

**Regulating in the Public Interest?
Canadian energy regulation as an institutional fix for
sovereign legitimacy**

**by
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Abstract

Perhaps the most visible and pressing pipeline conflict in Canadian history, the proposed Trans Mountain Pipeline expansion has yet to see shovels break ground as the project is bound up in a web of legal challenges and political controversy. At the centre of the debate is the National Energy Board (NEB)—Canada’s energy regulator—responsible for regulating interjurisdictional pipelines. Recently, the NEB’s legitimacy has been called into question amid criticisms of being an untrustworthy, industry-captured regulator. In this thesis, I argue that the NEB operates as an institutional fix for state sovereignty, primarily through its mandate to determine if a proposed project is in the “public” or “national interest”. By aggregating benefits and localizing consequences, the NEB’s “public interest” mandate has become a means of circumventing the thorny politics of deliberative consultation—especially regarding Indigenous jurisdiction—to capture legitimacy and ensure projects proceed.

Keywords: Sovereignty; energy regulation; institutional fix; National Energy Board; public interest

Dedication

This thesis is dedicated to protectors of the Coast, Water, and Land, for their courage and leadership in the fight for a better world.

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Table of Contents

Approval	ii
Ethics Statement	iii
Abstract	iv
Dedication.....	v
Acknowledgements	vi
Table of Contents	vii
List of Tables	viii
List of Figures	ix
List of Acronyms	x
Preface	xi
Introduction: Conflict and contradiction in Canadian pipelines	1
Introduction	1
Regulating in the “public interest”? Pipelines and the National Energy Board.....	5
Pro-pipeline logic	7
“Public trust” as sovereign legitimacy: Methods and argument	10
Chapter 1. Sovereign legitimacy, pipeline regulation, and the turbulent history of the National Energy Board.....	14
Who decides? Sovereign legitimacy, crisis, and hegemony	14
Decisionism	15
Legitimacy	17
Legitimacy and hegemony	21
In need of a fix: History, role, and function of the NEB	23
The Great Pipeline Debate.....	26
The early NEB.....	29
Deregulation, capture, and lost public trust.....	31
Malfunctioning legitimation?	34
Conclusion: The NEB, then and now	36
Chapter 2. The public interest mandate	38
Introduction.....	38
The pipeline approval process	40
“Balancing act”: Public interest as scalar logic.....	44
Bentham’s ghost?	48
Conclusion: “Balance”—for whom?	51
Conclusion: Renovating the NEB to save sovereignty.....	53
References	58

List of Tables

Table 1:	NEB decisions on recent pipeline projects.....	42
Table 2:	Burdens: Magnitude and scope	47
Table 3:	Benefits: Magnitude and scope.....	47

List of Figures

Figure 1: Map of proposed routes for Trans Mountain Expansion and Northern Gateway pipelines.....	2
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List of Acronyms

CEAA	Canadian Environmental Assessment Agency
<i>CEAA</i>	<i>Canadian Environmental Assessment Act</i>
<i>CERA</i>	<i>Canadian Energy Regulator Act</i>
CER	Canadian Energy Regulator
CPCN	Certificate of Public Convenience and Necessity
FCA	Federal Court of Appeals
GIC	Governor-in-Council
EA	Environmental assessment
IAA	Impact Assessment Agency
<i>NEBA</i>	<i>National Energy Board Act</i>
NEB	National Energy Board
NG	Northern Gateway Pipeline
NEP	National Energy Program
NOP	National Oil Policy
OIC	Order in Council
RFD	Reasons for Decision
RSC	Revised Statutes of Canada
SC	Statutes of Canada
SCC	Supreme Court of Canada
SCR	Supreme Court Reports
TMP	Trans Mountain Pipeline
TMX	Trans Mountain Expansion Project

Preface

I became interested in studying the politics of oil and gas pipelines after witnessing the widespread opposition to the proposed Trans Mountain Pipeline Expansion here in B.C.'s lower mainland. I had just moved to Vancouver to start graduate school with plans to study something completely different than pipelines. I had heard peripherally about the controversy around Trans Mountain and wanted to see for myself what all the fuss was about. I quickly became swept up in the Protect the Inlet movement, which was (and continues to be) a forceful coalition movement of anti-pipeline activist groups and environmental non-governmental organizations, led by the Tsleil-Waututh First Nation. I was involved in several different direct actions, two of which involved being arrested by the RCMP. In the first instance, a group of kayakers (calling ourselves “kayaktivists”)—myself included—were arrested on the charges of “mischief” after blocking construction on a barge in the Burrard Inlet. The charges for this offense were soon dropped. The second arrest also occurred in the Burrard Inlet, after our group blocked construction workers and an oil tanker from entering the Westridge Marine Terminal. These charges were not dropped. In fact, they occurred as part of a mass-arrest tactic used by the Protect the Inlet movement. This tactic has been used several times in recent years, the most significant of which—at least to my knowledge—being the 1993 Clayoquot protests (also known as “War in the Woods”) in which 900 people were arrested protesting clear-cut logging of old-growth forests on the west coast of B.C.'s Vancouver Island.

At least 200 protesters were arrested in 2018-2019 as part of the Protect the Inlet movement, and as of this writing, almost everyone involved has been charged (with the exception of one defendant, whose charges were dropped). Arrestees included local metro Vancouver citizens, along with a number of high-profile names such as Kennedy Stewart (later elected mayor of Vancouver), federal Green Party leader Elizabeth May, and Order of Canada recipient Jean Swanson. Protesters were charged with civil contempt of court for knowingly and publicly violating a court-issued injunction that prevented non-authorized persons from entering a 5-metre buffer zone around Kinder Morgan property in Burnaby. The sentences involved either community service, a fine, or jail time for some, and the degree of punishment escalated as the protests continued—presumably to deter further obstruction to pipeline operations.

As I spent a significant time in direct actions, in the courtroom, and reading and talking about the pipeline, it made sense that it should become the topic of my research for my Masters thesis. At the time, I was especially curious to know what the federal government meant when, after purchasing the pipeline, it declared it to be in the “national interest”. I was particularly moved by critiques from activists and Indigenous leaders that “national interest” prioritized purchasing a leaky pipeline, but not ensuring clean drinking water or adequate housing for many First Nations reserves across the country. The question of priorities stuck with me. One of the core arguments of my thesis is that concepts like national interest naturalize certain priorities and neutralize others, such as pipeline opposition, by insinuating that to be against pipelines is to be un-Canadian. Overall, this helps the Canadian state to secure political legitimacy—without which it could not call itself properly “sovereign”. I also became fascinated by the National Energy Board, which was embroiled in controversy around the time that I started paying attention to pipeline politics. Many at the time argued that the NEB could not be trusted because it was “captured” by private industry; but for me, that critique was not enough. I wanted to know what the NEB’s political-economic purpose was, if only to produce a “façade” for the interests of the state. I eventually came to argue, in this thesis, that the NEB and its pipeline approval process helps to produce legitimacy for the sovereign claims of the Canadian state. I wrote this thesis with the hope that it would be of help, in some form or another, to the social movements that I am lucky enough to be a part of.

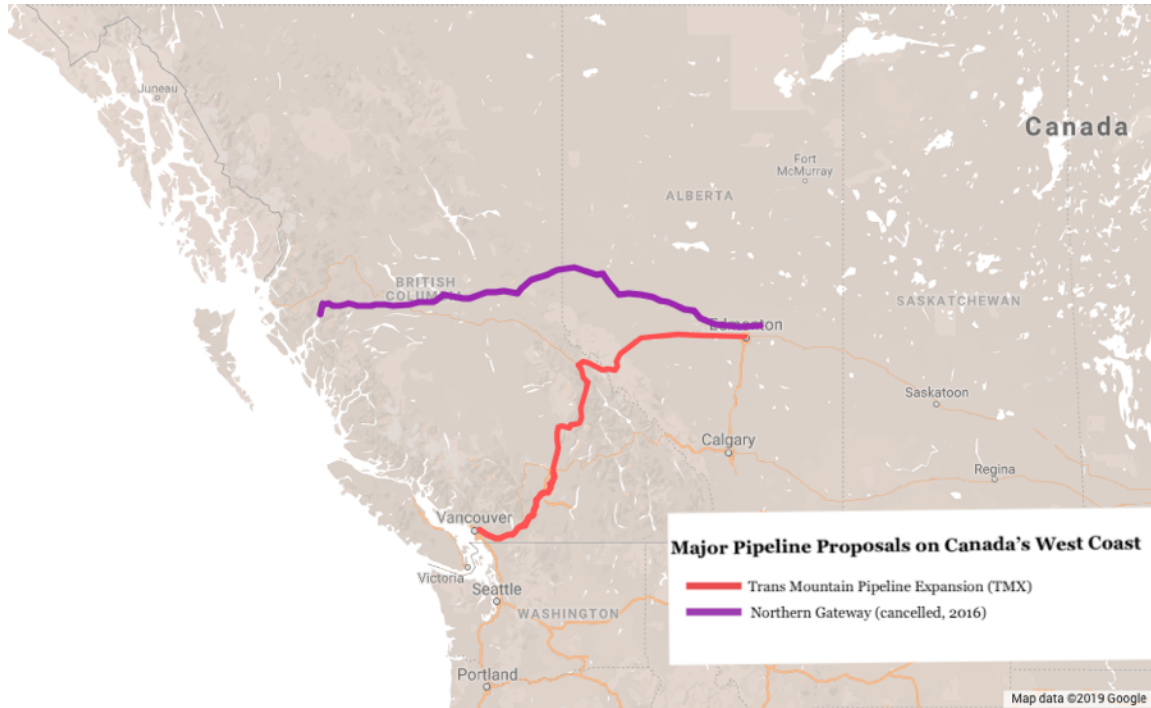
Introduction: Conflict and contradiction in Canadian pipelines

Introduction

On June 18, 2019, Canada's federal government announced its decision to re-approve the Trans Mountain Pipeline Expansion. For several years, the proposed pipeline had experienced delays in construction and legal setbacks. It had become the centre of a national struggle that pitted Indigenous jurisdiction and environmental concerns against the imperative to develop and expand Canada's domestic oil industry. Six years earlier, Kinder Morgan—the pipeline's operator—submitted an application to expand the existing 1,150 km of 24-inch pipe by adding a second or "twin" pipeline. The first pipeline, built in 1953, runs from Edmonton, Alberta, to its terminus outside of Vancouver, British Columbia. With the new expansion, the \$7.4 billion Trans Mountain Expansion project (or "TMX") was projected to carry more than 890,000 barrels of oil per day from Alberta's tar sands to Canada's west coast (see *Figure 1*). The federal Government approved the project in 2016, and Kinder Morgan expected to begin construction in 2017, with the expansion complete by late 2019.

But almost immediately after the project was announced, it was beset by legal, political, jurisdictional, and direct-action challenges. In November of 2014, more than 100 people were arrested blocking crews from conducting construction and survey work on Burnaby Mountain, near the pipeline's terminus (Sinclair, 2014). In 2018, the pipeline fell into political and legal limbo as a Federal Court of Appeals decision quashed the state's approval. In the unanimous decision, Justice Eleanor Dawson cited a deeply "flawed" approval process, given the lack of adequate consultation with Indigenous people and a poorly designed environmental assessment conducted by the National Energy Board (NEB), Canada's federal energy regulator. Following a new round of consultation with affected Indigenous groups and a second environmental assessment, and despite widespread opposition, the Canadian government again determined the pipeline was in Canada's "public interest," and gave the project the go-ahead for the second time (Office of the Prime Minister of Canada, 2019).

Figure 1: Map of proposed routes for Trans Mountain Expansion and Northern Gateway pipelines.



Data: Google.

One of the most formidable hurdles facing the federal government’s approval process is growing controversy over the NEB, which is responsible for conducting environmental assessments and recommending to the state whether projects should proceed or not. According to the *National Energy Board Act* (R.S.C. 1985, c-7), the NEB is expected to make its “go/no-go” recommendation by balancing the risks and benefits of the project to determine if it is in the “public interest”. The NEB possesses quasi-judicial regulatory power over energy firms and infrastructures under federal jurisdiction, namely, those projects that cross international or provincial boundaries, or those declared in the nation’s “general advantage.” Though the Governor in Council (the federal cabinet, or GIC) has the *de jure* final decision on the matter, NEB-approved pipelines virtually always proceed: 1966 was the first and last time the GIC vetoed a NEB approval, a decision which the GIC reversed just a month later. Since 1995, the NEB has also been tasked with conducting lengthy environmental and economic assessments of proposed projects. As I argue in this thesis, the controversy around pipeline approval in Canada signals a broader crisis in state sovereignty: if the NEB’s ability to approve pipelines is in peril, then the state’s sovereign legitimacy is also at risk.

The NEB conducted its assessment process for TMX between 2014-2016, holding hearings and accepting comments from the public regarding the pipeline's proposed route, environmental risks, and other concerns. Many involved in the process found it sorely lacking: countless intervenors expressed concern with the restricted and undemocratic nature of the NEB's public hearings (Gage, 2013). Others found the NEB's close ties to the oil and gas industry unsavory, calling it a "captured regulator" (Linnitt, 2015). Public trust in the institution plummeted in 2016 when an entire panel of NEB advisors recused themselves from TransCanada's Energy East pipeline proposal, after inappropriate meetings with industry consultants (Mar, 2016). After only a year of public hearings for TMX, as many as 35 intervenors had withdrawn, citing a lack of trust in the NEB and the pipeline approval process—similar criticisms to those the NEB faced during its assessment of the proposed Northern Gateway project, 2013-2016.¹

Disapproval also mounted over TMX's projected environmental risks, especially the likelihood of an oil spill. Since the 1989 Exxon Valdez disaster, in which a tanker spilled 11 million gallons of crude oil along the Alaskan coast, the risk of spills has generated unease for many living in coastal regions.² Trans Mountain claimed that the risk of a "worst-case" spill was "very low" over a 50-year timespan, but smaller spills in Vancouver's Burrard Inlet of 1,000 barrels of oil or less remained "likely"—up to 99% probability (Gunton, 2016).³ In its first environmental assessment, the NEB determined that despite technological advances and more stringent spill prevention and response regulation, "oil spills can still happen", and decided they posed a "moderate" but "acceptable" level of risk (National Energy Board, 2016, p. 143). A pressing concern was also that increased pipeline output would mean more tankers passing through sensitive marine environments. While TMX is not expected to significantly increase overall tanker traffic in the Burrard Inlet, the project's environmental assessment found that the slight increase would add to the overall cumulative effects of marine shipping on the environment. Indeed, the 2019 NEB re-assessment of TMX found that this increase

¹ One high-profile intervenor called the NEB's joint review of Northern Gateway "market propaganda masquerading as economic analysis" (Chisholm, 2013).

² As recently as 2015, an oil tanker spilled diluted bitumen in Vancouver's English Bay. In 2018, a B.C. court found that the ship's operator, Alassia NewShips, was not guilty of accidentally spilling oil, according to the *Canadian Environmental Protection Act* (S.C. 1999, c. 33) (Hunter, 2018)

³ Terms such as "likely", "unlikely", and "acceptable" were not defined in the NEB's first or second Trans Mountain assessment reports.

would likely lead to “significant adverse effects” that could contribute to the decline of the endangered Southern Resident Orca, or killer whale.⁴

Many Indigenous people and First Nations vehemently oppose the project. 150 nations across Canada and the U.S. signed the Treaty Alliance, a pact declaring opposition to increased expansion of Canada’s tar sands, including pipeline development. In the treaty, the parties agreed that staunch resistance was required to protect their own jurisdiction and to prevent climate change-induced disasters. Grand Chief Stewart Phillip of the Union of B.C. Indian Chiefs stated:

Based on our sovereign, inherent right to self-determination, we have collectively decided that we will pick up our sacred responsibilities to the land, waters, and people. We will come together in unity and solidarity to protect our territory from the predations of big oil interests, industry, and everything that represents (McSheffrey, 2016).

A number of First Nations have also conducted their own environmental assessments of the TMX project, using traditional legal and political economic principles, in contrast to those concepts and values of the settler Canadian state that guide the NEB’s recommendations. The Tsleil-Waututh Nation—whose territory includes Burrard Inlet, the terminus of the Trans Mountain Pipeline—found in its own thorough assessment that the TMX violates the legal obligation, under Coast Salish law, to steward the water in their territory. The report contains detailed maps of harvesting camps, seasonal movement patterns of various wildlife, and careful explanations of how the proposed pipeline impinges upon First Nation’s title, rights, interests, and law. It declares that “[Tsleil-Waututh] people have a sacred duty to ensure the health of our territory. The contemporary Tsleil-Waututh Nation carries this stewardship obligation forward and, according to Coast Salish law, remains the decision-making authority for Burrard Inlet” (Tsleil-Waututh Nation, 2016, p. 12). This finding reaffirms Tsleil-Waututh’s assertion of its jurisdiction—its “decision-making authority”—within its territory, in direct conflict with the sovereign claims of the Canadian state.

⁴ Orcas use echolocation to hunt and communicate, which is compromised by noise from marine vessel traffic. They are unlikely to survive the increase in tanker traffic the TMX would demand (Lavoie, 2017).

The Secwepemc Nation also conducted a risk assessment of the TMX. It found that Kinder Morgan never secured permission or consent to build the pipeline through the Nation's territory:

Core to its misleading projection is Kinder Morgan's claim to have secured the land base for the pipeline, which runs through 518 km of Secwepemc (pronounced Se-KWEP-muk) territory in the South-Central Interior of British Columbia (BC). Secwepemcul'ecw is the largest Indigenous territory across which the [TMX] is proposed to travel. It is unceded land — that is, the proper title and rights holders are the Secwepemc people, according to both the Supreme Court of Canada and to the Indigenous laws of the territory — and the Secwepemc have rejected the [TMX] in absolute terms (INET, 2017).

The Canadian government or the “Crown” has a constitutional and legal obligation to consult Indigenous peoples prior to approving any project that may interfere with Indigenous rights or title.⁵ In the courts, the Crown has increasingly relied on institutions, the NEB among them, to undertake certain phases of this consultation. The proposed TMX project—which would cross numerous First Nation territories—required extensive consultation. Concern over how a pipeline spill would affect the ecology of rivers, streams, and forests, and how it would disrupt Indigenous relationships to the land was widespread. Many Indigenous groups and First Nations argued that the Crown's consultation via the NEB was woefully inadequate, mostly fixating on “note taking” and “listening” but failing to take Indigenous concerns seriously or to offer appropriate accommodation (West Coast Environmental Law, 2017).

Regulating in the “public interest”? Pipelines and the National Energy Board

“Public trust” has recently become an object of central importance for both the state and the NEB. In its 2014 Report to Parliament, the NEB emphasized its unique ability to secure public trust through its ostensibly democratic decision-making mechanisms, stressing themes like “taking responsibility”, “doing the right thing”, and “being more transparent” (National Energy Board, 2014, p. 2). That same year, Peter Watson (then Chair of the NEB) undertook a nation-wide speaking tour with the purpose of rebuilding public trust in the regulator. In his presentation – titled “In the Eye of the

⁵ For a list of Supreme Court of Canada decisions affirming the Crown's duty to consult, see Canada (2012b).

Storm”, referring to the sudden onslaught of media attention—he praised the NEB’s unique ability to “balance” conflicting interests among the oil and gas sector, Indigenous people, and environmentalists (Watson, 2014). Industry also worked to restore public trust in the state’s decisions to build pipelines. Even the President and CEO of Enbridge understood that after the approval of Northern Gateway, “the economic benefits won’t matter” if the company failed to convince the public that the project would not cause undue environmental harm (CBC News, 2014).

When the NEB first recommended that the Governor in Council approve the TMX project in 2016, it maintained that the project was desirable and necessary, given the economic benefits that it would produce, including job creation and tax revenue:

On the whole, taking into account all of the evidence in the hearing, considering all relevant factors, and given that there are considerable benefits nationally, regionally and to some degree locally, the Board found that the benefits of the Project would outweigh the residual burdens. Accordingly, the Board concludes that the Project is in the Canadian public interest (National Energy Board, 2017a).

Based on this recommendation, the GIC approved TMX on November 29, 2016. The approval immediately met with widespread dismay and protest across political scales. In 2017, the B.C. Green and New Democratic Parties formed a coalition to topple the existing Liberal provincial government, campaigning on a promise to stop the pipeline.

The new government opted to restrict the flow of bitumen through the province via pipelines, prompting a standoff between the B.C., Alberta, and federal governments. A coalition of First Nations across B.C. also vowed to block pipeline construction through legal and direct action. Thousands of protesters marched back to Burnaby Mountain—reprising the 2014 action mentioned earlier—to protest the pipeline and a court-issued injunction preventing citizens from entering a five-metre buffer zone around Kinder Morgan property (Waisman, 2018). During the spring and summer of 2018, more than 200 protesters were arrested for violating the injunction.⁶ In one high-profile

⁶ Almost all protesters have been tried and convicted, with several still awaiting trial as of June, 2019. Upwards of 30 protesters have been sentenced with detention of some sort, such as jail or house arrest. The rest have been fined between \$500 and as much as \$5,000, or sentenced to up to 240 hours of community service (or some combination of both). All arrestees were charged with criminal or civil “contempt of court” (or both), which is not technically a criminal offense and thus does not appear on a criminal record. This common-law offense is designed as a deterrent to

demonstration, seven protesters rappelled from the iconic Iron Workers Memorial Bridge in Vancouver, blocking oil tanker traffic to and from the Trans Mountain terminal and loading dock (Ip, 2018).

The tenuous political and legal terrain surrounding TMX exacerbated the project's uncertainty, despite the federal approval. After massive displays of resistance and solidarity during opposition to projects such as Northern Gateway and Keystone-XL—and the state violence each elicited—it gradually became clear that Trans Mountain risked becoming the “Standing Rock of the North” (Beaumont, 2018). Construction delays risked devolving into outright challenges to state sovereignty. To maintain its aura of authority and creditworthiness in the face of political challenges, the Canadian state opted to purchase TMX from Kinder Morgan to the tune of \$4.5 billion—though many estimates now put that number much higher (Tasker, 2019). This did not deter opposition: the Secwepemc Assembly, for instance, called the move a “declaration of war by Canada against Indigenous peoples,” reaffirming their jurisdiction by (re)occupying provincial parks and constructing “tiny houses” in the path of the proposed pipeline (Dimoff, 2018; Secwepemcul’ecw Assembly, 2018).

Shortly after the pipeline purchase, fourteen First Nations launched lawsuits appealing the decision (including the Tsleil-Waututh, Coldwater, Squamish, and Stk-emplupsemc Te Secwepemc First Nations, and the Upper Nicola Band). Among various other concerns, the lawsuits—consolidated into a single Federal Court of Appeals case—asserted that Crown consultation was inadequate, and that the pipeline threatened Indigenous rights such as access to clean drinking water, fishing and hunting, and Aboriginal Title claims. In 2018, the court overturned the 2016 approval, arguing that the NEB’s assessment was so “flawed” that “the Governor in Council could not legally make the kind of assessment of the Project’s environmental effects and the public interest that the legislation requires” (*Tsleil-Waututh v. Canada*, 2018, para. 251).

Pro-pipeline logic

While opposition efforts are well-documented, polls have suggested that pipeline support has increasingly outweighed disapproval. A 2016 poll, for instance, found that 34

criminalize protest, but also gives the issuing judge “tremendous authority to make up the rules as he goes along” (Hermes, 2018).

percent of British Columbians opposed the project while 41 percent supported it (Angus Reid Institute, 2016). Three years later, in 2019, polls suggest 29 percent are opposed while 60 percent support the pipeline (Joseph, 2019). Some suggest that the slight decline in opposition and the increase in support is a sign that the federal government's measures to implement more stringent environmental protection measures have pacified those concerned about the likely scenario of a pipeline spill (Vescera, 2019).

Indeed, both the federal government and the Alberta government have taken pains to assure dissenters that pipelines and environmental protection are not contradictory pursuits. This was made plain in Prime Minister Trudeau's announcement approving TMX in 2016:

Canadians know that strong action on the environment is good for the economy. It makes us more competitive, by fostering innovation and reducing pollution. Canadians value clean air and water, beautiful coasts and wilderness, and refuse to accept that they must be compromised in order to create growth.... Climate change is real. It is here.... Canadians know this, and they know we need to transition to a clean energy economy. But we also know that this transition will take investment, and it won't happen in a day. We need to create good jobs and strong growth to pay for it (Office of the Prime Minister of Canada, 2016).

Similarly, the federal government announced its plan to re-approve TMX on June 18, 2019, just one day after it officially declared a climate emergency. In its re-approval statement, the government suggested that federal revenue from the pipeline would be required to fund the transition to a carbon-neutral economy. Meanwhile, the Alberta government spent upwards of \$3 million on billboard advertisements in B.C. promoting the pipeline as a job creator and falsely blaming increased gasoline prices on the pipeline's delay (Penner, 2019).⁷ The newly-elected United Conservative Party in Alberta, led by Premier Jason Kenney, promised to spend \$30 million on a "war room" to "defend" the Alberta oil and gas industry from outside "attacks" (Graney, 2019).

Both the state and industry have profited from a common sense among pipeline supporters that oil and gas industry expansion—regardless of its environmental impact—are necessary evils to maintain the health of the Canadian economy. Upon first glance, this logic appears reasonable and even shrewd, for many: take, for example, Prime

⁷ New research suggests that soaring gasoline prices in B.C.'s lower mainland in early 2019 were not caused by pipeline construction delays, but the result of retail price gouging (Lee, 2019).

Minister Trudeau's assertion, addressing a crowd of oil and gas industry executives in Texas, that "[n]o country would find 173 million barrels of oil in the ground and leave them there" (Berke, 2017). This common sense makes it necessary to situate pipeline contestation in broader hegemonic narratives of "economic development" that help make extractive industrial activity seem natural, even inevitable and in the "common interest" of all Canadians. According to this logic, to be against oil and gas—and by extension, pipelines—is to be unpatriotic or un-Canadian.

The logic equating economic development with national benefit animated one high-profile pro-pipeline protest in early 2019. Calling itself "United We Roll," a convoy of semi-trailers, pickup trucks, cars, and buses traveled from Alberta to the nation's capital to protest the government's perceived lack of action moving the pipeline forward. The convoy demanded that the federal government scrap its nation-wide carbon tax, along with legislation intended to strengthen environmental regulations and overhaul the pipeline approval process. Their protests encapsulate the economic squeeze felt by workers across the country, but with an Albertan twist: the story goes that oil and gas workers—and their supporters in the province—have been continuously promised economic prosperity as the state has striven for an elusive "energy superpower" status, only to be let down by government failure to compensate for successive boom-and-bust cycles endemic to resource extractive economies. Protesters described themselves as "second-class citizens", or part of an oil and gas industry "that has done so much to fuel this country's prosperity" (Corbella, 2019). As one protester remarked:

The message is we need [the TMX] pipeline not only because we want our oil and gas and we want to go to work. But Alberta provides 10 per cent of the gross domestic product when it comes to our contribution to the country. Upon that contribution to the country we are able to make these funds to help the other provinces.... Now we're down, we're hurting. Where's ours? When are we going to get the help? (Osman, 2019)

Underwriting the pro-pipeline argument is an understanding that the federal government's responsibility is to ensure secure employment and welfare. This association is not a coincidence: the federal government has historically used resource extraction labour to manage unemployment and poverty (Mazer, 2019). Accordingly, many pipeline supporters interpret pipeline regulatory slowdown as proof of the federal government's inability to "deliver the goods" to Albertans.

The Albertan pro-pipeline bloc, and especially United We Roll, have been associated with the racial-scapegoating “Yellow Vest” movement. This movement, in which protesters wear yellow vests at demonstrations, and animated by an anti-immigrant and white supremacist racism, objects to the federal government’s signing of the United Nations global migration pact (Hames, 2019). Notably, employment in Alberta’s oil and gas sector today has declined by as much as 23 percent since 2014 (Healing, 2019)—though less than a decade ago, concerns of labour shortages abounded in the province, prompting increases in immigration programs to supplement the provincial labour supply (Mueller, 2019). This association between pro-pipeline sentiment and racism not as contradictory as it may seem at first. The hegemonic ideas of “economic development” and national welfare articulate with violent narratives of racism and exclusion that form the basis of Canada’s nation-founding myths. This logic mobilizes a form of nationalism among citizens that ultimately lends legitimacy for the state’s decision to build pipelines and get its resources to market, even in the moment of climate emergency.

“Public trust” as sovereign legitimacy: Methods and argument

I argue in this thesis that the controversy around pipeline approval in Canada is in fact a sign of broader challenges to the state’s sovereign legitimacy. This is directly observable in the crisis of lost “public trust” that the NEB faced during its recent approvals of the Northern Gateway and TMX pipeline projects. The NEB, which represents the federal government’s jurisdiction in matters concerning pipelines, has enjoyed a somewhat quiet existence since its establishment in 1959. However, it is in fact a vital institution in the organization of state sovereignty. Its core function is to make recommendations—which inform executive state decisions—about pipelines on behalf of the “public interest”. It cannot, however, make authorizing recommendations without a certain amount of “trust” from the public that its decisions are justifiable. Its relative obscurity suggests that sovereignty—the act of making those truly political decisions about the fate of an entire nation—operates in part through the mundane, everyday practices of bureaucratic institutions. This inconspicuousness has concealed the deeply political nature of the NEB’s function since the beginning of its operation; indeed, despite criticisms of the NEB as a “captured regulator” that abound today, the political-economic purpose and function of the NEB remain unclear to most Canadians. Relatively little has

been written about the regulator, either scholarly or popular. What has been written tends to be from a public policy perspective, asking questions such as how to best achieve regulatory independence (Harrison, 2013), technical regulatory functions (Fisher, 1971), or—more fruitfully—how its public policy mandate has evolved over time (Matthews, 2017; McDougall, 1973; Savage, 2016). The most abundant evidence regarding the history and politics of the NEB is found in a growing grey literature, particularly reports written by environmental non-profit, activist, and Indigenous organizations.⁸

I began this project mainly to better understand the somewhat “black-boxed” operations of the NEB and the pipeline approval process more broadly. My primary research questions asked: what is the political-economic relationship between the NEB and the state—that is to say, what purpose was it intended to serve for the function of the state apparatus—and how has that relationship changed over time? How can we understand the NEB in the context of Canadian history and political economy? And what can we make of the public interest mandate—how is it conceptualized in Canadian jurisprudence and NEB regulatory practices? Methodologically, I decided to come at this project primarily from an archival angle, examining legal texts, memos, reports, and other administrative documents that might help me understand the evolution and practices of the NEB and its public interest mandate. My goal was to uncover how the NEB understands its own political purpose and mandates. I was unable to speak to NEB personnel directly, likely because I embarked on fieldwork around the time that the NEB was embroiled in controversy over its second approval of the TMX project in February of 2019. Instead, I resorted to speaking with industry consultants familiar with the NEB environmental assessment process and reading internal NEB memos—sometimes heavily redacted—accessed as public documents via the *Access to Information Act* (R.S.C., 1985 c. A-1).

My investigation suggests that understanding the state’s crisis-ridden inability to approve major pipeline projects entails paying attention to how the state attempts to secure and exercise sovereignty in its territory. While the state’s sovereign claim enables it to make supreme authoritative decisions within a specified territory—such as building a

⁸ A number of key sources used in this thesis came from submissions to the NEB Modernization Expert Panel (Canada, 2017b)

major pipeline—it cannot do so without a degree of legitimacy from that nation’s members. The state is thus faced with two competing demands. On the one hand, it must execute sovereignly decisions to administer the national economy, in particular, securing the conditions for capital accumulation and circulation and “fixing” market failures. On the other, it must acquire the necessary legitimacy to justify its decisions as benefiting the nation as a whole, or the “public interest”. This situation becomes contradictory when the demands of administration are at odds with the class interests of the “public” from which the state requires legitimation. The examples of varied pipeline opposition that open this introduction demonstrate the contradiction between these two demands: either the state acquiesces to the demands of oil and gas labour and industry, or it builds pipelines and risks losing legitimacy from Indigenous people and environmental opposition. This puts the state in a catch-22 situation in which legitimacy, above all, is at risk. The NEB has increasingly come to function as an “institutional fix” (Jessop, 2013, p. 9) for sovereignty by (ostensibly) independently facilitating, enabling, and producing the legitimacy necessary for the state to carry out its role managing the national capitalist economy. The NEB’s crisis of “public trust” alludes to its legitimating function: if it or another independent division of the state cannot secure the “trust” (legitimacy) of the public, then pipeline development cannot go forward. In other words, to speak “public trust” is to imply legitimacy and the processes by which the state attempts to secure it.

My argument proceeds as follows. In chapter one, I begin with a brief foray into state theory and sovereignty, two helpful orientations for understanding both the purpose of the NEB and what is at stake for the Canadian state in building pipelines. I then give a short history of the NEB and its foundational role as a flexible fix for various crises and contradictions of the Canadian state. The NEB has always functioned as an institutional fix for problems of jurisdiction inherent to Canada’s federalist political system that attempts to “balance” sovereign powers between the central and provincial governments. The Canadian confederation was, after all, designed to appease provinces and unite them under a single federal state. But the NEB cannot, and was never designed for, recognizing and managing a “third” level of jurisdiction, that of Indigenous peoples (who have asserted their jurisdiction and sovereignty since the time of colonization). The NEB’s jurisdictional-fix function is intimately tied to its legitimation function, since its purpose was to override certain jurisdictional contradictions to build

pipelines and strengthen a nascent domestic oil and gas sector. As pipelines have become sites of social, legal, political, and economic contestation, the NEB has begun to “malfunction,” unable to keep pace with the demands of legitimation and newly-recognized levels of authority.

One important function of the NEB is to conduct environmental assessments for major pending projects. As mentioned previously, when making its recommendation, the NEB must determine if the project is in the “public interest”. I argue that this is a crucial yet often overlooked mandate. In Chapter 2, I suggest that the term “public interest” has significant purchase in pipeline approvals: by appealing to the macro-level, it creates the false notion of a “public” as the aggregate of all citizens, the interests of which always supersede those of localized opposition. As Li (2015, p. 24) argues, this implicit logic of “equivalence” is intended to negotiate those political conflicts in which the contested elements fall “outside the logic of market and rational calculation”. My (geographical) intervention is that “public interest” equivalence logic produces a certain scalar disjunct, in which the perceived benefits of a given project are aggregated while opposition is localized. In the concluding chapter, I offer some preliminary observations on the current project to “modernize” the NEB by scrapping its founding legislation and implementing a new Impact Assessment Agency in its place. While the new legislation explicitly deals with Indigenous rights and consultation, I suggest that it offers mostly a renovated version of the original NEB but with the aim of securing Indigenous legitimation. It hints that, above all, the state cannot decide on sovereign matters without legitimacy—especially from Indigenous people. It also suggests a certain anxiety of the state that recognizing full Indigenous jurisdiction necessarily contradicts the settler state’s claim to sovereignty.

Chapter 1. Sovereign legitimacy, pipeline regulation, and the turbulent history of the National Energy Board

Who decides? Sovereign legitimacy, crisis, and hegemony

Sovereignty is a slippery thing, difficult or perhaps impossible to observe, an “amorphous, elusive, and polysemic term of political life” (Brown, 2010, p. 60). The concept is closely tied to the emergence of the Westphalian nation-state, but the features that distinguish sovereign power are a subject of four centuries of debate. According to “canonical” texts of European masculinist political theory (e.g. Jean Bodin, Thomas Hobbes, and Carl Schmitt), sovereignty is fundamentally about decision in the state of emergency, and a monopoly on the violence to enforce the decision. Hobbes, writing in the midst of civil war, described an awe-inspiring Leviathan that promises shelter from humanity’s violent, volatile state of nature. Like many others, Wainwright & Mann (2018) argue that for Hobbes, Leviathan’s sovereign rule offers the only escape from the constant threat of civil war by sublimating violence to politics, providing, in return for unquestioning obedience, protection to the people. Hobbes suggests this sovereignty is premised on an implicit social contract: citizens accept the sovereign as legitimate to the extent that it delivers on its promise to provide law and order. To conjure order from chaos, the sovereign requires ultimate authority in times of crisis. Schmitt captures this in his description of the sovereign as the figure “who decides the exception”. By definition, the sovereign distinguishes friend from enemy, both inside and outside its territory, and can suspend the law at its discretion in the name of maintaining order or realizing state interests.

Modern sovereignty is also an explicitly spatial mode of power, since it always involves the exercise of territorial control (Coleman & Grove, 2009). Any attempt to understand how sovereignty “works” must go beyond theorizing the power of the sovereign “figure”—the preoccupation of theorists such as Bodin and Hobbes—and examine how sovereignty operates on the ground, through legal techniques of governance such as jurisdiction (Pasternak, 2017). Doing so helps to de-naturalize sovereignty, to break down the notion of authority invested in a single subject—namely, the executive of a nation-state. This literature unsettles the foundational status of the

nation-state, questioning the validity of theories that assume the modern political order “emerged” with the 1648 Peace of Westphalia (Bartelson, 1995; Coleman, 2009). Instead, many of these scholars build on Foucault’s (2003) insistence that the “problem of sovereignty”, as he puts it, has been fundamentally misunderstood for centuries (Neal, 2004). Foucault suggests that sovereignty is a story we tell ourselves, co-opted by early modern states vying for political power in an age of widespread civil war and decentralized authority. For him, sovereignty is not claimed by a single source of power, but by a multitude of sources which converge, intersect, negate, and refer to one another. Sovereignty is thus fundamentally discursive, in the sense that it is built epistemically on a claim to authority, rather than a natural, God-like power embedded in a singular figure. For some in this vein, sovereignty is not “possessed” but “performed” (Brown, 2010).

But if sovereignty is indeed a set of discursive claims, why should the concept still matter today? As political theorist Wendy Brown writes, “[i]f nation-state sovereignty has always been something of a fiction in its aspiration and claim ... the fiction is a potent one” (2010, p. 33). Sovereignty remains, in effect, a fundamental logic of the contemporary capitalist state, engrained in law, politics, culture, and history. Moreover, as Mohawk scholar Audra Simpson (2014) observes, multiple claims to sovereignty can exist in a given space, although hierarchical or “nested,” especially in settler colonies. Any analysis of contemporary sovereignties must therefore consider histories (the concretizations of theories of sovereignty) and geographies (the spaces of sovereignty). Given the above, and acknowledging that definitions are somewhat ineffective, I take sovereignty to refer to a set of claims over the supreme authority to *decide* in a given territory, with the sovereign’s authority hinging on its *legitimacy*.

Decisionism

According to perhaps the most influential conception of sovereignty in the canon of political theory, its central feature is the authority to declare a state of exception, meaning any sort of political or economic disruption that can only be resolved through extra-legal (“exceptional”) measures. By definition, only a supreme sovereign power can make these sorts of decisions. The concept of sovereign “decisionism” is closely

associated with Carl Schmitt, a 20th century German political theorist and jurist.⁹ In *Political Theology*, he argues that “the sovereign is who decides the exception” (2005, p. 4). Schmitt’s point is that, in liberal constitutionalist states, there are moments in which the rule of law can no longer suffice. The sovereign is whomever has the capacity to decide when and how laws might apply, or when they no longer apply. For Schmitt, this makes the sovereign the highest authority on truly political matters. He argues that liberal constitutionalism tends to conceal the question of sovereignty through the popular constitution; yet despite this veil of popular rule, ultimately “[w]hat matters for the reality of legal life is who decides” (2005, p. 34).¹⁰ Schmitt takes the opacity of politics to be an Enlightenment legacy. In rejecting all forms of theology, Enlightenment rationality idealized popular sovereignty, discarding any notion of traditional divine (sovereign) authority. But the notion of a supreme sovereign necessarily continued to haunt the constitutions of early modern states. Though the sovereign as ruler may have been expunged from law and constitutions, its powers remained intact—the most important of which being the capacity to decide the exception. As such, the state remained the supreme authority of the land, and final arbiter on matters of law, politics, and economy.

To some extent, the sovereign’s “decisionism” is analogous to the undeniably interventionist nature of modern states, despite appearing to be “limited” to a handful of roles, such as establishing and protecting private property. Schmitt writes that

examining the public law literature of positive jurisprudence of its basic concepts and arguments will see that the state intervenes everywhere. At times it does so as a *deus ex machina*, to decide according to positive statute...at other times it does so as the graceful and merciful lord who proves by pardons and amnesties his supremacy over his own laws. There always exists the same inexplicable identity: lawgiver, executive power, police, pardoner, welfare institution” (2005, p. 38 emphasis original).

It is decisionism, Schmitt argues, that reveals an inherent contradiction in the liberal conception of the state. Though the liberal state may profess to be governed by democratically-enshrined constitution, in the decision, the state steps beyond the

⁹ Despite the highly objectionable path that he eventually took in his career through active involvement in National Socialism, his early work remains central to political theory, especially his critique of liberalism.

¹⁰ This gets to the heart of his critique of liberalism, which is that it confuses normative ideals with real political experience (Kahn, 2011). This is at least in part an Enlightenment-era legacy of the quest to separate Church from State: early constitutional theorists, Schmitt argues, also sought to eradicate any theological remnants from politics in pursuit of secular “rationalism”.

normative constitutional structure, and becomes “in the true sense absolute” (2005, p. 12).

Legitimacy

For Schmitt, the state is sovereign by virtue of its authority to decide in extraordinary circumstances. But for the state’s sovereign claim to “work,” it requires a broad consensus among its citizens that its rule and decisions are legitimate. Legitimacy, broadly understood as “the terms by which people recognize, defend, and accept political authority” (Bukovansky, 2002), is a fundamental—though perhaps taken for granted—feature of any political system. Understanding the operation of sovereignty in the contemporary conjuncture thus requires an analysis of legitimacy, including how it is produced and secured by states.

On this matter, Jürgen Habermas’s work on legitimation crisis (1973)¹¹ is a useful entry point. Observing some structural features of “late-capitalism”—more specifically, the postwar era of state-regulated monopoly capitalism—Habermas delineates four key topographies: the economic system, the administrative system, the legitimation system, and the class structure. The state thus represents one institutional ensemble within the administrative system of the capitalist society. Its core function, according to Habermas, is to regulate “the overall economic cycle by means of global planning”, especially by optimizing the conditions for capital accumulation (1973, p. 646). Historically, only recently did the state take on this global planning function—likely during and following the second world war—administering areas previously considered the turf of the private sector. Functions such as providing and maintaining infrastructure, regulating commerce, managing unemployment, and correcting for market failures all became

¹¹ Legitimation Crisis was Habermas’s intervention in the so-called “state debate” between orthodox and social-democratic Marxist theories of the state (Clarke, 1991). Orthodox accounts argued that the state’s fundamental purpose was to serve the interests of monopoly capitalism, or to “manage the affairs of the bourgeoisie”. The state had been forced to take on new functions of economic management to avoid crisis, maintain stable capital accumulation, and pacify class struggle in the era of mass concentration and centralization of capital. Social-democratic theories maintained that the state was its own distinct political ensemble, with its own autonomous class interests beyond those of the bourgeoisie. By the 1960s, it became clear neither theory was empirically adequate. The state was clearly not just an “instrument” of the bourgeoisie, but neither was it a neutral actor in class struggle. Habermas disputes both theories, arguing that the orthodox school underestimated the state’s degree of political autonomy, while the social-democratic school underestimated the limits to the state’s autonomy.

absorbed by the state apparatus. From time to time, the state displaces the market apparatus entirely to manage surplus capital accumulation. More recently in the era of financialization, states have become increasingly preoccupied with creditworthiness and attractiveness to global capital investment.

Habermas understands legitimation as a basic anthropological fact. Any complex social system in which administrative authorities are independent from the everyday considerations and motivations of individual members requires a “generalized willingness to comply” on behalf of those members. But, barring outright coercion, people only comply if they consider administrative decisions to be “based on a legitimate norm of action” (1973, p. 648). In a capitalist society, for the state to make any sovereign executive administrative decision, it requires a certain degree of legitimation. As its role gradually expands and inadvertently politicizes more previously private realms, the state “has unintentional effects of disquieting and publicizing” (1973, p. 658), thus requiring legitimation in more areas.

For Habermas, the late-capitalist state thus has two central roles. It must administer the economic system efficiently, and it must secure legitimation for its various roles. Weighing in on contemporary (German) debates on the role of the state, Habermas argues that the state is neither the “unconscious executive organ of economic laws” nor the “systematic agent of the united monopoly capitalists” (1973, p. 655).¹² Instead he suggests, like Claus Offe (1972), that the state must intervene via sovereignly decisions to address market failures and to save capitalism from itself. But it cannot do so without maintaining its legitimacy:

The state apparatus does not just see itself in the role of the supreme capitalist facing the conflicting interests of the various capital factions. It also has to consider the generalizable interests of the population as far as necessary to retain mass loyalty and prevent a conflict-ridden withdrawal of legitimation (Habermas, 1973, p. 657).

The state’s capacity to manage the economy efficiently depends on its sovereign decisionism, which in turn hinges on legitimacy.

¹² This latter vision corresponds to a traditional Marxist take in which the state is the proverbial—though oversimplified—“committee for managing the common affairs of the whole bourgeoisie” (from the *Communist Manifesto*).

Pursuing either administrative efficiency or legitimacy at the expense of the other can result in crisis. An “administrative crisis” occurs if the administrative system can no longer fulfill its “steering” role of efficient global planning and compensation for market failure. The economic imperative of limitless accumulation eventually threatens to destabilize or even destroy the political conditions making capitalism possible in the first place. This crisis takes the form of general economic disorganization and possible accumulation crises. A “legitimation crisis,” on the other hand, occurs when the legitimation system can no longer maintain the necessary level of mass loyalty. Because of this contradictory set of roles stemming from increased interventionism, the state must pursue a precarious balance between administration and legitimation. This crisis-ridden balance is a principal source of structural “disturbances” affecting late capitalism, according to Habermas.

Due to the increased demands for legitimation, crises of these sorts are acute. To avoid crisis, states must secure both their sovereignty over the capitalist economy and their legitimacy. For it to be properly sovereign, the state must be the sole executor of administrative decisions. But this arrangement is in direct contradiction with one of the key legitimation processes of capitalist societies, namely, democracy. On the one hand, “genuine democracy” (as Habermas puts it) promises that participating citizens will have full control over the “process of shaping political will” in a society. This is incompatible with traditional state sovereignty, which by definition necessitates a supreme sovereign whose decisions extend beyond custom, the rule of law, and the rule of the people. This is certainly the case in capitalist societies, in which the state or supranational organizations claim the sovereign authority to administer the economy. To ensure legitimation, the state must constrain civic political participation, or as Habermas writes, it must produce a legitimation process that “elicits mass loyalty but avoids participation” (1973, p. 648).

Consequently, the state eschews civic interference in the realm of objectively “political” decisions—those which affect the nation as a whole. Citizens are instead relegated to the realm of so-called private politics, or what Habermas refers to as “civil privatism”. On the terms of this social contract, citizens are tacitly expected to participate

only in those routine, controlled political matters such as voting in elections.¹³ As opposed to deliberative, active consent, legitimation of state sovereignty occurs spontaneously through civic passivity. As Nancy Fraser explains, legitimation takes the form of “a generalized willingness to approve proactive state steering by a pacified citizenry that was not disposed to inquire into the actual aims or justifications of state action” (2015, p. 170).

The “institutional fix”

How does a state secure legitimation for its sovereign administrative decisions? Much in the way that a state can pursue various spatial “fixes” to stave off crises of accumulation, it can seek certain strategies to avoid crises of legitimation. The language of the “fix” is a hallmark “root metaphor” of political economic geography, a short-hand alluding to capitalism’s drive to seek short-term solutions to its periodic crises of overaccumulation (Bok, 2018). It extends from the work of geographer David Harvey (Harvey, 1981, 1982), who draws on Marx to explain that the process of capital accumulation always results in a crisis of overaccumulation, or a surplus of employable capital (in the form of money, commodities, productive capacity, or labour-power). In such circumstances, capital risks becoming devalued through inflation, market gluts and falling prices, idle or underused productive capacity, or falling standards of living for labourers. Capitalists tend to seek spatial strategies to employ or “fix” capital, such as the geographic expansion of markets. Ultimately, spatial fixes do not provide a solution to capitalism’s long-term crisis tendencies, since they always replicate the contradictions inherent in capital accumulation. The spatial fix has spawned an important literature within geography that assesses other spatial, scalar, or temporal strategies through which capitalism’s crises of devaluation are displaced, re-scaled, or deferred (Brenner, 1998; Ekers & Prudham, 2015; Jessop, 2006; Leyshon, 1992; MacLeod, 2001; Peck & Tickell, 1994; Schoenberger, 2004). Fixes involve any variety of social, political, economic, or cultural forces, and can include a variety of strategies and tactics. By producing a regulatory space that governs interjurisdictional pipelines, Canadian energy regulation constitutes an *institutional fix*, which Jessop defines as

¹³ The split role of administration-legitimation is thus mirrored in the realm of political action: properly Political administrative decisions—including economic planning—are the realm of the sovereign executive, the routine, private politics the realm of citizens. This is but one concretization of the political and economic separation of spheres endemic to capitalist societies (Wood, 1981).

a complementary set of institutions that, via institutional design, imitation, imposition or chance evolution, helps to provide a temporary, partial, and relatively stable solution to the *régulation-cum-governance* problems involved in constituting and securing a social order” (2013, p. 9).

The NEB “fixes” capital accumulation insofar as it can produce the necessary legitimacy for the sovereign state to administer the economy and avoid crises of overaccumulation in oil production and transportation.

Habermas also writes that states increasingly steer the shaping of legitimating will process through various means. But in doing so, the state must appear to be independent of the legitimation process entirely. If citizens judge it to be meddling, then legitimation is compromised; it must appear to be produced by the spontaneous “will” of the people. To secure legitimation while also appearing objective, the state can rely on institutional mechanisms that perform impartiality and neutrality, such as symbolic inquiries, expert tribunals, and legal fora. The target audience of these mechanisms is “the public,” which Habermas contends does not actually exist “out-there” but is instead constructed discursively to generate the impression of legitimation. He maintains that the public is “engineered” through interpellating discourses “for purposes of legitimation, primarily [having] the function of structuring attention by means of areas of themes and thereby of pushing uncomfortable themes, problems, and arguments below the threshold of attention” (1973, p. 657). For example, discourses about the “public interest” have the dual effect of both producing a “public” and turning its attention toward certain concerns while turning attention away from others. As I argue later, the National Energy Board constitutes a form of legitimation “steering” that the Canadian state has pursued in building pipelines.

Legitimacy and hegemony

The mode of securing legitimation may sound an awful lot like “hegemony” to those familiar with the concept. In the Gramscian (1971) sense of the word, hegemony refers to the processes through which a ruling bloc obtains or maintains domination. In Gramsci’s *Prison Notebooks*, hegemony is never defined, but is used to explain the operation of power as a combination of coercion and consent. Hegemony explains how a “ruling bloc” asserts, naturalizes, and universalizes its interests as “commonsense” and secures the consent of the dominated classes that constitute “the masses”. The concept is useful for explaining the survival of capitalism by foregrounding how a ruling

bloc exercises control through achieving a sort of imposed political, economic, and moral unity of all classes (Ekers, Loftus, & Mann, 2009, p. 289).

Though consent may appear to be offered willingly, the means by which a hegemonic bloc secures consent is always coercive. As Anderson notes, “[t]he novelty of this consent is that it takes the fundamental form of a belief by the masses that *they exercise an ultimate self-determination* within the existing social order” (Anderson, 1976, p. 30). For Gramsci, a hegemonic bloc combines both “direction”—an ideological apparatus—and domination to maintain hegemony. The dominant group must therefore convince the “masses” of subordinate groups that the dominant group’s interests are of universal benefit:

It is true that the state is seen as the organ of one particular group, destined to create favourable conditions for the latter’s maximum expansion. But the development and expansion of the particular group are conceived of, and presented, as being the motor force of a universal expansion, of a development of all the ‘national’ energies. In other words, the dominant group is coordinated concretely with the general interests of the subordinate groups, and the life of the State is conceived of as a continuous process of formation and superseding of unstable equilibria (on the juridical plane) between the interests of the fundamental group and those of the subordinate groups—equilibria in which the interests of the dominant group prevail, but only up to a certain point, i.e. stopping short of narrowly corporate economic interests (1971, p. 182).

In other words, the dominant group’s interests must appear to be harmonious with the interests of subordinate groups. In this conception, the state acts as the ultimate balancer of conflicting interests or “unstable equilibria”. In this balancing act, the dominant group’s interests always triumph. The state’s decision must not appear to be outright corporatist, as this would jeopardize the legitimation process. This sense of coercive consent complements Habermas’s theory of legitimation crisis. Securing legitimation, in short, requires a consensus among the constructed “public”—based in established “commonsense” discourses—that the sovereign state’s rule is legitimate and benefits the interests of the nation as a whole. But for this consent to persist, the public must also consider themselves to have some sort of agency in the process—thus, Habermas’s theory of “civil privatism,” in which citizens participate in politics, but only in a tightly constrained way. The goal of participation is to produce such a sense of agency over decision-making processes without disrupting the status quo of class domination.

I argue that a focus on sovereignty, legitimation crisis, and hegemony produces a helpful framework through which we can understand the NEB's function in pipeline construction. Drawing on Habermas, I contend that the state has the dual, contradictory role of administering the economy and securing legitimacy. The state is especially efficient in economic administration because of its claim to sovereignty, which naturalizes its exceptional capacity to "decide". But its decisions, and thus its sovereignty, requires legitimacy. In the current conjuncture, economic administration requires pipeline construction extending from the Alberta tar sands in all possible directions to ensure optimal "optionality" for producers in market conditions that are constantly and rapidly changing (M. Simpson, 2018). In particular, current market orthodoxy demands increased pipeline capacity to carry oil and gas commodities to coastal tidewaters on Canada's west coast. This was the logic behind the controversial Trans Mountain expansion project. However, the state has encountered significant obstacles in pipeline construction threatening the success of the project, signalling a possible administrative crisis and potentially a subsequent legitimation crisis. For the state to avoid the latter crisis, it has pursued legitimation in the form of a commonsense discourse that, despite all possible consequences, pipeline construction is in the best interest of the nation as a whole.

The NEB's place in the institutional infrastructure of sovereignty should now become clear. I argue that the NEB can be understood as an "institutional fix" to sovereign legitimacy by producing a certain discursive framework that helps to naturalize and justify—as well as to neutralize and depoliticize—pipeline construction. This legitimation facilitates the state's sovereignly decisions, required to efficiently administer the national economy and avoid crises of over-accumulation. In particular, the NEB's "public interest" mandate—used in determining if a pipeline should be constructed—operates to establish a commonsense narrative about pipelines, while dismissing other counter-claims as of lesser importance, or as un-Canadian. In the following section, I turn to the case of the NEB. I outline a history of the institution and its operation, as well as its place in the current conjuncture and its recent crisis of lost "public trust".

In need of a fix: History, role, and function of the NEB

The NEB was established in 1959, just over a decade after the discovery of massive crude oil deposits in Leduc, Alberta. Though oil had been drilled in Canada

since at least 1858 (the first official well in Sarnia, Ontario), oil production did not reach exportable levels until 1914, when speculators struck vast deposits of oil in Turner Valley, Alberta. The discovery triggered Alberta's first "oil rush", with scores of entrepreneurs and workers migrating to the province in search of liquid gold. Wells across Alberta began to deplete by the late 1930s, and production at Turner Valley peaked in 1942, signaling a general downturn in the industry. Though these early discoveries had prompted optimism in the province, the depletion and subsequent economic slump lasted for decades. Then, in 1947, Imperial Oil rig workers tapped into an immense oil deposit in Leduc, a small town south of Edmonton, a moment often cited as the beginning of large-scale oil production in Canada.

The Leduc discovery made production at much greater scales possible, and resulted in a massive transformation in the political economy and culture of Alberta. Prior to the oil booms, the province's economy was based in agriculture, especially wheat production, which flourished during the first world war (MacFadyen & Watkins, 2014). At Leduc, however, oil prospectors had tapped into the vast reserves of the Devonian reef geological formation—now thought to contain one of the largest reserves of crude oil in the world. It re-ignited oil fever in Alberta, and hinted at Canada's possible status as a major energy exporter. Canada's oil reserves are now the third largest in the world, with most deposits located in the notorious oil sands (or "tar sands") of northern Alberta.

For the export-oriented Canadian settler staple state (Watkins, 1963; but see Kellogg, 2015), the stakes in ensuring that Alberta's valuable oil and gas commodities get to market have become remarkably high. Thanks to the efforts of a series of neoliberal governments since the 1970s, oilpatch development in Alberta has soared despite the expensive and inefficient nature of tar sands petroleum production (Adkin, 2016). For politicians and regulators, the conversation about oil since Leduc has shifted from how to discover marketable reserves, to how to transport petroleum products from the Canadian hinterland to urban refineries and global markets—and how to do so as efficiently as possible (Tahltan Central Government, 2017, p. 7).

It was in this political-economic climate of mass resource production that the NEB came into being. The national economy experienced new waves of industrialization. Canada's involvement in the second world war significantly changed the form and role of the state, now more centralized, with a more expansive bureaucratic

apparatus than in the pre-war era (Forbes, 1986). In light of the broader post-war political environment, at least three principal factors helped spawn the NEB: jurisdictional disputes, a need to regulate “natural” monopolies, and a perceived need to de-politicize and rationalize the pipeline approval process. The first arose because of the contradictory nature of jurisdiction laid out in the Canadian constitution. In the unusual Canadian variant of federalism, officially recognized state jurisdiction is decentralized as per the structure laid out in the *Constitution Act (1867)*. According to the Act, provincial and federal governments “share” territorially-bounded sovereign authority (jurisdiction). This takes the form of a division of constitutional powers. The federal government is mostly responsible for those matters considered geographically relevant to the entire nation, or the “national interest”—for example, national security, currency, and international trade. Provinces have responsibility for matters of “provincial interest,” such as the development and exploitation of natural resources. This decentralization of power has caused tensions throughout Canadian history between provinces and the federal government, especially over the development and control of land and natural resources (Cairns, 1992). A “third” level of jurisdiction—that of Indigenous people and First Nations—is gradually becoming recognized in jurisprudence since the implementation of the 1982 *Constitution Act* and its Charter of Rights and Freedoms.

By 1949, a number of oil companies producing in Alberta amassed an oil surplus, and their demand for pipelines escalated. To deal with its surplus, Imperial Oil proposed to build a pipeline from Edmonton to Regina, Saskatchewan. But crossing a provincial boundary raised jurisdictional matters. Imperial referred the issue to Parliament, which responded by passing the *Pipe Lines Act* in 1949 (superseded by the *National Energy Board Act* in 1959), which placed interprovincial and international pipeline projects and pipeline safety under the federal jurisdiction (Shaffer, 1983). The Act also established a Board of Transport Commissioners, responsible for regulating traffic, tolls, or tariffs on pipeline transmissions.¹⁴ While the principle decision-making authority on issues such as the need for pipelines and specific routes remained that of Parliament, this Board was the institutional predecessor of the National Energy Board. In 1951, upon the Board’s recommendation, Parliament approved the construction of Canada’s first large-scale

¹⁴ The Royal Commission on Energy (first report) stated that these regulatory powers had not been used as of the report’s writing (Canada, 1958). They were likely unused at all until the NEB was properly established.

crude oil pipeline, the Interprovincial Pipeline (IPL, today owned and operated by Enbridge).

The second factor—the problem of monopolies, both typical and “natural”—arose with the increasing need to build pipelines to deal with surplus accumulation. At the time, pipelines were mostly built and operated by the same companies drilling for oil. Given the high cost of constructing pipelines, firms quickly found cost advantages in economies of scale—in this case, by moving multiple petroleum products through a single pipeline. By the mid-1950s, however, single firms like TransCanada Pipelines began purchasing and operating pipelines as their primary business activity. This gave rise to what economists call a “natural monopoly,” usually thought to occur in sectors such as natural gas, electricity transmission, and telecommunications. Given certain economic and geographical conditions—such as the considerable cost in building pipelines and transporting oil and gas commodities—a monopoly situation was necessary or “natural”. Firms were unlikely to make the expensive and risky investment to build pipeline infrastructures unless they could guarantee promising returns. They could then, in an unregulated market, levy whatever fees they wished. In such situations of natural monopoly, neoclassical economic theory suggests that government regulation can safeguard against market failures associated with monopoly, like non-competitive pricing or price discrimination (MacFadyen & Watkins, 2014). With the oil and gas industry, this kind of behaviour was of particular concern because higher oil prices would have a massive effect on the economy as whole.¹⁵

The Great Pipeline Debate

The third factor leading to the NEB’s formation was the changing role of the state in the post-war era. The Leduc discovery generated a wave of rapidly expanding pipeline networks across the country. The most important of these included the Interprovincial Pipe Line (IPL) running east from Edmonton, and the Trans Mountain Pipeline, running

¹⁵ “It seems obvious to the Commission that, not only are the major oil refining companies in Canada in a position to assert effective control of the interprovincial oil pipe lines in Canada and the only interprovincial products pipe line and, in view of this, the tolls or tariffs charged by these pipe lines, but they also own a very large percentage of the proved reserves of crude oil in Canada. ... The Commission is of the opinion that...it is in the public interest that oil pipe line companies subject to the jurisdiction of the Parliament of Canada, should be regulated...so that they shall always be just and reasonable, non-discriminatory and calculated to yield a fair rate of return on the shareholder’s equity” (Canada, 1958, p. 40).

from Edmonton west to Vancouver and Canada's west coast. Unsurprisingly, these large-scale, expensive, nation-wide projects stimulated conflict over pipeline routes, public or private controlling interest, and degrees of government involvement through financing and regulation.

One debate in particular, now known as the "Great Pipeline Debate," exemplifies the political tensions (Gray, 2000). Prior to the creation of the federal Board of Transport Commissioners, decisions about energy infrastructures—under federal jurisdiction since the implementation of the *Pipe Lines Act* in 1949—were referred directly to Parliament, which made the final determination of questions such as pipeline routes. As demand for energy commodities like natural gas grew in Eastern provinces, so too did the need for a large-volume pipeline running east from Alberta. While the Trans Mountain Pipeline opened flows of crude from Alberta to the west coast of Canada and the U.S. in 1953, eastern Canada had yet to receive a pipeline of its own.

Leading the charge for a west-to-east natural gas pipeline was C.D. Howe, a federal Liberal cabinet minister and right-hand-man of Prime Minister Louis St. Laurent. The American-born Member of Parliament for Port Arthur (now Thunder Bay) was amicably nicknamed the "Minister of Everything" for his expansive portfolios and ministerial roles.¹⁶ He was also a forceful proponent of east-west national economic flows, rather than cross-border flows to the U.S (Kilbourn, 1970). This national policy, active at least since the Confederation era of the 1870s, still animated Canadian political economic governance in the Fordist era. When it came time for Parliament to decide on the route for the proposed pipeline, the Liberal federal government—led by Howe and St. Laurent—advocated for an all-Canadian route. But such a route required crossing northern Ontario's Canadian shield geography of swamp and rock. Accordingly, it was projected to be much costlier than an American path, which was proposed to follow a similar course as the Interprovincial Pipeline built just a few years earlier. TransCanada, the controlling firm of the proposed pipeline, approached the government asserting it was unable to finance construction for this expensive segment, since it could not secure

¹⁶ Among other accomplishments, Howe was intimately involved in the industrial expansion of the Canadian wartime economy, earning him the (moot) accolade of igniting industrial revolution in Canada, according to some (Roberts, 1957; "The Minister of Everything," 2008). Though he supported industrialization during wartime, he was notably hostile toward labour unions in post-war years (Bothwell & Kilbourn, 1979, p. 206).

sufficient gas purchase and sale contracts for the pipeline.¹⁷ On November 1, 1955, the federal government drew up an agreement with TransCanada outlining a government-subsidized financing plan for the pipeline, pending approval from Parliament. In this agreement, the government proposed to establish a Crown corporation (state enterprise) intended to secure the necessary rights-of-way and fund construction for the north Ontario section of the pipeline, spanning from the Ontario-Manitoba border to Kapuskasing, approximately 1,086 kilometres. The government would then lease the northern segment to TransCanada with a purchase option. The funding offer was one-third of the total cost of construction, not to exceed \$35 million. Later, the offer was expanded to 90 percent of construction costs, not to exceed \$80 million. As per the agreement, the Ontario legislature passed the *Northern Ontario Pipe Line Act* in 1956, which created the new Crown corporation (the “Northern Ontario Pipe Line Crown Corporation”) and authorized the Treasurer of Ontario to provide it with loans (Canada, 1958).

The government’s financing plan, however, did not receive a welcome reception in Parliament. Between May 1 and June 1, 1956, the legislature passed the special bill to fund the pipeline. Tensions flared up especially over the pipeline’s nationality. While it was proposed as an “all-Canadian” pipeline, U.S. capital controlled 50 percent of TransCanada’s equity stock, effectively making it just as Canadian as American.¹⁸ The Canadian route was far from an economically efficient option, but C.D. Howe’s vision of a nation-wide enterprise triumphed. In a desperate move to suppress dissent, on all three readings of the bill the Liberal government invoked “closure”, an obscure wartime parliamentary procedure used to preclude further debate on an issue. With the legislation passed, the federal government lent nearly \$50 million—nearly \$450 million in 2018 CAD—to build the TransCanada pipeline. But the government’s use of closure quash opposition one of the most famous parliamentary scandals in Canadian history

¹⁷ This marks a key difference between crude oil and natural gas pipelines. While oil pipelines typically have only one or two terminal sites—refineries or shipping terminals—gas requires no further refining and is often delivered directly from the mainline to individual consumers, via a network of smaller pipelines. Refineries thus set the demand for oil pipelines, while individual purchase and sale contracts set the demand for gas.

¹⁸ Two competing firms had vied to construct the west-to-east pipeline, namely, Western Pipe Line (Canadian-owned) and Canadian Delhi (U.S.-owned). To ensure majority ownership of the pipeline, the two firms merged in 1951, liaised by C.D. Howe, and TransCanada Pipe Lines was incorporated as a special act of Parliament in 1951 (Kilbourn, 1970).

eventually culminated in the Liberal party's electoral defeat and gave rise to the Progressive Conservative Party, led by John Diefenbaker, in office from 1957-1963 (Bothwell & Kilbourn, 1979).

The early NEB

Arguably, the Great Pipeline Debate was an administrative crisis that risked collapsing into a legitimization crisis. Amplified “petro-optimism”—higher development activity and investment—following the discovery at Leduc in 1947 quickly led to a transportation bottleneck, as railways and other means of transportation were simply not as efficient in transporting petroleum products. This lack of pipeline capacity in turn created a surplus of capital in Alberta with nowhere to go, risking a potential overaccumulation crisis and devaluation of capital—an administrative crisis in the making. Pipelines were expected to ease this bottleneck, but required the state to pave the way by overcoming administrative hurdles. The natural response was to create an institution that had the necessary authority to overcome these barriers and ensure pipelines were constructed as efficiently as possible.

Diefenbaker, who had advocated for a “national energy authority” during his electoral campaign, was especially concerned with tackling the regulatory hurdles involved in building pipelines (Kilbourn, 1970). Canada's expansion of its petroleum industry had come at an ideal time: in 1956, the Suez Crisis had cut the flow of Persian Gulf oil nearly in half, sending the price of Canadian oil on a steep rise. While production had increased greatly, it was largely a lack of pipeline capacity that restricted increased exports. The final hurdle in building pipelines efficiently was tackling the chaos of regulatory procedures, institutions, and commissions involved in exporting oil and gas. This regulatory process typically involved provincial approval of the right to develop and exploit gas and oil, federal approval of interprovincial and international exports (through the Department of Trade and Commerce and the Board of Transport Commissioners), U.S. approval of imports (through the Federal Power Commission), and Parliamentary approval of the pipeline route. Conflict was a common occurrence throughout this bureaucratic web, illustrated by the dramatic events of the Great Pipeline Debate, and devising an independent energy tribunal became a top priority for Diefenbaker. Upon taking office in 1957, the Diefenbaker administration enacted a Royal Commission on energy, commissioning the corporate lawyer and businessman Henry Borden to direct

an inquiry into the state of the Canadian energy industry. The primary purpose of the Royal Commission was to determine the policies that would best serve the “national interest” regarding the development and export of energy products, and to sketch an outline of a national energy board to streamline the regulatory process for pipelines.

Published in 1958, the first report of the Royal Commission on Energy—known colloquially simply as “the Borden Report”—made a number of ground-breaking and controversial recommendations regarding the state’s role in steering the nascent energy industry. In particular, it recommended enacting legislation for a National Energy Board “to exercise effective control over the export from and the import into Canada and the movement across provincial boundaries of all energy and sources of energy” (Canada, 1958, p. x). It further suggested that the NEB would also be responsible for studying and recommending to the Governor in Council “policies designed to assure to the people of Canada the best use of...energy sources in Canada”. Regarding authorization for pipeline construction, the Report listed a host of matters that the NEB should consider when deciding to issue permits, including the NEB’s determination if the pipeline is in the “public interest” (1958, pp. x-xii). Importantly, the Report emphasized the need for an independent board, stating that the NEB “shall not be a body corporate or be responsible to and subject to the direction of any specific Minister otherwise than as specified” (1958, p. xiii). In other words, the NEB was to be an independent tribunal, reporting directly to Parliament,¹⁹ responsible for adjudicating pipeline proposals, creating and enforcing regulations, and setting prices.

A year later, the Borden commission published its second report (Canada, 1959). If the first report was concerned mostly with developing protectionist policies to promote the Canadian energy sector, the second focused more on what to do about the problem of overaccumulation. The Suez Crisis had ended just as swiftly as it had begun, oil tanker rates had dropped, and Canada had cut exports nearly in half despite increased production. In 1959, Parliament passed the *National Energy Board Act or NEBA* (R.S.C. 1985, c. N-7), formally establishing the NEB. The NEB’s first priority was developing an energy strategy that could both appease international (U.S.) and Canadian oil producers. One strategy was to export more oil to the U.S., but this contradicted the protectionist logic of energy nationalism. A second strategy was to capture Canadian markets,

¹⁹ At the time, the NEB was to report to Parliament via the Minister of Trade and Commerce.

especially in Montreal, the refineries of which were supplied mostly by U.S.-owned Venezuelan oil. Doing so would require government controls to block imports to Montreal refineries and to substitute their supply of cheap imported crude with Canadian crude. The NEB was principally involved in negotiating with Canadian and international producers throughout the process (Gray, 2000). The definitive policy was a compromise between both these strategies: the National Oil Policy (NOP), implemented in 1961 and lasting until 1970. The NOP drew a line along the border of Ontario and Quebec, stipulating that Canadian producers had exclusive rights to supply refineries in all provinces west of the line, while the eastern provinces would continue to receive imported crude.

Deregulation, capture, and lost public trust

Between the years 1970 and 2009, the NEB remained central to devising and implementing national energy strategies. It was instrumental in generating the failed National Energy Program (NEP) in the 1970s, which envisioned a new round of protectionist policies and government-funded exploration activities to turn Canada into an energy superpower (McRae, 1982). The NEB faced its first criticisms of being a “captured” regulator around this time, disparaged for its apparent lack of independence from Pierre Trudeau’s federal administration (Gray, 2000). In the early 1970s, it participated in a joint review of the Mackenzie Valley pipeline, proposed to run from Norman Wells, Northwest Territories, to northern Alberta. This was likely the most publicized pipeline proposal in the NEB’s short history, with public consultation lasting more than 700 days over three years.²⁰

In the 1980s, the NEB’s role began to shift dramatically. The election of the federal Conservative party in 1984 under the leadership of Brian Mulroney signaled the end of the Fordist interventionist state. One of the top priorities of the Mulroney administration was to deregulate the energy industry, which required dismantling the Trudeau government’s National Energy Program. With the signing of the Agreement on

²⁰ A Royal Commission led by Justice Thomas Berger determined the fate for two proposed pipelines in Canada’s arctic region. Berger, who spent significant time consulting with Indigenous nations in the north, argued in his 1977 report that there was no significant economic benefit anticipated from either pipeline. He recommended no pipeline ever cross the Arctic Wildlife Range, and that no pipeline be built in the Mackenzie Valley for 10 years so that Aboriginal land claims could be settled. Despite his recommendation, the NEB ultimately approved a pipeline in the Mackenzie Valley in 1983, following only five weeks of public consultation (Dokis, 2016).

Natural Gas Markets and Prices in 1985, most price controls on oil and gas imports and exports were lifted. Shedding its role of price-setting, the NEB thus became “slimmer and trimmer” in the deregulation years, giving less attention to regulation and much more to streamlined pipeline approval (Gray, 2000, p. 107). But approving pipelines has been no straightforward matter for the NEB. In 1992, the newly enacted *Canadian Environmental Assessment Act* or *CEAA 1992* (S.C. 1992, c. 37) came into force, requiring the Canadian Environmental Assessment Agency (CEAA) to conduct environmental assessments for federal projects, including proposed projects that would fall under the NEB’s jurisdiction. Along with increasing environmental protection regulation, landmark court decisions such as *Delgamuukw v. British Columbia* (1997, 3 S.C.R. 1010) constitutionally enshrined Aboriginal Title and required the Crown to conduct extensive consultation prior to approving any project that crossed titled land. Increasingly, the federal government has delegated the role of Indigenous consultation to the NEB (West Coast Environmental Law, 2017).²¹ Given the new host of considerations, the pipeline approval process became once more lengthy and arduous, despite that the original purpose of the NEB was to streamline regulatory hurdles.

In response to regulatory slowdown, in 2012 the Conservative federal government passed omnibus legislation known as the *Jobs, Growth and Long-term Prosperity Act*, or more simply, Bill C-38 (S.C. 2012, c. 19). C-38 repealed and replaced several key statutes governing environmental regulation, such as the earlier *CEAA 1992*, the *Fisheries Act*, the *Species at Risk Act*, the *Navigable Waters Act*, and the *NEBA*. The newly renovated assessment protocol stipulated that the NEB would conduct its own environmental assessments, unless a joint review panel (JRP) is established with the CEAA or a provincial regulatory agency. It gave the Minister of Environment broad discretion to determine *ad hoc* which projects would require federal environmental assessment. C-38 also imposed strict timelines on the public hearing process during pipeline approvals, calling for a fixed 18-month timeline starting as soon as a firm filed an application. The NEB also began restricting public involvement in the consultation process, primarily by reducing the number of public intervenors and curbing public comment. During the hearing process for Enbridge’s Line 9 project proposal, the NEB

²¹ This lack of adequate consultation was a primary reason that the federal appellate court quashed the Trans Mountain Expansion approval in *Tsleil-Waututh Nation v. Canada (Attorney General)* (2018 F.C.A. 153).

required any member of the public wishing to submit a comment to fill out a 10-page application form and submit it to the NEB within two weeks of receiving it (Gage, 2013). These changes effectively eliminated the need for lengthier environmental assessments and clawing back at environmental protection mechanisms. The Bill is widely considered a strategic means of expediting pipeline approval—especially the Northern Gateway project (Gibson, 2012). Predictably, subsequent NEB approvals were met with uproar, and the NEB suddenly found itself “in the eye of the storm”.²²

One of the most significant changes to the NEB through Bill C-38 concerned final decision-making authority. Since 1959, the NEB’s decision-making authority set out in the *NEBA* was largely uncontested, except through a constitutional challenge. Though the Governor in Council was required to ratify the NEB’s decisions, it could not reverse or amend them. If the NEB rejected a proposed project, the GIC could not reverse that decision. Bill C-38 amended §52 of the *Act*, providing instead that the NEB could only recommend to the GIC whether a project should proceed or not. Since the Bill’s implementation, the NEB no longer possessed final decision-making authority on major projects.²³ The effect of this amendment was to consolidate the Crown’s decisionism in pipeline matters, but also to codify it. If the Crown was to reject the NEB’s recommendation on a pipeline, it would no longer be “exceptional” for it to do so; it would be entirely legal and impervious to court challenges. But the state would also require greater legitimation to consolidate decisionist power in this way. As Habermas (1974) notes, the demand for legitimation increases proportionately to increased state interventionism. While Bill C-38’s changes targeted administrative inefficiency and required greater state intervention to overcome legal and political hurdles, the changes did not resolve the problem of legitimacy for the state. Instead, the NEB gradually became the primary vehicle for the state to secure legitimacy.

²² Despite Peter Watson’s characterization, 2013 was not the first time the NEB had found itself in the eye of the storm. It is not the case that since its inception the NEB was able to approve and regulate pipelines without question. Controversy around the NOP, the Mackenzie Valley project, and the NEP all demonstrate that the NEB was never the quiet, neutral regulator that Watson presents.

²³ Interestingly, the amendments to the NEB’s decision-making authority only concerned pipelines. It still has the final say on matters regarding international powerlines, subject to GIC approval.

Malfunctioning legitimization?

Overall, the history of the NEB shows that it was a key institutional fix to help the state avoid administrative crisis and get pipelines built quick and efficiently. But more recently, changing hegemonic narratives about pipelines and climate, as well as the success of Indigenous peoples' counter-hegemonic battles in legal, political, and frontline arenas, place greater demands on the state's legitimization processes. For the state to build pipelines and get its oil products to market, it must overcome the commonsense contradiction between oil production, on the one hand, with climate considerations and Indigenous jurisdiction on the other. Additionally, as the state re-asserts its decisionist authority in pipeline matters, it must secure legitimization for those decisions. As it stands, the NEB—an institutional patchwork designed to support administrative efficiency, not political matters—is unable to produce the necessary legitimization for the state to pursue its strategic interests. It is increasingly regarded as an outdated, out-of-touch, “captured” regulator that has lost public trust, indicating that its legitimization function is broken, likely because it was never designed to do legitimating work.

Perhaps the most disastrous blow to the NEB came during a botched approval for the contentious Trans Mountain Expansion project. After conducting consultations with over 40 Indigenous nations, holding public hearings, and conducting an environmental assessment, in 2017 the NEB approved TMX:

On the whole, taking into account all of the evidence in the hearing, considering all relevant factors, and given that there are considerable benefits nationally, regionally and to some degree locally, the Board found that the benefits of the Project would outweigh the residual burdens. Accordingly, the Board concludes that the Project is in the Canadian public interest (National Energy Board, 2017).

The decision was subject to widespread criticism. Opponents attacked the NEB's decision to exclude from consideration the impacts of marine shipping on endangered resident orca populations, while Indigenous people and First Nations argued that the decision flagrantly disregarded their jurisdiction (see, for example, Secwepemcul'ecw Assembly, 2018). The NEB argued marine traffic did not fall within its regulatory scope (National Energy Board, 2017). As some have pointed out, the NEB's mandate for considering the impacts of pipeline construction have become much more flexible in recent years, giving the Board more prerogative to arbitrarily determine the spatial limits

and jurisdictional scope to its assessments (Forrest, 2018; Ghoussoub, 2018). Just a few months later, the federal appellate court ruled unanimously that the NEB's assessment was sufficiently flawed that the federal government's decision to proceed with the project was unconstitutional. Though the Crown has increasingly relied on the NEB to fulfill its role in consulting Indigenous people, the appellate court decided that the state did not engage satisfactorily in "meaningful", two-way dialogue with First Nations, as per *Delgamuukw v. British Columbia* (1997, 3 S.C.R. 1010). The court also found that the Crown erred in accepting the NEB's assessment, given that it had chosen not to consider the environmental consequences of increased oil tanker traffic for local marine life.

A second, more sustained criticism was again that the NEB had become a "captured" regulator. These claims proliferated since at least the years of deregulation, when the NEB's head office was moved to Calgary in 1991, down the road from the corporate headquarters of the very firms it regulated. It regularly appoints former oil and gas lobbyists and businesspeople to its advisory panels. Gray (2000, p. 83) reports that 90 per cent of the NEB's operating costs were paid for by billing the companies it regulated, and as such the NEB came to view itself "more as a partner of the interests it oversees than as a cop giving orders". Similarly, during the Trans Mountain Expansion review, intervenors and public commenters argued that the NEB "was on a predetermined course of action to recommend approval of the Project" (Eliesen, 2016) and that "the game is rigged" (Linnitt, 2015).²⁴ As noted earlier, the state's legitimation process necessarily benefits a hegemonic group, but it must stop short of "narrowly

²⁴ The widespread idea of "regulatory capture" comes from neoclassical economics, especially the work of George Stigler (1971). Stigler's theory states that commission regulation—in sectors such as electricity transmission and telecommunications—is effectively a commodity, subject to forces of supply (by legislators) and demand (by affected interest groups). This is in contrast to two other approaches: "public interest theory," which states that governments regulate to fix market failures and on behalf of greater social welfare, and "capture theory," which states that regulatory agencies tend to come under the influence of the industry they were intended to regulate. Priest (1993) argues that the concept of regulatory capture acted as a sort of proxy debate over socialism in the mid-1950s U.S., aimed at debunking government regulation and ushering in widespread industry deregulation. In addition, Priest speculates that for Stigler and others, capture theory sought to justify deregulation even in cases of natural monopoly—one of the few instances in which most economists agreed that regulation (and thus, state intervention) was acceptable. Ironically, the more recent charges that the NEB is an industry-captured regulator have come from those in favour of greater, not less regulation. It is likely that the concept of capture returned to the public discourse after two high-profile intervenors—Marc Eliesen and Robyn Allan, both trained as economists—withdraw from their positions during the approval for the Trans Mountain Expansion. Each publicly condemned the NEB as a "captured regulator".

corporate economic interest” (Gramsci, 1971, p. 182). That the NEB’s regulatory process is widely condemned as “captured” and its public consultation denounced as inadequate suggests that the legitimation process is not as “independent” as it should be.²⁵ If subordinate groups believe the state to be operating solely in the interests of one particular group—the corporate elite—and not in the universal interests of the entire nation, then they will likely withhold their legitimation. Justin Trudeau’s federal government cited this lack of regulatory independence as prime motivation to overhaul and “modernize” the NEB (Office of the Prime Minister of Canada, 2018).

Conclusion: The NEB, then and now

In this chapter, I have outlined the historical conjuncture in which the NEB came into being, as well as the political economic logic behind its creation and function. In the early 20th century, massive oil deposit discoveries in Alberta and Saskatchewan ignited one of Canada’s first major oil booms. Changing global market and geopolitical conditions made a successive boom possible in the mid-1950s, and again in the mid-1970s. The state jumped at these opportunities to make Canada a global “energy superpower”. In the early years of oil and gas development, the state’s primary policies were to boost exports and develop a national energy strategy to encourage a budding domestic industry. This meant, among other things, building pipelines. To coordinate effective and efficient pipeline construction, the state needed to overcome a number of political, economic, legal, and jurisdictional problems. The early NEB served as a sort of institutional patchwork to remedy these problems. It was, in a sense, an “administrative fix,” as its primary purpose was to ensure economic efficiency in energy regulation.

Over time, however, this patchwork became overburdened with increased responsibilities delegated by the state, such as environmental assessment and Indigenous consultation, which detracted from its goal of regulatory efficiency. Additionally, the need for legitimation became more acute, and the NEB became progressively accountable for overseeing the legitimation process in pipeline construction. It was, however, not designed to fulfill such purposes, and in fact has proven to hinder the legitimation process significantly. In the next section, I turn more

²⁵ Some, such as Harrison (2013), suggest that true regulatory independence is likely impossible to achieve.

directly to the NEB's public interest mandate, which I argue is the centrepiece of its legitimisation function. The NEB ostensibly "balances" competing corporate, ecological, and Indigenous interests to find an average "public interest." I argue this effectively fulfills an ideological function to maintain the hegemony of a ruling bloc by presenting the interests of a capitalist class as universal or in the "public interest".

Chapter 2. The public interest mandate

Introduction

To justify pipeline construction, the federal government has routinely invoked the term “national interest”. While ambiguous, the “national interest” is a foundational claim for pipeline proponents, of which the federal government is the most prominent and powerful. It underwrites the pro-pipeline argument in speeches from the throne, legislative documents, briefings, press conferences, and even government television and internet advertisements. A related but conceptually different term also used to justify its decisions to approve pipelines is the “public interest”. Whereas the state and political actors tend to frame pipeline decisions as part of a broader “national interest”, regulatory institutions such as the NEB refer to a “public interest”. While both generally refer to the same concept of a “common good” unifying all members of a particular “public,” the latter operates as a more depoliticized, bureaucratic referent than “national interest,” which appeals more to an affective dimension of nationalism to shore up legitimacy. The productive capacity of “national interest” is not limited to the sphere of formal politics and state actors, either: it helps mobilize parts of the citizenry in favour of pipeline development. In this sense, “national interest”—and the seemingly neutral “public interest”—are unspecified appeals to the Canadian nationalisms of everyday citizens. Speaking on the matter of the controversial Trans Mountain Expansion, Prime Minister Justin Trudeau stated that the project “is a vital strategic interest to Canada”:

It will be built. What does that mean, to say it’s a vital strategic interest to Canada? It means hundreds of thousands of Canadians who work long hours every day to put food on their table, and to build this country, depend on this project getting built. ... It means the billions in public funds, for health care, for infrastructure, for the environment, now being lost...because we can’t get our product to new markets, is not something we can accept as a permanent anchor on our national prospects (Office of the Prime Minister of Canada, 2018).

Of course, the “national interest” frame is not novel, but well-established in Canadian constitutional law. When, in early 2018, the federal government decided to purchase the TMX project from Texas-based Kinder Morgan—an effective nationalization—the Canadian Senate passed the *Trans Mountain Pipeline Project Act*, or *An Act to declare the Trans Mountain Pipeline Project and related works to be for the*

general advantage of Canada (Canada, 2018). The purpose of the Act was to circumvent a constitutional challenge lodged by the British Columbian government, which sought to restrict the flow of oil through the BC portion of the pipeline. The Act formally declared the project in the “general advantage” of Canada, citing the *Constitution Act* (1867). It referenced the so-called “declaratory power” of the federal government, which grants parliament the authority to declare, as deemed necessary, “Local works and undertakings” (infrastructure projects) “to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces” (*Constitution Act*, 1867, §29(10)(c)). The *Trans Mountain Pipeline Project Act* is the federal government’s formal declaration of full jurisdiction over the project, nullifying British Columbia’s constitutional challenge—though the Act was eventually defeated in the House of Commons.

In addition, the national or public interest functions as justification not only in the context of inter-scalar jurisdictional conflicts. One of the most pertinent and common deployments of “national interest” has been to authorize and legitimize colonial intervention in Indigenous lands, even those lands subject to Aboriginal title. According to the Supreme Court of Canada in *Tsilhqot’in Nation v. British Columbia* (2014), the Indigenous Tsilhqot’in Nation has full authority and use of a bounded territory, concerning which the Crown must seek the consent of the title-holding Indigenous group prior to approving any development project. However, the Court qualified that if the Crown could justify the approval of a development project on Tsilhqot’in land in the “public interest”, the Crown’s constitutional duty to consult could be waived. This is a *de jure* prerogative power the Court bestowed to the Crown, but which the state had effectively exercised *de facto* for significantly longer.

In this chapter, I argue that the NEB’s mandate to determine whether pipelines are in the “public interest” is an overlooked yet crucial means of producing legitimacy for the state’s decision to build pipelines. It operates to naturalize a scalar logic that prioritizes the (perceived and contestable) benefits of the project, which are assumed to accrue at the aggregate or national level, while discounting the adverse impacts of the project, events which occur at the local and regional levels. I begin with a technical overview of the NEB’s mandate and the pipeline approval process before moving on to analyzing the implicit scalar bias in the NEB’s assessment of benefits and burdens.

The pipeline approval process

The idea of “public interest” is central to the NEB’s pipeline approval logic. In its statement of purpose, the NEB defines its role as promoting “safety and security, environmental protection and efficient energy infrastructure and markets in the Canadian public interest” (Canada, 2018). The operation of this mandate can be observed in the pipeline adjudication process—one of the NEB’s two broad functions relating to energy infrastructures. In this primary role, the NEB makes a recommendation to the Governor in Council whether or not a pipeline should proceed. Its secondary role is as an energy regulator,²⁶ giving the NEB authority to set tariffs, tolls, and taxes on pipeline usage, to oversee environmental and safety regulations—which it can enforce with penalty, owing to its quasi-judicial status—and managing project abandonment. It also collects data on pipeline capacity, the export and import of various energy commodities, as well as their associated supply and demand. These data inform the NEB’s official reports, which the Minister of Natural Resources uses to anticipate the need for future energy projects, such as pipelines.

The process for approving a pipeline is fairly straightforward, but includes a number of regulatory steps that can take months to years to complete. As per the *NEBA*, pipelines only fall under federal jurisdiction and require NEB assessment if they cross international or provincial boundaries.²⁷ For larger projects (those longer than 40 km), the process begins when a company files a public project description or an application for construction and operation to the NEB. This triggers the public consultation phase, primarily involving public hearings in which the NEB consults groups directly impacted by the project as well as relevant experts. A significant part of the adjudication process involves conducting an environmental assessment that addresses environmental

²⁶ Since the late 1980s, oil and gas export prices are largely set by the market. The NEB’s regulatory function today is much more limited than at the time of its establishment, mostly consigned to setting rates for pipeline tolls (Gray, 2000).

²⁷ Pipelines under federal jurisdiction, and thus regulated by the NEB, only make up about 10% or 73,000 km of the 760,000 km of pipeline in Canada. The rest are regulated by provincial agencies, and most of the remainder—about 415,000 km of pipeline—are located in Alberta (National Energy Board, 2017b). However, perhaps the most important pipelines for the state are those that are export-oriented or cross international boundaries, making the NEB the most important political economic agency in terms of pipeline regulation.

impacts in the broadest sense of the term, including potential ecological, social, and cultural consequences of a project. The evidence that the NEB evaluates can include oral testimonies, written questionnaires submitted by intervenors, and data collected by the applicant on measures such as risk of spills, potential habitat loss, and anticipated greenhouse gas emissions from construction. Following its assessment, the NEB may conduct more rounds of public hearings to determine a final route for the pipeline.

The final stage in adjudication, involving approval from the GIC, is a somewhat more complicated three-step process. First, the NEB publishes its environmental assessment findings in its Reasons for Decision (RFD). The objective of the NEB's judgement is to find a "balance" between the costs and benefits of a project. It must determine whether, all risks and benefits considered, a project will be in "the present or future public convenience and necessity," or "public interest". The NEB then determines whether, given this net balance, a project would be in "the present or future public convenience and necessity," or "public interest". In its 70-year history, in almost every case the NEB has recommended that the GIC approve proposed projects. In the past 10 years, for example, the NEB has approved every major and minor project application (see *Table 1*).²⁸ Second, the GIC makes a final decision on a project's fate. While the GIC is not legally obligated to rely solely on the NEB's recommendation, in practice, it usually does. Third, the GIC either approves or rejects a project. In the former case, it issues an Order in Council (an executive order) to the NEB to issue a "Certificate of Public Convenience and Necessity" (CPCN), which authorizes the pipeline company to construct and operate its pipeline. In the latter, the GIC can refuse issuance of a CPCN. But in almost every case, it has approved pipeline proposals.

The challenge is that the NEB does not provide any clear operating definition of the "public interest," nor does it explain how it weighs different evidence in different circumstances. The *NEBA*, for instance, cites "public interest" 17 times, but stops short of defining it. This seems puzzling, since pipeline assessment essentially hinges on the NEB's public interest determination. The public interest mandate is legally informed by

²⁸ There is only one known case in the history of the NEB in which it has not recommended a project to the GIC. In 1966, the GIC rejected the NEB's recommendation to approve a gas pipeline proposed by Great Lakes Gas Transmission Co., running from Manitoba to Ontario but crossing through the U.S. The GIC insisted that the pipeline follow a Canadian route, but just one month later reversed its decision and approved the proposal after being assured that the pipeline's main terminal markets would be in Ontario and Quebec (Gray, 2000).

§52 of the *NEBA*, which details the criteria for recommending a Certificate of Public Convenience and Necessity. The NEB must evaluate the following factors when determining the public interest:

- (a) the availability of oil, gas or any other commodity to the pipeline;
- (b) the existence of markets, actual or potential;
- (c) the economic feasibility of the pipeline;
- (d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and
- (e) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application (*National Energy Board Act*, R.S.C. 1985, c. N-7).

Table 1: NEB decisions on recent pipeline projects

Project	Project type	Company	Filing date	RFD Date	Decision	Oil/Gas	Notes
South Peace Pipeline	Pipeline	Spectra Energy Transmission	2008	2008	Approve	Gas	
Keystone XL	Pipeline	TransCanada-Keystone Pipeline GP Ltd.	2009	2010	Approve	Oil	
Northern Gateway	Twin pipelines	TransCanada Pipelines Ltd.	2010	2013	Approve	Both	Overtaken by FCA decision in 2016
Mackenzie Gas Project (withdrawn)	<i>Pipeline</i>	<i>Aboriginal Pipeline Group + TCPL</i>	<i>2004</i>	<i>2010</i>	<i>Approve</i>	<i>Gas</i>	<i>Withdrawn due to changing market conditions</i>
Wolverine River Lateral Loop	Pipeline	Nova Gas Transmission Ltd.	2014	2015	Approve	Gas	
North Montney Mainline	Pipeline	Nova Gas Transmission Ltd.	2013	2015	Approve*	Gas	*1 panel member dissented (agreed with First Nations on route dispute)

King's North Connection	Pipeline	TransCanada Pipelines Ltd.	2014	2015	Approve	Gas	
Trans Mountain Pipeline	Expansion	Trans Mountain Pipeline ULC	2013	2016, 2019	Approve	Oil	Overtaken by FCA decision in 2018
Vaughan Mainline	Pipeline	TransCanada Pipelines Ltd.	2015	2016	Approve	Gas	
Enbridge line 3 replacement	Replace + expand	Enbridge Pipelines Inc.	2014	2016	Approve	Oil	
Line 10 Westover Segment	Replacement	Enbridge Pipelines Inc.	2015	2017	Approve	Oil	
Wyndwood Pipeline	Expansion	Spectra Energy Transmission	2016	2017	Approve	Gas	
Iroquois, Ottawa, Richmond	Facilities	TransCanada Pipelines Ltd.	2017	2017	Approve	Gas	
Sundre Crossover	Pipeline	Nova Gas Transmission Ltd.	2017	2017	Approve	Gas	
Line 21 (Norman Wells Pipeline)	Replacement	Enbridge Pipelines Inc.	2017	2018	Approve	Oil	
Northwest Mainline Loop	Pipeline	Nova Gas Transmission Ltd.	2017	2018	Approve	Gas	
Spruce Ridge Program	Pipeline	Spectra Energy Transmission	2017	2018	Approve	Gas	
West Path Delivery	Pipeline	Nova Gas Transmission Ltd.	2018	2019	Approve	Gas	
<i>Energy East (withdrawn)</i>	<i>Pipeline</i>	<i>Enbridge Pipelines Inc.</i>	<i>2014</i>	--	--	<i>Oil</i>	
<i>Merrick Mainline (on hold)</i>	<i>Pipeline</i>	<i>Nova Gas Transmission Ltd.</i>	<i>2014</i>	--	--	<i>Gas</i>	

Bold indicates a "major project," according to NEB (>40 km)

Italics indicates a withdrawn project

Table based on publicly available data at <https://apps.neb-one.gc.ca/REGDOCS/>.

Most of the factors listed in §52 are economic considerations, not social or environmental ones, which likely reflects the political climate at the time that the Act was written. But more recently, the NEB has suggested that such business aspects are not the sole factors that go into a public interest determination. Instead, they emphasize the need for flexibility in the mandate, ostensibly to weigh each application in light of its

broader political and economic context. Consider, for example, this statement in the RFD for an application by Emera Brunswick Pipeline Company in 2007:

[T]here are no firm criteria for determining the public interest that will be appropriate to every situation. Like “just and reasonable” and “public convenience and necessity”, *the criteria of public interest in any given situation are understood rather than defined* and it may well not serve any purpose to attempt to define these terms too precisely. Instead, it must be left to the Board to weigh the benefits and burdens of the case in front of it... Since the public interest is dynamic, varying from one situation to another (if only because the values ascribed to the conflicting interests alter), it follows that the criteria by which the public interest is served may also change according to the circumstances. In addition, it is worthwhile to note that while the Board may be guided by past decisions, it need not be bound by them; indeed, it may be imprudent to be so bound given the dynamic nature of the public interest, and *the inherent exercise of administrative discretion in the Board’s decision-making process* (National Energy Board, 2007, pp. 10–11, emphasis added).

Similarly, in the (first) Reason for Decision for the Trans Mountain expansion project, the NEB stresses that a flexible mandate can best capture the interests of all Canadians. It argues that the public interest is “inclusive of all Canadians and refers to a balance of economic, environmental and social interests that change as society’s values and preferences evolve over time” (National Energy Board, 2016, p. 13). This “balancing” act always prioritizes the interests of a ruling bloc—since pipeline applications are virtually always approved—but frames them as a universal interest affecting all Canadians. Producing this framing both facilitates the hegemonic project of the Canadian oil and gas bourgeoisie and abets the legitimation process.

“Balancing act”: Public interest as scalar logic

What should we make of the emphasis on circumstantial flexibility and discretion? On the one hand, at first glance it seems appropriate that the NEB should adjudicate projects on a case-by-case basis to assess their specific regional benefits and consequences. The problem, on the other hand, is that there is an implicit but clear scalar bias in the public interest determination: the “benefits” of projects accrue at the macro-level of the national economy, not to individual Canadians. This, along with the lack of comprehensive criteria in the public interest mandate, allows the NEB to more easily dismiss dissent and obstacles to pipeline development.

For the NEB, “public interest” tends to refer euphemistically to a balancing of all individual interests across a polity. Several examples from the NEB’s environmental assessments highlight this scalar disjunct. According to its report, “benefits” of the TMX would include market diversification, job creation, increased economic competition among pipeline companies, growth in pipeline material manufacturing sectors, community benefit programs, enhanced environmental regulations for spill prevention and response, and government revenue through taxes and royalties. The major “burdens” that the NEB weighed in contrast to the benefits included adverse effects to Southern resident killer whale (Orca) populations and associated “Aboriginal cultural uses”, increased greenhouse gas emissions (GHGs) from marine shipping, constrained municipal development plans, Indigenous and landowner rights to use land and water during construction phases, and oil spills (National Energy Board, 2016, pp. xiii–xiv). In weighing benefits and burdens, the NEB used a qualitative scale, categorizing impacts by magnitude as “modest”, “considerable”, or “significant”. It derived its categories based on the perceived geographical scale of impacts, ranging from “local” to “regional” and “national” (see *Table 2* and *Table 3* below). The NEB then derived a “balance” between the burdens and benefits, finding that the national nature of certain benefits greatly influenced its final recommendation:

There would be considerable local, regional and national benefits from market diversification. These include enabling increased capacity to access Pacific Rim markets. There will also be considerable spending on pipeline materials in Canada, as well as considerable jobs that would be created for Canadians, including jobs and opportunities for Aboriginal communities. Many of the benefits would be realized throughout Canada, particularly in British Columbia, Alberta, Ontario and Quebec. The national nature of the benefits was important to the Board” (National Energy Board, 2016, p. 17).

But, in their independent evaluation of the “public interest,” Gunton and Joseph point out that this categorization is inherently biased towards those impacts or benefits that are national in scope:

At no point did the NEB provide any definition of “modest” or “considerable” or any transparent method for how it determined whether an effect was modest or considerable. ... The NEB did not define what constituted ‘local’, ‘regional’, and ‘national’ effects, and failed to use a transparent method to

make this determination. In ‘balancing the benefits versus the burdens’ the NEB placed considerable weight on the economic impacts which it deemed to be national in scope while the environmental burdens were deemed to be local.... [The NEB did not] provide any rationale for its decision to automatically discount burdens incurred by a regional population relative to the benefits received by a larger national population regardless of the magnitude of the burden or benefit....Without a transparent evaluation framework, the NEB’s conclusion that the [TMX] would be in the public interest is therefore subjective and unfounded (2016, pp. ii–iii).

In addition, the nature of “benefits” and “burdens” is contestable. A 2014 study contended that Trans Mountain’s projected employment, tax, and fiscal benefits were “significantly overstated”, finding that, for example, estimated number of direct and spin-off jobs were inflated (Goodman & Rowan, 2014). The study also found that most of the profit from the pipeline would be captured by Kinder Morgan, rather than accruing at the national or provincial level in the form of taxes and royalties.

This “balancing” act, in other words, is not really a balance at all. Instead, it gives the NEB broad discretion to justifiably dismiss, discount, or minimize certain obstacles while privileging others. One example to this effect is the NEB’s consideration of marine shipping and its related burdens. Notably, the federal appellate court quashed the NEB’s first approval of TMX primarily because the assessment did not consider the risks of project-related marine shipping. After re-assessing the project, the NEB found that increased shipping would likely have grave, “significant adverse effects” on the endangered Southern Resident Orca population in the Juan de Fuca straight on British Columbia’s west coast. But because the NEB placed “significant weight” on the “national nature of benefits,” (National Energy Board, 2016, p. 17), it ultimately found that the benefits still outweighed the risks. It effectively framed the anticipated demise of the Orca population, and its associated Indigenous “cultural uses,” as local concerns. Meanwhile, the NEB accepted the view that “Canadians are the ultimate owners of petroleum resources,” (National Energy Board, 2016, p. 294), and that building the pipeline was still in the public interest.²⁹

²⁹ In addition, the “benefits” and “burdens” themselves are highly contested. One independent report finds that Trans Mountain’s projected job estimates and benefits to government revenue to be significantly inflated, while the burdens—such as the risk of oil spills—were understated (Gunton, 2016, 2017).

Table 2: Burdens: Magnitude and scope

Burden	Magnitude of adverse effect	Scope of impact
Southern resident killer whales	Significant	Local, regional, national
Aboriginal cultural use associated with Southern resident killer whales	Significant	Local, regional
Marine greenhouse gas emissions	Significant	Regional, national
Municipal development plans	Modest	Local
Aboriginal groups' ability to use the land and water during construction and operation	Modest	Local
Landowners' and land users' ability to use the land and water during construction and operation	Modest	Local
Project spill	Acceptable (very low probability)	Local, regional
Spill from a Project-related tanker	Acceptable (very low probability of significant spill)	Local, regional

Table based on data from National Energy Board (2016, pp. 16-17).

Table 3: Benefits: Magnitude and scope

Benefit	Magnitude of benefit	Scope of impact
Market diversification	Considerable	Regional, national
Jobs	Considerable	Local, regional, national
Competition among pipelines	Considerable	Regional, national
Spending on pipeline materials	Considerable	Local, regional
Community benefit program	Modest	Local, regional
Enhanced marine spill response	Modest	Local, regional
Capacity development (economic and educational opportunities, communities, businesses)	Modest	Local, regional
Government revenues	Considerable	Local, regional, national

Table based on data from National Energy Board (2016, p. 15).

“Public interest” remains unsubstantiated in both the NEB’s assessment practices and the projections of applicant firms. While there is no scholarly consensus on a definition for public interest, the emphasis on flexibility, indefinability, and discretion is common, especially among public administration literatures (Braun & Schultz, 2010; Campbell & Marshall, 2000, 2002; Elcock, 2006; Martin, 1997). Part of the ambiguity likely derives from the long history of the concept. The origins of “public interest” in public administration of course precede the establishment of the NEB, and the broad

mandate of determining the public or national interest is standard practice for many regulatory commissions and tribunals in North America.³⁰ The term has an even more extensive history in political philosophy, intersecting with conceptions of the “public good”. For centuries, intellectuals have struggled with questions about “the good” or “just” society; at the root of many of these concerns is how rulers can best provide social welfare. Aristotle’s “common interest,” for example, seeks to determine whether a constitution is “right” (in the interests of the common people) or “wrong” (in the interests of the ruler). Many thinkers such as Rousseau and Locke take the “common good” to be the object of a polity’s “general will,” and the highest end that a government could pursue (Diggs, 1973). In short, these theorizations of the “common good” tend to refer to the interests of all members across a polity.³¹

Bentham’s ghost?

While the “common” or “public good” is an ever-evolving, idealized endpoint of governments in general, strategizing how to practically achieve this endpoint—the “public interest”—is the realm of public administrators (Morrell & Harrington-Buhay, 2012). Since the time of Plato, public administrators have been taken to be the “guardians of the public interest” (Elcock, 2006, p. 101). In the post-war era, public administration has become the field of political strategy, the site of exercising “discretionary power” and “the making of value choices” on behalf of a polity (Sayre, 1958, p. 104). More recently, in the era of global financialized capitalism, some argue that public governance has entered an age of “governance without government”, as the private sector has captured considerable influence over public policy and administration (Peters & Pierre, 1998).

Different strategies for determining the public interest are rooted in some moral theory of “the good”. Contemporary public administration is arguably heavily influenced by utilitarianism, an ethical theory of calculative rationality often traced to the work of

³⁰ In the U.S., the State Department receives all applications for oil (but not natural gas) pipeline permits that cross international borders, and adjudicates them based on a “national interest” determination that supersedes statutes such as the *National Environmental Policy Act* (1969) and the *Endangered Species Act* (ESA) (Department of State, 2015).

³¹ This is in contrast with the neoclassical economic treatment of “public goods,” which are defined as commodities “which all enjoy in common”, and are not amenable to market organization because they are not readily “privatizable” (Samuelson, 1954, p. 387).

Jeremy Bentham (1747-1832). Bentham's "utility principle" sought to determine, by means of logical deduction, the "greatest happiness for the greatest number" (Baujard, 2009) across alternative social arrangements. In his *Introduction to the Principles of Morals and Legislation*, Bentham gives his famous formulation: "The interest of the community then, is what?—the sum of the interests of the several members who compose it" (Baujard, 2009).³² The task of government and public administrators, for utilitarians, is thus to determine the public interest and to maximize it through wise legislation, or coercion when necessary. Although Bentham failed to clarify what those interests might be, or how they might combine into a collective common interest, the impact of the utilitarian concept of public interest has been nothing short of enormous in the field of public policy and administration (Campbell & Marshall, 2002).

In effect, the scalar bias of the "public interest" mandate likely originates in this early Benthamite framing. The public interest subordinates what the NEB deems local or regional concerns to a higher-level macro-economic measure (the "greatest possible benefit for the greatest number") whose ill-defined political and spatial scale inevitably dilutes smaller-scale "costs". In such an equation, economic benefits virtually always triumph, since according to the aggregate calculus, they accrue and are meaningfully assessed only at the national or macro level, which represents the greatest number of individuals whose benefit can be maximized.

For 50 years, between the years 1959 and 2009, the public interest mandate went virtually unchallenged. What, then, explains the recent crisis of the public interest mandate, characterized as a "loss of public trust"? For starters, in recent decades, common sense has shifted toward the risks, both local and systemic, that pipeline construction poses. Increasingly, Indigenous-led efforts to defend land and water and acquire Aboriginal title have destabilized the business-as-usual pipeline approval process. Some First Nations suggest that the NEB has "permanently lost the trust" of Indigenous people (Canada, 2016, para. 126). In 2009, members of the Wetsu'wet'en

³² More sympathetic readings of Bentham contend this is an oversimplification. Gunn (1968), for instance, argues convincingly that grasping the full thrust of Bentham's idea requires understanding him as a radical political reformer, especially through his later mature works. According to this interpretation, Bentham's true aim was not to aggregate all interests, but instead to give them expression through representative government and universal suffrage. Despite Bentham's best intentions, I argue that his original formulation of the public interest as a sum-of-all-particulars (and a state as the arbiter of interests) remains a potent concept in public administration today.

First Nation and allies established a barricade camp called Unist'ot'en on their land in northern British Columbia to prevent the construction of the proposed Northern Gateway pipeline project. Similar land- and water-based protection efforts have ensued during the Trans Mountain expansion approval process. 14 First Nations filed appeals to the federal appellate court in opposition to the NEB's Trans Mountain approval; the consolidated appeal helped to overturn the approval and put the project in legal and political limbo. Meanwhile, settlers and organizations have contested the project, being arrested in droves protesting the pipeline, and lodging legal and constitutional challenges, among other efforts. At the same time, the NEB had found itself "in the eye of the storm", criticized as a captured regulator, a "handmaiden" of the state (Dokis, 2016), and unworthy of public trust.

Moreover, the purpose of the "public interest" mandate has changed considerably since its inception in 1959. The reports of the Royal Commissions on Energy, published in the mid-to-late 1950s, were some of the first instances in which the federal government referred to the "public interest". In the Borden Reports and the *NEBA*, this version of "public interest" is used to justify policies of economic nationalism, such as protecting Canadian consumers and firms from U.S. influence and price control. It was, in a sense, a slogan of a Fordist era in which one of the state's principal concerns was to establish a strong national energy sector. At the time, the state's primary concern was ensuring that pipelines could be built quickly and efficiently to ensure exports matched oil and gas production in Alberta and Saskatchewan to avoid an overaccumulation crisis. Doing so required an institutional patchwork of sorts to solve various legal, constitutional, and political problems preventing swift pipeline assembly. From the time of C.D. Howe to Pierre Trudeau, government programs such as the National Oil Policy and the National Energy Program offered substantial state intervention to help turn Canada into an energy superpower. The "public interest" mandate of the NEB, enshrined in the *NEBA*, was intended to prioritize energy nationalism over regulatory hurdles.

Conclusion: “Balance”—for whom?

In this chapter, I have argued that the NEB’s “public interest” mandate is a core feature of the state’s legitimation process for constructing pipelines in its territory. While the state tends to prefer the term “national interest” in its statements regarding pipeline approval, the NEB’s “public interest” mandate—codified in the *NEBA*—has been used to justify pipeline approval since its 1959 inception. Neither term is ever really defined, either in legislation or in NEB publications. When it is described or referred to, it usually alludes to a flexible mandate that gives the NEB broad discretion to balance competing interests and to bridge unity across social, economic, and political difference. Thus, its description of the public interest as “inclusive of all Canadians” and referring “a balance of economic, environmental and social interests that change as society’s values and preferences evolve over time” (National Energy Board, 2016, p. 13). But the NEB virtually always approves applications for pipelines, which suggests that its claim to “balance” opposing interests is contestable.

The “public interest” concept itself is engrained and habitually used in public administration, and was especially widespread in the mid-20th century in which the NEB was established. At that time, the concept was likely useful for the NEB, since it signaled that a national energy strategy and pipeline construction would strengthen domestic industry, creating jobs, and keeping oil and gas prices low for Canadian consumers. Today, however, public interest rings much more hollow since it is not at all clear that the “benefits” of a pipeline project will accrue for all Canadians. The state has long since been “hollowed-out” of its welfare functions and is much less concerned with establishing a strong national energy sector. The problem is not so much about “delivering the goods” to Canadian citizens and consumers, but about maintaining the conditions for accumulation to ensure its “credit-worthiness” to global investors. In short, the NEB now serves a financialized state, not a Fordist state. The “public interest” is, in this sense, anachronistic.

Instead, in this section I have suggested that the public interest mandate functions today to dismiss local opposition to pipeline projects and secure mass loyalty to a social contract of civil privatism. It implies that, despite any opposition, it is still the state (via the NEB) that has the final authority on pipeline decisions. It also establishes a commonsense narrative that pipelines—and by extension, continued expansion in the oil

and gas industry, despite violations to Indigenous jurisdiction and an impending ecological catastrophe—are of universal interest. The objective of the mandate is therefore both to construct and compose a hegemonic conception of “balance”—essentially a polite term for “legitimacy”, the tone of which suggests a certain reasonableness that is difficult to challenge. It is for this reason that the “public interest” is central to the state’s legitimation process.

Conclusion: Renovating the NEB to save sovereignty

The preceding sections have discussed the National Energy Board and its relationship to the production of sovereign legitimacy. Sovereignty, which is fundamentally about who gets to make decisions that impact the entire nation, cannot operate without legitimacy. Sovereignty “matters” because a state cannot effectively administer a national economy without some degree of decisionism, the capacity to step beyond the strictly procedural rule of law to make truly political decisions. To do so, it requires legitimation from the public. Securing legitimacy is thus a central goal of capitalist states. It is often acquired through a “legitimation process” that relies on an implicit social contract: citizens are only expected to participate in constrained, “private” political matters, such as elections or litigation, whereas the state executive makes those truly political decisions that affect the nation as a whole. The state’s sovereignty is legitimated if citizens abide by this social contract and do not oppose, refuse, or reject the state’s authority to decide.

In its economic administration, the Canadian state’s capacity to make sovereign decisions in the matter of pipeline construction has come into question. The state has been unable to secure the ideal market conditions for the oil and gas sector, including efficient pipeline construction and a “creditworthy” business environment. Its decisions have been met with widespread public disapproval and court challenges that have marred the state’s legitimacy. This has led to a stalemate, in which the state cannot execute on its sovereign decisions without adequate legitimation from the public.

In 1959, the NEB emerged as an institutional patchwork to overcome various obstacles to pipeline construction. In its early years, it functioned as a fix of sorts to solve problems of jurisdiction, monopoly regulation, and politicization, enabling more efficient pipeline approval, construction, and regulation. It also facilitated the development of a national energy strategy to protect and bolster a growing domestic oil and gas industry, which required a strong interventionist state. In the post-Fordist era, deregulation and a hollowed-out state led the NEB to shift its role to providing an efficient and rapid pipeline approval apparatus under the auspices of the state’s sovereign authority. Over time, the state devolved to the NEB a growing list of responsibilities—increased public

participation, Indigenous consultation and negotiation, and environmental assessment—all in the name of streamlined, efficient bureaucracy.

These expanding responsibilities for public engagement and consultation transformed the NEB into a crucial institution for organizing legitimacy for the state. But by the mid-2000s, it became increasingly clear that the patchwork could not be sustained by a single institution, especially one that had been “captured” by corporate interests. The institutional fix, designed as it was to buttress the nationalist economic policies of a bygone Fordist regime, was no longer holding, and the NEB faced a crisis of public trust. Under Prime Minister Stephen Harper (in office 2006-2015), the policy of the federal government was simply to scrap parts of the patchwork that were seen to be slowing down the regulatory process. The result has been anything but increased efficiency, and ever greater public distrust.

The “public interest” mandate has become a means of circumventing the thorny politics of deliberative consultation. While it once served to give the NEB broad discretionary power to prioritize Canadian economic concerns over U.S. or international concerns, the priority of strengthening domestic industry is no longer the order of the day. Greater concerns include providing producers with ideal “optionality” in their ability to rapidly respond to changing market conditions (M. Simpson, 2018). Accordingly, the broad “public interest” mandate has proven flexible, able to accommodate different priorities in different political environments, ultimately giving the NEB wide discretionary power in approving pipelines. Based in a utilitarian logic of maximizing profit for the greatest number, the mandate functions usefully with a scalar logic capable of subordinating regional concerns to the interests of the state and the entire nation.

Still, the NEB’s decisions have proven increasingly untenable, and contestable in the courts. With the failure of the Northern Gateway project, it became clear it was no longer possible to “streamline” pipeline approval. To that effect, Justin Trudeau prioritized the overhaul or “modernization” of the NEB during his campaign to become Prime Minister. After assuming office in 2015, Trudeau penned a mandate letter to then-Minister of Natural Resources Jim Carr, instructing him to “modernize” the energy regulator. The Prime Minister was unequivocal: modernization would shore up legitimacy, or “trust,” in the government. “If we are to tackle the real challenges we face as a country,” he wrote, “Canadians need to have faith in their government’s honesty

and willingness to listen” (Trudeau, 2015). He described the task at hand as to “position the NEB as a modern, efficient, and effective energy regulator and regain public trust”. In 2016, Minister Carr assembled the NEB Modernization Expert Panel, directing it to report on measures to modernize the NEB. Based on public comment and reports from Indigenous, environmental, and industry-related organizations, the panel published its findings in a report entitled “Forward, Together: Enabling Canada’s Clean, Safe, and Secure Energy Future” (Canada, 2017a).

Many of the changes the report proposed revolve around a renewed commitment to Indigenous consultation and environmental assessment. It recommended that the new energy regulator obtain “Real and substantive participation of Indigenous peoples, on their own terms and in full accord with Indigenous rights, aboriginal and treaty rights, and title, in every aspect of energy regulation” (2017a, p. 4). The report emphasized “nation to nation relationships with Indigenous peoples”, calling reconciliation “Canada’s most important domestic opportunity” (2017a, p. 8). The Panel even went so far as to recommend replacing the “public interest” mandate with a more inclusive “national interest” mandate, defined as

something more inclusive than the conventional “public interest”. Explained simply, a determination of whether any type of proposal is in the public interest involved trade-offs between factors like projected economic benefits, risks to the environment, and so on. Every project involves some degree of balancing these fundamental interests, and the art of sound decision-making is all about weighing these factors and judging appropriately on that basis. The critical distinction, however, when it comes to Indigenous peoples, is that they do not simply bring interests to the table. Rather, Indigenous peoples retain a set of rights under the constitution. While interests can be traded against each other, rights cannot (2017a, p. 36).

Yet, while the Panel recognized the fundamental inalienable rights of Indigenous peoples under the Constitution, it still suggested that the Crown retain final decision-making authority on all pipeline matters. It specified that

we see this phase of a project’s approval as an *inherently political question* which must be answered by the Governor-in-Council. In plain language: before going too far down the road of considering a new project, Cabinet must decide if, at a high level, that project is in the national interest” (2017a, pp. 21–22, my emphasis).

In other words, the state sought to retain its decisionism, or the authority to make those political decisions when the law is inadequate—a defining feature of sovereignty, for Carl Schmitt (2005). Doing so preserves the settler state’s sovereign claim in the face of the threat of Indigenous counter-sovereignty. Additionally, at the top of the list of “factors considered in determining alignment with national interest” was the concern of “net economic benefits to Canada”.

Ultimately, many—but not all—of these recommendations were taken up as the government drafted new legislation to replace the NEB. In 2018, the government introduced Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*. On June 21, 2019, the Bill received royal assent and was passed into law. As the name suggests, rather than amending the *NEBA*, C-69 creates two entirely new agencies to replace the NEB altogether. The Act repeals both the *NEBA*, replacing it with the new Canadian Energy Regulator (CER), and the *CEAA 2012*, in exchange for the new Impact Assessment Agency (IAA). The tentative preamble of the *Canadian Energy Regulator Act* makes plain two core priorities: to engage and consult Indigenous people, and to maintain Canada’s status as a competitive oil and gas producer.³³ The CER will be a corporation, but an “Agent of Her Majesty” (§10(2)), governed by a Board of Directors with a Chief Executive Officer and a Head Commissioner. The structure and responsibilities of the new Board are comparable to those of the current NEB, with the addition that one director and one commissioner must be Indigenous.

The CER will fulfil virtually the same advisory functions as the current NEB. The agency will still issue Certificates of Public Convenience and Necessity (CPCNs), but the *CERA* gives much more explicit direction as to what the CER should assess in its approval process. Unlike the NEB, which must only consider certain economic factors pertaining to pipelines (laid out in §52 of the *NEBA*), the CER will consider environmental effects, health and safety factors, Indigenous interests and rights, and environmental agreements, for example. The *CERA* also states that firms cannot

³³ The preamble reads that “the Government of Canada is committed to enhancing Canada’s global competitiveness by building a system that enables decisions to be made in a predictable and timely manner, providing certainty to investors and stakeholders, driving innovation and enabling the carrying out of sound projects that create jobs for Canadians”.

construct pipelines through Indigenous reserve land—§78 of the *NEBA* maintains that the GIC may permit construction on reserves without a First Nation’s consent—which overrides the expropriation power of the Crown laid out in the Indian Act (R.S.C. 1985, c I-5) (Bankes, 2018).

Despite these progressive changes, the CER’s relationship to Crown sovereignty remains virtually unchanged. Much like the Expert Panel’s report, it seems many of the provisions in the new legislation are attempts to shore up legitimation from certain populations—especially Indigenous peoples—as well as introducing mechanisms to make court challenges more difficult. The Bill was amended close to 200 times during its Senate readings, many of which were word-for-word recommendations made by oil industry lobby groups (CBC News, 2019). There is little that refers explicitly to climate commitments, but the Bill does take pains to mention Indigenous rights and title. The careful language around Indigenous rights suggests capturing legitimation from Indigenous peoples is a key concern for the state going forward. This is perhaps unsurprising, since both Northern Gateway and Trans Mountain Expansion projects were halted or delayed largely due to legal challenges and frontline, direct-action tactics employed by Indigenous-led social movements, such as the Unist’ot’en blockade and the Protect the Inlet coalition.

The *CERA* legislation also hints at a certain sovereign anxiety within federal politics and law. It attempts to re-vamp the legitimation process to secure approval from Indigenous people, yet it preserves the decisionist power of the state: notably, the *CERA* preserves the amendments that Bill C-38 made to the *NEBA*, transforming the NEB’s role from decision-maker to “recommendation”-maker for the GIC. This follows recent jurisprudence in landmark court decisions regarding Indigenous title: in *Tsilhqot’in Nation v. British Columbia*, for example, the Supreme Court of Canada established stricter rules around consultation for titled land; yet it also added the caveat that the Crown could infringe on titled land if doing so was in the “public interest”. While the Crown will likely use such legal mechanisms apprehensively, this pattern indicates a double-movement within federal consultation law and policy. On the one hand, court decisions and changing policy offer potentially progressive changes to settler law; yet on the other, the changes re-entrench state decisionism and fail to resolve the underlying contradiction between settler sovereignty and Indigenous nationhood. Going forward, pipeline politics will likely remain a key arena in which this tension transpires.

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