Pipelines and the Constitution: a Special Issue of the *Review of Constitutional Studies*

*Nigel Bankes**

Introduction

This special issue is concerned with the constitutional law and practice surrounding the construction and operation of interjurisdictional energy infrastructure in Canada — especially pipelines. This introductory essay sets the scene. Part 1 begins with some general observations on the nature of modern energy systems referencing the highly interconnected nature of such systems and some common characteristics of those systems. Part 2 describes the current interjurisdictional energy infrastructure in Canada. Part 3 introduces the basic elements of federal jurisdiction with respect to interprovincial and international energy infrastructure. Part 4 references recent events and current projects that have led to the introduction of new legislation that will see the abolition of the current federal regulator, the National Energy Board (NEB),[1] and its replacement by the Canadian Energy Regulator (CER).[2] Part 5 concludes.

Energy infrastructure issues are particularly salient at this time for several reasons. First, over the last several years, new greenfield pipeline proposals[3] and pipeline expansion proposals[4] have engendered significant (and taken in

* Professor and Chair of Natural Resources Law, University of Calgary.

1 Established by the *National Energy Board Act*, RSC 1985, c N- 7 [*NEB Act*].

2 Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018 (third reading 20 June 2018), online: <www.parl.ca/LegisInfo/BillDetails.aspx?billId=9630600&Language=E> [Bill C-69].

3 Examples include Enbridge's Northern Gateway project (NGP) and TransCanada's Energy East project (EAP). For NGP see Canada, National Energy Board, *Joint Review Panel Report on the Enbridge Northern Gateway Project*, Volume 1 - Connections, Filing: A56136 (20 December 2013), online <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2396699> [Northern Gateway Project]. For the subsequent litigation quashing the project certificate see *Gitxaala Nation v Canada*, 2016 FCA 187, [2016] 4 FCR 418. For EAP see, National Energy Board, "Energy East and Eastern Mainline Projects" (22 November 2017), online: <www.neb-one.gc.ca/pplctnflng/mjrpp/nrgyst/index-eng.html>. TransCanada withdrew its application for this project on October 5, 2017.

4 The most important expansion project is the Trans Mountain Expansion Project (TMX). See Canada, National Energy Board, *National Energy Board Report – Trans Mountain Expansion Project – OH-001-2014*, Filing: A77045 (19 May 2016), online: <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2969867> [Trans Mountain Expansion Project]. For the subsequent litigation quashing

its totality, unprecedented) opposition from members of civil society as well as from Indigenous communities, cities, towns and provincial governments. Second, Canada's main federal energy infrastructure statute, the *National Energy Board Act* (*NEBA*),[5] which underwent significant revisions under the Harper Conservative administration in 2012[6] and 2015,[7] is set to be significantly re-vamped by the current Trudeau Liberal administration following intensive public review principally under the auspices of two expert panels, one focusing on environmental impact assessment[8] and a second dealing directly with the modernization of the National Energy Board.[9] The new Act, the *Canadian Energy Regulator Act* (*CERA*)[10] will repeal *NEBA* and replace the NEB with the Canadian Energy Regulator (CER). Although *CERA* contains some innovations, much of the content of the legislation remains the same.

The third reason for the salience of these issues is that, while new energy infrastructure projects have always attracted litigation, current projects have attracted significantly increased litigation.[11] This litigation covers issues of administrative law[12] and constitutional law (both division of powers and Indigenous rights)[13] and provides a rich body of case law on which the authors draw in this special issue.

The invitation to commission and edit the essays for this special issue came to me in November 2017, shortly after the Federal Court of Appeal had heard argument in *Tsleil-Waututh Nation v Canada (Attorney General)*

---

the project certificate see *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153, [2018] FCJ No 876 [*Tsleil-Waututh*].

5 *NEB Act, supra* note 1.

6 *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19, at Part 3, Division 2 [*Jobs, Growth Act*].

7 *Pipeline Safety Act*, SC 2015, c 21.

8 Canada, Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada, Final Report of the Expert Panel for the Review of Environmental Assessment Processes* (Ottawa: Canada Environmental Assessment Agency, 2017), online: <www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf> [Common Ground].

9 Canada, Expert Panel on the Modernization of the National Energy Board, *Forward, Together: Enabling Canada's Clean, Safe and Secure Energy Future* (Ottawa: Expert Panel on the Modernization of the National Energy Board, 2017), online: <www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf> [Forward, Together].

10 Bill C-69, *supra* note 2, Part 2. At the time of writing, the Bill had passed the House of Commons.

11 For a listing of judicial proceedings relating to different NEB decisions, see the NEB's website under the tabs "Application and Filing" and then "Court Challenges", online: <www.neb-one.gc.ca/index-eng.html>.

12 Lucas' essay in this volume canvasses some of the relevant administrative law jurisprudence.

13 The division of powers case law is canvassed in this volume in the essays by Olszynski and Chalifour. Wright canvasses the case law dealing with Indigenous rights.

[*Tsleil-Waututh*] (the TransMountain Expansion case).[14] That Court handed down its unanimous decision on August 30, 2018, just as the authors of the essays in this volume were finalizing their contributions. In its decision, the Court concluded that the process that led the Governor in Council to direct the issuance of a certificate of public convenience and necessity was subject to two fatal flaws. The first flaw was that the NEB had failed to properly assess the scope of the expansion project by neglecting to consider whether associated incremental tanker traffic should be included within the definition of "the project" for the purposes of conducting the environmental impact assessment. The second flaw identified by the Court was that Canada had failed to adequately consult and accommodate Indigenous communities in the period between when the NEB gave its recommendations to the Governor in Council and when the Governor in Council issued its direction to the NEB to issue a project certificate.

The decision met with vastly different reactions. While it was welcomed by many First Nations (especially First Nations with territories on the Salish Sea) and by the cities of Vancouver and Burnaby, others were incensed. Premier Notley, for example, indicated that Albertans and she herself were "angry" and that this most recent development suggested that "building a pipeline to tidewater is practically impossible."[15] The Premier even called for Parliament to be recalled "to fix the NEB process" presumably therefore demanding passage of an amendment to the *Canadian Environmental Assessment Act 2012* to retroactively amend the definition of "project" to ensure that a pipeline project (or at least this one) does not include associated tanker traffic.[16]

14 *Tsleil-Waututh, supra* note 4.

15 Premier Rachel Notley, "Trans Mountain Pipeline: Premier Notley" (Address, 30 August 2018), online: <www.alberta.ca/release.cfm?xID=585428633B909-DEF9-2B91-6773792AA5DA51A9>.

16 Wiser heads have perhaps prevailed. On September 20, 2018, by Order in Council, PC 2018-1177, the federal cabinet directed the NEB to reconsider its recommendations and terms and conditions with respect to Project-related marine shipping. See National Energy Board, "NEB Receives New Order in Council regarding Trans Mountain Expansion Project", *Government of Canada* (20 September 2018), online: <www.neb-one.gc.ca/bts/nws/whtnw/2018/2018-09-21-eng.html>. Some days later the Minister of Natural Resources announced that the Government would not appeal the Federal Court's decision and it would engage in meaningful consultations as directed by the Federal Court of Appeal. More specifically, Minister Sohi indicated that the government had appointed the Honourable Frank Iacobucci as a Federal Representative to oversee the consultation process. The Press release indicated that Mr Iacobucci would "provide advice on designing the process" and then "oversee it to ensure that Indigenous consultations are meaningful and comply with the judgement of the Federal Court of Appeal." See Natural Resources Canada, News Release, "Government Announces Part II of Path Forward on the Trans Mountain Expansion Project" (3 October 2018), online: <www.canada.ca/en/natural-resources-canada/news/2018/10/government-announces-part-ii-of-path-forward-on-the-trans-mountain-expansion-project.html>.

At the very least, these events establish that the decision of the editors of this journal to devote a special issue of the *Review of Constitutional Studies* to "pipelines and the constitution" is a timely one. The issues are both important and challenging. They engage traditional division of powers questions, Indigenous rights issues, and questions relating to the scope of project assessments (and the upstream and downstream reach of those assessments) and the roles of provinces and municipalities.

1.0 Energy systems

Energy systems are highly interconnected by a value chain and by actual physical infrastructure from the point of production and generation through to transmission, distribution, and ultimately consumption by final end-use consumers.[17] Some types of energy systems are more highly connected than others due to the nature of the product or service. Electricity systems are the most highly connected since, with the limited exception of delivery through batteries, electricity is always delivered over lines and most domestic and industrial consumers are connected to those lines (i.e. they are "on the grid" rather than "off the grid"). Natural gas systems are the next most highly interconnected since, while liquefied natural gas (LNG) can be delivered via cylinders or larger containers including sea-going LNG tankers, natural gas is mostly collected from numerous wellheads in producing fields and then, following compression and processing (to ensure pipeline-quality gas for safety and quality control), transported across large distances and into individual factories and homes through some combination of transmission and distribution pipelines. Oil systems are the least tightly networked given the options that exist for economic transportation of oil across a number of media including trucks, gathering lines, transmission lines, railcars and large crude carriers.[18] Nevertheless, oil (whether in its crude form or as a refined product) is frequently carried over long distances by large diameter pipelines. Different liquid products can be 'batched' in pipelines. Thus, a pipeline such as the TransMountain, which

17 See generally Martha Roggenkamp et al, eds, *Energy Networks and the Law: Innovative Solutions in Changing Markets* (Oxford: Oxford University Press, 2012).

18 Exports of Canadian Crude Oil by Rail reached 170,000 barrels per day in March 2018. See National Energy Board, "Canadian Crude Oil Exports by Rail – Monthly Data", NEB, Canadian Crude Oil Exports by Rail – Monthly Data, *Government of Canada*, online: <www.neb-one.gc.ca/nrg/sttstc/crdlndptrlmprdct/stt/cndncrdlxprtsrl-eng.html>. No energy transportation system is free of risk, but the risks of oil transport by rail were brought home vividly to Canadians with the Lac Mégantic, Québec disaster in 2013. For the investigation report see Canada, Transportation Safety Board of Canada, *Railway Investigation Report*, R13D0054 (Ottawa: Minister of Public Works and Government Services Canada, 2014), online: <www.tsb.gc.ca/eng/rapports-reports/rail/2013/r13d0054/r13d0054.pdf>.

runs from Edmonton to Burnaby, can be used to transport refined petroleum product as well as different grades of crude oil to the lower mainland of British Columbia.

Electricity transmission lines and natural gas and oil pipelines share certain characteristics. Most importantly, they are linear projects that frequently stretch considerable distances. The electricity system in the Pacific Northwest connects generation and end users stretching from British Columbia down to California.[19] The TransCanada mainline (Canada's main west-to-east natural gas pipeline system) connects Alberta with Ontario and beyond.[20] Hence, unlike a single mining project with a limited footprint that directly impinges on a confined geographical area,[21] and perhaps only a single municipal and provincial jurisdiction or a single Indigenous community, pipelines and transmission lines inevitably cross many geographical and jurisdictional lines. These lines include natural watershed boundaries, international boundaries, interprovincial boundaries, municipal boundaries, and the traditional territories of Indigenous communities. The precise legal implications of this multi-jurisdictional presence must ultimately be determined by the terms of the *Constitution Act, 1867*. Viewed through that lens, any potentially relevant and applicable federal and provincial laws, as well as relevant municipal and similar by-laws, must be considered in tandem with the doctrines of paramountcy and interjurisdictional immunity. Our consideration must also extend to the constitutional rights of Indigenous communities recognized by the *Constitution Act, 1982* where interjurisdictional energy infrastructure projects cross the traditional territories of those communities as they invariably will.

19 The Western Interconnection comprises an integrated grid encompassing Alberta, British Columbia, 14 western States, and the northern portion of Baja California, Mexico. The Western Electricity Coordinating Council (WECC) develops reliability standards for this Interconnection. There are similar regional coordinating councils across North America. See Western Electricity Coordinating Council, online: <www.wecc.biz/Pages/home.aspx>.

20 A recent decision of the Ontario Court of Justice described the mainline as consisting of approximately 14,000 km (in some areas there are parallel lines of pipe) of pipeline extending from the Alberta/Saskatchewan Border to the Québec/Vermont border: *Aroland First Nation v Transcanada Pipelines Ltd.*, 2018 ONSC 4469, [2018] OJ No 4069.

21 This is not to suggest that the environmental effects of a mining project will necessarily be geographically confined. There may be atmospheric emissions associated with such a project, acid mine tailings, and tailings dam management issues, all of which may affect environmental quality over a broad area and throughout a watershed as in the case of a major tailings dam failure such as that of Mount Polley. For the Mount Polley incident see British Columbia, Independent Expert Engineering Investigation and Review Panel, *Report on Mount Polley Tailings Storage Facility Breach* (British Columbia: Province of British Columbia, 2015), online: <www.mountpolleyreviewpanel.ca/sites/default/files/report/ReportonMountPolleyTailingsStorageFacilityBreach.pdf>.

Pipelines and transmission lines share other features. They are typically considered to be natural monopolies[22] (although there is also the possibility of pipe-on-pipe competition).[23] Therefore, they are generally subject to some form of economic regulation, typically on a cost-of-service basis.[24] In return, the proponent of the pipeline or transmission line enjoys the benefit of a power of expropriation if it cannot secure an agreement to require the necessary right-of-way, as well as the opportunity to earn a reasonable return on invested capital (the rate base) and the return of its invested capital over the life of the plant.[25]

2.0 Existing interjurisdictional energy infrastructure

2.1 Pipelines

There are approximately 73,000 km of pipeline in Canada that are part of international or interprovincial undertakings.[26]

The main oil and product pipelines are: the Enbridge Mainline, formerly known as Interprovincial Pipeline, (Edmonton, AB to the international boundary at Gretna, MB re-entering Canada at Sarnia, ON) with a capacity of 2,851 Mb/d; TransCanada Keystone (Hardisty, Alberta to the international boundary in MB) with a capacity of 591 Mb/d; Kinder Morgan Trans Mountain Pipeline (Edmonton, AB to Burnaby, BC) with a capacity of about 300 Mb/d; Spectra Express (Hardisty AB to the international boundary near Wild Horse, AB) with a capacity of 280 Mb/d); Montréal Pipeline, Enbridge Westspur (capacity of 255 Mb/d); and the Trans Northern Pipeline (refined products from Montréal to Toronto) with an average throughput of 212 M/bd.[27] Federally

22 On natural monopolies and regulation see Stephen G Breyer, *Regulation and Its Reform* (Cambridge, Massachusetts: Harvard University Press, 1982) Ch 1.

23 For an example of pipe-on-pipe competition, consider the situation in North East British Columbia where three different pipeline systems compete to provide take-away capacity from significant shale gas developments. See Canada, National Energy Board, "Examination to Determine Whether to Undertake an Inquiry of the Tolling Methodologies, Tariff Provisions, and Competition in Northeast British Columbia", Examination Decision, *Government of Canada* (8 March 2018), online: <https://apps.neb-one.gc.ca/REGDOCS/File/Download/3490855>.

24 See generally Robert L Mansell & Jeffrey R Church, *Traditional and Incentive Regulation: Applications to Natural Gas Pipelines in Canada* (Calgary: University of Calgary Press,1995).

25 The return of capital is captured by the concept of depreciation. Depreciation costs are recovered from each successive generation of customers through the pipeline tolls and tariff.

26 Canada, National Energy Board, *Canada's Pipeline Transportation System 2016* (Calgary: National Energy Board, 2016) at 3, online: <www.neb-one.gc.ca/nrg/ntgrtd/trnsprttn/2016/index-eng.html> [Pipeline Transport System].

27 *Ibid* at 5.

regulated oil pipelines are generally common carriers with an obligation to accept product for carriage on a non-discriminatory basis.[28]

The main federally regulated natural gas pipelines are: Nova Gas Transmission Ltd (NGTL) (more than 25,000 km of pipeline and associated facilities in Alberta and North East British Columbia);[29] TransCanada Pipe Lines Limited Mainline (a 14,100 km system extending from Alberta-Saskatchewan boundary across Saskatchewan, Manitoba and Ontario and through to a portion of Québec);[30] the Foothills Pipeline System, BC (transports gas from a junction with the NGTL near Caroline, Alberta to the international boundary near Kingsgate, BC); the Foothills Pipeline System, SK (transports gas from a junction with the NGTL near Caroline, Alberta to the international boundary near Monchy, SK);[31] the Alliance Pipeline (transports gas from NE British Colu,bia and NW Alberta to the Chicago market hub);[32] the Westcoast Transmission System (extends from SE Yukon and SW Northwest Territories, Alberta and British Columbia to the international boundary near Huntington, BC);[33] the Trans Québec and Maritime Pipeline (extends from TransCanada's mainline near St. Lazare, Québec to a point near Québec City with a spur to the international boundary near East Hereford);[34] the Maritimes and Northeast Pipeline (from Goldsboro, NS through New Brunswick to the international boundary near St. Stephen, NB);[35] and Emera's Brunswick Pipeline (taking re-gasified gas from the Canaport LNG facility to the international border near St. Stephen, NB).[36] Federally regulated natural gas pipelines are generally contract carriers and thus are not subject to a default common carrier obligation.[37]

As noted above, federally regulated pipelines are subject to economic regulation by the NEB.[38] For this purpose, the Board distinguishes between Group

28 *NEB Act*, *supra* note 1, s 71. The obligation is subject "to such exemptions, conditions or regulations as the Board may prescribe". See *Dome Petroleum Ltd. v National Energy Board*, [1987] FCJ No 135, 73 NR 135 (FCA) [*Dome Petroleum*] and Jennifer Hocking, "The National Energy Board: Regulation of Access to Oil Pipelines" (2016), 53:3 Alb L Rev 777.

29 Pipeline Transport System, *supra* note 26 at 68.

30 *Ibid* at 72.

31 *Ibid* at 76.

32 *Ibid* at 79.

33 *Ibid* at 82.

34 *Ibid* at 85.

35 *Ibid* at 88.

36 *Ibid* at 91.

37 *NEB Act, supra* note 1, s 71(2). While the starting premise is that gas pipelines are contract carriers (and thus shippers must enter in to long term contracts), s 71(2) authorizes the NEB to make an order requiring the owner of a natural gas pipeline to provide service.

38 See *Ibid*, Part IV.

1 and Group 2 companies. Group 1 companies have extensive systems and many shippers. The Board subjects these companies to a higher degree of regulation and surveillance. The Group 2 companies "operate smaller, less complex pipelines with few shippers."[39] Group 2 companies are regulated on a complaint basis, meaning that the Board will not interfere absent a complaint.[40]

2.2 Powerlines

As of July 2016, there were 84 international powerlines regulated by the NEB. These lines vary in length and size.[41] The Canadian Electricity Association identifies 35 of these interconnections as "major."[42] Canada has significantly greater North\South (international) intertie capacity than it does west\east (interprovincial).[43] International powerlines are not subject to economic regulation by the NEB. There are a number of additional international intertie projects proposed,[44] recently approved, or under construction, including the Lake Erie Interconnector.[45] There is considerable interest in investing in additional intertie infrastructure driven, in part, by the need to reduce greenhouse gas emissions by facilitating connections to renewable forms of energy.[46]

39 See pipeline companies regulated by the NEB, National Energy Board, "Pipeline Companies Regulated by the NEB", *Government of Canada* (27 September 2018), online: <www.neb-one.gc.ca/bts/whwr/cmpnsrgltdbnb-eng.html>.

40 For an example of such a complaint and the Board's resolution of the complaint, see Letter from National Energy Board to D G Davies and Paul Kahler (26 May 2011) Letter Decision, Application Regarding the Express Pipelines Ltd. Husky Lateral.

41 Canada, National Energy Board, "Electricity Regulation and Market Monitoring", (Calgary: National Energy Board), online: <www.neb-one.gc.ca/bts/nws/rgltrsnpshts/2016/18rgltrsnpsht-eng.html#wb-cont>.

42 Canada, Canadian Electricity Association, *The North American Grid: Powering Cooperation on Clean Energy and the Environment* (Ottawa: Canadian Electricity Association, 2016) at 7, online: <https://electricity.ca/wp-content/uploads/2017/05/CEA_16-086_The_North_American_E_WEB.pdf> [The North American Grid].

43 House of Commons, *Strategic Electricity Interties*, 42nd Parl, 2st Sess, at 7, online: <www.ourcommons.ca/DocumentViewer/en/42-1/RNNR/report-7/> [Strategic Electricity Interties].

44 Manitoba Hydro, for example, is proposing to construct and operate a 500 kV alternating current international power line (IPL) extending from Manitoba Hydro's Dorsey Converter Station in Manitoba to the international boundary between Manitoba and Minnesota (Dorsey IPL). This application is currently under review by the NEB. See Canada, National Energy Board, "Manitoba-Minnesota Transmission Project", EH-001-2017, *Government of Canada* (1 June 2018), online: <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A92272>.

45 This project involves a 117 kilometre 1,000 megawatt (MW) ±320 kilovolt (kV) high-voltage direct current (HVDC), bi-directional electric transmission interconnection, plus associated facilities to transfer electricity between Nanticoke, Haldimand County, Ontario and Erie County, Pennsylvania, United States of America (US) crossing Lake Erie. Canada, National Energy Board, "Reasons for Decision: ITC Lake Erie Connector International Power Line Project", (Calgary: National Energy Board, 2017), online: <https://apps.neb-one.gc.ca/REGDOCS/File/Download/3166590>.

46 See Strategic Electricity Interties*, supra* note 43 and The North American Grid, *supra* note 42.

In sum, there is an extensive network of interjurisdictional energy infrastructure for oil and natural gas pipelines and electric transmission lines linking provinces to each other and linking the United States and Canada. Nevertheless, new projects continue to come forward.

3.0 Jurisdiction over interjurisdictional energy infrastructure

3.1 The basis of jurisdiction

The federal government has jurisdiction over interjurisdictional energy infrastructure in Canada although it has never fully exercised that jurisdiction in the electricity sector. Federal jurisdiction is principally based on sections 91(29) and 92(10)(a) of the *Constitution Act, 1867*[47] which provide as follows:

> 91 [Parliament has exclusive legislative authority to make laws in relation to]
>
> (29) Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.
>
> 92 [Provincial legislatures may exclusively make laws in relation to the following matters]
>
> (10) Local Works and Undertakings other than such as are of the following Classes:
>
> (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.[48]

The opening words of section 92(10) afford provincial legislatures jurisdiction over works and undertakings within each province, but the section then creates a series of exceptions, including paragraph (a), dealing with works and undertakings connecting provinces or extending beyond a province.

The leading decision on the interpretation of section 92(10)(a) in the context of pipelines is *Westcoast Energy Inc.* v *Canada (National Energy Board).*[49]

47 The federal trade and commerce power (s 91(2)) is also relevant to the extent that the NEB's jurisdiction extends to the licensing of interprovincial movement of energy goods. See *Caloil Inc v Canada (Attorney General)*, [1971] SCR 543, [1971] SCR 543 at 551, holding that the federal government could restrict the distribution of imported energy goods in order (Pigeon J) "to reserve the market in other areas for the benefit of products from other provinces of Canada." See also at 553 (Laskin J).

48 *Constitution Act, 1867* (UK), 30 & 31 Vict c 3, ss 91(29), 92(10)(a), reprinted in RSC 1985, Appendix II, No 5.

49 *Westcoast Energy Inc.* v *Canada (National Energy Board),* [1998] 1 SCR 322, [1998] SCJ No 27 [*Westcoast*].

Westcoast operates a natural gas transmission system that collects and processes gas in North East British Columbia and then transmits the processed gas to various delivery points in British Columba, Alberta, and the United States. It has long been under federal regulation. In this particular case, Westcoast was seeking NEB approval for some proposed expansions to its processing and gathering facilities (i.e. activities that were *'upstream*' of Westcoast's transmission function). The majority of the NEB panel hearing the matter took the view that the NEB had no jurisdiction over the application. The Federal Court of Appeal disagreed and affirmed federal jurisdiction and the majority of the Supreme Court of Canada agreed with that conclusion. The Supreme Court noted that undertakings could come under federal jurisdiction in one of two ways:[50]

> First, they are subject to federal jurisdiction if the Westcoast mainline transmission pipeline, gathering pipelines and processing plants, including the proposed facilities, together constitute a single federal work or undertaking. Second, if the proposed facilities do not form part of a single federal work or undertaking, they come within federal jurisdiction if they are integral to the mainline transmission pipeline.

These tests are sometime referred to as primary (single federal undertaking) and secondary or derivative (integral to the main pipeline or other federal undertaking).[51] In the end, the majority concluded that it was only necessary to consider the first possibility. The majority observed that mere physical interconnection was not enough to meet the first test. Instead, where there were several operations, "they must be functionally integrated and subject to common management, control and direction" before they could be considered a single federal undertaking for the purposes of section 92(10)(*a*).[52] An inquiry into whether "various operations are functionally integrated" requires a careful examination of the facts.[53] In this case, the majority found that the requisite degree of functional integration had been established. The relevant factors (beyond common ownership and physical connection) included "common control, direction and management" and operations "in a coordinated and integrated manner" effected by the same staff out of Westcoast's Vancouver office.[54] Furthermore, practi-

50 *Ibid* at para 45.

51 See, for example, *Daniels v EOG Resources*, 2014 MBQB 19, [2014] MJ No 23 (considering both instances in the context of an intraprovincial pipeline in Manitoba which then joined a pipeline crossing the boundary into Saskatchewan) and *Tessier Ltée v Québec (Commission de la sante et de la securite du travail)),* [2012] 2 SCR 3, 2012 SCC 23.

52 *Westcoast*, *supra* note 49 at para 49.

53 *Ibid* at para 52.

54 *Ibid* at para 69.

cally all of the gas carried on Westcoast's mainline was processed in Westcoast's upstream facilities.[55]

The Westcoast system is an unusual system in the context of the upstream Canadian pipeline industry insofar as Westcoast owns and operates upstream processing facilities closely associated with the operation of its transmission line. That is not the case in Alberta. In Alberta, the natural gas processing facilities tend to be constructed and owned by producers or midstream companies. They are not owned by the transmission company. Accordingly, natural gas processing facilities and all the gathering lines associated with those facilities fall under provincial jurisdiction. The extent to which the natural gas pipeline transmission system in Alberta falls under federal jurisdiction has also changed over time.

The first steps to building a natural gas transmission system in Alberta began under the auspices of Alberta Gas Trunk Line (AGTL) which was established under a special Act of the legislature.[56] While the AGTL system (subsequently known as NOVA[57] and thus NOVA Gas Transmission Ltd (NGTL)) interconnected with the federally regulated TransCanada system, it continued to be subject to provincial regulation.[58] NOVA was acquired by TransCanada in 1998 and, a decade later, NGTL applied to the NEB to be brought under federal regulation. The NEB accepted that application and, accordingly, the

55 *Ibid* at paras 70, 72. The Federal Court of Appeal recently applied the decision in *Westcoast* in *Sawyer v TransCanada Pipeline Ltd.*, 2017 FCA 159, [2017] FCJ No 727. The decision involved TCPL's proposal to construct a natural gas pipeline from the shale gas developments of NE BC to a proposed LNG terminal at Prince Rupert. The project would also tie-in to TCPL's federally regulated NGTL system, which covers Alberta and part of BC. TCPL proposed to build the project through PGRT, a wholly owned subsidiary, and to have the project subject to provincial regulation. Sawyer drew this to the attention of the NEB and asked the Board to inquire into whether or not PGRT should be federally regulated. The NEB did initiate a process in response to this inquiry and concluded that Sawyer had not made out a *prima facie* case for federal regulation. On appeal, the Federal Court of Appeal concluded that the NEB had not applied the tests from *Westcoast* and, as a result, had failed to make the appropriate inquiries. Accordingly, the Court remitted the matter back to the NEB for redetermination. TCPL subsequently put the project on hold but has since revived a version of the project under the name Coastal GasLink, online: <www.coastalgaslink.com/>. Mr. Sawyer, in return (Letter to the Board of July 30, 2018), has renewed his application to have the NEB consider its jurisdiction over the proposed pipeline. See National Energy Board, "A93296 Michael Sawyer – Application re Jurisdiction over TCPL CGL Project", *Government of Canada* (30 July 2018), online <https://apps.neb-one.gc.ca/REGDOCS/Item/View/3594963> [National Energy Board, "Michael Sawyer"].

56 *The Alberta Gas Trunk Line Company Act*, SA 1954, c 37.

57 *NOVA Corporation of Alberta Act Repeal Act*, RSA 1980, c N-12.

58 AGTL\NOVA was subject to complaint based economic regulation by Alberta's Public Utilities Board. See *Nova, An Alberta Corporation v Amoco Canada Petroleum Co.*, [1981] 2 SCR 437, [1981] SCJ No 92.

main transmission network in Alberta (and extending into north eastern British Columbia) is now, under the NGTL name, subject to federal regulation.[59]

The decision in *Westcoast* addresses the question of how far upstream federal jurisdiction might run in the context of pipelines.[60] Two authorities that deal with the downstream end are *Dome Petroleum Ltd v National Energy Board* [61] and *Reference re: National Energy Board Act* (the *Cyanamid* case).[62]

In *Dome Petroleum*, the question was whether the NEB could assume jurisdiction over certain storage caverns at Windsor on the Cochin liquids pipeline which carried different types of liquid petroleum products (e.g. ethane, ethylene, butane, propane and natural gas liquids) from Fort Saskatchewan (AB) to its Sarnia, Ontario terminus and to intermediate destinations in Canada and the United States. The liquids were "batched" for transportation on the line and the caverns facilitated their removal and storage. The caverns were owned by the joint venture that owned the pipeline. Under those circumstances, the Federal Court of Appeal concluded that the NEB had jurisdiction over the storage caverns and, as a consequence, the joint venture could be required to make those facilities available for use by others:[63]

> …. the undertaking of the joint venture's pipeline, Cochin, is the transportation of the products it is authorized to carry from Fort Saskatchewan to Sarnia and interme-

59 Canada, National Energy Board, *Reasons for Decision, TCPL – Jurisdiction and Facilities*, GH-5-2008 (Calgary: National Energy Board, February 2008), online: <https://apps.neb-one.gc.ca/REGDOCS/Search?txthl=Reasons%20for%20Decision%2C%20TransCanada%20PipeLines%20Limited%2C%20GH-5-2008> [National Energy Board, "Reasons for Decision"].

60 In the context of transmission facilities, it should be noted that s 92A(1)(c) of the *Constitution Act, 1867* provides that the legislature of the province that has the exclusive authority to make laws in relations to the "development, conservation and management of sites and facilities in the province for the generation and production of electrical energy." In a decision involving the construction of a new intraprovincial transmission system, the Western Alberta Transmission Line (WATL), the Alberta Utilities Commission (AUC) reaffirmed its jurisdiction over the application, notwithstanding that the new line would be interconnected with interprovincial facilities connecting Alberta and British Columbia. See Alberta Utilities Commission, "Decision 2012-327: AltaLink Management Ltd., Western Alberta Transmission Line Project" (Calgary: Alberta Utilities Commission, 2012) at paras 426-29, online: <http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2012/2012-327.pdf>. In subsequent decisions, the Alberta Court of Queen's Bench rejected efforts to second guess this conclusion in proceedings involving the province's Surface Rights Board on the basis that these proceedings represented a collateral attack on the AUC's decision. See *Togstad v Alberta (Surface Rights Board)* [2015] AJ No 635, 2015 ABCA 192; *Kure v Alberta (Surface Rights Board)* [2014 ABQB 572.

61 *Dome Petroleum*, *supra* note 28.

62 *National Energy Board (Re),* [1988] 2 FC 196, [1987] FCJ No 1060 [*Cyanamid*].

63 *Dome Petroleum supra* note 28, at paras 17-18. The majority decision of the Supreme Court in *Westcoast*, *supra* note 49 at 55 apparently approved this decision and its reasoning.

> diate points. There must be means of taking product from the line if the product in it is to move; without that there can be no transportation.
>
> The terminalling facilities of a pipeline, whoever provides them and whatever the ultimate destination of shipments, are provided solely for the benefit of shippers on the line. In my opinion, when they are provided by the owner of the transportation undertaking, they are part and parcel of that undertaking. That is the case here. The joint venture's storage caverns are an integral and essential part of its Cochin system.

In *Cyanamid,* Cyanamid proposed to construct a short interconnection between TCPL's mainline and Cyanamid's fertilizer plant in Welland, Ontario. The purpose of the line was to bypass the distribution network of Consumers Gas through which Cyanamid was then obtaining service.[64] The NEB had initially approved Cyanamid's proposal but was then persuaded to state a reference case to the Federal Court of Appeal in light of a contrary decision of the Ontario Divisional Court.[65] The Federal Court of Appeal concluded that the proposed pipeline would not be within federal jurisdiction. While the bypass line would be connected to TCPL's mainline, it was "[f]ar from being vital, essential, integral or necessary to TCPL." In fact, the proposed bypass was "unnecessary and redundant."[66]

In sum, federal jurisdiction is principally confined to the interconnected physical interjurisdictional transmission facilities. It will only extend beyond those transmission facilities — either upstream to processing and gathering facilities, or downstream to distribution or storage facilities — in cases where those facilities are integral to the transmission function.

3.2 The exercise of jurisdiction

The federal government has legislated comprehensively for the regulation of both international and interprovincial natural gas pipelines and oil pipelines in

64 The Western Accord of March 28, 1985 between the Governments of Canada, Alberta, British Columbia, and Saskatchewan brought about an unbundling of natural gas service from Western Canada to Ontario, thus allowing Cyanamid to purchase gas from producers in western Canada on a competitive basis and then contract for the carriage of that gas on TCPL's line.

65 *Ontario Energy Board and Consumers' Gas Co. et al.*, 39 DLR (4th) 161, 59 OR (2d) 766. See also *Reference re Constitution Act, 1867, s 92(10)(a)*, 64 OR (2d) 393, [1988] OJ No 176. In this latter case, the Ontario Court of Appeal relied on the principle of comity to postpone preparing its judgment until the Federal Court of Appeal had provided its opinion. This was because that application was commenced prior to any proceedings before the Ontario Energy Board and in the Ontario courts and because the FCA proceedings related to a concrete application rather than a more general reference. Given the FCA's conclusion the Ontario Court of Appeal, was content to observe that it agreed with both the decision and the reasons for decision offered by that Court.

66 *Cyanamid*, *supra* note 62 at para 41.

the *National Energy Board Act*.[67] Thus, *NEBA* requires approvals to construct, operate, and abandon such pipelines,[68] authorizes the expropriation of lands where necessary for a pipeline right of way,[69] addresses environmental concerns associated with pipeline operation and construction,[70] and also provides for the economic regulation of both types of pipelines.[71] This will all continue to be the case under Bill C-69 and the establishment of the CER.[72]

The legislative scheme is less comprehensive with respect to interjurisdictional transmission lines in three important respects. First, *NEBA* only applies to an interprovincial powerline to the extent that a particular powerline is designated by order in council.[73] No such order in council has ever been issued. As a result, interprovincial powerlines are approved by each province with respect to that part of the powerline located in the province. The Supreme Court of Canada endorsed this arrangement in *Fulton v Energy Resources Conservation Board*.[74] *Fulton* involved a decision by Alberta's Energy Resources Conservation Board (ERCB) to approve the construction of the Alberta portion of an intertie between British Columbia and Alberta under the terms of the relevant provincial legislation. Fulton and other landowners challenged this assertion of authority on the basis that the ERCB was effectively exercising the jurisdiction reserved to parliament under sections 91(29) and 92(10)(a). The Court rejected that submission. It acknowledged that there was no applicable federal legislation but also observed that Alberta was not purporting to regulate the interconnection. In those circumstances, the challenge failed.[75]

While the *Fulton* decision permitted the intertie to be built, *Summerside (Town) v Maritime Electric Co. Ltd*[76] illustrates the difficulties that might ensue should it be desirable to regulate the interconnection. This decision involved an application by the Town of Summerside to PEI's Public Utilities Commission (PUC) to have the PUC make an order to give the town access to the intertie and associated facilities that had been constructed between New Brunswick and PEI pursuant to a series of agreements. The intertie had been funded in part

67 See also the discussion of the scope of federal regulation in Lucas' contribution to this volume.
68 *NEB Act*, *supra* note 1, ss 20-58.
69 *NEB Act*, *supra* note 1, ss 77-115
70 *Ibid,* ss 48-48.48.
71 *Ibid,* ss 60-72.
72 *Canadian Energy Regulator Act* [*CER Act*] *supra* note 2.
73 *NEB Act*, *supra* note 1, s 58.4.
74 *Fulton v Alberta (Energy Resources Conservation Board)*, [1981] 1 SCR 153, [1981] SCJ No 16.
75 See more recently the AUC's decision with respect to the Western Alberta Transmission Line, *supra* note 60.
76 *Summerside (City) v Maritime Electric Co. Ltd*., 2011 PECA 13, [2011] PEIJ No 24.

by the federal government. The PEI Court of Appeal on a reference concluded that the PUC did not have the jurisdiction to make such an order. *Fulton* was distinguishable on the basis that, in this case, the PUC would be purporting to regulate the interconnection if it proceeded with Summerside's application. The Court recognized that this conclusion was not a desirable outcome. The terms of the federal funding agreement indicated that its intent was to allow all electrical consumers of Prince Edward Island to "share in the benefits of the submarine cable" but since the Province had leased the entire capacity of the cable to the dominant utility in PEI, Maritime Electric, if the PUC could not make the order requested, it followed that the customers of Summerside would be denied access to the benefit provided by this federally funded interjurisdictional infrastructure. The Court therefore suggested other options that might be available to Summerside, including the possibility that "the Town could request the federal government to regulate the interconnection for the benefit of all energy consumers in the province."[77]

Second, the more deferential nature of federal regulation is also visible even in the context of *international* powerlines. *NEBA* offers project proponents of international powerlines the choice of a purely federal process (a permit without a hearing or a certificate of public convenience and necessity) or a hybrid approach in which the proponent seeks the approval of the NEB (a permit) but then complies with provincial laws to obtain the approval of the provincial regulator including any necessary right of way.[78] This hybrid procedure

77 *Ibid* at para 44. Another example which suggests the desirability of federal intervention is the interconnection between the Churchill Falls development in Labrador and Québec. This interconnection was necessary to provide power generated in Labrador access to international markets. Absent federal willingness to designate the intertie as an intertie that would be subject to federal regulation, Churchill Falls/Newfoundland was compelled to take the terms offered by Québec/Hydro Québec. Those terms have proven to be very favourable to Québec, leading Newfoundland to pursue a number of different avenues to obtain better terms. To this point, all of these strategies have failed. Perhaps the best-known example is the strategy reflected in *Reference re Upper Churchill Water Rights Reversion Act 1980 (Newfoundland)*, [1984] 1 SCR 297, [1984] SCJ No 16 in which the province explored the possibility of having the Churchill Falls development revert to provincial ownership. The Court concluded that the legislation amounted to an impermissible interference with rights (the contractual arrangements between Churchill Falls and Hydro Québec) located outside the province. This decision continues to be an important authority on the colourability doctrine and offers important lessons in the ongoing dispute between Alberta and British Columbia with respect to the TransMountain expansion project.

78 The election is provided for in *NEBA Act*, s 58.23. The relevant provincial laws are laws (*NEBA Act*, s 58.19) pertaining to (a) the determination of their location or detailed route; (b) the acquisition of land required for the purposes of those lines, including its acquisition by expropriation, the power to so acquire land and the procedure for so acquiring it; (c) assessments of their impact on the environment; (d) the protection of the environment against, and the mitigation of the effects on the environment of, those lines; or (e) their construction and operation and the procedure to be followed in abandoning their operation.

(which applies only where the relevant provincial government has designated a provincial agency for this purpose[79]) adds complexity to the process, but it also represents significant deference to provincial authority, especially when one considers that a province may even decline to approve a project that has obtained a federal permit.[80]

Third, even where a transmission line is subject to the statutory jurisdiction of the NEB with respect to its construction, that jurisdiction does not entail economic regulation or even a third party access or wheeling regime. Consequently, if one considers the *Summerside* facts outlined above, even if that interconnection were designated by order in council as being subject to NEB jurisdiction under section 58.4 of *NEBA*, the NEB would still not have the authority to make the order sought by the town; further amendments to *NEBA* would be required to achieve this result.[81]

Although the above describes the situation under *NEBA* with respect to the regulation of interprovincial and international transmission lines, none of this will change under the *CERA*. This is perhaps surprising. The different resource endowments and energy mixes of the different provinces have, as noted above, led to increased interest in possible interconnection projects as a way of displacing greenhouse gas intensive fuels to generate electricity in some provinces.[82] One might have expected that this would have led to an enhanced federal role.

4.0 Recent events, current projects, and the 'modernization' of the NEB

4.1 Recent events and current projects

The past few years have proven to be tumultuous ones for the National Energy Board. It has had to deal with a series of very contentious applications to in-

79 *NEB Act*, *supra* note 1, s 58.17.

80 *NEB Act*, *supra* note 1, s 58.21. The complexity is illustrated by the example of the Montana/Alberta Transmission Line (MATL). This project obtained an NEB permit following a federal environmental assessment, but then followed provincial permitting rules under the *Hydro and Electric Energy Act*, RSA 2000, c H-16 as contemplated by the *NEB Act,* s 58.19. The resulting regulatory approvals issued by the Alberta Energy and Utilities Board (AEUB now the Alberta Utilities Commission (AUC)) were then challenged in the Alberta Court of Appeal. See *Sincennes v Alberta (Energy and Utilities Board)*, 2009 ABCA 167, [2009] AJ No 477, application for leave to appeal dismissed [2009] SCCA No 300. Lucas explores the *Sincennes* decision in more detail in his contribution to this Special Issue. A further attempt by landowners to question the applicability of Alberta's *Surface Rights Act*, RSA 2000, c S-24 to the project also failed: *Van Giessen v Montana Alberta Tie Ltd*., 2011 ABQB 219, [2011] AJ No 578.

81 The NEB could make such an order with respect to pipelines under *NEB Act*, s 71 but this provision only applies to pipelines and is not included in the list of sections made applicable to transmission lines by *NEB Act*, s 58.27.

82 See, for example, Strategic Electricity Interties, *supra* note 43.

crease pipeline take away capacity from the oil sands area of Alberta, including Northern Gateway[83] and the Trans Mountain expansion project,[84] and might potentially have to deal with natural gas pipeline proposals to serve shale gas developments in British Columbia and associated liquefied natural gas (LNG) facilities.[85]

These applications have been driven by the interests of producers and producing provinces in obtaining access, or increased access, to world markets and world prices rather than continental markets and continental prices. At the same time, these applications have engendered significant opposition. Some of that opposition has come from provinces and municipalities along the pipeline route alleging that the proponent lacks a social licence to operate and that such a licence is the only true test of the acceptability of a project.[86] Some of that opposition has come from Indigenous communities often couched in terms of free, prior informed consent (FPIC) and often referencing the United Nations Declaration on the Rights of Indigenous Peoples.[87] Some of the opposition has come from those who consider that the enhanced reliance on carbon fuels that these infrastructure investments imply will delay our transition away from carbon-based energy sources and are perhaps inconsistent with Canada's climate change commitments under the United Nations Framework Convention on Climate Change[88] and the Paris Agreement.[89] In many cases, these different groups and interests adopt mutually supportive positions.[90]

83 Northern Gateway Project, *supra* note 3.

84 Trans Mountain Expansion Project, *supra* note 4.

85 One such project was TransCanada's Prince Rupert Gas Transmission Project (PGRT). This project was proposed by TCPL as a project to move natural from the North Montney area of British Columbia to Lelu Island on the Pacific coast to an LNG facility. See discussion National Energy Board, "Michael Sawyer", *supra* note 55.

86 The most notable example is Burnaby's opposition to TMX described in further detail in Chalifour's paper in this Special Issue.

87 UNDRIP, UN Doc A/RES/61/295 (2017), online: <www.un.org/development/desa/indigenous peoples/declaration-on-the-rights-of-indigenous-peoples.html>. Adopted by the United Nations General Assembly, September 13, 2007 and subsequently endorsed by Canada. For further discussion see David Wright's essay in this Special Issue.

88 *United Nations Framework Convention on Climate Change,* 1771 UNTS 107, March 1994, online: <https://unfccc.int/resource/docs/convkp/conveng.pdf> (entered into force 21 March 1994).

89 *Paris Agreement*, 12 December 2015, UNTC Registration 54113 (entered into force 4 November 2016). Canada's "Nationally Determined Commitment" (NDC) under the Paris Agreement is to reduce its emissions over 2005 levels by 30 per cent by 2030, online: <www4.unfccc.int/ndcregistry/PublishedDocuments/Canada%20First/Canada%20First%20NDC-Revised%20submission%202017-05-11.pdf>.

90 Consider, for example, the coalition of interest that joined in support of motions brought by the City of Vancouver and the Parents of Cameron Elementary School Burnaby to have the NEB expand the list of issues to be considered in the context of TMX's application to include the upstream and downstream effects of the projects. Those in support included one MLA, NGOs, First Nations

The degree and nature of the opposition to these projects has created challenges for the Board as it has tried to manage the scope of its project review and the opportunities for public participation. Thus, in a number of cases, the Board refused to hear evidence with respect to the upstream and downstream GHG effects of new pipeline proposals on the grounds that these concerns fall outside its statutory mandate.[91] In addition, amendments to *NEBA* introduced as part of the Harper government's omnibus budget bill in 2012 tightened the rules on standing in *NEBA*.[92] One consequence of this engagement with the budget bill was that the Board and its processes were inevitably caught up in the larger critique of government represented by the Idle No More movement.

Nathalie Chalifour deals with some of these issues in more detail in her essay but perhaps the important point to make in the context of this introduction is that the NEB has served as the default forum in which citizens and ENGOs have tried to discuss these issues in the absence of alternative fora and in light of a perceived implementation gap between Canada's climate change commitments and progress towards meeting those commitments.

The Board has also been challenged by several unfortunate incidents that have led some to question its independence and impartiality. One such incident was the decision of Minister Joe Oliver to address an Open Letter to Canadians on the eve of the Joint Review Panel's hearings in respect of the Northern Gateway Project.[93] In that letter, the Minister referenced "environmental and other radical groups" who seek to block new pipelines such as NGP and suggested that these "radicals" will "hijack our regulatory system," stack public hearings, "kill good projects," and exploit any opportunity they can to delay project reviews. A second incident was the federal cabinet's decision to appoint Mr Steven Kelly as a member of the Board part way through the TMX application. This was unfortunate because TMX had retained Mr Kelly as a

and other municipal governments. The Board, in a ruling referred to as Ruling No 25, denied the motions. See Canada, National Energy Board, "Ruling No 25 – Motions Requesting that the Board include in the List of Issues the Environmental and Socio-Economic effects Associated with Upstream Activities and Downstream use", A61912, *Government of Canada* (23 July 2014), online <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A61912>. The Federal Court of Appeal denied leave (without reasons). See *Order* (16 October 2014), 14-A-55, online: Federal Court of Appeal <https://ablawg.ca/wp-content/uploads/2014/11/14-A-55-Order-20141016.pdf>. See further discussion in Hoberg's paper in this Special Issue.

91 *Ibid* and for Enbridge's Line 9 project see *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 FCR 75.

92 *Jobs, Growth Act, supra* note 6.

93 Natural Resources Canada, Media Release, "An open letter from the Honourable Joe Oliver, Minister of Natural Resources, on Canada's commitment to diversify our energy markets and the need to further streamline the regulatory process in order to advance Canada's national economic interest", (9 January 2012), online: <www.nrcan.gc.ca/media-room/news-release/2012/1/1909>.

consultant and his testimony was part of the record for TMX's application.[94] This led the panel hearing the application to conclude that it had to strike Mr. Kelly's evidence from the record, thereby requiring TMX to file additional evidence in support. The third such incident was of the Board's own making. This occurred when Board members, including members appointed to manage and hear TransCanada's Energy East application, met with Jean Charest (the former premier of Québec) as part of the Board's National Engagement Initiative which was designed to allow the Board to obtain a clearer understanding of the public's concerns generally with respect to pipeline safety and environmental protection. The meeting was one of many meetings held by the Board across the country with different stakeholders. Nevertheless, it transpired (unbeknownst to the panel members) that Mr. Charest was, at the time, retained by TransCanada with respect to the Energy East project. This led to the recusal of the panel members and required the appointment of a new panel, which decided to restart the hearings from the beginning.[95] While TransCanada ultimately decided to withdraw its application[96] it seems reasonable to assume that these events painted the Board in a poor light.

Provincial opposition to new pipeline projects has, in some cases, been particularly trenchant.[97] Gone are the days when transit and destination provinces generally welcomed new energy infrastructure as affording jobs as well as new sources of energy (e.g. natural gas for space heating and electricity generation) and enhanced energy security. Now, transit provinces seek financial assurances and enhanced economic benefits if not a veto. The Premier of British Columbia (then Christy Clark), for example, famously tabled BC's five conditions in response to Northern Gateway and TMX.[98] We have also seen provinces and

94 The incident is discussed in Kirk Lambrecht, "The Governor in Council Occasions Change and Delay in the National Energy Board's Review of the Trans Mountain Pipeline Expansion Project: The Curious Case of PC 2015-1137" (15 September 2015), *ABlawg* (blog), online: <https://ablawg.ca/wp-content/uploads/2015/09/Blog_KL_PC20151137_Sept2015.pdf>.

95 See Canada, National Energy Board, "Panel Member Recusals – Energy East and Eastern Mainline", *Government of Canada* (9 September 2016), online: <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A79373>; National Energy Board, Press Release, "Energy East Heating to Restart from the Beginning" (27 January 2017), online: <www.canada.ca/en/national-energy-board/news/2017/01/energy-east-hearing-restart-beginning.htm>.

96 Letter from TransCanada to Sheri Young, Secretary of the National Energy Board (5 October 2017), online: <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A86594>.

97 The principal opposition of provincial governments is to oil pipelines rather than natural gas pipelines. First Nations and environmental organizations may be just as concerned with respect to new gas pipelines which arguably fuel upstream gas exploration and development. See the discussion National Energy Board, "Michael Sawyer", *supra* in note 55.

98 British Columbia, News Release, "British Columbia Outlines Requirements for Heavy Oil Pipeline Consideration" (23 July 2012), online: <https://news.gov.bc.ca/stories/british-columbia-outlines-requirements-for-heavy-oil-pipeline-consideration> "Successful completion of the environmental

municipalities aggressively exercising and testing the limits of their jurisdiction with respect to federally permitted and regulated pipelines. There was a time when provincial governments did not seek to exercise much authority, such as environmental assessment authority, in relation to federal pipelines. This is still the case in some provinces. For example, Alberta does not apply its environmental assessment rules in relation to federal pipelines.[99] But other provinces, including British Columbia, Ontario, and Québec, have made it clear that they will apply provincial assessment laws to federal pipelines. The courts have acknowledged that provinces can do this subject to the doctrines of interjurisdictional immunity and paramountcy which must mean, at the very least, that provincial environmental rules cannot be used to veto a federally permitted project.[100] Martin Olszynski discusses the limits to the applicability and operability of provincial laws in his contribution to this special issue.

4.2 The NEB 'modernization' project

The Liberal administration elected under the leadership of Justin Trudeau in 2015 reached the conclusion that at least some of the developments outlined in the previous section had caused the public to lose faith in Canada's energy project review rules as well as the related environmental impact assessment (EIA) rules. As a result, the new Liberal Government adopted a number of interim measures to deal with projects like TMX (then still under review)[101] but also launched a three-track review of the NEB, the federal EIA rules and the rules pertaining to the protection of fisheries habitat. Three review processes ran in tandem. These were the NEB Modernization Panel,[102] the Expert Panel for the Review of Environmental Assessment Processes,[103] and a review of the changes made to the *Fisheries Act* by the Harper Administration.[104]

review process; World-leading marine oil spill response, prevention and recovery systems; World-leading practices for land oil spill prevention, response and recovery systems; Legal requirements regarding Aboriginal and treaty rights are addressed; and a fair share of the fiscal and economic benefits of a ... project that reflects the level, degree and nature of the risk borne by the province, the environment and taxpayers."

99 See Activities Designation Regulation, Alta Reg 276/2003, s 2(i)(iv).

100 *Coastal First Nations v British Columbia (Minister of Environment),* 2016 BCSC 34, [2016] BCJ No 30; *Squamish Nation v British Columbia (Minister of Environment)*, 2018 BCSC 844, [2018] BCJ No 971; *Vancouver (City) v British Columbia (Minister of Environment)*, 2018 BCSC 843, [2018] BCJ No 970.

101 Natural Resources Canada, Media Release, "Interim Measures for Pipeline Reviews" (27 January 2016), online: <www.canada.ca/en/natural-resources-canada/news/2016/01/interim-measures-for-pipeline-reviews.html>.

102 Forward, Together*, supra* note 9. For extended commentary on this Report see the Special Issue of Energy Regulation Quarterly (2017) 5:3.

103 Common Ground, *supra* note 8.

104 This review was conducted by the House of Commons Standing Committee on Fisheries and Oceans. See House of Commons, *Review of Changes made in 2012 to the Fisheries Act: Enhancing the*

The principal outcome of the review process[105] (at least with respect to the NEB and EIA tracks) is Bill C-69, *An Act to Enact the Impact Assessment Act and the Canadian Energy Regulator Act*, to amend the *Navigation Protection Act* and to make consequential amendments to other Acts.[106] As noted in the opening paragraphs of this introduction, Part 2 of that Bill (if enacted in its current form) will abolish the NEB and replace it with the CER. While that might seem to presage a huge sea change in the government's approach to the regulation of federal energy infrastructure projects, in fact, many of the detailed rules will remain the same. The next paragraphs summarize the most significant changes followed by a paragraph indicating where there has been little, if any, change.[107]

The principal changes effected by *CERA* are as follows: change in the name of the regulator from the NEB to CER; changes in the governance of the regulator to create a separation between a governance board and hearing commissioners with Indigenous representation on each of those bodies;[108] project review for all projects that are "designated projects" to be carried out by a review panel appointed under the *Impact Assessment Act* (with at least one CER Commissioner);[109] enhanced statutory guidance afforded to the CER with respect to the matters that it should take into account in assessing the public convenience and necessity with respect to new facilities, including a requirement that it take into account the implications of the project for meeting Canada's climate change commitments;[110] and a new jurisdiction with respect to offshore renewable projects.[111]

Those elements that will remain the same, or largely the same, include the following: the CER will continue to be based in Calgary;[112] the information and advisory jurisdiction of the CER will continue;[113] the ultimate decision-making

---

Protection of Fish and Fish Habitat and the Management of Canadian Fisheries, 42nd Parl, 1st Sess, online: <www.ourcommons.ca/Content/Committee/421/FOPO/Reports/RP8783708/foporp06/foporp06-e.pdf>.

105 See also Canada, Government of Canada, *Environmental and Regulatory Reviews, Discussion Paper* (Ottawa: Government of Canada, 2017). This paper provides the Government's overall policy response to the three processes.

106 Bill C-69, *supra* note 2.

107 See also Nigel Bankes, "Some Things Have Changed but Much Remains the Same: The New Canadian Energy Regulator" (15 February 2018), *ABlawg* (blog), online: <http://ablawg.ca/wp-content/uploads/2018/02/Blog_NB_Much_Remains_The_Same.pdf>.

108 *CER Act*, *supra* note 72 at Part 1.

109 *Ibid*, s 185; *Impact Assessment Act*, s 51.

110 *CER Act*, *supra* note 72, s 183(2)(j). This amendment was included at the Committee stage.

111 *Ibid*, Part 5.

112 *Ibid*, s 10.

113 *Ibid*, ss 80-86.

authority of cabinet with respect to designated projects is retained;[114] the rules pertaining to the judicial supervision of the CER and Cabinet in relation to project and other decisions continue;[115] the rules pertaining to the construction, operation, and abandonment of pipelines are the same;[116] the rules pertaining to the economic regulation of pipelines (i.e. rate regulation) will continue;[117] the rules pertaining to transmission lines, both interprovincial and international remain the same;[118] and the rules pertaining to exports and imports of oil, gas, and electricity are largely unchanged.[119]

5.0 Conclusions

There is an extensive existing network of interjurisdictional energy infrastructure in Canada connecting provinces and territories and extending across the international boundary into the United States. This network includes oil and natural gas pipelines and electric transmission lines and provides Canadians with necessary energy services and contributes to our energy security. It also provides producers, including generators of electricity as well as oil and gas producers, with access to both continental markets, and, through tidewater, at least some access to global oil markets — although current infrastructure capacity is oversubscribed.

While this energy infrastructure provides acknowledged benefits, proposals to extend and expand this infrastructure, especially oil pipeline infrastructure, is highly contested and the linear nature of these projects means that these proposals may be contested across a wide geography. The Constitution clearly allocates jurisdiction over the development of this infrastructure to the federal government but, in recent years, Indigenous communities and other levels of government have asserted their authorities in relation to these projects. Indigenous communities reference free, prior, informed consent (FPIC), or, short of that, the Crown's duty to consult and accommodate the rights of those communities. Provinces rely upon their legislative responsibility for the environment and for the safety of their citizens. Municipalities likewise assert their delegated responsibilities at a more local level. Environmental organizations may not claim legislative authority, but they do demand that governments fulfil their legal responsibilities under domestic law but also the commitments

114 *Ibid*, s 186.
115 *Ibid*, s 72, 188.
116 *Ibid*, Part 2.
117 *Ibid*, ss 225-40.
118 *Ibid*, Part 4.
119 *Ibid*, Part 7.

Canada has assumed under international law for curbing greenhouse gas emissions. All of these actors use the courts as a crucial forum within which to assert their authorities or to demand accountability. The field is a dynamic one, and, as the recent decision of the Federal Court of Appeal in *Tsleil-Waututh* confirms, the Courts are still clarifying the applicable rules.

It is our hope that this volume of essays will shed some light on these interesting and important issues.