Rhetoric Deployed in the Communication Between the National Energy Board and Aboriginal Communities in the Case of the Trans Mountain Pipeline

Lidia Cooey-Hurtado, Danielle Tan, and Breagh Kobayashi | University of British Columbia

The Canadian government has a duty to consult Aboriginal peoples on projects that impact them. However, the overall framework of the consultation and the definition of certain key terms, such as "impact" and "consent," are decided exclusively by the government. Retaining hold of this decision-making power is inconsistent with rulings by the Supreme Court of Canada and United Nations' Declaration on the Rights of Indigenous Peoples. The rhetoric used in the proposal, advertisement, and approval of the Trans Mountain Pipeline Expansion reflects and perpetuates both the power imbalance and the failure of the Canadian government to invest in a symbiotic and long-term relationship with First Nations, Métis, and Inuit peoples of Canada. The Canadian government uses similar rhetorical strategies as Kinder Morgan, such as accentuating pipeline positives and downplaying negatives, which construct a perspective that favours economic development and marginalizes Indigenous rights, human well-being, and ecological intactness.

The Aboriginal peoples of Canada possess treaty rights in exchange for ceding certain rights to their land. Treaty rights include Aboriginal ownership of reserve lands and the preservation of their traditional way of life. Since the Haida case in 2004, the Supreme Court of Canada has "held that the Crown has a duty to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights" (Indigenous and Northern Affairs Canada). The duty to consult, founded on reconciliation, aims to build nation-to-nation relationships with Aboriginal peoples "based on recognition of rights, respect, cooperation and partnership" (Indigenous and Northern Affairs Canada). The federal government is responsible for "designing the form and content of consultation process" (Indigenous and Northern Affairs Canada). The affected party should participate in determining the form of consultation. However, the Crown's model of "duty to consult" excludes Aboriginal peoples and is inconsistent with the notion of duty to consult. We see this in the consultation process of the Trans Mountain Pipeline Expansion project.

On November 29th, 2016, the Federal

government of Canada approved the Trans Mountain Pipeline Expansion project, directing the National Energy Board (NEB), a department of the Federal government, to issue a Certificate of Public Convenience and Necessity (NEB Report). The pipeline expansion, to be constructed by the Kinder Morgan energy infrastructure company, will carry crude oil from Alberta to British Columbia for export (see Fig. 1) (Tasker). The Crown relied on the NEB's hearings to fulfil its duty to consult in this case (Young). Despite firm objection from Aboriginal communities (Bailey), BC's Environmental Assessment Office issued approval of the pipeline on December 8th, 2016, followed by the BC government's approval, in solidarity with the Crown (Environmental Assessment Office).

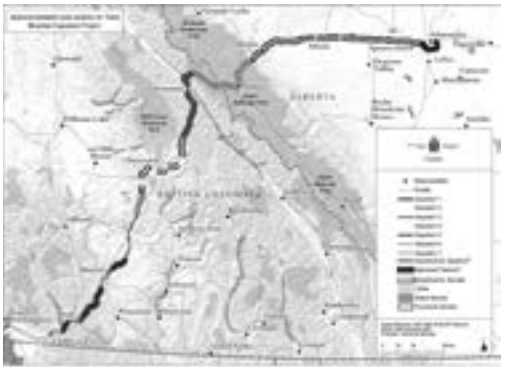

Figure 1
Proposed pipeline expansion route (NEB)

An analysis of letters, reports, and hearing transcripts on the NEB website shows that consultations were not conducted as government-to-government consultations (Government of Canada, "Consultation"). Instead, the Crown made the decisions. This shows a low level of decision-making power granted to Aboriginal communities (Forsyth et al. 9). In addition, government and Kinder Morgan documents share a similar kind of rhetoric, where both parties emphasize terms such as "economic benefits" and "market diversification" (see Sections 1.1 and 1.3). Terms used to describe the impacts on cultural and ecological life aren't given the same consideration as terms used to describe potential economic gains.

In this analysis, we will use the theories of Kenneth Burke to characterize the rhetoric of the NEB, Kinder Morgan, and certain Aboriginal communities. Although commonly thought of as artistic and subjective, rhetoric is found in all uses of language (Burke 114-25), including bureaucratic writing in government reports, letters, and policy manuals. What Burke calls the "terms" used by governments are suasive, conveying specific motives. These agents speak with terms that colour the "lens" through which they see reality (Burke 116). As "the nature of our terms affect the nature of our observations" (Burke 116), the nature of the agents' terms allows them to "select" a perspective by emphasizing certain values and excluding others, thus "deflecting" other perspectives (Burke 115). In governmental consultation, the privileging of one group's perspective, in part through privileging one group's terms over another, results in the suppression of other parties involved. In the case of the Trans Mountain pipeline, the NEB privileges one set of participants (Kinder Morgan) over another (Aboriginal communities), and this is both visible in and perpetuated by the rhetoric used.

The Rhetorical Landscape

The Rhetoric of Kinder Morgan

In its public documents, Kinder Morgan manipulates the reader by accentuating positives and concealing negatives. When Kinder Morgan promotes the pipeline's potential benefits on its webpage, it uses viewer-friendly images and specific, appealing terms ("$3.7 billion" and "15,000 jobs") (see Fig. 2). At the same time, information about the expansion project presented in letters, reports, and applications for Aboriginal viewers obstructs understanding. The technical codes and references make it harder for Aboriginal viewers (and the public) to critically address shortcomings in the project. As stated in one hearing, "It is unrealistic in the extreme to imagine for one moment that a Kwantlen First Nation whose future could be so impacted could meaningfully involve itself in this process without counsel and without technical advisors to tell them what this application means, to tell them where the shortcomings are in the assessment, to prepare studies to address the gaps in the application" (International Reporting, Transcript Hearing Volume 7, para. 3120).

For communities to participate in a technical dialogue with Kinder Morgan, they require experts and specialists. Obtaining technical counsel requires time and monetary resources. As a result, the ability to understand technical jargon depends on the financial assets of a given party. The language in these documents makes it difficult for people to understand the burdens (negative impacts) of the pipeline if they do not have time or financial capital, as demonstrated by this passage:

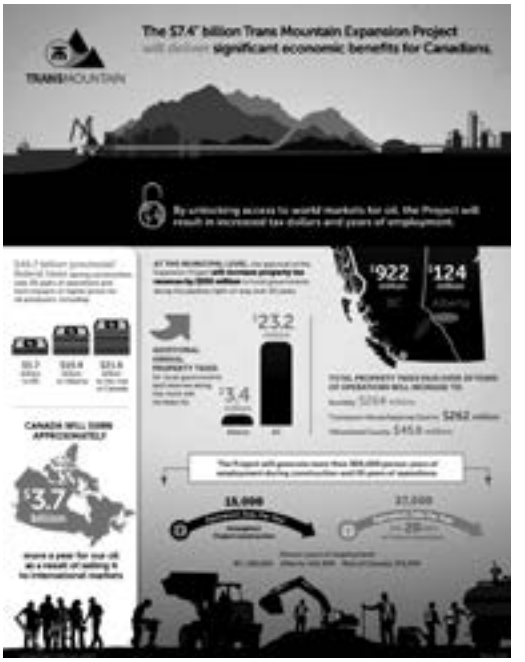

Figure 2
Benefits of the Trans Mountain Expansion project (Kinder Morgan)

> …. the NEB issued CPCN OC-064 and Amending Orders AO-003-OC-2 and AO-002-OC-49 (Filing ID A80871). Trans Mountain applies to the National Energy Board (NEB or Board), pursuant to sections 33 and 34 of the National Energy Board Act (NEB Act) and section 50 of the National Energy Board Rules of Practice and Procedure, 1995 (Rules)... (Trans Mountain)

In short, while the burdens have to be excavated from obfuscation, the pipeline benefits are easily understood. Thus, more weight is given to potential benefits, and the burdens are buried in technical language. Through

Kinder Morgan's rhetorical strategies, the public is persuaded to support the pipeline, rather than critique or protest it, and Aboriginal communities' efforts at assessing and critiquing the pipeline are frustrated.

The Rhetoric of the Government

Similar to Kinder Morgan, the NEB uses specific terms to emphasize the benefits of the pipeline while downplaying the burdens. In their report, the NEB writes, "The Board finds a considerable benefit in the form of jobs created across Canada: Pipeline construction - 400–600 workers per spread" (NEB 15). Concerning environmental impact, "The Board finds that there is a very low probability of a marine spill from a Project-related tanker that may result in a significant effect (high consequence). The Board finds this level of risk to be acceptable" (NEB 17). The NEB quantifies and guarantees benefits, but chooses not to quantify risk by using uncertain terms such as "probable". The NEB doesn't use "probable" for jobs, but determines this as certainty for the future (J. Giltrow, personal communication, 1 Feb. 2017). This rhetorical mode helps the NEB to conceal burdens and direct focus onto jobs, adopting Kinder Morgan's perspective.

The tone in the letters written by the NEB to Aboriginal communities, as in Kinder Morgan's documents, is technical and authoritative, constructing a premise where Aboriginal peoples' consent to the project is not valued. In a letter to Aboriginal communities affected by the project, the NEB writes, "The Board will make a decision of whether to approve the Project by weighing both the positive and negative impacts of the Project. *Should the Board approve the Project, it may impose conditions to ensure any negative impacts will be mitigated or minimized*" (Young, emphasis added). The NEB seems to say that both the pros and cons will be considered, but their emphasis on benefits and downplay of burdens in their report contradicts this statement. Also, the Board asserts its the right to make decisions and impose conditions, but Aboriginal communities do not. Thus, the Board overrides Aboriginal peoples' right to give consent (see Section 2.2).

The NEB uses the same unequal power structure in hearings to imply that Aboriginal peoples' consent doesn't matter. Oral hearings are a part of the Canadian government's consultation process when approving projects that are deemed, by the government, to affect the public (*National Energy Board Handbook*). The facilitators at the hearings are all NEB employees; how much can they speak to Aboriginal interests? In one hearing, Chairman David Hamilton states,

> *We will consider it all and we could* decide whether to recommend approval to the government if they can approve or reject this project. That's our job. It's to review all that information and recommend approval or we can recommend that the project be rejected. (International Reporting, Hearing Transcript Volume 2, para. 536, emphasis added)

Hamilton appears to say that the NEB will consider Aboriginal communities' interests in their decision. However, Hamilton's statement stresses the Crown's right to make all decisions. It's about the Crown's ability to approve or reject, not Aboriginal communities'. This confirms that Aboriginal peoples' consent loses its meaning, the Crown's duty to consult is not fulfilled, and nation-to-nation negotiations are not used.

The Rhetoric of Tsleil-Waututh, Squamish and Shxw'ōwhámel Nation

The representatives of Tsleil-Waututh, Squamish and Shxw'ōwhámel Nation are critical of the rhetoric employed by the government as they express concerns about the project's technical studies, since it serves to undermine their constitutional rights, the consultation design, and the government's execution of duty to consult.

Ernie George, the director of the Treaty, Lands and Resources Department of the Tsleil-Waututh Nation (TWN), criticizes that "despite ... numerous requests, the NEB has still failed to offer to consult and cooperate with the TWN in respect to the technical assessment of the project.... Declining to meet with TWN to consult and cooperate with us as you did in your June 20 letter is also inconsistent with the NEB's duties under s. 18 of CCEA" (George). Criticisms of the NEB's unconstitutional actions are seen in numerous other letters from Aboriginal communities to the NEB. These letters exemplify systemic injustices perpetuated by the Crown, which are by no means limited to the scope of the Trans Mountain Pipeline consultation process. In a letter from the Squamish Nation to the NEB, Squamish legal counsel criticized the pipeline route assessment as coming from a technical perspective and not considering "the history of the use of the Burnaby Mountain area and potential impacts to the surrounding communities, including impacts to traditional marine and land use" (Bruce). The NEB fails to consider Squamish perspective and values when it is their duty.

Further critique of the Crown's rhetoric by Aboriginal communities is seen in hearing transcripts. For instance, in their hearing, the Shxw'ōwhámel Nation challenges the appropriateness of the consultation structure and its unilateral design:

> ...Shxw'ōwhámel is disappointed that there is a largely absent Crown in this process. Shxw'ōwhámel, like other First Nations, has a nation-to-nation relationship with the Crown and there is a constitutional duty and obligation for the Crown to engage in a process with Shxw'ōwhámel to consult, to accommodate, and in fact, to obtain consent whenever there is title for any types of development in their territory.… In a related note, Shxw'ōwhámel, like other First Nations, was not consulted in the design of this process. And, again, going back to the nation-to-nation relationship and the constitutional nature of the obligations and duties to Shxw'ōwhámel, it is not appropriate for this process to be designed unilaterally and in a hope to fulfill these obligations without first engaging in how this process would be undertaken. (International Reporting, Hearing Transcript Volume 6, para. 2268-69)

The Shxw'ōwhámel Nation points out the unconstitutional nature of the Crown's consultation design where Aboriginal communities have no input on the content of consultation. This excludes Aboriginal communities with whom the Crown has partnerships and duty to consult in the project from the start.

Other communities also state that the duty to consult has not been fulfilled. There have been "over a hundred legal cases about the duty to consult and accommodate since 2004," showing that consultation based on "trust, respect, and understanding" needs further development (First Nations Leadership Council 15). Communities are aware and

critical of the NEB's breach of conduct, poor communication, and distortion of the rhetorical situation.

The Solutions Landscape

Change in Rhetoric and Worldview

The government's failure to address concerns is linked to its failure to use Burkean terms for expressing the profound totality of the damage produced by increased marine traffic, emissions and oil spills, interruptions to marine life, pollution, and the linkage between these dangers and human health. The language used by the government to describe burdens does not effectively encompass their severity. This results in the lack of their recognition in other legal frameworks, such as in court (J. Giltrow, personal communication, 1 Feb. 2017).

A gap needs to be bridged between the government's worldview (institutional knowledge) and indigenous or alternative worldviews (traditional ecological knowledge, or TEK) (Pierotti & Wildcat). Scholars have examined how TEK can be successfully integrated into law, policy, and other frameworks. By assessing difficulties and constraints of current development policies, they have proposed principles and models for successful institutional structures and partnership building that allow TEK and science to complement as opposed to compete (Grainger et al.; Wyatt 171-80; Bohensky and Maru). For example, Grainger et al. illustrate the importance of generating a 'Memorandum of Understanding' between partners, co-edited by both parties, outlining their intentions, responsibilities, and roles to set out a structure for the partnership (487). The Crown can learn from these guiding principles and rhetorical models to establish partnerships that allow equal share of power for Aboriginal communities. This would entail inclusion of Aboriginal terms of environmental and human impact along with government and industry terms of profit. The Crown should ensure more flexibility in their language use and make room for Indigenous and alternative perspectives in institutional structures, or they are unlikely to hold fair consultations where alternative opinions are heard and considered. The facilitators at any consultation should be agreed upon by both parties to ensure a fair consultation.

Free, Prior, Informed Consent (FPIC)

In 2016, Canada officially adopted the United Nations' Declaration on the Rights of Indigenous Peoples (UNDRIP) (Fontaine). Article 32(2) of the UNDRIP requires states to consult and obtain Free, Prior and Informed Consent (FPIC) (First Nations Leadership Council 54). FPIC is freely-given consent without any coercion or manipulation (J. Bulkan, personal communication, 18 Nov. 2016). When the principles of FPIC are followed, Aboriginal communities are given adequate time to formulate responses and questions after receiving information in a form that is understandable (J. Bulkan, personal communication, 18 Nov. 2016). The community is aware of its right to say 'no', and consent is given at every stage of project development (Boreal Leadership Council 4). It is evident in the case of the Kinder Morgan pipeline that FPIC is not being respected. For the Ditidaht Nation (Smart), it's clear that consent was not obtained, because the NEB makes the final decision. As Ditidaht Chief Councillor Robert Joseph put it, "We came to the determination … that [the project] was going to go ahead anyway. So it's not really support. If we opposed it, we would have no way of addressing spills, because we would be disqualified from funding from

Trans Mountain" (Smart).

FPIC is being violated, not only in this project, but in many others as well (First Nations Leadership Council 15). Although FPIC formulates a definition of consent on which both the government and Aboriginal communities agree, it is only effective if the government communicates transparently and adopts the perspective of Aboriginal peoples, so they can consult fairly and accommodate the needs of these communities.

Acknowledgments

Many thanks to all of those who have helped us build this paper. We could not have done it without the tremendous patience and generosity of everyone involved, most especially Dr. Andrea Lyall, Dr. Janet Giltrow, Dr. Janette Bulkan, the staff of the University of British Columbia's Centre for Scholarly Communication, and Isabela.

Works Cited

Bailey, Ian. "B.C. First Nations Unite in Fight against Trans Mountain Pipeline." *The Globe and Mail: Vancouver*, 17 Jan. 2017, www.theglobeandmail.com/news/british-columbia/bc-first-nations-unite-in-fight-against-trans-mountain-pipeline/article33653315/.

Bohensky, Erin, and Yiheyis Maru. "Indigenous Knowledge, Science, and Resilience: What Have We Learned from a Decade of International Literature on 'Integration'?" *Ecology and Society*. The Resilience Alliance, 26 Oct. 2011, www.ecologyandsociety.org/vol16/iss4/art6/.

Boreal Leadership Council. *Free, Prior, Informed Consent in Canada: A Summary of Key Issues, Lessons, and Case Studies towards Practical Guidance for Developers and Aboriginal Communities*. Boreal Leadership Council, 2012, borealcouncil.ca/wp-content/uploads/2013/09/FPICReport-English-web.pdf.

Bruce, Aaron. "Final Argument by the Squamish Nation." Application for the Trans Mountain Expansion Project. *Proc. of National Energy Board Hearing Order OH-001-2014*, Burnaby, vol. 28, 2016.

Burke, Kenneth, and Joseph R. Gusfield. *On Symbols and Society*. Chicago, IL: U of Chicago P, 1989.

Environmental Assessment Office. "Trans Mountain Expansion." *EAO Project Information and Collaboration (EPIC)*. British Columbia Environmental Assessment Office, 2017, projects.eao.gov.bc.ca/p/trans-mountain-expansion/detail.

The First Nations Leadership Council. "Advancing an Indigenous Framework for Consultation and Accommodation in BC." *Proc. of British Columbia Assembly of First Nations, Union of British Columbia Indian Chiefs, & First Nations Summit*, Vancouver. 2013.

Fontaine, Tim. "Canada officially adopts UN declaration on rights of Indigenous Peoples." *CBC News*. CBC/Radio Canada, 10 May 2016.

Forsyth, Glen, Ronald Trosper, and George Hoberg. "Chapter 4: Who's Got the Power?" *Analysis of Aboriginal Decision-Making Power in Canadian Forest Management Arrangements*. 2006. Working Paper of University of British Columbia.

George, Ernie. "Re: Trans Mountain pipeline ULC Application for the Trans Mountain Expansion Project ('The Project') Tsleil-Waututh Nation Update on its Assessment of the Project." 14 Nov 2014. Letter Sent to National Energy Board.

Government of Canada; Indigenous and Northern Affairs Canada. "Consultation and Engagement at Indigenous and Northern Affairs Canada." Indigenous and Northern Affairs Canada. Government of Canada, 06 June 2017, www.aadnc-aandc.gc.ca/eng/1307644732392/1307644769769#sec1.

Grainger, Sue, et al. "The John Prince Research Forest: Evolution of a Co-management Partnership in Northern British Columbia." *The Forestry Chronicle*, vol. 82, 2006, pp. 484-95.

Haida Nation v. British Columbia (Minister of Forests). *Judgments of the Supreme Court of Canada*,18 Nov. 2004, scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do.

Indigenous and Northern Affairs Canada; Communications Branch. "Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011." Government of Canada, 2016, www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675#chp3_2_6.

"International Reporting Inc. Hearing Transcript Vol. 2 (A62594) OH-001-2014." National Energy Board REGDOCS. Government of Canada, 14 Nov. 2014, apps.neb-one.gc.ca/REGDOCS/Item/View/2503917.

"International Reporting Inc. Hearing Transcript Vol. 6 (A62594) OH-001-2014." National Energy Board REGDOCS. Government of Canada, 14 Nov. 2014, apps.neb-one.gc.ca/REGDOCS/File/Download/2538772.

"International Reporting Inc. Hearing Transcript Vol. 7 (A62594) OH-001-2014." National Energy Board REGDOCS. Government of Canada, 14 Nov. 2014, apps.neb-one.gc.ca/REGDOCS/Item/View/2526215.

Kinder Morgan. "Economic Benefits." *Trans Mountain*. Kinder Morgan Inc., www.transmountain.com/economic-benefits. Accessed 8 June 2019.

"National Energy Board Certificate OC-064 and Orders AO-003-OC-2 and AO-002-OC-49 to Trans Mountain Pipeline ULC - Trans Mountain Expansion Project (A80871)." National Energy Board REGDOCS. Government of Canada, 01 Dec. 2016, apps.neb-one.gc.ca/REGDOCS/Item/Filing/A80871.

National Energy Board. *National Energy Board Hearing Process Handbook*. Government of Canada, 06 Jan. 2017, www.neb.gc.ca/prtcptn/hrng/hndbk/index-eng.html.

National Energy Board. "National Energy Board Report (OH-001-2014)." Rep. no. A77045. Government of Canada, 19 May 2016, apps.neb-one.gc.ca/REGDOCS/Item/Filing/A77045.

Pierotti, Raymond, and Daniel Wildcat. "Traditional Ecological Knowledge: The Third Alternative." *Ecological Applications*, vol. 10, 2000, pp. 1333-40.

Smart, Amy. "Better in than out: Why Nine Vancouver Island First Nations Signed on with Kinder Morgan." *Vancouver Sun*, 04 Dec. 2016, vancouversun.com/news/local-news/better-in-than-out-why-nine-vancouver-island-first-nations-signed-on-with-kinder-morgan.

Tasker, John Paul. "Trudeau Cabinet Approves Trans Mountain, Line 3 Pipelines, Rejects Northern Gateway." *CBC News*. CBC/Radio Canada, 29 Nov. 2016, www.cbc.ca/news/politics/federal-cabinet-trudeau-pipeline-decisions-1.3872828.

Trans Mountain. "Re: Trans Mountain Pipeline ULC (Trans Mountain) Trans Mountain Expansion Project (TMEP) Board File OF-Fac-Oil-T260-2013-03 02 Sample Section 34 Notices and Plan, Profile and Book of Reference (PPBoR)." 09 Dec. 2016. Letter sent to National Energy Board.

Wyatt, Stephen. "First Nations, Forest Lands, and 'Aboriginal Forestry' in Canada: From Exclusion to Co-management and Beyond." *The Canadian Journal of Forest Research*, vol. 32, no. 2, 2008, pp.171-80.

Young, Sheri. "Trans Mountain Expansion Project." 12 Aug 2013. Letter sent to Musqueam First Nation.