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Competing Visions and Inequitable Costs: the National Energy Strategy and Regional Distributive Conflicts

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The central aim of this article is to provide analysis of the current political dynamic of the push for a National Energy Strategy (NES) by examining it through the lens of the distributive effects associated with the transition to a low-carbon economy. We begin by outlining several distributive effects that are inherently associated with energy and climate policy and then discuss how this basic challenge has been framed by various participants involved in the NES discourse. While we view co-ordination of climate and energy policy as desirable, we identify a number of challenges that undermine coordination. We find that key participants in the NES dialogue have been reluctant to explicitly address the problem of distributive effects. We also find that the weakness of existing intergovernmental institutions hinders the ability of Canadian governments to reach a national agreement. Based on these findings, we conclude that coordinating climate and energy policy in one national program can only be achieved if more robust mechanisms for intergovernmental negotiations are adopted and all participants involved are willing to explicitly address the problem of distributive effects.

Essentiellement, cet article constitue une analyse des enjeux idéologiques actuels sous-tendant le développement d'une politique énergétique nationale (PÉN), considérant les effets distributifs qu'entraîne la transition vers une économie à faible émission de carbone. Les auteurs décrivent tout d'abord une série d'effets distributifs intimement liés à la politique sur l'énergie et le climat puis ils étudient la manière dont ce premier défi a été relevé par les divers intervenants ayant contribué au débat sur la PÉN. Les auteurs sont d'avis qu'une coordination de la politique sur l'énergie et le climat est préférable, mais ils identifient plusieurs obstacles à cette coordination. Selon eux, les principaux intervenants ayant contribué au

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débat sur la PÉN ont hésité à traiter spécifiquement du problème des effets distributifs. Toujours selon eux, la faiblesse des institutions intergouvernementales actuelles ne permet pas aux gouvernements canadiens de parvenir à une entente nationale. À partir de ces constats, les auteurs concluent qu'il n'est possible de coordonner une politique sur l'énergie et le climat dans le cadre d'un programme à l'échelle nationale que si des mécanismes plus efficaces sont adoptés en matière de négociation intergouvernementale et si tous les intervenants impliqués ont la volonté de traiter spécifiquement du problème des effets distributifs.

Although progress has been slow, it is now recognized that by implementing climate-change policy Canada, and the other industrialized nations, are in the initial stages of making the transition to a low-carbon economy and society. One analyst puts it this way: "On reflection, we are in a decades-long transformation of our economic, technological and energy systems to deal with population growth and a lower carbon footprint".[1] The transition is threatened, however, by the fact that it inevitably has major distributive impacts, motivating those actors who believe their interests are suffering (such as fossil fuel industries, or those living in proximity to wind turbines) to seek to stall its progress. The transition to a low-carbon economy will also produce winners (such as the wind-power industry) seeking to speed it along. The balance of political power between those who benefit and those who lose from this large-scale change in distributive effects will likely be an important factor influencing the speed and nature of the transition.

In Canada, these distributive effects have been particularly acute with respect to regional conflicts associated with geographic concentration of fossil-fuel energy extraction in some parts of the country (primarily the western provinces and offshore Newfoundland) and concentration of hydro-electric and other renewable energy capacity in others (British Columbia, Manitoba, Ontario, and Quebec). These basic differences in economic interest respecting energy generation and therefore climate change policy are one of the major factors explaining the failure of the National Climate Change Process (NCCP), the attempt by Canadian federal and provincial governments to reach agreement on a national, co-ordinated policy to reduce greenhouse gas emissions during the period 1990 to 2002. Since then, the federal and provincial, as well as municipal, governments have been engaged in unilateral climate-change policy-making, with no attempt at national co-ordination.[2]

Nevertheless, we are now seeing calls for co-ordination in the closely related field of energy policy, in particular respecting the proposed Northern Gateway pipeline which to achieve the objectives of Alberta and the oil industry must pass through, and pose environmental risks for, British Columbia — thus necessitating at least some implicit form of co-ordination between the two provinces. The economic interest of the Alberta government did not lead it to support national co-

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1 D Gagnier, "Sustainable Energy: A Driver for Economic, Environmental and Social Well-Being", *Policy Options* 33:2 (February 2012) 58 at 58.

2 D Macdonald, "Harper Energy and Climate Policy: Failing to Address the Key Challenges." in GB Doern and C Stoney, eds, *How Ottawa Spends: 2011-12* (Montreal: McGill-Queen's University Press, 2011) 127 [D Macdonald].

ordination of greenhouse gas mitigation efforts, but that interest does lead it to support co-ordination of pipeline approvals. This undeniable fact of interdependence in the realm of energy policy has led different state and non-state actors, for very different reasons, to endorse the concept of the proposed National Energy Strategy (NES).

The purpose of this paper is to provide analysis of the current political dynamic of the push for an NES by viewing it through the lens of the distributive effects associated with the transition to a low-carbon economy. To do so, we identify the distributive effects inherently associated with energy and climate policy. We then discuss the ways in which this basic challenge has been framed in the current NES discourse and has influenced its evolution to date. Finally, we present the argument that co-ordination of climate and energy policy in one national program is definitely needed, but can only be achieved, particularly given the weakness of the institutions of Canadian intergovernmental relations used to develop national policy, if all involved are willing to explicitly address the problem of distributive effects and negotiate means of more equitably sharing the costs of the transition to a low-carbon economy.

1. DISTRIBUTIVE EFFECTS ASSOCIATED WITH NATIONAL CLIMATE AND ENERGY POLICY

Policy analysis has long recognized that any policy initiative and use of the associated policy instrument such as tax or law will impose different costs and benefits upon different groups.[3] For these purposes, we classify these groups in three ways: 1) by demographic characteristics (e.g., financial status or age); 2) by temporal characteristics (e.g., policy which imposes costs on this generation to provide benefits for future generations); or, 3) by spatial location (e.g., urban or rural). In this section we set out a listing of the most important existing and potential distributive effects upon members of these groups resulting from federal and provincial policy actions associated with a National Energy Strategy. First, however, we delineate the concept of "distributive effects" in terms of environmental policy.

Johnstone and Serret set out the two basic categories of environmental distributive effects: (1) the distribution of the impacts of environmental problems and associated risk (referred to as the "distribution of environmental quality"); and, (2) the distribution of cost or benefit associated with the environmental policy intended to address those problems.[4] The first set of impacts is primarily conceived in demographic and spatial terms, and is most commonly associated with toxic pollution, such as air pollution in the low-income inner city. The second category refers to financial cost or benefit flowing from environmental policy, such as the differing financial burden imposed by the same carbon tax upon poor and rich. While important in moral terms, our interest is the ways in which such distributive effects motivate environmental policy actors. Analysts of environmental policy, drawing on

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3 T Sefton, "Distributive and Redistributive Policy" in M Moran, M Rein, and RE Goodin, eds, *The Oxford Handbook of Public Policy* (Oxford: OUP, 2006) 624.

4 N Johnstone & Y Serret, "Distributional effects of environmental policy: Introduction" in Y Serret & N Johnstone, eds, *The Distributional Effects of Environmental Policy* (Cheltenham, UK: Edward Elgar, 2006) 1.

Mancur Olson, have pointed to the way in which the costs of addressing a problem such as toxic air pollution are concentrated, born by a relatively small number of polluting firms, while the resulting environmental benefits are dispersed, received by a relatively large number of organizations and individuals. This means the firms are much more motivated than those receiving the benefit and so devote more resources to the policy contest, tilting the balance of political power in favour of the polluter.[5]

Distributive effects associated with the transition to a low-carbon economy must also be considered in terms of these two interconnected sets of cost and benefit and their implications for political motivation and power. The distribution of environmental quality associated with climate change can be identified, in terms of vulnerability to impacts — such as those with less financial or institutional capacity to adapt, and those who are vulnerable due to location, such as low-lying island states or those living on coasts exposed to sea-level rise. In terms of the cost and benefit of climate policy, those whose well-being depends upon fossil-fuels, such as fossil-fuel energy generators, who will lose market share, and high-quantity users who must switch to higher cost renewable fuels, plus those more vulnerable to effects of increased energy prices, such as the poor, will pay a higher portion of the total policy cost than others. Conversely, policy will provide benefit for those such as renewable energy industries, or citizens already living in high-density urban areas, served by public transit. All these actors are motivated to support or oppose climate-change policy by reason of the distributive effects they experience, of climate change itself or of climate policy.

More specifically, in terms of the policy areas caught up in the current NES dialogue, we identify five distributive effects, which are primarily spatial, but also demographic in terms of financial status of different industrial sectors (although temporal implications are important, they are not part of the current policy dialogue). The five distributive effects are:

> 1) the underlying distributive issue of the wealth boom in the western provinces associated with rising oil prices over the past decade (interrupted by the onset of recession in 2008) and its implications for national equalization of total Canadian wealth;
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> 2) the basic question which any national energy strategy must address, of the relative importance granted to different fuels (essentially, different forms of fossil, nuclear and different renewables), since to the extent policy implemented under the strategy supports one over the others it confers benefit on firms and groups in different regions;
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> 3) as a sub-set of that issue, federal government energy policy and subsidy for research and development, which has shifted decisively from renewables to carbon capture and storage, plus the total of provincial energy technology research and development spending — again which fuels (and therefore regions), are privileged in federal and provincial energy policy spending?;

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5 K Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy* (Vancouver: UBC Press, 1996).

4) the associated fact that greenhouse gas emission mitigation, for instance to the 6% below 1990 levels agreed at Kyoto or the current federal government target of 17% below 2005 levels by 2020 or any other national target, will impose much higher costs on Alberta and Saskatchewan than on other provinces — how will the costs of mitigation be allocated amongst different sources and therefore regions?;

5) energy transportation across provincial borders or international borders which may have the effect of giving financial benefit to one region while imposing environmental risk upon another — this was a significant factor, respecting concerns for local water quality in Nebraska, in the politics of the Keystone Pipeline and is very much an issue with respect to the proposed Northern Gateway pipeline, as discussed below.

2. FRAMING OF THE DISTRIBUTIVE EFFECTS ISSUE IN THE CURRENT NES DISCOURSE

The National Energy Strategy was first publicly proposed by Professor Roger Gibbins of the Canada West Foundation in a report titled *Getting it Right: A Canadian Energy Strategy for a Carbon-Constrained Future*, published in November 2007. The report called for a national policy to be developed by the federal and provincial governments, addressing both energy policy, including all forms of energy, and climate-change policy.[6]

The NES concept was then discussed and endorsed at a meeting of environmentalists, business representatives and policy think tanks (but not government representatives) in Winnipeg, in October 2009.[7] In April 2010, some sixty organizations, mostly business but also including ENGOs such as Pollution Probe and the Pembina Institute participated in the "Banff Dialogue" and endorsed the concept of a "Clean Energy Strategy." In May 2010, Roger Gibbins published an article in *Policy Options*, setting out the need for a national energy program and arguing that if non-state actors continued to develop the concept governments would then join them.[8] That hope was realized in August 2010, when the Council of the Federation meeting discussed the concept, although without referring to it in the meeting communiqué,[9] and then in September 2010, when it was discussed at the annual meeting of the Council of Energy Ministers. The communiqué from the meeting stated: "Ministers mandated their officials to identify areas of common interest as well as goals and objectives related to energy that will lead to greater pan-Canadian

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6 R Gibbins, *Getting it Right: A Canadian Energy Strategy for a Carbon-Constrained Future* (Calgary: Canada West Foundation, 2007) [R Gibbins].

7 The Winnipeg Consensus, *The Winnipeg Consensus: Sparking a National Dialogue on Canada's Clean Energy Future* (Winnipeg: International Institute for Sustainable Development, 2009) online: International Institute for Sustainable Development <http://www.winnipegconsensus.org/about.aspx> [The Winnipeg Consensus].

8 R Gibbins, "Creating a Canadian Energy Framework: If You Build It, They Will Come", *Policy Options* 31:5 (May 2010) 61 at 61.

9 Public Policy Forum, "A Building Consensus: Moving Toward a Canadian Energy Strategy: Letter to the Ministers of Energy" (4 July 2011) online: Public Policy Forum <http://www.ppforum.ca/>.

collaboration.[10]

In July 2011, federal Natural Resources Minister Joe Oliver said his government was open to the idea[11] and on July 19, 2011, the annual meeting of Energy and Mining Ministers endorsed the concept, saying they "supported a collaborative approach to energy"[12] and identifying these areas for collaboration:

> The ministers discussed common issues, which could be addressed collaboratively by the federal, provincial and territorial governments under this approach. Areas of possible collaboration identified by ministers included regulatory reform, energy efficiency, energy information and awareness, new markets and international trade, and smart grids and electricity reliability.[13]

Federal and provincial officials are developing proposals for consideration at the next Energy and Mines Ministers meeting, scheduled for September 2012, in Charlottetown. Gibbins was right — during the past five years, the NES concept has moved from think-tank meetings to a clearly established place on the agenda of federal and provincial governments.

How have the actors involved in this dialogue treated the issue of distributive effects? One of the central challenges recognized by the 2007 Canada West report, not surprisingly given the failure of the NCCP, was the problem of regional distributive effects associated with any effort to develop national climate change policy: "*how do we construct an energy strategy for a carbon-constrained future, and how do we do so without exacerbating regional tensions within the federation*?"[14] This problem exists, the report noted, because of the problem of geographic concentration of different energy sources such as fossil-fuels, uranium or hydro-electricity: "The country's immense energy resources, including conventional oil and gas, coal, hydro, uranium, the oil sands and potentially biofuels, bunch up in ways that create dramatic differences in circumstances among the ten provinces and three territories".[15] Moving to a "carbon-constrained future" imposes greater costs on some industrial sectors, regional economies and provinces than on others; conversely, it offers greater benefits to some, such as Quebec which can expect increased opportunity to export hydro-electricity, than to others. Accordingly, the report included

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10 Government of Canada, "Press Release: Canadian Energy Ministers Commit to Further Innovation and Strengthen Collaboration", (17 September 2010) online: Government of Canada News Centre <http//www.news.gc.ca>.

11 S McCarthy, "National energy strategy gains clout", *The Globe and Mail* (10 July 2011) online: Globe and Mail <http://www.theglobeandmail.com>.

12 Energy and Mines Ministers, "News Release: Canada's Annual Energy and Mines Ministers' Conference: Energy Ministers support collaborative approach to energy", (19 July 2011) online: Natural Resource Canada <http://www.nrcan.gc.ca/media-room/news-release/2011/63/1763> [Energy and Mines Ministers].

13 Energy and Mines Ministers, "Accompanying Report: Canada as a global energy leader: Toward greater pan-Canadian collaboration", (2011) online: Alberta Energy <http://www.energy.gov.ab.ca/Initiatives/3083.asp> [Energy and Mines Ministers 2011 Accompanying Report].

14 R Gibbins, *supra* note 6 at 2.

15 *Ibid.*

in its ten principles upon which the proposed Canadian energy strategy should be based the principle of "sharing the load"[16] (similar terminology is used in the 1998 and 2008 agreements amongst EU nations for allocation of responsibility for meeting over-all EU climate policy objectives: the 1998 Burden Sharing Agreement and 2008 Effort Sharing Agreement — within Canada, during the NCCP, the principle was expressed as the need to ensure no region is asked to accept an "unreasonable burden.").

The Winnipeg Consensus Group document of 2009 also recognized the political implications of the distributive problem: "To minimize historic, regional and political tensions, Canada has traditionally skirted the thorny and complex issues underlying the policy intent of 'national', 'energy' or 'strategy'".[17] The 2010 Banff document recognized the issue, but presented it as a benefit rather than challenge, saying the concept required "supporting a full and diverse range of energy sources while recognizing the regional diversity and mix of energy resources as a core Canadian advantage". The potential for regional conflict, however, was recognized: "The need for this strategy comes from its ability, if we do it right, to unite the country rather than divide it along energy fault lines. Because of our rich, diverse energy mix a Canadian strategy will incorporate sub-national strategies which all benefit from being part of a larger vision. Removal of barriers and cooperation leads to more efficiencies and a stronger federation."[18]

The report accompanying the Energy and Mines Ministers July 19, 2011, statement was explicit on the decarbonization objective: "To collaborate on a long-term transition to a lower-carbon economy". The report refers to "regional diversity in energy resources, supply and demand "but presents that as a "source of strength that continues to shape our economy" and makes only passing reference to the problem: "These regional differences lead to diverse challenges but also unique opportunities". The report endorsed by Ministers called for "greater pan-Canadian collaboration" based upon a set of stated principles and objectives. Unlike the Canada West Foundation, however, there was no recognition that distributive effects of such collaboration need be addressed. The closest it came was this principle: "Recognize that federal, provincial and territorial cooperation is essential while respecting distinct constitutional jurisdictions and government authorities".[19] The fact that "cooperation" will be needed to ensure reaching agreement on the major redistribution in cost and benefit inherent in the transition objective is nowhere mentioned. The "thorny" issue was again "skirted."

Thus we see that the problem of regional distributive effects has been recognized by participants in the NES dialogue. Governments, however, have recognized it only in passing and made no suggestions for addressing the challenge. The non-state actors, while more willing to see it as something which must be addressed, undercut their position by arguing that the NES must not include any measures

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16 *Ibid.*

17 The Winnipeg Consensus, *supra* note 7.

18 Banff Clean Energy Dialogue, "Towards a Canadian Clean Energy Strategy", (2009) online: International Institute for Sustainable Development <http://www.winnipegconsensus.org/report.aspx>.

19 Energy and Mines Ministers 2011 Accompanying Report, *supra* note 14.

which lead to wealth transfer amongst regions. In the original 2007 Canada West report, for instance, the logic of the argument is straight-forward: 1) the move to a low-carbon future necessarily involves differing regional distributive effects; 2) to address those, agreement must be reached on an equitable sharing of those costs; 3) for that, national policy is needed. However, the 2007 report then added the caveat that any such policy must not include measures which transfer wealth from one region or province to another.

> The goal must be to meet the climate change challenge, and *not* to redistribute wealth and economic opportunities. Should we choose to do the latter, we have other policy tools. If a national energy strategy is driven by concerns that Canadians share about climate change and global warming, then Canadians at large, both consumers and producers, should be prepared to shoulder some of the burden. Sharing the load also means being balanced across sectors, not focusing on a single industry or source of emissions, and taking into account both production and consumption as sources of GHGs.[20]

The Energy Policy Institute of Canada a think-tank funded by the energy industry, has supported the need for a "Canadian Energy Strategy", but has also argued against incorporating regional wealth transfer: "We are not proposing a centralized, top-down program that attempts to either redistribute wealth among regions or authority among governments. We are proposing that the provinces, territories and federal government take concerted action to address the complex and increasingly urgent issues that threaten to impede the full development of our energy potential and that diminish our claim to global energy leadership."[21]

A strategy, by definition, is a process of focussing on some objectives and not others — in this case, on some energy types more than others because they will provide a greater return on investment. Any national energy strategy, by dint of the simple fact it must give greater priority to some fuel types than others will result in more benefit to some firms, groups and regions than others. It will have distributive effects because, as noted by Canada West, energy sources are bunched in different regions. Saying an NES cannot include wealth transfer, when that is the inherent nature of the process removes the ability to explicitly address and broker agreements, including such things as side-payments to compensate losers.

In summary, then, we find that the actors engaged in the NES dialogue do recognize that their efforts inherently include the problem of distributive effects. However, their ability to address the issue is hampered by, first, the refusal of governments to explicitly state that is something which any national strategy must resolve and, secondly, refusal of western actors to consider any form of wealth redistribution as part of the NES.

3. INTERESTS

As stated in the introduction, the significance of the distributive effects inher-

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20 R Gibbins, *supra* note 6 at 3.

21 Energy Policy Institute of Canada, "A Strategy for Canada's Global Energy Leadership: Framework Document", (2011) online: Energy Policy Institute of Canada <http://www.canadasenergy.ca/>.

ently bound up with any potential national energy strategy is that they motivate actors to participate in relevant policy processes, working to reduce their costs, environmental or policy-related and maximize their benefits. To fully understand the challenge which the question of distributive effects poses for the NES, we need to identify the actors so motivated and the interests they are likely to pursue during the NES process. Since the NES originated with non-state actors, we first identify those and then move to the major state actors, the federal and a number of provincial governments.

The meeting in Winnipeg in October 2009 was attended by representatives of eleven organizations[22] (self-described as "think tanks").[23] Of those, three have as their mandate policy analysis leading to economic development (Atlantic and Manitoba Councils and Conference Board), while three others, while not opposed to economic development have a focus more upon environmental protection (IISD, NRTEE and Pembina) — the remaining organizations do not fall so clearly in the business or environmentalist camps. Since then, a number of business-funded organizations, such as the Energy Policy Institute of Canada and the Canadian Council of Chief Executives, have joined the call for a national energy strategy. In September 2009, trade associations representing a number of energy industry sectors, including nuclear and renewables, established the Energy Policy Institute, with a sole mandate to work for a national energy strategy. The organizations present at the Banff Dialogue in April 2010, were predominantly industry representatives.

Environmentalists, on the other hand, other than the Pembina Institute and Pollution Probe, have been less ready to participate. Presumably the interest of environmentalists who do participate, and that of think tanks like IISD or NRTEE working toward more effective environmental policy, is in gaining leverage from the industry and oil-producing provinces' interest in the NES. Since there is agreement it must encompass both energy and climate-policy, environmentalists may well think those actors could be convinced to make concessions respecting the latter, in order to achieve some of their energy-policy goals.

It seems clear, then, that the major non-state actor pressing for a national energy strategy has been business, and more particularly energy industries. Presumably those business actors are working to achieve three objectives: 1) the traditional objective pursued by an industrial sector which operates in a number of provinces, harmonization of regulatory standards (the Canadian Council of Chief Executives statement in support of an NES stated: "It should be readily apparent that Canada is not well served by the current patchwork of differing federal and provincial climate change targets and often conflicting policies and timelines.";[24] 2) deregulation, in

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22 The organizations that took part in this meeting included: Atlantic Provinces Economic Council; Business Council of Manitoba; Canada School for Energy and Environment; Canada West Foundation; Conference Board of Canada; International Institute for Sustainable Development (IISD); Institute for Research on Public Policy (IRPP); National Roundtable on Environment and Economy (NRTEE); Pembina Institute for Appropriate Development; and the Public Policy Forum.

23 Winnipeg Consensus, *supra* note 7.

24 Canadian Council of Chief Executives, "Kananaskis: Building an Agenda for a Sound Energy Future", (2011) online: Canadian Council of Chief Executives <http//www.ceocouncil.ca/>.

terms of a relaxation of environmental standards and processes used for energy-project regulatory approvals; and 3) in the case of the Alberta oil industry, assurance that other provinces will not block pipeline approvals.

As noted, the strategy originally recommended by the Canada West Foundation was to initially work to develop agreement amongst non-state actors, in order to show governments they could become involved without paying too heavy a price. Amongst the provinces, reaction has been mixed. Alberta has been the lead province pressing for the NES, particularly since Alison Redford became Premier in 2011. The Alberta motivation was clearly stated in the February 7, 2012 Speech from the Throne — since other jurisdictions have power to block pipelines, they cannot be simply ignored as has been the Alberta strategy on climate policy since it left the federal-provincial NCCP in 2002:

> The infrastructure necessary to get our resources to new markets must cross other jurisdictions, so any expansion will involve various partners at the provincial, national and international levels. The more we work together to coordinate our efforts, the greater our success and the more prosperity for everyone involved.[25]

Premier Redford met with Ontario Premier McGuinty and Quebec Premier then-Charest in early 2012 in an attempt to convince them the oil sands provides benefits to all, and that a national strategy would benefit all. To date her efforts have not been fully successful. Ontario Premier McGuinty responded by refusing to endorse the oil sands, arguing that western resource development has led to an inflated "Petro Dollar" and thus has crippled the competitiveness of Ontario's manufacturing sector. McGuinty went on and criticized the federal government for pursuing policies which have favoured the fossil-fuel producing provinces over the green energy development plans of other provinces, such as his.[26] The year before, at the Council of the Federation meeting, July 20, 2011, Premier McGuinty had objected to describing the oil sands as "responsible and sustainable" and criticized federal government subsidy of the oil industry.

This dispute with Ontario, however, was mild in comparison to the battle which then erupted between Premier Redford and Christy Clark, Premier of British Columbia. The latter, facing a significant electoral threat from the opposition NDP which had staked out a clear position of opposition to the Northern Gateway Pipeline, has publicly released a set of conditions which she said would have to be met before her government could accept the pipeline. One of these had to do with distributive effects: Premier Clark said B.C. "must receive a fair share of the fiscal and economic benefits" associated with the pipeline.[27] Clark did not say what she would consider to be "fair" but presumably something other than what she claimed

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25 Speech from the Throne to Open the Fifth Session of the 27th Alberta Legislature (Edmonton: Lieutenant Governor, 2012).

26 K Howlett & D Walton, "Redford's Energy vision clashes with McGuinty's view of oil-sands benefits", *The Globe and Mail* (28 February 2012) online: The Globe and Mail <http://www.theglobeandmail.com>.

27 British Columbia Ministry of Environment, "Press Release: British Columbia outlines requirements for heavy oil pipeline consideration", (23 July 2012) online: BC Newsroom <http://www.newsroom.gov.bc.ca/>.

would be the distribution of revenue associated with the pipeline — Alberta 68%, the federal government 17% and B.C. 8%.[28] The National Energy Strategy was then discussed at the Council of the Federation meeting on July 27, 2012 but no reference is made to the issue in the Council communiqué[29] clearly indicating no agreement was reached — which is hardly surprising, given the inability of that body to make decisions on any basis other than consensus.

In terms of federal government interest, when the NES was first proposed in 2009, the Harper government made no public statement of support. Although still silent on the issue, presumably the federal government did not strongly object at the, September 2010, Energy Ministers meeting to the statement that officials would be asked to discuss possible areas of co-operation. It was not until Resources Minister Oliver's speech of July 15, 2011, that the federal government explicitly endorsed the NES concept. He stated that:

> Over the last few years, provinces and territories, industry, think-tanks and stakeholders across Canada have been coming to a consensus that a pan-Canadian approach to energy is required. At the last EMMC, Ministers tasked officials to look into how we can move forward. At the upcoming conference, I will work together with my provincial and territorial colleagues on a shared vision.[30]

To demonstrate his government's commitment to the vision, he went on to discuss the Throne Speech commitment to "improvements in regulatory and environmental assessment process".[31] Deregulation, so far, seems to be the greatest interest of the federal government in the NES concept. That said, in remarks delivered on August 7, 2012, Prime Minister Harper made it clear he would not become involved in the BC-Alberta dispute over sharing of Northern Gateway revenues.[32] Like the Energy Ministers, his government is willing to endorse the concept of a national energy strategy, but is unwilling to grapple with the "thorny issue" which forms such a large part of the basic concept of a national energy strategy — the need to reach agreement amongst provinces upon sharing of associated cost and benefit.

4. INSTITUTIONS

As we have seen, the NES is being considered by government actors with widely divergent goals. The provinces are working to protect their regional eco-

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28 *Ibid.*

29 Council of the Federation, "Press Release: Premiers Steer Canada's Economic Future", (27 July 2012) online: Council of the Federation <http://www.councilofthefederation.ca/>.

30 Honourable Joe Oliver, Minister of Natural Resources, "Notes for a Speech: Energy and the Road to Canada's Prosperity" delivered to Calgary Chamber of Commerce (15 July 2011) online: Natural Resources Canada <http://www.nrcan.gc.ca> [Honourable Joe Oliver].

31 *Ibid.*

32 L Whittington, "Stephen Harper tempers message on Northern Gateway pipeline", *Toronto Star* (7 August 2012) online: Toronto Star <http://www.thestar.com> [L Whittington].

nomic interests while the federal government possesses no real interest in effective climate policy and is wary of invading provincial jurisdiction, for ideological and political reasons, but also in agreement with the basic argument that national co-ordination will improve the potential for energy to contribute to GDP growth. Underlying this is the inherent problem of the political conflicts necessarily associated with the distributive effects of the transition to a low-carbon economy. These actors face a basic collective-action problem: they have conflicting interests, but at the same time recognize that they have a common interest in co-operation, which each needs in order to achieve individual interest. Co-operation, however, depends upon institutions. Rules and procedures are necessary to bring actors to the table to negotiate some form of co-operation and provide an agreed form of decision-making, whether it be majority voting or consensual decision making.

What are the institutions available to the NES actors? Essentially there are two: first, the Canadian constitution, both *de jure* and as it is applied in practice, in order to determine government jurisdiction; and second, the intergovernmental procedures which determine how the federal and provincial governments can collectively develop national policy. Under the *Constitution Act, 1867*, and subsequent amendments, the provinces are powerful players in energy policy by virtue of their ownership of natural resources. In the case of the national energy strategy, this would include materials such as oil, coal or water used to generate energy and electricity. Constitutional control over natural resources has not remained static but rather has undergone important changes over time. First, in the 1930s, several separate Natural Resource Transfer Agreements were negotiated between the federal and provincial governments and were collectively incorporated into the constitution.[33] The 1930 amendment gave Alberta, Saskatchewan and Manitoba powers over natural resources identical to those of the other provinces. Prior to this, the Prairie Provinces did not have control over Crown lands or receive revenues from natural resources. Second, in response to the federal-provincial political conflicts over the National Energy Program, further constitutional changes were agreed to during the First Minister negotiations over the 1982 patriation of the Constitution. The resource amendments in the *Constitution Act, 1982* significantly strengthened provincial legislative power by giving them authority over the exploration, development, management and conservation of non-renewable resources.[34] This resource amendment helped to solidify the provinces' historic claim of constitutional responsibility over non-renewable natural resources.[35] In this vein, both the 1930 and 1982 amendments were important constitutional victories for provincial governments, especially for the non-renewable producing provinces. Less frequently noted however, is that the 1982 amendment also included a federal "paramountcy clause" over natural resource policy that involved interprovincial and international

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33 *Constitution Act, 1930*.

34 *Constitution Act, 1982*, s. 92A.

35 Prior to this amendment, provincial control over natural resources was largely restricted to their existing jurisdiction over Lands, Mines, Minerals and Royalties (s. 109) and provincial legislative authority over the management of provincially-owned Crown Lands, under s. 92(5) of the *Constitution Act, 1867*.

trade.[36] Thus the amendment does not fully provide the provinces with complete jurisdictional control over natural resources.

In addition to this concurrent power, the federal Parliament also shares authority over environmental policy with the provinces. Jurisdiction over the environment is not explicitly allocated to either order of government but the federal Parliament holds several constitutional powers to regulate environmental impacts, which have been confirmed by the Supreme Court, primarily through its criminal law power and the "peace order and good government" clause.[37] Despite this, however, the federal government has typically been a secondary player respecting environment and natural resources. Whatever *de jure* powers it might hold, it does not have the *de facto* jurisdictional power, or desire given the inevitable backlash and political cost, to step in and resolve regional energy disputes amongst provinces by fiat. Canadian constitutional practice, in this very decentralized federation, guarantees that it is the provinces who hold the cards and which in turn tend to pursue their own narrow interest. The one government which might have a national interest and might be able to play a lead role in brokering regional agreements is typically relegated to second place.

The problem of federal ambivalence is compounded by the relative weakness of the institutions used by federal and provincial governments when they meet, either at the elected or appointed level, to discuss and co-ordinate policy — that is, to solve their collective action problem by finding ways to co-operate. Regional interests are reflected in federal government decision-making, in particular through the norm of regional representation in Cabinet, but they are not institutionally guaranteed the way they are in the U.S. Senate or German Bundesrat. By default, then, regional accommodation must be achieved through the intergovernmental relations (IGR) process and the formal agreements generated by that process, such as the 1994 Agreement on Internal Trade (AIT) or the 1998 Environmental Harmonization Accord. Three features of Canadian IGR underscore the weakness of these political institutions. First, any given federal or provincial government is under no legal requirement to participate in IGR processes and may threaten to leave such a process if it is unhappy with the anticipated outcome. Second, decisions between governments are only made by consensus, never by voting, either majority or qualified majority. As a result, each government holds a potential veto power and agreements reached reflect that lowest common denominator. Third, even if governments can successfully reach an intergovernmental agreement, such agreements exist in a "legal limbo".[38] The reason for their legal ambiguity can be partially

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36 *Constitution Act, 1982*, s. 92A [3]. For discussion of this subsection, see M Chandler, "Constitutional Change and Public Policy: The Impact of the Resource Amendment (s 92A)" (1986) 19:1 *Canadian Journal of Political Science* 103.

37 For discussion of federal environmental constitutional authority see P Hogg, "A Question of Parliamentary Power: Criminal Law and the Control of Greenhouse Gas Emissions" (2008) 114 (Toronto: CD Howe Institute); and S Hsu & R Elliot, "Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions" (2009) 54 *McGill LJ* 463.

38 R Simeon & A Nugent, "Parliamentary Canada and Intergovernmental Canada: Exploring the Tensions" in Herman Bakvis and Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness and Legitimacy* 3rd ed (Toronto: OUP 2012) 59 at 65.

explained by Canada's blending of parliamentary democracy and federalism. Since federal and provincial governments are constitutionally accountable to their own legislatures (and not to one another), there is nothing that prevents a government from adopting a bill that contravenes an intergovernmental agreement. As the Supreme Court held in its 1991 *Reference re Canada Assistance Plan (B.C.)*, IGR agreements "do not trump the fundamental parliamentary principle that each government should be responsible to its own legislature"[39] Thus Canada's fairly unique institutional make-up reduces the capacity of the courts to adjudicate legal disputes over IGR agreements. Some have nuanced this view claiming that the legal force of an agreement largely depends on the specific agreement in question. Intergovernmental agreements can be understood as operating along a continuum with "political agreements" (e.g., promises to collaborate) situated at one extreme (non-enforceable) and legally-binding agreements between governments (e.g., a contract of sale between two provinces) situated at the other end (enforceable).[40] According to Poirier, weak enforceability can be attributed to the vague and general terms of the agreements themselves rather than reflecting the inability of governments to bind themselves through such intergovernmental agreements.[41] Most Canadian IGR agreements fall into the non-enforceable category.[42] In recent years though, Canadian governments have sought to strengthen the legal force of specific intergovernmental agreements. In the case of the AIT for example, governments agreed in 2011 that the panel which oversees inter-provincial trade disputes ought to have greater power in its capacity to impose penalties for non-compliance. Such changes allow the panel to either levy tariff costs or issue monetary penalties that are enforceable in the same manner as a judgment of the Courts.[43] Although the AIT case demonstrates how institutional rules can be reformed and strengthened, the fact remains that Canadian IGR agreements tend to be institutionally weak.

The institutional mechanism most used for IGR is periodic meetings of ministers in a given policy field, supported by a secretariat, such as the Canadian Council of Ministers of Environment or in the case of the NES, the Council of Energy Ministers meeting jointly with Mines Ministers. As noted above, the NES has been discussed by federal and provincial ministers. Meetings of First Minsters are rare and can only be convened by the federal government — the Harper government,

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39 *Ibid.* at 65-66.

40 J Poirier, "Intergovernmental Agreements in Canada: At the Crossroads Between Law and Politics" in JP Meekison, H Telford & H Lazar, eds., *Reconsidering the Institutions of Canadian Federalism. Canada, the State of the Federation, 2002* (Montreal: McGill-Queen's University Press) 425 at 432.

41 *Ibid.* at 434.

42 For discussion, see DM Brown, *Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada* (Montreal: McGill-Queen's University Press, 2002).

43 See for example, Bill C-28, *An Act to amend the Act respecting the implementation of the Agreement on Internal Trade*, 2nd Sess, 39th Leg, Quebec, 2011. According to the legislation, Quebec will treat a ruling of the panel as being equivalent to that of a court, thus maintaining the requirement referred to above that the Quebec government be accountable to its legislature and not any other body.

since taking power in January 2006, has only done so once. While the NES was discussed by provincial First Ministers (Premiers) in 2010 and 2012, it is unlikely the Harper government, eager to stay out of the B.C.-Alberta fray, will convene a First Ministers' meeting to discuss the issue.

If federal and provincial governments somehow became convinced that a national energy strategy was their first priority and started to devote considerable time and resources to putting it in place they would immediately be confronted by the problem of these institutional weaknesses. Even if this new privileging of the issue meant the file moved up from the office of the energy minister to that of the Prime Minister or Premier in each government (and inevitably that would happen more fully in some governments than others, depending upon the importance of energy to the provincial economy) the institutional problems would remain. The absence of majority voting would mean any agreement reached would be watered down, by making it vague and ambiguous, until it could be signed by all. Implementation would be left in the hands of each government, with no mechanisms for enforcement or even, unless they were specifically created for this purpose, for regular review and reporting on progress in implementation by a neutral body.

Institutional ambiguity has been highlighted by the current dispute over the construction of the Northern Gateway Pipeline, which raises a host of constitutional uncertainties. It is unclear what would transpire should the B.C. government take actions that would prevent the construction of the pipeline. On the one hand, s. 92(13) confers provincial authority over "property and civil rights". Thus an argument could be made that the B.C. government possesses some constitutional authority to impose a direct prohibition on the construction of the pipeline. At the same time though, given the dispute at hand, there are two constitutional provisions that arguably provide the *legal* authority for the federal government to trump provincial legislation. First, s. 92(10A) confers jurisdiction to the federal Parliament over railways, canals, and "other works and undertakings" that connect the provinces. Political scientist Tom Flanagan has interpreted this power to include pipelines.[44] Second and perhaps more strikingly, the federal Parliament also possesses a "declatory" power over local undertakings if it is for the "general Advantage of Canada". Thus Flanagan argues that in the event that B.C. prevents the construction of Northern Gateway through legislation (or some other measure), this constitutional power could allow Parliament to unilaterally impose the pipeline on British Columbia.[45] While Flanagan might be right in a technical legal sense, he might be underestimating the *political* will of the federal government to use such powers. Federal governments have been historically reluctant to utilise such declaratory powers. In 1964, Newfoundland sought out federal intervention when Quebec would not allow the province to use its hydro-electric lines to transport energy from the Churchill Falls site. According to some accounts, Prime Minister Pearson feared that invoking the federal declaratory power could generate political fallout in

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44 T Flanagan, "To connect the pipeline, connect the dots" *The Globe and Mail*, (4 August 2012) online: The Globe and Mail <http://www.theglobeandmail.com/>.

45 *Ibid.*

Quebec and as a corollary backlash amongst his heavily Quebec-based caucus.[46] While the Pearson and Harper governments are ideologically distinct, the political situations are quite similar. First, Harper faces the recurring challenge of any Canadian Prime Minister: balancing competing regional interests. Second, the electoral risks of federal intervention provide a powerful incentive not to get involved. British Columbia constitutes a key part of the Harper electoral coalition, and justifying unilateral action in the name of the "national interest" might help win over voters in other parts of the country (namely Alberta) but would likely alienate B.C. voters. There is even some preliminary evidence to imply that caucus members would likely be reluctant to support a federal override. Since the B.C. government issued its set of five set of demands for the pipeline to get its approval, members of federal B.C. Conservative caucus have been less forceful than previously in their defence of the project.[47] In sum, despite the constitutional tools that might be available, there are political risks inherent in unilateral action by the federal government.

5. CONCLUSION

If the interest in co-operation to achieve individual interest of these actors, and most importantly governments, were high enough the weakness of the institutional context could be overcome. New mechanisms for decision-making could be put in place or *ad hoc* ones used on a one-time basis. The last time such a national effort in the area of energy and environment was tried, the impetus to develop co-ordinated climate policy came from the external context of Canadian membership in the United Nations Framework on Climate Change regime — because Canada had given a commitment to achieve one national objective, while jurisdiction rested primarily with the provinces, intergovernmental policy development was seen as necessary.[48] That effort collapsed in 2002, with Kyoto ratification, and from then until Canada left the Kyoto regime in 2011 the fact of regime membership has not been strong enough to induce co-operation. A more powerful external factor, the perceived need to harmonize climate policy with that of the U.S., has influenced Canadian climate policy but it has induced some co-operation with U.S. jurisdictions, at both the federal and sub-national levels, rather than amongst all Canadian governments.[49]

This time the impetus comes primarily from the desire to achieve financial gains by exporting energy and climate-change policy takes second place. That means that rather than being a wary and reluctant participant, Alberta is this time the government most interested in reaching national agreement. Given that the western-based Conservative Party is in power in Ottawa, the federal government is at least as motivated as it was previously. However, the same problem of conflict-

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46 JP Feehan, "Smallwood, Churchill Falls, and the Power Corridor through Quebec" (2011) 40:2 Acadiensis 112 at 117.

47 L Whittington, *supra* note 35.

48 D Macdonald, "The failure of Canadian climate change policy: veto power, absent leadership and institutional weakness" In DL VanNijnatten & R Boardman, eds, *Canadian Environmental Policy: Prospects for Leadership and Innovation* 3rd ed. (Toronto: OUP, 2009) 152.

49 D Macdonald, *supra* note 2.

ing regional interests is still present. B.C. must be convinced to accept the environmental risk of the Northern Gateway Pipeline and Ontario and Quebec must be given something to make them think their efforts to develop green electricity will be aided, rather than hurt, by doing that as part of a national energy strategy.

In terms of non-state actors, the big difference is that this time the oil industry, like Alberta, is supportive rather than opposed. It is difficult to imagine, though, that environmentalists will join them, despite the initial participation of some ENGOs. This is because the most tangible outcome of the NES, has been federal government action to weaken the *Canadian Environmental Assessment Act* and *Fisheries Act* — the "regulatory reform" called for by the Energy and mining Minsters in July 2011.[50] This deregulation, which seems to be associated with the NES, both in time and the NRCan Minister's discourse linking the importance of national cooperation and energy exports,[51] makes it very unlikely environmentalists will actively support the NES the way they previously did the NCCP.

Despite the fact that Alberta and the oil industry are now supportive rather than opposed, it is difficult to see how this new alignment of interests will be more successful in overcoming the basic institutional barrier to negotiating agreement on distributive effects than was the previous one. Canada needed intergovernmental co-operation for a national climate policy in the 1990s and still needs one today. Climate policy and energy policy are closely inter-related and so it certainly makes sense to discuss both together. However, absent events which will bring about a significant strengthening in the motivation of all governments to achieve national agreement, accompanied by putting in place more robust mechanisms for intergovernmental negotiations, the prospects for an effective national energy strategy appear dim. For that, the distributive effects inherently associated with the transition to a low-carbon economy and any national energy strategy intended to assist that process must be explicitly addressed. It is only then that Canada can put in place what is so badly needed, an integrated climate change and energy program to be implemented by both levels of government, and resting upon negotiated agreement of the sharing of associated costs and benefits.

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50 Energy and Mines Ministers, *supra* note 13.

51 Honourable Joe Oliver, *supra* note 33.