

**Comparative Pipeline Politics:  
Oil Sands Pipeline Controversies in Canada and the United States**

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Conference and early review draft. Please do not quote without permission of lead author.  
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Prepared for Delivery at the Canadian Political Science Association annual meeting, Edmonton, AB, June  
12-15, 2012

## Overview

Over the past decade, energy policy has become increasingly controversial in Canada and the United States, with Canada's oil sands emerging as a major flashpoint of controversy. Canada's oil sands have been the engine driving the Canadian economic growth over the past decade, and have become an increasingly important part of US oil supply. However, the intensive extraction process has significant environmental impacts in terms of water quantity and quality, land use disturbance, and air pollution including greenhouse gas emissions.

This paper will compare energy-environment policy and governance in Canada and the United States through a case study of two controversial oil sands pipelines: Keystone XL to the US Gulf Coast, and Northern Gateway to British Columbia's West Coast. Both cases have become nationally prominent and been front-page news as a result of conflicting concerns over jobs, energy security, access to markets, the environmental risk of pipelines (and tankers in the BC case), and greenhouse gases. President Obama became directly involved in the US decision, provoking conflict with a Republican controlled House of Representatives. With Canadian environmentalists and many affected First Nations adamantly opposed, Canada's prime minister has actively supported the Northern Gateway pipeline and his Natural Resources minister has referred to it as "nation-building," and the pipeline has emerged as a major partisan and cultural issue.

This comparative case study provides an excellent opportunity to assess the impact of different institutional structures in the two countries on the process for environmental assessment and regulatory review and the eventual regulatory policy outcome. The ultimate policy outcomes in this case are the decisions on pipeline approval and the terms and conditions established for the pipeline if approved. Neither decision is expected before early 2013, so this paper will focus on the structure and dynamics of political conflict, not on explaining policy outcomes.

The cross-jurisdictional comparisons will provide enhanced leverage of institutions as a potential explanatory variable. Of particular interest are the procedural requirements for the review process and their relation to the larger legal and political structures of each country. What are the similarities and differences in these processes, and do the differences contribute to differences in strategies, resources, or influence of any of the major political actors? There have also been significant interaction effects in this case that may be highly influential, especially cross-border lobbying of industry groups and NGOs.

The first section reviews the two project proposals, followed by an overview of the structure of interests in the dispute on each side of the border. The paper then analyzes the detail of the environmental assessment and regulatory review process for the two pipelines. The final section compares the similarities and differences in the two cases and draws out some conclusions about the relationship between the institutions and interests. The conclusions yield some surprises. Courts, which are generally thought to play a more important role in the US, are shown to be a powerful force in the Canadian case. Subnational governments, generally thought to play a more important role in Canada's more decentralized federation, are shown to be a more influential force in the US case.

## The Two Projects

The TransCanada Keystone XL pipeline project is the third and fourth phases of TransCanada's Keystone pipeline system, shown in Figure 1. The first phase converted a natural gas pipeline to transport crude oil from Hardisty, Alberta, east through Saskatchewan and Manitoba before turning south towards Steel City, Nebraska and finally ending in Patoka, Illinois. The second phase extended the pipeline 480 kilometers south to Cushing, Oklahoma, and was completed in February 2011. The third phase (now called the Gulf Coast Pipeline Project) will extend the pipeline 700 kilometers from Cushing to refineries in Houston and Port Arthur, Texas. The fourth, and final phase, will provide a more direct pipeline from Hardisty, Alberta to Nebraska by bypassing the Phase 1 route. According to TransCanada's website, the final two phases will increase total capacity of the system to 1.3 million barrels a day of Alberta crude oil from the oil sands (TransCanada 2011).



Beyond concerns about increased usage of Alberta oil sands oil and the overall contribution of this pipeline to the problem of climate change, the Keystone XL pipeline is facing major opposition due to the fact that it would cross the Ogallala Aquifer in the sensitive Sand Hills region of Nebraska. The Ogallala Aquifer is one of the world's largest aquifers covering an area of approximately 450,000 km<sup>2</sup>. Concerns about oil spills from the pipeline affecting such a significant source of fresh water have achieved a high level of salience due to the recent Deepwater Horizon oil spill in the Gulf of Mexico and the major Enbridge pipeline spill near Kalamazoo, Michigan.

The proposed Enbridge Northern Gateway project entails the construction and operation of a 1,177 kilometer long twin pipeline from Bruderheim, Alberta to Kitimat, British Columbia. In May of 2010, Northern Gateway Pipelines Partnership Limited, a division of Enbridge, formally filed the project's application with the Government of Canada for regulatory review. The application calls for the approval of an oil export pipeline, condensate import pipeline, and a marine terminal which includes tank facilities and two marine berths to enable the storage, transfer, and marine transportation of these liquids (Canadian Environmental Assessment Agency 2011). The westerly flowing export pipeline will transport up to 525,000 barrels daily across the Alberta Plateau and into British Columbia traversing the Rocky Mountains, central Fraser Plateau, Coast Mountains, and into the Kitimat River Valley. A smaller, parallel pipeline will flow east to Alberta carrying an average of 193,000 barrels per day of imported condensate (a liquid petroleum byproduct necessary to thin oil sands bitumen transported via pipeline). The pipelines would traverse 773 watercourses (Enbridge Northern Gateway Pipelines 2010). The proposed marine terminal will be comprised of two mooring berths outfitted to load oil and unload

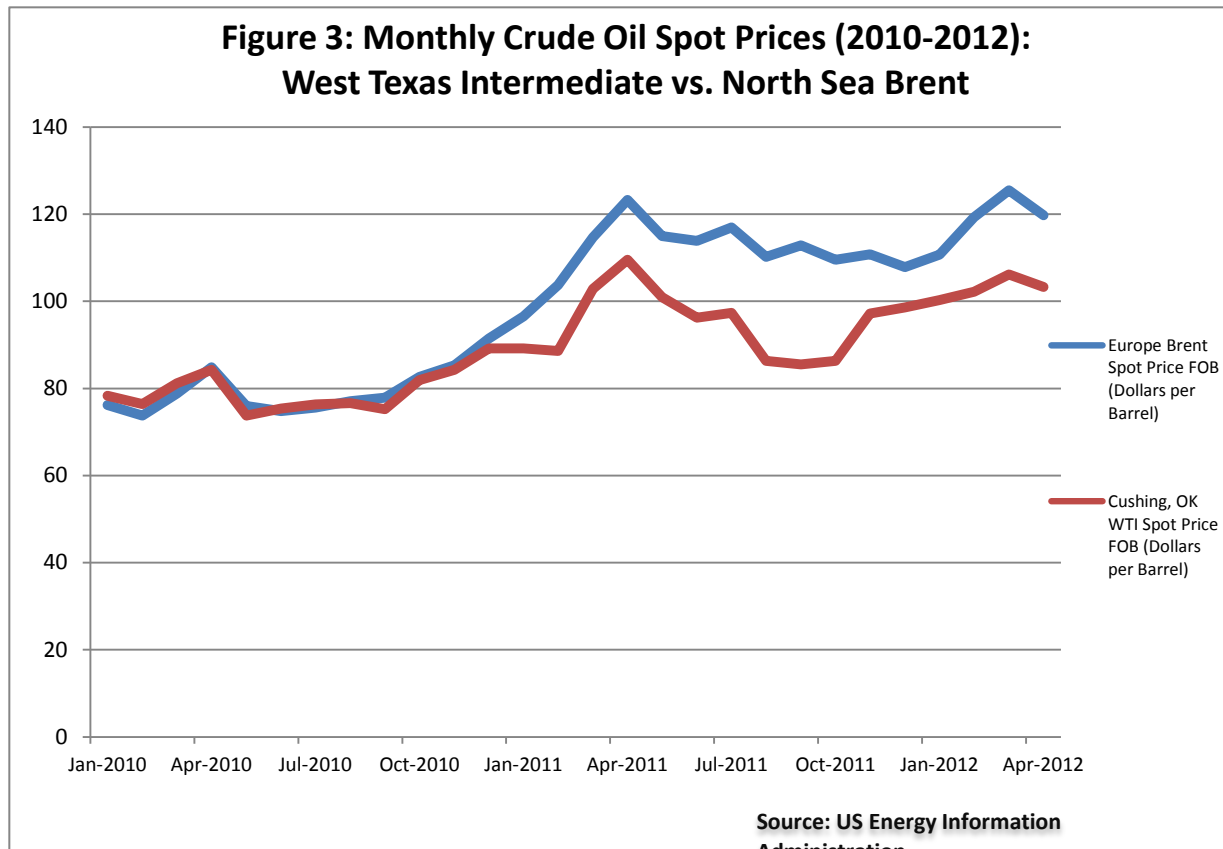
condensate, 14 storage tankers, and a pumping initiation station for the condensate line. Very large crude carriers (VLCCs) leaving the Kitimat marine terminal will navigate one of three existing shipping routes (Enbridge Northern Gateway Pipelines 2010).

The principal objective of the \$5.5 billion infrastructure project is to diversify the market for Canadian oil exports. Canada is almost exclusively dependant on the United States as a source of export with 99% of the country's exported petroleum products traveling south of the border, mostly

through extensive pipeline systems (American Petroleum Institute 2011). Enbridge asserts that US demand for Canadian petroleum products has peaked and that connecting Alberta's vast oil sands resources to tidewater, and consequently, Asia-Pacific markets, will offer producers higher net revenues and facilitate innovation within Canada's energy sector (Enbridge Northern Gateway Pipelines 2010).

From the perspective of the Canadian oil sector, the major impetus behind both of these proposals is to get a world price for a higher fraction of oil sands production. At present, the structure of pipeline and refining infrastructure to which Alberta is connected has produced a stubborn surplus capacity in Cushing, Oklahoma. As a result, a persistent price spread has emerged between international oil prices, reflected in the Brent Crude index, and Western North America prices, reflected in the West Texas Intermediate (WTI) index. As figure 3 shows, this spread has become significant over the past year, leading to billions of dollars annually in foregone revenue to oil sands producers (Moore *et al.* 2011). Keystone XL would address this price gap directly by reducing the surplus at Cushing, and creating increased pipeline capacity from there to the Gulf coast. Northern Gateway would address it by exposing oil sands products to higher prices in the Asian markets.





### Interests – Keystone XL

#### *Proponent – TransCanada*

TransCanada is a large energy infrastructure company based in Calgary, Alberta. It has major projects involving transportation and storage infrastructure for natural gas and oil, as well as an energy production portfolio that includes nuclear, natural gas, coal, wind and hydro. TransCanada’s interests, especially regarding the \$13 billion dollar Keystone pipeline project, are straightforward. In its effort to garner public support for the project, TransCanada, a Canadian company, has had to appeal to specifically American concerns. Some of the central framing strategies have focused on issues of energy security and job creation. Oil sands companies also have a significant stake in the pipeline, whose central is to connect oil sands oil to refineries in Texas that have the capacity to refine the heavy oil from the oil sands and have access to world markets.

#### *Refiners*

Texas refineries are already equipped to handle the heavy oil that comes from Alberta’s oil sands or Venezuela. These refineries have the required capacity and are currently underutilized. With political tensions between the US and Venezuela, and declining production in Mexico, securing a steady source of oil to keep these refineries operational will be an important interest (Parfomak *et al.* 2011).

### *Rival pipelines*

There is already a vast network of oil pipelines connecting the oil sands to markets in the United States. The key component of the Keystone XL pipeline that connects Cushing, Oklahoma with Gulf Coast refineries does have several competitors. The most prominent competing project is being developed by Enbridge. On November 16, 2011, six days after the Keystone project was delayed by the Obama administration, Enbridge announced the purchase of a 50% share of the Seaway pipeline system (Seaway Crude Pipeline Company LLC 2012). This existing pipeline will be reversed to carry oil from Cushing, OK to Freeport, TX on the Gulf Coast. It will be upgraded and twinned with an eventual capacity of approximately 400,000 bpd.

### *Labour*

Labour groups are divided with regard to the Keystone XL pipeline. Controversies over job estimates have been a critical part of the political controversy over the pipeline. Estimates of job creation potential range from a cautious 5,000 (US Department of State 2011a, pp. 3.10–57) to an extravagant 550,000 (The Perryman Group 2010). Claims of job creation potential remain a central rhetorical claim as a key benefit of the pipeline. When Obama postponed the project, one large union of construction workers denounced the administration as “job killers” (Laborers’ International Union of North America 2012). But many other labour unions came out in support of the President’s decision including United Auto Workers, United Steelworkers Union, Amalgamated Transit Union, Transport Workers Union and the Service Employees International Union (Communications Workers of America 2012). The union’s noted the potential jobs lost, but they also identified many other areas where the Republican House of Representatives had blocked other decisions that would have resulted in job creation. Thus the “job creation” argument for Keystone was not sufficient when many other opportunities for job creation were shot down.

### *Environmental Groups*

Environmental groups in the US have followed an effective inside/outside strategy. In the “outside” political mobilization arena, the key player has been 350.org, formed in 2007 by author Bill McKibben as a grassroots international group promoting more concerted action on climate. This group adopted the Keystone XL pipeline project as a focal point for its campaign throughout the United States to target the oil sands in Alberta as part of a larger global strategy for action on climate change. This three level approach – targeting a project, a region and a global issue – has allowed 350.org to effectively connect the Keystone XL pipeline with larger, more diffuse concerns about climate change in general. This strategy has brought new life into the American environmental movement.

A key part of 350.org’s strategy has been dramatic framing linking the pipeline to grave climate risks. Central figures in the group’s campaign have been continually referring to the Keystone pipeline as a “fuse to the biggest carbon bomb on the planet” and, if it goes ahead, it would mean “game over” for the planet (Hansen 2011a, 2011b, 2012). Yet many climate analysts repudiated such claims, echoing the EnSys (2010) report in suggesting that compared to overall global greenhouse gas emissions, the effect of the Keystone pipeline would be insignificant (Revkin 2011). Nevertheless, the “game over” frame continued to be repeated despite criticism of exaggeration.

Other environmental organizations in the United States, as well as some in Canada, have also been active in opposition to Keystone XL through research and lobbying. The most prominent is the Natural Resources Defense Council (NRDC), which led the research and institutional lobbying effort (Congress,

agencies) in the campaign. NRDC, as well as the Sierra Club, submitted lengthy comments on various stages of the environmental impact statement. Some Canadian organizations, including the Pembina Institute, also submitted comments in opposition to the pipeline. Environmental organizations also influenced the formal environmental assessment process by producing reports on salient issues regarding the potential consequences of the pipeline (Droitsch 2011, Swift *et al.* 2011). Finally, other organizations, such as Sierra Club and Friends of the Earth, provided form letters for citizens to submit as part of the process. The combined total of those two form letters resulted in 45,782 submissions alone (US Department of State 2011a, pp. 741, 752 Appendix A).

### *Aboriginal / Landowners*

TransCanada has not had to deal with direct opposition from Aboriginal groups. On this pipeline issue, the federal government is required to consult with tribal councils only with regard to section 106 of the *National Historic Preservation Act*, concerning potential effects on culturally or historically significant areas (US Department of State 2011a, pp. 3.11–1). While there has been some opposition from tribes in the United States, the opposition TransCanada has had to face is more indirectly connected to general concern with the Ogallala Aquifer rather than direct land use issues.

Of greater concern is the private landowners with whom TransCanada is required to deal. Of the 1,384 miles of pipeline, 1,286 miles (93%) cross over private land (US Department of State 2011a, p. 3.9.1). The first step is to gain access to the necessary property through voluntarily negotiated deals wherein landowners agree to have the pipeline cross their land in exchange for financial compensation. For those land owners that refuse, TransCanada can be granted the legal power known as eminent domain. State governments can authorize a private company, such as TransCanada, to take the necessary land from private owners with fair compensation, in order to construct a project that is in the public interest. The use of eminent domain by a private, foreign company has been controversial, and created an unusual common interest among environmental opponents and some conservative landowners and politicians (Root 2012).

### *Nebraska (State/Federal Issues)*

While the Keystone XL pipeline crosses a number of U.S. states, Nebraska is one which warrants special attention because of the location of the sensitive Sand Hills area, whose porous soils increase risks that a pipeline spill could affect the Ogallala Aquifer. The most productive parts of the aquifer are located within the borders of Nebraska, and it provides the state with much of its water for human consumption and agricultural use. As a result, the risk of an oil spill is very salient in the State, and public concern and opposition in Nebraska has been more substantial than in other jurisdictions along the route. When the federal government and the White House seemed to be doing little to address many of the concerns his state held, Governor Dave Heineman brought in legislation, shortly before a federal decision was to be made concerning Keystone XL, that would give Nebraska jurisdiction over the routes of oil pipelines within its state borders. Unlike other states along the route, Nebraska has not previously had such legislation (Parfomak *et al.* 2011). The intense opposition from Nebraska was undoubtedly one of the main factors in Obama's decision to postpone the pipeline approval until a new route avoiding the aquifer was considered.

### **Interests – Northern Gateway**

#### *The Proponent: Enbridge*

Enbridge operates the world's largest oil and liquids pipeline system. As the proponent of this \$5.5 billion pipeline project, its interests are equally straightforward. To secure and protect its financial interests, Enbridge must counter opposition from First Nations and environmental groups. Swaying public opinion in their favor can minimize resistance through the regulatory process and convince regulators that the project is in the best interest of Canadians. Enbridge frames Northern Gateway as a "nation-building" energy project. The company has pursued many strategies in support of these interests, including offering benefits to First Nations and forming a community-level advocacy group.<sup>1</sup> Most notably, Enbridge has been running textbook public relations through mainstream and social media to weigh against strong campaigns led by opposing groups. The timing of these public relations campaigns has proven to be one of their most effective strategies.

### *Oil sands companies*

The interests of oil sands producers, access to higher prices in Asia-Pacific markets, are forthright. Enbridge's claims that Northern Gateway will offer substantial benefits to Canadian oil producers by facilitating access to international markets have been supported by recent publications. A 2011 paper from the University of Calgary's School of Public Policy explores the potential for diversification of Canada's oil export market in the context of heavy crude world prices and potential differentials as a result of overseas market access (Moore *et al.* 2011). A recent "Netback Analysis for West Coast Export Capacity" prepared for the Alberta Department of Energy, frames the project's benefits to Canadian oil producers as lost revenue if the pipeline does not go ahead, suggesting producers would lose \$8 billion per year from 2017 to 2025 if the pipeline is not built (Wood MacKenzie Inc. 2011).

The promise of higher prices and netbacks from market diversification is an obvious incentive for Canadian oil producers to become involved in the project. A total of 16 Canadian and multi-national oil companies operating in the oil sands have registered for intervener status in the Joint Review Panel (JRP) hearings for the project (National Energy Board 2012a). Five of these companies were identified as funding participants<sup>2</sup> in documents submitted in regulatory proceedings (National Energy Board 2012b). Four oil sands lobby groups have also filed for intervention including the oil industry's largest lobby group, the Canadian Association of Petroleum Producers (National Energy Board 2012a).

Canadian oil producers have not publicly or directly advocated for the pipeline. However, oil sands advocacy group, Ethical Oil,<sup>3</sup> has supported their stance by employing idea-based strategies in an attempt to discredit environmental groups and reframe the debate.<sup>4</sup>

### *Refineries*

The Enbridge Northern Gateway project has the potential to provide a steady supply of Canadian crude to Asian refineries. Asia's largest refining company, and second largest energy company, Sinopec Corp.,

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<sup>1</sup> In 2009, Enbridge convened the Northern Gateway Alliance, a coalition of Northern BC community leaders in support of the pipeline. Funded by Enbridge, the alliance works to inform the public on the benefits of the project (Northern Gateway Alliance 2009).

<sup>2</sup> In 2007 and 2008, Enbridge sold 10 units of a \$100 million fund to interested Canadian producers and foreign refiners to support the company through the regulatory stage (Vanderklippe 2012).

<sup>3</sup> Ethical oil (ethicaloil.org) is an advocacy group that "encourages businesses and governments to choose ethical oil from Canada, its oil sands and other liberal democracies" (Ethical Oil 2012).

<sup>4</sup> Ourdecision.ca is a campaign by ethical oil that questions the funding sources of environmental groups opposing the pipeline (Ourdecision.ca 2012).



has confirmed its involvement in the project as a funding participant (Tait 2011). China's largest oil company, state-owned China National Petroleum Corporation (parent company of PetroChina) (Vanderklippe 2012), and another Chinese state-owned company, Chinese National Offshore Oil Company (CNOOC Ltd.) are said to have invested. SinoCanada Petroleum Corp., a subsidiary of Sinopec, is a registered intervener in the regulatory review. Additionally, MEG Energy, a company partially owned by CNOOC Ltd. is both a funding participant and intervener for the project.

Chinese interest in Canada's oil sands is exemplified by escalating investment from state-owned oil producers and refiners, China's 'big three' oil companies (Sinopec, CNOOC, Petrochina) have invested billions of dollars in Canada's oil sands over the past six years, obtaining shares in various producers and extraction projects, with further investment projected to increase dramatically (Tait 2012). It would be logical for these companies to be involved in Northern Gateway or any other project that will facilitate China's access to petroleum products from the Alberta basin, thus strengthening the nation's future energy security.

### *Rival pipelines*

The Northern Gateway Pipeline proposal is facing competition from a rival pipeline company hungry for expansion to Asian markets. Kinder Morgan Canada shares Enbridge's Asia-pacific export interests and currently operates the Trans Mountain pipeline carrying crude oil from outside of Edmonton, AB to tidewater in Burnaby, BC.

Kinder Morgan is interested in expanding their pipeline to significantly increase capacity for export to Asia (Vanderklippe 2011). To protect their vested interests, they have strategically attempted to stall the Northern Gateway regulatory review. In 2010, Kinder Morgan Canada appealed to the National Energy Board (NEB) asking regulators to delay their review of the project until the company can demonstrate the existence of commercial support for the project, noting that Enbridge's regulatory application does not meet NEB standards for economic feasibility (Lemphers 2010). Kinder Morgan believes that their pipeline expansion project is a more viable way to export Canadian oil to Asian markets, as there are less business risks and costs, and lower impacts on the environment, as most construction will occur on the existing Trans Mountain pipeline right-of-way (Vanderklippe 2011).

### *Environmental groups*

Weighing heavily against the financial benefits of the proposed pipeline are the environmental risks its construction and operation entails. Virtually the entire Canadian environmental community has expressed intense opposition to the project. The issues addressed by these groups are far-reaching in scope, from climate change, to the protection salmon-spawning watersheds and marine areas at risk from tanker spills. A report prepared by three groups, the Pembina Institute, the Living Oceans Society and the Natural Resources Defense Council outlines the social, economic and environmental costs and risk to British Columbia associated with construction of the Northern Gateway pipeline (Swift *et al.* 2011). The risks of tanker and pipeline oil spills are among the most prominent justifications for opposition provided by these groups.

Opposition to the pipeline has been fortified by a number of strategies. Many environmental groups have registered as interveners in the regulatory proceedings. These groups have also been instrumental in galvanizing public opinion and awareness on the subject through reports, polls, and protests via social and mainstream media. Increased public awareness has spurred community advocacy, direct action, and public participation in the regulatory process.

Two major players in the pipeline opposition movement, ForestEthics and the BC-based group Dogwood Initiative, have had longstanding campaigns against the pipeline. Oil tanker traffic has been a major focus of their respective campaigns. The Dogwood Initiative launched their No Tankers campaign in the Spring of 2007 to spread public awareness of the threats to BC's coastal waters from marine oil spills, and to collect signatures in support of a tanker ban on BC's north coast. The group's "mob the mic" campaign has proven to be one of the most successful as it has contributed to the largest levels of regulatory process public participation in Canadian history. "Mob the mic" encouraged members of the general public to register to make oral statements at the official public hearings. Through social media and word of mouth over 4,200 people registered to give oral statements at the hearings, with 1600 directly attributed to Dogwood's campaign (Swanson 2011). As we will see, however, this success in mobilization triggered a major political backlash.

### *First Nations*

A large proportion of the pipeline route passes through unceded First Nations territory. Enbridge has claimed to have equity agreement with 60% of eligible aboriginal communities along the route (Enbridge Northern Gateway Pipelines 2012), however many influential First Nations along the route or downstream stand in adamant opposition (Stueck 2011). For many First Nations communities along the proposed pipeline route, the risks of the project outweigh the benefits Enbridge has offered. Opposed First Nations cite unsettled land claims and threats to the livelihood of their communities (food, water, source of income) as justification for their opposition to the project. They believe it is in their best interests to protect these resources from the threat of oil spills. These Nations voice their disapproval with the pipeline project through the formal regulatory process, direct action (protests, rallies) and declarations that exercise their Aboriginal Title over the lands and waters of their traditional territories.

A number of First Nations groups are registered intervenors in the regulatory process, including 26 from British Columbia and 14 from Alberta (National Energy Board 2012a). Among the registered intervenors are the Yinka Dene Alliance, a BC coalition of five First Nations, that have been among the most spoken adversaries of the project. Members from this alliance have traveled across Canada and abroad to deliver their message of project opposition to Enbridge shareholders and possible financiers, while also organizing and participating in many local forums and demonstrations (Yinka Dene Alliance 2012).

In December 2010, The Yinka Dene joined a group of 61 Nations in signing the *Save the Fraser* Declaration (Save the Fraser 2011), enacting a ban on the proposed pipeline, and similar oil sands transportation projects that would cross their territories and the headwaters of the salmon-bearing Fraser River watershed. Earlier in 2010, The Coastal First Nations issued a declaration banning oil sands tankers and pipelines in their traditional territories and waters (Coastal First Nations 2010).<sup>5</sup> These two declarations were made under the power of First Nations Ancestral Laws, Rights and Title.

First Nations Rights and Title are protected by the Canadian Constitution. As ruled by the Supreme Court of Canada, it is the federal government's constitutional duty to consult and accommodate First Nations. If the pipeline is approved, a strategy of one or more opposed First Nations will be to challenge the infringement of their Rights and Title and enforce these declarations through Canadian and/or international courts (Patterson 2011).

### *Public opinion*

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<sup>5</sup> An alliance of 9 First Nations from BC's Central Coast, North Coast, and Haida Gwaii.

Strategies employed by interest groups from both sides of the issue - such as opinion polls, rallies, and advertising campaigns – have been largely aimed at gaining public support. These strategies appear to have deepened a polarization of public opinion and interests, most noticeably between British Columbia and Alberta. The most important reason for this divergence in sentiment is the dramatic difference between the allocation of benefits and risks. The economic benefits of the project will be concentrated in Alberta, and the environmental and social risks will be concentrated in BC. The pipeline offers some jobs and revenue to British Columbia and is supported by some municipalities and business associations in the province (Northern Gateway Alliance 2009). But at the same time, virtually all of the pipeline rupture and all of the tanker spill risk is to BC. Those risks threaten jobs and revenue from the region's existing industries such as tourism, forestry, commercial fisheries, shellfish aquaculture, recreational fishing, hunting, and trapping among others. Mounting public concern among northern BC communities has been exemplified by the recent decisions of four municipalities, Smithers, Prince Rupert, Terrace and the regional district of Skeena-Queen Charlotte, to formally oppose the pipeline (Kaufmann 2012).

In BC, opposition to increased oil tanker traffic on the coast generates more opposition than the pipeline itself. In 2010, a Mustel poll commissioned by ForestEthics found 80% of British Columbians opposed crude oil tanker traffic in BC's inside coastal waters. The same poll found that while 51% of BC residents opposed the pipeline project, while 34% favoured it (ForestEthics 2010).<sup>6</sup> A poll with different wording from Ipsos Reid from 48% of respondents favoured the pipeline, 32% opposed it (Ipsos Reid 2012).

There is also an evident cultural divide between British Columbia and Alberta when it comes to Northern Gateway. It has been suggested that the divergence of public support for the project between Alberta and BC can be attributed to differences in attitudes with respect to aboriginal rights, trade unionism, Alberta's familiarity with the oil industry/pipelines, and BC's history of grassroots environmental movements (O'Neil and Audette 2011).

## **Institutions**

While the structure of the policy problems and their politics are similar in the two cases, they are being debated within remarkably different political structures. Canada's leader-centered Parliamentary government concentrates power in the executive, especially the prime minister or premier, and has little independent role for the legislature. Statutes tend to be broad and enabling, with few limits on the discretion of implementing agencies. The US system of separation of powers and checks and balances involves much greater fragmentation of authority at the federal level. The separation of the legislative and executive branches promotes a different style of lawmaking, wherein statutes tend to contain far more specific direction and timelines, so constrain the exercise of executive authority (Moe and Caldwell 1994, Hoberg 2000). These differences in statutory design have direct implications for the role of the courts. In the administrative law context, Canada's discretionary statutes limit the legal tools available to interest groups to challenge administrative action or inaction. The US system, in contrast, creates numerous opportunities to challenge administrative decisions in court, promoting a policy style widely known as "adversarial legalism" (Kagan 2001). One of the consequences of this judicial scrutiny is that regulatory agencies tend to provide far more comprehensive analysis and detailed rationales for their decisions as a sort of preemptive insulation against accusations in litigation that they did not consider all

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<sup>6</sup> The question wording was: "Based on what you currently know, would you say you support or oppose Enbridge's proposal to build an oil pipeline from the tar sands and bring oil tanker traffic to B.C.'s North Coast?"

relevant factors.<sup>7</sup> This logic helps explain one of the key differences in the pipeline assessments process in the two countries.

While the pervasiveness of legalism in the US is dominant in the comparative policy literature, an intriguing feature in the case of Canada's Northern Gateway pipeline is that courts are expected to play a significant role. While environmental groups are not likely to have many opportunities for effective redress, the fact that Aboriginal rights are enshrined in the Canadian constitution gives First Nations formidable legal tools. Evolving jurisprudence in the Supreme Court of Canada requires governments to effectively consult and accommodate First Nations when Aboriginal rights and title might be affected. With so many First Nations in BC adamantly opposed to the pipeline and tanker project, the Northern Gateway case is expected to test to vague doctrine of accommodation outlined in the court's 2004 Haida and Taku cases (Treacy *et al.* 2006).

There are also very significant differences in the structure of federalism between the two countries. In general, Canada is a significantly more decentralized federation than the United States. Energy, natural resource, and environmental policy tend to be dominated by provincial government in Canada, in large part because of provincial ownership of land (Harrison 2007). In this case, however, this difference may be less significant because one area where the Canadian federal government does play a significant role is in energy pipelines that cross provincial boundaries.

### **Interaction effects**

While these two cases are separate decisions by different national governments, there has been a strong interaction between the two of them. There are three types of interactions. First, there are international networks of interest groups on both sides of the issues. There are strong links within the energy sector between Canadian and US firms. Both pipelines companies have significant assets in both countries, and there is substantial US corporate ownership of the oil sands. On the environmental side, there is a significant amount of cooperation between leading environmental groups in the campaigns of both countries. Some groups involved have substantial organizational presence in both countries, particularly ForestEthics and Greenpeace. Given the centrality of the oil sands to the climate movement in North America, major players such as Greenpeace, 350.org, and NRDC are intent on seeing both pipelines stopped as a way to thwart oil sands expansion. Greenpeace, ForestEthics, and NRDC are central players in a collaborative "tar sands campaign" that is using the pipelines as pinch points in a broader political strategy. Environmentally-oriented US philanthropic foundations have supported a number of groups working on the issue.

Second, governments on both sides of the border have stakes in the other country's decision, although this is turning out to be far more important to Canada than the US. One might think that the US would have strategic concerns about increased Chinese involvement in the oil sands, but there is little evidence that has been a significant concern to date. Canadian government stakes in the US Keystone XL decision have been far more apparent. The Government of Canada has been active at making representations to Congress and the administration on the issue, as has the Government of Alberta.

The third and most important type of interaction has been the influence of the Obama government's decision to postpone approval on the intensity of support for the Northern Gateway pipeline by the oil sector, the government of Alberta, and most notably the government of Canada. After declaring the

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<sup>7</sup> "final EISs often become defensive documents packed with as much information as possible to protect the agency in case of a legal challenge" (Greenberg 2007, p. 191).

case for the Keystone XL pipeline a “no brainer,” Prime Minister Harper (along with the rest of the Canadian oil establishment) were shocked by the Obama’s decision to postpone the pipeline. The Harper government already seemed extremely committed using the Northern Gateway to open access to Asian markets, but the Obama decision dramatically increased the sense of urgency in diversifying away from a US market that looked increasingly unreliable economically and now politically. One influential reporter credits the Obama government’s decision as the trigger event behind the Harper government political backlash against environmentalists, described in more detail below (O’Neil 2012).

### **Comparative environmental assessment procedures**

In both cases, environmental assessment plays a central role in pipeline policy-making. There are four key components of the environmental assessment process: screening, scoping, assessment, and decision-making.

*Screening* is a process designed to evaluate whether or not a more thorough assessment of the project is required. A screening mechanism: “seeks to focus on those projects with potentially significant adverse environmental impacts or whose impacts are not fully known (Glasson *et al.* 2005, p. 89). Screening can be accomplished through threshold mechanisms or case by case evaluations, each with particular trade-offs associated with them (Glasson *et al.* 2005). Threshold mechanisms provide simple criteria that apply consistently across cases yet can place arbitrary, inflexible rules on situations that contain a lot of variability. Case by case evaluations can be more attentive to the particularity of the situations and allow for the application of common sense or good judgment but sacrifice the clarity of simple and consistent rules. As a result, case by case screening can become more costly and time consuming.

There is a stipulation that 75 km of new right-of-way passage is required for an assessment to go beyond screening to the next stage. In Canada, a list of threshold criteria is provided that would automatically trigger a comprehensive study (Government of Canada 2006). In the US the screening process proceeds via three steps: does the National Environmental Protection Act apply? If so, are the effects likely to be significant? If the answer is yes to both then an environmental impact statement (EIS) is prepared. If not an environmental assessment (EA) can be published to support an agency’s compliance with NEPA when an EIS is not required or a finding of no significant impact (FONSI) is prepared.

*Scoping* is the process whereby the boundaries of the environmental assessment are established and issues or concerns of significance are determined. Sadler (1996, p. 113) lists the following four issues as key determinations of the scoping process:

- The information necessary for decision making;
- The important issues and concerns (interests);
- The significant effects, factors and alternatives to be considered; and
- The appropriate boundaries of the EA study.

Both US and Canadian EA procedures require public consultation and input into the scope process.

*Assessment* is the central and most substantial component of the process. This stage is where all of the potentially significant impacts that have been identified in the scoping stage are evaluated for their overall impact on the environment. It is important that environmental assessments “carefully and

systematically describe[e] the initial or baseline environmental conditions [in order to] present an accurate and convincing picture of the likely effects that the development will have on its environment” (Wood 2003, p. 177). Often this is accomplished through the comparison to alternatives including a “no action” alternative. In Canada, the Canadian Environmental Assessment Agency has expert staff that performs assessments, frequently in collaboration with other lead federal agencies (in this case the National Energy Board). In the United States, there is no federal agency dedicated to the environmental assessment process. The designation of lead agency for the production of an environmental impact statement falls to different federal agencies under different conditions. As the Keystone XL pipeline crosses the Canada/US border, the responsibility falls to the State Department (DOS) as lead agency. Moreover, without a dedicated federal agency to do the environmental assessment, the lead agency must contract the work out.

*Decision-making* is the stage at which the information from the environmental assessment process is brought together with the objectives of policy-makers to produce an authoritative decision. This stage can be “delicate” (Wood 2003, p. 239) because, among other things, it needs to demonstrate that the assessment has influenced the overall decision and that it is not merely a rubber stamp or regulatory hoop on the way to project approval. Both countries explicitly authorize policy-makers to act approve projects even if the assessment demonstrates they pose significant environmental risks. Canada’s Environmental Assessment Act authorizes government approval where “the project is likely to cause significant adverse environmental effects that can be justified in the circumstances.”<sup>8</sup> NEPA does not contain any specific balancing language – it merely specifies procedures required before a project can be authorized. Those decisions need to be made according to the criteria of the guiding legal authority. In the Keystone XL case, this involves the “national interest determination” that can include many non-environmental factors including energy supply and security. Environmental assessment processes require regulatory agencies to think about environmental consequences of their actions, but they do not necessarily require that they act on them (Taylor 1984).

### **The Environmental Assessment Process: Keystone XL**

As the KXL project is a transboundary pipeline, it underwent two reviews: one for the Canadian portion of the pipeline, the other for the American portion of the pipeline. The Canadian portion only extends 529 kilometers and because it required less than “75 km of new right-of-way (RoW), a screening level of environmental assessment under the CEA Act was required” (National Energy Board 2010a). In Canada this is the least rigorous form of environmental assessment, whereas the review panel is the most rigorous and the conceptual equivalent to the Environmental Impact Statement.<sup>9</sup> The second review concerns the American portion, and is governed by the rules of the National Environmental Policy Act (NEPA), which requires particular federal agencies to issue an Environmental Impact Statement (EIS) for any project under their jurisdiction that may have adverse environmental impacts.

#### *Screening*

TransCanada submitted its application for the Keystone XL pipeline process on September 19, 2008. On January 28, 2009 the Department of State released a Notice of Intent to prepare an Environmental Impact Statement for the Keystone XL project (US Department of State 2009a). While there are no set

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<sup>8</sup> [http://laws.justice.gc.ca/eng/c-15.2/page-3.html#anchorbo-ga:s\\_14-gb:s\\_37](http://laws.justice.gc.ca/eng/c-15.2/page-3.html#anchorbo-ga:s_14-gb:s_37)

<sup>9</sup> Christopher Wood amusingly compares the two by suggesting that “the panel review has been an elaborate ice castle constructed on a screening iceberg more than 99 per cent of which has been submerged in cold, impenetrable waters” (Wood 2003, p. 363)

criteria or thresholds that automatically trigger a more substantial Environmental Impact Statement, the Keystone XL project was large enough to make this decision an uncontroversial one.

### *Scoping*

Public consultations over scoping began in early 2009. In May of 2009 a Scoping Meeting Summary Report was published providing an account of all of the issues that had been raised by the public at those meetings. In contrast to the Northern Gateway pipeline EA, the US process explicitly decided to consider the upstream and downstream greenhouse gas implications of oil sands expansion. There was a request that the Environmental Impact Statement:

Address the air quality impacts of refining tar sands; greenhouse gas emissions due to the project and increased carbon emissions. We suggest that the EIS include a separate section on Climate Change impacts and cover the full slate of greenhouse gas emissions that are foreseeable from the extraction, refining, and end-use of the tar sands as fuel (US Department of State 2009b, p. 11).

### *Assessment*

As noted earlier, the responsibility for the production of the Keystone Environmental Impact Statement falls under the jurisdiction of the State Department because the project crosses the national border. However, the department has no experienced personnel with which to execute such an assessment. As a result, a private company is the one that does the actual environmental assessment, in this case Cardno ENTRIX (Cardno ENTRIX 2012). Cardno ENTRIX is a respected environmental and natural resource management consultancy company. As such, they have been hired previously by the State department but also by TransCanada, which caused concern about a potential conflict of interest in the production of the EIS. Environmental groups raised concerns, and members of Congress requested an investigation by the State Department's Inspector General. That investigation concluded there was no conflict, and that issue subsided (Geisel 2012).

Once the scoping meetings were completed in May 2009, that information was given to Cardno ENTRIX as guidance for its environmental assessment. Over the course of a year, Cardno prepared the Draft Environmental Impact Statement which was issued on April 16, 2010. Once that Draft EIS has been issued, there was a 45 day comment period, which was extended, for both the public as well as other interested agencies at the state and federal levels (Environmental Protection Agency for example). Despite the direction to include upstream and downstream GHG considerations in the scoping report, the Draft EIS only evaluated the GHG emissions with regard to construction and operation of the project itself.

On April 15, 2011, nearly a year after the Draft EIS had been issued, a Supplementary Draft EIS was issued. This EIS was created both in response to comments received, as well as in response to new information that had become available after the original Draft EIS has been issued. The SDEIS has substantially more analysis of "greenhouse gas (GHG) and climate change considerations" (US Department of State 2011b, p. ES-2). Much of this was based on a report by EnSys that had been commissioned by the Department of Energy and published in early 2011 (EnSys Energy 2010). This report evaluated how the increase of Alberta oil sands oil, displacing conventional sources, would impact local and global GHG emissions. When considered globally, the report concluded that little difference would be made. Environmental organizations, including the Pembina Institute, disputed the

EnSys report with regard to its conclusions that Keystone XL would not have any effect on the expansion of Canadian oil sands (Droitsch 2011).

On August 26, 2011 the Final Environmental Impact Statement was released (US Department of State 2011a). With regard to consideration of GHG emissions or consideration of Alternatives, no substantial differences were made from the Supplemental Draft EIS. Once released, a final public comment period of 90 days follows after which a proposed National Interest Determination is circulated among federal agencies identified in Executive Order 13337.<sup>10</sup> If the agencies involved are unable to come to a unanimous decision on the National Interest Determination, the final decision falls to the President. A Presidential Permit is then issued or denied.

### *Decision-making*

The Keystone XL pipeline attracted massive public opposition from environmentalists concerned about climate impacts and Nebraskans concerned about local impacts, especially to the Ogallala Aquifer. After the final EIS was released, many participated in a sit in front of the White House to protest the pipeline. Over twelve hundred people were arrested between August 20 and September 3, 2011 (Dembicki 2011). The central argument of the protest was that the Keystone XL pipeline would encourage expansion of the Alberta oils sands (tar sands), and that the tar sands constituted a more greenhouse gas intensive energy source than other conventional oils (hence were termed “dirty oil”), and that expansion of the Alberta oil sands, in particular, was extremely problematic in the context of an increasing threat of climate change

Near the end of October after failing to get anywhere with federal officials (The Associated Press 2011), Nebraska Governor Dave Heineman called a special session of the state legislature for November 1, 2011 in order to introduce legislation that would establish Nebraska’s jurisdiction over the routes of oil pipelines within its borders (Gardner 2011). This was the culmination of increasingly vociferous opposition from Nebraska citizens in particular, who were especially concerned about the consequences of an oil spill affecting the largest source of potable water in the Midwest. Thus opposition joined in protest of the Keystone XL pipeline, but for local environmental concerns rather than global ones. The citizens of Nebraska, as well as the governor, were not opposed to the pipeline in theory, but not the preferred route TransCanada was putting forth.

On November 6<sup>th</sup>, 2011 another protest was organized by 350.org against the Keystone XL pipeline. The concept was to get enough people to participate to surround the White House. By this point, public opposition was increasing, and the response was overwhelming: approximately 13,000 people showed up, enough to surround the White House three times (CBC News 2011). Public opposition was growing both on the climate front, and with regards to Nebraska.

Four days later, on November 10, 2011, the US State Department announced that a decision on the Keystone XL pipeline would not be made until sometime in 2013 (US Department of State 2011c). The main public argument for the postponement was the concerns raised by Nebraska, and the desire to evaluate an alternate route that did not present similar risks to the Ogallala aquifer. While environmentalists celebrated the small victory, critics suggested this was merely a political move: appease the environmental movement until after the 2012 elections, while still leaving the door open

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<sup>10</sup> <http://www.gpo.gov/fdsys/pkg/WCPD-2004-05-10/pdf/WCPD-2004-05-10-Pg723.pdf>



for approval, thus placating keeping the oil industry. It seemed like a non-decision that avoided any political consequences of actually making a choice.

Republicans, who were either supportive of the oil industry and wanted the pipeline approved or simply did not want Obama to get away from the political consequences of making a decision, in late December forced an amendment onto an emergency debt ceiling extension bill requiring the Obama administration to make a decision within 60 days.<sup>11</sup> January 18, 2012 the State Department and White House denied the Keystone XL pipeline a Presidential permit citing inadequate time to evaluate alternative routes, and the project, as it stands, was not in the national interest. However, the official statement released stated that this decision did not preclude “any subsequent permit application or applications for similar projects” (US Department of State 2012). In other words, TransCanada was welcome to propose the pipeline again, with an alternate route that addressed the concerns that had been put forth thus far.

On February 27, 2012, TransCanada announced that it was going to attempt to go ahead with only stage 3 of the Keystone XL pipeline, now renamed the Gulf Coast Pipeline project. Stage 3 was the southern leg that was to go from Cushing, Oklahoma to the refineries in Texas. This segment is crucial to the oil sector as it would help free up the surplus oil in Cushing, relieving the WTI-Brent spread. President Obama announced on March 22, 2012 his support of this move by fast-tracking the permit for the southern half of the pipeline (Keilar 2012).

On May 4, 2012 the U.S. State Department received a new application for the Keystone XL pipeline (TransCanada 2012). The application did not include a new route as the legislation passed in Nebraska requires TransCanada to plan the route in coordination with the state. TransCanada began that process by submitting a new route proposal on April 18, 2012; one day after the new legislation came into effect (TransCanada 2012, p. 4).

### **The Environmental Assessment Process: Northern Gateway**

In Canada, The Canadian Environmental Assessment Agency (CEAA), a body accountable to the Federal Environment Minister, manages environmental assessment processes. This federal agency operates in accordance with the *Canadian Environmental Assessment Act* (1992), the federal statute that requires an environmental assessment of development projects, as guided by certain regulations<sup>12</sup> (Muldoon *et al.* 2009). Canada’s federal energy regulator, the National Energy Board has “regulatory responsibilities for interprovincial and international natural gas, oil and commodity pipelines pursuant to the *National Energy Board Act*” (Joint Review Panel 2010a). This federal statute requires the National Energy Board to consider the potential environmental affects relating to the construction and operation of inter-provincial pipelines (Muldoon *et al.* 2009) and determine if proposed projects are in the public’s best interest (National Energy Board 2010b).

#### *Screening*

The proposed Northern Gateway pipeline project requires the approval of a number of responsible authorities whose duties, powers or functions trigger an environmental assessment under the *Canadian Environmental Assessment Act* (Canadian Environmental Assessment Agency 2012). Because the

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<sup>11</sup> “Temporary Payroll Tax Cut Continuation Act of 2011”

<sup>12</sup> “The law applies to projects that are proposed or funded by federal authorities, or use federal lands, or that require certain federal regulatory approvals” (Muldoon *et al.* 2009, p.132).

pipeline is inter-provincial, the National Energy Board is also implicated and can issue approval under the *National Energy Board Act*. Other responsible authorities include the following government agencies: Fisheries and Oceans Canada, Transport Canada, and Indian and Northern Affairs Canada. Additionally, the Canadian Transportation Agency, Environment Canada, and Natural Resources Canada may also be responsible authorities for the project under the *Canadian Environmental Assessment Act*.

The Northern Gateway proposal has been referred to a review panel conducted jointly between the Canadian Environmental Assessment Agency and the National Energy Board. As specified under the *Canadian Environmental Assessment Act*, when a proposed project has the potential to cause adverse environmental effects, or there is a high level of concern from the public, the Minister of the Environment can refer the proposal to a review panel (Joint Review Panel 2010b), the most stringent form of federal environmental assessment. When a project requires a decision from another federal agency or level of government, the review panel may be conducted jointly to merge the assessments required by each agency into a single process (Canadian Environmental Assessment Agency 2012). The Minister of the Environment and the Chair of the National Energy Board established a joint review panel to conduct the environmental assessment of the project (Canadian Environmental Assessment Agency and National Energy Board 2009), fulfilling requirements of the *Canadian Environmental Assessment Act* and the *National Energy Board Act*. The Joint Review Panel Agreement between these two agencies also includes terms of reference for the regulatory and environmental review of the proposed project (Joint Review Panel 2010c).

The Joint Review Panel consists of an independent panel of experts, selected and appointed on the basis of their knowledge and proficiency (National Energy Board 2010b). As outlined in the Joint Review Panel Agreement, it is the responsibility of the JRP to review the regulatory application submitted by the proponent and conduct a thorough environmental assessment. Through this assessment the panel will determine, in accordance with the *Canadian Environmental Assessment Act*, whether or not the project will cause significant, adverse environmental impacts. And additionally, whether or not the project is in the public interest, as legislated by the *National Energy Board Act*. The assessment includes an extensive public and consultative process, as the panel will conduct public hearings to receive information about the project and consider comments from the public and aboriginal peoples. The panel will also consider technically and economically feasible actions to mitigate environmental effects and whether or not follow-up programs will be necessary (Canadian Environmental Assessment Agency and National Energy Board 2009).

### *Scoping*

Decisions with respect to the scope of the assessment were made following the proponent's formal regulatory filing in May 2010. The JRP held consultation about a draft list of issues in three locations along the proposed pipeline route through the summer of 2010 (Joint Review Panel 2010c). The JRP scoping decision was issued Panel Session Results and Decision document (Joint Review Panel 2011a). In this document, the panel revealed it would not consider a number of fundamental issues that had been raised by First Nations, community, and environmental groups during the panel sessions with regards to greenhouse gas and oil sands expansion issues (West Coast Environmental Law 2011). Regarding upstream impacts from increased oil sands production enabled by the pipeline, the panel ruled "we will not consider the environmental effects of upstream hydrocarbon production projects or activities in our review." Regarding the use of oil once it gets to market, the Panel made the same decision: "we will not consider the environmental effects associated with the downstream use of the oil to be transported by

the Project” (Joint Review Panel 2011a, p. 6). A coalition of environmental groups appealed this scoping decision to the Panel, but was denied by the Joint Review Panel (Robinson 2011).

### *Assessment*

In May 2011, the JRP issued a hearing order detailing the process and opportunities for participation (Joint Review Panel 2011b). The document outlined four options for participation: submit a letter of comment, make an oral statement, become an intervenor, or become a government participant. The first two options are means in which members of the public can provide the JRP with personal knowledge, views, or concerns. Participants with intervenor or government participant status are able to submit information requests (written questions), submit evidence in written format or oral (with prior JRP approval), question other intervenors orally (with prior JRP approval), and receive all documents submitted to the JRP (Joint Review Panel 2011b). Community hearings for oral evidence (intervenors) began in January 2012 in Kitimaat Village, BC. Community hearings for oral statements began in March 2012 (Joint Review Panel 2011c).

### *Decision Making*

Upon completion of the public hearings and consultation phase, the JRP will issue a report detailing its conclusions, recommendations, and supporting rationale with respect to the environmental assessment of the project. This report will also include a summary of participant comments, Aboriginal consultation, follow-up programs and possible mitigation measures (Joint Review Panel 2011d).

The completed JRP report will be submitted to the Minister of the Environment for Government response, and will be made available to Aboriginal peoples and the public. The government response will then be considered by the JRP, and the Joint Review Panel will issue a final decision on project approval with supporting reasons pursuant to the NEB Act (Joint Review Panel 2010a). As the law currently stands (June 1, 2012), the cabinet cannot order the Joint Review Panel or adopt a particular decision because the Panel is operating as the National Energy Board, which has independent regulatory decision-making authority on interprovincial pipelines. If the government wanted to force the pipeline through if it was not approved by the Panel, it would have to enact new legislation (Bankes 2012). However, pending legislation in the Omnibus Budget bill pending before Parliament would shift ultimate pipeline approval authority to cabinet.

### **Conservative Political Backlash**

Concerned at the political traction of pipeline opponents, the Conservative government and allied interest groups launched a concerted effort to discredit their adversaries and reform environmental law to facilitate what they called “responsible resource development.” One important catalyst in this reaction was the December 2011 decision by the Joint Review Panel to delay its process by a year in response to the unprecedented number of individuals and groups that registered to participate in the Northern Gateway Joint Review Panel hearings. With more than 4300 participants registered to give oral statements in the panel hearings, many as a result of environmental group campaigns, the panel was forced to extend its review deadlines to accommodate the schedule for community hearings, anticipating a final decision date near the end of 2013 (Joint Review Panel 2011d).

### *Discrediting Environmentalists*

The backlash strategy has two overlapping components: a media-based political strategy to discredit environmentalists working to block the project, and legislative strategy to overhaul environmental laws to speed the approval of resource development projects. The ground work for the strategy to discredit environmental groups was laid by the research of a Vancouver-based blogger Vivian Krause, alleging that pipeline opposition groups were receiving significant amount of funding from US foundations, and as a result foreign interests were either pursuing commercial interests through their opposition, or simply that foreign meddling undermined Canadian sovereignty.<sup>13</sup> This framing was picked up by the oil sands advocacy group Ethical Oil, who had the financial resources to launch a social media and advertising campaign to give them much broader exposure.<sup>14</sup>

This campaign crested when its framing was adopted by the Harper government. In January 2012, Prime Minister Harper raised concerns about foreign money being used to hijack the regulatory process: “We have to have processes in Canada that come to our decision in a reasonable amount of time and processes that cannot be hijacked. In particular, growing concern has been expressed to me about the use of foreign money to really overload the public consultation phase of regulatory hearings, just for the purpose of slowing down the process” (Audette 2012). Its most strident form appeared in January of 2011 when Federal Natural Resources Minister Joe Oliver penned an open letter to Canadians on “Canada’s commitment to diversify our energy markets and the need to further streamline the regulatory process in order to advance Canada’s national economic interest” (Oliver 2012). Published on the eve of the Northern Gateway Joint Review Panel hearings, Oliver’s letter reinforced allegations about the financial motives of allegations with regards to the environmental groups involved in public hearing registration, and suggested regulatory changes were on the horizon. Oliver wrote:

Environmental and other radical groups seek to block this opportunity to diversify our trade.....

These groups threaten to hijack our regulatory system to achieve their radical ideological agenda. They seek to exploit any loophole they can find, stacking public hearings with bodies to ensure that delays kill good projects. They use funding from foreign special interest groups to undermine Canada’s national economic interest.....

We believe reviews for major projects can be accomplished in a quicker and more streamlined fashion. We do not want projects that are safe, generate thousands of new jobs and open up new export markets, to die in the approval phase due to unnecessary delays. Unfortunately, the system seems to have lost sight of this balance over the past years. It is broken. It is time to take a look at it. (Oliver 2012)

Concerns about inappropriate foreign influence were, in the Spring 2012, combined with allegations of inappropriate use of charitable status by environmental groups.<sup>15</sup> Federal Environment Minister Peter Kent accused environmental charities of “laundering” money, explaining in a CBC interview: “There are allegations - and we have very strong suspicions - that some funds have come into the country improperly to obstruct, not to assist, in the environmental assessment process” (CBC 2012). Some

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<sup>13</sup> Blogger Vivian Krause alleges: “In various environmental campaigns in Canada, American economic and trade interests are being protected. For example, the campaign against oil tanker traffic on the north coast of British Columbia would land lock Canadian oil and continue the virtual monopoly that the U.S. has on our oil exports - all in the name of protecting the environment.” ([http://fairquestions.typepad.com/rethink\\_campaigns/](http://fairquestions.typepad.com/rethink_campaigns/))

<sup>14</sup> Ethical Oil launched the <http://www.ourdecision.ca/> campaign based on Krause’s allegations

<sup>15</sup> Charitable groups in Canada are not permitted to allocate more than 10% of their resources to political advocacy (Canada Revenue Agency 2012).

Conservative MPs and Senators have also expressed concern regarding this matter, which has led to an inquiry by the Senate finance committee.

### *Revamping Environmental Law*

The second prong of the Conservative party backlash was legislative reform. In March 2012, the Harper government introduced legislative changes in the 2012 Budget Implementation Bill (C-38) to overhaul the federal regulatory review framework for major natural resource projects and to bring further scrutiny the political activities of charitable organizations (Parliament of Canada 2012). The Act makes major changes to the *Canadian Environmental Assessment Act*, *The National Energy Board Act*, and *The Fisheries Act* that would, if enacted, have major implications for the approval and regulation of pipelines and many other natural resource development projects (Fekete 2012).

Under the new environmental assessment provisions, the definition of “environmental effects” is altered, narrowing the scope of assessment. Participation in reviews would be limited to interests that are “directly affected” or have, in the review panels judgment, “relevant information and expertise.” The Act reduces the number of responsible authorities (federal departments) involved in environmental assessments from forty to three: The Canadian Environmental Assessment Agency (CEAA), the National Energy Board (NEB) and the Canadian Nuclear Safety Commission (CNSC). More power will be designated to the Provinces to avoid duplication of environmental assessments. The Act also sets forth a two year timeline for the environmental assessments of major projects.

The *National Energy Board Act* would also be amended by Bill C-38. The changes would apply the same directly affected or relevant expertise test described above to hearing participants, and limit reviews to 2 years. Perhaps most consequentially for the Northern Gateway case, the Act specifically authorizes cabinet to override NEB decisions (which would essentially become mere recommendations). The government has been evasive about whether these legislative changes will apply to the ongoing Northern Gateway review, but applying that one modest change to the review process could have immense implications for the politics of this project.

Bill C-38 also proposes controversial changes to *The Fisheries Act* which may further ease the regulatory burden on major resource development projects by changing fish habitat provisions, and giving other responsible authorities the power to give approvals under the federal statute. New provisions in Bill C-38 shift away from the protection of all fish habitat to protecting fish solely on the basis of their usefulness. As summary of the bill reads: “Division 5 of Part 3 amends *the Fisheries Act* to focus the Act on the protection of fish that support commercial, recreational or Aboriginal fisheries” (Parliament of Canada 2012, p. 4).

In addition to the changes in environmental law, the budget implementation bill tightens supervision of charitable organization’s political activities. As announced in the 2012 Federal Budget, charities will now be required to disclose further information on their political activities, including the amount of money received from foreign sources providing the Canada Revenue Agency with increased funding for education, compliance, and audits (Government of Canada 2012).

### **Comparative Analysis and Conclusions**

This comparative case study reveals an intriguing pattern of similarities and differences. The pipeline disputes are being fought out in quite different political systems: the legalistic US system of checks and

balances, and Canada's leader-centered Parliamentary system. Despite those widely divergent institutions, there are a number of areas of strong convergence in the cases.

The first important similarity to note is the commonality in structure of interests. Despite leaving Alberta in different directions towards different coasts on different oceans, the structure of interests on both sides of the debate has much in common. The two pipeline companies have significant economic stakes in the project, and the oil sands sector has an estimated \$8 billion per year stake in seeing the WTI-Brent price spread reduced or eliminated. Both pipeline proposals have attracted strong environmental opposition, in part because the environmental community is relatively integrated across the border, and there is a widely shared concern about limiting the expansion of the oil sands out of concern over greenhouse gas emissions and other environmental impacts.

One significant difference in interests is in the nature of place-based opposition, a difference driven by the different nature of land ownership and the resources at stake. In the US case, opposition has come both from private landowners but especially Nebraskans concerned about risks to the Sand Hills area and water supply. In the Canadian case, place-based opposition has been dominated by First Nations, especially in the coastal region and the Fraser River watershed. Institutions empower these place-based groups in different ways: state control over pipeline siting gives Nebraska special power, and constitutional entrenched aboriginal rights give BC First Nations a significant source of leverage.

There are also differences in the salience of particular issues in the two processes. Climate impacts have played a more prominent role in the US case than they have in Canada. The risks of tanker accidents has been the most dominant issue in the Northern Gateway pipeline case, but a non-issue in the Keystone XL case. We'll return to the implications of this difference below.

There is also a considerable amount of similarity in reliance on environmental assessment to analyze information about the risks and benefits of the projects, and to elicit the views of the public. Both processes have considerable strengths in provided opportunities for extensive analysis and participation. Yet both face the same limits inherent in using environmental assessment to make critical policy decisions: they force agencies to critically evaluate relevant information, but they don't necessary inform or alter the political values shaping the final decision. Both policy frameworks allow economic or other values to trump environmental concerns.

There are some important differences in the assessment processes, mostly notably in the assessment stage where Canadian government organizations play a more direct role in performing the analysis than in the US. There are perhaps more consequential differences in outcomes of scoping in this case, as the US process has explicitly agreed to consider upstream and downstream greenhouse gas implication of oil sands expansion facilitated by the pipeline. The Canadian process explicitly rejected doing so despite explicit and direct pleas by environmental groups. The greater comprehensiveness in scope in the US can be linked to institutional factors, notably the legalism that pervades environmental policy. Agencies typically try to conduct as comprehensive an analysis as possible in an effort to increase their probability of success in the evitable litigation to come. Canadian regulators don't face the same threat of environmental litigation.

Both cases reveal prominent efforts to exert political control over the regulatory process, but the way that is manifested in each case reflects the different institutional and partisan configurations of the two countries. In the US, a bitterly partisan divided government has ensured the case has been reflected in a conflict between Congress and the President. In Canada, Prime Minister Harper's majority conservative

government is working to remove the independent decision-making authority of the National Energy Board.

The conclusions yield some surprises. There are clear indications that institutions matter, but not in the ways normally characterized by those in the comparative literature. Courts, which are generally thought to play a more important role in the US, are shown to be a powerful force in the Canadian case. Subnational governments, generally thought to play a more important role in Canada's more decentralized federation, are shown to be a more influential force in the US case.

Interactions between the cases have been important as well. A strong network of environmental groups across the border has helped coordinate strategy and analysis. Canadian governments have lobbied in the US. The most important source of interaction is how the US reluctance on Keystone XL motivated the Harper government to intensify its efforts to ensure increased oil sands access to Asian markets.

In some respects this analysis is premature because we do not yet have the policy outcomes in the two cases. The Keystone XL case is much further along, even though TransCanada has had to resubmit its application. A decision is expected in early 2013, and may well be followed by litigation. It will certainly be influenced by the November 2012 elections. A Republican electoral victory would seem to ensure its approval. If Obama remains in power, a negative decision is certainly plausible at least on the segment from Alberta to southern Nebraska; the most critical transportation issue for the oil sector is the segment from Cushing to the Gulf Coast, for which there are competing proposals. Assuming the pipeline will be rerouted to avoid the Sand Hills, a negative decision would probably need to be justified on climate grounds and not about water quality concerns along the pipeline route.

The Northern Gateway case is currently planned to be decided by the end of 2013. There are a number of different outcomes possible. The most likely outcome appears to be that the Joint Review Panel will approve the pipeline. Even if so, however, there is a virtual certainty that the decision would be challenged in courts by First Nations. At a minimum, that would lead to delays. It is plausible, given the nature of the jurisprudence and how adamant the opposition from many First Nations, that the Supreme Court could rule that the government did not sufficiently accommodate First Nations concerns. It is also plausible, but less likely, that given the intensity of opposition in British Columbia, Enbridge may decide that the proposal should be withdrawn. Another possibility is that the Joint Review Panel could decide against the project. Given the legislation on the verge of approval in Parliament that would transfer final pipeline approval authority from the National Energy Board to the cabinet, it seems likely that even if this happens, cabinet would approve the pipeline so long as the Conservative government is still in power (the next Federal election is not scheduled until October 2015).

One final consideration is what these cases reveal, or may reveal, about the relative importance of specific, local environmental concerns and the more abstract and diffuse concerns about climate change. In the Keystone case, climate concerns were fundamental to the surprisingly large protests mobilized by 350.org. The rationale for Obama's November decision does give a passing reference to climate, but it focused its core argument on the local risks the pipeline faced to the Sand Hills area in Nebraska and the need to consider alternative routes. It is uncertain whether that relative emphasis reflects the administration's underlying values or merely the most expedient political rationale. Assuming TransCanada will deliver a new pipeline route that avoids the Sand Hills, the next presidential decision will be very revealing about the political power of climate interests in the US.

In Canada, the climate issue has essentially been taken off the agenda for the pipeline through the Joint Review Panel's narrow scoping decision. Canadian opponents still have plenty of ammunition with place-based issues, with strong First Nations opposition in critical areas and especially widespread and intense public concern over tanker safety on the coast.



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