

COVER STORY

Oil and Water

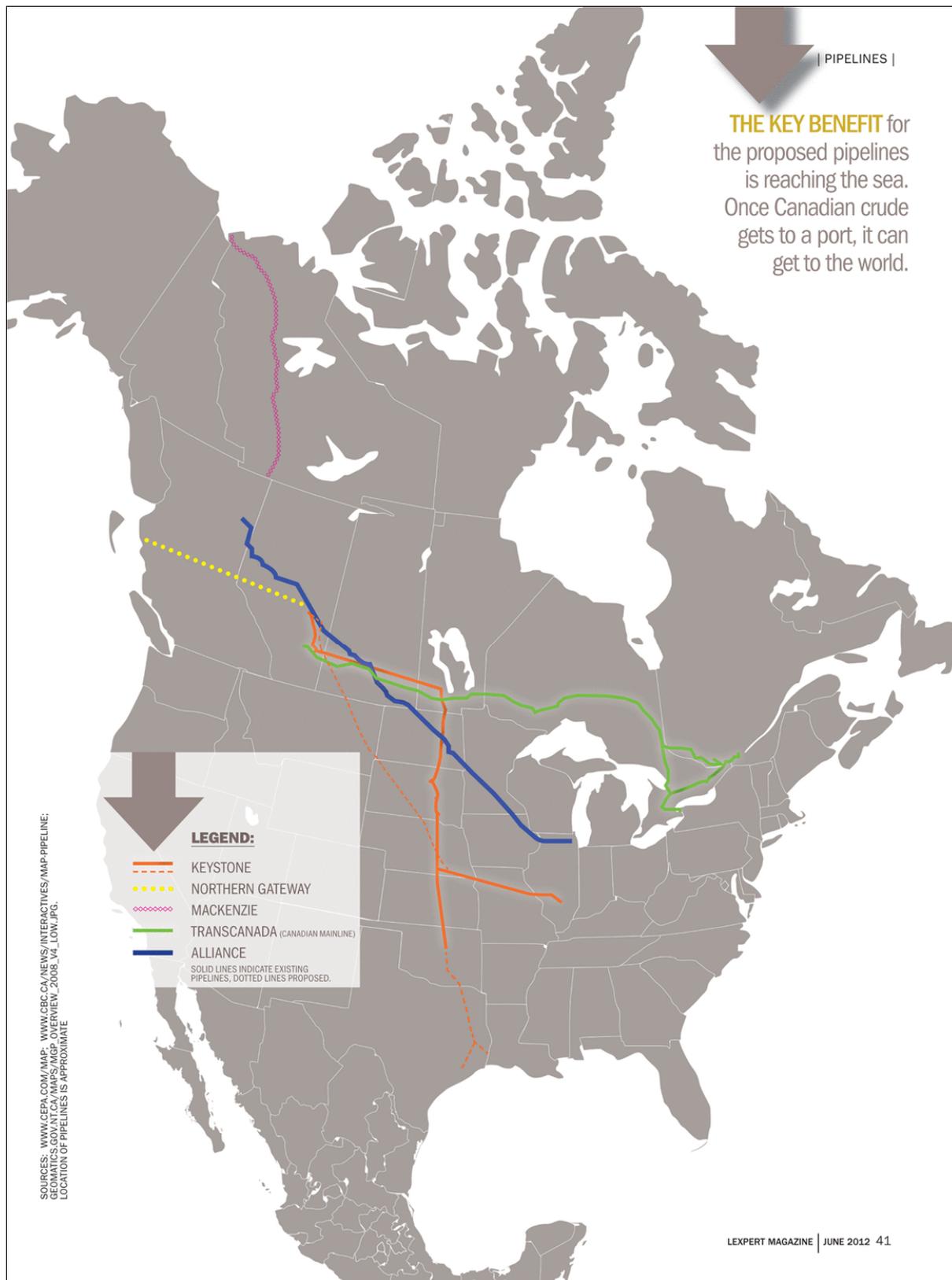
PIPELINE PROPONENTS and opponents hold starkly different views about the Canadian economy. How much compromise is needed to get the pipelines built?

BY MARZENA CZARNECKA

P IPELINE PROJECTS HAVE rarely been uncontroversial. The 1956 approval process for what would become the first TransCanada pipeline, connecting consumers in Ontario and Québec to the supply of natural gas in Western Canada, effectively brought down the federal Liberal government that pushed it through, and ended the careers of several prominent politicians, including then Minister of Trade and Commerce, C.D. Howe.

But none have even approximated the polarization, passion and outright hysteria currently accompanying the proposed trans-provincial Northern Gateway pipeline and the now stalled cross-border Keystone XL pipeline. Whether one listens to the projects' proponents and their advocates – including the unabashedly *partisan*, pro-pipeline federal government – or the environmental and community groups lobbying against the project, the rhetoric is beyond inflamed, and anything that smacks of compromise is apparently off the table.

Why? Simply, because the stakes have never been higher. Not for the environmentalists, not for the project proponents, and not for the energy-focused Canadian government. In 2010, energy products accounted for more than 22 per cent of Canada's export revenue. Not all of that is the oil sands crude that would flow through Gateway and Keystone, of course, but Harper's policy-makers see oil sands production alone increasing the Canadian GDP by nearly \$800 billion between 2000 and 2020. Currently, Canada exports 69 per cent of its crude, oil sands and other, most of it to the United States. Gateway in Canada would bring



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THE KEY BENEFIT for the proposed pipelines is reaching the sea. Once Canadian crude gets to a port, it can get to the world.

SOURCES: WWW.CEDA.COM/MAP; WWW.CBC.CA/NEWS/INTERACTIVES/MAP-PIPELINE; GEOMATICS.GOV.NT.CA/MAPS/IMG/MP-OVERVIEW_2008_V4_LOW.JPG. LOCATION OF PIPELINES IS APPROXIMATE

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“AS CANADIANS, we can’t take it for granted that there is going to be a market and a customer south of us forever without impediment. ... We need to diversify our markets.”

that supply to the West Coast; and while Keystone XL in the US is nominally about getting it more efficiently to the US market, it’s ultimately about getting that supply *out* of Port Arthur.

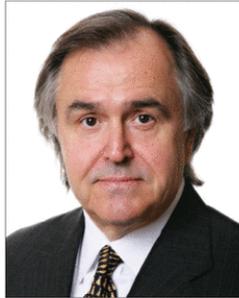
That changes *everything*. “Once you hit tide water, then you are a world commodity,” says Lorne Carson, a project-finance lawyer with Osler, Hoskin & Harcourt LLP in Calgary. Getting those pipelines built and getting crude flowing through them isn’t – for the federal government and the pipeline and hydrocarbon industries, anyway – about *those* specific projects. It’s about redefining the market for Canadian energy exports. When Alberta oil trades at \$70, West Texas oil trades at \$100. “That is an \$18-billion value discount,” says Carson. The same thing happened with Alberta natural gas, until the Alliance Pipeline got built. The premium paid in Asia is even higher. With the suspension decision on Keystone, the attractiveness of those markets — the necessity of getting to those markets is, as Carson puts it, “more imperative.” Listen carefully, because this is what it is all about: once Canadian crude gets to a port, it can get to the world. Asia today. South America tomorrow. Wherever it’s most needed, at the best price, as the hydrocarbon demand fluctuates.

And that means — accelerated oil sands development. The frustration that pipeline proponents who see this big picture have with the opposition is extreme. But the problem isn’t that the project opponents don’t see what a game changer these pipelines are. The problem is that they *do* see it. Getting the crude to water will change everything. And if you are opposed to a hydrocarbon-powered economy — if you are opposed to current and accelerated oil sands development — it is at these coastal pipelines that you must take your stand.

“Pipelines are now a favourite target for people who want to make the pipeline project a referendum on hydrocarbon development — and the hydrocarbon world,” says Lawrence Smith, regulatory partner with Bennett Jones LLP, and former counsel to

the National Energy Board (NEB), the federal agency most in the spotlight during the pipeline wars.

Smith’s take on the issue, along with that of most regulatory lawyers at major Canadian law firms, is perhaps somewhat biased, and he owns it. His constituency, so to speak, is the project proponents. It is his



LAWRENCE SMITH
> BENNETT JONES LLP



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job to get the ruddy things approved so the clients can get them built. And when that’s your goal, the tenor of the debate about Gateway and Keystone is more than a little disturbing to you.

“There has always been and there is always going to be real and legitimate controversy around pipelines stemming from local and landowner issues,” Smith says. The Canadian regulatory process was designed to address these issues; lawyers are well versed in shepherding their clients through them, and project proponents are used to making

compromises and redesigning aspects of their projects in response to regulators’ decisions — which have long included some level of public input and consultation. “But when you start getting into the broader ideology of hydrocarbon development,” Smith continues, “and when the goal of some of the interests is to delay and thereby defeat the developments altogether — and what you’re seeing with Keystone XL and Northern Gateway in the minds of what has turned out to be a significant constituency is an attempt to bottle up what they call the tar sands...” he pauses. Can one call that concern, that strategy illegitimate? He’s on the other side here. He’s frustrated. But dissent, discussion has always been part of the process.

“That’s different,” he says. The goal isn’t to understand, to compromise, to negotiate. It’s not even to stop the pipeline: it’s to stop oil sands development. When the project proponents’ purpose is to connect that oil sands resource to the world — and thereby, effectively, step up the scope and probably pace of that development — and the opponents’ purpose is to stop the tar sands, where is the middle ground on which they can meet?

The regulatory process against which the pipeline wars are unfolding is meant to find that middle ground. The context for the Keystone debate is the US regulatory — and, frankly, mostly political — background. But the fur over Gateway is flying at home, and this engagement is taking place on a well trod regulatory battlefield. All the environmental, political and industry rhetoric aside, there are well-defined rules of engagement in the pipeline regulatory process. Whether they work — and given its pronouncements in the March 29, 2012, budget, Canada’s federal government clearly thinks several of them do not work — is a question perhaps as open to debate as the desirability of a hydrocarbon economy.

What opens them to debate is that, simply, they are neither straightforward nor simple, and while projects have gotten more complicated — and subject to wider

public scrutiny – the regulatory framework governing them hasn't changed much.

In a nutshell, this is how it's supposed to work: under the *National Energy Board Act* (NEBA), the NEB regulates any energy pipelines that cross borders, provincial or international. For such a pipeline project to be built, the NEB has to approve it, by issuing to the project proponent a Certificate of Public Convenience and Necessity. In law, the process starts when the proponent applies for this certificate. In reality, the application is pretty complex and detailed, so proponents give the NEB a preliminary information package that outlines the scope of the project. This preliminary step allows the NEB to figure out what other federal agencies might be involved (and there can be quite a few; see box to the right) and how they might work in tandem. To make all this more efficient, a Major Projects Management Office, created by the feds in 2008, provides "overarching project management and accountability for major resource projects in the federal regulatory review process, and...[facilitates] improvements to the regulatory system for major resource projects."

What generally triggers the involvement of these other agencies are their obligations under the *Canadian Environmental Assessment Act* (CEAA), and odds are, if you need a thumbs-up from the NEB on something, you're going to trigger the CEAA. Environmental assessments are, certainly these days, the most public aspect of the process. And while CEAA reviews and NEB reviews – as well as any reviews required by provincial legislation – are not *legally* required to occur in tandem, for more than a decade now, the prevalent practice on major projects such as Northern Gateway is the creation of joint review panels that meet the requirements of the CEAA and NEBA simultaneously.

So far, so good. Where things start to get bogged down is once the reviews, joint or otherwise, are underway. Between them, the NEBA and CEAA set out rules for what these panels need to review and how. This includes allowances for the type of broad public participation seen to date on Gateway. But according to critics such as Joseph Doucet, Interim Dean of the Alberta School of Business at the University of Alberta, the process allows "scope creep." In the C.D. Howe Institute's recent

Undogging the Pipes report, Doucet argues, "While issues such as energy security, greenhouse gas emissions, and energy efficiency are important to society and relevant to the energy sector and the national economy, these overarching social and environmental issues should be dealt with by governments in setting energy policy, not as part of the regulatory review process." When these

pleted, the panel gives a project a thumbs-up or -down. If the decision is positive, the NEB issues the Certificate of Public Convenience and Necessity, the application for which started the whole process. Finally, the federal government then comes back into the picture, for the certificate does not become valid until approved by the Governor in Council.

Simple, right?

Well, regulatory lawyers aver it *used* to be. "Pipeline applications used to be so routine," says Gavin Fitch, a regulatory partner with Alberta regional law firm McLennan Ross LLP. "For those of us who know anything about pipelines, yes, there certainly are breaks from time to time, but the environmental implications of pipelines [from risks involved to mitigation strategies] are well understood." The process, if not precisely cookie cutter, *used* to lack the drama that accompanied Keystone, and is accompanying Gateway.

But its reputation for unpredictably long timelines has been around for a long time. The Mackenzie Valley pipeline (also known as the Mackenzie Gas Project) got the thumbs-up from the NEB and then the federal government in March 2011. The proposed project would carry natural gas over 1,200 km from the Beaufort Sea to the Alberta border. First put forward in 1974, Mackenzie's haul was perhaps the longest on record. And it's not built yet — indeed, it may have missed its market window. During the six years that it took the project to wind its way through its second leg of the regulatory process, the market changed drastically: when the approval game down, natural gas was at \$4.57 per MMBtu, down from a high of \$15.38 in December 2005 — the date the proponents could expect a decision under the federal government's new proposed rules.

Mackenzie's lesson? First, that delay can be a darn effective strategy if your goal is to kill a project — although, as Smith is quick to point out, no one is making the case that any group of stakeholders consciously employed that strategy with the Mackenzie project. Second, that even with something as long-term as pipeline projects, one is vulnerable to market trends. And commodity prices. And competitors gaining an edge while you wait.

If pipeline opponents are putting the first

WHY THE PIPELINE APPROVAL PROCESS IS COMPLICATED

Any pipeline that crosses provincial borders triggers federal legislation. The federal pipeline approval process may include the following federal agencies and statutes:

FISHERIES AND OCEANS CANADA

Fisheries Act

TRANSPORT CANADA

Navigable Waters Protection Act

NATIONAL ENERGY BOARD

National Energy Board Act

CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY

Canadian Environmental Assessment Act

ENVIRONMENT CANADA

Canadian Environmental Assessment Act
Migratory Birds Convention Act

ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA

Department of Indian Affairs and Northern Development Act

AGRICULTURE AND AGRI-FOODS CANADA

Department of Agriculture and Agri-Food Act

INDIAN OIL AND GAS CANADA

Indian Oil and Gas Act

issues become part of the regulatory review process – as they certainly have in the recent pipeline debates – they affect timelines. The workload of the panel. The strain on the proponent — and intervenors and other stakeholders. Or, as critics such as Doucet would put it, the overall effectiveness and efficiency of the process.

Efficient or not, once the review is com-

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of these lessons into play with proposed projects like Gateway and Keystone, pipeline proponents are hyper-focused on that second lesson. With project-approval timelines clocking in not just at years but, in the case of Mackenzie at least, at decades, they need to design projects that aren't about meeting the current need or next year's need — but projects that are able to adapt to a changing, fluctuating, unpredictable global market and economy.

Coast-bound pipelines do that — so long as that economy and market remains hydrocarbon-dependent — by bringing the crude to water.

Shawn Denstedt, a regulatory partner in

But you can't be adaptable to those market changes if you're not at the ports.

This is why the Harper government is so staunchly behind the proposed pipelines; why federal Natural Resource Minister Joe Oliver is making hysterical statements about "radical groups that would seek to block this opportunity to diversify our trade" and "hijack our regulatory system" when speaking about the Northern Gateway. The federal government is, effectively, betting the Canadian farm on an energy policy in which global export of hydrocarbons is key. Prime Minister Stephen Harper could not be more clear: "It's essential that we be able sell our energy products outside

get the significance of this *before*, Finance Minister Jim Flaherty hammered it home within the budget speech: "We will ensure that Canada has the infrastructure we need to move our exports to new markets." (See "Timelines" below) They might as well have been saying, "We will make sure these pipelines get built."

This should cause, and is indeed causing, pipeline opponents angst. Josh Paterson, counsel with West Coast Environmental Law, the oldest environmental law organization in British Columbia, was braced for the proposed reforms. "Our response to that is that these are very complex decisions on very complex projects, and their impacts take a long time to study and understand," he says. "In Gateway, Enbridge has put forward literally thousands and thousands of pages of evidence. To expect the regulator to quickly understand that — never mind all of the impacted First Nations groups, community groups and citizens — to expect them to turn it around in a quick period of time is not reasonable. The bigger these projects are, the more time it should take to arrive at a decision, and it is more important that the regulator arrives at a good decision, with strong participation from the public and Aboriginal governments."

The Aboriginal consultation (and litigation) component of the pipeline approval process, both on Gateway right now and on Mackenzie and other pipelines in the past, is of course critical — and its ups and downs well-documented in the daily press. (Proposed regulatory reforms include more money to support Aboriginal consultation, as well as integration of Aboriginal consultation into the regulatory review process.) While far from uncontentious, this is well trod ground. As Fitch puts it, "After all, it is these folks' territory that this pipeline is supposed to go through." What's raising the feds' — and the industry's, as well as its legal advisors' — ire on Gateway in particular is

SOURCE: CD HOWE INSTITUTE

TIMELINES

How long does it take to get approval?

PROJECTS > Date Preliminary Info Sent to NEB > Date of NEB Decision/Certificate

- MACKENZIE VALLEY** —> Original Application March 1974 > June 1977
- MACKENZIE VALLEY (REDUX)** —> June 18, 2003 > December 16, 2010
- ALLIANCE PIPELINE** —> December 31, 1996 > December 3, 1998
- KEYSTONE** —> July 10, 2006 > September 21, 2007
- NORTHERN GATEWAY** —> November 1, 2005 > Ongoing
- KEYSTONE XL** —> July 18, 2008 > March 11, 2010

PROPOSED TIMELINES

The 2012 federal budget announced the following fixed timelines:



Osler's Calgary office, explains it this way: "As Canadians, we can't take it for granted that there is going to be a market and a customer south of us forever without impediment....We need to diversify our markets. The world energy market has changed dramatically in the last few years. The opportunities in Asia are increasing — but the energy market is going to change even more quickly and dramatically over the next 10 to 15 years. So we have to adapt to making those changes."

of North America to partners, countries other than the United States. That will require some significant infrastructure projects to go forward, and we're obviously, as we've indicated, looking at taking steps necessary to ensure we can get timely regulatory decisions."

To that end, the March 29, 2012, budget included provisions to "fix" Canada's regulatory system by, inter alia, introducing mandatory timelines for all federal environmental reviews. In case anyone didn't



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the *depth* and *breadth* of public involvement. The 4,000-plus submissions. The intervenors allegedly (and, in some cases, really) funded by non-Canadian environmental groups.

“You have to ask where is the public interest in allowing every single person, no matter where they live in the world, to have five or 10 or 15 minutes of the joint review panel’s time to speak about their concerns,” says Fitch. Minister Oliver, of course, has put it much more strongly.

But here’s where things get really interesting. The NEB is a federal agency — but it’s supposed to be an independent one. For Alan Ross, regulatory partner with national law firm Borden Ladner Gervais LLP, the current dynamic between regulator and government in face of Gateway is... fascinating, to say the least. If the politicization of Keystone down south has had Canadians raising eyebrows — to the point of pondering whether the American process violates provisions of NAFTA and whether TransCanada can sue the US government under NAFTA if Keystone doesn’t get built — there’s certainly been no lack of politicization of Gateway on its domestic turf, either.

“The infusion of politics represents a potential risk to the structure of the regulator,” says Ross. Or perhaps something more — a weakening of its integrity? It could be the recipe for an unprecedented explosion between regulator and government. In *Unclogging the Pipes*, Doucet takes the issue head on. The legal fact that “regulators do not have the final word on pipeline approval,” he writes, “might lead to ex post political interference, real or perceived, in regulatory decisionmaking. As energy policy becomes more political (witness the Keystone XL debates) and the ramifications more numerous (climate change, energy security), this concern could grow — indeed, it argues for more clarity in ex ante policy development, which could also indirectly improve the regulatory process.”

As far as the pipeline approvals currently before the Canadian regulator go, says Ross, “there may well be countervail-

ing forces here, between a government that as a matter of international strategy — as a matter of economic policy — declares that we’ve got to speed up these projects, and a regulator that under its statute views itself as independent, and says people have a right to be heard, and there is a rule of law applicable to these proceedings, and we have to follow that.”

No matter how long it takes?

That’s a tough question. Proponents pushed Mackenzie for decades — the first application was put forward in 1974 (the last in 2003). “If the proposed economics are worth the risk of delay, they will likely be put forward,” says Ross. Proponents build the risk of delay into their expectations — Enbridge, for one, did not expect Gateway to cross its finish line either in record time or with no challenges. “Nothing in this industry is a short-term proposition,” Ross adds. Once built, the pipelines then function for decades.

That, of course, is part of the fuel for the opposition fire. If built, a pipeline like Gateway will move crude — oil sands crude — for decades. To the coast. To the water. For decades. To the world.

“Oil and water don’t mix,” says Paterson. The specific issues at stake in Gateway and Keystone may be different — and, of course, involve different jurisdictions — but the basic concern is the same. “People are concerned about their water supply.” And with both Enbridge’s Kalamazoo spill and BP’s massive Macondo blowout in the Gulf still fresh in the public’s mind (and the Exxon Valdez Alaska spill neither forgotten nor, as far as the affected marine ecosystem goes, fully recovered from) it doesn’t matter how minimal or mitigated the risk of a spill from the pipeline is. “People don’t want to take the risk at all,” says Paterson.

Do project proponents really understand that? Does the federal government? And given how diverse their goals and priorities are, will there ever be a time where the two sides come to a compromise?

Some stakeholders may find a middle ground on *some* projects. But a middle

ground between those ardently opposed to a hydrocarbon economy and those who want to export Canada’s hydrocarbons to the world? When Paterson looks at the interest and argument lineup in Gateway, he sees no obvious solution. No possible compromise.

“My understanding of the position taken by First Nations who oppose this development through their country is that it is unequivocal, and while there may certainly be at some point certain communities who take a different view, there are so many others who are so deeply opposed, I don’t think...that there is room for some sort of compromise to be built,” Paterson says.

What does this mean for Gateway? And down south for Keystone? And future pipelines? “What seems clear is that there seems to be a high degree of legal risk attached to this project and this decision,” says Paterson of Gateway. “I think that it is going to face a lot of legal obstacles, which could quite realistically delay and tie it up for many years to go.”

So will it get built? Will Keystone? One thing is certain: in 2012, Canada is, firmly, a hydrocarbon-producing economy in a hydrocarbon-powered world. “Whether we like it or not, we are a country that sells natural resources to other people,” says Shawn Denstedt.

Pipelines are a way to get some of those natural resources there — including the most coveted and controversial ones. And so long as the world wants Canadian hydrocarbons — and the federal government pushes the efficient export of these as a key part of Canada’s energy and economic policy — proponents will bring projects forward. Regulators will find most of them in the broader public interest. And they will get built.

But no matter how the federal government tinkers with the regulatory process, they will undergo evermore severe public scrutiny, evaluation and opposition.

Building a pipeline will never be boring or routine again. 

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