Energy Justice and Canada’s National Energy Board: A Critical Analysis of the Line 9 Pipeline Decision

Carol Hunsberger * and Sâkihitowin Awâsis

Department of Geography, The University of Western Ontario, London, ON N6A 5C2, Canada; cdakin2@uwo.ca
* Correspondence: chunsber@uwo.ca; Tel.: +1-519-661-2111 (ext. 85020)

Received: 16 November 2018; Accepted: 26 January 2019; Published: 2 February 2019

Abstract: This paper investigates the values and priorities reflected in a Canadian pipeline review: The National Energy Board (NEB) decision on Line 9. Theories of energy justice guided analysis of evidence presented at NEB hearings, the NEB’s explanation of its decision, and a Supreme Court challenge. We find that several aspects of energy justice were weak in the NEB process. First, a project-specific scope obstructed the pursuit of equity within and between generations: the pipeline’s contributions to climate change, impacts of the oil sands, and cumulative encroachment on Indigenous lands were excluded from review. Second, the NEB created a hierarchy of knowledge: it considered evidence of potential spill impacts as hypothetical while accepting as fact the proponent’s claim that it could prevent and manage spills. Third, recognition of diversity remained elusive: Indigenous nations’ dissatisfaction with the process challenged the NEB’s interpretation of meaningful consultation and procedural fairness. To address the challenges of climate change and reconciliation between Indigenous and settler nations, it is crucial to identify which kinds of evidence decision-makers recognize as valid and which they exclude. Ideas from energy justice can help support actions to improve the public acceptability of energy decisions, as well as to foster greater Indigenous autonomy.

Keywords: energy justice; environmental justice; pipeline; Line 9; environmental governance; National Energy Board; Indigenous rights

1. Introduction

On 26 July 2017, community members and supporters gathered at the Chippewas of the Thames (Deshkan Ziibiing) community centre in southwestern Ontario. They came to hear news they had been anticipating for eight months: The Supreme Court of Canada’s decision on an appeal over a pipeline running through the Nation’s territory. In 2012 the oil company Enbridge applied to expand Line 9’s capacity, reverse its direction and use it to carry a wider variety of products—including diluted bitumen—from Sarnia to Montreal. The National Energy Board (NEB) approved the application in 2014, a decision Chippewas of the Thames challenged at the Supreme Court two years later.

After a series of speakers and songs, attention nervously shifted toward a telephone that was due to ring. When it did, newly elected Chief Myeengun Henry put the call on speakerphone for all to hear. A lawyer relayed the verdict: The Court had dismissed the community’s appeal, ruling the NEB had fulfilled the Crown’s duty to consult First Nations over proposed modifications to the 40-year-old Line 9.

The news prompted dismay, anger and tears. Some voiced their feelings into a microphone that circulated the room. Former Chief Leslie White-Eye, whose efforts were central to pushing the appeal forward, offered a deep critique: that the decision showed the Canadian legal system cannot engage with Indigenous rights. Later, standing near the place where the pipeline crosses the Thames River, Chief Henry made two direct appeals: he called on Prime Minister Justin Trudeau to honour his
commitment to respect Indigenous rights, and asked the president of Enbridge to voluntarily stop shipping bitumen through the Nation’s territory within 30 days.

We begin with this story because it animates several key issues of justice and fairness in Canadian energy governance. First, it captures disappointment with, and lack of faith in, how regulatory and legal institutions deal with Indigenous rights. Chippewas of the Thames perceived the project as a continuation of historical oppression and a threat to the future of their livelihoods and cultural traditions—rights violations they felt the review and Court decision did not address. Second, the Supreme Court decision reveals a wide gap between First Nations and institutional interpretations of ‘procedural fairness’ in relation to consultation over resource projects. Finally, reaction to the decision reflects the frustration of community members who engaged with the review process at great cost and ended up feeling their rights still went unrecognized, having previously faced criticism for taking actions outside these official channels, such as setting up blockades.

The events described above also fit into a larger story of tension over pipeline projects throughout North America: a story that includes protests and legal challenges, direct actions and arrests over Northern Gateway, Trans Mountain, Energy East, Keystone XL, Dakota Access, Line 3, and more. While each project is contentious, the processes through which they are reviewed are also under scrutiny. For example, in August 2018, the Canadian Federal Court of Appeal overturned the government’s approval of the Trans Mountain Pipeline, finding the NEB had wrongly excluded marine impacts from its review and the government had not fulfilled its duty to consult Indigenous people [1]. In 2017, the Energy East pipeline application was withdrawn after lengthy delays in the review process [2], in part because the NEB had to appoint new panelists after two of the initial three met with a consultant working for the proponent [3]. At the time of writing, Indigenous communities continue to occupy the Unist’ot’en and Gidimt’en camps in northern British Columbia, blocking work on a gas pipeline in a challenge to the government’s authority to approve industrial projects on un-ceded territory [4]. The Canadian government itself acknowledged weaknesses in its review regime when it appointed two Expert Panels to suggest ways to “modernize” Environmental Assessment and the National Energy Board [5,6]. Some of these recommendations are reflected in Bill C-69, now working its way through the Senate.

These controversies reveal deep social and political divides, as well as institutional failures to grapple with divergent values and the unique rights of Indigenous people. Arguments about the importance of economic growth and job creation run up against appeals to reduce fossil fuel use in the face of climate change, concerns over pollution and health, struggles for Indigenous sovereignty, and systemic critiques of capitalism [7]. Where these contested priorities meet, clear ways to navigate between them are needed in order to reach decisions that are broadly perceived as legitimate and fair. Energy justice provides one guiding framework for achieving this goal.

In this paper we apply ideas from energy justice literature to untangle competing interpretations of distributional fairness, procedural fairness, and recognition as they played out in the regulatory process for Line 9. We ask: How do the arguments raised by participants in the Line 9 process compare with the regulator’s explanation of its decision, and with theories of energy justice? Using document analysis, we trace which aspects of scholarly definitions of energy justice are reflected in the statements of participants and regulators in a review by Canada’s National Energy Board, and a subsequent challenge to the Supreme Court of Canada. Our analysis finds that the review process excluded important issues, including climate change, perpetuated inequities and hierarchies of knowledge, and advanced a one-sided approach to reconciliation between Indigenous and settler nations. Our goal is to inform theoretical understandings of energy regulatory processes as well as strategies to improve their acceptability.

**Energy Justice**

Theories of energy justice are situated within ongoing philosophical debates about defining justice and fairness. Over the centuries, freedom, virtue, welfare and equality have served as alternative
foundations of justice—a pattern that continues today, meaning that debates over fairness are often based on completely different reference points [8]. For example, the utilitarian ideal of ensuring the greatest good for the greatest number frequently conflicts with efforts to protect individual and minority rights. Understanding the specific concerns of different players in pipeline controversies thus requires looking past general statements about, say, national interest or prosperity, which rest on the flawed assumption that these concepts mean the same thing to everyone and are equally valued by everyone. Defining what constitutes justice, and who is entitled to it in what ways, becomes even more complicated when problems play out in transnational, national and subnational arenas [9]. Decisions about energy often transcend provincial or national jurisdiction because they involve local and distant resources and land use changes, and affect local and distant populations in a variety of ways (e.g., through climate change or particulate air pollution).

Another foundation of energy justice can be found in Indigenous law. In contrast to Western political philosophy’s preoccupation with rights, Indigenous legal systems are based on principles of responsibility and reciprocity [10,11]. Indigenous law refers to a set of practices that existed prior to Canadian law and continues to exist parallel to it. Canadian Constitutional law is founded on treaty agreements that oblige both parties to maintain respectful relations between these distinct legal systems [12]. Yet there have been ongoing tensions between Constitutional law and Indigenous rights throughout the history of Canadian legal institutions [11,13,14], with many conflicts resulting from energy project proposals and politics [15].

A just energy system can be understood as “one that is safe, reliable, fair, affordable, and also sustainable for current and future generations and the natural world. Importantly, energy justice also necessitates an energy path forward that is restorative, or minimizes and reverses the cumulative impacts of energy systems at local, regional, and global levels” [16] (p. 2). Most energy justice scholarship adopts a three-part approach that considers distributional, procedural and recognition issues [17,18], drawing on similar foundations in theories of environmental justice [19]. Sovacool and Dworkin [20–22] propose a set of principles for energy justice: energy availability and affordability; transparency and procedural fairness (Sovacool and Dworkin use “due process”, the term used in the American legal context; “procedural fairness” is generally used in Canada); equity within and between generations; prudence in managing energy resources and their revenues; and environmental responsibility. These categories guide our analysis. Energy justice scholarship has applied these themes to wide-ranging problems, including energy poverty [23–25], energy democracy [26], discourse and framing [27], energy transitions [28,29], and place-based opposition to energy projects [30].

From this diverse literature we pull out three key points. First, existing work highlights how unevenly the benefits and risks of energy projects are distributed—and the implications of this lumpiness for public acceptance. Inequities occur across and within social groups as well as at different spatial scales [25]. Further, different people consider different kinds of outcomes most important: those directly affected by a project may care more about outcome favourability, while those less directly affected may care more about outcome fairness in the interests of maintaining relationships within the community [30]. Understanding the nuanced positions of different actors relative to a project can therefore help unpack competing claims about benefits and impacts.

Second, literature on process fairness tends to involve two sets of concerns: whether regulatory institutions are transparent and impartial, and whether affected people have meaningful opportunities to participate in decisions. Theories of participation and citizen control stretch back to Aronstein’s ladder [31], with more recent work affirming that meaningful participation means having not only the opportunity to be heard, but the ability to shape outcomes [32]. Two relevant critiques levelled against the NEB are that many of its members have oil and gas industry backgrounds, compromising their impartiality, and that the NEB has failed to engage with Indigenous values [6].

Third, energy justice research raises concerns about recognition by asking if participants in decision processes are taken seriously, their diversity respected, their priorities valued, and their knowledge accepted. Jenkins et al. [18] (p. 179) consider institutional misrepresentation of particular
groups a “motor for unjust energy decisions,” while Heffron and McCauley [33] observe that people who are unrecognized in decision processes are often assumed to lack knowledge, with little effort made to understand their motivations. Arguments against energy projects are often construed as ‘NIMBY’ (Not In My Back Yard), implying that project opponents are parochial and narrow-minded — yet dismissing concerns in this way not only violates the right to recognition, it can also obstruct negotiated solutions [18,34], reinforce dominant hierarchies of knowledge and impede a just energy transition [35].

While some propose ‘restorative justice’ as an alternative to recognition [29], we see the two as intertwined: meaningfully recognizing Indigenous life experiences, worldviews, knowledge and desires cannot be separated from efforts to repair the harms of colonial acts. Indigenous scholars challenge colonial forms of recognition, arguing that reconciliation in the non-transitional context of Canada “requires that Indigenous peoples reconcile themselves to colonialism” [12] (p. 33). Many see the federal government’s view of reconciliation as focused on attaining economic certainty and control over resources on Indigenous lands [36,37]. Similarly, Coulthard [15] argues that reconciliation discourses aim to overcome past abuse but not the colonial power structure itself. These works highlight the importance of looking beyond mere use of the words ‘recognition’ or ‘reconciliation’ to examine the power relations embedded in decision processes and outcomes.

If theories of energy justice are on track in terms of articulating principles to guide fairer and more socially acceptable energy decisions, then it is useful to identify which of these principles have been reflected in actual project reviews and which have not. In the analysis that follows, we make explicit which aspects and interpretations of energy justice were expressed and prioritized in the review process for Line 9, by whom—and which were downplayed or overlooked.

2. Methods

To compare the positions expressed by participants in a review process with those of the regulator and with theories of energy justice, we conducted a literature and document analysis of the Line 9B National Energy Board review. The NEB is a Canadian regulatory body responsible for reviewing and overseeing energy infrastructure projects that cross provincial or national boundaries; it holds public hearings for projects meeting certain criteria and makes a recommendation to Cabinet, who issues the final decision. The research process followed four steps:

1. Derive energy justice criteria from literature;
2. Analyze NEB documents in relation to these criteria;
3. Compare the content of intervenor and NEB statements;
4. Reflect on the content of the Supreme Court proceedings and decision on Line 9.

The themes used in the document analysis (step 1) follow the three major categories of distribution, process and recognition issues, each broken into sub-nodes corresponding to more detailed principles of energy justice.

The documents analyzed in steps 2 and 3 were all accessed on the NEB website. Participants’ perspectives were drawn from English-language submissions of written evidence in the Line 9B NEB hearing, summarized in Table 1 (n = 36). (Intervenor written evidence represents a subset of arguments presented in the hearings: a total of 178 people or groups applied to participate; 60 were approved as intervenors and 111 as commenters. Of the intervenors, 45 provided written evidence (9 in French), 40 gave final oral argument, and 11 provided written final argument. There were also 76 Letters of Comment [38]). We focused on written evidence submitted in advance of the 2013 public hearings because we believe these documents capture a broader set of issues than the oral and written final arguments that followed, partly because more intervenors submitted written evidence than the other two types of arguments, and partly because the conversation narrowed over time as the intervenors and proponent responded to each other’s positions.
Table 1. Intervenors by affiliation.

<table>
<thead>
<tr>
<th>Category</th>
<th>Name</th>
<th>Abbreviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Industry</td>
<td>Alberta Federation of Labour</td>
<td>AFL</td>
</tr>
<tr>
<td></td>
<td>Communications, Energy and Paperworkers Union</td>
<td>CEP</td>
</tr>
<tr>
<td></td>
<td>Ontario Petroleum Institute</td>
<td>OPI</td>
</tr>
<tr>
<td></td>
<td>Progressive Contractors Association of Canada</td>
<td>PCA</td>
</tr>
<tr>
<td></td>
<td>Suncor Energy Marketing</td>
<td>Suncor</td>
</tr>
<tr>
<td></td>
<td>Valero Energy</td>
<td>Valero</td>
</tr>
<tr>
<td>Government</td>
<td>Environment Canada</td>
<td>EC</td>
</tr>
<tr>
<td></td>
<td>Toronto and Region Conservation Authority</td>
<td>TRCA</td>
</tr>
<tr>
<td></td>
<td>City of Mississauga</td>
<td>Mississauga</td>
</tr>
<tr>
<td></td>
<td>City of Toronto</td>
<td>Toronto</td>
</tr>
<tr>
<td>Indigenous</td>
<td>Aamjiwnaang First Nation</td>
<td>AFN</td>
</tr>
<tr>
<td></td>
<td>Chippewas of the Thames First Nation</td>
<td>COTTFN</td>
</tr>
<tr>
<td></td>
<td>Mississaugas of the New Credit First Nation</td>
<td>MNCFN</td>
</tr>
<tr>
<td></td>
<td>Mohawk Council of Kahnawà:ke</td>
<td>MCK</td>
</tr>
<tr>
<td>NGO</td>
<td>Algonquin to Adirondacks</td>
<td>A2A</td>
</tr>
<tr>
<td></td>
<td>Council of Canadians—York University Chapter</td>
<td>CoCY</td>
</tr>
<tr>
<td></td>
<td>Canadian Voice of Women for Peace</td>
<td>CVWP</td>
</tr>
<tr>
<td></td>
<td>Durham Citizens Lobby for Environmental Awareness and Responsibility</td>
<td>DurhamCLEAR</td>
</tr>
<tr>
<td></td>
<td>Équiterre Coalition (Équiterre, Environmental Defence, ENvironnement JEUnesse, Association québécoise de lutte contre la pollution atmosphérique, The Sierra Club, Climate Justice Montreal, Nature Québec)</td>
<td>Équiterre</td>
</tr>
<tr>
<td></td>
<td>Grand River Indigenous Solidarity</td>
<td>GRIS</td>
</tr>
<tr>
<td></td>
<td>Great Lakes and St. Lawrence Cities Initiative</td>
<td>GLSLCI</td>
</tr>
<tr>
<td></td>
<td>Les Citoyens au Courant</td>
<td>CAC</td>
</tr>
<tr>
<td></td>
<td>National Farmers Union of Ontario</td>
<td>NFU</td>
</tr>
<tr>
<td></td>
<td>Ontario Pipeline Landowners Association</td>
<td>OPLA</td>
</tr>
<tr>
<td></td>
<td>Ontario Pipeline Probe</td>
<td>OPP</td>
</tr>
<tr>
<td></td>
<td>Rising Tide Toronto</td>
<td>RTT</td>
</tr>
<tr>
<td></td>
<td>Sustainable Trent</td>
<td>ST</td>
</tr>
<tr>
<td>Individual</td>
<td>Catharine Doucet</td>
<td>Doucet</td>
</tr>
<tr>
<td></td>
<td>Marilyn Eriksen</td>
<td>Eriksen</td>
</tr>
<tr>
<td></td>
<td>Emily Ferguson</td>
<td>Ferguson</td>
</tr>
<tr>
<td></td>
<td>Dr. Nicole Goodman</td>
<td>Goodman</td>
</tr>
<tr>
<td></td>
<td>Sarah Harmer</td>
<td>Harmer</td>
</tr>
<tr>
<td></td>
<td>Paul Kuebler</td>
<td>Kuebler</td>
</tr>
<tr>
<td></td>
<td>Louisette Lanteigne</td>
<td>Lanteigne</td>
</tr>
<tr>
<td></td>
<td>Christopher Powell</td>
<td>Powell</td>
</tr>
<tr>
<td></td>
<td>John Quarterly</td>
<td>Quarterly</td>
</tr>
</tbody>
</table>

NEB perspectives came primarily from the Reasons for Decision report on the Line 9B Reversal and Line 9 Capacity Expansion Project [38]. These documents were coded line-by-line using the themes introduced above. The NEB Filing Manual [39] and National Energy Board Act [40] were also consulted to clarify the NEB’s mandate and decision-making criteria. Analysis of the Supreme Court challenge (step 4) was based on video footage of the Court’s proceedings on 30 November, 2016 and the Court’s decision document, released 26 July 2017 [41]—both available on the Supreme Court website.

This study is part of a larger investigation into how decision-making institutions engage with understandings of just and sustainable energy systems held by the constituencies they represent, and how they could improve in this regard. The larger project complements the document analysis presented here with in-depth qualitative interviews with a range of actors exploring the values, priorities and worldviews they attach to the idea of a better energy system. By focusing on the
positions expressed in a formal decision-making process, the analysis presented here therefore focuses on one aspect of a more complex problem.

Background to the Case: Line 9

Built in 1976 by Enbridge Inc. (then Interprovincial Pipe Line Ltd.), Line 9 runs from Aamjiwnaang (Sarnia, Ontario) to Kahnawake (Montreal, Quebec). It is part of the company’s 3,000 km Lakehead system connecting northern Alberta to the Great Lakes region [42]. Line 9 originally carried conventional crude oil eastward. In 1997, after NEB approval, Enbridge reversed the flow and began operating Line 9 from East to West.

In 2012, Enbridge applied to again reverse the direction of Line 9, to increase its capacity and to use the pipeline to transport heavy crude oil and diluted bitumen. The application was broken into two parts. In July 2012, the NEB approved Enbridge’s plan to reverse Line 9A, a 194 km section from Aamjiwnaang to Westover, Ontario [43]. In November of the same year, Enbridge applied to reverse Line 9B from Westover to Kahnawake, at the same time increasing the capacity of the entire pipeline from 240,000 to 300,000 bpd. After a set of hearings, the NEB conditionally approved the 9B application in March 2014, imposing 30 conditions. In September 2015 the NEB granted final approval.

Indigenous community members note that Line 9 has operated for more than 40 years without the consultation or consent of the 18 First Nations along its route, including Anishinaabeg, Haudenosaunee, Lenape, and Métis communities. As discussed below, throughout the review process Indigenous and non-Indigenous people raised concerns about risks to the environment, human health and Indigenous rights—both along the Line 9 route and in solidarity with those affected by oil sands production in Alberta. Indigenous community members disrupted Line 9B hearings in protest, and Indigenous-led blockades and other direct actions followed the NEB’s 2014 decision [44].

Chippewas of the Thames First Nation (COTTFN) challenged the NEB decision in court, arguing that the Crown’s failure to adequately consult the Nation violated their Aboriginal rights: first at the Federal Court of Appeal; then at the Supreme Court. (The Government of Canada uses the term Aboriginal to collectively refer to First Nations, Inuit and Métis. Where we refer to government statements and court rulings, we use this term. Otherwise we use the term Indigenous, which is generally preferred by original peoples of the territory known as Canada.) The Supreme Court case considered whether the NEB had the authority and expertise necessary to assess impacts on Aboriginal rights. One judge pointed out that the NEB mandate allowed it to decide what consultation was required, carry it out, then decide if it was sufficient—acting as its own “judge and jury.” Both sides agreed the NEB’s primary expertise pertained to pipeline design and operation, but used this to build opposing arguments: one side claiming that deferring to other authorities on Aboriginal rights would undermine the Board’s expertise, the other arguing the Board lacked the necessary competence to determine what rights were at stake.

Another central question before the Court was whether the NEB process fulfilled the duty to consult, a statutory and common law doctrine obliging the Crown to consult with Aboriginal people before making decisions that may negatively impact Aboriginal rights as defined in section 35 of the 1982 Constitution Act. Lawyers representing Enbridge and the NEB claimed that meaningful consultation had occurred, the NEB was an appropriate vehicle for reconciliation, and the process was “transparent” and “evidence-based”. Lawyers representing Chippewas of the Thames claimed the NEB’s mandate was too narrow to consider the full range of impacts on Aboriginal rights. They argued that consultation is inadequate if it only considers site-specific impacts on land and harvesting activities; it should also examine project impacts on broader issues such as climate change and First Nation struggles to thrive in the face of cumulative land changes in their territories.

In July 2017 the Court dismissed the appeal. Its decision affirmed that the NEB was an appropriate body to conduct Crown consultation and its consultation with First Nations over Line 9 was sufficient—largely because Chippewas of the Thames and other Nations had participated in hearings and received funding to assist them in doing so. The Court also supported the NEB’s position
that modifying an existing pipeline would only minimally impact Aboriginal rights, and that the conditions imposed on Enbridge adequately mitigated any risks. However, the Court acknowledged that the NEB failed to communicate that the NEB review would be the only form of Crown consultation on Line 9 until after the hearings had ended [41].

3. Results

This section describes how each energy justice principle played out in the Line 9B decision process, drawing on intervenor evidence, the NEB’s Reasons for Decision, and the Supreme Court proceedings and decision. Table 2 provides a summary at the end of the section.

3.1. Availability and Affordability

Availability and affordability both concern access to energy: the availability principle calls for sufficient, high-quality energy when and where needed; the affordability principle states that no one should have to make undue sacrifices to satisfy reasonable energy needs [20].

Energy access issues in the Line 9B review were raised by industry intervenors who argued the project could boost supply and lower prices for Canadian consumers. Some argued that changing the pipeline’s direction and increasing its capacity would support future growth in Canadian oil sands production and refining, thus increasing the quantity of fossil fuels available to domestic and/or export markets [45,46]. If used to supply Canadian markets, the Line 9 reversal could ease potential supply shortages in Ontario [47] and provide a more stable supply than imported oil [38]. On the other hand, two individuals [48,49] raised the possibility that spills from Line 9 could temporarily disrupt hydroelectric or nuclear energy production in affected areas.

Regarding affordability, industry intervenors stated that refineries in eastern Canada currently pay more for imported crude oil than they would for western Canadian crude supplied by pipeline [47,50,51]. In turn, the Line 9 changes could lower prices for consumers. CEP also wrote that the pipeline reversal could reduce Ontario’s vulnerability to price jumps during supply shortages [47].

3.2. Procedural Fairness and Transparency

The principles of procedural fairness and transparency call for energy decisions to be made through an inclusive process with opportunities for meaningful participation, overseen by impartial decision-makers, and supported by timely access to information [20].

Intervenors raised relevant critiques of the review process, many aimed at Enbridge. Objections included that Enbridge did not do enough to contact potentially affected people about public meetings [52,53], gave short notice [54], and held initial meetings after the registration deadline to participate in the NEB process had passed [54]. Citoyens Au Courant described how meetings with Enbridge were not dialogues: in Rigaud, Quebec, citizens allegedly requested an open-microphone format but were told instead to have individual conversations with Enbridge representatives, some of whom could not speak French [54].

Intervenors also stated that Enbridge provided insufficient information to affected communities. The National Farmers Union of Ontario (NFU) noted that Enbridge’s Public Awareness Program materials did not mention any possible impacts or risks [55]. Aamjiwnaang First Nation (AFN) wrote that because Enbridge only provided information on activities needed to modify the pipeline, not the implications of operating the pipeline with different products under higher pressure, they could not properly assess the project’s potential impacts on their rights [56].

Two First Nations wrote that Enbridge failed to acknowledge their input. Enbridge “stated in its application that it . . . has not been made aware of any current use of these lands for the purposes of exercising traditional rights or activities” [57] (p. 43). However, AFN and COTTFN attested they had clearly told Enbridge that community members use lands and resources along the route, and spills would compromise those activities [56,57]. Both provided traditional land use studies.
Several intervenors stated that Enbridge inadequately responded to requests for information. When Mississaugas of the New Credit First Nation (MNCFN) requested an archaeological assessment, Enbridge provided a 1974 environmental report covering only above-ground landscape features. MNCFN wrote: “The report’s conclusion that ‘[n]o significant archaeological sites are known along the proposed route at the present time’ is the result of no archaeological assessment being done. No sites can be ‘known’ if one has not looked for them” [58] (p 13). Other unsatisfied intervenors included the City of Toronto, who asked about emergency response and received a “generic” document about Ontario that did not address conditions in Toronto [59]. Quarterly argued that by grouping questions together, Enbridge failed to address requests individually and directly [60], while Algonquin to Adirondacks (A2A) objected to parts of Enbridge’s application being redacted [61].

The NFU cited Enbridge’s past behaviour as a sign of lack of transparency: “although Enbridge has had pipelines in Toronto for decades and claims to work proactively with local first responders on a regular basis . . . It was recently revealed, ‘the Enbridge Emergency Response Plan has not been previously made available to the Toronto Fire Department’” [55] (par. 105).

Others critiqued the NEB, claiming it was impossible to review all the documents in the time available. Ontario Pipeline Probe wrote: “The hearing process is heavily restricted with unrealistic, hard to meet deadlines. We commend NEB for providing the opportunity to peruse over all the submission documents, but it remains more a great potential, than a transparency tool” [62] (par. 10).

The NEB’s Reasons for Decision document [38] expressed overall satisfaction with Enbridge’s consultation, noting the company had “contacted over 2,600 interested persons . . . sent information packages to landowners along the right of way, engaged with landowner associations, and continued consultation throughout the hearing process” as well as holding 26 information sessions (p. 19). However, the Board noted “room for improvement in the design of the consultation program”, as 19 of these sessions were added almost a year after the initial sessions, suggesting Enbridge underestimated public interest (p. 20). The Board also saw “room for improvement” in encouraging two-way communication, writing: “Pipeline companies should view consultation programs as opportunities to discover new ways to improve their operations from those who live and work closest to the pipeline, rather than simply as obligations they must fulfill because the NEB mandates it” (p. 26). The NEB imposed several conditions related to information sharing.

The discrepancy between participant and NEB interpretations of Enbridge’s outreach efforts and information sharing demonstrates that these groups had different understandings of, and standards for, procedural fairness and transparency. Chippewas of the Thames First Nation was so dissatisfied with the review process that it formally challenged its integrity in court.

3.3. Equity Within and Between Generations

Theories of energy justice highlight two types of equity concerns. Equity within generations refers to fairly distributing the benefits and burdens of energy production, distribution and use. Equity between generations means protecting the rights of future generations, including the right to make choices about their energy sources [20]. It also means acknowledging legacies of past decisions that helped shape current inequalities.

Intervenors raised three main arguments about how the project could concentrate impacts on particular people within a generation. First, several presented spill risk scenarios showing how leaks or ruptures could disproportionately impact particular people through contaminated drinking water, exposure to harmful fumes, or damage to water treatment and transportation systems [55,59,63–69]. Intervenors identified specific potential impacts on Indigenous land uses and rights [56–58,70]. Second, AFN raised the health impacts of fossil fuel refining on nearby communities, documenting how their community already experiences health burdens from living in “Canada’s Chemical Valley” and arguing that expanding the pipeline’s capacity would intensify such impacts around refineries [56]. Third, two intervenors worried that landowners along the pipeline would experience declining property
values [53] and disruption from integrity digs [71]. While varied, these concerns speak to unevenly distributed burdens and risks from the pipeline changes.

Climate change was the most frequently mentioned intergenerational equity issue. Canadian Voice of Women for Peace (CVWP) wrote: “It is irresponsible for the NEB to agree to consider this proposal without considering the impacts that can be anticipated, not just local impacts, but global impacts in terms of out of control climate warming that threatens the coming generations” [66] (p. 2). Similar views were expressed by Quarterly, Grand River Indigenous Solidarity (GRIS), A2A and Equiterre [60,61,72,73]. The Communications, Energy and Paperworkers Union (CEP) made a pragmatic case for confronting the issue, writing that until Canada resolves the contradiction between its climate change commitments and high emissions from the oil sands, the “oil sands will remain mired in controversy, and accessing foreign markets will become increasingly difficult” [47] (par. 40).

Two intergenerational arguments concerned Indigenous rights. First, AFN argued that spills affecting their traditional territory could inhibit the transfer of cultural knowledge and skills to younger generations [56]. Second, several intervenors argued that historical injustices toward Indigenous peoples should be considered, presenting detailed evidence of historical harvesting activities, treaties with European settlers, and successive encroachment of industrial projects on traditional territories [56,70,72]. AFN described how “industrial development continues to erode the Crown’s solemn promise in Treaty 29 that we would have the right to exclusively use and enjoy our reserve lands” [56] (p. 16). AFN further pointed out that they were not consulted over the pipeline’s construction in the 1970s (before the duty to consult was added to the Constitution) and have not received any revenue from oil transported through their territory, “despite the fact that the construction and operation of Line 9 constitutes an ongoing infringement of our Aboriginal and treaty rights” [56] (p. 16).

The NEB dismissed most of these equity issues as either speculative or outside the Board’s project-specific mandate, discussed further below. The Supreme Court, focusing on procedural aspects of the review, also drew boundaries around the case that excluded historical and cumulative impacts on Indigenous lands and culture.

3.4. Prudence and Responsibility

The principle of prudence refers to wisely managing finite resources and their revenues, while responsibility in this context refers to minimizing environmental damage associated with energy production, distribution and use [20].

Prudence is relevant to discussions of pipeline safety. Much evidence on this topic pertained to technical pipeline specifications, properties of diluted bitumen, leak detection techniques, and Enbridge’s safety record. Some intervenors commented on the relative safety of transporting fossil fuels by pipeline versus rail, referencing the 2013 derailment and explosion of a train carrying crude oil that killed 47 people in Lac-Mégantic, Québec [74]. For some, Lac-Mégantic illustrated the intensity of the threat to human life posed by transporting fossil fuels and the need for higher standards for engineering, risk mitigation and transparency [55,60]. Others cited the derailment as evidence that the risks of pipeline failures are not particularly high. For example, CEP wrote: “We sympathize with these concerns [over pipeline safety and potential spills] . . . But all modes for transporting oil to markets are inherently dangerous, as the derailment in Lac-Mégantic tragically illustrates” [47] (par. 10).

Two intervenors objected to the existing distribution of revenues to communities along Line 9: AFN wrote that they had not received any revenue [56], while Durham Citizens Lobby for Environmental Awareness and Responsibility (DurhamCLEAR) wrote that taxes paid to communities along the route were too low [75].

Arguments about environmental responsibility overlapped with the concerns about climate change and spill impacts already discussed. Intervenors also raised potential impacts of spills on environmentally sensitive areas and wildlife, including species at risk [61,64,70,76]. Two intervenors advocated pursuing alternative energy sources, even though alternatives to the project were off the List...
of issues the NEB would consider: CVWP and Équiterre described a need to transition from reliance on fossil fuels toward renewable energy for environmental reasons [66,73].

In general, the NEB’s response to intervenor evidence on safety and environmental risk focused on technical means of preventing, detecting and cleaning up releases (e.g., valves, detection systems, emergency response). Conditions 6 and 9 require Enbridge to submit an environmental protection plan and updated Engineering Assessment before implementation. Alternatives to the project, as well as impacts on specific environments or species, were considered inadmissible or speculative.

Table 2. Energy justice principles and how they were mobilized in the Line 9B review.

<table>
<thead>
<tr>
<th>EJ Principle</th>
<th>Definition (Adapted from [20])</th>
<th>How Principle was Mobilized in Line 9B Review</th>
</tr>
</thead>
<tbody>
<tr>
<td>Availability</td>
<td>Provide sufficient, high-quality energy when and where needed</td>
<td>Intervenors: Increased pipeline capacity would support growth in Canadian oil sands production and refining (AFL, PCA). Line 9 reversal could ease supply shortages in Ontario (CEP) and provide more stable supply than imports (Enbridge). Spills could interrupt hydro or nuclear energy production in affected areas (Kuebler, Powell).</td>
</tr>
<tr>
<td>Affordability</td>
<td>Keep energy costs within reason, including for low-income users</td>
<td>Intervenors: Eastern Canada refineries pay more for imported crude than they would for Western Canadian crude (CEP, Suncor, Valero). Line 9 changes could lower consumer prices and reduce Ontario’s vulnerability to price jumps during supply shortages (CEP).</td>
</tr>
<tr>
<td>Procedural fairness</td>
<td>Follow a legitimate, inclusive, impartial decision process</td>
<td>NEB funded 11 of 17 participants who applied. Intervenors: Enbridge failed to tell affected people about public meetings (Ferguson, Goodman); provided short notice; meetings were not dialogues (CAC). COTTFN court challenge: duty to consult was not met. Supreme Court ruled consultation was adequate.</td>
</tr>
<tr>
<td>Transparency</td>
<td>Provide timely, reliable information to all relevant actors</td>
<td>Intervenors: Enbridge gave unsatisfactory responses to information requests (AFN, COTTFN, MNCFN, DurhamCLEAR, Pipeline Probe, Toronto, Ferguson, Lanteigne, Quarterly). Enbridge’s communication with emergency services in communities with pipelines poor (NFU). Not enough time to read relevant documents (OPP).</td>
</tr>
<tr>
<td>Equity within generations</td>
<td>Fairly distribute benefits and burdens</td>
<td>Intervenors: spill scenarios showed potential for concentrated impacts in particular places. Benefits/taxes paid to communities on the route nonexistent (AFN) or too low (DurhamCLEAR). NEB: spill risks preventable and manageable. Health effects of downstream activities (refining), esp. on First Nations, excluded from review.</td>
</tr>
<tr>
<td>Equity between generations</td>
<td>Protect future generations’ rights and acknowledge past legacies</td>
<td>Intervenors: issues excluded by NEB: climate change (CVWP, GRIS, A2A, Équiterre, Quarterly); inter-generational transfer of cultural practices (AFN); lack of consultation when Line 9 was built (AFN); cumulative encroachment on Indigenous territories (AFN, MCK, GRIS).</td>
</tr>
<tr>
<td>Prudence</td>
<td>Wisely manage finite energy sources and their revenues</td>
<td>Intervenors: Pipelines as safe as trains (CEP), Kalamazoo spill evidence of likely failure and impacts (NFU, Quarterly). Enbridge: improved safety practices after Kalamazoo spill. NEB process: precautionary approach limited to safety plans and technologies (valves, etc.).</td>
</tr>
</tbody>
</table>

4. Discussion

Three cross-cutting issues further link the Line 9B intervenor evidence and NEB replies to theories of energy justice.
4.1. Scoping the Review

Intervenors on both sides of the issue sought wider boundaries around the project than the NEB would allow—with the result that many important implications of the project were excluded from review. Pipeline supporters anticipated economic benefits from activities beyond the pipeline renovation—especially linked to continued expansion of the oil sands. Progressive Contractors Association of Canada (PCA) cited projected growth in oil sands production and listed direct and indirect economic benefits expected to follow in several provinces, then wrote: “This additional economic activity is dependent upon our ability to get the increased oil production to market and thus the need for the additional pipeline capacity” [46] (p. 4). Alberta Federation of Labour (AFL) took a similar position, stating: “In and of themselves, pipelines and their proponents do not contribute a great deal to the economy, save some short-term construction jobs and a handful of operations employment. What makes pipelines important to Canada is not the pipe itself, but what is in it, what markets it accesses, and what uses to which the products are put” [45] (p. 5). These intervenors directly tied future growth in the oil sands sector and related economic activities to the pipeline project.

Intervenors opposed to the project raised arguments about climate change impacts of oil sands expansion, health effects of downstream activities such as refining, historical injustices including that Indigenous nations were not consulted when pipeline was built, and the importance of pursuing energy alternatives. Aamjiwnaang First Nation lamented: “The only effects that Enbridge has assessed are those narrowly arising from the modifications to the pipeline that need to be carried out to enable the reversal of flow and to increase the capacity of Line 9” [56] (p. 30).

The NEB concluded that upstream effects of oil sands production and downstream effects of refining were subject to provincial regulations, thus they fell outside the scope of the 9B review. Other downstream effects related to using the products transported in the pipeline were considered “too speculative to merit consideration” [38] (p. 76).

Similar patterns can be found in other pipeline reviews. The Joint Review Panel for the Northern Gateway pipeline (comprised of three NEB members) excluded upstream and downstream impacts from its List of Issues, and refused to hear discussion about alternatives to the project unless they matched its purpose as defined by the proponent: to ship bitumen to the west coast to access new markets [77]. The NEB review of the Trans Mountain pipeline expansion had a mandate to consider upstream greenhouse gas emissions, but did not attribute emissions from oil sands expansion to the pipeline—assuming that the products could be transported by other means. However, the review gave the pipeline credit for anticipated economic benefits tied to oil sands expansion, stating (as PCA argued for Line 9) that growth in the sector depended on increased pipeline capacity [78].

Intervenors on both sides of the issue were frustrated that topics they perceived as central to the project were defined away by the NEB’s scope. The Expert Panel on NEB Modernization [6] emphasized the same problem, concluding that without coherent policy outlining a national climate change and energy strategy, and with no forum in which to debate these larger issues, the NEB was bound to hear issues it could not address to the satisfaction of anyone involved.

By only considering effects of modifying a pipeline while excluding effects of activities that depend on the pipeline, one could argue the Board engaged in the kind of erasure or “unimagining” of impacts—particularly cumulative, slow and indirect impacts on people at sites of extraction and refining—that Dayna Scott observed [79]. This narrow focus greatly reduced the scope for engaging with questions of equity within and between generations—a central idea in energy justice.

4.2. Politics of Knowledge

Evidence suggests that the review process privileged certain kinds of knowledge (primarily technical) over others, including cultural knowledge, spill scenarios, and examples from similar cases. Moreover, the NEB seemed to selectively engage with evidence of potential impacts, reflecting a failure to recognize the legitimacy of diverse participants’ knowledge and concerns.
As discussed, intervenors provided detailed spill risk assessments for particular sites, as well as specific impacts in Indigenous traditional territories. Numerous intervenors also cited the Kalamazoo River spill as an example of what could go wrong with Line 9. In July 2010 Enbridge’s Line 6B spilled nearly 4 million litres of heavy crude oil in Marshall, Michigan, causing 150 families to be permanently evacuated from their homes [42]. Governments [59,63], Indigenous groups [57,70], NGOs [66,67,71] and individuals [48,49,52,53,68,69,80] referred to the spill, pointing out similarities in the pipelines’ age, ownership and material being transported (diluted bitumen). They cited the Line 6B failure as evidence that: a similar incident for Line 9 was likely; Enbridge’s emergency response was deficient; the ‘worst case’ release scenario in the application was an underestimate; cleaning up dilbit was extremely difficult; the company’s insurance was inadequate; and Enbridge showed a general disregard for safety. Enbridge claimed it had learned from the incident and was now better able to prevent and manage spills [38]. Intervenors also described the impacts of specific spills in Alaska, Arkansas, Montana, Utah, Wisconsin, Alberta and Saskatchewan.

Despite these arguments, the NEB agreed with Enbridge that spills could be prevented or mitigated. Section 5.2 of the Reasons for Decision [38] holds that “the NEB will take all available actions to protect Canadians and the environment” (p. 54), just before stating that potential spill impacts were too speculative to consider: “Since spill locations and timing cannot be predicted with any degree of certainty, an assessment on individual receptors or specific areas would be hypothetical” (p. 54). The latter statement effectively sidesteps scrutiny of risks.

In most cases the NEB sided with Enbridge’s claim that it could safely operate the pipeline. Where the Board acknowledged counter-evidence, three things happened: intervenor concerns were dismissed as speculative; the Board expressed confidence in Enbridge’s ability to mitigate risk through current practices or the conditions imposed; or concerns were restated in ways that those who raised them may not have agreed with. For example, the Reasons for Decision “acknowledges Participant concerns that there is an evaluated qualitative 2.2% increase in risk along the pipeline” and expresses confidence that “the risk control and mitigation strategies currently being executed or committed to by Enbridge should manage these risks effectively” [38] (p. 46). However, written evidence makes clear that intervenors did not object to a 2.2% increase in risk; rather, they contested Enbridge’s claim that risk would only increase by 2.2% and its method for reaching this number (qualitatively estimating that risk would increase for 60/2,730 pipeline segments).

Some intervenors felt they were unfairly expected to prove the project’s risks rather than Enbridge being expected to demonstrate its safety. Quarterly wrote: “the burden of proof for the safety of this application . . . is the responsibility solely of the applicant Enbridge. It is not possible for any person, or group of people or society at large to prove the integrity or non-integrity of the application . . . as all the documentation for this process is controlled by the applicant” [60] (p. 4).

Taken together, these dynamics signal a power differential in whose knowledge was considered valid—and valuable. Enbridge’s claim that it could manage spill risks (despite counter-evidence from the Kalamazoo spill) was considered more authoritative than the evidence of risks that intervenors presented. This represents a weakness in the area of recognition—in this case, recognizing the validity of knowledge from diverse sources—that in turn works against the energy justice principles of transparency and procedural fairness.

4.3. Indigenous Rights

The way the review engaged with Indigenous rights was particularly contentious, serving as the basis for later legal challenges. Because of Canada’s constitutional duty to consult Aboriginal peoples about projects affecting their territories, the government’s commitment to uphold the United Nations Declaration on the Rights of Indigenous Peoples (signed in 2011), and the moral imperative to redress longstanding injustices, the review had a special responsibility to not only hear, but meaningfully respond to Indigenous people’s priorities and rights. Debates over the NEB’s and Enbridge’s
authority, competence and practices in assessing and addressing impacts on Indigenous rights thus deserve scrutiny.

First Nations who participated in the review insisted the duty to consult was not met. They remained convinced that the arguments they raised about risks to traditional land uses, encroachment on their territories, and historical failures to honour treaty rights had gone unheard. Several non-Indigenous intervenors expressed solidarity with this position. GRIS wrote: “. . . it is quite clear that Enbridge does not differentiate between a process of consultation (which they are required to do), and the process of notification (which is what they do). Informing an impacted party of your plans for a project and asking them if they have any concerns or questions is not consulting in good faith . . . the no option must be on the table” [72] (sec. 4). Rising Tide Toronto echoed this position [81]. Even the Alberta Federation of Labour, who endorsed the project, made its support conditional on “appropriate community consultation (with urban and rural municipalities, landowners, and on a respectful nation-to-nation basis with indigenous peoples)” [45] (p. 4).

Aside from the NEB hearings, Enbridge conducted the remainder of what was later considered ‘consultation’ with First Nations over Line 9. The company argued that it sent information to relevant groups, heard their concerns, and “to the extent practicable, addressed the concerns raised by Aboriginal groups about the Project” [38] (p. 96). However, we could not find any reference to how Enbridge adjusted its plans to address those concerns. As an example of how the company handled issues raised by First Nations, Enbridge responded to Chippewas of the Thames’s map of traditional land uses potentially impacted by a spill by offering to provide “opportunities for First Nations members to tour and observe project work” to “facilitate an improved understanding of Enbridge’s practices and emphasis on safety” [38] (p. 96). The NEB appears to have recognized traditional land use while failing to recognize Indigenous law. Similarly, reflecting on the Northern Gateway pipeline proposal, McCreary and Milligan [82] describe how recognizing traditional knowledge and land use as evidence can actually serve to undermine Indigenous legal systems as frameworks for decision making.

The Supreme Court held that the NEB process met the standard for Aboriginal consultation, pointing out that oral hearings occurred and First Nations received funding to participate. The Court stated that the duty to consult “is not the vehicle to address historical grievances” [41] (par. 41), nor to address the cumulative impacts of multiple projects. However, the decision acknowledged that cumulative effects of past activities can influence the severity of impacts of an additional project, and could therefore help inform the scope of consultation required (par. 42). The Court’s decision also stated that “the duty to consult does not provide Indigenous groups with a ‘veto’ over final Crown decisions” (par. 59), and that “The Chippewas of the Thames are not entitled to a one-sided process, but rather, a cooperative one with a view towards reconciliation. Balance and compromise are inherent in that process” (par. 60). Certainly, those who gathered at the Chippewas of the Thames community centre to hear the court’s decision had a different image of a one-sided process in mind: one in which Crown institutions have the power to decide what it means to consult Indigenous people, the discretion to ignore rights violations that are raised, and the authority to impose final decisions. Supreme Court rulings like this one undermine treaties as consensual, legally binding, nation-to-nation relationships because they hold that only one of the partners (the Crown) has the right to unilaterally amend the terms of treaty agreements [12]. Seen from this perspective, the NEB’s ability to impose its will appears just as one-sided as a ‘veto’ from affected nations. Similar displays of one-sided reconciliation can be found in state-centered Indigenous rights frameworks that seek to subject Aboriginal rights to provincial jurisdiction [37], and to compartmentalize questions of land title from those of political and legal recognition [83].

The Expert Panel on NEB modernization [6] stressed that Indigenous consultation has been poorly handled, recommending that it assume a more central role earlier and throughout the review process. These recommendations seem to be partly reflected in Bill C-69, which proposes changes to impact
assessment and energy reviews. Bill C-69 adds consultation during an earlier ‘planning phase’ and requires consideration of Indigenous knowledge at all stages of review [84].

First Nations participants in the 9B process strongly felt their rights were not recognized on their own terms. Rather, they were brushed aside using the NEB’s and Enbridge’s terms—including an emphasis on technical discussions, dismissal of specific potential impacts, and irrelevant responses to questions. Dokis [85] observed the same dynamics in the 2009-10 Mackenzie Valley Pipeline hearings. While the NEB followed its own rules to the satisfaction of the Supreme Court over Line 9, two government-appointed expert panels have critiqued the NEB’s failures to address Indigenous rights [6,78]. This pattern constitutes a recognition failure with consequences for distributional fairness.

5. Conclusions

This analysis finds that the NEB and Supreme Court were closely aligned in their view of the Line 9B review process, and that their interpretation of outcome fairness, procedural fairness and recognition diverged substantially from those of many participants in the process, as well as from theories of energy justice. Narrow mandates and a case-specific scope provided a rationale for skirting questions of equity within and between generations, while selective engagement with evidence of risks and potential impacts imposed a hierarchy of knowledge—a recognition failure, in the language of energy justice. Participants’ concerns about Enbridge’s consultation practices and the NEB’s competence to assess impacts on Indigenous rights remained at odds with the NEB’s assertion that the process was fair, and the Supreme Court’s confidence in the NEB as an appropriate body to consult on behalf of the Crown. Energy justice provided a useful framework to foreground equity issues that were important to intervenors but not addressed by the NEB. Based on this analysis, we believe energy justice research can identify processes of avoidance and help develop processes of remediation.

The Expert Panel on NEB Modernization observed that without coherent national policies on energy and climate, the NEB is doomed to hear arguments it cannot resolve. Based on its decision on Line 9, it seems the Supreme Court faces the same dilemma. The Court did not provide guidance on what it means to conduct a fair process in the context of past injustices, stating it could not consider historical grievances even as it acknowledged that understanding the impacts of a new proposal partly depends on appreciating the cumulative impacts of past projects. We conclude that in relation to pipeline reviews, Canadian regulatory and legal institutions in their current form are not meaningfully engaging with critical underlying issues such as climate change and Indigenous rights.

One could ask why the NEB or Supreme Court should be evaluated against a theory—energy justice—that falls outside their mandates. Indeed, Parliament bears responsibility for creating laws that foster the principles of energy justice. The changes spelled out in Bill C-69, before Senate at the time of writing, offer only partial improvements in these areas. Further, one could argue that it is futile to engage the NEB or Supreme Court with a theory that lies outside the kinds of legal argumentation these institutions recognize as legitimate. But that is part of our point: Indigenous laws do not fit within the parameters of Canadian legal argumentation [10,86]. If the same logic that excludes Indigenous experiences is considered the only acceptable way to frame institutional critiques, that constraint powerfully reinforces the status quo. Thus, we believe ideas from energy justice can usefully contribute to interrogating energy project reviews and legal challenges.

There is a risk that critiquing the flaws of a review process like the one examined here can reinforce the legitimacy of that process [87]—including the colonialism built into state institutions making decisions over ‘resources’ and rights [88]. Davine et al. [87] (p. 5) warn against focusing on critiques that “argue that Canadian practice is not what it claims, rather than putting forward a different vision of what Canada ought to be.” While we point out several such critiques in this paper, our larger project aims to contribute to articulating alternatives. We agree with Green [89] (pp. 5–6):

Post-colonialism “implies that the colonizer also changes ... it requires the effective indigenisation of the state, its institutions, economy, cultures, and populations in ways that have never been contemplated by those with power. Post-colonialism requires not
concessions, but mutual accommodations for a common (though not necessarily assimilated or homogenized) future.”

It is beyond our scope to map out specific ways to transform Canadian legal systems. We appreciate the work of Indigenous legal scholars like Borrows [10,12] who seek on one hand to articulate how constitutional reform might help foster a resurgence of Indigenous law, while on the other grappling with how to deal with incompatibilities between Canadian and Indigenous legal systems. Borrows [10] (p. 35) persuasively argues that closer connection between Canadian and Indigenous legal systems could benefit both: “Indigenous legal principles form a system of ‘empirical observations and pragmatic knowledge’ that has value both in itself and as a tool to demonstrate how people structure information. First Nations laws embrace ecological protection, and they could be woven into the very fabric of North American legal ideas.”

There is much work to be done to achieve this goal. Understanding how regulatory processes currently engage with a plurality of values and understandings of justice, and where they fail to resolve conflicts over distribution, process and recognition, is an important starting point.

Author Contributions: Conceptualization, methodology, funding acquisition and supervision, C.H.; analysis, writing—original draft preparation, and writing—review and editing, C.H. and S.A.

Funding: This work was supported by a Western Strategic Support grant under the project ID 0000038955.

Acknowledgments: The authors presented earlier versions of this work at the 2017 AAG, ESAC, NGM and 2018 ONSEP conferences and would like to thank co-panelists, discussants and attendees for their comments. We also thank Wade Wright, Jason Sandhar and the anonymous reviewers for their helpful suggestions.

Conflicts of Interest: The authors declare no conflict of interest. The funders had no role in the design of the study; in the collection, analyses, or interpretation of data; in the writing of the manuscript, or in the decision to publish the results.

References

1. Federal Court of Appeal. *Executive Summary Trans Mountain Decision*; Federal Court of Appeal: Ottawa, ON, Canada, 2018; Volume 17.


34. McIvor, B. First Peoples Law: Essays on Canadian Law and decolonization; First Peoples Law Corporation: Vancouver, BC, Canada; Toronto, ON, Canada, 2018.


