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THE ECONOMY, ENVIRONMENT, AND POLITICS IN THE CANADIAN PIPELINE REGULATORY PROCESS

Brooke Neal

I. INTRODUCTION

IN November 2016, Justin Trudeau, the Prime Minister of Canada, approved the “expansion of a pipeline linking the oil sands in Alberta to a tanker port in British Columbia.”¹ The recently approved Kinder Morgan Trans Mountain project will “increase the capacity of a fifty-three-year-old pipeline to 890,000 barrels a day from 300,000 and expand the tanker port.”² As noted by Trudeau in his remarks following the approval of Trans Mountain, there was staunch opposition to the approval of this pipeline from environmental groups and certain Aboriginal peoples, particularly the First Nations.³ But, those who support the Prime Minister’s decision, cite the wide reaching economic effects that such a pipeline can have for Canada.⁴

The Trans Mountain approval comes on the heels of another hotly debated Canadian pipeline application, Energy East. The Energy East pipeline project was proposed by the TransCanada Corporation and is “designed to run from Alberta to New Brunswick” with the capability of transporting “1.1 million barrels-a-day.”⁵ Although, the Trans Mountain approval did not come without opposition, the Energy East application “has been mired in regulatory hearings and opposition from environmentalists,” resulting in a delay of decision that has lasted longer than two years.⁶

Because the Trans Mountain and Energy East pipeline applications have taken very different routes and have had different outcomes under the current Canadian regulatory system, they are perfect vehicles to ana-

1. Ian Austen, *Justin Trudeau Approves Oil Pipeline Expansion in Canada*, THE NEW YORK TIMES (Nov. 29, 2016), https://www.nytimes.com/2016/11/29/world/canada/canada-trudeau-kinder-morgan-pipeline.html?_r=0.

2. *Id.*

3. *Id.*

4. Devin Henry, *Greens Slam Trudeau for Canadian Pipeline Approvals*, THE HILL (Nov. 30, 2016), <http://thehill.com/policy/energy-environment/308053-greens-slam-trudeau-for-canadian-pipeline-approvals>.

5. Robert Tuttle, *Energy East the Odd Pipeline Out as Canada Approves Two Others*, BLOOMBERG (Dec. 1, 2016), <https://www.bloomberg.com/news/articles/2016-12-01/energy-east-the-odd-pipeline-out-as-canada-approves-two-others>.

6. *Id.*

lyze both the opposing arguments behind the approval or disapproval of a certain pipeline applications, as well as some of the major criticisms of the Canadian regulatory process itself. As these two pipelines illustrate, “the construction and maintenance of . . . natural gas pipelines raise a multitude of complex, political, commercial, fiscal, environmental, technical and legal issues,” which will be the focus of this paper.⁷ This paper will begin with a general overview of the Canadian pipeline application and approval process, starting first with the federal agencies and federal legislation involved in making the decision to build or deny approval of a pipeline as well as the provincial legislation that often shares jurisdiction over these projects. Next, consideration will be given to the conflicting political arguments both for and against the expansion of pipeline projects, focusing on the economic effects such projects will have in Canada and abroad. Finally, criticisms of the regulatory approval process will be considered, with particular attention paid to how the conflicting politics have victimized the smooth functioning of the regulatory process. Throughout this analysis, consideration will be given to how these processes and arguments played out in the context of the Trans Mountain project, as well as the Energy East project.

II. CANADIAN PIPELINE APPROVAL PROCESS

The approval of a proposed pipeline or energy project in Canada requires “a range of regulatory and environmental approvals from the federal and/or provincial/territorial governments,” including “consultation with Aboriginal peoples” in Canada.⁸ Although the size and nature of different pipeline projects can vary greatly, the National Energy Board is central to the approval of almost all of Canada’s pipeline projects.⁹ But, the provincial governments are also usually heavily involved in the process.¹⁰ The following section will give a general background on the agencies involved in such decisions and the role they play in approving or rejecting a pipeline application, starting with an overview of the role of the National Energy Board and followed by an overview of several important pieces of provincial legislation governing certain pipeline projects.

A. NATIONAL ENERGY BOARD (NEB)

As stated above, the National Energy Board is a central fixture in the Canadian pipeline application and approval process. The National Energy Board (NEB) was created in 1959 by the Canadian Parliament as an

7. Fazil Jamal, *Legal Aspects of Transnational Energy Pipelines: A Critical Appraisal*, 3 EUR. NETWORKS L. & REG. Q 103, 107 (2015).

8. Shawn Denstedt Et Al., *Regulatory Approvals for Energy Projects* OSLER, <https://www.osler.com/osler/media/Osler/reports/doing-business-in-canada/Energy-Project-Regulatory-Approvals-Canada.pdf> (last visited Feb. 13, 2017).

9. *Id.*

10. *Id.*

“independent federal agency,”¹¹ charged with “regulat[ing] inter-provincial and international pipelines, international power lines and designated inter-provincial power lines, and the importation and exportation of energy to and from Canada.”¹² The NEB “also regulates onshore and offshore development in the Yukon and Nunavut [and] offshore development in the Northwest Territories.”¹³ After the passage of the Canada Oil and Gas Operations Act,¹⁴ the NEB is also charged with regulating “offshore areas not within provincial jurisdiction.”¹⁵

The NEB “carries out the organization’s regulatory responsibilities in the Canadian ‘public interest.’”¹⁶ “In the public interest” is defined by the NEB as being “inclusive of all Canadians,” and it strives to reach a “balance of economic, environmental, and social interests that changes as society’s values and preferences evolve over time.”¹⁷ Therefore, when the NEB is reviewing a pipeline application, “it must consider the overall public good that a project may create as well as its potential negative impacts,” which, as will be explored in further detail later, usually comes down to weighing the economic benefits against the environmental concerns.¹⁸

In terms of the actual NEB pipeline application process, “the level of detail that the NEB requires in an application to build a pipeline or other facility will depend on the type of project, the complexity or size of the project, its anticipated effects, and the level of public concern.”¹⁹ In submitting an application, a company is bound by the procedures set forth in the National Energy Board Act and the National Energy Board Rules of Practice and Procedure, 1995.²⁰ To “assist applicants seeking NEB approval in understanding the Board’s expectations about the information to include in an application,” the NEB publishes and frequently updates a Filing Manual.²¹ According to the Filing Manual, generally, an application “should include details about: the purpose of the proposed project; the company’s consultation activities and results; engineering design of the proposed project; an environmental and socio-economic assessment (ESA) of the proposed project; economic and financial information; and

11. *Pipeline Regulation in Canada: A Guide for Landowners and the Public* NATIONAL ENERGY BOARD, <https://www.neb-one.gc.ca/prtcptn/Indwnrgd/Indwnrgdch1-eng.html> (Last visited Feb. 17, 2017).

12. Denstedt, *supra* note 8.

13. *Id.*

14. Canada Oil and Gas Operations Act, R.S.C. 1985, c. O-7.

15. Denstedt, *supra* note 8.

16. *Pipeline Regulation in Canada: A Guide for Landowners and the Public*, *supra* note 11.

17. *Id.*

18. Denstedt, *supra* note 8.

19. *Pipeline Regulation in Canada: A Guide for Landowners and the Public*, *supra* note 11.

20. *Id.*

21. *Filing Manual*, NATIONAL ENERGY BOARD, <https://www.neb-one.gc.ca/bts/ctrg/gnnb/flngmnl/index-eng.html> (Last updated Aug. 23, 2016).

lands information.”²² But, again, this will likely vary depending on the complexity and type of pipeline pending approval and, as will be seen later, what provincial legislation requires.

From there, the NEB begins its review of the application to determine whether it is in the “public interest.” According to the NEB Act, “in making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:”²³

- (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.²⁴

After their review process is complete, the NEB Act requires that the Board “submit and prepare for the minister, and make public a report setting out” their findings.²⁵ The report is required to include the Board’s “recommendation as to whether or not the certificate should be issued for all or any portion of the pipeline,” as well as “reasons for that recommendation.”²⁶ The Act also requires that the report include “all the terms and conditions that it considers necessary or desirable in the public interest” and terms or conditions relating to when the certificate or portions or provisions of it are to come into force.”²⁷

Additionally, if the project is under the domain of the Canadian Environmental Assessment Act²⁸ (CEAA), then the NEB Act requires that the report include the findings from the environmental assessment per-

22. *Pipeline Regulation in Canada: A Guide for Landowners and the Public*, *supra* note 11.

23. National Energy Board Act, R.S.C. 1985, c. N-7, § 52(2).

24. *Id.*

25. *Id.* § 52(1)

26. *Id.* § 52(1)(A)

27. *Id.* § 52(1)(B). For example, the Trans Mountain project in its final form” will be subjected to 157 additional conditions to ensure that the highest standards of safety and environmental protection are met. More than 120 indigenous groups were consulted, almost a third of which responded in support of the pipeline, and they will have a role in ensuring these conditions are met.” Perrin Beatty, *Trans Mountain Pipeline Approval Was Right Decision for Canada*, HUFFINGTON POST CANADA (Dec. 14, 2016), http://www.huffingtonpost.ca/perrin-beatty/trans-mountain-pipeline-approval_b_13629676.html.

28. The Canadian Environmental Assessment Act of 2012 defines a “designated project” as “one or more physical activities that (A) are carried out in Canada or on federal lands; (B) are designated by regulations made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and (C) are linked to the same federal authority as specified in those regulations or that order. It includes any physical activity that is incidental to those physical activities (*projet désigné*). Canadian Environmental Assessment Act, S.C. 2012, c. 19, s. 52, § 2(1).

formed by the Board.²⁹ For certain projects subject to a “federal environmental assessment” under the CEAA “a review panel may be appointed and public hearings held,” adding another level of required review.³⁰ All CEAA assessments “are subject to fixed timelines: 365 days for standard assessments, 18 months for reviews by the NEB and 24 months for assessments by a review panel.”³¹

The completed report must be given to the Minister “within the time limit specified by the Chairperson,” which can be “no longer than 15 months after the day on which the applicant has, in the Board’s opinion, provided a complete application.”³² From there, as seen in the introduction, the Prime Minister then announces his approval or disapproval of the project, as well as any modifications or adjustments that need to be made.³³

B. PROVINCIAL LEGISLATION

As noted above, the Canadian federal and provincial governments often share jurisdiction to approve certain environmental and energy related projects; therefore, the provincial legislation controlling such pipeline projects is also very important.³⁴ In general, “each province and territory maintains its own regulatory regime for approving” certain projects.³⁵ For example, in provinces such as Alberta and British Columbia, where there is significant oil and gas activity, provincial legislation and regulatory boards have been set up to “ensure the safe, responsible and efficient development of . . . energy resources, and to regulate pipelines and transmission lines.”³⁶

Specifically in Alberta, the Energy Regulator and the Alberta Utilities Commission must approve all significant steps in proposed projects that “regulate upstream energy, intra-Alberta electricity transmission, and pipeline projects.”³⁷ In a process that runs almost parallel to the process under the NEB Act, under the Alberta Environmental Protection and Enhancement Act, more complex pipeline projects require an “environmental assessment” and review that the AER and AUC must then “consider . . . in assessing the public interest.”³⁸

29. NEB Act R.S.C. 1985, c. N-7, § 52(3).

30. Shawn Denstedt Et Al., *Regulatory Approvals for Energy Projects* OSLER, <https://www.osler.com/osler/media/Osler/reports/doing-business-in-canada/Energy-Project-Regulatory-Approvals-Canada.pdf> (last visited Feb. 13, 2017).

31. *Id.*

32. NEB Act R.S.C. 1985, c. N-7, § 52 (4).

33. Ian Austen, *Justin Trudeau Approves Oil Pipeline Expansion in Canada*, THE NEW YORK TIMES (Nov. 29, 2016), https://www.nytimes.com/2016/11/29/world/canada/canada-trudeau-kinder-morgan-pipeline.html?_r=0.

34. Denstedt, *supra* note 8.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

Similarly, in British Columbia, the British Columbia Oil and Gas Commission, which is charged by the British Columbia Oil and Gas Activities Act with regulating oil and gas pipelines, reviews applications and an environmental assessment of the project to determine that it is in the “public interest.”³⁹ To make the application process less duplicative for the pipeline applicant, Alberta and British Columbia, along with Manitoba, Newfoundland and Labrador, Ontario, Quebec, Saskatchewan, and the Yukon, have all entered into “environmental cooperation agreements with the federal government that provide for a single, cooperative environmental assessment process” under the CEAA and any applicable provincial environmental legislation.⁴⁰ Specifically, for “several major projects” in British Columbia that fall under federal and provincial jurisdiction for approval, there has been an “agree[ment] to substitute the provincial regulatory process for the federal process.”⁴¹

III. REGULATORY CRITICISMS AND ECONOMIC ARGUMENTS

As noted previously, “the construction and maintenance of . . . natural gas pipelines raise a multitude of complex, political, commercial, fiscal, environmental, technical, and legal issues.”⁴² Two of the biggest areas of contention surrounding the pipeline approval process in Canada are the environmental and economic arguments given for or against the construction of such a pipeline and the state of the regulatory approvals system itself. This final section will consider the economic and environmental arguments put forth in favor of or in opposition to pipeline projects in a general context, as well as within the context of the Canadian First Nations. Next, the ways these arguments have manifested themselves in the politics of the regulatory system will be considered.

A. ECONOMIC EFFECTS OF PIPELINES AND CONFLICTING ENVIRONMENTAL POLITICS

As the above discussion captures, the fight over proposed Canadian pipeline applications often centers on weighing the environmental effects with the possible economic outcomes and attempting to strike a balance between the two that is in “the public interest.”⁴³ A statement made by Trudeau after his approval of the Trans Mountain project captured this struggle, he said:

We’ve heard clearly from Canadians that they don’t want to see someone trying to make a choice between what’s good for the environment and what’s good for the economy . . . They need to go to

39. *Id.*

40. *Id.*

41. *Id.*

42. Fazil Jamal, *Legal Aspects of Transnational Energy Pipelines: A Critical Appraisal*, 3 EUR. NETWORKS L. & REG. Q 103, 107 (2015).

43. NEB Act R.S.C. 1985, c. N-7, § 52(1).

gether, and the decisions we've made today and leading up to today are entirely consistent with that.⁴⁴

Particularly, Trudeau pointed to the economic boost the Trans Mountain project would bring to Canada, citing it as a "major win for Canadian workers, for Canadian families, and the Canadian economy now and into the future," creating "thousands of jobs and billions in tax and royalty revenue."⁴⁵ Additionally, the project will be "subjected to 157 additional conditions to ensure that the highest standards of safety and environmental protection are met."⁴⁶

Even despite these additional conditions, those who opposed the approval of the pipeline, due mostly to environmental concerns were quick to disagree with the decision by the Trudeau. For example, Marcie Kever, director of the Friends of the Earth oceans and vessels program, said that "Trudeau has decided to value short-term profits over the long-term health of the Pacific Northwest's people, climate, and orcas."⁴⁷ Criticism over the environmental effects of the pipeline even came from "leading pipeline activists in the United States," claiming that Trudeau "should be ashamed [for] using middle class workers as cover to wreak havoc on our water, climate and property rights."⁴⁸

This environmental and economic conflict has also played out within the First Nations of Canada. In September 2016, First Nations, the predominant Aboriginal groups in Canada, signed the Treaty Alliance Against Tar Sands Expansion, "an expression of Indigenous law prohibiting the pipelines/trains/tankers that will feed the expansion of the tar lands," in opposition to several pipelines including Trans Mountain.⁴⁹ But in recent years, "some chiefs . . . cheer the idea of jobs and financial independence," that come with pipeline construction.⁵⁰ Therefore, while some Aboriginal groups have joined the Treaty Alliance, "other First Nations have gathered in Calgary to discuss how to encourage the oil industry."⁵¹

44. Ian Austen, *Justin Trudeau Approves Oil Pipeline Expansion in Canada*, THE NEW YORK TIMES (Nov. 29, 2016), https://www.nytimes.com/2016/11/29/world/canada/canada-trudeau-kinder-morgan-pipeline.html?_r=0.

45. Devin Henry, *Greens Slam Trudeau for Canadian Pipeline Approvals*, THE HILL (Nov. 30, 2016), <http://thehill.com/policy/energy-environment/308053-greens-slam-trudeau-for-canadian-pipeline-approvals>.

46. Perrin Beatty, *Trans Mountain Pipeline Approval Was Right Decision for Canada*, HUFFINGTON POST CANADA (Dec. 14, 2016), http://www.huffingtonpost.ca/perrin-beatty/trans-mountain-pipeline-approval_b_13629676.html.

47. Henry, *supra* note 45.

48. *Id.*

49. *Treaty Alliance Against Tar Sands Expansion*, TREATY ALLIANCE, <http://www.treatyalliance.org> (last visited Feb. 13, 2017).

50. *Canada's Pipeline Approval Process is Approaching FUBAR Status*, OIL & GAS 360 (Oct. 4, 2016), <http://www.oilandgas360.com/canadas-pipeline-approval-process-approaching-fubar-status/>.

51. *Id.*

These conflicts seem far from resolution and often leave groups “chasing each other in circles,” and as the next section will further explore the regulatory approval process has been the most recent victim.

B. CRITICISMS OF THE STATE OF THE REGULATORY APPROVAL PROCESS

Even with the existence of cooperative programs, such as the one described above in British Columbia, there are strong criticisms about the efficiency of the regulatory approval process.⁵² For instance, before its approval, the Trans Mountain pipeline was reviewed twice, first by the NEB and “a second, separate review led by Natural Resources Canada,” amounting to a review process that took over three years for “experts and concerned citizens” to weigh in.⁵³ Although the Trans Mountain decision took a long time to make it through the regulatory process, the Energy East review process is perhaps an even stronger example of issues with the regulatory process.⁵⁴ During the NEB hearings in Montreal, disruptions by protesters caused “the review to be abandoned and the panel scrubbed,” due to charges of bias.⁵⁵ These bias charges arose out of claims that “two of the three panelists met last year with former Quebec premier Jean Charest, who was then a consultant for Trans Canada.”⁵⁶ As a result of the charges, “all three Panel Members decided to recuse themselves in order to preserve the integrity of the National Energy Board and of the Energy East Review.”⁵⁷ The recusals mean even more delays as the review process is “adjourned until a new panel is appointed.”⁵⁸

Hal Kvisle, former CEO of TransCanada, said “the delays caused by the replacement of a panel reviewing the Energy East Pipeline project show that Canada’s regulatory system is flawed and must be fixed . . . there needs to be significant improvements in the regulatory process and here we’ve just had it thrown in the ditch again by people whose objective is really just to stop the whole thing.”⁵⁹ As Kvisle mentioned, those who oppose the construction of pipeline projects often take every possibility to slow the process down in an effort to “delay the decision forever.”⁶⁰ In a recent editorial written on Canada’s decision to approve Trans Moun-

52. Shawn Denstedt Et Al., *Regulatory Approvals for Energy Projects* OSLER, <https://www.osler.com/osler/media/Osler/reports/doing-business-in-canada/Energy-Project-Regulatory-Approvals-Canada.pdf> (last visited Feb. 13, 2017).

53. Perrin Beatty, Trans Mountain Pipeline Approval Was Right Decision for Canada, *HUFFINGTON POST CANADA* (Dec. 14, 2016), http://www.huffingtonpost.ca/perrin-beatty/trans-mountain-pipeline-approval_b_13629676.html.

54. *OIL & GAS* 360, *supra* note 50.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Perrin Beatty, Trans Mountain Pipeline Approval Was Right Decision for Canada, *HUFFINGTON POST CANADA* (Dec. 14, 2016), http://www.huffingtonpost.ca/perrin-beatty/trans-mountain-pipeline-approval_b_13629676.html.

tain, Val Litwin, the President and CEO of the BC Chamber of Commerce, cautions against letting “the domestic debate go in circles,” saying that “Canadians cannot afford to let our regulatory process to be overtaken by the politics of mistrust. We cannot simply afford to delay these decisions forever.”⁶¹ Litwin argues that “the divisive nature of the pipeline debates has eroded Canada’s reputation as an economy for open for investment.”⁶² Litwin finds that those in positions similar to his own are “hearing too many of our members questioning whether Canada can get large projects built,” and “if these business leaders conclude that the answer is no, they will simply invest elsewhere.”⁶³

IV. CONCLUSION

The Kinder Morgan Trans Mountain and Energy East pipelines are perfect illustrations of the competing politics behind pipeline applications in Canada and abroad. As these two recent examples demonstrate, the decision often comes down to finding the right balance between environmental concerns and economic opportunities that is in the “public interest” of all Canadians. But as the above discussion also explores, even if what is considered a balance is achieved there will still be parties that are upset with the outcome, or parties that will try to prevent the regulatory process from functioning as it is intended. While it seems unlikely that a resolution between the opposing sides of the argument will be reached anytime soon, the current state of the regulatory approvals process is evidence that an agreement needs to be reached.

61. *Id.*

62. *Id.*

63. *Id.*

