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Conflict, Constituent Power and Institutional Legitimacy in the Canadian Oil Sands

ARTICLE

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ABSTRACT

Much has been written about the loss of trust and issues concerning 'social license to operate' (SLO) in relation to the Canadian oil sands, raising questions about whether there is a crisis of legitimacy. This article considers the implications of constituent power and the democratic constitutional theory advanced by Colón-Ríos for the legitimacy of modern oil sands institutions. Building upon Colón-Ríos's theory, this article proposes the examination of constituent power as an analytical approach to understanding institutional legitimacy in resource conflicts where legitimacy is contested. In other words, where the exercise of constituted power raises questions of legitimacy, this ought to trigger an examination of the democratic legitimacy of the overarching constitutional regime by reference to constituent power. If there is a democratic deficit in the formation of the constitutional regime that empowers them, it may be difficult to defend the regulatory bodies responsible for administering the oil sands as normatively legitimate. This article does not aim to draw broad conclusions about the legitimacy of oil sands governance institutions or the Canadian constitutional regime per se. Rather, it sees the contested nature of legitimacy as a potential indicator that difficulties in resolving oil sands conflicts may stem from the existence of deeper systemic issues relating to the constitutional regime in which the institutional framework is embedded. Focusing on constituent power theory to examine the democratic legitimacy of the overarching constitutional regime may serve an explanatory role, perhaps shedding light on why democratic approaches are not reflected in oil sands decision-making. It might also further clarify why popular acceptance of the system of governance remains in question, particularly by some Aboriginal communities, and why public stakeholders have struggled with having their concerns addressed appropriately. Such an examination may reveal the true extent of the democratic deficit and, therefore, provide a deeper understanding of the legitimacy issues that oil sands institutions might face when determining ways to improve governance, particularly where there are demands for more deliberative, democratic decision-making. This analytical approach may also potentially be valuable in institutional contexts other than oil sands and resource governance.

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1. INTRODUCTION

Canada is ranked among the top ten polluters in the world for total emissions, and Northern Canada is reportedly warming at almost three times the global rate.[1] Oil sands development has been implicated as a major contributor to emissions, with environmental and climate impacts so profound that some have described it as the 'world's most destructive oil operation'.[2] As the world's third largest proven oil reserve, the oil sands are critical to Canadian economic and energy security.[3] However, they are located in more remote parts of Alberta, amongst large tracts of ecologically sensitive boreal forest home to diverse endangered and protected species. Local communities and interest groups have raised concerns about water quality and safety; impacts on marine life, fisheries, wildlife and their habitats; climate impacts; human health; and socioeconomic impacts. Many project sites overlap with Aboriginal treaty land, resulting in impacts upon Aboriginal land use and traditional practices like hunting, fishing, trapping and gathering traditional plants; loss of spiritual and community connections; and impacts on historical sites.[4] In addition, there is concern regarding cumulative impacts due to the scale of development and the multitude of projects operating in close proximity.[5]

In striving to balance economic development with environmental, health and other social priorities, the approach of Canadian regulatory authorities has, at times, failed to inspire public trust. Project-by-project assessment has proven inadequate in the comprehensive management of broader impacts.[6] Projects are routinely approved despite clear evidence of serious and irreversible harm to the environment and/or human rights, including Indigenous rights and the right to a healthy environment.[7] The rationale justifying decisions made by the Governor in Council 'in the national interest' is sometimes protected by Cabinet privilege, and therefore beyond public view or scrutiny. The adequacy of government monitoring and oversight has also been challenged repeatedly.[8] Moreover, there is a lack of public confidence in the studies and reports commissioned by the government on human health impacts. Published, peer-reviewed studies highlighting the severity of impacts in connection with the oil sands are often at odds

1 E Bush and DS Lemmen (eds), 'Canada's Changing Climate Report' (Government of Canada 2019); Environment and Climate Change Canada, 'Canadian Environmental Sustainability Indicators: Global greenhouse gas emissions' (Government of Canada 2022).

2 S Leahy, 'This is the world's most destructive oil operation—and it's growing' (*National Geographic*, 11 April 2019) <https://www.nationalgeographic.com/environment/article/alberta-canadas-tar-sands-is-growing-but-indigenous-people-fight-back> accessed 6 December 2022.

3 Natural Resource Canada, 'Oil Sands: Economic contributions' (Government of Canada, 7 July 2016) <https://www.nrcan.gc.ca/energy/publications/18756> accessed 6 December 2022; Natural Resource Canada, 'Oil Resources' (Government of Canada, 16 December 2019) <https://www.nrcan.gc.ca/energy/oil-sands/18085> accessed 6 December 2022.

4 See e.g. *Shell Canada Energy, Jackpine Mine Expansion Project, Application to Amend Approval 9756, Fort McMurray Area*, 2013 ABAER 011 (Report of the Joint Review Panel Established by the Federal Minister of the Environment and the Energy Resources Conservation Board, 9 July 2013) 10.

5 D Woynillowicz, C Severson-Baker and M Raynolds, 'Oil Sands Fever: The Environmental Implications of Canada's Oil Sands Rush' (The Pembina Institute 2005); JR Brook and others, 'Advances in science and applications of air pollution monitoring: A case study on oil sands monitoring targeting ecosystem protection' (2019) 69 Journal of the Air & Waste Management Association 661; JM Culp and others, 'Ecological effects and causal synthesis of oil sands activity impacts on river ecosystems: water synthesis review' (2021) 29 Environmental Reviews 315; MG Dubé and others, 'History, overview, and governance of environmental monitoring in the oil sands region of Alberta, Canada' (2021) 18 Integrated Environmental Assessment and Management 319.

6 MM Passelac-Ross and V Potes, 'Crown Consultation with Aboriginal Peoples in Oil Sands Development: Is it Adequate, Is it Legal?' (Occasional Paper No 19, Canadian Institute of Resource Law 2007) 164.

7 See e.g. A Lameman, 'Amended, Further Amended Statement of Claim', *Germaine Anderson on her own behalf and on behalf of all other Beaver Lake Cree Nation beneficiaries of Treaty No 6 and Beaver Lake Cree Nation v Her Majesty the Queen in Right of the Province of Alberta and the Attorney General of Canada*, Court File No 0803 06718, 13 July 2012 (Court of Queen's Bench of Alberta) ('*BLCN v Alberta*'); *Shell Canada Energy, Jackpine Mine Expansion Project* (n 4); *Fort McMurray Métis Local Council 1935 v Alberta Energy Regulator*, 2022 ABCA 179. See also JM Baker and CN Westman, 'Extracting knowledge: Social science, environmental impact assessment, and Indigenous consultation in the oil sands of Alberta, Canada' (2018) 5 The Extractive Industries and Society 144.

8 See e.g. KP Timoney, 'A Study of Water and Sediment Quality as Related to Public Health Issues, Fort Chipewyan, Alberta' (Nunee Health Board Society 2007) 4, 72–73; EN Kelly and others, 'Oil sands development contributes polycyclic aromatic compounds to the Athabasca River and its tributaries' (2009) 106 Proceedings of the National Academy of Sciences (PNAS) 22346; L Dowdeswell and others, 'A Foundation for the Future: Building an Environmental Monitoring System for the Oil Sands' (Report submitted to the Minister of Environment, Oil Sands Advisory Panel 2010) 33–34; P Gosselin and others, 'Environmental and Health Impacts of Canada's Oil Sands Industry' (RSC Expert Panel Report: Executive Summary, The Royal Society of Canada 2010) 280–281; Dubé (n 5).

with the government narrative.[9] Consequently, there is a persistent level of mistrust amongst some local communities, environmental organisations and Indigenous groups regarding the government's commitment to protecting the 'public interest'.[10] Here, it is important to note that recent studies and reports on public acceptance have been varied in their accounts of the extent to which Canadians support or oppose oil sands development.[11]

Much has been written about the loss of trust and issues concerning 'social license to operate' (SLO) in relation to Canadian natural resource development, including oil sands projects and pipelines. Poor public perception or approval in some cases may undermine the legitimacy of these projects in an empirical sense.[12] Apart from this, however, the normative legitimacy of resource governance institutions and processes may also be challenged. Within the social sciences, legitimacy is generally understood as the belief that authorities, institutions and social arrangements are appropriate, proper and just.[13] It implies congruence with the cultural environment, with 'the norms of acceptable behaviour in the larger social system'.[14] The recognition of the right of a governing body to rule is tied to normative beliefs about who is entitled to rule and how, and moral and political philosophers are more often concerned with the question of how political power ought to be arranged, rather than legal validity or actual belief.[15] Normative beliefs are, in turn, shaped by the structure and processes that define the governing body and are related to factors such as effectiveness, transparency and inclusiveness.[16] *How* such structures and processes came into existence is critical to understanding issues around institutional legitimacy, as popular belief in an institution's right to govern or acceptance of a system of governance may be weakened by historical legacies of exclusion or oppression. Looking at the past can also help to identify shifts in the norms of acceptable behaviour over time that might affect the legitimacy of modern institutions. Moreover, such an examination may shed light on whether governance systems were designed with matters such as transparency and inclusivity in mind, and in what sense they were meant to be effective. After all, a system that ensures efficient resource development may be considered effective if the intention was to design a system that maximises economic growth and international trade and investment.[17]

Canadian resource decision-makers exercise the powers granted to them through constitutional and legislative sources. These powers have come into existence through various sociopolitical processes, i.e. they were constituted somehow. What can be learned by examining how these powers came into existence? This article considers the implications of constituent power and

9 See e.g. the findings of the Gosselin report as compared to the other studies cited above: ibid.

10 See e.g. JP Findlay, 'The Future of the Canadian Oil Sands: Growth potential of a unique resource amidst regulation, egress, cost, and price uncertainty' (OIES PAPER WPM 64, Oxford Institute for Energy Studies 2016); TL Joly and CN Westman, 'Taking Research Off the Shelf: Impacts, Benefits, and Participatory Processes around the Oil Sands Industry in Northern Alberta' (SSHRC Imagining Canada's Future Initiative, Knowledge Synthesis Grants: Aboriginal Peoples 2017); D Natcher and others, 'Seeking indigenous consensus on the impacts of oil sands development in Alberta, Canada' (2020) 7 The Extractive Industries and Society 1330; AA Janzwood, 'The Contentious Politics of Mega Oil Sands Pipeline Projects' (PhD Thesis, University of Toronto 2021).

11 B Anderson and D Coletto, 'Public perspectives on Canada's oil resources' (Abacus Data 2016); K Sherren and others, 'Does noticing energy infrastructure influence public support for energy development? Evidence from a national survey in Canada' (2019) 51 Energy Research and Social Science 176; T Brunner and J Axsen, 'Oil sands, pipelines and fracking: Citizen acceptance of unconventional fossil fuel development and infrastructure in Canada' (2020) 67 Energy Research & Social Science 101511.

12 See e.g. MO Wood and J Thistlethwaite, 'Social License to Operate (SLO): Case Review of Enbridge and the Northern Gateway Pipeline' in S Dhiman and J Marques (eds), *Handbook of Engaged Sustainability* (Springer 2018).

13 D Beetham, *The Legitimation of Power* (Humanities Press International 1991) 6; TR Tyler, 'Psychological perspectives on legitimacy and legitimation' (2006) 57 Annual Review of Psychology 375, 376.

14 J Dowling and J Pfeffer, 'Organizational Legitimacy: Social Values and Organizational Behavior' (1975) 18 The Pacific Sociological Review 122; J Gehman, LM Lefsrud and St Fast, 'Social License to Operate: Legitimacy by Another Name?' (2017) 60 Canadian Public Administration 293, 304.

15 M Lockwood, 'Good governance for terrestrial protected areas: A framework, principles and performance outcomes' (2010) 91 Journal of Environmental Management 754; J Colón-Ríos, *Weak Constitutionalism: Democratic legitimacy and the question of constituent power* (Routledge 2012) 104; RA Turner and others, 'Trust, confidence, and equity affect the legitimacy of natural resource governance' (2016) 21 Ecology and Society 18.

16 Turner (n 15); M Levi, A Sacks and T Tyler, 'Conceptualizing Legitimacy, Measuring Legitimating Beliefs' (2009) 53 American Behavioral Scientist 354; FW Scharpf, 'Legitimacy in the multilevel European polity' (2009) 1 European Political Science Review 173; VA Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'' (2013) 61 Political Studies 2.

17 See e.g. JM Miller, 'The authority of a foreign talisman: A study of US constitutional practice as authority in nineteenth century Argentina and the Argentine elite's leap of faith' (1997) 46 The American University Law Review 1483, 1503–1505.

the democratic constitutional theory advanced by Colón-Ríos for the legitimacy of modern oil sands institutions. Using constituent power theory to examine issues of democratic legitimacy within the context of oil sands development raises some initial questions. What is the utility of examining the democratic legitimacy of the Canadian constitutional regime and how it came into existence when considering problems in modern oil sands governance? What is the relationship between constituted and constituent powers, and how is it relevant to such a discussion? Can (and should) problems with the way constituted power is exercised alert one to the need to examine constituent power?

Colón-Ríos envisions constituent power as a constitution-making power, 'the source of production of juridical norms', with constituted powers being the legal and political institutions created by the bearer of constituent power.[18] He makes the argument that if there is a democratic deficit at the level of fundamental laws (i.e. the relation of citizens to their constitution), the legitimacy of the regime will inevitably be called into question. This conception of legitimacy associates the legitimacy of laws and institutions with the ways in which they come into existence.[19] Building upon Colón-Ríos's theory, this article proposes the examination of constituent power as an analytical approach to understanding institutional legitimacy in resource conflicts where legitimacy is contested. In other words, where the exercise of constituted power raises questions of legitimacy, this ought to trigger an examination of the democratic legitimacy of the overarching constitutional regime by reference to constituent power. If there is a democratic deficit in the formation of the constitutional regime that empowers them, it may be difficult to defend the regulatory bodies responsible for administering the oil sands as normatively legitimate.

This article does not aim to draw broad conclusions about the legitimacy of oil sands governance institutions per se. Rather, it sees the *contested* nature of legitimacy as a potential indicator that difficulties in resolving oil sands conflicts may stem from the existence of deeper systemic issues relating to the constitutional regime in which the institutional framework is embedded. This article commences with a brief consideration, in Section 2, of the constitutional allocation of power over the environment and resources and the resulting regulatory framework that governs oil sands decision-making. It then discusses the contested nature of legitimacy in oil sands governance to provide context. Section 3 contains an overview of constituent power theory and its relevance to legitimacy. Section 4 then discusses what can be learned by applying constituent power theory to oil sands governance institutions, followed by concluding remarks in Section 5.

Focusing on constituent power theory to examine the democratic legitimacy of the overarching constitutional regime may serve an explanatory role, perhaps shedding light on *why* democratic approaches are not reflected in oil sands decision-making despite countless efforts to consult with public stakeholders and reform federal and provincial institutions and processes. It might also further clarify why popular acceptance of the system of governance remains in question, particularly by some Aboriginal communities, and why public stakeholders have struggled with having their concerns addressed appropriately, increasing controversy over these projects. Such an examination may reveal the true extent of the democratic deficit and, therefore, provide a deeper understanding of the legitimacy issues that oil sands institutions might face when determining ways to improve governance, particularly where there are demands for more deliberative democratic decision-making within institutions that do not implicitly support such approaches. This knowledge may prove beneficial in helping to craft better institutional reforms that address these deficits in a manner that aligns with current norms and expectations. How decision-making power is constituted at the level of fundamental laws is not often examined in relation to modern resource conflicts. Nevertheless, it offers a valuable analytical approach for understanding institutional legitimacy that may have been overlooked in its importance and relevance. Such an approach is also potentially applicable to institutional contexts other than oil sands decision-making and resource governance.

18 Colón-Ríos (n 15) 7, 85.

19 ibid 108, 186–187.

2. CONSTITUTED POWER AND CONTESTED LEGITIMACY

2.1. CONSTITUTIONAL ALLOCATION OF POWER OVER ENVIRONMENT AND RESOURCES

Canada as a modern nation was founded by an Act of the British Parliament, following a period of colonial settlement. The British North America Act 1867 ('BNA Act' or the 'Constitution Act 1867')[20] set out a Westminster form of responsible government, with executive, legislative and judicial branches.[21] Responsible government did not require legislative and executive powers to be exercised by separate and independent bodies (as in American-style separation of powers), allowing delegation of some legislative powers to the executive.[22] The Constitution Act 1867 also lacked provisions for amendment, as the framers were content for amendments to be made by the British Parliament.[23] Confederation did not create an independent country, and autonomy was only achieved in a formal transfer of authority from the British Parliament to Canadian legislatures through patriation of the Constitution in 1982.[24] The Constitution Act 1982 made a number of significant changes, including recognition of the rights of Aboriginal peoples and a constitutionally entrenched bill of rights.[25] However, it did not supplant the Constitution Act 1867, but rather operates in conjunction with it.

Despite patriation, Canada remains a constitutional monarchy, though, in practice, executive power is largely exercised by the Prime Minister and his or her ministers.[26] Legislative power is distributed between the federal and provincial governments based on classes of subjects,[27] and the regulatory framework that governs oil sands development is a product of this division of powers. Since the environment was not specifically enumerated as a designated head of power within the Constitution Act 1867, responsibility for legislating on environmental matters is shared.[28] Although the provinces have broad powers over the environment and natural resources, crucial aspects of environmental and resource policy have come within the sphere of joint federal-provincial decision-making.[29]

Statutory requirements relating to project approvals, licences, or permits are the main mechanisms for regulating the potentially adverse environmental effects of development.[30] Responsibility for planning and approval is often delegated to administrative boards, tribunals and commissions that have been created and empowered by legislation and generally have subject matter expertise, such as the Alberta Energy Regulator (AER).[31] These administrative bodies enjoy a measure of independence and autonomy from the government department having overall responsibility for a particular programme.[32] Appellate bodies, such as the Alberta Environmental Appeals Board, have also been established to hear appeals of administrative decisions (which may then be reviewed by the courts).[33] In fact, proceedings before such

20 Constitution Act 1867 (Imp), 30 & 31 Vict, c 3.

21 PW Hogg, *Constitutional Law of Canada* (Thomson Reuters Canada Ltd 2015) 9–3.

22 ibid 9–2.

23 ibid 4–4 to 4–7.

24 ibid 3–1, 3–14 to 3–15, 4–5 to 4–7.

25 Canada Act 1982 (UK) c 11, sch B, s 35, ss 38–49 ('Constitution Act 1982'); Canada Act 1982 (UK) c 11, sch B pt I ('Canadian Charter of Rights and Freedoms' or 'Charter').

26 Hogg (n 21).

27 Constitution Act 1867 (n 20) ss 91, 92, 92A, 109, Preamble.

28 *Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] 1 SCR 3; *Canada (AG) v Hydro-Québec* [1997] 3 SCR 213; J Benidickson, *Environmental Law* (Irwin Law 2000) 31.

29 DV Smiley, 'Federal-Provincial Conflict in Canada' (1974) 4 Publius: The Journal of Federalism 7, 9–10, 21.

30 KN Lambrecht, *Aboriginal Consultation, Environmental Assessment and Regulatory Review in Canada* (University of Regina Press 2013) 39; G van Harten and others, *Administrative Law: Cases, Text, and Materials* (7th edn, Edmond Montgomery Publications 2015) 13.

31 Lambrecht (n 30) 39.

32 Van Harten (n 30) 12–13.

33 MG Lee, 'How Tribunals and Appeal Boards Are Contributing to Advances in Environmental Laws' (2014) 26 Journal of Environmental Law and Practice 249, 260.

tribunals and boards are the predominant means of adjudicating environmental disputes.[34] Oil sands project proponents must engage in extensive stakeholder consultation and undergo individual project review and approval by the AER, which is delegated with broad authority to make decisions regarding the application of the statutory regime[35] on an individual basis.[36] Affected parties are given an opportunity to participate in environmental decision-making by providing evidence and making submissions in writing or at a hearing, if one is required.[37] A review is conducted of the entire project, including potential environmental impacts, and may involve a joint federal-provincial review with the Impact Assessment Agency of Canada.[38] After the review process, provincial and federal approvals may be granted, and the AER will publish its decision online.[39]

Collectively, the above-mentioned decision-makers comprise the 'institutions' responsible for directing the development of oil sands and resolving many of the conflicts that arise around it. These institutions, in essence, exercise constituted power. When questions of legitimacy arise around their exercise of authority, there are two possible points of focus: (i) one might consider how their power was constituted, and (ii) one might focus on how the constituted power is exercised. The latter is connected to notions of legality and it is, of course, important to consider the legitimacy issues that might arise due to how power is exercised. For the purposes of this article, however, the focus is on how the power was *constituted* and the potential advantages of using constituent power theory as a framework for improving our understanding of institutional legitimacy. As such, the article does not engage in a detailed examination of the processes and structures of oil sands institutions that might give rise to claims of illegitimacy. Instead, it accepts that there are such claims (as discussed in Section 2.2 below), and proposes an analytical approach that investigates how the exercised power was actually constituted.

2.2. CONTESTED LEGITIMACY IN THE OIL SANDS

At first glance, the institutions responsible for the development of oil sands (and their processes) appear to be legitimate in a normative sense. Administrative bodies have been created through a legislative process by elected officials, pursuant to constitutional authority over environmental and resource management. Administrative decisions are governed by procedural fairness requirements. The public is notified, provided with detailed information, and consulted in certain phases, and extensive impact assessments are conducted before many decisions are made. Rights of appeal and judicial review may be exercised by dissatisfied parties. Thus, decision-making concerning oil sands development has the appearance of legitimacy. Yet, oil sands institutions and processes may lack democratic legitimacy when examined from the perspective of representativeness and the extent to which they protect the status and interests of all stakeholders (e.g. Indigenous groups, youth).[40] The AER Stakeholder Engagement Framework released in 2017 recognised that public stakeholders experienced confusion and frustration about how to access and influence the development decision-making process for their communities.[41] Thus, the extent to which oil sands institutions enjoy normative legitimacy is debatable, depending upon how one views these issues.

34 ibid; JV DeMarco and P Muldoon, 'Environmental Boards and Tribunals in Canada: A Practical Guide' (LexisNexis Canada 2016).

35 Although a discussion of the complex statutory regime governing oil sands projects would be interesting here, particularly in terms of how it incorporates the views and preferences of various stakeholders, a detailed discussion is, unfortunately, beyond the scope of this article. An extensive overview can be found in the article by N Nikolaou, 'Mapping the legal framework for oil sands development in Alberta' (2022) 60 Alberta Law Review 67.

36 Responsible Energy Development Act SA 2012, c R-17.3, s 81, s 2(2) ('REDA'); van Harten (n 30) 12–13; KN Lambrecht, 'Constitutional Law and the Alberta Energy Regulator' (2014) 23 Constitutional Forum 33, 35–36.

37 Affected parties are defined as persons who 'may be directly and adversely affected' by an application: REDA (n 36) ss 32 and 34(3).

38 C Perry and others, 'Energy: Oil & Gas Canada' (Law & Practice Guide, Stikeman Elliott LLP 2017) 10.

39 Alberta Energy Regulator, 'Oil Sands Mining Authorizations' (Alberta Energy Regulator 2022) <https://www.aer.ca/regulating-development/project-application/application-process/oil-sands-mining-operations> accessed 6 December 2022.

40 Baker and Westman (n 7); Joly and Westman (n 10) 2, 18; Natcher (n 10) 1331–1332; Alberta Energy Regulator, *Stakeholder Engagement Framework* (March 2017) <https://www.aer.ca/documents/about-us/StakeholderEngagement_Framework.pdf> ('*AER Stakeholder Engagement Framework*').

41 AER *Stakeholder Engagement Framework* (n 40); M Cleland, L Nourallah and S Fast, 'Fair Enough: Assessing Community Confidence in Energy Authorities' (Canada West Foundation, University of Ottawa 2016).

Similarly, the perceived legitimacy of oil sands institutions and processes can be contested.[42] This mirrors broader concerns around building public support and acceptance[43] and addressing lower levels of trust amongst the public[44] in relation to other types of resource projects. Approval of oil sands projects and pipelines 'in the public interest', notwithstanding significant and irreversible harm to the environment and/or Indigenous rights, perpetuates conflict and public mistrust around oil sands development.[45] This is particularly so where decisions are made in an opaque manner lacking in transparency, making it difficult for the public to understand the 'public interest' values that override concern for the environment and climate, public health, Aboriginal and treaty rights, and other interests.[46] Public stakeholders often disagree with decision-makers about the appropriate balance to be struck, but struggle to find a suitable forum where their concerns may go from being 'heard' to being incorporated into environmental decision-making. During legal administrative challenges to these decisions, the courts apply narrow standards of review and grant broad discretion to oil sands decision-makers based upon their expertise, and many applications for judicial review are unsuccessful.[47]

Current institutional approaches to these difficult societal questions are inadequate in resolving these conflicts. Governments at all levels have been unable to effectively address issues that matter to local communities, contributing to stakeholder frustration and loss of public confidence.[48] Regulators are seen as prioritising economic concerns at the expense of other cherished values and interests.[49] However, these concerns are not shared by all, and many Canadians also support oil sands development. Given what is at stake for both supporters and detractors in these polarising conflicts, the decision-making process and how it incorporates various viewpoints becomes a central concern.[50] If decisions are slanted in favour of further development, the negative impacts cause consternation amongst its detractors. On the other hand, if development is hindered, the loss of its benefits becomes a source of controversy amongst its supporters. Striking the right balance to achieve responsible development in the oil sands has become increasingly challenging for regulators.

Recent studies and reports on public acceptance have been varied, with some finding that more Canadians support oil sands development than oppose it (particularly in Alberta), while others find that more Canadians are in opposition.[51] The fact that such studies are repeatedly

42 See e.g. Findlay (n 10); M Denchak, 'The Dirty Fight Over Canadian Tar Sands Oil' (Natural Resources Defense Council, 31 December 2015) <https://www.nrdc.org/stories/dirty-fight-over-canadian-tar-sands-oil> accessed 6 December 2022; Janzwood (n 10).

43 N Bankes, 'The Social Licence to Operate: Mind the Gap' (ABlawg.ca, 24 June 2015) <https://ablawg.ca/2015/06/24/the-social-licence-to-operate-mind-the-gap/> accessed 6 December 2022; M Cleland, 'From the ground up: Earning public support for resource development' (CanWest Foundation, Centre for Natural Resources Policy 2014); Turner (n 15); Gehman (n 14); J Emborg, SE Daniels and GB Walker, 'A Framework for Exploring Trust and Distrust in Natural Resource Management' (2020) 5 Frontiers in Communication 1; G Poelzer and S Yu, 'All trust is local: Sustainable development, trust in government and legitimacy in northern mining projects' (2021) 70 Resources Policy 101888.

44 M Gattinger, 'Public confidence in energy and mining development: Context, opportunities, challenges and issues for discussion' (National Workshop on Public Confidence in Energy and Mining Development, Energy and Mines Ministers' Conference 2016); D Hauka and S Muir, 'Healing the Divide: A submission to the Province of British Columbia's Rural Development Strategy' (Resource Works Society 2018); N Hotte, 'How is trust created during collaborative natural resource governance involving Indigenous communities in Canada?' (PhD Thesis, University of British Columbia 2020); F Bradley and others, 'Recommendations for the management of coal resources in Alberta' (Coal Policy Committee 2021).

45 Joly and Westman (n 10); Natcher (n 10); CN Westman and TL Joly, 'Oil sands extraction in Alberta, Canada: A review of impacts and processes concerning Indigenous peoples' (2019) 47 Human Ecology 233; BL Parlee, 'Avoiding the Resource Curse: Indigenous Communities and Canada's Oil Sands' (2015) 74 World Development 425.

46 See eg. *Métis Nation of Alberta Region 1 v Joint Review Panel* [2012] ABCA 352; *Adam v Canada (Minister of the Environment)* [2014] FCJ No 1248.

47 ibid.

48 AER *Stakeholder Engagement Framework* (n 40).

49 ibid; *BLCN v Alberta* (n 7); Baker and Westman (n 7).

50 See e.g. CK Aksamit and others, 'Sources of uncertainties in environmental assessment: Lessons about uncertainty disclosure and communication from an oil sands extraction project in Northern Alberta' (2020) 63 Journal of Environmental Planning and Management 317.

51 Brunner and Axsen (n 11); B Anderson and D Coletto, 'Public perspectives on Canada's oil resources' (Abacus Data 2016); K Sherren and others, 'Does noticing energy infrastructure influence public support for energy development? Evidence from a national survey in Canada' (2019) 51 Energy Research and Social Science 176; N Dusyk, J Axsen and K Dullemond, 'Who cares about climate change? The mass media and socio-political acceptance of Canada's oil sands and Northern Gateway Pipeline' (2018) 37 Energy Research & Social Science 12.

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undertaken supports the view that legitimacy is contested. However, apart from the lack of consistent results, such broad surveys do not reflect the nuances of public 'acceptance'. For example, many Aboriginal groups might acquiesce to development on treaty land and attempt to negotiate better terms for their communities because of perceptions that they will be on the losing side if they do not, believing that development will proceed in any event.[52] Some of these groups see environmental assessments, consultation, and other participatory processes for Indigenous communities in the oil sands region as a 'box-ticking' approach to SLO, rather than meaningful participation in development.[53] Prominent environmental advocacy groups continue to raise issues concerning standing to be heard and, of course, generally oppose oil sands development due to environmental and climate impacts.[54] Public concerns have been exacerbated by conflicting reports about the severity of environmental and health impacts relating to oil sands development.[55] A search of case law conducted by the author indicates an increase in the number of appeal and judicial review applications that have been filed in recent years challenging AER approvals, reflecting the level of contention.[56] This may be exacerbated in the future by youth climate litigation.[57]

Debates about oil sands extraction have become polarised.[58] A federal government report observed that 'the prevailing narrative positions their essential and significant contribution to Canada's economy and energy security against potential environmental damage and impact on First Nations communities', with conflicting scientific opinions 'calling into question the availability of credible data used in making sound policy decisions'.[59] Review panels have also noted the 'highly polarised views' that exist amongst different stakeholders, including Aboriginal groups, environmentalists, industry, and government representatives, about the merits of oil sands development versus its impacts.[60] SLO, i.e. the (ongoing) acceptance or approval of an activity or decision by local communities and other stakeholders,[61] continues to be identified as a key business risk faced by the industry.[62] Although there are some distinctions, the definitions of SLO and legitimacy are strikingly interrelated,[63] and so the identification of SLO as an ongoing business risk lends further support to the possibility that oil sands institutions may be suffering an unacknowledged crisis of legitimacy (depending upon whom one asks). Regardless of whether one considers normative or empirical accounts, it is clear that the legitimacy of oil sands institutions and processes is far from settled. Moreover, in considering the role of SLO

52 I Urquhart, 'Between the Sands and a Hard Place?: Aboriginal Peoples and the Oil Sands' (Working Paper No 10-005, Buffett Centre 2010).

53 Joly and Westman (n 10) 2.

54 See e.g. M Huot, N Lemphers and L Fischer, 'Oilsands and climate change: How Canada's oilsands are standing in the way of effective climate action' (Briefing Note, Pembina Institute 2011); *Pembina Institute v Alberta (Environment and Sustainable Resources Development)* [2013] AJ No 1047; Denchak (n 42); Janzwood (n 10).

55 See n 8 above.

56 See e.g. The Canadian Press, 'All litigation, all the time: Simmering Alberta oil sands disputes set to ignite legal firestorm in 2014' (*Financial Post,* 2 January 2014) <https://financialpost.com/legal-post/alberta-oil-sands-legal-disputes> accessed 6 December 2022.

57 Two youth climate cases against the Canadian government, *La Rose et al v Her Majesty the Queen,* 2020 FC 1008, and *Environnement Jeunesse v Procureur General du Canada*, 2021 QCCA 1871, were unsuccessful, and a third case against Ontario, *Mathur et al v Her Majesty the Queen in Right of Ontario* (Court File No CV-19-00631627), has not yet been decided. However, the global wave of climate cases may have implications for Canadian oil sands development in the future.

58 D Schindler, 'Tar sands need solid science' (2010) 468 Nature 499; G Hoberg and J Phillips, 'Playing Defence: Early Responses to Conflict Expansion in the Oil Sands Policy Subsystem' (2011) 44 Canadian Journal of Political Science 507.

59 Dowdeswell (n 8) 5.

60 Gosselin (n 8) 7.

61 World Bank, 'Striking a Better Balance: Volume 1. The World Bank Group and Extractive Industries' (WB 2003) <https://openknowledge.worldbank.org/handle/10986/17705> accessed 6 December 2022; RG Boutilier and I Thomson, 'Modelling and measuring the social license to operate: Fruits of a dialogue between theory and practice' (Conference Proceedings, International Mine Management, Queensland, Australia, 2011); K Moffat and A Zhang, 'The paths to social license to operate: an integrative model explaining community acceptance of mining' (2014) 39 Resources Policy 61–70; N Hall and others, 'Social license to operate: understanding how a concept has been translated into practice in energy industries' (2015) 86 Journal of Cleaner Production 301–310.

62 Ernst & Young Global Mining & Metals, 'Top 10 business risks facing mining and metals 2017–2018' (EYGM 2017) 8.

63 Gehman (n 14).

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in assessing the perceived legitimacy of extractive operations, Meesters et al find a tendency in the literature to focus on local stakeholders and a failure to consider wider sustainability implications.[64] Consequently, they argue that the evaluation of extractive operations must be based on a 'comprehensive concept of legitimacy that not only seeks the approval of local stakeholders but also recognises the importance of open-ended political deliberation that addresses global norms of social and environmental sustainability and includes diverse values, needs and interests'.[65] This points to a consideration of democratic legitimacy.

3. CONSTITUENT POWER AND DEMOCRATIC LEGITIMACY

3.1. WHY CONSTITUENT POWER THEORY

While political legitimacy considers the historical relationship between a state and its citizens, democratic legitimacy assesses the democratic character of the particular constitutional regimes that might exist in a state over time.[66] The democratic legitimacy of a constitutional regime can be assessed by reference to constituent power, such that if the creation of the constitution does not meet with its requirements (e.g. it does not originate in an act of popular participation that took place within the context of democratic openness and is not susceptible to reconstitution), it cannot be considered democratically legitimate.[67] A democratic deficit at that level may then provide an *explanation* for the legitimacy concerns that arise in the exercise of constituted power. This is important because efforts to address democratic deficits in the exercise of constituted power may otherwise prove futile without a comprehensive understanding of the legitimacy issues that a particular institution faces. Thus, if the way in which constituted power is exercised raises concerns around legitimacy, this may point to a need to look deeper into how this power came into existence. In other words, it may trigger the need to examine the legitimacy of the overarching constitutional regime governing the exercise of constituted power.

How the constitutional framers intended to allocate or consolidate power, who they were (and by extension, who was excluded), why they wished to structure power in this manner, and the institutional arrangements they created, are all relevant to the dynamics that exist in modern constitutional regimes. These underlie the legal and institutional contexts in which stakeholders operate. In the case of oil sands governance, without a deeper understanding of the root cause of legitimacy problems and a fulsome discussion of these power dynamics, policy-makers may find themselves skirting around potential solutions relating to public participation and deliberation. Conflicts over how decisions are made may persist until policy-makers acknowledge how (and why) power is structured the way it is within the Canadian environmental and resource governance framework. Any discussion of legitimacy is not complete without consideration of the democratic legitimacy of the constitutional regime that is responsible for creating and empowering present-day oil sands decision-makers.

There are many different ways to look at legitimacy, and from a multitude of disciplinary perspectives. Each of these perspectives has something to contribute to understandings of legitimacy and perhaps no single approach is preferable to any other. While they each offer something of interest, the focus of this article is to demonstrate the application of an approach from constitutional theory that has not been considered at length in relation to institutional legitimacy. This approach allows legitimacy issues to be traced back to a (possible) lack of popular participation at the time when the broader architecture for environmental governance was established (and an exploration of what that might reveal). As such, constituent power theory can deepen understandings of institutional legitimacy.

64 M Meesters and others, 'The Social Licence to Operate and the legitimacy of resource extraction' (2021) 49 Current Opinion in Environmental Sustainability 7.

65 ibid.

66 J Colón-Ríos, 'The Legitimacy of the Juridical: Weak Constitutionalism, Democracy and Constituent Power' (PhD Thesis, York University 2008) 133.

67 Colón-Ríos (n 15).

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3.2. OVERVIEW OF THE THEORETICAL APPROACH

The democratic legitimacy of a constitutional regime can be assessed in a number of ways, and the aim of this article is not to provide a thorough account of these various approaches. Rather, a consideration of what constituent power theory brings to an understanding of democratic legitimacy[68] requires a more focused discussion of how Colón-Ríos's approach differs from other ways of looking at the democratic legitimacy of constitutional regimes. For the purposes of this discussion, 'constitutional regime' encompasses the constitution (written or unwritten) and the juridical structures it creates (e.g. legislative, judicial, and executive branches of government as well as their interpretations about what the constitution requires).[69] It is the legal apparatus that shapes the exercise of power,[70] in this case the exercise of power in relation to oil sands governance.

Colón-Ríos begins by discussing conventional academic accounts that maintain the democratic legitimacy of a constitutional regime in one of two ways: (i) the substantive approach, which looks for the democratic character of a regime in the content of its fundamental laws and institutions; and (ii) the procedural approach, which sees it as the result of a democratic procedure.[71] Under the substantive approach, a regime may be defended as democratic if its laws and institutions are consistent with the principle of 'rule by the people' and it treats citizens equally, allows them to participate in everyday decision-making, and produces just outcomes. Under the procedural approach, laws and institutions enacted by an elected legislature according to the principle of majority rule can be defended as democratically legitimate, regardless of their content or nature.[72] Colón-Ríos argues that these two approaches tend to obscure the relationship between citizens and their constitution and fail to distinguish between the two dimensions of democracy: democracy at the level of daily governance (i.e. democratic governance) and democracy at the level of fundamental laws (i.e. the relation of citizens to their constitution). He criticises scholars like Jeremy Waldron, a proponent of the procedural approach, and Ronald Dworkin, 'the prototypical substantivist', as operating only at the level of democratic governance, approaching the first dimension of democracy as if it exhausted the democratic ideal, and ignoring the meaning of democracy at the level of fundamental laws.[73] Colón-Ríos sees the second dimension as directly connected to the question of democratic legitimacy because if there is a democratic deficit at the level of fundamental laws, legitimacy of the regime will inevitably be called into question.[74]

The second dimension is concerned with how a constitution came into existence (i.e. was it the result of a democratic process) and whether it can be altered through democratic means.[75] Constitution-making is seen as an exercise in self-government that must take place within a context of democratic openness. It requires a maximisation of public participation and is incompatible with 'given' or 'imposed' constitutions, regardless of the wisdom of their content.[76] Thus, a constitution may be consistent or inconsistent with democracy at the level of fundamental laws, with respect to the moment it was created (i.e. it may have been born democratically or undemocratically).[77] Colón-Ríos claims that democracy at the level of fundamental laws is not to be identified with a *form* of government but with 'moments in which a juridical order can come closer to an exercise of popular sovereignty'.[78] In doing so, he advances an alternative conception of popular sovereignty in which sovereignty is understood

68 ibid.

69 ibid 114.

70 ibid.

71 ibid 35–36; Colón-Ríos (n 66) 72.

72 Colón-Ríos (n 15) 35, 41.

73 ibid; Colón-Ríos (n 66).

74 Colón-Ríos (n 15) 35, 37.

75 ibid 38–39.

76 ibid 39, 102.

77 ibid.

78 Colón-Ríos (n 15) 38–39, 41.

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as constituent power (i.e. the power to produce novel constitutions), and not as the power of a commander to regulate the conduct of an inferior.[79]

The theory of constituent power emerged within the context of the French and American revolutions in the late 18th century, and was developed within the works of its most well-known proponents, Emmanuel Sieyes and Carl Schmitt.[80] It has been used to frame different conceptualisations of popular power over time, and Rubinelli notes that no single meaning can be attached to the notion of constituent power.[81] Instead, it has been used to make sense of the people's relationship to political power and to the institutions meant to embody it.[82] Constituent power is mobilised to question the role played by the people in the foundation of the modern state, the working of the legal-political system, and the criteria to assess its legitimacy over time.[83] Colón-Ríos's conception of constituent power is characterised by the idea that politics does not end with the adoption of a constitution, and that the citizenry retains the power to alter the constitutional regime when it wishes.[84] It is premised on the notion that present generations ought to have an unlimited right to model the fundamental laws under which they live, in accordance with the writings of Thomas Paine and Thomas Jefferson.[85] Similarly, Schmitt stresses that constituent power does not end or disappear after being exercised, and the political decision on which a constitution rests cannot act against its constituent subject. Thus, a constitution cannot destroy the political existence of the people's constituent power.[86]

Colón-Ríos highlights the distinction between the will that pre-dates the constitution (and is superior to it) and the positive constitutional forms that determine how public power is to be exercised and how ordinary laws are to be created.[87] Thus, there is a distinction between constituent and constituted powers, with constituted powers being the legal and political institutions created by the bearer of constituent power.[88] Sieyes asserts that these bodies (e.g. executive, legislative and judicial) are always limited by the constitutional forms which grant their existence, and that they have no power to alter the constitutional clauses that empower them.[89] Constituent power, on the other hand, remains 'in the state of nature' and is always capable of renovating established juridical orders.[90]

Based on the theories of Sieyes and Schmitt, Colón-Ríos arrives at a number of conclusions. Firstly, he concludes that democracy at the level of daily governance takes place in the juridical domain of the constituted powers, wherein executive, legislative and judicial actors enact, interpret and apply the ordinary laws that regulate and govern daily life in accordance with their constitutional mandate.[91] Democracy at the level of fundamental laws, however, belongs to the political domain of constituent power, wherein citizens deliberate and decide about important constitutional changes.[92] Secondly, Colón-Ríos sees the legitimacy of a constitutional regime as a matter of politics as opposed to a matter of juristic interpretation, justifiability, or belief. This necessitates that a constitution be the result of the constituent power of the people as a condition of legitimacy, and rules out 'given' or 'imposed' constitutions that are accepted as legitimate by a passive population. This conception explicitly rejects the idea that a legitimate constitution is one that was created according to the legal procedures in place at

79 Colón-Ríos (n 66) 104.

80 Colón-Ríos (n 15) 8; L Rubinelli, *Constituent Power: A History* (Cambridge University Press 2020).

81 Rubinelli (n 80) 3.

82 ibid. Colón-Ríos and Rubinelli have both described the various conceptions of constituent power over time, a discussion of which is beyond the scope of this article.

83 Rubinelli (n 80) 4.

84 Colón-Ríos (n 66) 153.

85 ibid 154.

86 C Schmitt, *Teoria de la Constitution* (Editorial Revista de Derecho Privado 1934) 88.

87 Colón-Ríos (n 15) 86.

88 ibid 84–85.

89 EJ Sieyes, *What is the Third Estate?* (Praeger 1963) 134.

90 ibid.

91 Colón-Ríos (n 15) 94–95.

92 ibid.

the moment of its adoption, one whose content can be rationally justified, or one that people believe to be legitimate.[93]

The connection with democracy becomes even clearer when one considers Kalyvas' deconstruction of the root word *constituere*, which literally means 'to set up or construct together'.[94] Hence, the very meaning of constituent power mandates that constitutional forms regulating the political association of constitution-makers must be jointly created.[95] On this basis, Colón-Ríos asserts that constituent power cannot be attributed to an individual or elite.[96] To enjoy democratic legitimacy, Colón-Ríos argues that a constitutional regime must meet two requirements. Firstly, it should originate in an act of popular participation that took place within the context of democratic openness, wherein even the most fundamental principles are subject to question and revision.[97] Secondly, the constitutional regime must allow popular sovereignty (understood as constituent power) to manifest from time to time. In other words, it must be 'susceptible to re-constitution' through a process that attempts to reproduce the degree of openness and popular participation present during a moment of democratic constitution-making.[98] A constitutional regime cannot meet these requirements if it attempts to permanently expel constituent power from the juridical terrain or approaches it as a threat.[99]

In highlighting the contested nature of the term 'democracy', Colón-Ríos notes that it is far from clear what democracy requires within the context of large and complex societies.[100] He does, however, elaborate upon some important principles regarding 'rule by the people'. He envisions a 'self-governing' people as a group of human beings that come together as political equals and give themselves the laws that will regulate their conduct and the institutions under which they live, highlighting that it must be today's people who rule and not past generations.[101] In a democratically open society, a self-governing people must be able to reformulate their commitments democratically. Democratic openness 'welcomes conflict and dissent'. Thus, it is incompatible with untouchable abstract principles, and stringent requirements for constitutional amendment are in clear tension with it.[102]

Popular participation in a democratically open society entails the 'equal sharing of activity and power' of all citizens.[103] Yet, radical changes in conceptions of democracy over the past few centuries have corresponded with the demise of popular participation within these conceptions.[104] Nevertheless, this is changing, and new forms of political investment have emerged within a broader decentring of democracy, resulting in changes to conceptions of legitimacy.[105] In discussing the evolution of democratic ideals, Rosanvallon notes that the meaning of the word 'majority' has changed and the 'people' can no longer be conceived of as a homogenous mass, as societies increasingly understand themselves in terms of minorities.[106] Thus, changes in normative understandings of what constitutes 'the people' add layers of complexity to Colón-Ríos's notion of 'a self-governing people'. While a deeper exploration of popular participation is beyond the scope of this article, it is worth mentioning that changing understandings and expectations around concepts of popular participation are relevant to participatory issues that

93 ibid 108.

94 A Kalyvas, 'The Basic Norm and Democracy in Hans Kelsen's Legal and Political Theory' (2006) 32 Philosophy and Social Criticism 588.

95 Colón-Ríos (n 15) 110–111.

96 ibid.

97 ibid 115–117.

98 ibid 116–117.

99 ibid.

100 Colón-Ríos embarks on an interesting discussion of how democracy is at odds with liberal constitutionalism, one that is beyond the scope of this article: ibid 57.

101 ibid.

102 ibid.

103 C Castoriadis, 'The Greek Polis and the Creation of Democracy' in David Ames Curtis (ed), *The Castoriadis Reader* (Blackwell Publishers 1997) 275.

104 Colón-Ríos (n 15) 68–69.

105 P Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Princeton University Press 2011) 4–7.

106 ibid.

arise within the context of oil sands development and are likely to be a source of tension and conflict.

4. CONSTITUENT POWER, DEMOCRATIC (IL)LEGITIMACY, AND OIL SANDS GOVERNANCE

Democracy at the level of governance is concerned with how a constitutional regime works on a day-to-day basis and, because of its impact on the daily lives of individuals, a deficit in democratic governance can be pressing for its citizens.[107] Many of the issues raised by public stakeholders concerning oil sands decision-making touch on matters of democratic governance at this level. For example, it may be argued that oil sands institutions suffer from a deficit in democratic governance because non-democratic institutions, lacking in representativeness and accountability to the electorate, may impose decisions upon the citizenry.[108] In the alternative, one might find a democratic deficit based on Dworkin's partnership view, wherein decisions can only be democratic if they protect the status and interests of every individual as a full partner and do not ignore the interests of some individuals and groups[109] (as may occur with some Aboriginal groups, landowners, or environmental advocacy groups).

Yet, oil sands institutions can also be defended as democratically legitimate under conventional substantive and procedural approaches. One may argue that the extensive participatory mechanisms that are employed during individual project review and approval, including constitutionally mandated Aboriginal consultation, are sufficient to support the democratic legitimacy of oil sands institutions and processes. It may also be argued that the laws and institutions that govern oil sands development have been created by a duly elected legislature in a process that was democratic, thus ensuring a democratic pedigree. The ultimate conclusions drawn about legitimacy at the level of governance will be guided by the theoretical or conceptual approach taken. However, looking deeper into the overarching constitutional regime can be revealing. Focusing on the second dimension of democracy by examining constituent power and shifting to a temporal approach that considers the formation of the constitutional regime that empowers oil sands institutions and processes may expose some underlying problems, and perhaps even highlight difficulties in defending their democratic legitimacy.

As mentioned before, the aim of this article is not to draw broad conclusions about the legitimacy of oil sands governance institutions or the Canadian constitutional regime per se. Rather, it seeks to demonstrate what might be learned about institutional legitimacy through an analysis based on constituent power theory. Although much more discussion and analysis would be required before any far-reaching conclusions can be drawn (something that is beyond the scope of this article), an application of Colón-Ríos's approach might go as follows. The requirements for assessing the democratic legitimacy of a constitutional regime (i.e. that it originates in an act of popular participation within the context of democratic openness and is susceptible to reconstitution) would have to be assessed separately for the two significant periods in Canadian constitutional history described above.

4.1. POPULAR PARTICIPATION AND DEMOCRATIC OPENNESS

One might begin with the Constitution Act 1867 to see if it originated in an act of popular participation. Here, it is important to consider the fact that the resolutions leading to the BNA Act were drafted at the Quebec Conference in 1864 by 33 delegates from various regions of Canada, at a time when the population of these colonial territories was nearly 3.6 million.[110] All of the drafters of the BNA Act were white males and, in fact, are known colloquially as

107 Colón-Ríos (n 15) 38.

108 Based on Waldron's conception of democratic institutions: Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999). For clarity, the author is not making such an argument, as any determination of representativeness or accountability would require deeper analysis of how tribunal members are selected, appointed and held accountable for their decisions. Such an analysis is beyond the scope of this article.

109 R Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006).

110 Statistics Canada, 'Canadian statistics in 1867' (Statistics Canada, 26 August 2009) <https://www65.statcan.gc.ca/acyb07/acyb07_0002-eng.htm> accessed 6 December 2022.

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the 'Fathers of Confederation'.[111] These individuals were of Western European heritage, mainly English and French, with some Irish, Scottish and German ancestry. They represented the legal and political elite of the time, though there were some who were formerly in business, farming or medicine. No Aboriginal people are believed to have participated.[112] Thus, the Constitution Act 1867 was framed by a very small number of elite individuals (a fairly homogenous group by today's standards), and then imposed upon the citizenry. In fact, Russell contends that Canadians did not 'come together as a sovereign people' at Confederation and have still not come together more than 130 years later.[113] Based on the foregoing, it would be difficult to argue that the Constitution Act 1867 originated in an act of popular participation. One might argue that, even at Confederation, constituent power was seen as existing within the exclusive domain of a few.

Even if by some stretch of the imagination it could be demonstrated that the Constitution Act 1867 originated in an act of popular participation that took place within the context of democratic openness,[114] it is uncertain whether it was susceptible to reconstitution. The sheer difficulty in achieving changes to it in 1982 is a testament to its fixed nature. Although a number of small amendments were made in subsequent decades through the UK Parliament, when Canadians sought to exercise their constituent power to re-constitute themselves in 1982, this could only be achieved through political manoeuvring that ultimately excluded a large segment of the Canadian population.[115] Moreover, many of the core elements that structured and allocated power remained fixed (apart from the introduction of human rights constraints), which might be taken to mean that the exclusive manner in which constituent power was exercised in 1867 resulted in power structures that were firmly embedded into the fabric of Canadian society, thus precluding the exercise of constituent power by subsequent generations.

Broad-based public consultation and participation did occur in the decade leading up to the 1982 patriation of the constitution. Many segments of Canadian society were represented, including women, minorities, and Aboriginal groups. The text was drafted and re-drafted to reflect ongoing deliberations, and had the appearance of not being framed exclusively by the political elite. However, aspects of the process leading up to patriation call into question whether it truly originated in an act of popular participation. Prime Minister Pierre Elliott Trudeau was unable to secure the cooperation of provincial premiers and considered bypassing them altogether by going straight to the UK Parliament to achieve the constitutional reforms which he sought. He proposed to go over the heads of provincial politicians to present the Canadian people with a 'people's package' for reform and contemplated the possibility of a public referendum.[116] The matter ended up before the courts, and in *Patriation Reference*, the Supreme Court of Canada held that, although the federal government had the legal authority to unilaterally seek amendment of the constitution without the consent of the provinces, such amendments required a substantial degree of provincial consent by constitutional convention.[117]

This forced the federal and provincial governments to return to negotiations, and various drafts were considered during a ministers' conference in November 1981. Unfortunately, consensus was reached during late night meetings that were attended by most delegations, with the exception of Quebec, in what has come to be known as the 'Night of the Long Knives'.[118] At the

111 J Pope (ed), *Confederation: Being a series of hitherto unpublished documents on the British North America Act* (Carswell Co Ltd 1895) 1–4.

112 K Ladouceur, 'Achieving Legitimacy: The Legal Relationship between Indigenous Peoples and the Canadian State' (MA thesis, Carleton University 2012).

113 PH Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (University of Toronto Press 2004).

114 One may find the criteria of democratic openness is satisfied, given the extent to which possible configurations for organisation and administration of the new federation were debated and deliberated upon leading up to Confederation.

115 M Dunsmuir and B O'Neal, 'Quebec's Constitutional Veto: The Legal and Historical Context' (Background Paper BP-295E, Library of Parliament 1992); Government of Quebec, 'Quebec's political and constitutional status: An overview' (Government of Quebec 1999); I MacPherson, 'The Patriation of Canada's Constitution by Pierre Trudeau' (2022) 6 MacEwan University Student EJournal 1.

116 M Dawson, 'From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown' (2012) 57 McGill Law Journal 955.

117 *Patriation Reference* [1981] 1 SCR 753.

118 Dawson (n 116).

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time, Quebec comprised approximately 25 per cent of the Canadian population, including the vast majority of French Canadians. Its exclusion from these last-minute negotiations resulted in the imposition of the Constitution Act 1982 upon at least 25 per cent of the citizenry. Several major (and controversial) changes were introduced into the new agreement, and these were not subject to widespread public debate or put to a referendum. Due to its exclusion, Quebec rejected the new agreement and its relationship with the rest of Canada was strained in subsequent years. Though the criterion of democratic openness may have been satisfied given the extent to which human rights, Aboriginal recognition, and provincial powers were debated, these events call into question whether the Constitution Act 1982 originated in an act of popular participation.

The above analysis with regards to popular participation and democratic openness may apply with even greater force to Aboriginal communities. While the exclusion of Aboriginal groups from constitutional deliberations in 1867 is a complex topic that is beyond the scope of this article, it is worth mentioning that they were excluded from deliberations that ultimately established an entire system of governance that affected them profoundly.[119] This, coupled with the fact that much of oil sands development occurs on Aboriginal treaty land and impacts the rights of Aboriginal groups significantly in other ways, means that legitimacy claims may fail from their perspective, as well.

4.2. SUSCEPTIBILITY TO RECONSTITUTION

It may also be difficult to argue that the Constitution Act 1982 meets the other requirement, namely that the constitutional regime must allow popular sovereignty (i.e. constituent power) to manifest from time to time, and cannot permanently expel constituent power from the juridical terrain or approach it as a threat. Since patriation in 1982, there have been about fourteen amendments made to the constitution, largely limited to matters affecting specific provinces, although one amendment did strengthen Aboriginal and treaty rights.[120] However, the two most comprehensive attempts at reform (i.e. Meech Lake Accord, Charlottetown Accord) were unsuccessful due to onerous provisions for amendment and the difficulties in achieving consensus. Many scholars now believe that the constitution is firmly entrenched and that textual requirements for major constitutional amendment that were agreed upon without open deliberation during the 'Night of the Long Knives' are impossible to satisfy.[121] Like other liberal constitutions around the world, the Canadian constitution is quite fixed. While the representativeness requirements for significant amendments would be likely to ensure high levels of popular participation, the realities of consensus-building in a large and complex society mean that such amendments will be nearly impossible to achieve.[122] That such difficulties would have already been recognised at the time of patriation lends support to the view that the Constitution Act 1982 may not have been designed to be 'susceptible to re-constitution'.

4.3. IMPLICATIONS?

Although the question of democratic legitimacy of the Canadian constitutional regime is one that requires deeper analysis, based on Colón-Ríos's theory of constituent power, such an analysis may very well lead to the conclusion that it is not democratically legitimate. If so, what does this mean for oil sands institutions and processes? If the overarching constitutional regime that creates and empowers oil sands institutions and processes is lacking in democratic legitimacy, then a lack of legitimacy at the level of democratic governance may flow from this and need to be accounted for in any discussions of institutional legitimacy. Arguably, if the Canadian constitutional regime originated out of an exclusive process of deliberation amongst the legal and political elite who structured power to their liking, reserving control over the most

119 Ladouceur (n 112). See also B Slattery, 'The Hidden Constitution: Aboriginal Rights in Canada' (1984) 32 American Journal of Comparative Law 361; RA Milen, 'Canadian Representation and Aboriginal Peoples: A Survey of the Issues' (Research Program of the Royal Commission on Aboriginal Peoples 1994); BF Gussen, 'A comparative analysis of constitutional recognition of Aboriginal peoples' (2017) 40 Melbourne University Law Review 867, 883–884.

120 Constitution Amendment Proclamation, 1983 (SI/84-102).

121 See e.g. R Albert, 'The Difficulty of Constitutional Amendment in Canada' (2015) 53 Alberta Law Review 85.

122 See eg. J Cameron, 'Legality, Legitimacy and Constitutional Amendment in Canada' (Legal Studies Research Paper Series, Osgoode Hall Law School 2016).

important decisions that would be taken by successive governments, it is not surprising that they created a system that was not designed to share decision-making power with the broader public. The institutional framework created as a result of this constitutional design may simply not have envisioned widespread deliberative decision-making.

5. CONCLUDING REMARKS

The lack of popular participation at Confederation remains relevant today, as it was the time when much of the broader architecture for Canadian environmental governance was established. Oil sands decision-making occurs within this framework, and much of this architecture was retained with patriation in 1982. In recent decades, oil sands institutions and processes have increasingly become a source of controversy, conflict and public mistrust. This has called into question the legitimacy of these institutions and their decision-making processes, though public opinion is divided. This article considered the implications of constituent power and the democratic constitutional theory advanced by Colón-Ríos for the legitimacy of modern oil sands institutions. It proposed the examination of constituent power as an analytical approach to understanding institutional legitimacy in resource conflicts where legitimacy is contested. Through such an approach, it is possible to trace legitimacy issues back to democratic deficits at the level of fundamental laws (i.e. the relation of citizens to their constitution). Though this approach has not received much consideration in relation to institutional legitimacy, it is valuable because it may reveal the underlying causes of a democratic deficit at an institutional level, which may be contributing to legitimacy issues. If the analysis reveals that the constitutional regime does not meet the criteria for democratic legitimacy in its formation, it becomes more difficult to support legitimacy claims in relation to the regulatory framework created and empowered by it. This can be relevant where questions around the legitimacy of these institutions are prompted by competing visions of what democratic governance requires.

In this instance, an application of constituent power theory may reveal that the creation of the constitutional regime in 1867 and its patriation in 1982 did not originate in an act of popular participation. This may undermine any claims to democratic legitimacy, but can also provide an explanation for modern-day conflicts over oil sands development. If the constitutional framework was developed in the absence of popular participation by the legal and political elite of the time, it should not be surprising that the system as constituted lacked stronger mechanisms for popular participation. This, then, may be carried through into oil sands governance and reflected in the role of the public in 'public participation'. It may explain the significant barriers that public stakeholders currently face in having their views incorporated into oil sands decision-making. The public was perhaps never meant to share extensively in decision-making power over matters that were considered to be within the exclusive domain of law-makers and policy experts (though such a conclusion would require further investigation of the constitutional framers' intentions). If this is, in fact, the case, it is a factor which ought to be taken into account when determining ways to improve oil sands governance frameworks. Given the difficulties (and perhaps even undesirability) of engaging in further constitutional reform, it may be necessary to look for other ways to bolster democratic decision-making.

A deep understanding of the institutional framework is an important starting point for determining other strategies to address the democratic deficit (outside of constitutional reform). For example, rather than simply relying on the election process and the appointment of expert decision-makers, it may be possible to experiment with various forms of decentralised (i.e. local not just provincial) decision-making that seek to establish broad-based consensus on resource development. After all, governance that is inclusive in design and decision-making brings legitimacy and improves outcomes, as actors are more likely to buy into results, help to identify solutions, and put them into practice if they are involved in decision-making.[123] This begins with the effective and collaborative design of the governance system (i.e. process co-design).[124] While an extensive discussion of deliberative democratic approaches is beyond the scope of this article, it is important to note that, without a deeper understanding of these power

123 Council of Canadian Academies, 'Greater Than the Sum of Its Parts: Toward Integrated Natural Resource Management in Canada' (The Expert Panel on the State of Knowledge and Practice of Integrated Approaches to Natural Resource Management in Canada, CCA 2019) xviii.

124 ibid.

dynamics, conflicts over how decisions are made will persist, particularly with the resurgence of popular participation and decentring seen in modern democracies.[125] A concrete understanding of democratic legitimacy is essential to questions of institutional legitimacy in cases of conflict.

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COMPETING INTERESTS

The author has no competing interests to declare.

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125 As observed by Rosanvallon (n 105).

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