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A COMPARATIVE PERSPECTIVE OF THE IMPACT OF CANADIAN AND UNITED STATES OIL REGULATION LAW DIFFERENCES ON APPROVING USE OF NEW PETROLEUM- BASED ENERGY SOURCES

By: Diana Mohyi

INTRODUCTION:

The race to find alternative energy to fuel the American economy and save it from reliance on the Middle East oil supply fails to reflect that the United States has a ready source of oil from Canada. In terms of proven petroleum reserves, Canada ranks third after Saudi Arabia and Venezuela.¹ Canada's oil reserves are eight times larger than the United States.² Although the United States and Canada have similar governing structures due to their shared heritage, and both countries are committed to working together, their energy policies are not completely congruent. United States energy policy overemphasizes security and environmental concerns consequently disadvantaging its economy; alternatively, Canada's economy-focused energy policy gives its economy an advantage in energy matters.

I. BACKGROUND

Security and environmental concerns are the 'rock and hard place' in the American race to find alternative energy sources. The risk to United States energy security mandates that the United States find energy sources outside of the Middle East.³ Experts have determined that a potential terrorist attack on the Saudi Arabian oil infrastructure can be easily carried out and have devastating effects on the United States economy.⁴ As the State Department sits poised to approve the Keystone XL Pipeline Project that would allow

¹ *Notes for a Speech by The Honourable Joe Oliver, P.C., M.P. Minister of Natural Resources: Canada and the U.S.: Charting our Secure Energy Future*, October 4, 2011, United States Energy Association Washington, DC, <http://www.nrcan.gc.ca/media-room/speeches/87/3079> (last visited June 29, 2012).

² *Id.*

³ Lee-Anne Goodman, *State Department Poised to Approve TransCanada's Keystone XL Pipeline to Reduce Reliance on Persian Gulf*, *GLOBE & MAIL* (Oct. 21, 2010 5:41PM), <http://www.theglobeandmail.com/globe-investor/us-set-to-approve-keystone-xl-pipeline/article4329910/>.

⁴ See ROBERT BAER, *SLEEPING WITH THE DEVIL: HOW WASHINGTON SOLD OUR SOUL FOR SAUDI CRUDE* 23, 26 (2003).

increased oil imports from Canada, those opposed have raised concerns about the negative impact on climate change and possible air, water and wildlife pollution.⁵

The oil sands of Alberta produce crude bitumen, commonly called 'dirty oil,' which TransCanada Corporation intends to import into the United States via its Keystone XL Pipeline.⁶ The Keystone XL project would transport 900,000 barrels of oil a day from Alberta through the United States and on to refineries in the Gulf of Mexico.⁷ The pipeline will start in Hardisty, Alberta, cross the United States border from Monchy, Saskatchewan, and cut across Montana, South Dakota and Nebraska.⁸ The pipeline expansion project will also extend the pipeline from Cushing, Oklahoma, to Houston and Port Arthur, Texas.⁹ American groups opposed to the pipeline worry about the potential for more oil-leak disasters.¹⁰ Politicians in Nebraska have urged United States Secretary of State Hillary Clinton to consider alternative routes for the pipeline.¹¹ Meanwhile, the Canadian government has already approved the Keystone XL Pipeline Project.¹² Canada's approval includes provisions for landowner rights and environmental protection.¹³

The United States has cautiously made advancements toward full approval of the project. In January 2012, United States President Barack Obama denied TransCanada permission to build the northern part of the pipeline from Canada to Oklahoma because of the need for more time to review the environmental impact.¹⁴ Recently, in June 2012, the Obama Administration acted on its promise to expedite the southernmost portion of the project by granting construction permits for part of the route passing through Texas.¹⁵ Other United States government entities have followed suit. The U.S. Army Corps of Engi-

⁵ Goodman, *supra* note 3.

⁶ *Id.*

⁷ *Id.*

⁸ Jordan Burke, *TransCanada Keystone XL Pipeline Approved by Canada (Update2)*, BLOOMBERG (Mar. 11, 2010), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aAvvuk.jDH3A>.

⁹ Goodman, *supra* note 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² Burke, *supra* note 8.

¹³ *Id.*

¹⁴ John M. Broder, U.S. Grants a Keystone Pipeline Permit, N.Y. TIMES (June 26, 2012 11:08 AM), <http://green.blogs.nytimes.com/2012/06/26/u-s-grants-a-keystone-pipeline-permit/>.

¹⁵ *Id.*

neers in Tulsa, Oklahoma subsequently approved the segment of the Keystone XL pipeline, which will run from Cushing to Texas.¹⁶ Keystone XL Pipeline builder TransCanada needs approval for its wetland and water-crossing plans from each U.S. Army Corps office which oversees a district included in its Keystone XL Pipeline Plan.¹⁷ TransCanada awaits similar approval from the Corp's Fort Worth, Texas district office.¹⁸

II. SURVEY OF OIL REGULATION LAWS IN CANADA AND THE UNITED STATES

The United States and Canada have a shared British history, which has influenced legal development in the two countries.¹⁹ The founders of these nations sought to ensure that their citizens had freedom and sought to build prosperous economies.²⁰ Founders also established federal systems of government in which the national government shares its powers with the sub-national state or provincial governments, respectively.²¹ Different influences have contributed to each nation's development and produced both subtle and significant differences in the ways in which each government runs its respective country.²²

A. Oil Regulation Law in Canada

The Canadian Constitution Act of 1867, otherwise known as the British-North America Act of 1867, specifically vests various powers of Canadian government in the provincial and national governments, and established that any powers not specifically granted rest in the hands of the Canadian national government.²³ The exclusive legisla-

¹⁶ Keystone XL Pipeline Segment Approved by Tulsa, Oklahoma Group, HUFFINGTON POST (June 29, 2012, 2:01PM), http://www.huffingtonpost.com/2012/06/29/keystone-xl-pipeline-tulsa-oklahoma_n_1638226.html.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See, e.g.*, Mark Kasoff & Christine Drennen, *The Economy*, in CANADIAN STUDIES IN THE NEW MILLENNIUM 37 (Patrick James & Mark Kasoff eds., 2008).

²⁰ *Id.*

²¹ *Id.*

²² *See id.* at 38.

²³ Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), *reprinted in* R.S.C. 1985, app. VII, no. 91 (Can.).

tive authority of the Canadian Parliament extends to the regulation of trade and commerce.²⁴ The Act grants provincial legislatures the power to make laws in relation to exploration for non-renewable energy sources and development, conservation, and management of non-renewable energy resources.²⁵ It also grants provincial legislatures the power to make laws respecting the export of natural resources to other Canadian provinces; such laws cannot allow for discrimination between provinces in terms of prices or supplies exported to another province.²⁶ The Act states that the ability of the provincial legislatures to enact laws relating to non-renewable energy resources does not detract from the authority of the federal Parliament and that where the laws conflict, the law enacted by Parliament prevails.²⁷ In each province, the provincial government has the power to tax non-renewable energy resources whether the resource is exported in part or in full from the province.²⁸ Such laws may not authorize taxation that differentiates based on whether the production is exported from the province.²⁹

The three main principles of Canadian energy policy are: market orientation; respect for jurisdictional authority and the role of the provinces; and, where necessary, targeted intervention in the market through regulation or other means in order to achieve specific policy objectives.³⁰ The first principle of market orientation is the idea that it is most efficient to allow the market to determine supply, demand, prices, and trade to guarantee an efficient, competitive, and innovative energy system that is responsive to Canada's energy needs.³¹ The second principle of respecting jurisdictional authority and the role of the provinces means that provincial governments directly manage most of Canada's resources and are responsible for resource management within their borders.³² The third principle of market intervention is employed for policy objectives,

²⁴ *Id.* at no. 91(2).

²⁵ *Id.* at no. 92A(1).

²⁶ *Id.* at no. 92A(2).

²⁷ *Id.* at no. 92A(3).

²⁸ *Id.* at no. 92A(4).

²⁹ Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C. 1985, app. VII, no. 92A(4) (Can.).

³⁰ *Overview of Canada's Energy Policy*, NAT. RESOURCES CAN., <http://www.nrcan.gc.ca/energy/policy/1352> (last visited Mar. 4, 2012).

³¹ *Id.*

³² *Id.*

which include issues relating to health, safety, and environmental sustainability. Safety issues include such matters as pipeline regulation.³³

Domestic and international agreements and accords have helped shape Canada's energy policy.³⁴ The Western Accord and 'Agreement on Natural Gas Markets and Prices', are agreements between Canada's federal government with the provinces of Alberta, Saskatchewan, and British Columbia, which concern oil and gas pricing and taxation.³⁵ The Atlantic Accords, an agreement between the Canadian federal government and the provinces of Newfoundland, Labrador and Nova Scotia, include the establishment of jointly managed Offshore Boards.³⁶ The Canadian government considers Canada's Free Trade Agreement with the United States, which was followed by the North American Free Trade Agreement ("NAFTA"),³⁷ to be the cornerstone of Canadian energy policy regarding trade.³⁸ NAFTA emphasizes the importance of competitive market behavior and encourages investment in Canadian energy markets.³⁹ Energy is a globally traded commodity; many international agreements deal with its trade and the emissions associated with the production and use of energy.⁴⁰ These agreements also greatly influence how Canada develops and carries out its energy policy.⁴¹ Canadian energy policy includes the resolve to stay "flexible to ensure an economically competitive and innovative energy sector that sustainably delivers a secure, reliable and safe supply of energy."⁴² This is to ensure that Canada can meet challenges and benefit from the opportunities that appear on international and domestic energy markets.⁴³

Various government organizations work with companies in the Canadian energy sector.⁴⁴ Those dealing with petroleum-based resources include the Canada-Newfoundland and Labrador Offshore Petroleum Board ("CNLOPB"), Canada-Nova Scotia Offshore Petroleum Board ("CNSOPB"), National Energy Board ("NEB"), and Northern Pipeline Agency ("NPA").⁴⁵ The CNLOPB interprets and applies the provisions of the Atlantic Accord

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Overview of Canada's Energy Policy*, NAT. RESOURCES CAN., <http://www.nrcan.gc.ca/energy/policy/1352> (last visited Mar. 4, 2012).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Overview of Canada's Energy Policy*, NAT. RESOURCES CAN., <http://www.nrcan.gc.ca/energy/policy/1352> (last visited Mar. 4, 2012).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

and the Atlantic Accord Implementation Acts to the activities of operators in the Newfoundland and Labrador Offshore Area and oversees operator compliance with those statutory provisions.⁴⁶ The CNSOPB is the independent joint agency of the Governments of Canada and Nova Scotia responsible for the regulation of petroleum activities in the Nova Scotia Offshore Area.⁴⁷

The NPA represents the Canadian federal government in overseeing the planning and construction of the Canadian portion of the Alaska Highway Gas Pipeline Project by the Foothills Group of Companies, which are involved in that project.⁴⁸ The Alaska Highway Pipeline Project runs from the Alaska North Slope natural gas reserves to Calgary, Alberta along the Alaska Highway.⁴⁹

The NEB is an independent federal regulatory agency.⁵⁰ The Canadian Parliament established the NEB in 1959 to regulate international and interprovincial aspects of Canada's oil, gas, and electric utility industries.⁵¹ The Canadian Parliament holds the NEB accountable through its Minister of Natural Resources Canada.⁵² The NEB's purposes—to regulate pipelines, energy development, and trade in the Canadian public interest—are what guide its staff in interpreting the organization's regulatory responsibilities.⁵³ The NEB specifically regulates: the construction and operation of interprovincial and international pipelines; pipeline traffic, tolls and tariffs; the construction and operation of international and designated interprovincial power lines; the export and import of natural gas; the export of oil and electricity; and frontier oil and gas activities.⁵⁴ The NEB's other responsibilities include: providing energy advice to the Minister of Natural Resources in areas where the Board has expertise derived from its regulatory functions; carrying out studies and preparing reports when requested by the Minister; conducting studies into specific en-

⁴⁶ CAN.-NFLD. OFFSHORE PETROL. BD., http://www.cnlopb.nl.ca/abt_mandate.shtml (last visited Mar. 4, 2012).

⁴⁷ *Id.*

⁴⁸ N. PIPELINE AGENCY CAN., <http://www.infosource.gc.ca/inst/npa/fed01-eng.asp> (last visited Mar. 4, 2012).

⁴⁹ *The Alaska Highway Pipeline Project*, N. PIPELINE AGENCY CAN., <http://npa.gc.ca/5> (last visited Mar. 4, 2012).

⁵⁰ *Who We Are and Our Governance*, NAT'L ENERGY BD. CAN., <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwmdrgvrnnc/whwmdrgvrnnc-eng.html> (last visited Mar. 4, 2012).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Canada's National Energy Regulator*, NAT'L ENERGY BD. CAN., <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwmdrgvrnnc/cndntnlrgrgltr-eng.html> (last modified Oct. 28, 2011).

ergy matters; holding public inquiries when appropriate; and monitoring current and future supplies of Canada's major energy commodities.⁵⁵ Its responsibilities are listed under various Acts which include the National Energy Board Act ("NEB Act"),⁵⁶ the Canada Oil and Gas Operations Act,⁵⁷ the Canadian Environmental Assessment Act,⁵⁸ the Northern Pipeline Act,⁵⁹ certain Provisions of the Canada Petroleum Resources Act,⁶⁰ and the Canada Transportation Act⁶¹ which broadened the board's jurisdiction to include pipelines that transport commodities other than oil or natural gas.⁶²

The Governor General, the representative of the Queen in Canada, is responsible for appointing the members of the NEB.⁶³ The NEB can consist of up to nine board members who are initially appointed for a seven-year term with the ability to be reappointed for seven years or less until the member reaches the age of seventy.⁶⁴ Up to six temporary Board members may be appointed subject to terms and conditions set by the Governor General, also known as the Governor in Counsel when acting on advice of the federal cabinet.⁶⁵ Board members usually have a wide range of experience in the government and energy industries.⁶⁶ The Governor General, in his role as Governor Counsel, also chooses the Chairman (Chief Executive Officer) and Vice-Chairman of the Board from among the members he or she appoints.⁶⁷ The NEB is supported by 280 employees consisting of financial analysts, computer specialists, economists, engineers, environmentalists, geologists, geophysicists, communications specialists, lawyers, human resource, and library specialists or administrative staff.⁶⁸

The NEB decides annually whether to approve about 750 applications relating to the activities that it regulates.⁶⁹ Like a civil court, the NEB operates as a court of record with the power of swearing in and the examining of witnesses and taking evidence.⁷⁰ A panel of three NEB board members is as-

⁵⁵ *Id.*

⁵⁶ National Energy Board Act, R.S.C. 1985, c. N-7 (Can.).

⁵⁷ Canada Oil and Gas Operations Act, R.S.C. 1985, c. O-7.

⁵⁸ Canadian Environmental Assessment Act, S.C. 1992, c. 37.

⁵⁹ Northern Pipeline Act, R.S.C. 1985, c. N-26.

⁶⁰ Canada Petroleum Resources Act, R.S.C. 1985, c. 36.

⁶¹ Canada Transportation Act, S.C. 1996, c. 10.

⁶² *Id.*

⁶³ NATIONAL ENERGY BOARD CANADA., *supra* note 54.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Canada's National Energy Regulator*, NAT'L ENERGY BD. CAN., <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrnmnc/cndntnlrgrgltr-eng.html> (last modified Oct. 28, 2011).

⁷⁰ *Id.*

signed to hear each application.⁷¹ Before hearings, the panel provides an opportunity for active participation of outside groups by allowing individuals, interest groups, companies, and other organizations an opportunity to register as “intervenor” or interested parties.⁷² The NEB holds oral public hearings for major applications.⁷³ The hearings take place in the location where there is the most public interest in the project or it may be conducted in writing.⁷⁴ Afterwards, the NEB may condition its approval of a pipeline project on the fulfillment of environmental conditions which it then monitors and enforces from the point of approval to the point at which the pipeline project is abandoned.⁷⁵ The NEB seeks to interact with the Canadian public by holding information sessions about the NEB and how the public can participate in NEB hearings.⁷⁶

On behalf of the Canadian federal government, the NEB was responsible for approving the Keystone XL Pipeline project.⁷⁷ Whenever it considers approving a project, the NEB considers whether it would be in the public interest and, to that end, it takes into account the potential impacts on commercial third parties.⁷⁸ The NEB was previously concerned about whether Keystone had notified commercial third parties of its application and determined that it had done so in accordance with the NEB’s directions given at a previous NEB hearing.⁷⁹ The Alberta Federation of Labour (“AFL”) was an intervener in the hearing and argued that the expansion would result in the loss of thousands of fulltime jobs in Canada.⁸⁰ The AFL wanted evidence of how the project would impact Canadian upgrading, refining, and secondary industries, as well as associated employment and investment.⁸¹ The NEB was ultimately satisfied that there would be sufficient supply and markets to support the Keystone Cushing Expansion.⁸² Although the NEB agreed that the Expansion might mean lost Canadian jobs, the NEB nevertheless approved the pro-

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Canada’s National Energy Regulator*, NAT’L ENERGY BD. CAN., <http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrmndrgvmnc/cndntnlnglgrltr-eng.html> (last modified Oct. 28, 2011).

⁷⁶ *Id.*

⁷⁷ See generally Michael W. McCachen et al., *Recent Regulatory and Legislative Developments of Interest to Oil and Gas Lawyers*, 47 ALTA. L. REV. 529 (2010).

⁷⁸ *Id.* ¶ 26.

⁷⁹ *Id.*

⁸⁰ *Id.* ¶ 27.

⁸¹ *Id.*

⁸² *Id.* ¶29.

ject believing that it was economically possible and likely to provide a positive benefit for Canadians.⁸³

As the largest petroleum-exporting province,⁸⁴ Alberta serves as a suitable prototype for display of those provincial laws that most heavily regulate the Canadian petroleum industry. Alberta's Ministry of Energy is engaged in a variety of activities to promote Alberta's energy sector.⁸⁵ It manages the development of Alberta's non-renewable resources (including coal, minerals, natural gas, petrochemicals, conventional oil and oil sands) and renewable energy (wind, bioenergy, solar, hydro, geothermal, etc.).⁸⁶ It grants industries the right to explore for and develop energy and mineral resources.⁸⁷ The Ministry establishes, administers, and monitors the effectiveness of fiscal and royalty systems.⁸⁸ It promotes energy efficiency and conservation by both Albertans and industry.⁸⁹ It also encourages additional investment to create jobs and economic prosperity.⁹⁰ Lastly, the provincial government strives to ensure Alberta's energy resources are developed in an environmentally sustainable way.⁹¹ The Premier of Alberta, the head of the provincial government, issued a mandate letter to his cabinet members, which sets for key initiatives, which cabinet members are to implement.⁹² Of his six key initiatives, three dealt with energy issues. They include the following:

1. Rebalanced Fiscal Framework: reduces the reliance on volatile non-renewable resource revenue in funding essential programs and services for Albertans.

- Restore the Sustainability Fund and, with Albertans' input, renew the Alberta Heritage Savings Fund.
- Review all government programs and services through Results-based Budgeting.

⁸³ See generally Michael W. McCachen et al., *Recent Regulatory and Legislative Developments of Interest to Oil and Gas Lawyers*, 47 ALTA. L. REV. 529, ¶ 27 (2010).

⁸⁴ Scott Hagggett, *Alberta Comes Close to Surplus on Strong Revenue*, REUTERS CANADA (June 28, 2012, 2:36PM), <http://ca.reuters.com/article/businessNews/idCABRE85R19K20120628>.

⁸⁵ *About Alberta Energy*, GOV'T OF ALTA., <http://www.energy.alberta.ca/AboutUs.asp> (last visited June 29, 2012).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *About Alberta Energy*, GOV'T OF ALTA., <http://www.energy.alberta.ca/AboutUs.asp> (last visited June 29, 2012).

⁹² *Id.*

2. Integrated Resource System: sets and achieves the environmental, economic and social outcomes Albertans expect from resource development and maintains the social license to develop resources.

- Complete regional plans and the implementation of the Regulatory Enhancement Project, including the development of a single regulator for oil and gas.
- Develop a world-class monitoring system to provide transparent, reliable information on achievement of outcomes.

3. Expanded Market Access: contributes to the sustainability of the province's export driven economy.

- Develop new access (e.g. through pipelines and rail) to markets outside the United States.⁹³

Alberta's provincial government has established various agencies to help it implement its energy strategy, including the Alberta Utilities Commission ("AUC"),⁹⁴ the Balancing Pool,⁹⁵ the Energy Resources Conservation Board ("ERCB"),⁹⁶ the Independent System Operator, also known as the Alberta Electric System Operator ("AESO"),⁹⁷ and the Market Surveillance Administrator ("MSA").⁹⁸ The ERCB is responsible for the development of Alberta's oil and gas resources and the AUC is responsible for the distribution and sale of electricity and natural gas to Alberta consumers.⁹⁹ Alberta's government established the Balancing Pool to help manage particular assets, revenues, and expenses arising from the transition to competition in Alberta's electric industry.¹⁰⁰ It has a major role in managing the power purchase agreements of several major power plants.¹⁰¹ The AESO is responsible

⁹³ *Department of Energy Key Initiatives*, GOV'T OF ALTA., <http://www.energy.alberta.ca/Initiatives/Initiatives.asp> (last visited June 29, 2012).

⁹⁴ *Agencies*, GOV'T OF ALTA., http://www.energy.alberta.ca/About_Us/1839.asp (last visited June, 29 2012).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *About Alberta Energy*, GOV'T OF ALTA., <http://www.energy.alberta.ca/AboutUs.asp> (last visited June 29, 2012).

¹⁰⁰ BALANCING POOL, <http://www.balancingpool.ca/> (last visited Mar. 5, 2012).

¹⁰¹ *Id.*

for ensuring the safety and reliability of Alberta's Interconnected Electric System ("AIES") and for its economic planning and operation.¹⁰² MSA, established by the Alberta Utilities Commission Act,¹⁰³ engages in surveillance, investigation, and enforcement to help ensure fair, efficient, and openly competitive electricity and retail natural gas markets in Alberta.¹⁰⁴

Alberta's Oil and Gas Conservation Act provides for regulation of Alberta's industry to ensure both the environmental and economic health of the province.¹⁰⁵ The Act ensures conservation of Alberta's oil and gas resources.¹⁰⁶ It ensures the observance of safe and efficient practices in oil and gas exploration and production by providing for economic, orderly and efficient development of Alberta's oil and gas resources to further the public interest.¹⁰⁷ The Act also guarantees the fairness of the industry by affording an oil or gas reserves owner the opportunity to obtain his or her share from the particular resource pool.¹⁰⁸ Additionally, the Act ensures a provision for the recording and timely dissemination of information relating to the oil and gas resources of Alberta.¹⁰⁹ The Act's purpose is also to control pollution resulting from oil and gas production in Alberta.¹¹⁰

Energy and mining have grown in importance to Canada's capitalist economy.¹¹¹ The petroleum and natural gas industries provide a significant source of jobs and revenue to the Canadian economy.¹¹² "Canada exports more oil and petroleum products to the United States than any other country in the world."¹¹³ Although Canada's economic dependence on the United States economy drives its energy policy, Canada engages in regulation to protect its natural environment without stunting the growth of its economy. The provinces also take a strong role in regu-

¹⁰² ALTA. ELECTRIC SYSTEM OPERATOR, <http://www.aeso.ca/ourcompany/ourCompany.html> (last visited June 29, 2012).

¹⁰³ MARKET SURVEILLANCE ADMIN., <http://albertamsa.ca/index.php?page=what-we-do>.

¹⁰⁴ *Id.*

¹⁰⁵ Oil and Gas Conservation Act, R.S.A., 2000, c. O-6 (Can.).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Kasoff & Drennen, *supra* note 19, at 224.

¹¹² Kasoff & Drennen, *supra* note 19, at 243.

¹¹³ Kasoff & Drennen, *supra* note 19, at 237.

lating their own oil and gas industries, as exemplified by the provincial government of Alberta.

B. Oil Regulation Law in the United States

The United States Constitution grants the U.S. federal government the power to regulate commerce with foreign nations and between the States and with Indian Tribes.¹¹⁴ The United States Congress has the power to make all laws ‘necessary and proper’ for carrying out this power and others granted by the U.S. Constitution in the government of the United States, or in any Department or Officer thereof.¹¹⁵ The powers not delegated to the federal government by the Constitution, which are not prohibited by it to the States, are reserved for the States or the people.¹¹⁶

United States Energy Policy focuses more heavily on national security interests and the environment rather than economic benefits and the public interest. It is the United States government’s view that America’s addiction to foreign oil and fossil fuels puts the United States’ economy, national security and environment at risk.¹¹⁷ Accordingly, United States President Obama is working with Congress to pass energy and climate change legislation to protect the economy from those risks and to create jobs and reduce carbon pollution which contributes to climate change.¹¹⁸ The American Recovery and Reinvestment Act provided \$80 billion towards the generation of renewable energy sources.¹¹⁹ The investment allowed for the expansion of the manufacturing capacity for clean energy technology, advancement of vehicle and fuel technologies, and the building of a bigger, better and smarter electric grid, all while creating sustainable jobs.¹²⁰ President Obama has committed to investing \$150 billion in clean energy research and development over the next 10 years.¹²¹ It is the current ad-

¹¹⁴ U.S. Const. Art. I, §8.

¹¹⁵ *Id.*

¹¹⁶ U.S. Const. amend. X.

¹¹⁷ *Energy and Environment*, WHITE HOUSE, <http://www.whitehouse.gov/issues/energy-and-environment> (last visited Mar. 5, 2012).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Foreign Policy*, WHITE HOUSE, <http://www.whitehouse.gov/issues/foreign-policy> (last visited Mar. 5, 2012).

ministration's goal for the United States to be a leader in addressing global climate change both by contributing to the effort itself and encouraging other countries to do so.¹²²

United States Energy Policy is influenced by Canada. The United States is committed to an active partnership with Canada. United States President Obama has met with the Canadian Prime Minister Stephen Harper to discuss joint efforts to combat the problems of climate change and energy security.¹²³ During a joint press assembly, the two leaders reaffirmed the United States-Canada partnership commitment on energy issues and others of importance to the two countries.¹²⁴ The leaders have agreed that the two countries are committed to working together to improve the global economy.¹²⁵

The United States Department of Energy carries out the federal government's goals related to energy. These include energy security, nuclear security, scientific discovery and innovation, environmental responsibility and management excellence.¹²⁶ The Department of Energy primarily considers itself a national security agency and views all its missions as flowing from this primary function of protecting United States national security.¹²⁷ The Department deems oil to be the "lifeblood" of the American economy because it accounts for 40% of United States energy demands and 99% of the fuel used in America's automobiles.¹²⁸ America's Strategic Petroleum Reserve consists of an emergency supply of crude oil stockpiled in underground salt caverns along the Gulf of Mexico.¹²⁹ According to Department statistics, 900 of the next 1000 U.S. power plants will use natural gas,¹³⁰ because it is increasing in popularity as a transport fuel.¹³¹

Various organizations within the Department of Energy actively work to improve the United States oil and natural gas industry. The Office of Fos-

¹²² *Id.*

¹²³ President Obama and Canadian Prime Minister Harper, Remarks During Joint Press Availability (Sept. 16, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-President-Obama-and-Canadian-Prime-Minister-Harper-During-Joint-Press-Availability/.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ U.S. DEP'T OF ENERGY, <http://www.energy.gov/about/index.htm> (last visited Mar. 5, 2012).

¹²⁷ *Program Offices*, U.S. DEP'T OF ENERGY, http://www.energy.gov/organization/program_offices.htm (last visited Mar. 5, 2012).

¹²⁸ *Oil*, U.S. DEP'T OF ENERGY, <http://www.energy.gov/energysources/oil.htm> (last visited Mar. 5, 2012).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

sil Energy invests in research and development of technologies relating to natural gas supply, delivery reliability, and utilization.¹³² The Department's Strategic Center for Natural Gas works with industry to develop technologies to support this fuel.¹³³ The Natural Gas and Petroleum Import and Export Office regulates natural gas imports and exports under Section 3 of the Natural Gas Act of 1938, maintains statistics on North American natural gas trade, and oversees the Office of Fossil Energy's international programs which relate to natural gas and petroleum.¹³⁴ The National Petroleum Council is an Oil & Natural Gas Advisory Committee to the Secretary of Energy, which advises the Secretary on matters related to oil and natural gas, or the oil and natural gas industries.¹³⁵ The Secretary of Energy appoints about 175 people to the Council who are representatives of their industry or interests, not as representatives of individual companies or affiliations.¹³⁶

The Federal Energy Regulatory Commission ("FERC") is an independent agency that regulates the interstate transmission of electricity, natural gas, and oil.¹³⁷ It reviews proposals to build liquefied natural gas ("LNG") terminals and interstate natural gas pipelines and handles licensing of hydropower projects.¹³⁸ The Commission's legal authority is granted by the Federal Power Act and amendments made to it by the United States Congress.¹³⁹ The Energy Policy Act of 2005 also gave it additional responsibilities such as: regulating the transmission and sale of natural gas for resale in interstate commerce and the transportation of oil by pipeline in interstate commerce; approving the siting and abandonment of interstate natural gas pipelines and storage facilities; ensuring the safe operation and reliability of proposed and operating LNG terminals; monitoring and investigating energy markets; enforcing FERC regulatory requirements through imposition of civil penalties and other means; overseeing environmental matters related to natural gas and hydroelectricity projects and other matters; and administering accounting and financial reporting regulations and conduct of regulated companies.¹⁴⁰

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *The National Petroleum Council*, U.S DEP'T OF ENERGY, http://www.fossil.energy.gov/programs/oilgas/advisorycommittees/National_Petroleum_Council.html (last visited Mar. 5, 2012).

¹³⁶ *Id.*

¹³⁷ *See generally What FERC Does*, FED. ENERGY REGULATORY COMM'N, <http://www.ferc.gov/about/ferc-does.asp> (last visited Feb. 29, 2012).

¹³⁸ *Id.*

¹³⁹ *See Federal Statutes*, FED. ENERGY REGULATORY COMM'N, <http://www.ferc.gov/legal/fed-sta.asp> (last visited Feb. 29, 2012).

¹⁴⁰ *See* FED. ENERGY REGULATORY COMM'N, *supra* note 137.

Various other Federal Agencies also participate in oversight of the oil and gas industry because the ability to regulate the industry falls under a wide spectrum of federal environmental, health, safety, emergency response, and homeland security laws.¹⁴¹ The U.S. Environmental Protection Agency (“EPA”) protects human health and the environment.¹⁴² It enforces the Clean Air Act, Clean Water Act, Oil Pollution Act, the Comprehensive Environmental Response, Compensation & Liability Act, and the Superfund Amendments and Reauthorization Act, which focus on cleaning up hazardous waste sites.¹⁴³ The EPA delegates the responsibility for issuing permits and monitoring and enforcing compliance with particular Acts to individual states,¹⁴⁴ and its ten regional offices oversee programs that the agency has not delegated to state oversight.¹⁴⁵ The federal Occupational Safety and Health Administration (“OSHA”) supervises the safety of the working environment in nearly all phases of crude oil exploration and production.¹⁴⁶ The U.S. Department of Transportation supervises overland petroleum transportation and pipeline safety.¹⁴⁷ The Coast Guard enforces federal pollution and safety laws regulations on navigable waters.¹⁴⁸ The U.S. Army Corps of Engineers issues permits for construction in federal waters or wetlands.¹⁴⁹ The Federal Energy Regulatory Commission oversees rate-setting for interstate oil pipelines and is involved in market oversight for interstate gas pipelines.¹⁵⁰

United States preoccupation with national security is reflected in the notion that the State Department’s approval is required before the Keystone XL Project can move forward. Because the pipeline will cross the United States-Canada border, the State Department must grant it a Presidential Permit.¹⁵¹ This subjects the Keystone XL Project

¹⁴¹ See *State and Federal Oversight*, WINDOW ON STATE GOV’T, <http://www.window.state.tx.us/specialrpt/energy/nonrenewable/crude.php#intexas> (last visited Feb. 29, 2012).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See *State and Federal Oversight*, WINDOW ON STATE GOV’T, <http://www.window.state.tx.us/specialrpt/energy/nonrenewable/crude.php#intexas> (last visited Feb. 29, 2012).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See generally *New Keystone XL Pipeline Project*, U.S. DEP’T OF STATE, <http://www.keystonepipeline-xl.state.gov/> (last visited Feb. 29, 2012) (stating that the Department of State recommends that the President deny the presidential permit for the proposed

to the National Environmental Policy Act (“NEPA”), which requires disclosure of its potential impacts on the environment and the consideration of possible alternatives.¹⁵² Executive Order No. 13337, issued by the President of the United States, grants the State Department the authority to decide whether to approve the Keystone Pipeline Project.¹⁵³ It is acting as the lead agency in preparing an Environmental Impact Statement required by the National Environmental Policy Act (“NEPA”).¹⁵⁴ Both the President’s Executive Order and NEPA allowed for public comment on the Keystone Pipeline Project.¹⁵⁵ The State Department requested public comment and held meetings to receive the comments in 20 locations along the proposed pipeline route, as well as in Houston, Texas and Washington, D.C.¹⁵⁶ The State Department additionally requested a public comment on the draft of its Environmental Impact Statement.¹⁵⁷ The Executive Order also directs the State Department to request that particular federal departments and agencies provide their opinion on whether the project application would be in the national interest.¹⁵⁸ On May 4, 2012, the Department of State received a new application from TransCanada Corp. for a portion of the Keystone XL Pipeline Project, which will cross the Canadian border to connect to an existing pipeline in Steele City, Nebraska.¹⁵⁹ Consistent with the Executive Order, it will evaluate the application by considering various factors including, energy security, health, environmental, cultural, economic, and foreign policy concerns.¹⁶⁰ The State Department is preparing a Supplemental Environmental Impact Statement (“SEIS”) for the assessment of the Keystone Pipeline application.¹⁶¹ The SEIS will include analysis of the route and of new circumstances or information relevant to environmental concerns which have surfaced since the Final Environmental Impact Statement

Keystone XL Pipeline).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *New Keystone XL Pipeline Project*, U.S. DEP’T OF STATE, <http://www.keystonepipeline-xl.state.gov/> (last visited Feb. 29, 2012).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

("FEIS") was completed in August 2011 on the original application.¹⁶² The State Department released a Request for Proposals ("RFP") to select an independent third-party contractor to assist the Department with the review process.¹⁶³ The State Department also indicated it would cooperate with the State of Nebraska and other relevant state and federal agencies in its review process.¹⁶⁴ In June 2012, the governor of Nebraska estimated that this review process would take at least six to ten months and would be complete in the first quarter of 2013.¹⁶⁵ The State Department expressed its intent to conduct its review in a rigorous, transparent and efficient manner, using existing analyses as appropriate.¹⁶⁶

As the highest oil and natural gas producing state in the United States,¹⁶⁷ Texas serves as a perfect prototype of a major state-level regulator of the United States' oil and natural gas industry. Texas crude oil represents one-fourth of total United States' reserves, and these reserves can be found throughout the state.¹⁶⁸ It is the nation's largest producer and consumer of Liquid Petroleum Gas.¹⁶⁹ It is the nation's leading producer of natural gas—it produced 27.8 percent of the total United States marketed production in 2006.¹⁷⁰ In Texas, the EPA has delegated enforcement duties for many regulatory and environmental permits and standards to the Railroad Commission of Texas ("RRC") and the Texas Commission on Environmental Quality ("TCEQ").¹⁷¹ TCEQ has jurisdiction to enforce all major federal environmental laws except oil and gas production, which fall under the RRC's authority.¹⁷²

¹⁶² *Id.*

¹⁶³ *New Keystone XL Pipeline Project*, U.S. DEP'T OF STATE, <http://www.keystonepipeline-xl.state.gov/> (last visited Feb. 29, 2012).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See generally* WINDOW ON STATE GOV'T, *supra* note 141.

¹⁶⁸ *Id.*

¹⁶⁹ *See generally* LPG in Texas, WINDOW ON STATE GOV'T, <http://www.window.state.tx.us/specialrpt/energy/nonrenewable/lpg.php#intexas> (last visited Feb. 29, 2012).

¹⁷⁰ *See generally* Natural Gas in Texas, WINDOW ON STATE GOV'T, <http://www.window.state.tx.us/specialrpt/energy/nonrenewable/gas.php#intexas> (last visited Feb. 29, 2012).

¹⁷¹ *Id.*

¹⁷² *Id.*

Energy is important to the economy of Texas. According to a report released by the Texas Comptroller of Public Accounts in 2008, the Texan economy will continue to depend on the availability of energy,¹⁷³ as its economy is strongly tied to the oil and gas industry.¹⁷⁴ A significant portion of state tax revenues are from energy production and use, especially oil and gas.¹⁷⁵ Like the national government, Texas is concerned with diversifying its energy portfolio to avoid reliance on foreign sources and to protect the environment.¹⁷⁶ The Texas government not only recognizes the states' ability to develop new technologies to make fossil fuels in a more efficient and environmentally friendly manner, but also how to make the technological advances necessary for making better use of its abundant renewable resources.¹⁷⁷ The state is making significant progress away from traditional fossil fuels by using wind energy, by being the leading United States producer of biodiesel and home to two of the first new commercial nuclear applications.¹⁷⁸

III. CONCLUSION

The United States and Canada have similar government entities that regulate their oil and gas industries to protect natural environments and promote industry growth. The difference between the two is that the United States federal and state governments are more focused on security and environmental concerns than their Canadian counterparts. The Canadian Federal and Provincial governments are more focused on a project's economic benefits and the public interest. The United States government's overemphasis on the security and environmental risks of approving the Keystone Pipeline project could keep its economy from benefiting from the pipeline when its economy most needs it. The increased energy resources that the pipeline could provide will help the United States achieve its goal of decreasing its dependence on unstable foreign sources. The United States should de-emphasize security concerns when deciding to approve a new energy source if its economic

¹⁷³ See generally *Diversifying Our Energy Portfolio*, WINDOW ON STATE GOV'T, <http://www.window.state.tx.us/specialrpt/energy/01-intro.html> (last visited Feb. 29, 2012).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

benefit is readily apparent and if the source country is not a hostile foreign nation. Furthermore, as all projects have their environmental risks, the United States should not allow the potential risks to weigh too heavily against the potential benefits to its economy. Although it is important for government to consider the concerns of interest groups, the public interest should prevail. The Canadian economy is one of the most successful in the world,¹⁷⁹ and the United States economy would benefit from an energy policy, which falls more in line with the Canadian energy policy.

¹⁷⁹ Kasoff & Drennen, *supra* note 19, at 223.

