills into pristine river environments would be profound. In these particular and unique circumstances, NG should not be granted a certificate on the basis of a promise to do more study and planning once the certificate is granted. The standard in this particular case must be higher. And yet, it is respectfully submitted, for the reasons set out below, NG has not met this standard. “Trust me” is not good enough in this case. (Government of British Columbia 2013)

Over the ensuing years, Clark sent signals that she was open to reconsidering this opposition, especially if emergency response readiness could be improved and if the province’s share of economic benefits from the project could be increased, but the provincial government never formally backed away from this position of opposition.

Opposition to the pipeline also emerged among municipal governments. The Union of British Columbia Municipalities voted to oppose the pipeline at its annual meeting in fall 2010 (CBC 2010). Not all municipalities opposed the project, of course, but a majority of elected officials at that meeting voted for the resolution opposing the project, making it the official policy of the body representing municipalities in the province. The town of Kitimat, British Columbia, the Pacific coast port that would host the pipeline and tanker terminal, conducted a plebiscite on the pipeline proposal in April 2014. To the surprise of many, Kitimat residents voted against the project by a considerable margin, 58% to 42% (Rowland 2014; Bowles and MacPhail 2017). The result was a symbolic blow to Enbridge and the project and fed the political momentum against the project.

Nation Building versus Coastal Protection: Ideas and the Northern Gateway

Framing Arguments

The Northern Gateway battle was in part a battle over ideas framed and communicated by strategic actors within the dispute. The pro-pipeline oil

sands coalition focused its framing around ideas of economic growth, jobs, and future prosperity. Enbridge, as well as both the Harper government and the Alberta government, stressed the economic benefits the pipeline would deliver to Canadians. Both the company and Harper government officials went beyond making the case that the project was in the “national interest” to the loftier claim that it was “nation-building.” In a 2011 speech at the Empire Club in Toronto, Enbridge CEO Pat Daniel compared the project to the great leaps forward in national infrastructure in previous centuries:

Northern Gateway will bring Canada’s energy resources to the booming economies of the Pacific basin, while delivering sustainable local and regional prosperity to northern BC and Alberta and national economic advantage for all Canadians. . . . The benefits of this transformation will mean billions of dollars flowing into Canadian hands for decades. Reliable independent estimates of the project’s impact over thirty years say it will deliver to all Canadians an additional \$270 billion increase in Canada’s GDP. . . . Where will the impact of that \$270 Billion increase be felt? Not just in Alberta or BC. But here, in the industrial heartland of Canada, in the steel mills and manufacturing centres, and from heavy industry to high finance, for a long, long time. This isn’t just another Alberta oil and gas project. *This is a nation-building project.* . . . Canada’s earliest nation builders invested in massive infrastructure to make us a North American and European economic champion. Look at the St. Lawrence Seaway. It’s an economic engine bringing maritime trade to the heart of the North American continent. It was and remains a massive and multi-generational undertaking that has cemented Canada’s trade connections to the Atlantic nations. A gateway to Pacific markets will have the same advantage for Canada in the 21st Century that the St. Lawrence Seaway and key canals had for our country in the 19th and 20th Centuries. (Daniel 2011, emphasis added)

These comments were reiterated by Joe Oliver, Harper’s natural resources minister, in December 2011. He called gaining access to new markets “nation-building, without exaggeration” (O’Neil 2011a).

To counter this frame of economic prosperity through a nation-building pipeline, Northern Gateway opponents focused on the risks of environmental damage and Aboriginal rights. Environmental groups focused on the relatively pristine environment through which the pipeline and tankers would travel and the threats to that environment posed by oil sands. A March 2012 report by Environmental Defence and ForestEthics characterized the case against Northern Gateway in the following terms:

The project is premised on a rapid increase of the amount of tar sands oil being produced. The impacts of it would span from the tar sands region, which would

deal with more habitat destruction, toxic tailings and air pollution, across pristine boreal forests and nearly 800 rivers and streams, to the coast. It would put at risk the survival of the threatened woodland caribou, the spawning grounds of all five species of wild salmon, and a unique and diverse marine ecosystem. The tankers would travel through the Great Bear Rainforest, where a spill would harm the iconic Spirit Bear, the animal that inspired one of the 2010 Olympic mascots. (Environmental Defence and ForestEthics 2012)

This frame of toxic oil threatening the pristine environment was central to the environmental campaign from the start.

First Nations also emphasized the risks of pipeline and tanker accidents, but they also focused on Aboriginal rights over traditional lands and waters. The Coastal First Nations declaration speaks of defending “this magnificent coast, its creatures, cultures and communities” (Coastal First Nations 2010). The Save the Fraser declaration refers specifically to the need to protect “the ocean migration routes of Fraser River salmon.” In a media interview following the Harper government’s approval decision, Grand Chief Stewart Phillip focused on Aboriginal decision rights: “The First Nations people of this province have made it abundantly clear that we have every right, based on our constitutional and judicially upheld rights, rights that are reflected in the UN Declaration on the Rights of Indigenous Peoples, to stand by our traditional laws and legal orders and defend our territories from the threats and predations of oil and gas. And we fully intend to do that” (Judd 2014).

Content of Media Coverage

Conflict over the Northern Gateway Pipeline proved to be quite newsworthy. Figure 5.2 shows how many times the pipeline was mentioned in Canadian news stories from 2010 and 2016. Media mentions of the pipeline peaked with 6,844 mentions in 2012—the first year of the hearings. While mentions tailed off before the pipeline was finally terminated in 2016, in 2013 and 2014 it continued to be mentioned over 3,500 times by Canadian media.

Figure 5.3 shows what issue the media focused on when it reported about the pipeline. The chart displays four categories of issues and depicts their relative priority in media coverage of Northern Gateway and how that has changed over time: climate change, jobs, pipeline or tanker accidents, and First Nations.³ The analysis shows that First Nations concerns were the dominant issue overall, followed by concerns about accidents. Jobs ranked a close third, and climate change was a distant fourth. For this pipeline controversy,

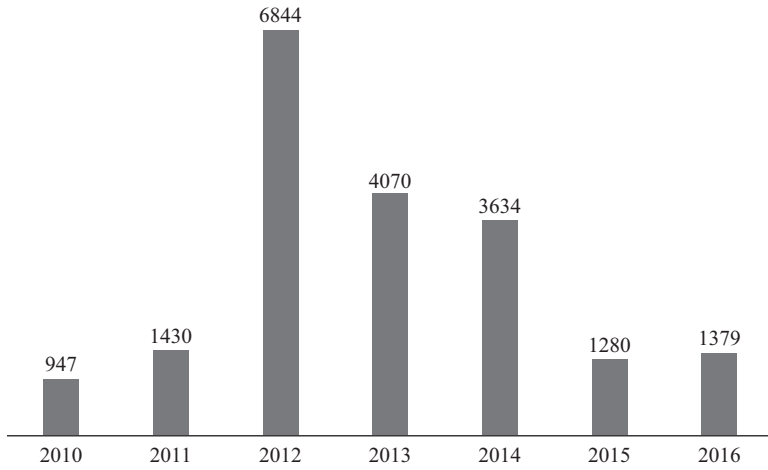


Figure 5.2
Northern Gateway Pipeline total media mentions, 2010–2016.

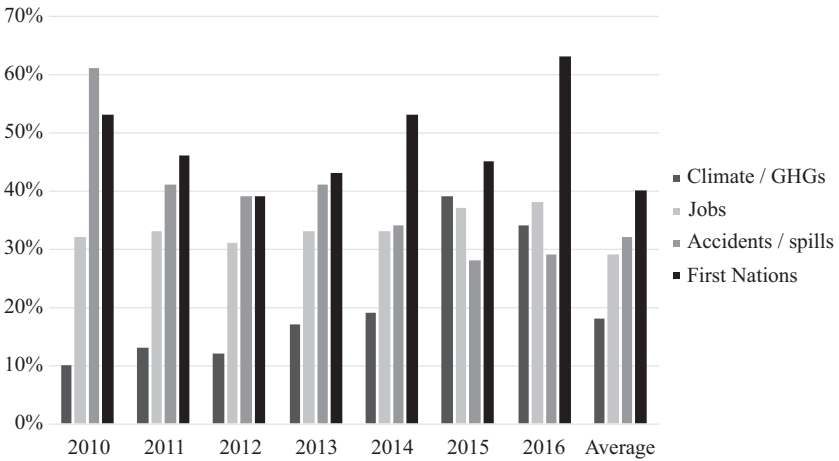


Figure 5.3
Northern Gateway Pipeline media focus, 2010–2016.

the issues given the greatest attention in opposition campaigns received more coverage than the central issue, jobs, featured in communications of the pro-pipeline coalition.

While overall these results support the behavioral hypothesis that opposition groups emphasize place-based risks, the trend over time shows that climate concerns became increasingly important in media coverage. While accidents and spills were mentioned more than three times as often as climate in 2010, 2011, and 2012, by 2015 and 2016, climate was mentioned more often than accidents and spills. The causes and implications of this shift are discussed further in chapter 6.

Public Opinion

In the early years of the Northern Gateway controversy, public opinion in Canada was generally opposed to the pipeline, but a big shift toward support appeared to occur by 2016. A March 2016 Forum Research poll showed that the Canadian public approved of the construction of the Northern Gateway Pipeline by a margin of 51% to 36%. However, between December 2011 and October 2013, Forum Research polls showed pipeline disapproval was greater than approval by between 12% and 16%. Even when national support for the pipeline surged in 2016, opposition in British Columbia was still strong: those opposed outnumbered those approving by a margin of 53% to 40%. In 2016, British Columbia was the only province other than Quebec that was opposed to the pipeline; Albertans approved of the pipeline by a 75% to 21% margin (Forum Research 2016).

An Ekos poll issued the same month showed less national support, but supporters still outnumbered opponents, 48% to 43% (Ekos 2016). While showing narrower national support, the Ekos poll showed even greater opposition in British Columbia. The pipeline was opposed by 60% and supported by 37% of respondents in British Columbia. An Insights West poll (figure 5.4) shows that British Columbia respondents consistently opposed the pipeline. In August 2016, the margin of opponents over supporters was 50% to 35% (Insights West 2016a).

Northern Gateway was not just a battle over interests but also a battle over values and ideas. Despite the structural advantages of economic issues over environmental concerns, appeals to jobs and prosperity through a nation-building pipeline were, in this case, trumped by concerns over environmental

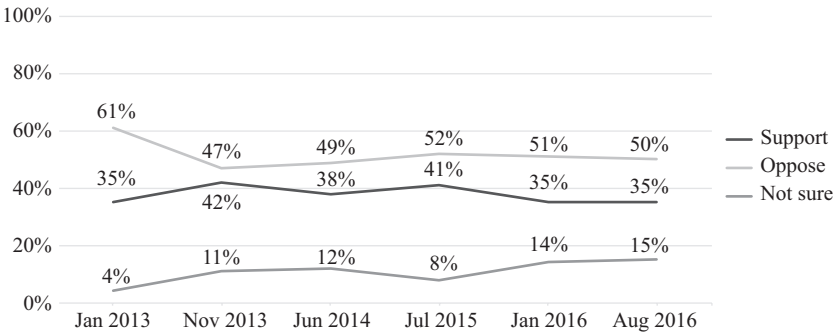


Figure 5.4 British Columbia poll results for Northern Gateway support when respondents were asked: “Given what you know about the proposed Enbridge Northern Gateway pipelines project, do you support or oppose the project?”
Source: Insights West (2016a).

damage to pristine environments and the rights of Aboriginal groups to make decisions affecting their own territory.

Institutions and the Politics of Structure

Intergovernmental Rules

One major institutional question with respect to pipeline review and approval is the allocation of decision-making authority between the federal and provincial governments (Olszynski 2018). Because the pipeline is inter-provincial, the federal government has the clear lead responsibility for it, but there are also a number of areas within provincial jurisdiction, including the need for provincial permits to authorize various aspects of construction and operation (Bankes 2015). Canadian governments have dealt with this coordination challenge in a variety of ways in the past. At one end of the spectrum are cases where the provincial and federal governments conducted separate environmental reviews, as happened in the case of British Columbia’s Prosperity Mine (Haddock 2010).

Over time, governments have made increased efforts to avoid duplication as much as possible. This could be done through conducting the process jointly, as occurred in the Site C Dam (see chapter 9). Alternatively, a formal agreement between the province and the federal government could be established to determine who would take the lead in performing the

review and approval. This is how the governments proceeded in the Northern Gateway case. In June 2010, the British Columbia Environmental Assessment Office, under the authority of the British Columbia Environmental Assessment Act, entered an “equivalency agreement” with the National Energy Board (NEB) that essentially declared the federal review process equivalent to that which would be required under the act. The agreement states that “EAO accepts under the terms of this Agreement that any NEB assessment of a Project conducted . . . constitutes an equivalent assessment under Sections 27 and 28 of the BCEAA” (National Energy Board and British Columbia Environmental Assessment Office 2010).

The delegation of provincial authority to the federal government had the effect of transforming the British Columbia government from playing a direct role in pipeline approval to an intervenor in the regulatory proceedings. It was, in effect, a voluntary surrender by the province of a form of potential veto power it held. As will be described in the section on court cases, the British Columbia Supreme Court invalidated this equivalency agreement, ruling that the British Columbia Environmental Assessment Act clearly required the province to make a legal determination on the pipeline review.

Joint Review Panel Decision Rules

The regulatory review process for Northern Gateway was conducted in a changing legal landscape, with changes that in large part were precipitated by the conflict over the pipeline. When the Northern Gateway application was submitted, the process at that time provided for the establishment of a Joint Review Panel (JRP), constituting members of the National Energy Board and appointees of the Canadian Environmental Assessment Agency (CEAA) within the Ministry of Environment. The rules at that time, under the National Energy Board Act, provided that the panel itself was given the authority to make the final decision on the pipeline (Hoberg 2016). Once the hearings were completed, the JRP would issue an environmental assessment report as well as a recommended decision. The minister of environment would have an opportunity to provide a government response to the recommendation; the JRP would then consider the government’s views and make a final decision.

In summer 2012, the Harper government introduced its controversial Bill C-38, an omnibus budget implementation bill, under the slogan of “responsible resource development.” It followed several months later with

Bill C-45, a second massive omnibus bill. Together, the two bills rewrote much of the federal law designed to protect environmental values in the review, construction, and operation of major projects. The Fisheries Act was changed to significantly reduce the protection of fish habitat. The Navigable Waters Protection Act was altered so that far fewer projects triggered federal environmental reviews (Toner and McKee 2014; Olszynski 2015).

Of greatest concern here were the changes to the two core statutes most directly relevant to the review of pipelines and other major energy projects. The Canadian Environmental Assessment Act was repealed and replaced, and the National Energy Board Act was amended. The changes resulted in four significant implications for pipeline reviews. First, the regulatory approval process was “streamlined,” including the number of agencies involved. Pipeline reviews would now be done exclusively by the NEB and not through Joint Review Panels with CEAA. Second, strict timelines were established for review. In the case of pipelines, the NEB hearing process was limited to 18 months. Third, participation in reviews was narrowed by changing eligibility requirements from “any person” to only those “directly affected” or who have, in the regulators’ judgment, “relevant information and expertise” (Salomons and Hoberg 2014). Fourth, final approval authority for pipelines was moved from the National Energy Board to the federal cabinet. Under this new statutory scheme, NEB authority was restricted to evaluating proposals and making recommendations. The cabinet would make the authorizing decision by ordering the NEB to issue the appropriate permits.

These changes were potentially highly consequential because, in addition to reducing the number and variety of participants in the process, they resulted in the elimination of a veto point within the regulatory process. The final authority of a putatively expert independent panel was replaced by the elected politicians forming the government of the day. For the Harper government, this establishment of political authority over major resource projects was critical to its agenda of responsible resource development (Hoberg 2016). This change strongly supports the behavioral hypothesis that actors focus strategies on the institutional venues most favorable to their interests. In this case, Harper used his control over government to change the venue to one where his party had more control.

These new rules would end up playing a more important role in pipeline proposals after summer 2012, including the Trans Mountain Expansion Project and Energy East. Because the Northern Gateway process was already

under way when the rule changes were made, the Joint Review Panel agreement needed to be amended to respect the ongoing process but also incorporate new timelines and the new allocation of decision-making authority. The agreement was amended in August 2012, bringing the process into compliance with the National Energy Board Act revisions by making the panel member appointed by the minister of environment a temporary member of the NEB and confirming that it would be the cabinet, not the Joint Review Panel, that would make the final decision. The amended agreement established a deadline for the completion of the assessment at the end of 2013 (Joint Review Panel 2013, appendix 4).

The Joint Review Panel Process

The project review stage began when Enbridge submitted its project application in May 2010. The environmental assessment and regulatory review were performed by a Joint Review Panel combining officials from the National Energy Board and the Canadian Environmental Assessment Agency. The agreement establishing the Joint Review Panel contained the Terms of Reference, including the scope of the assessment. The JRP was charged with conducting “a review of the Environmental Effects of the project and the appropriate mitigation measures based on the project description and consideration of the project application under the NEB Act” (Joint Review Panel 2013, appendix 4). The project scope included the oil sands pipeline and condensate pipeline, as well as the marine terminal in Kitimat. The scope of the review considered, in addition to the environmental effects, the commercial need and alternatives to the project, and comments from First Nations and the public. The potential impacts of the project-induced upstream operations in the oil sands on downstream use were explicitly excluded. The panel stated: “We do not consider that there is a sufficiently direct connection between the Project and any particular existing or proposed oil sands development, or other oil production activities, to warrant consideration of the environmental effects of such activities as part of our assessment of the Project under the CEA Act or the NEB Act” (Joint Review Panel 2011, 13). The JRP began hearings on January 10, 2012, and was originally scheduled to complete its work by fall 2013.

Procedures for the process were laid out by the JRP in a hearing order issued in May 2011. The process was designed to be open to a broad range

of participants. In addition to formal intervenors and government participants, the process also invited oral statements and letters of comment. With the exception of the government category, no criteria were specified as to who could participate.

Environmentalists and other pipeline opponents took full advantage of these procedures by staging a “mob the mic” campaign to get as many opponents registered to participate as possible. The response was impressive. Over 4,000 signed up to participate, with the Dogwood Initiative claiming that its campaign was responsible for 1,600 of those successes (Dogwood Initiative 2011). The Joint Review Panel was clearly not anticipating this response, and it was forced to extend the timeframe for project review by a year in order to accommodate the large number of requests to be oral participants.

The hearings began in January 2012 and were completed in June 2013. The panel described the intense level of interest they witnessed in the 21 communities they visited: “Public hearings for the proposed project attracted a high level of public interest. There were 206 intervenors, 12 government participants, and 1,179 oral statements before the Panel. Over 9,000 letters of comment were received. The Panel held 180 days of hearings, of which 72 days were set aside for listening to oral statements and oral evidence. Most of the hearings were held in communities along the proposed pipeline corridor and shipping routes. The entire record of the proceeding is available on the National Energy Board website” (Joint Review Panel 2013, vol. 2, 2).

There was some controversy over public access to the hearings. Rather than conducting the hearings in public forums, oral statements and other hearings were held in a closed-room format with only directly participating individuals permitted. The hearings were webcast live. For proceedings involving intervenors, oral cross-examination was permitted. The overwhelming majority of public input expressed opposition to the project. Apparently referring to the oral statement submitted, an environmental group meme circulating in 2013 showed a football scoreboard giving the score “1159 against, 2 for.” Ecojustice, an environmental law group representing a number of environmental groups in the hearing, states that “a staggering 96 per cent of written comments submitted to the joint review panel over the past two years. . . . oppose the proposed Northern Gateway” (Shearon 2013).

The panel, however, was apparently unmoved by the depth and breadth of opposition to the project. In its report, made public on December 19,

2013, it recommended the project be approved, subject to 209 conditions. Rather than provide any kind of quantitative summary of the tone or stance of the many submissions it received, the panel only referenced opposition obliquely in two passages:

We acknowledged that different people placed different values on the burdens, benefits, and risks of the project. (Joint Review Panel 2013, vol. 1, 72)

All parties did not agree on whether this project should proceed or not, and it was our job to weigh all aspects and deliver our recommendations to the Minister of Natural Resources for consideration by the Governor in Council. (Joint Review Panel 2013, vol. 1, 74)

The panel's core conclusions were as follows:

We have taken a careful and precautionary approach in assessing the project. We are of the view that opening Pacific Basin markets is important to the Canadian economy and society. Societal and economic benefits can be expected from the project. We find that the environmental burdens associated with project construction and routine operation can generally be effectively mitigated.

Some environmental burdens may not be fully mitigated in spite of reasonable best efforts and techniques. Continued monitoring, research, and adaptive management of these issues may lead to improved mitigation and further reduction of adverse effects. We acknowledge that this project may require some people and local communities to adapt to temporary disruptions during construction.

The environmental, societal, and economic burdens of a large oil spill, while unlikely and not permanent, would be significant. Through our conditions we require Northern Gateway to implement appropriate and effective spill prevention measures and spill response capabilities, so that the likelihood and consequences of a large spill would be minimized. (Joint Review Panel 2013, vol. 1, 71–72)

The panel did not consider the risks of pipeline or tanker accidents significant: "It is our view that, after mitigation, the likelihood of significant adverse environmental effects resulting from project malfunctions or accidents is very low." It did find significant risks to two sensitive species—woodland caribou and grizzly bears—but it recommended that "the Governor in Council find these cases of significant adverse environmental effects are justified in the circumstances" (Joint Review Panel 2013, vol. 1, 72). With the completion of the regulatory review in December 2013, the Northern Gateway Pipeline completed the project review stage and entered the political stage of the pipeline controversy. The Harper government had six months to respond to the panel's recommendation (although the National Energy Board Act does allow the cabinet to grant itself extensions).

The Harper Government's Response

The Harper government took the entire six months to make its decision. While Harper's continued emphasis on the importance of access to tidewater to oil sands expansion and the prosperity of Canadians, it could not have been an easy or straightforward choice for the prime minister. With the 2015 election just over a year away, the electoral risk was considerable given the opposition to the project within British Columbia. The Harper government held 21 seats in British Columbia, some of which were highly vulnerable to the outcome of the pipeline decision. A Bloomberg-Nanos survey in early June 2014 had a very direct warning for Harper: "Forty seven percent of respondents said they would be less likely to support local Conservative candidates in BC if the Harper government approved the pipeline while only 11 percent said they would be more likely to support the local Conservative candidate if the project was approved by the Harper government" (Bloomberg-Nanos 2014). Moreover, while the Clark government sent signals that it could reconsider its position if the economic benefits to British Columbia were increased, the formal position of the provincial government remained a firm no.

Under the National Energy Board Act, the Harper cabinet had three options: approve the pipeline with the NEB's conditions, reject the pipeline, or delay the decision by directing the NEB to reconsider either its recommendation or its conditions. Ultimately, Harper chose to remain true to his vision and rolled the electoral dice by approving the pipeline. On June 17, 2014, the Harper government announced its agreement with the Joint Review Panel's report and directed the NEB to issue a certificate of public convenience and necessity with the 209 conditions. The NEB did so the following day. The June 17 cabinet decision statement addressed the requirements of the Canadian Environmental Assessment Act with the following terse statement:

The Governor in Council has decided, after considering the Panel's report together with the conditions proposed in it, that the Designated Project is not likely to cause significant adverse environmental effects referred to in subsection 5(1) of CEEA 2012 but that it is likely to cause significant adverse environmental effects referred to in subsection 5(2) of CEEA 2012 to certain populations of woodland caribou and grizzly bear as described in the Panel's report. The Governor in Council has also decided that, pursuant to subsection 52(4) of CEEA 2012, the significant adverse environmental effects that the Designated Project is likely to cause to certain populations of woodland caribou and grizzly bear are justified in the circumstances. (National Energy Board 2014b)

Harper's approval decision brought an end to the political stage but hardly created a smooth path toward construction and operation of the Northern Gateway Pipeline. Five legal challenges had already been filed prior to the cabinet decision and another dozen quickly followed. The government of British Columbia remained formally opposed to the pipeline. Environmental groups and First Nations leaders vowed to stop the project through every legal means possible. The day Harper approved the pipeline, the price of WTI oil was US\$107, but by the end of the year it had fallen below US\$55. By that point, the youthful new leader of the Liberal Party of Canada had rejuvenated his party's electoral prospects and surged ahead of Harper's Tories in the polls.

Legal Challenges

There have been two major judicial decisions on Northern Gateway, both of which were major setbacks for pipeline proponents. The first decision was by the British Columbia Supreme Court about whether the equivalency agreement between British Columbia and the federal government was consistent with British Columbia's statutory framework for environmental assessment. The equivalency agreement between British Columbia and the federal government was challenged by the Coastal First Nations, who filed suit over the application of this agreement to the Northern Gateway Pipeline. The British Columbia Supreme Court ruled that the province had abdicated its decision-making authority under the British Columbia Environmental Assessment Act. The judge ruled that the act allows the province to defer to the federal government's review process but that it must still decide whether to issue an environmental assessment certificate (*Coastal First Nations v. British Columbia (Environment)*, 2016 BCSC 34). In a new twist on regulatory federalism in Canada, the judge in this case ruled that despite federal paramountcy over interprovincial pipeline approvals, it would be permissible for the provincial government to impose certain conditions on interprovincial pipeline approvals. The province could not use its regulatory authority to deny an approval to a pipeline that the federal government approved, but it could add conditions to the federal government's conditions.

The court decision (not appealed by the British Columbia government) shifts the intergovernmental politics of pipelines. For an equivalency agreement to pass muster, British Columbia can defer the assessment process to

the federal government, but it would need to issue its own final decision. The approach the British Columbia government under Christy Clark used for Northern Gateway, where the province submits strenuous objections to the pipeline but then defers the final decision to the federal regulator, was no longer workable. The Trans Mountain case in chapter 6 will show how consequential that change can be.

The second major setback for the Northern Gateway Pipeline came in June 2016, when the Federal Court of Appeal struck an inevitably fatal blow to the project. In reviewing 18 appeals of the government's decision from First Nations and environmental groups consolidated into one decision, the court quashed the certificates of conditional approval provided by the government of Canada. The decision reflected a stunning victory for pipeline opponents, but the legal reasoning underlying the decision contained quite mixed ammunition for critics of pipelines and other large infrastructure projects.

The FCA decision was based on its conclusion that the Harper government engaged in a deeply flawed consultation process with First Nations that did not meet the government's obligations. Aboriginal engagement for the project was guided by a framework document issued by the federal government in February 2009. The process outlined five phases of the consultations: (1) a preliminary phase of consultation about the terms and conditions of the review process; (2) a prehearing phase to inform Aboriginal groups about the process and encourage their participation; (3) the hearing phase, where Aboriginal participation was encouraged and supported; (4) the posthearing phase to consult groups after the release of the Joint Review Panel's decision but before the cabinet's final decision; and (5) the permitting stage, where additional consultations on implementing the conditions and other legal requirements for authorization would be conducted (*Gitx-aala Nation* 2016, 14–15). While laudatory about the federal government's consultations during the first three phases, it was the fourth phase, the posthearing stage, where the Federal Court of Appeal found major flaws in the government's performance. Two paragraphs from the decision effectively summarize the court's rationale:

Based on our view of the totality of the evidence, we are satisfied that Canada failed in Phase IV to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations. Missing was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report, or to provide

meaningful feedback in response to the material concerns raised. Missing was a real and sustained effort to pursue meaningful two-way dialogue. Missing was someone from Canada's side empowered to do more than take notes, someone able to respond meaningfully at some point. (*Gitxaala Nation* 2016, paragraph 279)

We have applied the Supreme Court's authorities on the duty to consult to the uncontested evidence before us. We conclude that Canada offered only a brief, hurried and inadequate opportunity in Phase IV—a critical part of Canada's consultation framework—to exchange and discuss information and to dialogue. The inadequacies—more than just a handful and more than mere imperfections—left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored. Many impacts of the Project—some identified in the Report of the Joint Review Panel, some not—were left undisclosed, undiscussed and unconsidered. It would have taken Canada little time and little organizational effort to engage in meaningful dialogue on these and other subjects of prime importance to Aboriginal peoples. But this did not happen. (*Gitxaala Nation* 2016, paragraph 325)

While these passages show that the court was quite critical of the Harper government's consultation approach, the court emphasized that it was merely applying existing law: "In reaching this conclusion, we have not extended any existing legal principles or fashioned new ones. Our conclusion follows from the application of legal principles previously settled by the Supreme Court of Canada to the undisputed facts of this case" (*Gitxaala Nation* 2016, paragraph 9). The court did not see itself as advancing the duty of Crown governments any closer to the "free, prior, and informed consent" advocated by many First Nations.

While the effect of the decision was very positive for environmental opponents to the project, the Federal Court of Appeal's ruling was actually a major setback for the ability of environmentalists to challenge environmental reviews in court. The court emphasized the distinction between three aspects of the decision process: the report of the Joint Review Panel, the federal cabinet's order in council, and the certificates issued by the NEB. The court ruled that it was only the order in council that was reviewable, not the process or report of the JRP. The court ruled that unless the cabinet asked for reconsideration, the JRP report is considered "final and conclusive." "Any deficiency," the court wrote, "in the Report of the Joint Review Panel was to be considered only by the Governor in Council, not this Court" (*Gitxaala Nation* 2016, paragraph 125). If this interpretation is applied to other cases, it will dramatically reduce the capacity of environmental groups

to challenge energy projects in the future. Law scholar Martin Olszynski argues that the court erred by applying the wrong section of the Canadian Environmental Assessment Act in the ruling (Olszynski 2016). Nonetheless, the Supreme Court of Canada declined to hear the appeal by environmental groups of that part of the ruling. The Trans Mountain pipeline judicial rulings (discussed in the next chapter) continued to find that environmental assessment reports in cases like these are not subject to review.

The decision had the effect of putting the Trudeau government in the position of either simply canceling the pipeline certificates or restarting the post-JRP consultation proceedings with First Nations. Given his commitments in the 2015 election campaign and the lack of reasons to believe the positions of any First Nations had changed since the Harper government's process, it really was not much of a decision at all.

The Final Rejection

On November 30, 2016, Justin Trudeau announced that the government was dismissing the application for the Northern Gateway Pipeline. "It has become clear," Trudeau stated, "that this project is not in the best interests of the local affected communities, including Indigenous peoples." Repeating the line he used during the election campaign and since then, he reiterated that "The Great Bear Rainforest is no place for a pipeline, and the Douglas Channel is no place for oil tanker traffic." To bring finality to the issues, Trudeau also announced, "We will keep our commitment to implement a moratorium on crude oil tanker shipping on British Columbia's north coast" (Trudeau 2016). Trudeau's focus on place-based concerns in his decision to reject the pipeline is consistent with the behavioral hypothesis about decision rationales.

Trudeau's attachment to the Great Bear Rainforest and his choice to use it to inform his stance against the pipeline were influenced by several factors. First, Trudeau's longtime friend and political adviser Gerald Butts had a background as the leader of an environmental group active in the area. From 2008 to 2012, Butts was executive director of the World Wildlife Fund (WWF) for Canada. WWF had been active in efforts to protect the Great Bear Rainforest. While historically the organization had not taken positions on specific projects, the group did come out to formally oppose the Northern Gateway Pipeline while Butts was executive director. Butts explicitly

linked the group's pipeline opposition to its support for rainforest protection in a 2012 op-ed, saying, "The hearings to decide the future of the Great Bear Sea and Rainforest got off to quite a start this week. Big oil, foreign intrigue, a grassroots uprising, duelling polls, angry ministers—this one has all the makings of a blockbuster. But the fervour obscures the heart of the matter: whether and under what conditions we should permit supertankers and a bitumen pipeline in one of the last intact temperate coastal rain forests on Earth" (Butts 2012).

Trudeau himself also got a personal tour of the region during the campaign. Art Sterritt, then executive director of the Coastal First Nations, was approached by Jody Wilson-Reybould, a longtime friend and newly designated Liberal Party candidate, with a request that he lead Trudeau on a tour of the region. According to Sterritt, "We took a seaplane to Digby Island and Prince Rupert and flew down to Hartley Bay and let him meet the elders and the kids and everybody else. It was soon after that he came out and said that he was opposed to Northern Gateway" (Sterritt 2017).

The decision statement issued by the cabinet reflected how fundamentally the political calculus on the pipeline had changed since Harper's approval decision as a result of the Federal Court of Appeal's decision and the election of a government with different values:

In a 23 June 2016 decision, the Federal Court of Appeal quashed Order in Council P.C. 2014–809 dated 17 June 2014, which was the order directing the National Energy Board (Board) to issue Certificates OC-060 and OC-061 for the Project. The Court also quashed the certificates at that time and remitted the matter to the Governor in Council for redetermination.

Through Order in Council P.C. 2016–1047 dated 25 November 2016, the Governor in Council does not accept the finding of the joint review panel (Panel) that the Project, if constructed and operated in full compliance with the conditions set out in the Panel's report, is and will be required by the present and future convenience and necessity. The Governor in Council does not accept the Panel's recommendation and is of the view that the Project is not in the public interest. (National Energy Board 2016d)

Pipeline opponents used their access to the judicial veto point to alter the government's decision calculus. When the court quashed the license, "they had no pathway out" (Clogg 2017). With a new federal government in power that was more supportive of protecting environmental values, the long-running conflict over the Northern Gateway Pipeline was brought to a close. While the announcement was made at the same time as the Trudeau

government approved Kinder Morgan's Trans Mountain Expansion Project and Enbridge's Line 3 Replacement Project, there is no denying that the final rejection of Northern Gateway—once the oil sector and Harper government's first choice to improve oil sands access to tidewater and Asian markets—was an extraordinary victory for the anti-pipeline coalition.

Conclusion

Stopping the Northern Gateway Pipeline is a remarkable accomplishment for the anti-pipeline coalition. Up against Canada's most powerful economic sector and a determined federal government, environmentalists and First Nations were enormously successful mobilizing opposition to the pipeline. While their political clout was not enough to stop the Harper government from approving the pipeline, it was enough to prevent it from being built and, ultimately, to get Harper's decision reversed. That political clout was attained, for the most part, through a sustained focus on place-based concerns: the risk of pipeline and tanker accidents damaging precious environmental values, and Aboriginal rights to decision-making on their traditional lands. Climate concerns were a part of the opposition argument but not as central as they were to the three other pipeline cases.

Opponents gained access to the two critical authoritative decision bodies in this case: the federal courts and the federal government. Aboriginal rights were used by the Federal Court of Appeal to negate the pipeline's approval, forcing the federal government to either reverse its decision or undertake a new, more sincere process of Aboriginal engagement. The federal election of October 2015 swept the Harper government out of power, replacing it with a prime minister already determined to stop the pipeline and impose a tanker ban on the north coast of British Columbia. It would be too much to say that the 2015 election shifted the federal government from the oil sands coalition to the anti-pipeline coalition. After all, the same day Trudeau formally rejected Northern Gateway he approved the Trans Mountain Expansion Project and Enbridge's Line 3 pipeline. But there is no question that the Trudeau government is greener than the Harper government.

The potential veto point of the Alberta-British Columbia border also proved to be very important. Sustained public opposition in British Columbia made advocating the pipeline undesirable even for the pro-business government of Premier Christy Clark. The British Columbia Supreme Court

nullified the British Columbia government's effort to abdicate responsibility for approving or rejecting the pipeline. While the position of British Columbia did not constitute a legal veto, it did act as a political veto of sorts. The coalition supporting oil sands was powerful enough to get a conditional approval over the objections of the British Columbia government but not powerful enough to get the pipeline constructed and into operation.

As Keystone XL stumbled in the pro-environment Obama administration, the oil sands coalition's hope for tidewater access quickly shifted to Northern Gateway. But the advocates of nation-building pipelines ran straight into a well-organized, well-resourced coalition of pipeline opponents that proved sufficiently formidable to put the pipeline into a death spiral as early as 2012 and eventually get the project formally terminated. Northern Gateway's demise was not, however, the defeat of the oil sands coalition's vision of access to Pacific tidewater. Waiting in the wings was Enbridge's competitor Kinder Morgan, whose proposal to triple the capacity of the Trans Mountain pipeline was the next major oil sands pipeline to go through regulatory review and the surrounding political turmoil.

