



Like oil and water? Canada's administrative and legal framework for oil sands pipeline development and climate change mitigation



Jason MacLean

Bora Laskin Faculty of Law, Lakehead University, Thunder Bay, Ontario P7B 5E1, Canada

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ABSTRACT

This article examines the legal dimensions of energy development and environmental protection in respect of the oil pipeline approval process in Canada. More specifically, focusing on TransCanada's controversial "Energy East" oil pipeline proposal, this article argues that the oil pipeline approval process in Canada is on a collision course with the core principles of sustainable development law, the constitutional protection of free speech and democratic self-government, and administrative independence in Canada. The article concludes by exploring the relationship between oil pipelines – and energy development more generally – and fundamental democratic values.

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1. Introduction: fossil fuel values?

In *Foragers, Farmers, and Fossil Fuels: How Human Values Evolve*, U. S. anthropologist Morris (2015, p. 14) argues that "each age gets the thought it needs." Looking at the entire planet over the past 20,000 years, Morris sees the emergence and evolution of three broadly successive systems of cultural values: foragers' values, farmers' values, and fossil fuels users' values. In turn, Morris contends that each of these systems of cultural values – each particular way of organizing human society – "is dictated by a particular way of capturing energy from the world around us" (p. 4).

Morris calls the first system of values "foraging values," because foraging is associated with societies that support themselves primarily by gathering wild plants and hunting wild animals; foragers, Morris maintains, tend to value equality over hierarchy and appear rather tolerant of violence. The second system Morris calls "farming values," named for societies that subsist primarily on domesticated plants and animals; farmers, according to Morris, tend to value hierarchy over equality but are less given to violence. The third system, our own, is what Morris calls "fossil fuel values," which are associated with societies that augment the energy of living plants and animals by exploiting the energy of fossilized plants that have turned into coal, gas, and oil. "Fossil-fuel users tend to value equality of most kinds over hierarchy and to be very

intolerant of violence" (p. 4).¹ For Morris, then, "energy capture determines values" (p. 5).²

More specifically, Morris argues that fossil fuel values include peace, democracy, open markets, gender equality, and equal treatment before the law (p. 118).³ When it comes to democracy in particular, Morris allows that "[p]lenty of scope remains for arguments over just what 'democracy' means, but in much (probably most) of the world, it rests heavily on the belief that steep political hierarchies are bad" (p. 121). Nevertheless, Morris confidently asserts that "[t]he spread of fossil-fuel economies around much of the planet has taken liberalization with it, to the extent that many activists now speak of a worldwide human rights revolution since the 1950s" (p. 116).

Morris' sweeping historical argument is counter-intuitive, perhaps, controversial certainly. For the purposes of this article, however, Morris' account offers a useful framework for examining the relationships obtaining among energy development,

¹ For a trenchant critique of this line of cultural evolutionary argument, see Scott (2011).

² For a contrasting historical approach, albeit on a much smaller and far more detailed scale, see Sabin (2005, p. 209), who argues that "the history of the Californian oil economy yields a basic insight and lesson: political decisions, as much as the consumption choices of our everyday lives, have greatly influenced our development as a petroleum society. Politics brought us here and keep us on the present path. Only politics and policy choices can lead us away".

³ Note that this analysis does not specifically take up Morris's particular arguments regarding gender equality and open markets.

E-mail address: jason.maclean@lakeheadu.ca (J. MacLean).

environmental protection and sustainability, and the constitutional and administrative laws (and their underlying democratic values) in fossil-fuel countries like Canada, which has been characterized on more than one occasion as a petro-state.⁴

In particular, Morris' surprisingly sanguine account of the relationship between fossil-fuel development and democratization offers a broader contextual lens through which to view fossil fuel's – and oil pipelines' – collision course with the values of democratic governance, the rule of law, and environmental stewardship in Canada and elsewhere.⁵

In this article, I attempt to describe the contours of this seeming collision course between oil pipeline development – and the development, particularly, of Alberta's oil sands – and Canadian sustainable development law, constitutional law, and administrative law. Examining each in turn, I focus primarily on the review and approval process surrounding the controversial "Energy East" oil pipeline proposal, along with closely related pipeline projects previously or currently being assessed on virtually the same terms and conditions as Energy East. In doing so, I draw upon various and seemingly disparate strands of jurisprudence (e.g., American administrative law, and Canadian Aboriginal law) that are, upon closer inspection, directly relevant to the relationship between oil sands pipeline development and Canadian democracy.

The plan of this article is as follows. The analysis begins with a brief overview of the National Energy Board (NEB) and its statutory mandate to regulate energy and oil pipelines in the public interest of all Canadians. The article proceeds by introducing TransCanada's Energy East oil pipeline proposal, including its resonant historical background, followed by an account of Energy East's expected climate change implications. The article then examines Energy East's seeming "collision course" with (1) Canada's legal framework for sustainable development, (2) Canadian constitutional law, particularly the fundamental rights of freedom of expression and meaningful participation in democratic self-government, and (3) Canadian administrative law, including the principles of administrative independence, competence, and deference. The article concludes by critically reconsidering Professor Morris' argument that "each age gets the thought that it needs" in light of both the current oil pipeline approval process in Canada and the recent emergence of the "Alberta Spring," or the election of the left-wing New Democratic Party (NDP) in the heart of Canada's oil sands. The election of the NDP in the "Texas of Canada" is a kind of natural experiment testing the relationship between fossil fuels and democracy: co-evolutionary, or – to mix one last metaphor – like oil and water?

2. The National Energy Board's mandate and oil pipeline approval process

In 1957 the Canadian federal government struck a Royal Commission on Energy to examine whether a national administrative board governing energy matters ought to be established. The issue did not suddenly appear out of the blue. In 1955, an earlier Royal Commission, on "Canada's Economic Prospects," recommended that a national energy authority be created to regulate energy exports (NEB, 2015d). Notably – and not a little ironically – the Royal Commission on Energy's examination unfolded just as Canada debated, and both the Liberal and

succeeding Conservative federal governments facilitated, the construction of a west-to-east natural gas pipeline, the Trans-Canada Pipeline, which is the forerunner of the Energy East oil pipeline project discussed in this article.

The federal government acted promptly on the Royal Commission's recommendation to establish a national energy authority. The NEB was created in 1959 as a federal administrative board with a mandate to regulate certain aspects of the Canadian energy industry (i.e., those that fall under the federal government's jurisdiction pursuant to the *Constitution Act, 1867*⁶), as well as to inform both the government and the greater public about energy matters (NEB, 2015d). From the outset, the Board was entrusted with oversight of interprovincial and international oil pipelines (assuming that responsibility from the former Board of Transport Commissioners) as well as oil, gas, and electricity exports (from the then Minister of Trade and Commerce). The federal government further conferred upon the Board the status and jurisdiction as an independent court of record, at the time an important new feature, and one that remains critically important today.

According to the Board's (2015d) own account of its history and evolution, since its formation "the Board has developed its expertise on energy matters and enjoys a respected national and international reputation. In 1991, the Board relocated from Ottawa, Ontario [the capital of Canada] to Calgary, Alberta."⁷

Concerning oil, for example, the Board authorizes its export. Canada produces enough oil to meet its own needs and has been for quite some time a net exporter of oil, with the exception of oil imports to meet the energy needs of its Atlantic provinces (i.e., Newfoundland, Nova Scotia, New Brunswick, and Prince Edward Island) and, to a lesser extent, the province of Quebec. The majority of Canadian crude oil is exported to states in the American Midwest region and Montana; smaller volumes are exported to the U.S. West and Gulf Coasts. As the NEB (2015b) explains, it monitors the supply and demand of oil (as it also does with natural gas) in order to ensure that export volume does not exceed the surplus remaining after Canada's domestic requirements have been met.

More specifically, the Board regulates interprovincial and international oil and gas pipelines (both new pipelines and additions to extant pipelines); significantly, both additions to extant pipelines and the construction of new pipelines are subject to a public approval process (discussed in further detail below) governed by the Board. Pursuant to recent amendments (enacted in 2012) to the Board's governing statute, the *National Energy Board Act, 1985* (NEB Act), the ultimate approval of pipeline proposals rests, not with the Board, but with the Governor in Council. For all intents and purposes, this means that approval resides with the Prime Minister's Office. Pursuant to s. 52 of the NEB Act:

"52. (1) If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and

⁴ See e.g., Homer-Dixon (2013), who argues that "Canada is beginning to exhibit the economic and political characteristics of a petro-state."

⁵ See Oreskes and Conway (2014, pp. 54–55), defining the "carbon-combustion complex" as the "interlinked fossil fuel extraction, refinement, and combustion industries, financiers, and government 'regulatory' agencies that enabled and defended destabilization of the world's climate in the name of employment, growth, and prosperity" [emphasis added].

⁶ For a comprehensive treatment of federal versus provincial jurisdiction over energy and other environmental matters in Canada, see Hogg (2007), especially ch. 30; see also Doelle and Tollefson (2013), ch. 3; Boyd (2003, pp. 228–250); Hsu and Elliot (2009, pp. 515–516), who argue that the Canadian constitution does not present any significant barriers to federal or provincial regulation and that policy considerations strongly favor the use of two federal instruments: a federal carbon tax to impose a marginal cost on emissions and the Canadian Environmental Assessment Act to review federal projects that may increase greenhouse gases). The Supreme Court of Canada's leading decisions on the issue of jurisdiction over the environment are *Friends of the Oldman River Society v. Canada (Minister of Transport)* ([1992] 1 S.C.R. 3), and *R. v. Hydro-Québec* ([1997] 1 S.C.R. 213).

⁷ For further details regarding the history of the NEB, see <http://www.neb.gc.ca>. For a more critical account of the Board, however, see Nikiforuk (2010, p. 184): "Bitumen has also begun to reorient the federal bureaucracy. In 2004, the NEB (which some critics suggest should be renamed No Energy Policy) . . ."; see also Kopecky (2013, pp. 6, 8, 10, 73, 85, 87, 251); MacLean (2014b).

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