# The National Energy Board and Energy Infrastructure Regulation: History, Legal Authority, and Judicial Supervision

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*This article shows that the National Energy Board (NEB) is a comprehensive pipeline regulator, including: approval and regulation of construction, operation, and abandonment; necessary land acquisition environmental effects, and transportation tolls. The NEB was borne in the 1950s amid tumultuous political and public debate about the federal role in the original trans-Canada natural gas pipeline. In contrast to pipelines, while the Board regulates international and interprovincial powerlines, the* National Energy Board Act *requires deference in several ways to provincial regulation of portions of these facilities within provinces. None of this will change fundamentally under the new Canadian Energy Regulator, which will replace the NEB. However, there has already been a power shift from the Board to the Cabinet, with all final pipeline approval power vested in Cabinet since 2012. The NEB Act requires the board to determine whether proposed pipelines are "required by the present and future public convenience and necessity" and recommend accordingly to cabinet. Though, this has been treated as a kind of cost-benefit analysis, social and environmental factors and potential First Nations impacts have become more significant as shown by the Northern Gateway and Trans Mountain Expansion pipeline decision processes. Judicial supervision of the NEB is largely deferential, with more intense "correctness"*

*Cet article montre que l'Office national de l'énergie (ONÉ) est un organisme exhaustif de réglementation des pipelines, notamment en ce qui concerne l'approbation et la réglementation de la construction, de l'exploitation et de la cessation d'activité, l'acquisition des terrains nécessaires, les effets environnementaux et les droits de transport. L'ONÉ est né dans les années 50 dans le contexte d'un débat politique et public tumultueux sur le rôle du gouvernement fédéral dans le premier pipeline de gaz naturel de TransCanada. Comparativement aux pipelines, alors que l'Office régit les lignes internationales et interprovinciales de transport d'électricité, la* Loi sur l'Office national de l'énergie *exige à plusieurs égards de la déférence à l'égard de la réglementation provinciale de certaines parties de ces installations dans les provinces. Rien de tout cela ne changera fondamentalement sous la nouvelle Régie canadienne de l'énergie, qui remplacera l'ONÉ. Cependant, il y a déjà eu un transfert de pouvoir de l'Office au Cabinet, alors que le pouvoir d'approbation final des pipelines appartient au Cabinet depuis 2012. La Loi sur l'ONÉ exige que l'Office détermine si les pipelines proposés sont « requis pour la commodité et les besoins présents et futurs du public » et recommande en conséquence au Cabinet. Bien que cela ait été traité comme une sorte d'analyse coûts-avantages, les facteurs sociaux et environnementaux*

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*review of certain matters including federalism and Aboriginal rights issues.*

*et les impacts potentiels sur les Premières Nations sont devenus plus significatifs, comme le montrent les processus décisionnels relatifs au pipeline Northern Gateway et au projet d'agrandissement du réseau de Trans Mountain. La supervision judiciaire de l'ONÉ est en grande partie déférente, avec un examen plus intense de la « décision correcte » de certaines questions, notamment le fédéralisme et les droits des autochtones.*

## I. Introduction

This article will show that the National Energy Board (NEB) is a comprehensive interjurisdictional pipeline regulator over the life cycle of facilities. It has power to review and recommend to Cabinet whether a major facilities approval is in the public interest; it is an economic regulator for pipelines in approving rates, tariffs and tolls; it has power to approve export and import of oil or gas; and, in its advisory function, it studies, monitors and reports on a range of pipeline and other energy matters to the Minister of Natural Resources. For all of these purposes, it has the powers of adjudication, investigation, study, and administration.

This is not to say that there is no provincial jurisdiction that affects interjurisdictional pipelines. In this very issue, Martin Olszynski's article[1] addresses, in some detail, the potential reach of provincial regulation with respect to interjurisdictional energy infrastructure.

During the NEB's existence, there have been a number of amendments to its governing statute, the *National Energy Board Act*.[2] The focus here will be on two of these amendments, namely the 1990 changes concerning powerlines[3] and the 2012 changes that affected the Board's interjurisdictional pipeline powers, shortening decision time limits and giving all final approval authority to Cabinet.[4]

In the last decade, there have been significant changes in the NEB's operating environment.[5] These changes include: (1) growing public opposition

1 Martin Olszynski, at p 91.
2 RSC 1985, c N-7 [*NEB Act*].
3 SC 1990, c 7, s 23.
4 SC 2012, c 19, s 83.
5 See Alastair R Lucas & Chidinma B Thompson, "Infrastructure, Governance and Global Energy Futures: Regulating the Oil Sands Pipelines" (2016) 28 J Envtl L & Prac 355 at 382-83.

to pipelines with focus on global climate change and environmental effects on waters and terrestrial ecosystems; (2) increasing demands for broader and deeper public participation in pipeline decisions; (3) increasing First Nations opposition as well as demands for participation; and, (4) provincial assertions of jurisdiction to regulate interjurisdictional pipelines (particularly in British Columbia but also in Ontario and Québec, as demonstrated by Hoberg[6]). These concerns are reflected in the Expert Panel Reports commissioned by the federal government on NEB modernization[7] and on federal environmental impact assessment[8], and ultimately in Bill C-69 that, when proclaimed, will replace the NEB with a new Canadian Energy Regulator (CER).[9] The CER will continue to carry out the basic NEB functions. Overall, the regulatory scheme and essential powers will remain largely the same.

The article is organized as follows. An NEB origins section shows how the NEB grew out of the political controversy surrounding the 1950s interjurisdictional pipeline construction era. Then, the Board's purpose, structure, and relevant functions are delineated. The fundamental original purposes of fostering energy resource development, and advancing the public interest (principally economic), are shown, along with more recent environmental protection and Aboriginal consultation and accommodation purposes. NEB powers concerning construction, operation, and abandonment of pipelines are reviewed, with differences between pipeline and powerline powers highlighted. Public utility tolling functions are noted. Discussion then turns to judicial supervision with focus on judicial deference to Board decisions. In the final section, historical NEB development is placed against Bill C-69's regulatory changes.

Conclusions are that while provincial environmental regulation has become more prominent, NEB (and now CER) authority over interjurisdictional pipelines remains plenary. Since 2012, NEB pipeline decision authority has declined relative to that of the federal Cabinet. The power of review panels under Bill C-69 may further erode current NEB jurisdiction. Aboriginal rights and environmental impacts are likely to remain significant decision factors. Judicial supervision of CER pipeline decisions is likely, at least pending Supreme Court of Canada action on standards of judicial review, to remain largely deferential.

6 George Hoberg, at p 53.

7 Expert Panel on the Modernization of the National Energy Board, *Forward Together: Enabling Canada's Clean, Safe and Secure Energy Future,* (Report) (Ottawa: Expert Panel on the Modernization of the NEB, 2017).

8 Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada*, (Final Report) (Ottawa: Expert Panel for the Review of EAP, 2017).

9 See discussion on Bill C-69, below.

## II. NEB origins: a pipeline tribunal

The NEB grew out of federal political chaos in the 1950s. But, this was very different political chaos from the intergovernmental pipeline battles of the current decade. It was a story of rapid oil and gas industry growth, east-west tensions, and economic nationalism that began with Imperial Oil's 1947 discovery well near Leduc, Alberta.[10]

### A. The pipeline-building decade

Oil discoveries prompted a decade of pipeline-building under the hastily enacted 1949 federal *The Pipe Lines Act*.[11] This statute was modeled on the *Railway Act*[12] and adopted the existing Board of Transport Commissioners as the regulator. Major pipeline companies, including Interprovincial, the predecessor of Enbridge, were incorporated by special Act of Parliament.[13] Only 38 days after the *Pipe Lines Act* came into force, the Board of Transport Commissioners approved Interprovincial's pipeline and its purpose of carrying Alberta oil to Regina. This was the first phase of the Interprovincial pipeline that would eventually extend to Sarnia, Ontario. The fires of Canadian nationalism would be stoked by the proposed route of this pipeline (largely built for export) that dipped south of the border, connecting to US lines at Superior, Wisconsin.

It was natural gas pipeline proposals that created the political and public controversy that led to the establishment of the NEB in 1959. There was hot rhetoric, staggering cost, alleged American economic influence, east-west rivalry, Canadian nationalism, and government subsidy issues, all culminating in an acrimonious Parliamentary debate. William Kilbourne described the pipeline debate of 1956 as "the stormiest episode in Canadian parliamentary history."[14]

The government's goal was an all-Canadian route. For the proponent, TransCanada Pipe Lines, the problem was financing the 1080 km Northern Ontario section of the pipeline. Ultimately, a deal was struck calling for the government to finance and own the problem pipeline sections through a Crown corporation and then lease these sections to TransCanada as operator and ultimately as purchaser. This supported a plausible "nation building" narrative for

10 Earle Gray, *Forty Years in the Public Interest: A History of the National Energy Board* (Vancouver: Douglas & McIntyre, 2000) at 1-2.

11 SC 1949 (5th Sess), c 20.

12 RSC 1927, c 170.

13 *An Act to Incorporate Interprovincial Pipe Line Company*, SC 1949 (5th Sess), c 34.

14 William Kilbourn, *PipeLine* (Toronto: Clarke, Irwin & Company, 1970) at vii.

the government. There was also an $80 million "bridging" loan to speed the construction start. By 1959, gas was being delivered as far as Montréal, and the $80 million had been repaid.

This arrangement was the essence of the bill to incorporate the Crown Corporation — a bill that required quick passage to meet financial deadlines.[15] Parliamentary fireworks ensued and escalated when the government invoked closure to speed the final vote. The bill passed; but resulting public distaste was a significant factor in the liberal government's election defeat the following year.

There were also calls for firmer energy regulation that led to recommendations for establishment of a national energy authority, first by the liberal government's *Royal Commission on Canada's Economic Prospects*[16] in 1957, and following the 1957 election, by the conservative government's *Royal Commission on Energy*[17], which reported in 1958. The *National Energy Board Act* received final reading in 1959, following spirited parliamentary debate on oil and gas policy.[18]

The focus of the Act was on oil and gas pipeline regulation, plus regulation of oil, gas and electricity exports to the US. Final approval for new pipelines would be for Cabinet, though the National Energy Board could reject pipeline applications and approve or reject electricity import or export applications.

This reflected the government objective, consistent with *Borden Commission* recommendations, of a regulatory agency with a considerable degree of independence from government.[19] Authority to approve electricity transmission facilities was not included. The Board was also empowered to approve pipeline companies' rates, tariffs and tolls. A provision, curious at the time, gave the

15 *Northern Ontario Pipe Line Crown Corporation Act*, SC 1956, c 10.

16 *Royal Commission on Canada's Economic Prospects: Final Report* (Ottawa: Royal Commission on Canada's Economic Prospects, 1957) (WL Gordon).

17 Canada, *Royal Commission on Energy: First Report* (Ottawa: Privy Council Office, 1958) (Henry Borden) [*Borden Commission*]. The Commission's Second Report, issued in July, 1959, covered matters of energy supply and demand including export demand *Royal Commission on Energy: Second Report* (Ottawa: Privy Council Office, 1959) (Henry Borden).

18 SC 1959, c 46.

19 *Supra* note 17 at xiii (Recommendation 27), 53. See Rowland J Harrison, "The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What Does Regulatory "Independence" Mean? Should We Pursue It?" (2013) 50:4 Alta L Rev 757 at 766-68 [Harrison]. Independence was bolstered by the *NEB Act* (now s 3(2)) under which board members, while appointed for initial seven year terms, could be removed only by joint address of the Senate and House of Commons to the Governor-in-Council: see Harrison, *ibid*, at 764.

Board a government advisory function. This raised conflict of interest concerns, but this provision provided the basis for close Board-government relations, both formal and informal.[20]

## B. The context today

TransCanada's original gas pipeline, as well as the Interprovincial and Trans Mountain oil pipelines (also completed in the 1950s), shared a common element: significant opposition by elements in the Canadian public. That is still the case today. Three major interjurisdictional pipelines have been proposed to transport Alberta oil sands production and all face or have faced challenges. One, Northern Gateway, was intended to transport bitumen to a new northern British Columbia marine terminal from which it would be shipped primarily to new Asian markets.[21] A second is intended to expand the existing Trans Mountain pipeline, opened in 1953, to deliver oil sands production to a marine terminal in Burnaby, BC, part of Greater Vancouver.[22] A third pipeline, Energy East was to move oil east from Alberta to marine terminals in Québec and New Brunswick.[23] Not to be forgotten is the Keystone XL pipeline proposal to increase significantly oil sands pipeline transport to US Gulf Coast refineries. The latter, which received NEB approval in 2010,[24] languished pending US Presidential approval. President Obama ultimately vetoed a US Senate approval bill[25], and then denied Department of State approval.[26] However, a new president granted approval in 2018.[27]

20 Alastair R Lucas & Trevor Bell, *The National Energy Board: Policy, Procedure, Practice* (Ottawa: Minister of Supply and Services, 1977) at 32-33.

21 National Energy Board, "2010-05-27 - Application for the Enbridge Northern Gateway Pipeline Project (OH-4- 2011)", (Ottawa: NEB) [Northern Gateway].

22 National Energy Board, "2013-12-16 -Application for Trans Mountain Expansion Project (OH-001-2014)", (Ottawa: NEB) [Trans Mountain Expansion].

23 National Energy Board, "2014-10-30 - Application for the Energy East Project and Asset Transfer", (Ottawa: NEB) [Energy East].

24 *Reasons for Decision TransCanada Keystone Pipeline GP Ltd* (11 March 2010), OH-1-2009, online: NEB <https://apps.neb-one.gc.ca/REGDOCS/Item/View/604441> [Keystone XL].

25 Lisa Mascaro, "Senate Fails to Override Obama's Veto of Keystone Pipeline", *The Toronto Star* (4 March 2015), online: <www.thestar.com/news/world/2015/03/04/senate-fails-to-override-obamas-veto- of-keystone-pipeline.html>.

26 US, White House Office of the Press Secretary, *Statement by the President on the Keystone XL Pipeline* (Washington, DC: Office of the Press Secretary, 6 November 2015), online: <https://obamawhitehouse.archives.gov/the-press-office/2015/11/06/statement-president-keystone-xl-pipeline>.

27 Elise Labott & Jeremy Diamond, "Trump Administration Approves Keystone XL Pipeline", *CNN* (24 March 2017), online: <https://www.cnn.com/2017/03/23/politics/keystone-xl-pipeline-trump-approve/index.html>.

As for the first three pipelines, only the Trans Mountain Expansion has been approved. However, that pipeline has become the target of furious environmental movement opposition, considerable First Nations opposition, and a strange tit for tat battle between the Alberta NDP government which supported and lobbied for the pipeline, and the BC NDP government which was implacably opposed.[28] Then, on May 29, 2018 the federal government purchased the Trans Mountain Pipeline Expansion Project under an arrangement that at least promised ultimate resale to the private sector.[29] However, on August 30, 2018 the Federal Court of Appeal issued a unanimous decision quashing the Order in Council directing the issuance of the project certificate.[30]

## III. NEB structure, purpose, and powers

The NEB has three main regulatory functions. It regulates interjurisdictional and international pipelines, and designated powerlines; it approves export and import of oil, gas and electricity, and it acts as energy development regulator for increasingly smaller parts of the Canadian Arctic.

Its pipeline role, the focus of this article, involves determining whether any proposed pipeline "is and will be required by the present and future public convenience and necessity."[31]The *NEB Act* provides that,

In making its recommendation [to the federal cabinet], the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:

a) the availability of oil, gas or any other commodity to the pipeline;

b) the existence of markets, actual or potential;

c) the economic feasibility of the pipeline;

d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians

28 These issues are explored in greater detail in the articles in this volume by Martin Olszynski, George Hoberg, and David Wright.

29 Department of Finance Canada, "Backgrounder: Details of Agreement for the Completion of the Trans Mountain Expansion Project", (Ottawa: DFC, 29 May 2018) online: <https://www.fin.gc.ca/n18/data/18-038_1-eng.asp>.

30 *Tsleil-Waututh Nation v Canada (AG)*, 2018 FCA 153 (CanLII) [*Tsleil-Waututh Nation*]. For further discussion see David Wright's essay in this volume at p 175.

31 *NEB Act*, *supra* note 2, s 52(1)(a).

will have an opportunity to participate in the financing, engineering and construction of the pipeline; and

e) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application[32]

The overriding criterion is public interest, structured by the listed factors required to be taken into account. The Board also functions as a public utility regulator and as such establishes or approves just and reasonable tolls as well as terms and conditions and rules. Tolling arrangements may also be relevant to certificate decisions.

Originally, the NEB was authorized to make final decisions denying certificates to major pipeline applicants. However, if the Board was prepared to approve the application, its decision required Cabinet approval. This changed in 2012 with amendments that gave the final decision to Cabinet (including reconsideration by the Board) in all cases.[33] This includes Cabinet power to add or modify conditions to NEB certificate recommendations.[34] A 15 month time limit following application (subject to ministerial extension) was added in 2012.[35] Otherwise, decisions on such matters as leave to open completed pipelines, land compensation, exemption of pipelines shorter than 40 kilometers, tolls and tariffs and, with some exceptions, short term export and import of oil, gas, and electricity are within the Board's exclusive jurisdiction.

## A. Key structural elements

The board is structured as a regulatory tribunal with a chair, vice-chair and members appointed by cabinet for seven year terms. Key features are:

### *a) Expertise*

The NEB has a large staff that brings considerable professional and technical expertise to its operations. This expertise can be related directly to the board's public interest objectives and specific issues that arise in the exercise of its statutory powers and duties.

### *b) Adjudicative powers and administrative procedures*

Statutory decision powers are exercised through adjudicative procedures. The NEB Act gives the Board discretion to establish procedures. Under these

32 *Ibid*, s 52(2).
33 *Ibid,* ss 52(1), 53(1), 54.
34 As confirmed in *Tsleil-Waututh Nation, supra* note 30 at para 760.
35 *NEB Act*, *supra* note 2, s 52(4)-(5).

powers, rules of practice and procedure grounded in classical natural justice and procedural fairness principles that approximate the formalities of judicial procedures have been promulgated.[36] Thus, in *Forest Ethics Advocacy Association v. National Energy Board*, a case concerning a pipeline certificate decision, Justice David Stratas, in confirming that the constitutional issue in question could have been raised before the Board, said that if so, the Board,

> [C]ould have received evidence relevant to it, including any evidence of justification under section 1 of the Charter. The Board would also have had the benefit of cross-examinations and submissions on the matter, along with an opportunity to question all parties on the issues.[37]

His point was that these quasi-judicial procedures would provide a sound evidentiary and policy basis for a decision on the issue and a fully developed record for potential judicial review.

In *Forest Ethics* the Federal Court of Appeal approved an NEB standing decision in which the Board concluded that for participation in its hearings on a pipeline certificate application, the "directly affected" test in section 52.2 of the *NEB Act* includes effects on legal rights, imposing legal obligations, and prejudicial effects.[38] The consequence is that these regulatory powers concerning standing and hearings go a long way toward advancing the statutory purposes around participation and hearings and delineating the context for board decisions.

## B. Fundamental purposes

### *1. Energy resource development*

Energy tribunal enabling statutes are intended to facilitate and regulate development and use of energy infrastructure, assessed to be in the public interest. In the case of the National Energy Board, Canada's constitutional distribution of legislative powers, means that the Board's constituting and empowering statute is largely about assessing and regulating interjurisdictional energy facilities.

### *2. Public interest*

The meaning of "public interest"[39] (the essence of the term "public convenience and necessity") has been decidedly problematic. This is shown by Hierlmeier's

36 *National Energy Board Rules of Practice and Procedure*, SOR/95-208 (1995).

37 2014 FCA 245 at para 42, [2015] 4 FCR 75 [*Forest Ethics*].

38 *Ibid* at para 30.

39 The term appears as "public convenience and necessity" in *NEB Act* s 52(1)(a) (interjurisdictional pipelines) and s 58.16(1) (international power lines).

review of the theoretical literature on "public interest in the natural resources context."[40] She identified six definitional streams, namely, 1. common interest, 2. majority interest, 3. the idea of "public interest" being ethically or perhaps scientifically superior, 4. shared values, 5. economic interest and, 6. fair, inclusive procedures. Not surprisingly, there is no scholarly consensus on these articulations of the public interest. The problem is the size and characteristics of different publics. Some definitions, including shared values, are inclusive; others such as majority and economic preference approaches are different forms of disaggregation that narrow the definition.

Several decisions have considered the meaning and implications of statutory public interest requirements. In *Sumas Energy 2 Inc. v. Canada (National Energy Board)*, the Federal Court of Appeal considered that the NEB Act's public convenience and necessity standard authorized the evidence based weighing and balancing of potential project benefits and adverse effects that led the Board to reject the application.[41] The idea that public interest determination is a matter of opinion and consequently within the discretionary powers of tribunals like the NEB continues to be recited.[42] But the statute remains the touchstone. In *ATCO Gas & Pipelines Ltd v. Alberta (Energy and Utilities Board)*[43], the Supreme Court of Canada considered that the term "public interest" did not in itself confer a wide discretion on the EUB. Rather, the statutory purpose was the governing concept.

Recognized potential social and environmental impacts are addressed through extensive and detailed monitoring and mitigation conditions.[44] Thus, in the Enbridge Northern Gateway Pipeline application, the joint NEB-Canadian Environmental Assessment Agency Review Panel (whose positive

40 Jody L Hierlmeier, "'The Public Interest': Can it Provide Guidance for the ERCB and NRCB?" (2008) 18:3 J Envtl L & Prac 279 [Hierlmeier]. See also Nigel Bankes, "Pipelines, The National Energy Board and the Federal Court" (2015) 3:2 ERQ (Bankes noted the "competing assessments of public interest", Conclusions).

41 2005 FCA 377 at para 34, [2006] 1 FCR 456 (concerning an international power line certificate of public convenience and necessity application under *NEB Act* ss 58.16 and 58.23, provisions essentially similar to the s 52 pipeline provision).

42 See *Sincennes v Alberta (Energy and Utilities Board)*, 2009 ABCA 167 at para 66, 454 AR 121 [*Sincennes*], citing *Memorial Gardens Association (Canada) Limited v Colwood Cemetery Company*, [1985] SCR 353, at 357, 13 DLR (2d) 97; *Emera Brunswick Pipeline Company Ltd*, (31 May 2005), GH-1-2006 at 10, online: NEB <https://www.neb-one.gc.ca/pplctnflng/mjrpp/archive/brnswck/brnswck-eng.html>, cited in *Sincennes*, *ibid* at para 67.

43 2006 SCC 4, [2006] 1 SCR 140 (this case involved the Alberta Board's public utility authority in an era in which rate regulatory powers as well as facility regulation powers were vested in the Alberta EUB).

44 Hierlmeier, *supra* note 40 at 301.

report was approved by the responsible Minister and the federal Cabinet), approached the section 52 "present and future public convenience and necessity" test as a kind of cost-benefit analysis. It stated:

> The Panel considered the views and evidence of all participants to the hearing. This information was conveyed to the Panel orally and in writing, and included Aboriginal Traditional Knowledge, personal experience and beliefs, and science-based technology and research. The Panel weighed the potential burdens and benefits of the project as they would affect the environment, society, and economy at the local, regional, and national levels. These three dimensions of the public interest interact and overlap and were considered in an integrated manner.[45]

The "burdens" considered were: environmental, societal (particularly on local communities, including employment, education and training), economic (both national and regional), and the burden of a large oil spill. The Board took a "careful and precautionary approach."[46] New Pacific Basin oil markets were identified as "important to the Canadian economy and society,"[47] so that "societal and economic benefits can be expected from the project."[48] A specific finding was made that associated environmental impacts "can, generally, be effectively mitigated…[through] monitoring, research, and adaptive management."[49] This led to a recommendation that:

> [P]roject effects, in combination with cumulative effects, be found likely to be significant for certain populations of woodland caribou and grizzly bear…. Despite substantial mitigation proposed by Northern Gateway, there is uncertainty over the effectiveness of Northern Gateway's proposed mitigation to control access and achieve the goal of no net gain, or net decrease, in linear feature density. *The Panel recommends that the Governor in Council find that these cases of significant adverse environmental effects are justified in the circumstances*.[50]

The Board's recommendation was subject to 209 specific environmental, social and economic conditions. The ultimate conclusion was that for these reasons,

> … the Panel is of the view that, overall, [the Project], constructed and operated in full compliance with the conditions required by the Panel, is in the Canadian public inter-

45 Canada, *Considerations*: *Report of the Joint Review Panel for the Enbridge Northern Gateway Project*, vol 2 (Calgary, Alta: NEB, 2013) at 10 [*Northern Gateway Joint Review Panel Report*].
46 *Ibid* at 13.
47 *Ibid*.
48 *Ibid*.
49 *Ibid*.
50 *Ibid* [emphasis added].

> est. The Panel finds that Canadians would be better off with this Project than without it.[51]

This was the extent of the analysis. Behind it is the mountain of evidence heard by the Panel during 180 days of hearings, as well as numerous written submissions and supporting documentation. A considerable amount of public participant evidence centred on environmental and First Nation impacts. These factors have become vitally important in any public interest calculus that the Board must consider concerning pipeline certification, operational requirements, and ultimate abandonment.

### *3. Environmental effects*

Major interjurisdictional pipeline applications such as Northern Gateway and Trans Mountain show that the Board has given considerable attention to potential environmental impacts including cumulative impacts on the basis of the *NEB Act*'s public interest authority and its jurisdiction under the *Canadian Environmental Assessment Act, 2012*.[52] Yet, in many cases, the Board has resolutely declined to consider upstream and downstream activities associated with a pipeline, including the greenhouse gas emissions associated with those activities. However, one panel of the Board took a different view of this matter in 2017.[53]

The Board reports through the Minister to Cabinet with respect to major project applications. Its recommendations provide the basis for the ultimate Cabinet decision on the application under both the *NEB Act* and, where relevant, under the *Canadian Environmental Assessment Act*. In *Gitxaala Nation v. Canada* (dealing with the Northern Gateway project), the Federal Court of Appeal applied a deferential standard of reasonableness and concluded that the Cabinet decision to rely on the Board's recommendations was not unreasonable. According to the Court:

> The Governor in Council was entitled to assess the sufficiency of the information and recommendations it had received, balance all the considerations — economic, cultural, environmental and otherwise — and come to the conclusion it did. To rule otherwise would be to second-guess the Governor in Council's appreciation of the facts, its choice of policy, its access to scientific expertise and its evaluation and weighing of competing public interest considerations, matters very much outside of the ken of the courts.[54]

51 *Ibid*.

52 SC 2012, c 19, s 52 [*Canadian Environmental Assessment Act*].

53 See discussion, below, regarding Bill C-69.

54 *Gitxaala Nation v Canada (Minister of the Environment)*, [2016] 4 FCR 418, 2016 FCA 187 (CanLII) at para 157 [*Gitxaala*].

### *4. Aboriginal and treaty rights*

When the Crown has knowledge that a proposed pipeline project is likely to affect Aboriginal rights or title or treaty rights, a duty to consult and accommodate arises. Procedural aspects of this duty may be delegated to a tribunal such as the NEB[55] and, in such a case, the Board must consider Indigenous interests when formulating recommendations to Cabinet on pipeline applications. *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*[56] confirmed that consultation can be carried out through the NEB's pipeline certificate process and that this does not depend on whether the Crown (which has the ultimate duty to consult) is a party to the NEB proceeding. The Court stated:

> When the NEB is called on to assess the adequacy of Crown consultation, it may consider what consultative steps were provided, but its obligation to remain a neutral arbitrator does not change. A tribunal is not compromised when it carries out the functions Parliament has assigned to it under its Act and issues decisions that conform to the law and the Constitution. Regulatory agencies often carry out different, overlapping functions without giving rise to a reasonable apprehension of bias. Indeed this may be necessary for agencies to operate effectively and according to their intended roles.[57]

In *Chippewas of the Thames*, the Court concluded that the procedures followed by the Board were adequate in the circumstances of that case to discharge the duty to consult and accommodate. On the other hand, in *Gitxaala Nation*,[58] the Federal Court of Appeal concluded that the Crown had not discharged its duty to consult and accommodate. This was a Cabinet decision approving Board recommendations to grant a pipeline certificate of public convenience and necessity under section 54(1) of the *NEB Act*. As noted above, while the Court held that the Cabinet's decisions to issue the project certificate could not be set aside based on administrative law arguments pertaining to environmental considerations, it could be impugned on the basis of the duty to consult and accommodate.[59] To the same effect is *Tsleil-Waututh Nation,* concerning the Trans Mountain Expansion Project.[60]

55 *Chippewas of the Thames First Nation v Enbridge Pipelines Inc,* 2017 SCC 41, [2017] 1 SCR 1099 [*Chippewas of the Thames*]. David Wright's article in this issue examines the duty to consult and accommodate in detail.

56 *Ibid.*

57 *Ibid* at para 34.

58 *Supra* note 54.

59 *Ibid* at paras 325-32.

60 *Supra* note 30.

### C. Regulating construction, operations, and abandonment

The Board monitors construction of approved pipelines, with particular focus on the terms and conditions attached to the certificate of public convenience and necessity.[61] Issues arising during construction may be the subject of Board orders, as in the case of Trans Mountain's construction activities associated with the Burnaby terminal. In that case, the Board resolved an issue with the applicability of some Burnaby by-laws and also established an expedited process for considering similar applications.[62]

Upon completion of pipeline construction, a leave to open order from the Board is required before operations can begin.[63] Environmental and socio-economic conditions attached to the certificate must have been satisfied. The Board also monitors operations, with companies required to report accidents resulting in harm to humans and the natural environment. Companies are required to publish emergency response manuals.

Pipeline abandonment requires the Board's leave.[64] An abandonment application must include a plan providing a rationale for the abandonment, including a public engagement program, and how it will be carried out.[65] All regulated companies must have "set aside" mechanisms in place to pay for pipeline abandonment, subject to regular Board review. These arrangements such as trust agreements, surety bonds, or letters of credit must be approved by the Board.[66]

## IV. Powerline jurisdiction distinguished

The NEB's jurisdiction in relation to powerlines raises many issues very similar to those concerning pipelines. However, there are also significant differences. These differences underline the comprehensive nature of the NEB's jurisdiction over pipelines.

There are two categories of powerlines for the purposes of the *NEB Act*: international and interprovincial. The latter can be designated by cabinet order

61 *NEB Act*, *supra* note 2, s 52(1)(b).

62 *NEB -Trans Mountain - TMX - Decision on Motion* (18 January 2018), A89357-1 at 2, Appendix I, online: NEB <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A89357>.

63 *NEB Act*, *supra* note 2, s 47.

64 *Ibid*, s 74(1)(d).

65 *National Energy Board Onshore Pipeline Regulations*, SOR/99-294, s 50.

66 *Set-aside and collection mechanisms* (May 2014), MH-001-2013, online: NEB <https://www.neb-one.gc.ca/pplctnflng/mjrpp/archive/stsdcllctn/index-eng.html>.

as facilities to which certificate requirements apply.[67] However, no order of this kind has ever been made.[68]

International powerlines are subject to Board jurisdiction, but the *Act* contemplates two classes of approvals for such projects: certificates and permits. Applicants choose either the certificate route or the permit process, although the Board may recommend and the Minister may require that the certificate procedure be followed.[69] Similar to pipelines, a public interest test is applied, though there are no listed factors — only a Board discretion based on "public convenience and necessity"[70] to "have regard to all considerations that appear to it to be directly related to the line and relevant."[71] Public hearings are only required in the case of certificate applications.[72]

The most significant difference between the treatment of pipelines under the *NEB Act* and the treatment of international powerlines is that the *NEB Act* contemplates the widespread application of provincial laws to international powerline proposals where a project follows the permit option. Thus, section 58.2 of the *NEB Act* states:

> The laws from time to time in force in a province in relation to lines for the transmission of electricity from a place in the province to another place in that province apply in respect of those portions of international power lines that are within that province.[73]

Section 58.19 defines which laws are contemplated:

> For the purposes of sections 58.2, 58.21 and 58.22, a law of a province is in relation to lines for the transmission of electricity from a place in the province to another place in the province if the law is in relation to any of the following matters:
>
> (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;

67 *NEB Act*, *supra* note 2, s 58.4.
68 *Ibid,* ss 58.24, 58.4. See Nigel Bankes, "Some Things Have Changed but Much Remains the Same: the New Canadian Energy Regulator" (15 February 2018) *ABlawg* (blog), online: <https://ablawg.ca/2018/02/15/some-things-have-changed-but-much-remains-the-same-the-new-canadian-energy-regulator/> [Bankes, "The New Canadian Energy Regulator"].
69 *NEB Act*, *supra* note 2, s 58.16; See *Sincennes*, *supra* note 42 at paras 3-8.
70 *NEB Act*, *supra* note 2, s 58.16(1).
71 *Ibid*, s 58.16(2).
72 *Ibid*, s 58.11(1).
73 *Ibid*, s 58.2.

> (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.

Further, section 58.21 underlines the scope of these provincial powers and the role of provincial regulatory authorities:

> A provincial regulatory agency designated under section 58.17 has, in respect of those portions of international power lines that are within that province, the powers and duties that it has under the laws of the province in respect of lines for the transmission of electricity from a place in the province to another place in that province, including a power or duty to refuse to approve any matter or thing for which the approval of the agency is required, even though the result of the refusal is that the line cannot be constructed or operated.[74]

The application of provincial laws is conditional in two senses. First, the province must designate a relevant provincial agency,[75] and second, the applicant may elect to have its application dealt with as a certificate application under federal law.[76]

Provincial laws, if applicable, do not override the *NEB Act* or the terms of a permit on detailed route selection notwithstanding that Section 58.19 refers to "determination of [transmission line] location or detailed route." In *Sincennes*[77] the Alberta Court of Appeal pointed to *NEB Act* section 58.22 which makes it clear that: "Acts of Parliament of general application are, for the purpose of applying the laws of a province under section 58.2 or 58.21, paramount to those laws."[78] The Court noted that what is paramount are the "terms and conditions of permits [and certificates]."[79] In this case, the NEB had included a condition in the permit that the international powerline be constructed and operated within a prescribed corridor.

Plaintiff landowners complained that they had been denied a public hearing on the detailed route because the applicant opted for the permit track and the NEB did not recommend a certificate process to cabinet that would have

74 *Ibid*, s 58.21.
75 *Ibid*, ss 58.18, 58.24.
76 *Ibid,* s 58.23.
77 *Supra* note 42 at para 33.
78 *NEB Act*, *supra* note 2, s 58.22.
79 *Sincennes, supra* note 42 at para 44, citing *NEB Act*, *ibid*.

required a public hearing. The court pointed out that the landowners had been permitted to file letters of comment and the NEB had considered the issues raised. The landowners did get a hearing before Alberta's Energy and Utilities Board (the provincially designated authority) but the EUB concluded that it was bound by the corridor specified in the permit. Consequently, the Court declined to interfere with the EUB's approval of the project.

## V. Utility regulation: tolling

A key NEB function is acting as the pipeline sector's economic regulator. The Board is authorized to make orders concerning "traffic, tolls or tariffs."[80] This power extends to affecting private contracts. Payments by pipeline shippers have two components: "tolls" which are the price shippers pay for pipeline service, and "tariffs," which are the terms the shippers agree to follow in the form of lists of transportation tolls as well as conditions and methodology for calculating tolls.[81] Tolls must be approved by the Board.[82] The term "rate" is commonly used to describe charges to shippers. It has been used with reference to a toll "that is measured by a rate applied to some variable such as quantity or distance…."[83]

Tolls must be "just and reasonable" — charged equally under substantially similar circumstances.[84] "Unjust discrimination in tolls, service or facilities" is prohibited.[85] There are uniform accounting regulations for gas and oil pipelines. The Board cannot set rates retroactively or retrospectively.[86]

While no specific methodology for establishing tolls is mandated, the Board's approach has consistently been cost-based. The methodology can be described generally as rate base-rate of return. For pipeline companies, this originally meant lengthy and complex annual two-stage hearings. Revenue needs were determined for the coming year. The first stage concerned what cost items could be included in the rate base; the second stage involved fixing a "reasonable" rate of return on the rate base. Beginning in the 1990s, the Board began to review and, in the absence of objection, accept negotiated settlements

80 *NEB Act*, *supra* note 2, s 59.
81 *Ibid*, s 58.5.
82 *Ibid*, s 60.
83 *British Columbia Hydro & Power Authority v Westcoast Transmission Co*, [1981] 2 FC 646 (CA) at 7, 36 NR 33.
84 *NEB Act*, *supra* note 2, s 62.
85 *Ibid*, s 67.
86 Nickie Nikolaou & Allan Ingelson, eds, *Canada Energy Law Service* (Toronto: Thomson Reuters, 2014) (loose-leaf 2017-2 supplement) at 10-1064.2 [*CELS*].

between a pipeline company or several companies and their customers. The result has been considerably shortened rate hearings. Expedited proceedings that involve only written submissions for Board consideration have also been used in some circumstances.

In broad terms, utility regulation focuses on balancing the interests of regulated utilities and their customers. Core decisions involve protection of consumers concerning prices and quality of energy services. The foundational principle of utility regulation has been described as a "regulatory compact."[87] The idea is that a utility is granted the right to provide energy service in a defined area with the opportunity to earn a reasonable return. In exchange, it must provide nondiscriminatory service at a fair and reasonable price. For this purpose, utility regulators like the NEB have developed a methodology designed to balance the interests of utilities and consumers. This is a complex subject requiring particular specialized expertise.[88] This is reflected in the standard of review applied by the courts on appeals and applications for judicial review. This is discussed further in the next section.

## VI. Judicial supervision

### A. Leave to appeal

Appeals from NEB decisions or orders lie to the Federal Court of Appeal, with leave of the Court, on questions of law or jurisdiction.[89] Board recommendations to the Minister and Cabinet on certificate applications under the *NEB Act* or as "responsible authority" under the *Canadian Environmental Assessment Act* are not appealable.[90] However, Cabinet certificate decisions are subject to judicial review by the Federal Court of Appeal with leave.[91] In this kind of proceeding, the Court reviews the NEB (or Joint Review Panel) report to determine whether it meets the legislative standards and is consequently a report on which Cabinet can rely.

87 *Fortis Alberta Inc v Alberta (Utilities Commission),* 2015 ABCA 295 at paras 10-15, 389 DLR (4th) 1. Compare *TransCanada PipeLines Limited, NOVA Gas Transmission Ltd, and Foothills Pipe Lines Ltd: Business and Services Restructuring Proposal and Mainline Final Tolls for 2012 and 2013* (27 March 2013), RH-003-2011, online: NEB <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A51040> [*NEB Decision Restructuring Proposal*] (the Board concluded that the regulatory compact concept was not helpful and the Board also noted in that decision that federally regulated pipelines do not have exclusive franchise areas, at 37).

88 *NEB Decision Restructuring Proposal*, *supra* note 87.

89 *NEB Act*, *supra* note 2, s 22(1).

90 *Ibid*, s 22(4); *Tsleil-Waututh*, *supra* note 30; *Gitxaala*, *supra* note 54 at paras 124-27.

91 *NEB Act, supra* note 2, s 55(1) (the Court does not normally give reasons in leave applications).

It may also be possible to raise constitutional issues relating to pipelines and powerlines in provincial superior courts without the need for a leave application. Examples include a challenge to the validity of an environmental impact assessment equivalency agreement between the British Columbia Environmental Assessment Office and the NEB concerning the Northern Gateway Pipeline project,[92] and claims by the City of Burnaby that its Tree and Planning bylaws apply to the Trans Mountain Pipeline Expansion project notwithstanding an NEB entry order.[93]

## B. Standing

In *Forest Ethics*,[94] the Federal Court of Appeal declined to interfere with the Board's decision not to allow one of the parties to participate in the review of Enbridge's Line 9 application. Section 55.2 of the *NEB Act* provides that the Board must consider representations from a person that is directly affected by an application, and may consider representations from others who have "relevant information or expertise."[95] The Court concluded that the Board's decision to decline to consider representations is a "mix of substance *and* procedure."[96] However, regardless of how the decision is characterized, "the Board deserves to be allowed a significant margin of appreciation."[97]

## C. Standard of review

This section examines the extent to which reviewing courts defer to the Board's specialized energy expertise. At the centre of judicial deference to tribunal decisions is parliamentary sovereignty. In making decisions and recommendations under the *NEB Act*, the Board ultimately is implementing Parliament's purposes. Thus, democratic legitimacy supports deference to Board decisions. In determining the appropriate degree of deference in any particular case, the

92 *Coastal First Nations v British Columbia (Environment),* 2016 BCSC 34, 85 BCLR (5th) 360.

93 *Burnaby (City) v Trans Mountain Pipeline ULC*, 2015 BCSC 2140, 83 BCLR (5th) 134, aff'd 2017 BCCA 132, 409 DLR (4th) 129 [*Burnaby*].

94 *Supra* note 37.

95 *Supra* note 2, s 55.2.

96 *Forest Ethics, supra* note 37 at para 79 [emphasis in original].

97 *Ibid* at para 82. In this decision the Court also commented (*ibid* at paras 28-29) on the words "directly affected" noting that Forest Ethics could not be said to be directly affected by the Board's decision since the decision did not "affect its legal rights, impose legal obligations upon it, or prejudicially affect it in any way" at para 30. Thus, the Court concluded, Forest Ethics lacked standing to bring an application for judicial review. However, it bears emphasizing that in making these observations the Court was commenting on the "directly affected" language of s 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7.

key source is the Board's enabling statute, the *NEB Act*, along with any relevant jurisprudence.

There is a presumption that a tribunal is entitled to deference in interpreting its enabling or home statute.[98] Thus, the standard is "reasonableness," meaning that decisions must be concerned with "justification, transparency and intelligibility within the decision-making process…[and be situated] within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[99] This underlines the significance of the public interest language of the *NEB Act* reviewed above. The alternative to the reasonableness standard is "correctness," meaning correct in law on which the court, not the tribunal, is the expert. If the standard is correctness and the court does not agree with the Board's decision, the court will substitute its own view.[100]

Apart from consideration of statutory purpose gleaned from the *NEB Act* as the empowering statute, the choice of the applicable standard of review is guided by a number of contextual factors including presence or absence and relative strength of a privative clause[101] or statutory appeal provision, tribunal expertise and experience relative to its statutory functions, and the nature of the question — law, fact, or mixed fact and law.[102]

All of this suggests a narrow window for challenging decisions of an experienced, well- resourced tribunal like the NEB. If so, is this consistent with democratic legitimacy[103] and the rule of law? [104]

98 *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54, [2008] 1 SCR 190 [*Dunsmuir*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 34, 39, [2011] 3 SCR 654 [*Alberta (Information and Privacy Commissioner*)]*; Edmonton (City) v Edmonton East (Capilano) Shopping Centres* Ltd, 2016 SCC 47 at paras 22-24, [2016] 2 SCR 293 [*Capilano*].

99 *Dunsmuir*, *supra* note 98 at para 47.

100 *Ibid* at para 50.

101 The NEB like other energy tribunals is protected by a privative clause that purports to exclude judicial review of decisions. This must be viewed in combination with s 22(1) of the *NEB Act*s which allows appeals to the Federal Court of Appeal (with leave) on questions of law or jurisdiction. For its various decisions concerning pipelines the NEB is well endowed with the kind of specialized expertise apparently contemplated by the Supreme Court of Canada in *Dunsmuir*. The privative clause in the *NEB Act* is relatively weak. It does not include a "not subject to review in any court" component. Section 23(1) merely states that, "[e]xcept as provided in this Act, every decision or order of the Board is final and conclusive."

102 *Dunsmuir*, *supra* note 98.

103 Julia Black, "Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes" (2008) 2 Regulation & Governance 137.

104 In the sense of guarding against arbitrariness; see Martin Krygier, "Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?" online: (2010) UNSW Law Research Paper No 2010-22, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1627465>.

An instructive example is the Supreme Court of Canada's decision in *Smith v. Alliance Pipeline Ltd*.[105] This case involved a landowner compensation issue decided by an Arbitration Committee established under the *NEB Act*.[106] Justice Fish stated:

> Applying…[the *Dunsmuir* standard of review] analytical framework here, I am satisfied that the governing standard of review is reasonableness.
>
> In this case, the Committee was interpreting its home statute. Under *Dunsmuir*, this will usually attract a reasonableness standard of review (*ibid*. at para. 54). And nothing in these reasons or in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 (CanLII), [2011] 1 S.C.R. 3, recently decided, represents a departure from *Dunsmuir*.
>
> Any doubt whether reasonableness is the applicable standard here can be comfortably resolved by other considerations.
>
> First, the Committee was interpreting s. 99(1) of the *NEBA*, a provision of its home statute regarding awards for costs. Awards for costs are invariably fact-sensitive and generally discretionary.
>
> Second, and more specifically, in fixing the costs that must be paid by expropriating parties, the Committee has been expressly endowed by Parliament with a wide "margin of appreciation within the range of acceptable and rational solutions" (*Dunsmuir*, at para. 47): the only costs that must be awarded under s. 99(1) are those "determined by the Committee to have been reasonably incurred." This statutory language reflects a legislative intention to vest in Arbitration Committees sole responsibility for determining the nature and the amount of the costs to be awarded in the disputes they are bound under the *NEBA* to resolve.
>
> Third, in discharging that responsibility, Committees must interpret s. 99(1) in order to apply it in accordance with their statutory mandate, a process that will frequently raise "questions where the legal issues cannot be easily separated from the factual issues" (*Dunsmuir*, at para. 51).
>
> These considerations all fall within categories which according to *Dunsmuir* generally attract the standard of reasonableness. Cumulatively considered, they point unmistakably to that standard.[107]

Applying the reasonableness standard, the court concluded that the NEB Arbitration Committee decision was reasonable. A major factor was the

105 2011 SCC 7, [2011] 1 SCR 160 [*Smith*].

106 Though this is not a decision of the NEB itself, it involves a related body that is part of the overall facilities regulation process under the *NEB Act*. The case is a leading authority in the Supreme Court of Canada's development of standard of review principles.

107 *Smith*, *supra* note 105 at paras 27-33 [emphasis in original].

Committee's discretionary power to make essentially fact-based cost awards applying a "reasonably incurred" test.[108]

In *Forest Ethics Advocacy Association v. Canada (National Energy Board)*[109] the Federal Court of Appeal was faced with a series of issues including: the relevance of climate change in its section 52 pipeline certificate process; the standing of certain parties to participate in the NEB pipeline hearing;[110] and whether certain issues should have first been raised before the Board. In the case of the section 52 issues, the court emphasized that the Board had to apply its interpretation of section 52 of the *NEB Act* to the particular facts and to assess the relevance and materiality of specific parts of the applicant's proposed evidence. Focus was on the overall outcome rather than the separate component issues. Applying the *Dunsmuir* analysis led the Court to conclude (agreeing with the parties) that the standard of review was reasonableness on the section 52 issues.[111]

The judicial approach has been to consider categories that may rebut the presumption of a reasonableness standard. These categories, according to the *Dunsmuir* court, are: (1) constitutional questions, (2) issues "of central importance to the legal system as a whole and outside a tribunal's area of specialized expertise," (3) "true questions of jurisdiction or *vires*," and (4) issues concerning jurisdictional lines between tribunals. Further, if jurisprudence has settled the degree of deference for a particular type of decision, the court looks no farther.[112]

A recent NEB constitutional question example is *Burnaby (City) v. Trans Mountain Pipeline ULC.* [113] The City argued that Trans Mountain had to comply with its municipal planning and land use bylaws when entering Burnaby park land for pipeline-surveying purposes under *NEB Act* section 73. The court analyzed the constitutional question on a correctness standard, concluding that the bylaws were inoperative in relation to Trans Mountain.

As to the second category, *Smith v. Alliance Pipeline*[114] introduced above, involved interpretation by an NEB Arbitration Committee of the term "costs" in section 99 (1) of the *NEB Act.* Did the phrase "all legal, appraisal and other costs determined by the Committee to have been reasonably incurred, [by a

108 *Ibid* at para 110.
109 *Supra* note 37.
110 See the section on Standing, above.
111 *Forest Ethics, supra* note 37 at paras 60, 64.
112 *Dunsmuir, supra* note 98 at paras 51-64.
113 *Supra* note 93.
114 *Supra* note 105.

person subject to a pipeline right of way]" include legal costs arising out of judicial challenge proceedings?[115] The Supreme Court of Canada concluded that the standard was reasonableness and that the Committee's interpretation that legal costs were not included was also reasonable. The Court's reasoning was brief. Home statute interpretation weighed heavily. But, on the argument that this matter was a question of law to be assessed on a correctness standard, the court said simply that this was "clearly not the case"[116] This question was not of "central importance to the legal system" and added that the *Dunsmuir* court had noted that "[t]here is nothing unprincipled in the fact that some questions of law will be decided on [a reasonableness] basis."[117]

Another issue category subject to the correctness standard, recognized by the court in *Dunsmuir*, is "questions of true jurisdiction or *vires*."[118] But it is clear that this category is rare. One example in the energy context albeit not involving the NEB is *Shaw v. Alberta (Utilities Commission).*[119] The issue, in this case, was whether a legislative amendment had removed a specific matter from the authority of the commission and vested that power in the government. These true questions of jurisdiction, said the Alberta court, "will be exceptional."[120]

*Sincennes v Alberta (EUB)*,[121] discussed above, is a classic example of a dispute about the relative responsibilities of federal and provincial tribunals in the context of international powerlines. The Alberta Court of Appeal settled on a correctness standard with little discussion.[122]

Thus, *Dunsmuir*'s proclamation that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function"[123] remains significant. In principle, true questions of jurisdiction must still be decided correctly. However, "as long as the true question of jurisdiction…remains, the party seeking to invoke it must be required to demonstrate why the court should not review [the] tribunal's interpretation of its home statute on the deferential standard of reasonableness."[124]

115 *Ibid* at para 28.
116 *Ibid* at para 37.
117 *Ibid* at para 38, citing *Dunsmuir*, *supra* note 98 at para 56.
118 *Supra* note 98 at para 59.
119 2012 ABCA 378, 539 AR 315.
120 *Ibid* at para 23. See also *Alberta (Information and Privacy Commissioner)*, *supra* note 98 at para 39.
121 *Supra* note 42.
122 *Ibid* at paras 28-30.
123 *Dunsmuir*, *supra* note 98 at para 54.
124 *Alberta (Information and Privacy Commissioner)*, *supra* note 98 at para 39.

The presumption approach has developed considerable traction. However, it may be less significant for certificate decisions where legal challenges are not to Board recommendations but to the Order in Council directing the Board to issue a certificate. This is apparent in *Gitxaala Nation v. Canada*,[125] an appeal from the Cabinet decision under the *NEB Act* to approve the Northern Gateway Pipeline. The Federal Court of Appeal did not mention the home statute presumption. Rather, in adopting a reasonableness standard, it focused on contextual factors — the nature of the Governor in Council (Cabinet) and the broad discretionary nature of the powers exercised.[126] The Court emphasized that the Joint Review Panel (which included an NEB representative) that made the recommendation to Cabinet really decided nothing except in a formal sense, a conclusion that is debatable in view of challenges to previous joint review panel recommendations. The Federal Court of Appeal also had to deal with one of its own decisions[127] that applied a correctness standard to review a cabinet decision responding to a joint review panel recommendation. This case was distinguished on the basis that the decision involved a specific environmental assessment and not a range of environmental, social, and economic factors.

There are some signs that the Supreme Court of Canada may be open to reconsidering its approach to determining standard of judicial review and content of standard issues. In the Spring of 2018, the Supreme Court, in granting leave to appeal in three cases (none involving the NEB), stated that the appeals "provide an opportunity to consider the nature and scope of judicial review as addressed in *Dunsmuir* and subsequent cases."[128]

125 *Supra* note 54.

126 The Federal Court of Appeal took a similar approach to reach a reasonableness standard in *Tsleil-Waututh Nation*, *supra* note 30 at paras 215-17.

127 *Gitxaala,* supra note 54 at paras 129-38 referring to *Council of the Innu of Ekuanitshit v Canada (AG)*, 2014 FCA 189, 376 DLR (4th) 248.

128 *Minister of Citizenship and Immigration v Alexander Vavilov,* 2017 FCA 132, leave to appeal to SCC granted, 37748 (10 May 2018) ("[t]he application for leave to appeal from the judgment of the Federal Court of Appeal, Number A-394-15, 2017 FCA 132, dated June 21, 2017, is granted with costs in the cause. The appeal will be heard with *Bell Canada, et al. v. Attorney General of Canada* (37896), and with *National Football League, et al. v. Attorney General of Canada* (37897). The Court is of the view that these appeals provide an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, and subsequent cases…" at 1.)

## XI. The expert panels and Bill C-69 2018

As noted in Bankes's introduction to this special issue, the current Liberal government seems set to abolish the NEB under the terms of Bill C-69, 2018[129] that includes the *Canadian Energy Regulator Ac*t (*CERA*) and a new *Impact Assessment Act* (*IAA*).

The *CERA* will replace the NEB with a new Canadian Energy Regulator (CER). The model is quasi corporate, with a Board of Directors and a Chief Executive Officer. However, under the "Lead Commissioner," the Commission will have pipeline regulatory powers similar to those of the current Board. Beyond this new structure and name change, the overall regulatory scheme and the key regulatory powers remain largely the same. One major change however relates to the linkage of pipeline review with the *IAA*. Whereas the *NEB Act* made the NEB the sole pipeline environmental assessment authority, the *CERA* and *IAA* together contemplate that where pipeline certificate applications are "designated projects" under the *IAA*, then the panel established under the *IAA* will exercise the Commission's power to make a report and recommendations on the project to the Minister of the Environment. At least one member of the *IAA* panel in such a case must be selected from a roster of CER Commissioners. The Panel report will fulfill duties under both the *CERA* and the *IAA*. The *IAA* report must include consideration of cumulative effects.[130]

Full integration of *CERA* and *IAA* powers and process may be challenging. For example, Bankes points out that the "Designated Project" process will make it "difficult or impossible"[131] to deal, in an integrated way, with tolling issues at the same time as considering the infrastructure project, as the NEB has done under the *NEB Act*.

The new legislation will give both the CER and *IAA* panels significantly more direction when assessing public interest matters. Unlike the *NEB Act*, which gave the Board a wide discretion, listing four economic and financial decision matters followed by a general factor ("any public interest that in the board's opinion may be affected"), the *CERA* specifically mentions factors

129 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, online: <www.parl.ca/DocumentViewer/en/42-1/bill/C-69/third-reading> [*Bill C-69 CERA*].

130 *Ibid*, s 183(2). Also relevant is Bill C-68*, An Act to amend the Fisheries Act and other Acts in consequence*, 1st Sess, 42nd Parl, 2018, which removes the commercial, Indigenous and sport fishery scope limitation and restores the "harmful alteration, disruption or destruction" (HADD) fish habitat protection standard for ministerial facility approval.

131 Bankes, "The New Canadian Energy Regulator", *supra* note 68.

relating to the environment, health, Canadian society, and Indigenous peoples. Section 183(2) provides that:

> (2) The Commission must make its recommendation taking into account — in light of, among other things, any Indigenous knowledge that has been provided to the Commission and scientific information and data — all considerations that appear to it to be relevant and directly related to the pipeline, including
>
> (a) the environmental effects, including any cumulative environmental effects;
>
> (b) the safety and security of persons and the protection of property and the environment;
>
> (c) the health, social and economic effects, including with respect to the intersection of sex and gender with other identity factors;
>
> (d) the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes;
>
> (e) the effects on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;
>
> (f) the availability of oil, gas or any other commodity to the pipeline;
>
> (g) the existence of actual or potential markets;
>
> (h) the economic feasibility of the pipeline;
>
> (i) the financial resources, financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline;
>
> (j) the extent to which the effects of the pipeline hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;
>
> (k) any relevant assessment referred to in section 92, 93 or 95 of the *Impact Assessment Act*; and
>
> (l) any public interest that the Commission considers may be affected by the issuance of the certificate or the dismissal of the application.[132]

Though climate change appears as a factor in para (j), there is no specific mention in the *CERA* of upstream and downstream GHG emissions associated

132 *Bill C-69 CERA*, *supra* note 130, s 183(2).

with a pipeline. This notwithstanding intense public debate around the NEB's Energy East Panel's decision to require consideration of these emissions.[133]

While these changes to the certificate provisions are important, largely unchanged are powers concerning pipeline construction; land acquisition (but a new Pipeline Claims Tribunal replaces the arbitration system); abandonment; tariffs and tolls; oil and gas import and export; advice at government request; energy market research; and public information. The distinct powerline provisions discussed above are also unchanged. Public participation is addressed for the first time under the *CERA*, but only to give the Commission an open discretion concerning "public engagement"[134] along with public funding powers.[135]

Judicial supervision powers also remain the same. Appeal to the Federal Court of Appeal requires leave of the court, except concerning certificate recommendations to cabinet. However, uncertainty remains concerning whether Joint Review Panel recommendations can be challenged directly or whether the sole option is to appeal the ultimate Cabinet decision.[136]

## XII. National interest in 2018

As the National Energy Board fades to black, soon to be replaced by the Canadian Energy Regulator, the drive to build new export pipelines has produced a nation-building rhetoric very different from that of the 1950s. In the 1950s, the federal government was able to get the TransCanada natural gas pipeline completed in a chaotic economic and political context. This was the origin of the NEB. Now, the chaos to overcome is not the result of a regulatory vacuum, even though a new national regulator is imminent. Rather, the problems stem from changing public views (and extreme regional differences) about environment, development, and society, together with First Nations rights, title, and aspirations.

133 *Energy East Pipeline Ltd and TransCanada PipeLines Limited List of Issues and Factors and Scope of Factors for the Environmental Assessments* (23 August 2017), File OF-Fac-Oil-E266-2014-01 02, online: NEB <https://apps.neb-one.gc.ca/REGDOCS/File/Download/3320560>. The Energy East application was subsequently withdrawn (NEB Filing 86594) by the proponent TransCanada Pipelines Ltd at least in part on the ground that this requirement presented onerous evidentiary issues.

134 *Bill C-69 CERA*, *supra* note 130, s 74.

135 *Ibid,* s 75.

136 See discussion, above, and Martin Olszynski's contribution in this issue at p 91.

## XIII. Conclusions

The NEB was conceived as a pipeline regulator and has remained a comprehensive pipeline regulator throughout its existence. Provinces do have jurisdiction in relation to provincial lands and environment. However, though provincial environmental regulation has become more prominent, the NEB authority over pipelines remains plenary. By contrast, the NEB has far less authority in relation to powerlines.

The NEB's decision-making authority has declined over time. Since 2012, Cabinet has been the ultimate decision-maker for all major pipelines. Bill C-69 may further erode the authority of the energy regulator insofar as *CERA* and the *IAA* contemplate (at least to the extent that pipelines are "designated projects") that the CER's recommendatory powers will be assumed by review panels under the *IAA*.

Judicial supervision of NEB pipeline decisions has been largely deferential. Though there is uncertainty about future standard of review principles, this deference to regulator decisions is likely to continue.

A major development beginning in the 1970s has been the significance of environmental and Aboriginal rights issues, as well as unprecedented public concern and participation in pipeline approval processes. These are the factors that have been most prominent in the decision to replace the NEB with a new regulator with a broader public interest mandate that includes a full range of environmental factors as well as Indigenous interests.