

# *Aboriginal Issues and Canada's Oil and Gas Sector*

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**Montreal, February 7, 2014**

It is a pleasure to join this panel; congratulations to the McGill Institute for the Study of Canada (MISC) for hosting this two-day meeting.

I want to focus my comments around issues: who owns Canada's oil and other natural resources? Who buys the oil produced in Canada and issues related to estimating royalty payments? And finally, the question of the broad impacts of oil in relation to climate change.

First, on ownership, as I think everyone at the conference knows well, under the Canadian constitution natural resources fall under the jurisdiction of the provinces, and that is where royalty payments are primarily directed.

This does not mean that the federal government of Canada does not have legal responsibility in the oil sector. On the contrary, the federal government has a number of critical areas of responsibility, from oversight of offshore oil and gas platforms, oversight of maritime traffic inside Canadian waterways of oil tankers, oversight of the transportation of oil by both rail and in pipelines that cross a provincial or international border, and assurance that companies have in place adequate spill prevention and spill response mechanisms. In various reports submitted to Parliament in my previous job as the federal environment commissioner, we noted that there were a number of serious gaps and weaknesses in Canada's oversight of the energy sector, including the lack of capacity to respond to a major oil spill from a ship or blowout similar to the Gulf of Mexico, inadequate inspections and follow-up of pipelines, out-of-date liability limits for spills and other areas. The government has, to its credit, responded to most of the recommendations in those reports,

When we look at ownership and responsibility, we tend to think about it within the dual lens of either provincial or federal governments. Yet the third and I think more interesting, hopeful and dynamic area when looking at the question of natural resource ownership is that of Aboriginal issues and First Nations.

In looking at legal precedence, it's important to first note that First Nations have now won approximately 180 court cases related to natural resource developments, with courts referencing treaty obligations including obligations and the spirit of those obligations dating back to 1752.

Canadian courts have repeatedly affirmed the fiduciary rights of First Nations so as to ensure they have unrestricted access to traditional resources such as fishing and hunting, as well as by extension access to the lands upon which these activities have taken place. Under this assertion is the expectation that resource developments would avoid harm.

An important mechanism that governments hold in relation to natural resource development projects is the ‘duty to consult,’ again an expectation that has been reaffirmed in the courts. However, too often First Nations communities have seen the duty to consult look more like a mechanical checklist of presentations and checklists, with government regulators going through the motions without appearing to be listening and sharing what they have heard—which is among the reasons the “Idle No More” movement in Canada continues, with groups expressing frustration at being ignored, while social problems and economic issues like unemployment among First Nations being unacceptable.

One of the other triggers of the “Idle No More” demonstrations was the changes set out by the federal government, under C-38, to the environmental assessment process. Federal environmental assessments have been a critical and formal process within which aboriginal communities have shared views and concerns about proposed project development. In 2012, with changes to the Canadian Environmental Assessment Act, the number of annual federal environmental assessments dropped from approximately 6,000 per year to roughly 30. For reviews under the National Energy Board, restrictions have been placed so as to allow standing with formal reviews only to communities ‘directly affected’ by proposed resource development projects.

This changes raises the broader issue of accommodation. There have been scores of decisions up to the Supreme Court on framing accommodation in relation to resource development and First Nations/aboriginal peoples. The 2005 Supreme Court Haida decision famously referred to the “Honour of the Crown” in helping to frame accommodation, with the Court noting that the Crown should act “appropriately as a fiduciary; interpreting treaties and documents *generously*; negotiating, and where appropriate, consulting with and accommodating Aboriginal interests; and justifying legislative objectives when Aboriginal rights are infringed.” (emphasis added)

Given these framing comments, I wanted to make three observations under this question of resource ownership, responsibility and partnership.

First, First Nation peoples have significant influence over resource development. This case is illustrated in the book *Resource Rulers* by Bill Gallagher; after losing a number of court cases to aboriginal groups, he concludes that First Nation peoples have a veto-like say over major resource development projects. This veto is not from an operational legal process, as is reflected in the above Supreme Court decision. Instead, it suggests that if First Nations oppose a major project, then it is almost impossible that that project will be built: I think this will have tremendous implications for the next steps in the proposed Northern Gateway pipeline project.

Second, on benefits to local communities: my colleagues at IISD have been working behind the scenes for years with countries and communities to review and renegotiate investment agreements—in mining and resource extraction—so as to lock in forward and backwards linkages that benefit local communities. These benefit agreements are increasingly important both for local communities but also more broadly for environmental protection.

Third, from a conservation perspective: the real gains in conservation in Canada in the past decade have come almost exclusively when First Nations have been involved, and conservation initiatives that have excluded First Nations have collapsed.

The next area I'll touch upon is the question – who buys Canada's oil?

Canada produced about 1.3 billion barrels of oil in 2013, slightly up from 1.2 billion in 2012. On a daily basis, the Alberta oil sands is now the biggest component of total oil production, at 1.7 million barrels a day, compared to 1.3 million from conventional sources (which include offshore oil production in Hibernia and other places).

In terms of exports, roughly 70 percent of total production is exported – this varies from 72 percent in 2012 to 67 percent in 2013 – all according to the NEB. In terms of where it goes, the largest export market is the United States, which comprises almost 98 percent of total exports (NEB 2013).

One important fiscal instrument of huge importance is royalties; the amount oil companies pay to explore and exploit Canada's oil resources. Different royalty rates tend to be lower in exploration and higher, as in the case of Alberta and Newfoundland, in production. Also for up-front auctions, the average is in the order of 10 percent per barrel for bitumen and 20 percent for conventional. For oil sands, it is estimated that the gross revenue rate before is 6.54 percent tax and 35.38 percent after payout. This equates to \$100/bbl the before payout of about \$5/bbl, and after payout of \$18/bbl.

Debates around the appropriate level of royalty payments are complex, partly because such levels are immensely difficult to calculate because of different instruments that affect royalty rates, like front-end auctions. They are also difficult because they prompt broader discussions about what is a 'fair' rate to share oil revenues: since we live in highly globalized energy markets, the move of a jurisdiction to increase its royalty rates also the threat by the investing company that it will move its operations to a country with lower rates: that is exactly what happened in Newfoundland when Premier Williams announced a higher royalty rate. After much fanfare, the companies quietly returned and operations in Hibernia and other offshore locations and ramped them up.

Where the royalty issue has a significant public policy perspective is when looking at the percentage of revenues from royalty and related rates that the energy sector contributes to provincial government revenues: this ranges from almost 30 percent in Newfoundland and Labrador, roughly 20 percent in Alberta and Saskatchewan, about 10 percent in BC. From a political economy perspective, this represents an important concentration of economic power, which is often translated into access and lobbying impact on proposed environmental, climate and other regulations.

Getting the actual estimate of royalty rates remains difficult, in part because they fit into a broader fiscal policy framework that includes subsidies. In a report presented to Canada's Parliament last year, the federal government provided up to \$800 million to the fossil fuel sector; of this \$100 million was in direct grants and contributions, while the remaining \$700 million was provided through various tax breaks, especially very high write off rates in the front-end oil and gas exploration stage.

This figure does not include subsidies provided at the provincial level. IISD, through its Global Subsidies Initiative, estimated that the total level of subsidies is likely the federal level.

Why these subsidies matter from an environmental perspective is because of their contribution to the emissions of greenhouse gases, the main driver of climate change. From a perspective of policy coherence, it makes no sense for a government to spend hundreds of millions on various measures to reduce greenhouse gases on the one hand, and

to also spend hundreds of millions of dollars on payouts to the fossil fuel sector on the other. Moving some of that money into a climate dividend to accelerate cleaner energy sources would advance efforts to tackle climate change. Unfortunately, we are doing neither: the International Energy Agency continues to warn that global emissions of greenhouse gases are on a one-way trajectory of dramatic increases, while the International Monetary Fund has estimated that global subsidy levels for fossil fuels are in the vicinity of \$1.9 trillion a year.

## Who Faces the Impacts related to Climate Change?

The final area is climate change. The IPCC Fifth Assessment Reports on Impacts and Adaptation is being released in the spring of 2014. We know that climate science is now absolutely certain: emissions are increasing and observable impacts of climate change—from hotter summers, more frequent and severe storms, prolonged drought—are already being observed.

The challenge is also clearly set out by the IPCC: the world is running out of time to cap global average temperatures at 2 degrees Celsius. Impacts from an average 2 degrees Celsius will be catastrophic. Yet more and more scientists are looking beyond that level to a 4 or 5 or even 6 degree average temperature increase.

Unfortunately the climate debate has been caught in a political divide, with some arguing that such scenarios as forwarded by environmental radicals. The scientific analysis that is now looking at a 4 or higher average degree increase comes from many sources, including a recent 13 US federal agency evaluation that comprised the US Commerce, State, Trade, Health, Defense departments as well as the Environmental Protection Agency.

In many ways, the IPCC assessment will reiterate much of what the previous assessments have found, with a greater degree of scientific certainty. What is new about the IPCC report is the simple notion that since climate science is now settled, countries, industries and communities face an arithmetical challenge in working out the carbon budget needed to constrain emissions at a level to maintain the 2 degrees Celsius cap.

What science tells us is that the global carbon budget will require a reduction in total GHG emissions by almost 60 percent, from around 35 billion tons per year to around 15 billion. With population growth globally, that means that the per capita CO<sub>2</sub> equivalent will need to be reduced seven-fold.

So we need to look seriously at what this challenge means, including what it means for the energy sector. There are enough oil gas proven reserves already discovered; governments shouldn't be handing out free tax breaks to discover more fossil fuels that we know will break the global carbon budget. IISD will be working on this issue in the coming year, including finding ways to dramatically reduce the use of coal, and to dramatically scale up investments in cleaner, renewable energy including hydro-power.

Published by the International Institute for Sustainable Development.

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