

TMX and the crisis of consent: Cracks in Canada's settler-colonial political order

From opposition to the Dakota Access Pipeline to more recent conflicts surrounding the Trans Mountain Expansion (TMX) and Coastal GasLink (CGL) pipelines, Indigenous peoples have been at the forefront of these struggles as they defend their lands against encroachment from state and corporate actors. Fossil fuel pipelines are infrastructures that rely on contested jurisdiction and consent processes, enable the transportation of resources that benefit a specific class of people, pose disproportionate risks (spills, contamination of water and food sources) to Indigenous communities and their homelands, and contribute to a “doubling down” on an energy system with universally negative climatic impacts (intensification of fossil fuel reliance and greenhouse gas emissions). As a result, pipelines have emerged as flashpoints of conflict in Canadian politics (Shaw, 2021), eruptions that display longstanding antagonisms in Canadian history and society.

In this article, I will present fossil fuel pipelines as symptoms of settler colonialism and fossil capitalism, two concepts that I will outline in the next section. To illustrate these symptoms, I will focus on the recent history of the TMX project—a contested project, currently under construction, set to traverse the territories of more than 140 Indigenous communities—and examine the coercive aspects of state consultation processes and the use of mutual benefit agreements to establish “consent by contract” (Scott, 2020).

SETTLER COLONIALISM AND FOSSIL CAPITALISM IN CANADA

Settler colonialism is a concept that describes a system of political domination, where a population of outsiders attempts to displace and replace an Indigenous population (Veracini, 2017). In a settler-colonial society (such as Canada), access to land and extraction of

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resources are achieved, in part, through the introduction of a permanent settler (non-Indigenous) population and through the dispossession, displacement, and (partial) elimination of the Indigenous population. While overt policies of elimination and assimilation no longer have legitimacy in Canada, Indigenous peoples remain largely dispossessed while the role of the settler-colonial state remains essentially the same: to facilitate corporate access to Indigenous lands and enable resource extraction.

Fossil capitalism is a concept that comprises three main ideas about capitalism in relation to fossil fuels: (1) modern capitalism has been largely powered by fossil fuels since the 19th century; (2) the material properties of fossil fuels (their energy density, the ease with which they can be transported and stored) make them especially useful for capitalist control over labour and the accumulation of capital (Altvater, 2007); and (3) the subject of the capitalist class that owns and controls fossil fuel assets (often termed “fossil capital”) wields disproportionate political-economic power and uses it to constrain transitions toward a more sustainable and democratic socio-economic system.

Canada is a settler-colonial nation (a political-legal order where rights to land and resources facilitate corporate access and extraction) that serves the interests of fossil capital by facilitating

the construction of transportation infrastructures (such as pipelines) used to circulate fossil fuels. From the railroads of the 19th century to the pipelines of the 21st century (railroads, highways, etc.), transportation infrastructures, the forms of jurisdiction on which they depend, and the ideological fantasies that sustain them have been central to settler Canadian nation building. Cowen (2017) argues that “infrastructure is often the means of dispossession, and the material force that implants colonial economies and socialities. Infrastructures thus highlight the issue of competing and overlapping jurisdiction—matters of both time and space” (A Crisis of Infrastructure section, para. 4).

This political order facilitates the extractive drive of fossil capitalism in Canada, but it is also cracking under pressure. Indigenous land defence, assertions of inherent governing authority, and head-on collisions with the RCMP reveal both the antagonistic nature of settler colonialism and the contestation between colonial and Indigenous legal orders. Proponents of extractive development attempt to smooth over these cracks by mobilizing the consent of Indigenous peoples within a cultural paradigm of “reconciliation lite,” where colonialism is framed as a regrettable feature of Canada’s past rather than a structure that persists in the present (Midzain-Gobin & Smith, 2020).

INDIGENOUS CONSENT AND THE CASE OF THE TMX

On June 18, 2019, the government of Canada declared a national climate emergency, and then the following day approved the TMX (currently under construction, amid strong resistance) with the goal of tripling the pipeline’s capacity to transport bitumen from the Alberta tar sands to the Pacific coast of British Col-

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umbia (Mabee, 2019). The project poses disproportionate harm to Indigenous peoples on their unceded and treaty territories and has given rise to resistance on many fronts, including the construction of tiny houses, land defence, divestment campaigns, and legal challenges (the latter of which have been undertaken by coalitions of First Nations, settler municipalities, and environmental organizations).

The project has emerged as a political-legal battleground for what “Indigenous consent” means within natural resource governance processes. Successful legal challenges (culminating in the Federal Court of Appeal’s decision in *Tsleil-Waututh Nation v. Canada (Attorney General)* in August 2018 to halt the project) necessitated a second round of consultations with affected Indigenous communities, but subsequent challenges were unsuccessful, with the courts concluding that First Nations have no “veto power,” and therefore no ability to say no to projects on their unceded territories (Markusoff, 2020).

While an unproblematized concept of “Indigenous consent” is often circulated in the public discourses that promote the TMX, the consultations and approval processes have effectively served as rubber-stamping exercises for what was always, in the eyes of the federal government, a “done deal.” This has been demonstrated by the government’s purchase of the project from energy company Kinder Morgan in May 2018 for \$4.5 billion, and its enduring faith in the project’s economic viability despite significant uncertainty. The project is touted as having a strong business case (“in the national interest”), even though costs have ballooned by 70 percent to \$21.4 billion, and multiple analyses (Allan, 2022; Gunton et al., 2021; Nikiforuk, 2020) have raised doubts about whether the project will ever be built or be profitable. Most recently, economist Robyn Allan (2022) has argued that the project is not commercially viable and as a result \$17 billion of debt will not be repaid to Canadians (p. 3). Given

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the consistency of federal government messaging—to quote Justin Trudeau, “we are going to get the pipeline built” (Snyder, 2018)—paired with the government’s purchase of the project and commitment to it despite budgetary overruns and economic risks, it is clear that consultations with Indigenous communities could never have resulted in project cancellation. One mechanism that functions to obfuscate this lack of real consent is the use of mutual benefit agreements (MBAs).

CONCEALING THE CRACKS: MBAs AND EXTRACTION CONTRACTING

The TMX crosses the territories of more than 140 Indigenous communities (APTN News, 2018). Trans Mountain Corporation (a subsidiary of the federal Crown corporation Canada Development Investment Corporation) has signed 69 MBAs with 81 of these Indigenous communities worth \$650 million, promising to generate \$4.2 billion in “Indigenous-based contract awards” (Trans Mountain Corporation, 2022). MBAs are essentially contracts between extractive companies and Indigenous communities. They are confidential commercial agreements that may include “education and jobs training, skills enhancement, business opportunities or improved community services and infrastructure” (Trans Mountain Corporation, 2022). As Pasternak and King (2019) argue, while “there are clear financial benefits to participating in various

stakes of resource projects, especially in light of the state’s divestment from Indigenous people’s wellbeing . . . the types of benefits accruing from participation [in projects such as TMX] . . . are mere incremental gains against the bar of fulsome Indigenous jurisdiction and inherent rights” (p. 44).

Dayna Nadine Scott (2020) has theorized the use of MBAs as tools for gaining the consent of Indigenous communities as a regime of “extraction contracting.” Scott defines this as “a mode of governance that attempts to define the social, political, ecological, and economic relations regarding the use of Indigenous lands solely through confidential bargaining and agreement-making between private extraction companies and First Nations, but in fact affords the state a key role in setting the terms” (pp. 272–273). Scott argues that it is not that contracts “fill the gap” of an inadequate public regulatory regime; rather, it is that the state is “actively holding open the space for extraction contracting to fill” (p. 273). This “insulates the settler law from demands for reform” and delays “the inevitable breakdown of the state’s jurisdictional authority on those lands” (p. 273), which would entail a radical redistribution of wealth and reorganization of property rights.

“BETWEEN A ROCK AND A HARD PLACE”

Many Indigenous leaders find themselves in the difficult position of having

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to choose between taking a principled stance against a project they disagree with and deriving some benefit from a project that appears inevitable. This forced choice is exacerbated by the poverty that many communities face because of land dispossession, paired with lack of government provisioning of basic infrastructure and social services. As Chief Robert Joseph of Ditidaht First Nation told APTN News after signing a letter of support for the TMX, “we are not really in favour of any pipeline, but we believe it’s going to go through anyway . . . They will not listen to anybody and that’s the history of consultation with First Nations people . . . They consult and go ahead and do what they were going to do anyways” (Paling, 2018).

The ambivalence that Indigenous communities might express toward projects like the TMX is a pattern in Canadian history. Clifford Atleo (2021) observes that Indigenous communities are caught “between a rock and a hard place”: “most Indigenous leaders want to do what they truly believe is best for their communities. Within the constraints of settler colonialism, environmental politics, and neoliberal capitalism, options for Indigenous communities are tremendously limited” (p. 369). While Canada wants to legitimize extractive developments through appeals to Indigenous “consent,” if saying “no” to a project is not an option, then consent is not really on the table. 🍁

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