Drawing Lines in the Sand: Parliament's Jurisdiction to Consider Upstream and Downstream Greenhouse Gas (GHG) Emissions in Interprovincial Pipeline Project Reviews

*Nathalie J. Chalifour**

Many constitutional questions arise in the context of assessing, approving, and regulating interprovincial pipelines. This paper examines the extent to which upstream and downstream greenhouse gas (GHG) emissions can be considered and acted upon when proponents seek federal approval to build, expand, or modify an interprovincial pipeline. This question has become relevant in the context of Canada's international commitments under the Paris Agreement*, which require rapid, broad, and systemic decarbonisation of the Canadian economy. The article examines the questions through the lens of the regulatory frameworks in force at the time of writing (the* National Energy Board Act *and the* Canadian Environmental Assessment Act, 2012*) as well as draft legislation under Bill C-69, namely the* Canadian Energy Regulator Act *and the I*mpact Assessment Act. *Although the new laws do not explicitly refer to indirect emissions, a reasonable interpretation of the legislation suggests that federal regulators would be within the bounds of their statutory authority to include indirect*

*De nombreuses questions constitutionnelles se posent dans le cadre de l'évaluation, de l'approbation et de la réglementation des pipelines interprovinciaux. Cet article examine dans quelle mesure il est possible de prendre en compte et de réagir aux émissions de gaz à effet de serre (GES) en amont et en aval lorsque les promoteurs sollicitent l'approbation du gouvernement fédéral pour construire, agrandir ou modifier un pipeline interprovincial. Cette question est devenue de plus en plus pertinente dans le contexte des engagements internationaux du Canada à l'égard de l'*Accord de Paris*, qui exigent une décarbonisation rapide, généralisée et systémique de l'économie canadienne. L'article examine les questions du point de vue des cadres de réglementation en vigueur au moment de la présente publication (la* Loi sur l'Office national de l'énergie *et la* Loi canadienne sur l'évaluation environnementale [2012]*), ainsi que du projet législatif en vertu du projet de loi C-69, à savoir la* Loi sur la Régie canadienne de l'énergie *et la* Loi sur l'évaluation d'impact. *Bien que les nouvelles lois ne*

* Nathalie Chalifour (PhD Stanford) is an Associate Professor and Co-Director of the Centre for Environmental Law and Global Sustainability at the University of Ottawa. The author wishes to acknowledge the helpful comments from reviewers, including Professor Nigel Bankes, Faculty of Law, University of Calgary, Professor Meinhard Doelle, Faculty of Law, Dalhousie University, Professor Peter Oliver, Faculty of Law, University of Ottawa, and the anonymous peer reviewers. The author is grateful for the excellent research assistance provided by Tyler Paquette, JD 2018 and Taylor Wormington, JD 2020.

emissions in their deliberations and decision-making. A constitutional analysis suggests that that they would also be justified in doing so. The courts have confirmed federal jurisdiction over regulation of GHG emissions under the criminal law power, and there are two reference cases active at the time of writing that will examine the jurisdictional scope of the peace, order and good government power in the context of carbon pricing. Although it is unchartered jurisprudential territory, it is reasonable to conclude that under the new regulatory regime, Parliament will have the statutory and constitutional authority to consider the full implications of GHG emissions associated with an interprovincial pipeline proposal, especially if the courts continue to interpret jurisdictional powers through the flexible, purposive lens of cooperative federalism.

mentionnent pas explicitement les émissions indirectes, une interprétation raisonnable de la législation suggère que les organismes de réglementation fédéraux pourraient, conformément à leurs pouvoirs statuaires, inclure les émissions indirectes dans leurs délibérations et processus décisionnels. Une analyse constitutionnelle suggère qu'ils auraient aussi raison d'agir ainsi. Les tribunaux ont confirmé la compétence fédérale en matière de réglementation des émissions de GES en vertu du pouvoir pénal, et deux cas de référence en cours au moment de la rédaction examineront l'étendue juridictionnelle des pouvoirs relatifs à la paix, l'ordre et le bon gouvernement dans le cadre de la tarification du carbone. Bien qu'il s'agisse d'un territoire jurisprudentiel entièrement nouveau, il est raisonnable de conclure qu'en vertu du nouveau régime réglementaire, le Parlement aura le pouvoir légal et constitutionnel d'examiner toutes les conséquences des émissions de GES associées à une proposition de pipeline interprovincial, en particulier si les tribunaux continuent d'interpréter les pouvoirs juridictionnels à travers une interprétation téléologique et flexible du fédéralisme coopératif.

Part I: Introduction

If there were to be a competition for the most polarizing sustainability challenge in Canadian politics, pipelines might emerge as the winner.[1] In recent years, several major pipeline proposals have been the subject of great controversy, with proponents emphasizing their importance for moving resources to markets[2] and opponents questioning the expansion of fossil fuel infrastructure in an era of decarbonisation.[3] The tension between fossil fuel development and decarbonisation was a very live issue in Canadian politics in 2018: Kinder Morgan's Trans Mountain pipeline expansion proposal to move hydrocarbons from Edmonton, Alberta to Burnaby, British Columbia locked two provinces in diametric opposition to each other, both wielding the Constitution as sword and shield, while Indigenous leaders reminded stakeholders of the risks to their inherent rights.[4] Meanwhile, the federal government was caught in the politically charged quagmire of simultaneously supporting the pipeline, Indigenous rights, and ambitious climate policy,[5] angering many when it chose to buy the pipeline in response to Kinder Morgan's ultimatum.[6]

1 The topic of carbon pricing is also a top contender, especially as the issue features in the electoral politics of several provincial elections. See e.g. Shawn McCarthy, "'Carbon Pricing Works', Canadian Economists says as National Debate Heats up", *The Globe and Mail* (6 April 2018), online: <www.theglobeandmail.com/business/article-carbon-pricing-works-canadian-economists-say-as-national-debate/>.

2 See e.g. Jennifer Hocking, "The National Energy Board: Regulation of Access to Oil Pipelines" (2016) 53:3 Alta L Rev 777 at 778-81; Geoffrey Morgan, "Pipeline Shortage to Cost the Economy $15.6 Billion this Year: Report", *Financial Post* (21 February 2018), online: <https://business.financialpost.com/commodities/energy/a-self-inflicted-wound-pipeline-delays-to-cost-canadian-economy-15-6b-in-2018-says-scotiabank>.

3 See e.g. Jurgen Poesche, "Quo Vadis Canada's Hydrocarbon Pipelines?" (2016) 9:2 J World Energy L & Bus 105-15; David Hughes, *Can Canada Expand Oil and Gas Production, Build Pipelines and Keep its Climate Change Commitments?* (Ottawa: Canadian Centre for Policy Alternatives, 2016) at 31-33; Jeffrey D Sachs, "Forget Trans Mountain, Here's the Sustainable way Forward for Canada's Energy Sector", *The Globe and Mail* (13 April 2018), online: <www.theglobeandmail.com/opinion/article-the-sustainable-way-forward-for-canadas-energy-sector/>.

4 Gemma Karstens-Smith, "B.C. First Nation Leader Pitches Sustainability to Kinder Morgan Pipeline Investors", *CBC News* (9 May 2018), online: <www.cbc.ca/news/canada/british-columbia/b-c-first-nation-leader-pitches-sustainability-to-kinder-morgan-pipeline-investors-1.4656006> (Neskonlith Chief Judy Wilson: "We do not believe the risks of the project have been accurately evaluated nor fully disclosed and we wanted to point that out to shareholders").

5 While summarizing the Trans Mountain pipeline expansion proposal, the federal government promotes the pipeline's economic benefits, while also indicating that the project includes environmental protections, the involvement of Indigenous communities, and varying forms of community consultations. See Natural Resources Canada, "Trans Mountain Expansion Project", *Government of Canada* (24 July 2017), online: <www.nrcan.gc.ca/energy/resources/19142>.

6 Steven Chase, Kelly Cryderman & Jeff Lewis, "Trudeau Government to Buy Kinder Morgan's Trans Mountain for $4.5-Billion", *The Globe and Mail* (29 May 2018), online: <www.theglobeandmail.com/politics/article-trudeau-government-to-buy-kinder-morgans-trans-mountain-pipeline/>.

Many constitutional questions arise in the context of assessing, approving, and regulating interprovincial pipelines. For instance, one of the constitutional debates relating to the Trans Mountain pipeline expansion relates to whether British Columbia has the jurisdiction to restrict the flow of bitumen from that pipeline into the province. The government of British Columbia (BC) asked the province's Court of Appeal for guidance on this issue through a constitutional reference.[7] In a related case, the Supreme Court of Canada recently dismissed an appeal by BC and the City of Burnaby to overturn the National Energy Board (NEB)'s ruling that allowed Kinder Morgan to bypass local bylaws relating to construction of the expansion.[8] Another piece of the constitutional puzzle which has garnered relatively less media attention — but is at the heart of this article — is the extent to which federal regulators have jurisdiction to bring greenhouse gas (GHG) emissions into their deliberations about whether to approve a proposal to build, expand, or modify an interprovincial pipeline.

The 2015 Paris Agreement, which Canada has signed and ratified, commits Parties to strive to mitigate GHG emissions in order to limit global warming to 1.5 to 2 degrees Celsius.[9] In 2016, the Canadian federal government, all but one province and the territories, agreed to the *Pan Canadian Framework on Clean Growth and Climate Change* (*PCF*).[10] A blueprint for

7 A Reference by the Lieutenant Governor in Council set out in Order in Council No 211/18 dated April 25, 2018 concerning the constitutionality of amendments to provisions in the *Environmental Management Act*, RSBC 2003, c 53 regarding the impacts of releases of certain hazardous substances, CA 45253:

1 Is it within the legislative authority of the Legislature of British Columbia to enact legislation substantially in the form set out in the attached Appendix?

2 If the answer to question 1 is yes, would the attached legislation be applicable to hazardous substances brought into British Columbia by means of interprovincial undertakings?

3 If the answers to questions 1 and 2 are yes, would existing federal legislation render all or part of the attached legislation inoperative?

8 *Burnaby (City) v Trans Mountain Pipeline ULC*, 2017 BCCA 132, [2017] BCJ No 562, leave to appeal to SCC refused [2018] SCCA No 165. For further discussion of these issues see the essay by Martin Olszynski in this Special Issue.

9 UNFCCC, 2st Sess, UN Doc FCCC/CP/2015/L9/Rev 1 (2015) [Paris Agreement]. Canada's Nationally Determined Contribution (NDC) under the Paris Agreement is to reduce GHG emissions by 30 percent below 2005 levels by 2030. Canada, Government of Canada, "Canada's 2017 Nationally Determined Contribution Submission to the United Nations Framework Convention on Climate Change", (Ottawa: UNFCCC 11 May 2017), online: <www4.unfccc.int/ndcregistry/PublishedDocuments/Canada%20First/Canada%20First%20NDC-Revised%20submission%202017-05-11.pdf>.

10 Canada, Environment and Climate Change Canada, *Pan-Canadian Framework on Clean Growth and Climate Change: Canada's Plan to Address Climate Change and Grow the Economy*, (Ottawa: Environment and Climate Change Canada, 2016). The province of Saskatchewan and Manitoba did not sign the Framework initially, but Manitoba signed it 23 February 2018, leaving Saskatchewan as the only outlier.

implementing Canada's commitments under the Paris Agreement, the *PCF* requires rapid, broad, and systemic decarbonisation of the Canadian economy. While many of the policies needed to implement the *PCF* are already underway at different levels of government, others are in development and generating their own constitutional debates.[11] When one rises above the fray of the emotional, often ideology-laden, debates about how best to reduce GHG emissions, the fact remains that — no matter what policy is used — reducing GHG emissions will require integrated, coordinated action by all levels of government. Multi-billion dollar pipeline proposals have always required careful reviews to understand their environmental and socio-economic impacts. Many argue that pipeline reviews must now also consider how the project will influence the country's level of GHG emissions, since new pipeline capacity creates long-term fossil fuel energy path-dependency at a time when there is a global and national imperative to rapidly reduce GHG emissions.[12]

Regardless of one's views on how broad the scope of federal pipeline reviews *should* be in terms of GHG emissions, an interesting legal question is whether a federal regulator has jurisdiction to consider the upstream and downstream GHG emissions associated with an interprovincial pipeline (as part of the associated environmental assessment) when deciding whether to approve (with or without conditions) or refuse a given proposal. It is widely accepted that a federal regulator can consider the *direct* GHG emissions that will be created by a proposal to expand or build an interprovincial pipeline (the emissions from construction of the pipeline, for example). Debate arises when scrutiny moves towards the additional fossil fuels that will be extracted upstream of the pipeline in response to the expanded pipeline capacity, and the additional emissions that will be burned at the moment of consumption, downstream at the end of the pipe. Could a federal pipeline regulator refuse to approve a project on the basis, in whole or in part, of these indirect GHG emissions? Could indirect

11 The government of Saskatchewan, for instance, has launched a reference question on the constitutionality of the proposed *Greenhouse Gas Pollution Prevention Act*, OIC 194/2018 (25 April 2018) [Saskatchewan, Reference] ("[t]he *Greenhouse Gas Pollution Pricing Act* was introduced into Parliament on March 28, 2018 as Part 5 of Bill C-74. If enacted, will this Act be unconstitutional in whole or in part?"). Ontario launched a similar lawsuit following the election of Premier Doug Ford, asking the Ontario Court of Appeal through a reference question pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c C 43: "Is the Greenhouse Gas Pollution Pricing Act, Part 5 of the *Budget Implementation Act, 2018*, No. 1, SC 2018, c. 12, unconstitutional in whole or in part?" (OIC 1014/2018 (1 August 2018)).

12 Kelly Levin et al, "Overcoming the Tragedy of Super Wicked Problems: Constraining our Future Selves to Ameliorate Global Climate Change" (2012) 45:2 Pol'y Sci 123-52 (discussing path dependencies of energy choices).

GHG emissions be the sole basis for triggering an impact assessment at all, or at a level that would not otherwise be required?

Answering these questions requires examining the statutory and jurisdictional basis for interprovincial pipeline reviews. When proponents seek a permit to build, operate, own, or expand an interprovincial pipeline, that proposal is subject to a complex regulatory review process that includes the application for a certificate of approval and an environmental impact assessment (hereafter the "pipeline review" process). The relevant regulatory frameworks at the time of writing are the *National Energy Board Act*[13] (*NEB Act*) and the *Canadian Environmental Assessment Act, 2012*[14] (*CEAA 2012*). However, both of these laws have recently undergone a major reform under Bill C-69.[15] The revised and renamed *Canadian Energy Regulator Act*[16] (*CER Act*) and *Impact Assessment Act*[17] (*IAA*) are undergoing review by the Senate at the time of writing. Bill C=69 explicitly brings climate considerations into the process of interprovincial pipeline reviews, though it does not refer specifically to indirect emissions.[18] In the lead up to the legislative reform, the federal government had signalled its intention to bring indirect GHG emissions into the interprovincial pipeline reviews for the Trans Mountain and Energy East pipeline proposals.[19] As such, we can see there is an intention to bring indirect emissions into pipeline reviews. This article examines the jurisdictional basis for doing so.

The article is organized around the three main phases of the environmental assessments conducted as part of interprovincial pipeline reviews, namely: (1) determining whether an assessment is required (the "trigger"); (2) ascertaining the scope of the assessment, including how the project is defined ("scope") and what factors can be considered in that assessment ("reach"); and (3) the decision-making phase, which includes deciding whether (or not) to allow a project proposal and, if so, what modifications or conditions must be applied ("decision-making"). These phases are recognized throughout the relevant jurisprudence and scholarship, sometimes explicitly, sometimes implicitly, as well

13 RSC 1985, c N-7 [*NEB Act*].

14 SC 2012, c 19, s 52 [*CEAA 2012*].

15 *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) [Bill C-69].

16 *Ibid*, Part 2.

17 *Ibid*, Part 1.

18 See Part II-2-A, *below*, for a detailed discussion of Bill C-69.

19 See Part III-2-A(ii-iii), *below*, for a detailed discussion of the Trans Mountain and Energy East pipeline proposals. The second review panel for the Energy East pipeline proposal stated that direct, upstream, and downstream emissions would be included in its assessment. See Part III-2-A(iii), *below*, for a detailed discussion of the Energy East pipeline proposal.

as in the structure of environmental assessment laws.[20] For each phase, I examine the relevant statutory authority under both the old and new regulatory regimes, and examine the basis of jurisdictional authority, in order to determine whether the federal government has jurisdiction to include indirect GHG emissions in its pipeline reviews.

Before proceeding with the analysis, Part II offers some relevant background information to situate readers on (1) jurisdiction over interprovincial pipelines; (2) the federal regulatory context for interprovincial pipeline reviews (including assessment); and (3) indirect GHG emissions, including some arguments for and against their inclusion in interprovincial pipeline reviews, and the current federal government's policy approach to indirect emissions. Part III offers a jurisdictional analysis of the three key phases of pipeline reviews as explained above. Part IV offers some concluding remarks. The analysis focuses exclusively on the federal component of pipeline reviews, and federal jurisdiction for incorporating indirect GHG emissions in those reviews. While recognizing the importance of the provincial role in pipeline proposals, provincial jurisdiction over many related matters, and the importance of coordinating assessments and reviews, the scope of the article is limited to federal jurisdiction.

Part II: background and context

1. Parliament's jurisdiction over interprovincial pipelines

It is well accepted that provinces have wide-ranging jurisdiction over the natural resources within their borders, including oil and gas resources.[21] It is also well understood that Parliament has jurisdiction over interprovincial energy

20 See e.g. *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, [1992] SCJ No 1 at 71 [*Oldman River*], citing R Cotton & D P Emond, "Environmental Impact Assessment" in John Swaigen, ed, *Environmental Rights in Canada/Canadian Environmental Law Research Foundation* (Toronto: Butterworths, 1981) at 247 (the Supreme Court in *Friends of the Oldman River* explicitly recognized the information-gathering and decision-making phases of environmental assessment). See also Meinhard Doelle, "Reflecting on Federal Jurisdiction for Upcoming EA Reform" (21 June 2016), *Environmental Law News* (blog), online: <https://blogs.dal.ca/melaw/2016/06/21/ea-jurisdiction/> [Doelle, "Federal Jurisdiction"].

21 See Luanne A Walton, "The Exploitation of Natural Resources in the Federation" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 533 at 545-49 [Walton]. There is a long history of jurisdictional wrangling over oil and gas resources. Wishing to harness the power of oil to support nation-building after the Second World War, Parliament passed the *Pipe Lines Act,* RSC 1952, c 211, in 1949, which had the stated purpose of exercising "control over all interprovincial and international oil and gas pipelines in the country" (Walton, at 536, citing Susan Blackman et al, "The Evolution of Federal/Provincial Relations in Natural Resources Management" (1994) 32:2 Alta L Rev 511 at 514. Wanting to transition its economy from agriculture to oil and gas, the province of Alberta responded with the 1949 *Gas Resources Preservation Act*, SA 1949, c 2, which required permits for removing gas

infrastructure, including pipelines.[22] This federal jurisdiction is derived from section 92(10)(a) of the *Constitution Act, 1867*, which grants the federal government authority over "Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province," and section 91(29) which grants to Parliament jurisdiction over "Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects assigned exclusively to the Legislatures of the Provinces."[23]

While Parliament's authority over interprovincial pipelines is not generally contested, there are still jurisdictional battles over whether a given pipeline qualifies as a federal work or undertaking and, if it does, the scope of that power. The test for determining whether a pipeline falls within federal jurisdiction under section 92(10)(a) was articulated by the Supreme Court of Canada in *Westcoast Energy Inc. v Canada (National Energy Board)*.[24] In that case, the NEB had held that proposed facilities related to the expansion of an interprovincial pipeline were not federal works or undertakings because they were entirely within the province of British Columbia. The Federal Court of Appeal overturned this ruling, holding that the facilities were part of a single federal transportation undertaking, and therefore within federal jurisdiction.[25] The Supreme Court of Canada confirmed this result, clarifying that undertakings may fall within federal jurisdiction not only if they constitute a single federal undertaking, but also if they are integral to the core of the federal undertaking.[26]

Another area that has generated controversy relates to the application of provincial laws to interprovincial pipelines. In the recent decision concerning the Northern Gateway pipeline proposal,[27] the Federal Court of Appeal pointed to consistent decisions by the Supreme Court of Canada holding that matters falling within federal jurisdiction do not become immune from provincial jurisdiction.[28] Provincial legislation of general application will usually apply

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from the province. Each jurisdiction was in essence staking its claim to the component of oil and gas resources falling within its constitutional authority.

22 *Campbell-Bennett Ltd. v Comstock Midwestern Ltd.*, [1954] SCR 207, [1954] SCR 207.

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

24 [1998] 1 SCR 322, [1998] SCJ No 27 (*Westcoast* cited to SCR). This decision is examined in greater detail in the Introduction to this Special Issue.

25 *Ibid* at para 85.

26 *Ibid.*

27 *Gitxaala Nation v Canada*, 2016 FCA 187, [2016] 4 FCR 418.

28 Walton, *supra* note 21 at 548-49, citing *Air Canada v British Columbia*, [1989] 1 SCR 1161, 59 DLR (4th) 161 at 1191 ("[b]y and large federal undertakings, like other private enterprises functioning within the province, must operate in a provincial legislative environment"). See also *Consolidated*

to federal works and undertakings subject to the doctrines of paramountcy and interjurisdictional immunity discussed in detail in another article in this issue.[29]

2. Overview of federal regulatory context for pipeline reviews

Parliament has used its authority under section 92(10)(a) to make a number of laws relating to energy regulation. It created the NEB[30] in 1959, thereby asserting federal regulatory jurisdiction "over oil and gas pipelines and international power lines together with jurisdiction over the export and import of gas and the export of electric power."[31] The NEB is mandated to "promote safety and security, environmental protection and economic efficiency in the Canadian public interest."[32] Subsection 52(2) of the *NEB Act* requires the Board to make its decisions with "regard to all considerations that appear to it to be directly related to the pipeline and to be relevant."[33] Subsection 52(2)(e) allows the NEB to also consider "any public interest" that may be affected by the decision to approve the pipeline or not.[34] This leaves the NEB with a broad discretion to determine what is relevant and what issues should be included in the consideration of the public interest. I return to this question of scope in Part III-2.

Proposals subject to NEB approval are required to undergo a federal environmental assessment in accordance with *CEAA 2012*, and the NEB must include that assessment in its report to the Minister.[35] Environmental assessment has been part of federal law for many years.[36] In its first iteration, environmental assessment was required as part of a federal Guidelines Order.[37] The process was formalized in the *Canadian Environmental*

Fastfrate Inc. v Western Canada Council of Teamsters, 2009 SCC 53, [2009] 3 SCR 407; *Coastal First Nations v British Columbia (Minister of Environment)*, 2016 BCSC 34, 85 BCLR (5th) 360 at para 56.

29 Walton, *supra* note 21 at 549. Olszynski discusses this in another article in this Special Issue.

30 National Energy Board, "National Energy Board", *Government of Canada* (3 March 2018), online: <www.canada.ca/en/national-energy-board.html> [National Energy Board, "National Energy Board"]. Note that the NEB will shortly be replaced by the Canadian Energy Regulator under Bill C-69, *supra* note 15, Part 2. See Part II-2-A, *below*, for a detailed discussion of Bill C-69.

31 Walton, *supra* note 21 at 537.

32 National Energy Board, "National Energy Board", *supra* note 30. See also *NEB Act*, *supra* note 13.

33 *NEB Act*, *supra* note 13, s 52(2).

34 *Ibid*, s 52(2)(e). Lucas elaborates on these provisions in his article in this Special Issue.

35 *Ibid*, s 52(3).

36 The provinces also have environmental assessment regimes. Some of these require consideration of climate change. Ontario, for example, requires proponents to integrate climate change considerations into EA early on in the assessment process and include estimates of a project's expected impact on GHG emissions. See Government of Ontario, "Considering Climate Change in the Environmental Assessment Process", *Government of Ontario* (23 January 2018), online: <www.ontario.ca/page/considering-climate-change-environmental-assessment-process>.

37 *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 [*Guidelines Order*].

Assessment Act[38] of 1992 (*CEAA 1992*). Federal environmental assessment was subjected to a major reform in the *CEAA 2012*.[39] This reform was highly criticized for many reasons, including that it significantly reduced the number of projects subject to assessment.[40] *CEAA 2012* also delegated responsibility for conducting environmental assessments of interprovincial pipelines to the NEB, rather than the Canadian Environmental Assessment Agency (CEAA), a move criticized on the basis of the NEB's lack of environmental expertise.[41] Federal environmental assessment is now undergoing another set of changes as it progresses through a third major reform, as reflected in the draft *IAA* in Bill C-69.[42]

A. Bill C-69

As part of the electoral commitments to federal environmental law reform, the Minister of Environment and Climate Change, Catherine McKenna, established two Expert Panels: one to review the federal assessment process in Canada, and the other to examine the NEB's structure, role, and mandate. The Assessment Expert Panel conducted extensive consultations, visiting over 20 cities, reviewing over 500 written submissions, hearing almost 400 in-person presentations, and holding workshops and dialogues with over 1000 participants. It issued a report in April 2017 summarizing its recommendations.[43] The NEB Expert Panel similarly engaged stakeholders and the public and issued its report in May 2017.[44] The government then produced draft legislation in Bill

38 SC 1992, c 37 [*CEAA 1992*], as repealed by *CEAA 2012*, *supra* note 14, s 66.

39 Bill C-69, *supra* note 15.

40 See Meinhard Doelle, "The Evolution of Federal EA in Canada: One Step Forward, Two Steps Back?" (2014) Marime and Environmental Law Institute Working Paper at 8, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384541> (Doelle estimates only 10 percent of projects previously assessed are assessed under the 2012 legislation). See also Robert B Gibson, "In Full Retreat: The Canadian Government's New Environmental Assessment Law Undoes Decades of Progress" (2012) 30:3 Impact Assessment & Project Appraisal 179 at 179; Jocelyn Stacey, "The Environmental, Democratic, and Rule-of-Law Implications of Harper's Environmental Assessment Legacy" (2016) 21:2 Rev Const Stud 165 (discussing the drop-in numbers of assessments under *CEAA 2012*).

41 See e.g. Chris Tollefson, "Canada's Current Environmental Assessment Law: A Tear-Down not a Reno", *Policy Options* (13 July 2016), online: <http://policyoptions.irpp.org/magazines/july-2016/canadas-current-environmental-assessment-law-a-tear-down-not-a-reno/> ("[t]o secure the trust of Canadians, federal EAs need to be conducted by an agency that has the expertise and the independence from the interests it is charged with regulating").

42 Bill C-69, *supra* note 15, Part 1.

43 Canada, Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in* Canada, The Final Report of the Expert Panel for the Review of Environmental Assessment Processes (Ottawa: Canadian Environmental Assessment Agency, 2017) [Expert Panel, "Building Common Ground"].

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

C-69.[45] Part 1 of that Bill introduces changes to the federal environmental assessment process through the *IAA*.[46] Part 2 of Bill C-69 introduced the *CER Act*, which abolishes the NEB and replaces it with a new Canadian Energy Regulator (CER).[47] Bill C-69 contains many changes of great interest, including an expansion of environmental assessment to impact assessment (incorporating a broader range of factors geared towards promoting sustainability). However, I focus only on those changes relevant to the scope of assessments and approvals in terms of GHG emissions.

B. CER Act

The newly minted CER under Part 2 of Bill C-69 will share a mandate similar to its predecessor of ensuring energy projects and infrastructure are constructed, operated, and abandoned in a way that is "safe, secure and efficient and that protects people, property and the environment."[48] The *CER Act* creates a Commission and grants to it a number of powers, including the power to "inquire into, hear and determine" matters related to the implementation of the *CER Act*,[49] inquire into accidents related to facilities under its jurisdiction,[50] and other matters regulated under the *Act*, and issue orders.[51] *The CER Act* authorizes the Commission to issue orders related to the safety and security of persons or the environment to all levels of government, including Indigenous governing bodies and persons.[52] Part 3 of the *CER Act* relates to pipelines, and sets out the process whereby pipeline proposals are regulated. In response to a pipeline proposal, the Commission must issue a public report with its recommendation about whether to approve the proposal, taking into account "whether the pipeline is and will be required by the present and future public convenience and necessity" and setting out "all the conditions that it considers necessary or in the public interest" if the pipeline is approved.[53]

The *CER Act* also enumerates a list of factors that the Commission must take into account in making its recommendations. This list of factors is considerably expanded from those that the NEB must consider, including "any cumulative environmental effects."[54] In particular, the CER must consider

45 Bill C-69, *supra* note 15.
46 *Ibid*, Part 1.
47 *Ibid*, Part 2.
48 *Ibid*, s 6(a).
49 *Ibid*, s 32(1).
50 *Ibid*, s 32(2).
51 *Ibid*, s 34.
52 *Ibid*, s 95(2).
53 *Ibid*, ss 183(1)(a)–(b).
54 *Ibid*, s 183(2)(a).

"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."[55] This is a notable departure from the *NEB Act*, which made no explicit reference to environmental or climate obligations. These statutory reforms seem to bring consideration of indirect GHG emissions squarely within the CER's mandate, though the legislation does not make explicit reference to indirect emissions, nor does it specify how indirect emissions would be considered. For instance, in evaluating indirect emissions, a regulator might consider GHG emissions on a 1:1 basis, calculating the GHG emissions resulting from the transport of a given volume per day of fossil fuel, which resulted in X GHG emissions from production, Y emissions from its transmission and distribution, and Z from its ultimate combustion. A regulator might also opt to take into account a variety of economic factors and thus calculate GHG emissions on something other than a 1:1 basis (for instance, if there are alternate forms of transport available and/or the conditions are such that some of the fuel would be displaced by these other methods). Regardless of the method used, the key point is that it is a reasonable interpretation of the statute that the Commission will be required to consider indirect GHG emissions in order to assess the effects a given pipeline proposal could have on Canada's ability to meet its climate commitments. The statute's mandate to consider cumulative effects supports this interpretation, since it would be essential for regulators to turn their minds to the impact a particular project could have on the country's ability to meet its national targets.[56]

55 *Ibid*, s 183(2)(j). See also *ibid*, ss 183(2)(a), 183(2)(i) respectively (note that the first iteration of this legislation did not make explicit reference to climate change. This was subject to criticism, and the legislation was consequently amended). See e.g. Nigel Bankes, "Submission to The House of Commons Standing Committee on Environment and Sustainable Development with Respect to its Study of 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", *House of Commons* (4 April 2018), online: <www.ourcommons.ca/Content/Committee/421/ENVI/Brief/BR9775958/br-external/BankesNigel-e.pdf>; Mark Winfield, "Submission to the House of Commons Standing Committee on the Environment and Sustainable Development regarding Bill C-69 (The *Impact Assessment Act*, The *Canadian Energy Regulator Act* and amendments to the *Navigation Protection Act*)", *House of Commons* (March 2018), online: <www.ourcommons.ca/Content/Committee/421/ENVI/Brief/BR9761867/br-external/WinfieldMark-e.pdf>; Robert Gibson, "Supplementary Submission to the House of Commons Standing Committee on Environment and Sustainable Development Concerning its Review of the Proposed *Impact Assessment Act* in Bill C-69 – Sustainability in the Proposed New Federal Assessment Law as Proposed: An Initial Report Card", *House of* Commons (6 April 2018), online: <www.ourcommons.ca/Content/Committee/421/ENVI/Brief/BR9803981/br-external/GibsonRobert-UniveristyOfWaterloo-e.pdf> [Gibson, "Supplementary"].

56 Note that cumulative effects were part of the NEB's mandate through its role in administering assessments under *CEAA 2012*, *supra* note 14.

The *CER Act* qualifies these considerations in the opening of subsection 183(2) as those that appear to the Commission "to be relevant and directly related to the pipeline," which could support a narrower interpretation aligned with the reasoning in the *Forest Ethics* decision (discussed below).[57] That said, the language in paragraph (j) of subsection 183(2) is clear that the Commission must consider the impacts of the project on Canada's ability to meet its climate change commitments. A narrow reading of the opening segment of section 183 would render this paragraph rather meaningless. Time will soon tell how the new Commission will interpret its mandate, and whether the courts will continue to be highly deferential to reasonable interpretations of the statute.

C. Impact Assessment Act

The *IAA* introduces a number of reforms to environmental assessment, including a widening of the scope of assessments to consider a broader range of impacts, including socio-economic impacts and climate considerations. The Preamble to the *IAA,* for instance, makes explicit reference to Canada's climate obligations.[58] The *IAA* requires that impact assessments of designated projects take into account a list of factors that includes "the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change."[59] Similarly, section 63 of the *IAA* identifies the factors that the Governor-in-Council must consider in deciding whether to approve a project, and includes among its five core factors consideration of the project's impacts on "Canada's ability to meet its environmental obligations and its commitments in respect of climate change."[60] This is important because it brings the issue of GHG emissions squarely within the scope of federal environmental assessments.

Although (like the *CER Act*) the *IAA* is silent about indirect GHG emissions, it would be difficult to evaluate a project's impact on Canada's climate obligations if it did not entail — in the case of a pipeline — examining upstream oil and gas development and the end use of the fossil fuel that will ultimately be transported by the pipeline. There were proposals to include an explicit legislative trigger for any project with estimated annual GHG emission levels above a

57 Bill C-69, *supra* note 15, Part 2, s 183(2). See also *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 FCR 75 [*Forest Ethics Advocacy*].

58 Bill C-69, *supra* note 15, Part 1, Preamble ("[w]hereas the Government of Canada recognizes that impact assessment contributes to Canada's ability to meet its environmental obligations and its commitments in respect of climate change"). See also Gibson, "Supplementary", *supra* note 55.

59 Bill C-69, *supra* note 15, Part 1, s 22(1)(i).

60 *Ibid*, s 63(e).

given threshold,[61] but these were not adopted. Parliament's overall intention to bring climate change squarely into federal environmental assessment is clear; as ECCC Minister Catherine McKenna stated to the House of Commons Standing Committee on Environment and Sustainable Development in relation to Bill C-69: "when we do environmental assessments, we need to be making sure that they take into account our environmental obligations, domestic and international, including under the Paris Agreement."[62] A proper consideration of the impact of a decision on the country's climate commitments would seem to require comprehensively assessing the full range of influence a major project could have on the future GHG emissions.[63]

3. Upstream and Downstream GHG Emissions in the Context of Interprovincial Pipeline Reviews

The idea of including upstream and downstream GHG emissions (referred to collectively as "indirect emissions") in pipeline reviews has been controversial.[64] The debate is complex, since it is as much about the "whether" as the "how" this is achieved. For instance, critics point to the potential for double-counting if indirect emissions are included in multiple regulatory processes. They also raise concerns about the extent to which indirect emissions can be fairly attributed to a given project, and subtle differences in terms of life-cycle accounting of GHG emissions for a project or fuel. As noted earlier, a sensitivity analysis that takes into consideration fluctuations in market demand or the influences of alternative modes of transportation for fuels (such as rail) will yield a different result than an analysis that does not take these factors into account. While the purpose of this article is not to examine the technical points of an assessment,

61 See e.g. Kegan Pepper-Smith, "Part 5: Environmental Assessments must Consider Climate Change", *Ecojustice* (29 March 2017), online: <www.ecojustice.ca/environmental-assessment-reviews-must-consider-climate-change/>.

62 *House of Common – Standing Committee on Environment and Sustainable Development*, 42nd Parl, 1st Sess, No 99 (22 March 2018) at 1140 (Hon Catherine McKenna).

63 Joshua Ginsberg, "Ecojustice Submissions on Bill C-69", *Ecojustice* (6 April 2018) at 1, online: <www.ecojustice.ca/wp-content/uploads/2018/04/Ecojustice-ENVI-submission-re-Bill-C-69.pdf>.

64 NGOs that advocate for the inclusion of indirect emissions include Ecojustice Canada, whereas representatives of Canada's fossil fuel industry, such as the Canadian Association of Petroleum Producers (CAPP) and the Canadian Energy Pipeline Association (CEPA) oppose the added analysis of indirect emissions. See e.g. Karen Campbell & Kegan Pepper-Smith, "Ecojustice Submission to the Expert Panel on the Review of Environmental Assessment Processes: Considering Climate Change in Environmental Assessments", *Ecojustice* (12 December 2016), online: <http://eareview-examenee.ca/wp-content/uploads/uploaded_files/dec.12-13h25-kegan-pepper-smith-ecojustice-written-submission-climate-change.pdf>; Claudia Cattaneo, "Environmentalists Cheer, Industry Jeers: NEB to Examine Climate Change in the Energy East Review", *Financial Post* (23 August 2017), online: <http://business.financialpost.com/commodities/energy/environmentalists-cheer-industry-jeers-neb-to-examine-climate-change-in-energy-east-review> [Cattaneo].

it is important to be clear about definitions and what is contemplated when we speak about indirect emissions being considered in pipeline reviews.

Starting with some definitions, upstream emissions are those that will be generated from the exploration, extraction, production, and processing of fossil fuels that will be transported through the pipeline. Downstream emissions are those that result when the fossil fuel that travels through a pipeline is ultimately combusted by the consumer.[65]

Proponents of taking a comprehensive approach to assessing GHG emissions in the context of pipeline proposals argue that we need to understand the full GHG implications of additional pipeline capacity in order to assess whether the associated emissions are aligned with national climate objectives. They argue that anything but a full "well-to-wheels"[66] assessment would paint an incomplete picture of the implications of a major pipeline project on climate change. They suggest that the influences that expanded pipeline capacity could have on GHG emissions associated with production and consumption decisions tied to that expanded capacity should be within the scope of the assessment.[67] Even when there is an ambitious and effective regulatory framework to reduce GHG emissions in line with international commitments in place across jurisdictions, proponents of the comprehensive approach argue that it is still important to assess the GHG implications of particular projects in order to understand whether that project is aligned with the overall framework and what proportion of a jurisdiction's carbon budget the project would represent. With this approach, concerns about the potential for double-counting could be addressed by policies and guidelines aimed at reducing this risk.

Stakeholders that oppose a comprehensive approach suggest that it is unnecessary to evaluate these broader considerations, since indirect GHG emissions are accounted for elsewhere. For example, upstream emissions are accounted for in applications for upstream facilities, point-source emissions are accounted for in applications to construct downstream facilities, and non-point

65 For a definition of upstream emissions, see Mark Cauchi, Department of Environment and Climate Change – Estimating Upstream GHG Emissions, (2016) C Gaz I, 786 [Cauchi]. For a definition of downstream emissions, see Greenhouse Gas Protocol, "Corporate Value Chain (Scope 3) Accounting and Reporting Standard – Supplement to the GHG Protocol Corporate Accounting and Reporting Standard", *Greenhouse Gas Protocol* (September 2011) at 137, online: <https://ghgprotocol.org/sites/default/files/standards/Corporate-Value-Chain-Accounting-Reporing-Standard_041613_2.pdf>.

66 Brandon D Cunningham, "Border Petrol: U.S. Challenges to Canadian Tar Sands Development" (2012) 19:3 NYU Envtl LJ 489 at 536.

67 See Karen Campbell, "Federal Environmental Assessment for the Future", *Ecojustice* (19 December 2016) at 13, online: <www.eareview-examenee.ca/wp-content/uploads/uploaded_files/2016-12-19-ecojustice-submissions-to-the-ea-review-panel.pdf> [Campbell, "Federal Environmental"].

source emissions are regulated through tools such as fuel efficiency standards and carbon pricing.[68] Proponents of this narrower approach argue against including anything but direct emissions in pipeline reviews, asserting that the connection between a pipeline and emissions upstream or downstream is too indirect.[69] In their view, pipelines are a means to an end — getting oil to market — and that the role of a federal energy regulator should be confined to evaluating direct emissions along with the safety and efficiency of a proposed pipeline.[70] The argument has some initial intuitive appeal — the clean, crisp edges of separating indirect GHG emissions from pipelines approvals offer simplicity. But advocates of more comprehensive assessments suggest this is artificially simplistic; it ignores the fact that life does not exist in separate, distinct silos and that expanded pipeline capacity will influence GHG emissions beyond the construction of the pipeline, and that these emissions are not necessarily effectively accounted for in other ways. Narrow, segregated reviews could create gaps where cumulative effects are not considered or could inhibit the potential for understanding the broader implications of a decision. The potential for overlap or double counting can be addressed in multiple ways, including through explicit policies and effective coordination mechanisms.

While the narrower approach to reviews was in favour under the former Prime Minister Stephen Harper's administration, the political winds of climate change and environmental assessment policy shifted in late 2015 with the election of Prime Minister Justin Trudeau. Climate change and environmental law reform were central features of Trudeau's electoral platform, and once elected, the government took several steps in furtherance of these campaign promises. In January 2016, for instance, the government published a set of interim principles which they stated were aimed at restoring public trust in the environmental assessment process.[71] Among other things, these guidelines reflected a move towards the more comprehensive approach, specifying that environmental assessments should include consideration of not only the direct GHG emissions that will be generated by the construction and operation of the

68 Grant Bishop & Benjamin Dachis, "The National Energy Board's Limits in Assessing Upstream Greenhouse Gas Emissions" (2016) Essential Pol'y Intelligence at 2, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2737604> [Bishop & Dachis].

69 See Dan Healing, "Energy East Pipeline to Review Upstream, Downstream Greenhouse Gas Emissions", *The Star* (23 August 2017), online: <www.thestar.com/business/2017/08/23/energy-east-pipeline-to-review-upstream-downstream-greenhouse-gas-emissions.html> (Dirk Lever: "It is not like any pipeline company can control the emissions on either side of their pipe").

70 Bishop & Dachis, *supra* note 68 at 2.

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

pipelines themselves, but also the upstream GHG emissions.[72] The guidelines did not require consideration of downstream GHG emissions.

The guidelines referenced two projects in particular: the Trans Mountain Pipeline Expansion project and the TransCanada Energy East Pipeline proposal.[73] In March 2016, Environment and Climate Change Canada (ECCC) published a proposed methodology to estimate upstream GHG emissions associated with major oil and gas projects undergoing federal environmental assessments.[74] Applying these guidelines and the methodology, ECCC estimated that the Trans Mountain pipeline expansion project would generate an additional 13 to 15 megatonnes of C02e annually.[75] As discussed later, the Energy East project was abandoned before ECCC provided its estimates, but a study by the Pembina Institute offered a "preliminary estimate of the Energy East proposed pipeline's upstream GHG impact of between 30 and 32 million tonnes of annual emissions."[76] The government then launched the comprehensive review of the environmental assessment process under *CEAA 2012*,[77] with the goal of ensuring that future assessments be proactive, strategic, and "evaluate big-picture issues" such as climate change and the cumulative effects of development.[78]

Part III: jurisdictional analysis

Having offered a brief introduction to jurisdiction over interprovincial pipelines, the regulatory context for their review and approval, including environmental assessment, and some of rationale for incorporating indirect GHG emissions into these reviews, I will now discuss the jurisdictional basis for considering indirect GHG emissions in assessments. At its core, environmental

72 *Ibid*.

73 *Ibid*.

74 Cauchi, *supra* note 65 at 786-89.

75 Canada, Environment and Climate Change Canada, *Trans Mountain Pipeline ULC – Trans Mountain Expansion Project: Review of Related Upstream Greenhouse Gas Emissions Estimates* (Ottawa: Environment and Climate Change Canada, 2016) at 5, online: <www.ceaa.gc.ca/050/documents/p80061/116524E.pdf>.

76 Alberta, Erin Flanagan & Clare Demerse, *Climate Implications of the Proposed Energy East Pipeline – A Preliminary Assessment* (Calgary: Pembina Institute, 2014) at 2, online: <www.pembina.org/reports/energy-east-climate-implications.pdf> [Flanagan & Demerse].

77 Government of Canada, "A Proposed New Impact Assessment System", *Government of Canada* (30 April 2018), online: <www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes.html>.

78 *Ibid*. See also Government of Canada, "Better Rules for Major Project Reviews to Protect Canada's Environment and Grow the Economy", *Government of Canada* (24 April 2018) at 8, online: <www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/ia-handbook-e.pdf>.

assessment is fundamentally an information-gathering tool designed to lead to better decisions. As the Supreme Court stated in 1992, "[e]nvironmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making."[79] At first glance, it may seem odd to apply constitutional limits to the exercise of gathering information. It is, however, less difficult to conceive of limiting the range of decisions that a government can make in relation to a project proposal to those within its jurisdictional authority. The environmental assessment process involves not only identifying environmental risks and making recommendations about whether to approve a project, but may also entail proposing modifications, alternatives and even conditions for projects aimed at reducing environmental risks. Sorting out the appropriate reach of jurisdiction in environmental assessments requires paying attention to the different stages of environmental assessment. This is why jurisdiction is discussed for each of the three key phrases of assessments: (1) the trigger; (2) scope and reach; and (3) decision-making.

1. The trigger

The first case to address Parliament's constitutional authority to conduct environmental assessment was *Friends of the Oldman River v Canada (Minister of Transport)*.[80] In that case, an environmental group had sought to compel the federal government to conduct an environmental assessment of the Alberta government's proposal to build a dam on the Oldman River under the *Environmental Assessment and Review Process Guidelines Order*.[81] The Alberta government argued that the federal *Guidelines Order* was *ultra vires*, as it attempted to regulate the environmental effects of "matters largely within the control of the province."[82] The federal government argued that it was *intra vires*: although the project was being built in Alberta and governed by provincial laws, it was likely to impact a number of matters under federal jurisdiction.

The Court recognized that jurisdiction over environmental matters is not squarely assigned to either level of government. Both levels of government have authority, sometimes overlapping, over different aspects of the environment. For instance, Parliament has authority to legislate in relation to various aspects of fisheries, pollution, water, biodiversity and climate through its powers

79 *Oldman River*, *supra* note 20 at 71.
80 *Ibid*.
81 *Ibid* at 5. See also *Guidelines Order*, *supra* note 37.
82 *Oldman River*, *supra* note 20 at 63.

over navigable waters,[83] fisheries,[84] migratory birds,[85] criminal law,[86] and Peace, Order, and good Government (POGG).[87] The provinces are authorized to legislate on internal environmental issues and natural resources through their powers over the development, conservation and management of natural resources,[88] property and civil rights,[89] and local works and undertakings,[90] among others.

The Court concluded that the *Guidelines Order* was *intra vires*, and that Parliament had jurisdictional authority to conduct environmental assessments of projects and activities within federal jurisdiction. *CEAA 1992* included a set of triggers that initiated the need for an assessment by a federal body, such as the need for a federal approval, funding by the federal government, or the location of the project on federal land.[91] Anytime there was a need to make one of these federal decisions, an assessment could be triggered and this was within constitutional authority because the triggers were attached to matters of federal jurisdiction. Under *CEAA 2012*, this approach was changed, with the legislation instead including a list in regulations of designated projects that would be subject to assessments.[92] The regulations list projects that are clearly within federal jurisdiction, such as interprovincial pipelines.

Jurisdictional issues featured prominently throughout the current review and reform of CEAA 2012. The 2017 Environmental Assessment Expert Panel Report stated that it heard a wide range of views regarding what is the appropriate scope of federal impact assessment. The Panel reported general agreement on the need for clarity with respect to when a federal impact assessment

83 *Constitution Act, 1867*, *supra* note 23, s 91(10).

84 *Ibid*, s 91(12).

85 *Migratory Birds Convention Act, 1994*, SC 1994, c 22; *Migratory Birds Regulations*, CRC, c 1035. See also Government of Canada, "Birds Protected Under the Migratory Birds Convention Act", *Government of Canada* (17 July 2017), online: <www.canada.ca/en/environment-climate-change/services/migratory-birds-legal-protection/convention-act.html> ("the Canadian federal government has the authority to pass and enforce regulations to protect those species of birds that are included in the Convention").

86 *Constitution Act, 1867*, *supra* note 23, s 91(27).

87 *Ibid*, s 91.

88 *Ibid*, s 92A.

89 *Ibid*, s 92(13).

90 *Ibid*, s 92(10).

91 *CEAA 1992*, *supra* note 38, s 5(1).

92 *Regulations Designating Physical Activities*, SOR/2012-147. See also Canadian Environmental Assessment Agency, "Designating a Project Under the Canadian Environmental Assessment Act, 2012", *Government of Canada* (6 July 2016), online: <www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/designating-project-under-canadian-environmental-assessment-act-2012.html> ("[t]his document describes the process for determining whether to require an environmental assessment of a project not identified in the *Regulations Designating Physical Activities*").

(IA) will be required.[93] It also underlined that federal IA must respect the Constitution, stating (in relation to phase 1 of the process, the trigger) that federal IAs "cannot apply to every project or every decision that may affect the environment," but should be conducted where a "project, plan or policy has clear links to matters of federal interest."[94] The Report lists a number of subjects that it says qualify, at minimum, as federal interests. These include federal lands, federal funding, activities crossing provincial or national boundaries and the works related to those activities, as well as subjects traditionally held to be within federal authority, such as species at risk, fish, migratory birds, and issues relating to Indigenous concerns.[95] Importantly for our purposes, the Panel Report included in this list watershed or airshed effects crossing provincial or national boundaries, and "greenhouse gas emissions of national significance."[96] This reflects the Panel's view that Parliament has jurisdiction over GHG emissions of national significance, though it does not clarify what would be the threshold for "national significance" or whether an assessment could be triggered solely on the basis of potential GHG implications for a project otherwise entirely within provincial jurisdiction.

It is worth noting that the Environmental Assessment Expert Panel Report acknowledges the distinction between the second and third phases of assessment, information-gathering and regulating, noting that "[f]ederal, provincial, territorial, municipal and Indigenous governments may each have responsibility for the conduct of IA, but each level of government can only regulate matters within its jurisdiction."[97] The Report notes that while there is "broad federal authority to gather relevant information on all five pillars [of sustainability]… the same breadth of authority does not also apply to imposing legally binding conditions of approval on a project."[98] The Report underlines that setting conditions on a project requires constitutional authority. In other words, the Report reflects jurisprudential interpretation of broad constitutional reach in the information-gathering part of assessments (phase 2) and limits to constrain decision-making to areas of federal jurisdiction (phase 3). The legislation similarly limits the prohibitions in section 7 (against doing anything in relation to the proposed project that causes a set of listed effects) to changes that are within the legislative authority of Parliament, on federal lands, in a province other than the one in which the act or thing is done,

93 Expert Panel, "Building Common Ground", *supra* note 43 at 17.
94 *Ibid* at 18.
95 *Ibid*.
96 *Ibid*.
97 *Ibid* at 3.
98 *Ibid* at 64. The five pillars of sustainability are environmental, health, social, cultural and economic.

outside Canada and other matters, having certain impacts on Indigenous peoples of Canada, and other changes within federal authority as identified in Schedule 3.[99]

In the end, the IAA followed closely in the footsteps of CEAA 2012 in requiring assessments for projects listed in regulations that are, in the case of the IAA, not yet drafted. The Government of Canada's *Consultation Paper on Approach to Revising the Project List: A Proposed Impact Assessment System (2018)* explains the basis upon which the government will revise the current project list under *CEAA 2012*.[100] The "Project List" will identify the physical activities associated with projects that may require an assessment, often if the activity crosses a particular threshold. The consultation paper is clear that the Project List will focus on projects that have the most potential for impacting areas under federal jurisdiction, including changes to the environment in a province other than the one where the project is taking place, changes to the environment outside of Canada and environmental effects arising from federally regulated projects such as interprovincial pipelines. The use of the Project List has been criticized, since it risks carrying forward the limited range of projects to which assessment applies that was introduced by *CEAA 2012*.

In terms of jurisdiction, the IAA states that the decision whether or not to require an impact assessment requires the Agency to consider a number of factors, including whether the carrying out of the project may cause adverse effects within federal jurisdiction or adverse direct or incidental effects.[101] The legislation defines direct or incidental effects as those that are "directly linked or necessarily incidental to a federal authority's exercise of a power… "[102] The definition illustrates Parliament's intention to limit federal assessments to issues with a direct or incidental link to a federal sphere of power. The reference to incidental effects is an allusion to the ancillary powers doctrine in constitutional law, which has often been applied to expand the reach of federal powers to subjects that fall outside their constitutional purview but are ancillary to the exercise of federal power. In other words, even though a given legislative provision falls outside the pith and substance of the subject-matter under which the law is constitutionally justified, the Courts will not declare it

99 *Ibid*, s 7(1).

100 Canada, Government of Canada, *Consultation Paper on Approach to Revising the Project List: A Proposed Impact Assessment System*, (Ottawa: 2018), online: <www.impactassessmentregulations.ca/project-list>.

101 Bill C-69, *supra* note 15, s 16.

102 *Ibid*, s 2.

invalid so long as there is an essential link between the provision and the valid legislative whole of which it is part.[103]

Since interprovincial pipelines are a matter of federal authority, it is virtually certain that an assessment will be triggered by a proposal related to such a pipeline. The issue will then become whether the scope of that assessment would allow consideration of indirect emissions. We discuss that in the next section. If a project was found otherwise to be within provincial jurisdiction, but the Agency wished to conduct an assessment on the basis that the project could have adverse effects on the country's commitment to reduce GHG emissions, would it have jurisdictional authority to do so? That would depend on whether Parliament has jurisdiction over GHG emissions — something I discuss in detail in Part III:3. Next, I turn to the issue of the scope of reviews.

2. Phase 2: scope and reach of pipeline reviews

Because the NEB is responsible for conducting environmental assessments under *CEAA 2012*, decisions emerging from the NEB often touch on the interpretation of both its enabling statute (the *NEB Act*) and *CEAA 2012,* with respect to numerous issues, including the scope of assessments. Whether the NEB is required to consider GHG emissions in its assessments, and how far-reaching this consideration can be, has been dictated in large measure by the interpretation of the Board's statutory mandate, and the way it has defined what factors it will consider in its evaluations under the *NEB Act* and in conducting environmental assessments under *CEAA 2012*. The NEB's broad discretion in defining what factors are relevant to pipeline approvals and what falls within the 'public interest' has led to different interpretations regarding the scope of GHG emissions that should be brought into pipeline reviews, as illustrated by the jurisprudence reviewed in this section. In this section, I discuss decisions relating to three pipeline projects — the Line 9B, Trans Mountain, and Energy East proposals — and then discuss the jurisprudence relating to constitutional jurisdiction over the scope of projects subject to environmental assessment, in order to help define the parameters of how far a federal regulator can go in terms of evaluating indirect GHG emissions when conducting a review.

103 See Eugénie Brouillet & Bruce Ryder, "Key Doctrines in Canadian Legal Federalism" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 415 at 422-23 [Brouillet & Ryder]. See also at 424 (it used to be that the link had to be necessary and indispensable to the effective exercise of own powers – but a more flexible test was introduced in 1988, that is more about integration and a functional connection).

A. Statutory interpretation by NEB of scope of assessments in pipeline reviews

i. Line 9B proposal and Forest Ethics decision

The question of whether indirect GHG emissions associated with a pipeline should be part of the public interest determination by the NEB (at least as a matter of administrative law) was subject to judicial scrutiny in *Forest Ethics Advocacy Association v Canada (National Energy Board).*[104] That case involved an application by Enbridge to the NEB to reverse the flow of their Line 9 pipeline. Line 9 is a pipeline built in the 1970s that runs between Sarnia, Ontario and Montréal, Québec. While it has traditionally flowed in a westerly direction, bringing oil from Montréal to refineries in Sarnia, Enbridge reversed the flow in 2013 from Sarnia to Toronto (Line 9A), and applied for a further extension of this reversal to reach Montréal (Line 9B). The NEB recommended approval of this extension of the reversal in 2014. Forest Ethics and an individual, Donna Sinclair, applied for judicial review of three interlocutory decisions made by the NEB in relation to this application, including the NEB's finding that the upstream and downstream effects of the pipeline proposal were irrelevant.[105] Subsection 52(2) of the *NEB Act* requires the Board to make its decisions with "regard to all considerations that appear to it to be directly related to the pipeline and to be relevant." [106] Forest Ethics argued that the Board erred when it chose not to consider the socio-economic and environmental impacts of the activities upstream of the pipeline, as well as the downstream use of the oil transported by the pipeline.

Forest Ethics' argument failed. To determine whether indirect emissions could be brought into the scope of review, the NEB examined section 52(2) of the *NEB Act* and ruled that the "environmental and socio-economic effects associated with upstream activities, the development of the Alberta oil sands, and the downstream use of oil transported by the pipeline… were irrelevant."[107] Applying a standard of reasonableness, the Court upheld the NEB's ruling.[108] The Court emphasized that there was nothing in the *NEB Act* requiring the Board to take larger, general issues — such as climate change — into consideration in its decisions.[109] While section 52(2)(e) of the *NEB Act* allows the NEB to consider "any public interest," the Board interpreted that broad phrase in

104 *Forest Ethics Advocacy, supra* note 57.
105 *Ibid* at para 8.
106 *NEB Act*, *supra* note 13, s 52(2).
107 *Forest Ethics Advocacy, supra* note 57 at para 8.
108 *Ibid.*
109 *Ibid* at para 69.

the context of its mandate in Part III of the Act (which is to decide whether or not to approve the operation and construction of interprovincial oil and gas pipelines) and the other factors in section 52(2), which relate to the economic and market considerations for the pipeline. The Court noted that subsection 52(2) of the *NEB Act* "empowers the Board to have regard to considerations that 'to it' appear to be 'directly related' to the pipeline and 'relevant.'"[110] These words, combined with the "highly factual and policy nature of relevancy determinations," led the Court to grant the Board a wide margin of discretion in determining relevancy.[111] Subsection 52(2) enumerates a list of matters that Parliament considers to be relevant, and most of these are narrow in that they focus on the pipeline. Although subsection 52(2)(e) includes in this list "any public interest," the Court found it reasonable for the Board to interpret this as the public interest in relation to the pipeline project itself, and not the upstream or downstream activities.

The Court was also influenced by the fact that the NEB does not regulate activities and facilities upstream and downstream of the pipeline. If those facilities or activities have impacts on climate change, the Court said that "it is for those regulators to act or, more broadly, for Parliament to act."[112] In other words, these considerations were, in the Court's view, appropriately external to the NEB's decision to take a narrow approach to the consideration of GHG emissions. In the end, the Court applied the standard of reasonableness and was highly deferential to the Board's narrow interpretation of what was relevant and related to the pipeline.[113] As already discussed, the *CER Act* explicitly requires consideration of how a pipeline will impact Canada's ability to meet its climate change commitments, which will very likely entail consideration of indirect GHG emissions. The Court's willingness to offer such a high level of deference to the Board's narrow interpretation of its mandate suggests that the Commission would be equally empowered to apply a broad interpretation — inclusive of indirect GHG emissions — if it so chose, as long as doing so was a reasonable interpretation of its statutory powers under the new legislation.

ii. Trans Mountain expansion proposal and Harvey and City of Vancouver decisions

The issue of whether the NEB is obligated to consider indirect GHG emissions in its review was also raised in the context of the proposal to expand the

110 *Ibid.*
111 *Ibid.*
112 *Ibid.*
113 *Ibid* at para 64.

Trans Mountain pipeline. Trans Mountain Pipelines, which is a subsidiary of Kinder Morgan, applied on December 16, 2013 to expand the existing Trans Mountain Pipeline which runs between Edmonton, Alberta and Burnaby, British Columbia.[114] The pipeline currently transports 350,000 barrels of crude oil and refined petroleum per day. The proposal is to expand capacity of the pipeline by more than double, to 890,000 barrels per day.[115] The NEB established a Panel to hold hearings aimed at soliciting input from those directly affected or with relevant information about the proposal, and identified the set of issues that would be considered as part of its hearings. While it included the potential environmental and socio-economic effects of the project, including cumulative environmental impacts resulting from the project, it determined that it would not consider the effects (including GHG emissions) of upstream or downstream activities related to the pipeline.[116]

The City of Vancouver and a group called "Parents from Cameron Elementary School Burnaby" challenged the decision to exclude from the Panel's list of issues consideration of the environmental and socio-economic effects associated with activities upstream of the pipeline, including oil sands development, and the downstream use of the oil that would be shipped by the pipeline.[117] The NEB conceded that subsection 5(1) of *CEAA 2012* requires it to evaluate possible changes to the global atmosphere as a result of GHG emissions from the Project's construction and operation (direct emissions).[118] The City of Vancouver argued that subsection 5(2)(a) of *CEAA 2012* required the Board to include a broader range of environmental changes that are "directly linked or necessarily incidental" to the exercise of its functions in approving the project.[119] The NEB agreed that "there is a connection between the Board's possible recommendation that the Project be approved and upstream production, in that the Project would transport a portion of that production," but was

114 Canada, National Energy Board, *National Energy Board Report – Trans Mountain Expansion Project* (Calgary: National Energy Board, May 2016) at 1, online: <www.ceaa-acee.gc.ca/050/documents/p80061/114562E.pdf>.

115 Canada, National Energy Board, Peter Watson, "National Energy Board Ministerial Briefing Binder – Status: NEB Review of the Proposed Kinder Morgan Trans Mountain Expansion Project", (Ottawa: National Energy Board, 4 November 2015) at 1, online: <www.neb-one.gc.ca/bts/whwr/gvrnnc/brfngbndr/brfngbndr-eng.pdf>.

116 *Ibid* at 3.

117 Canada, National Energy Board, Sheri Young, "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", (Ottawa: National Energy Board, 23 July 2014) at 1, online: <https://apps.neb-one.gc.ca/REGDOCS/File/Download/2487522> [Young, "Ruling No. 25"].

118 *Ibid* at 2.

119 *Ibid*.

not persuaded that the effects from that production are "directly linked or necessarily incidental" to the Board's decision.[120] The Board acknowledged that its recommendation to approve the pipeline might contribute to the development of upstream oil sands, but that "the degree of that contribution is dependent on demand and other transportation options available now or in the future."[121] The NEB also underlined that oil sands projects are already subject to environmental assessments, and argued that duplication of assessments is discouraged by subsection 4(1) of *CEAA 2012*.[122] Based on these reasons, the NEB rejected the motion to expand the list of issues. The Federal Court of Appeal denied the application for leave to appeal.[123]

In *L.D. Harvey*, the applicants argued that the choice not to include upstream and downstream effects in the list of issues to be considered by the Board violated section 7 of the *Canadian Charter of Rights and Freedoms*[124] (*Charter*).[125] The Board rejected this argument, holding that the risks of harm are only speculative and that this is an inadequate basis for a section 7 claim.[126] The Federal Court of Appeal denied leave to appeal.[127] In the end, the NEB recommended approval of the Trans Mountain Expansion project and the Governor in Council accepted that recommendation. Accordingly, the Board issued a certificate of public convenience and necessity for the project. The approval, however, has been subject to multiple criticisms, ranging from suggestions that the process was flawed and approval pre-conceived, to concerns from Indigenous communities about their territorial and ancestral rights.[128] The

120 *Ibid* at 3.

121 *Ibid*.

122 *Ibid*.

123 *City of Vancouver v NEB and Trans Mountain Pipeline ULC* (16 October 2014), FCA 14-A-55 (motion to dismiss).

124 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

125 Canada, National Energy Board, Sheri Young, "Ruling No. 29 – Mr. L D Danny Harvey – Notice of Motion dated 12 August 2014 – Trans Mountain Expansion Project", (Ottawa: National Energy Board, 19 August 2014) at 1, online: <https://apps.neb-one.gc.ca/REGDOCS/File/Download/2498608>.

126 *Ibid* at 2.

127 *L D Danny Harvey v NEB and Trans Mountain Pipeline ULC* (24 October 2014), FCA 14-A-59 (leave to appeal dismissed). As is typical, the Federal Court of Appeal provided no reasons for its decision. See also Canada, National Energy Board, "ARCHIVED – Court Challenges to National Energy Board or Governor in Council Decisions", (Ottawa: National Energy Board, 21 September 2017), online: <www.neb-one.gc.ca/pplctnflng/crt/archive/index-eng.html>.

128 See e.g. Audrea Lim, "Game Over for the Tar Sands?" (2016) 63:2 Dissent 63 at 66-67; Julie Gordon & Ethan Lou, "Canada Review of Trans Mountain Flawed, Lawyers Argue", *Reuters* (7 October 2017), online: <https://ca.reuters.com/article/idCAKCN1C719A-OCA-BS>; Karin Larsen, "Anti-Pipeline Leaders Restate Resistance to Trans Mountain Pipeline

approval was also subject to litigation in both the British Columbia Supreme Court[129] and in the Federal Court of Appeal.[130] In August, the Federal Court of Appeal overturned the certificate of approval based on the failure to consider the project's marine / shipping impacts (notably on the South Resident killer whale population) and inadequate consultation with First Nations, sending Trans Mountain back to the drawing board.[131] It is an understatement to say that the project remains shrouded in controversy, which promises to continue in the wake of the federal court's decision, and the federal government's decision to purchase the Trans Mountain pipeline.[132]

In the *Forest Ethics* and *Trans Mountain* decisions, the NEB used its statutory discretion to apply the narrower approach to evaluating GHG emissions in those pipeline reviews, and the Courts upheld this approach, offering considerable deference to the Board's choice. After the federal political shift in 2015, the NEB applied its discretion under the same legislation in a more expansive way, as illustrated in the Energy East pipeline review discussed next.

iii. Energy East pipeline

The Energy East project involved an application by TransCanada to the NEB for the Board's approval to convert existing natural gas pipelines to crude oil, and to add to the existing pipeline.[133] With plans to transport 1.1 million barrels of crude oil per day from Hardisty, Alberta to refineries in Québec and New Brunswick, the Energy East pipeline would have been the longest in North America.[134] It is not surprising that a pipeline project crossing six provincial

Project", *CBC News* (16 April 2018), online: <www.cbc.ca/news/canada/british-columbia/kinder-morgan-trans-mountain-pipeline-opposition-1.4611055>.

129 See e.g. *Squamish Nation v British Columbia (Minister of Environment)*, 2018 BCSC 844, [2018] BCJ No 971.

130 See the ongoing litigation consolidated as *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 102, [2017] FCJ No 493.

131 *Tsleil-Waututh Nation v Canada (Attorny General),* (2018) FCA 153, [2018] FCJ No 876.

132 The purchase was Canada's response to the ultimatum Kinder Morgan issued to Canada. See Kinder Morgan Canada Limited, "Kinder Morgan Canada Limited Suspends Non-Essential Spending on Trans Mountain Expansion Project", *Kinder Morgan Canada Limited* (8 April 2018), online: <https://ir.kindermorgancanadalimited.com/2018-04-08-Kinder-Morgan-Canada-Limited-Suspends-Non-Essential-Spending-on-Trans-Mountain-Expansion-Project>; Kelly Cryderman & Ian Bailey, "Kinder Morgan Issues Ultimatum, Suspends 'Non-Essential' Spending on Trans Mountain Pipeline", *The Globe and Mail* (8 April 2018), online: <www.theglobeandmail.com/canada/alberta/article-kinder-morgan-cites-bc-opposition-as-it-suspends-non-essential/>.

133 TransCanada, "TransCanada to Proceed with 1.1 Million Barrel/Day Energy East Pipeline Project to Saint John", *TransCanada* (1 August 2013), online: <www.transcanada.com/en/announcements/2013-08-01transcanada-to-proceed-with-1.1-million-barrelday-energy-east-pipeline-project-to-saint-john/>.

134 Jillian Bell, "Energy East Pipeline: What you Need to Know", *CBC News* (26 January 2016), online: <www.cbc.ca/news/business/energy-east-pipeline-explained-1.3420595>.

boundaries,[135] thousands of municipalities,[136] and the traditional territory of 180 Indigenous groups[137] would generate controversy. Many raised concerns about the environmental risks associated with the pipeline, including the direct and indirect GHG emissions relating to the project.[138]

In spite of public pressure and mounting opposition to the project, the NEB's initial statement of issues for the Energy East proposal did not consider indirect GHG emissions. However, the panel that developed this initial set of issues resigned in the wake of a conflict of interest controversy.[139] A new NEB panel was created in January 2017,[140] and this panel announced in August 2017 that it would "consider indirect GHG emissions in its NEB Act public interest determination for each of the [Energy East] projects."[141] More specifically, the NEB stated that it would examine incremental upstream and downstream GHG emissions as well as incremental emissions from third-party electricity generation.[142]

The NEB explained that it was motivated to expand the scope of its review of the Energy East project after receiving over 820 submissions calling for the inclusion of upstream and downstream greenhouse gases in its reviews.[143] In justifying its decision, the Board referred to the "increasing public interest in GHG emissions, together with increasing governmental actions and commitments (including the federal government's stated interest in assessing upstream

135 *Ibid*.

136 Les Whittington, "Stephen Harper Endorses Energy East Pipeline Proposal", *Toronto Star* (2 August 2013), online: <www.thestar.com/news/canada/2013/08/02/stephen_harper_endorses_energy_east_pipeline_proposal.html>.

137 Shawn McCarthy, "First Nations Prepare for Fight Against Energy East Pipeline", *The Globe and Mail* (12 May 2018), online: <www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/first-nations-prepare-for-fight-against-energy-east-pipeline/article18748066/>.

138 Flanagan & Demerse, *supra* note 76.

139 This conflict of interest occurred when members of the review panel met in secret with ex-Québec premier Jean Charest, who was acting as a paid consultant for TransCanada. See Alex Ballingall, "TransCanada Ends Bid to Build Energy East Pipeline after 'Careful Review of Changed Circumstances'", *The Star* (5 October 2017), online: <www.thestar.com/business/2017/10/05/transcanada-ends-bid-to-build-energy-east-pipeline-after-careful-review-of-changed-circumstances.html>.

140 The Canadian Press, "Controversial Events in the History of TransCanada's Energy East Pipeline", *Financial Post* (5 October 2017), online: <http://business.financialpost.com/pmn/business-pmn/controversial-events-in-the-history-of-transcanadas-energy-east-pipeline>.

141 Letter from Sheri Young to Energy East Pipeline Ltd. and TransCanada PipeLines Limited, all interested parties (23 August 2017) National Energy Board at 3, online: <https://apps.neb-one.gc.ca/REGDOCS/File/Download/3320560> [Young, "Letter"]; Cattaneo, *supra* note 64.

142 Young, "Letter", *ibid*.

143 *Ibid* at 2.

GHG emissions associated with major pipelines)."[144] The NEB also noted that GHG laws and policies may have an impact on markets and the availability of oil or gas to the proposed pipeline, rendering them relevant to its determination of supply and demand for oil and gas.[145]

The NEB clarified that it does not consider upstream production and upgrading activities, downstream refining activities and end-use, and third-party electricity generation to be part of the "designated project" under *CEAA 2012*, since they are not within the applicant's control.[146] It noted, for example, that the intra-provincial power lines required to deliver electricity to facilities related to the pipeline will be constructed and operated by parties other than the applicants.[147] However, the NEB made a distinction between regulatory approval of a designated project, and the scope of information-gathering to determine environmental impacts. Using intra-provincial power lines as an example, the NEB stated that the environmental effects of these power lines could be part of the Board's assessment of the cumulative effects of the Energy East project under *CEAA 2012*. In other words, although not within its regulatory ambit, the NEB would consider the GHG emissions from these activities as relevant to the information-gathering function of its environmental assessment of the project.[148] It is notable that the NEB explicitly recognized the distinction between information-gathering and decision-making functions, and the fact that the scope of its powers in each case may be different.

The NEB's decision to include indirect GHGs in their review was praised by many groups. For instance, Charles Hatt, a lawyer for Ecojustice, noted that the "decision culminates years of work by countless individuals and groups that have fought against blinkered, siloed regulatory reviews that only pass the buck on climate change."[149] In contrast, the oil and gas industry was highly critical of the NEB's decision. For example, the Canadian Energy Pipeline Association (CEPA) noted that it "believes that broad public policy issues, such as climate change, should be addressed at the political level, and not through pipeline project reviews."[150] TransCanada did consider appealing the NEB's decision to include greenhouse gases in its review, but instead announced in October 2017

144 *Ibid* at 3.
145 *Ibid* at 4 (however, the NEB clarified that the hearing process is not the appropriate forum to debate the adequacy of GHG laws and policies in general).
146 *Ibid* at 3.
147 *Ibid* at 4.
148 *Ibid*.
149 Cattaneo, *supra* note 64.
150 *Ibid*.

that it was abandoning the Energy East pipeline project "[a]fter careful review of changed circumstances."[151]

These three decisions show that until 2015, the NEB interpreted its statutory powers and applied its discretion narrowly with respect to indirect GHG emissions. The change in government at the federal level in 2015 had a noticeable impact on the NEB's exercise of its discretion, as illustrated in the NEB's broader interpretation of its powers and choice to include indirect GHG emissions in the range of issues included in the Energy East review.

B. Statutory interpretation of scope and reach by environmental assessment agency

Although neither *CEAA 1992* nor *CEAA 2012* refer to GHG emissions or climate change, terminology related to GHG emissions made its way into assessments as part of the consideration of environmental effects. As early as 2003, the CEAA published a guidance document aimed at helping environmental assessment practitioners incorporate climate change considerations into project-level assessments.[152] The document recognized that environmental assessment has the potential to "link project planning to the broader management of climate change issues in Canada" and that doing so can help "determine whether projects are consistent with jurisdictional actions and initiatives to manage GHG emissions."[153] This guide existed in the absence of a clear national framework for GHG mitigation, as embodied today in the *PCF*.

CEAA 2012 lists in subsection 5(1) the factors to be considered in environmental assessments and these include any changes that may be caused by the environment outside Canada or in a province other than the one where the project will be carried out.[154] The Agency has interpreted this as allowing consideration of a project's impacts on GHG emissions since emissions have extraprovincial and international reach.[155] Consequently, direct GHG emis-

151 TransCanada, "TransCanada Announces Termination of Energy East Pipeline and Eastern Mainline Projects", *TransCanada* (5 October 2017), online: <www.transcanada.com/en/announcements/2017-10-05-transcanada-anounces-termination-of-energy-east-pipeline-and-eastern-mainline-projects/>.

152 Canada, Federal-Provincial-Territorial Committee on Climate Change and Environmental Assessment, *Incorporating Climate Change Considerations in Environmental Assessment: General Guidance for Practitioners* (Gatineau: Federal-Provincial-Territorial Committee on Climate Change and Environmental Assessment, 2003) at 1.

153 *Ibid* at 1-2.

154 *CEAA 2012*, *supra* note 14, s 5(1)(b).

155 Canadian Environmental Assessment Agency, *Pacific NorthWest LNG Project – Environmental Assessment Report* (Ottawa: Canadian Environmental Assessment Agency, 2016), online: <www.ceaa.gc.ca/050/documents/p80032/115668E.pdf>. See also Young, "Ruling No. 25", *supra* note 117 at 2 (wherein the NEB concluded that direct GHG emissions could fall within the scope of

sions have become more commonly integrated into federal environmental assessments in recent years. When environmental assessment was governed under the *CEAA 1992* regime, direct GHG emissions were explicitly factored into two federal joint panel reviews for oil sands mining projects: the Kearl Oil Sands and Joslyn Mines reviews.[156] Although the projected emissions were considerable, the panels concluded that they would not cause significant adverse environmental effects, largely because of promises made by the proponents to implement mitigation measures.[157] Under the *CEAA 2012* regime, three projects explicitly considered GHG emissions. I've already discussed the Trans Mountain and Energy East proposals above. The third project was the Jackpine Mine Expansion. The Panel estimated that the Jackpine Mine Expansion would emit (directly) an additional 1.2 million tonnes of C02 annually.[158] Once again, based on promises by the project proponent to implement mitigate measures, the panel concluded that the GHG impacts of the project would not be significant.[159] None of the panels have considered indirect GHG emissions, though

subsection 5(1) of *CEAA 2012*); Mark Friedman, "Assessing Greenhouse Gas Emissions in the Oil Sands: Legislative or Administrative (in)Action?" (2015) 6:3 West J Leg Studies 1 at 8 [Friedman].

156 For the federal joint panel review of the Kearl Oil Sands Project, see Canada, Joint Review Panel Established by the Alberta Energy and Utilities Board and the Government of Canada, *Report of the Joint Panel Established by the Alberta Energy and Utilities Board and the Government of Canada – EUB Decision 2007-013: Imperial Oil Resources Ventured Limited, Application for an Oil Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project) in the Fort McMurray Area* (Calgary: Alberta Energy and Utilities Board & Canadian Environmental Assessment Agency, 27 February 2007), online: <www.aer.ca/documents/decisions/2007/2007-013.pdf> [Joint Review Panel, *Report of Kearl Oil Sands*]. See also *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302, [2008] FCJ No 324 at para 70 ("the [Kearl Oil Sands] Project will be responsible for average emissions of 3.7 million tonnes of carbon dioxide equivalent per year"). For the federal joint panel review of the Joslyn North Mine Project, see Canada, Joint Review Panel Established by the Federal Minister of the Environment and the Energy Resources Conservation Board, *Report of the Joint Review Panel Established by the Federal Minister of the Environment and the Energy Resources Conservation Board – Decision 2011-005: Total E&P Joslyn Ltd., Application for the Joslyn North Mine Project* (Calgary: Energy Resources Conservation Board & Canadian Environmental Assessment Agency, 27 January 2011) at 102, online: <www.aer.ca/documents/decisions/2011/2011-ABER-CB-005.pdf> [Joint Review Panel, *Report of Joslyn Mines*] ("the project would contribute 26.7 million tonnes of greenhouse gas emissions in CO_2 equivalent per year").

157 See Joint Review Panel, *Report of Kearl Oil Sands*, *supra* note 156 at 99; Joint Review Panel, *Report of Joslyn Mines*, *supra* note 156 at 136-38.

158 See Canada, Joint Review Panel Established by the Federal Minister of the Environment and the Energy Resources Conservation Board, *Report of the Joint Review Panel Established by the Federal Minister of the Environment and the Energy Resources Conservation Board – Decision 2013 ABAER 011: Shell Canada Energy, Jackpine Mine Expansion Project, Application to Amend Approval 9756, Fort McMurray Area* (Calgary: Alberta Energy Regulator & Canadian Environmental Assessment Agency, 9 July 2013) at 49, online: <http://ceaa-acee.gc.ca/050/documents/p59540/90873E.pdf>.

159 *Ibid* at 5, 50 (the Panel did find significant adverse effects on certain components of the environment, including wetlands). See also *Taseko Mines Ltd. v Canada (Minister of the Environment),* 2017 FC 1099, [2017] FCJ No 1166 (where the Federal Court provided an expansive interpretation of significant adverse environmental effects under CEAA 2012).

(as noted earlier) the Energy East panel was poised to do so before the project was abandoned.

C. Scope and reach of environmental assessment from a jurisdictional perspective

The Supreme Court has considered the constitutional scope of environmental assessments in a number of decisions. In the *Oldman River* decision, the Supreme Court was clear in underlining that the environment is not a subject that is exclusively assigned to either level of government. Each level of government has the jurisdiction to evaluate the environmental effects of projects linked to matters within its constitutional authority. The Court recognized that environmental assessment is fundamentally a planning tool that leads to better decision-making. It rejected the argument that environmental assessments are a "constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far ranging inquiry into matters that are exclusively within provincial jurisdiction."[160] If there is an "element of proximity" between the environmental assessment process and the matter under federal jurisdiction, it is appropriate to evaluate effects on matters under provincial jurisdiction.[161] Additionally, the Court noted that the scope of the assessment is not limited to the head of power under which the decision is made but rather that the review must "consider the environmental effect on all areas of federal jurisdiction."[162]

The Supreme Court had occasion to consider the constitutional scope of federal environmental assessments again only two years after the *Oldman River* decision. In *Québec (Attorney General) v Canada (National Energy Board),*[163] the NEB had granted Hydro-Québec licences to export blocks of power to New York and Vermont, conditional upon the successful completion of environmental assessments for any future generating facilities to be built to supply the increasing demand of the export contract.[164] Hydro-Québec and the government of Québec challenged the addition of these conditions, arguing that they were *ultra vires* of Parliament as they imposed conditions on subject matters under the exclusive jurisdiction of the province.[165] The Federal Court of Appeal agreed and ruled that, when granting a licence to export power blocks,

160 *Oldman River*, *supra* note 20 at 71-72.
161 *Ibid* at 72.
162 *Ibid* at 72-73.
163 [1994] 1 SCR 159, 112 DLR (4th) 129.
164 *Ibid* at 164-66.
165 *Ibid*.

"the Board was limited solely to the consideration of the environmental effects of the export" and not the potential effects of future facilities wholly situated within the province that would supply the electricity to be exported.[166]

The Supreme Court disagreed, however, ruling that the Federal Court of Appeal erred in limiting the scope of the NEB's environmental assessment to the effects of the transmission of power itself.[167] It stated that to "limit the effects considered to those resulting from the physical act of transmission is an unduly narrow interpretation."[168] Instead, the Court held that the NEB should consider the "overall environmental costs" of any decision under its jurisdiction.[169] The Supreme Court was clear in holding that the federal government has the authority to consider a wide range of impacts in environmental assessment, including local ones, as long as they are connected to a valid federal authority.[170] Using the example of interprovincial railways, the Court stated that Parliament was entitled to take into account a variety of local issues — such as local communities, ecologically sensitive habitats, noise concerns, and emissions standards — in determining the merits of a railway proposal.[171] While provinces have regulatory authority over these local issues, the Court noted that it "defies reason to assert that Parliament is constitutionally barred from weighing the broad environmental repercussions, including socio-economic concerns, when legislating with respect to decisions of this nature."[172] To the Court, as long as the fundamental nature of the legislation is grounded in a valid head of power, the range of implications that a decision-making body must consider "will not detract from the fundamental nature of the legislation," except in cases where a colourable purpose is present.[173] The Court was in essence drawing a distinction between the second and third phases of environmental assessment, constraining decision-making authority to matters within federal jurisdiction, but allowing broad consideration (beyond the confines of federal jurisdiction) of the implications of a proposed project in the second phase (scope).

While some subsequent decisions created uncertainty as to the reach of environmental assessments in the second phase,[174] this uncertainty was

166 *Ibid* at 189-90.
167 *Ibid* at 191.
168 *Ibid*.
169 *Ibid*.
170 *Oldman River, supra* note 20 at 65-66.
171 *Ibid*.
172 *Ibid* at 66. See also *Friends of the West Country Assn. v Canada (Minister of Fisheries and Oceans)*, [2000] 2 FC 263, [1999] FCJ No 1515 at para 3.
173 *Oldman River*, *supra* note 20 at 69.
174 See e.g. *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] FCR 610.

resolved by the Supreme Court in 2010 with the *MiningWatch Canada v Canada (Fisheries and Oceans)* decision (also known as the Red Chris Mine case).[175] That case involved a proposal to build a large copper and gold mine in Northern British Columbia, which required building an open pit mine and associated infrastructure, including tailings pond, access roads, water intake, transmission lines, and a variety of buildings. The project was subject to *CEAA 1992*, which required comprehensive studies to be done on projects of a certain size.[176] The proposed mine clearly met the size threshold, but the Department of Fisheries and Oceans (the responsible authority), chose to define the project narrowly and focus its environmental assessment on only some elements of the project, namely the tailings pond and an explosives plant. By doing so, the more narrowly defined project no longer met the threshold for a comprehensive study and qualified for a less intensive screening assessment. This had a number of repercussions, including restricting public participation.[177]

MiningWatch Canada and others applied for judicial review of the decision. The Federal Court of Appeal held that the federal government was justified in using its discretion to define the project narrowly and focus its evaluation on areas of the project within its jurisdiction. The Supreme Court of Canada disagreed. It overturned the Federal Court of Appeal's decision, unanimously holding that the appropriate framing of a project subject to environmental assessment is the whole project as proposed by a proponent. In other words, if a proponent seeks approval to build a major industrial mine (as it did in this case), the federal government cannot artificially carve out particular components of that project and subject these smaller subsets of the project to a less rigorous evaluation (in this case, a screening process). While not a matter of constitutional law, this interpretation of *CEAA 1992* illustrates the court's rejection of efforts to avoid comprehensive reviews of projects.

In response to arguments that the government should be able to frame projects narrowly to avoid duplication, the Court pointed to mechanisms within *CEAA 1992* to promote intergovernmental coordination and avoid unnecessary duplication.[178] The Court noted that there was little to be gained in artificially dividing assessments into jurisdictional silos; not only was this unnecessary, but it risked neither level of government having enough information to make informed decisions about the potential environmental impacts of a given project. In other words, the Court wished to avoid creating a legislative vacuum

175 2010 SCC 2, [2010] 1 SCR 6.
176 *Ibid* at paras 1, 14, 17-18.
177 Significantly, screening assessments did not require public participation.
178 *Ibid* at paras 23-25, 41.

in which certain environmental impacts do not get considered by either level of government because their respective jurisdictional powers are interpreted in an unduly restrictive way.[179]

With respect to scoping the project, the Court confirmed that the federal government had the discretion under subsection 15(1) of *CEAA 1992* to enlarge the scope of a given project when appropriate to do so (for instance, when combining projects into a larger assessment would be helpful).[180] It might need to do this if, for instance, a project proponent divided its project into smaller pieces to circumvent the need for a comprehensive assessment. However, it was not open to the government to narrow the scope of the project any further than the project as scoped. In the words of the Court, "the minimum scope is the project as proposed by the proponent."[181] This decision is important, because it explicitly overturned prior Federal Court of Appeal jurisprudence that had been used by government departments to avoid comprehensive studies of listed projects.[182] The decision also precludes government officials from circumventing the goals of environmental assessment by taking a piecemeal approach to assessing large projects.

Another recent Federal Court decision suggests that the scope of factors to be considered in the information-gathering phase of assessment is broad. In the *Greenpeace Canada v Canada (Attorney General)*[183] decision, the applicants sought judicial review of a joint review panel report for a project proposed by Ontario Power Generation to build new reactors at the Darlington nuclear power plant. The applicants argued that the environmental assessment had certain major gaps, including failing to consider certain emissions of hazardous substances and spent nuclear fuel. The Federal Court agreed with the applicants, holding that the environmental assessment needed to include consideration of emissions from hazardous substances and creation of nuclear waste. The Court rejected the idea that spent nuclear fuel was a separate issue, noting that the environmental assessment process is the only opportunity for federal decision-makers to determine whether the waste should be generated in the first place.[184] The court underlined the important distinction

179 *Ibid*.

180 *Ibid* at para 39.

181 *Ibid*.

182 *Ibid* at para 26.

183 2014 FC 463, 455 FTR 1 [*Greenpeace*].

184 *Ibid* at para 312. See also Martin Olszynski, "Greenpeace v Canada: Symbolic Blow to the Nuclear Industry, Game-Changer for Everyone Else?" (9 June 2014), *ABlawg* (blog), online: <https://ablawg.ca/2014/06/09/greenpeace-v-canada-symbolic-blow-to-the-nuclear-industry-game-changer-for-everyone-else/>.

between the information-gathering function of EA and licensing or permitting processes.[185]

The *IAA* departs from the predecessor *CEAA 2012* in allowing a broader range of environmental effects to be taken into account in assessments. Whereas subsection 5(1) of *CEAA 2012* circumscribed the study of environmental effects to those directly related to subjects within federal authority,[186] the *IAA* enumerates a list of factors that the Agency or review panel must take into account in its assessments, which includes a broad range of changes (positive and negative) "to the environment or to health, social or economic conditions."[187] It also specifies that the Agency or Minister (if the assessment is referred to a panel) determines the scope of factors to be considered under most of the factors listed in subsection 22(1). In other words, the wording of the *IAA* is aligned with the jurisprudence interpreting jurisdiction in federal environmental assessments, which recognizes that the information-gathering and evaluation phase of assessments are not constrained to matters within federal jurisdiction, but may consider a broad range of environmental impacts.

The *IAA* also requires that cumulative effects be considered in assessments. Not only is consideration of cumulative effects part of the law's stated purpose,[188] but an impact assessment must consider "any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out."[189] This would almost have to include indirect GHG emissions, since one cannot properly understand the impacts of a project on the country's GHG emissions without knowing how a project will influence GHG production at the well head and when the fuels are combusted.

The imperative to consider cumulative effects in both the *IAA* and *CER Act* strengthen the argument that indirect GHG emissions should be part of federal reviews. After many years of advocating for the inclusion of cumulative effects in environmental assessments (and in decision-making), legislation and policy increasingly mandate that this be done.[190] The argument is simple and has instant intuitive appeal: it makes no sense to evaluate the impacts of a given project in isolation if that project in its broader geographic context would add

185 *Greenpeace, supra* note 183 at para 211.
186 See *CEAA 2012*, *supra* note 14, s 5(1). See also Campbell, "Federal Environmental", *supra* note 67 at 12.
187 Bill C-69, *supra* note 15, Part 1, s 22(1)(a).
188 *Ibid*, s 6(1)(m).
189 *Ibid*, s 22(1)(a)(ii).
190 See e.g. *CEAA 2012*, *supra* note 14, s 4(1)(i); Bill C-69, *supra* note 15, Part 1, s 6(1)(m).

to a pre-existing burden and could potentially be the water drop that causes the full glass to overflow. Similarly, evaluating major fossil fuel infrastructure projects without considering the influence they will have on the development, production, and consumption of fossil fuels is akin to managing one's financial budget by only examining one withdrawal, and not the culmination of withdrawals over a period of time. As Mark Friedman states, it is essential to consider the cumulative effects of projects' GHG emissions since one "project's GHG emissions may be individually minor but collectively" meaningful.[191] Considering cumulative effects requires agencies to consider "not whether a particular emission was the one that broke the camel's back, but rather whether it is an emission that will contribute to such an occurrence."[192] Evaluating cumulative effects requires assessments to consider the impact of a given project in context. Applied to climate change, this means that as a country's remaining "carbon budget" decreases (as we approach the upper limit of CO_2 emissions that can be safely emitted), each incremental source of emissions becomes more important.[193]

Ultimately, the IAA requires decision-makers to make a determination of what is in the public interest. The jurisdictional basis for making decisions is discussed in the next section, but in terms of scope, the jurisprudence suggests that the courts would allow federal bodies to include indirect GHG emissions in their evaluations of what is in the public interest. For instance, the Federal Court of Appeal was critical of a federal regulatory agency that chose to narrowly construe its jurisdiction to evaluate socio-economic effects as part of evaluating what is in the public interest.[194] It described the Canadian Transport Commission's role in determining what is in the public interest as requiring consideration of what is in the interests of all the affected members of the public, stating that "surely a body charged with deciding in the public interest is 'entitled' to consider the effects of what is proposed on all members of the public."[195] In *Sumas Energy 2, Inc. v Canada (National Energy Board)*,[196] the Court was asked to determine whether the NEB had exceeded its jurisdiction when it considered the potential environmental effects of an international power plant located in the United States on Canada. The Federal Court of Appeal confirmed that the NEB was not limited to considering matters specifically

191 Friedman, *supra* note 155 at 9.
192 *Ibid*, citing Albert Koehl, "EA and Climate Change Mitigation" (2010) 21 J Envtl L & Prac 18.
193 See Toby Kruger, "The *Canadian Environmental Assessment Act* and Global Climate Change: Rethinking Significance" (2009) 47:1 Alta L Rev 161 at 174; Friedman, *supra* note 155 at 13.
194 See *Nakina (Township) v Canadian National Railway Co.*, [1986] FCJ No 426, 69 NR 124.
195 *Ibid*.
196 2005 FCA 377, [2006] 1 FCR 456 at para 8.

enumerated in the *NEB Act*, but could take a broad approach to evaluating environmental impacts of a potential project, including international ones. These decisions suggest the courts are inclined to allow a fulsome evaluation of relevant factors in ascertaining what is in the public interest.

3. Phase 3: decision-making

Under *CEAA 2012*, the decision made at the end of an assessment is whether a project is likely to cause significant adverse environmental effects within federal jurisdiction. If it does, the project may still proceed if the Governor in Council determines that those effects are justified in the circumstances.[197] Because of the IAA's broader focus on sustainability, the impact assessment report will identify the positive and negative environmental, health, social, and economic effects a project will likely have. The Minister or Governor in Council will then have to determine whether the project is in the public interest, focusing on whether the project's adverse effects, within federal jurisdiction or incidental to other federal decisions, are in the public interest.[198] This determination of public interest must be based on the impact assessment report and a set of factors within federal jurisdiction, including "the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change."[199] The legislation also requires Parliament to establish conditions on a project deemed to be in the public interest that relate to the adverse effects within federal jurisdiction and those directly linked or necessarily incidental to the exercise of federal authority (e.g. permitting, financing).[200]

As discussed above, there is no constitutional bar to the federal government considering indirect GHG emissions in its assessments, at least at the information-gathering stage, whether under the *IAA* or the *CER Act*. However, if the federal government wanted to exercise decision-making authority in the context of a pipeline proposal that related to upstream or downstream GHG emissions — refusing the project because of a determination that it is not in the public interest because of its implications for national GHG emissions, or imposing conditions on the project to reduce its GHG emissions footprint — or if courts were to take a more narrow view of jurisdiction in the information-gathering

197 CEAA 2012, *supra* note 14, s 52(2).

198 Bill C-69, supra note 15, Part 1. The decision may be made by the Minister (*ibid*, s 60(1)) or referred to Governor in Council (*ibid*, s 62). In both cases, they must decide if the project is in the public interest.

199 *Ibid*, s 63(e).

200 *Ibid*, s 64.

phase of assessments, limiting it to only matters within federal authority, then it is necessary to discuss the extent of federal jurisdiction over GHG emissions. What, then, are the federal powers that could justify decisions relating to indirect GHG emissions?

One possibility would be to justify federal authority to consider indirect GHG effects as part of federal authority over interprovincial pipelines in section 92(10)(a) of the *Constitution Act, 1867*.[201] Bishop and Dachis argue against this based on the absence of a strong connection between those indirect emissions and the pipeline.[202] They point to the fact that a pipeline proponent does not necessarily have control over an upstream producer of GHG emissions, or consumers downstream.[203] In their view, the connection between the indirect emissions and a given pipeline is not sufficiently direct to bring those indirect emissions into the scope of environmental assessment based on federal jurisdiction over international pipelines.[204] They view the assessment of upstream and downstream GHG emissions as colourable attempts "to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power."[205]

Another argument would be to find federal jurisdiction through Parliament's authority over GHG emissions. Even the strongest critics acknowledge that bringing upstream and downstream GHG emissions into a federal environmental assessment would be *intra vires* if grounded in an area of federal responsibility.[206] In particular, Bishop and Dachis note that if the federal government is able to ground the regulation of GHG emissions in a federal head of power, the assessment of upstream and downstream GHG emissions relating to an interprovincial pipeline would be constitutionally valid.[207]

Given the scope, scale, and variety of GHG emissions, it is not surprising that both the provinces and federal governments have jurisdiction to regulate GHG emissions.[208] For instance, the provinces have the authority to regulate

201 *Constitution Act, 1867, supra* note 23, s 92(10)(a).
202 Bishop & Dachis, *supra* note 68 at 3-4.
203 *Ibid*.
204 *Ibid*.
205 *Oldman River, supra* note 20 at 10. See also Bishop & Dachis, *supra* note 68 at 3.
206 Bishop & Dachis, *supra* note 68 at 4-5.
207 *Ibid*.
208 See Nathalie J Chalifour, "Making Federalism Work for Climate Change: Canada's Division of Powers over Carbon Taxes" (2008) 22 NJCL 121 [Chalifour, "Making Federalism Work"]; Nathalie J Chalifour, "Constitutional Authority to Levy Carbon Taxes" in Thomas J Courchene & John R Allan, eds, *Canada: The State of the Federation, 2009 – Carbon Pricing and Environmental Federalism* (Montréal: Institute of Intergovernmental Relations, 2010) 177; Nathalie J Chalifour, "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions

pollution from industrial activity within their borders, as well as impose carbon prices on emissions from activities within their jurisdiction.[209] Parliament has the authority to legislate on a variety of matters relating to GHG emissions at the national level under a variety of powers, such as criminal law, taxation, trade and commerce, and the national concern branch of POGG.[210]

Both levels of government are currently exercising their powers and implementing a variety of climate-related laws. Provinces have implemented laws aimed at the deployment of renewable energy[211] as well as carbon prices in the form of carbon taxes[212] and cap and trade programs.[213] Parliament has enacted a variety of fuel efficiency standards for vehicles and regulations requiring a minimum percentage of renewable content in fuels,[214] both under the banner of the *Canadian Environmental Protection Act, 1999*[215] (*CEPA*). Several key GHGs, including CO_2, were added to Schedule I of *CEPA* in 2005.[216] The decision to enact these regulations under *CEPA* was influenced by the Supreme Court's broad interpretation of the criminal law power as a source of authority for federal environmental laws, including its upholding of sections 34 and 35 of *CEPA* in the *R v Hydro-Québec* decision.[217]

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though Regulations, a National Cap and Trade Program, or a National Carbon Tax" (2016) 36 NJCL 331 [Chalifour, "Canadian Climate Federalism"]. See also Alastair R Lucas & Jenette Yearsley, "The Constitutionality of Federal Climate Change Legislation" (2011) 4:15 SPP Research Papers 1; Shin-Ling Hsu & Robin Elliot, "Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions" (2009) 54:3 McGill LJ 463; Peter W Hogg, "Constitutional Authority over Greenhouse Gas Emissions" (2009) 46:2 Alta L Rev 507; Nigel D Bankes & Alastair R Lucas, "Kyoto, Constitutional Law and Alberta's Proposals (2004) 42:2 Alta L Rev 355; Stewart Elgie, "Kyoto, the Constitution and Carbon Trading: Waking a Sleeping *BNA* Bear (or Two)" (2007) 13:1 Rev Const Stud 67.

209 See Chalifour, "Making Federalism Work", *supra* note 208 at 200-14 (British Columbia's carbon tax and Québec's "redevance annuelle" (the carbon pricing policy in place in Québec at that time) are constitutionally valid provincial initiatives).

210 See Chalifour, "Canadian Climate Federalism", *supra* note 208 at 355-63. I have also written about the potential application of the emergency branch of POGG and the declaratory power, though I recognize that Parliament would not likely use these powers for political reasons.

211 See e.g. *Green Energy Act*, SO 2009, c 12, Schedule A.

212 See e.g. *Carbon Tax Act*, SBC 2008, c 40 [*Carbon Tax Act*].

213 See e.g. *The Cap and Trade Program*, O Reg 144/16 [Ontario, *Cap and Trade Program*], as repealed by *Prohibition Against the Purchase, Sale and Other Dealings with Emission Allowances and Credits,* O Reg 386/18 s. 2 [*Prohibition Against Emission Allowances*]; *Regulation respecting a cap-and-trade system for greenhouse gas emissions allowances*, CQLR, c Q-2, r 46.1 [Québec, *Cap and Trade System*].

214 See e.g. *Renewable Fuels Regulations*, SOR/2010-189 [*Renewable Fuels Regulations*]; *Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations*, SOR/2010-201; *Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations*, SOR/2013-24.

215 SC 1999, c 33.

216 *Ibid*, as it appeared on 21 November 2005, Schedule I, s 74 ("[c]arbon dioxide, which has the molecular formula CO_2" was added to *CEPA* in 2005 as a toxic substance).

217 [1997] 3 SCR 213, 151 DLR (4th) 32 at para 161 [*Hydro-Québec*].

While there is some overlap and interplay between federal and provincial climate laws, they are valid exercises of respective provincial and federal powers and can, for the most part, peacefully co-exist. It is well understood that subjects can have a double aspect in a constitutional sense. For example, subjects like "highway traffic, games and lotteries, youth protection, and waterfront protection" are all subjects appropriately governed at both the federal and provincial levels.[218] This is not concurrent jurisdiction, but rather the concurrent application of validly enacted provincial and federal laws.[219] The courts have said we should err on the side of allowing two laws to coexist whenever possible.[220]

What is the scope of Parliament's authority over GHG emissions? In my view, Parliament has authority to regulate with respect to GHG emissions through a number of powers, including criminal law, taxation, trade and commerce and the national concern branch of POGG.[221] Since I have written elsewhere about this, I will not reiterate that analysis, but I will refer briefly to two constitutional challenges of federal climate laws, the second of which is ongoing at the time of writing, as these offer some guidance as to how the courts view Parliament's authority in this area.

The first challenge offers insight into the scope of Parliament's authority over GHGs under the federal criminal law power. In that case, Syncrude challenged the constitutionality of federal renewable fuel regulations enacted under *CEPA*. These regulations require a minimum content of renewable fuels in diesel and gas (2% and 5% respectively).[222] Syncrude argued the regulations were *ultra vires* of Parliament because they are aimed at creating demand for biofuels in the marketplace (a matter, they argued, of provincial jurisdiction).[223] Relying upon the Supreme Court's decision in *Hydro-Québec*, the federal government argued that the regulations were justified under its criminal law power. The Federal Court of Appeal firmly rejected Syncrude's challenge, sending a strong signal that national GHG regulations are entirely appropriate criminal law measures. The Court held that the regulations are unambiguously aimed at protecting the health of Canadians and the environment by lowering GHG emissions, and that lowering GHG emissions is a valid criminal purpose.[224] The Court rejected

218 Brouillet & Ryder, *supra* note 103 at 422.

219 See *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837 at para 66.

220 See e.g. *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at para 36.

221 See Chalifour, "Canadian Climate Federalism", *supra* note 208 at 355.

222 *Renewable Fuels Regulations*, *supra* note 214, ss 5(1)-(2).

223 *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160, 398 DLR (4th) 91 at para 14.

224 Syncrude, in fact, conceded this point. See *ibid* at para 20 ("Syncrude does not . . . contest that GHGs contribute to air pollution, and that their reduction is a proper objective of the criminal law power…").

Syncrude's argument that the nature of the regulations as minimum content requirements, rather than prohibitions, removed them from the scope of criminal law. Regulations within criminal law do not need to be in the form of total prohibitions, but can regulate behaviour by setting limits on given substances and penalizing actors for exceeding those limits. The court underlined that the very purpose of criminal law is to modify behaviour, and that the means chosen for how to achieve the change can be quite indirect (as they are in the case of cigarette packaging laws, for instance). Unless there is a major shift in the court's approach to the criminal law power, this means that regulations impacting upon GHG emissions are valid exercises of the federal criminal law power.

The second challenge relates to the national carbon price. Carbon pricing is a centrepiece of the *PCF*. Carbon can be priced in different ways, including through taxation or cap and trade programs, and there is a great deal of debate about the relative merits of each approach. When the *PCF* was signed, British Columbia[225] and Alberta[226] had already enacted carbon taxes, and Québec[227] and Ontario[228] had opted to establish cap and trade programs. Faced with this patchwork of existing provincial pricing policies, the federal government acted in accordance with the concept reflected in cooperative federalism that when faced with overlapping jurisdictional authority, parties should work out a solution. Rather than imposing its own choice of pricing system on the provinces, Parliament established a benchmark price that could be met by either system and would only be imposed in jurisdictions that did not implement an equivalent price. The national backstop measure was introduced into legislation in March 2018 under the *Greenhouse Gas Pollution Pricing Act*[229] (*GHGPPA*), and came into force in June 2018. While many credit the Trudeau administration with approaching the situation in a sensibly deferential and cooperative way, some provinces argue the backstop mechanism oversteps Parliament's jurisdiction. The province of Saskatchewan — the only jurisdiction that is not a signatory to the *PCF* — initiated a reference on its constitutionality.[230] When Ontario Premier Doug Ford was elected in 2018, he abolished that province's cap and trade program and also challenged the constitutionality of the *GHGPPA*.[231]

225 See *Carbon Tax Act*, *supra* note 212.

226 See *Climate Leadership Act*, SA 2016, c 16.9.

227 See Québec, *Cap and Trade System*, *supra* note 213.

228 See Ontario, *Cap and Trade Program*, *supra* note 213.

229 Bill C-74, *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 1st Sess, 42nd Parl, 2018, Part 5 (assented to 21 June 2018), SC 2018, c 12 [Bill C-74].

230 See Saskatchewan, Reference, *supra* note 11.

231 See e.g. Office of the Premier, "Premier Doug Ford Announces the End of the Cap-and-Trade Carbon Tax Era in Ontario", *Government of Ontario* (3 July 2018), online: ≤https://news.ontario.

While the cases have yet to be argued, the federal government has stated that it is asserting jurisdiction for the law under the National Concern branch of POGG. The national and international dimensions of climate change and the policies needed to reduce GHG emissions at a national scale make this subject matter a poster child for POGG's National Concern branch.[232] If we look at the pith and substance of the *GHGPPA*, the storyline is clear. This is a law aimed at dealing with an issue of international and national dimensions of great importance to Canadians. GHGs are the quintessential global pollutants, impacting the atmosphere regardless of where they are emitted, and presenting "an unprecedented risk to the environment."[233] The *GHGPPA* notes that Canada has ratified the United Nations Framework Convention on Climate Change[234] and the Paris Agreement.[235] The dominant purpose of the legislation is clearly to address national emissions of GHGs, an issue of national concern, in line with international commitments, using national carbon pricing.

However, the National Concern branch of POGG has been interpreted in a limited way by Courts in the past, in order to avoid upsetting the balance of powers between federal and provincial governments.[236] For a matter to be justifiable under the National Concern branch of POGG, the Supreme Court in *R v Crown Zellerbach Ltd*[237] held that a subject must have a singleness, distinctiveness, and indivisibility that render it national, yet be sufficiently delimited so as to minimize the impacts on provincial jurisdiction.[238]

One of the tests the courts use to determine whether an issue has the requisite "singleness" is to consider what could happen if one province failed to deal

ca/opo/en/2018/07/premier-doug-ford-announces-the-end-of-the-cap-and-trade-carbon-tax-era-in-ontario.html>; *Prohibition Against Emission Allowances, supra* note 213, s 2; Canadian Press, "Doug Ford Moves To Dismantle Ontario's Cap-And-Trade Program", *Huffington Post* (3 July 2018), online: <www.huffingtonpost.ca/2018/07/03/doug-ford-ontario-cap-and-trade_a_23473881/>; Ashleigh Mattern, "Sask. Government Calls on Doug Ford to Help Fight Federal Carbon Tax", *CBC News* (29 June 2018), online: <www.cbc.ca/news/canada/saskatchewan/saskatchewan-government-doug-ford-federal-carbon-tax-1.4729561>.

232 See Chalifour, "Canadian Climate Federalism", *supra* note 208. See also Nathalie Chalifour & Stewart Elgie, "Brad Wall's Carbon-Pricing Fight is Constitutional Hot Air", *The Globe and Mail* (14 June 2017), online: <www.theglobeandmail.com/opinion/brad-walls-carbon-pricing-fight-is-constitutional-hot-air/article35297947/>.

233 Bill C-74, *supra* note 229, Part 5, Preamble.

234 *United Nations Framework Convention on Climate Change*, 4 June 1992, FCCC/INFORMAL/84, GE.05-62220 (E) 200705 (entered into force 21 March 1994).

235 See Bill C-74, *supra* note 229, Part 5, Preamble; Paris Agreement, *supra* note 9.

236 See e.g. *Hydro-Québec*, *supra* note 217 (the Supreme Court relied upon the federal government's criminal law power arising from subsection 91(27) of the *Constitution Act, 1867*, *supra* note 23 to justify *CEPA* rather than relying on POGG).

237 [1988] 1 SCR 401, [1988] SCJ No 23.

238 *Ibid* at para 33.

effectively with the issue within its borders.[239] If the failure of one province to cooperate could cause problems for the residents of another province, or affect the national interest, it is a matter of national concern. Applying these tests, the Court in *Zellerbach* ultimately held that marine pollution is a matter of national concern to Canada because of its extra-provincial and international character.[240] The Court was, however, divided about the degree of intrusion into provincial jurisdiction. The minority felt the federal law was too broad, as it created a blanket prohibition against dumping any substance in the water without considering its nature or the amount.[241] To be justified as a national concern, the minority thought the legislation should have targeted the dumping of substances that were harmful to waters or contributed to pollution. The take-home message from this case is that POGG's National Concern branch is appropriate to deal with the subject matter of GHG emissions, since those are a matter of national and international concerns that spill beyond the borders of any one jurisdiction, but that the law must be specific and clearly delimited in order to limit intrusions into provincial jurisdiction. The *GHGPPA* is carefully drafted to focus on attaching a price to the GHG component of economic activity, rather than trying to limit economic activity itself. It also applies to emissions from a broad range of sources, versus one specific sector. These are helpful design features to support a finding that the legislation is sufficiently delimited to avoid too much intrusion into provincial jurisdiction. Also, the fact that the legislation was designed as a backstop measure — which will only come into effect if a province fails to establish its own price, using whichever of the two systems it prefers — is an illustration in design to minimize intrusion.

It is also possible that the GHGPPA will be constitutionally justified as a federal tax. The courts have stated that taxes must have general revenue-raising as their dominant purpose if they are to be justified as a federal tax.[242] Under the *GHGPPA*, Parliament will retain no revenue; if it needs to implement the backstop measure, all revenue generated will be returned to the province or its residents. It is still possible that the courts will accept the carbon price as a federal tax, since it will raise revenue, even if raising the revenue is not the primary goal.[243]

239 *Ibid*.

240 *Ibid* at paras 37-38.

241 *Ibid* at para 64.

242 See Chalifour, "Making Federalism Work", *supra* note 208 at 149.

243 Note that if the Courts were to accept taxation as the justification for the measure, section 125 of the *Constitution Act, 1867* would then apply. This provision exempts provincial Crown resources from federal taxation (and vice versa). This could result in exemptions from the tax for certain provincially-owned utilities, which would reduce the effectiveness of the tax (in terms of behaviour modification)

Part VI: conclusion

As global and national imperatives to decarbonize economies grow stronger and the amount of GHG emissions that we can continue to emit decreases, the necessity to consider the implications of major energy infrastructure decisions — including consideration of whether such infrastructure should be expanded — grows. There is an inevitable tension inherent in facilitating the movement of hydrocarbons in an era of GHG mitigation. This tension plays out in protests, interprovincial conflicts, and in the courts. Indeed, the imposition of federal limits on a pipeline proposal based on climate considerations would not be welcomed by proponents of pipelines. But pipeline proposals are already awash in political and legal controversy, and high-level public policy choices about whether pipeline capacity should be expanded need to be made in the context of international and national obligations relating to GHG emissions.

The Trudeau government has been firm in stating its resolve to meet its climate commitments under the Paris Agreement. Even though some have called this resolve into question in the wake of the government's position on the Trans Mountain pipeline, the emerging *IAA* and *CER Act* regimes bring climate considerations squarely within the assessment and regulatory processes. Although the new laws do not explicitly refer to indirect emissions, a reasonable interpretation of the legislation suggests that federal regulators would be well within the bounds of their statutory authority to review a project and make decisions in respect of a project, on the basis of indirect emissions.

As discussed in this paper, I believe they would also be constitutionally justified in doing so. The jurisprudence indicates that while the first and third phases of environmental assessment (trigger and decision-making, respectively) need to be grounded in spheres of federal authority, the reach and scope of inquiry in the information-gathering stage (phase two) allows for a broader reach into matters otherwise in provincial jurisdiction in order to provide a fulsome picture of the environmental effects. Many scholars support this interpretation.[244] This means that federal regulators taking the indirect GHG emissions into consideration in the second phase of assessments would be well within their jurisdictional authority to do so, regardless of whether one considers GHG emissions to be part of federal jurisdiction.

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and could lead to uneven application across provinces, depending on the relative proportion of crown-owned GHG generating utilities. It is not surprising that Parliament designed the *GHGPPA* so it would be justified under another power. See Chalifour, "Making Federalism Work", *supra* note 208.

244 See e.g. Doelle, "Federal Jurisdiction", *supra* note 20; Albert Koehl, "EA and Climate Change Mitigation" (2010) 21 J Envtl L & Prac 18; Campbell, "Federal Environmental", *supra* note 67 at 11.

The more interesting question, of course, is whether a federal regulator could require an assessment of an otherwise purely provincial project on the basis of GHG implications, or make a decision relating to a project (such as refusing to authorize a pipeline proposal, or imposing limits or conditions) on the basis of the indirect GHG emissions associated with that pipeline. Doing this would require there be federal jurisdiction over GHG emissions. The courts have confirmed jurisdiction over regulation of GHG emissions under the criminal law power, and they will soon pronounce on jurisdiction over emissions in the litigation over the national carbon price. As I have argued above and elsewhere, I believe that indirect GHG emissions at the scale likely to be associated with a major pipeline project would be considered within federal jurisdiction. This means that a federal regulator would be constitutionally justified in imposing conditions on, or refusing to issue a certificate of approval for, an intergovernmental pipeline proposal.

This is aligned with Supreme Court of Canada jurisprudence in recent years that favours a modern approach to cooperative federalism where overlap and interplay between provincial and federal powers are tolerated.[245] The Courts generally wish to avoid creating legislative vacuums where no jurisdiction has authority.[246] The same argument applies in the case of impacts of projects on national climate change commitments, since if the impacts of interprovincial pipeline projects on generation of GHG emissions are not considered in federal assessments, they will not likely be considered at all. I have argued in this paper that Parliament has the constitutional authority to consider the full implications for GHG emissions of an interprovincial pipeline proposal, and even to deny the project's application on this basis. The reality, however, is that project proponents would prefer to limit GHG emissions so as to secure approval. And therein lies the power of integrated assessments: they change behaviour, and align policy objectives relating to energy and climate.

245 Brouillet & Ryder, *supra* note 103 at 416.

246 In one case, for example, the Court erred on the side of allowing Parliament jurisdiction to evaluate the environmental impact of spent (used) fuels, because not doing so meant the environmental impacts of those fuels might never be evaluated by either jurisdiction. See *Greenpeace*, *supra* note 183 at 417.