Federal Linear Energy Infrastructure Projects and the Rights of Indigenous Peoples: Current Legal Landscape and Emerging Developments

*David V. Wright**

In Canada today, the review and approval of federal linear energy infrastructure projects is a contentious matter. Tension is driven in part by the complex regulatory regime, and this complexity is intensified by the federal government's responsibility to fulfill obligations associated with the rights of Indigenous peoples. The federal legal regime is evolving rapidly and is part of a broader policy debate pertaining to energy and climate policy, and interprovincial pipelines in particular. This article presents the current legal landscape and then discusses emerging changes in federal law and policy. In doing so, it discusses the rights of Indigenous peoples, summarizes the associated varied legal terrain across the country, describes the legislative scheme for review and approval of federally regulated linear energy projects, and provides in-depth discussion of the duty to consult and accommodate. The final part of the paper turns to the current evolving context, setting out recent changes the federal government has put forward for law reform. While acknowledging that there is an important continuing need for analysis and commentary with a normative approach to the field of Aboriginal law and the revitalization of Indigenous law, this article takes the approach of focusing on the current content of federal law in Canada as it pertains to Indigenous peoples.

Aujourd'hui, au Canada, l'examen ainsi que l'approbation des projets fédéraux d'infrastructures énergétiques linéaires demeurent une question litigieuse. Les tensions sont en partie attribuables au caractère complexe du régime de règlementation, et cette complexité est amplifiée par la responsabilité du gouvernement fédéral de respecter les obligations liées aux droits des peuples autochtones. Le régime juridique fédéral évolue rapidement et fait partie d'un débat politique plus vaste portant sur les politiques énergétiques et climatiques, et plus particulièrement sur les pipelines interprovinciaux. Cet article présente le paysage juridique actuel, puis aborde les changements émergents dans les lois et les politiques fédérales. Ce faisant, il aborde les droits des peuples autochtones, résume les divers contextes juridiques associés à travers le pays, décrit le régime législatif régissant l'examen et l'approbation des projets d'énergie linéaire sous réglementation fédérale et propose une discussion approfondie sur l'obligation de consulter et d'accommoder. La dernière partie de l'article se penche sur le contexte actuel en constante évolution et présente les récents changements proposés par le gouvernement fédéral pour la réforme des lois. Tout en reconnaissant qu'il est toujours nécessaire d'analyser et de commenter avec une approche normative lorsqu'il est question du droit autochtone et de la dynamisation du droit autochtone, le présent article décrit le contenu actuel de la loi fédérale au Canada en ce qui concerne les peuples autochtones.

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Linear energy infrastructure projects typically have a significant physical presence on the land, particularly during the construction phase.[1] Such projects cross vast tracts of Canada.[2] These projects frequently interface directly and indirectly with Indigenous peoples.[3] The regulatory review process for the Northern Gateway Project, for example, involved more than 80 Indigenous communities and territories in Alberta and British Columbia,[4] and the now cancelled Energy East Project would have crossed the traditional territory of 180 Indigenous communities on its route from Alberta to the Maritimes.[5] Similarly, the review and approval process for the Trans Mountain Expansion Project (TMX) involved at least 120 Indigenous communities along its route from the Edmonton area to Vancouver.[6]

The federal regime for reviewing and permitting these projects is complex, and this is intensified by Indigenous dimensions. The complexity — and importance — of considering the rights and interests of Indigenous peoples has attracted much attention in recent years.[7] However, the need for a sophisticated

1 See e.g. Trans Mountain Pipeline Expansion Project, which consists of a total of 987 km of new buried pipeline, Canada, National Energy Board, *National Energy Board Report – Trans Mountain Expansion Project*, OH-001-2014, Filing: A77045 (19 May 2016) at 1, online: <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2969867> [NEB Report TMX]; the Northern Gateway Project consisted of a total of 1178 km of pipeline in a 25 m wide right-of-way, Canada, National Energy Board, *Joint Review Panel Report on the Enbridge Northern Gateway Project*, Volume 1 – Connections, Filing: A56136 (20 December 2013) at 4, online: <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2396699>.

2 For a map of federally regulated pipelines see National Energy Board, "Major Pipeline Systems and Frontier Activities Regulated by the National Energy Board", online: <www.neb-one.gc.ca/sftnvrnmnt/sft/dshbrd/rgltdpplns-eng.html>.

3 In this article, the term "Indigenous" is synonymous with "Aboriginal" to include Inuit, First Nations, and Metis groups and individuals, recognizing that the term Indigenous is increasingly used in Canada in light of international developments including in the United Nations Declaration on the Rights of Indigenous Peoples. The term "Indigenous communities" refers to situations involving identifiable groups of Indigenous peoples in Canada, such as those involved in energy project regulatory processes.

4 See Canada, National Energy Board, *Joint Review Panel Report on the Enbridge Northern Gateway Project*, Volume 2 – Considerations, Filing: A56136 (20 December 2013) at 2-6, online: <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2396699>; *Gitxaala Nation v Canada,* 2016 FCA 187, [2016] FCJ No 705 at para 58 [*Gitxaala*].

5 Shawn McCarthy, "Energy Companies Struggle with Aboriginal needs on Pipelines", *The Globe and Mail* (8 December 2013), online: <www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/energy-companies-struggle-with-aboriginal-needs-on-pipelines/article15818477/> [McCarthy].

6 NEB Report TMX, *supra* note 1 at 32, 511-13.

7 See e.g. McCarthy, *supra* note 5; Jennifer Ditchburn, "Indigenous Rights aren't a Subplot of Pipeline Debate," *Policy Options* (11 April 2018), online: <http://policyoptions.irpp.org/magazines/april-2018/indigenous-rights-arent-subplot-pipeline-debate/>; William M Laurin & JoAnn P Jamieson, "Aligning Energy Development with the Interests of Aboriginal Peoples in Canada" (2015) 53:2 Alta LR at 453.

and respectful approach has been recognized since at least the 1970s when Canada commissioned Justice Thomas Berger to lead the Mackenzie Valley Pipeline Inquiry.[8] The "Berger Inquiry" took place over the course of three years, and involved hearings in communities across the Northwest Territories and Yukon.[9] While much has evolved since, the Berger Inquiry had a significant influence on today's development assessment regimes in Canada, including the federal government's engagement with Indigenous peoples and consideration of their the rights and interests.[10]

Today, the rate of change and degree of political and legal tensions with respect to pipelines and Indigenous rights are reaching new heights.[11] Independently, both legal realms — the federal regime for review of major projects, and the legal framework for the recognition and implementation of Aboriginal rights and treaty rights[12] — are experiencing fundamental change. As discussed in the introduction to the Special Issue, it is anticipated that

8 Canada, Minister of Supply and Services, "Northern Frontier, Northern Homeland – The Report of the Mackenzie Valley Pipeline Inquiry: Volume One", Mr. Justice Thomas Berger (Ottawa: Supply and Services Canada, 1997), online: <www.pwnhc.ca/extras/berger/report/BergerV1_complete_e.pdf>.

9 *Ibid* at vii.

10 See Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Toronto: LexisNexis Canada, 2008) at 6-8; See also Paul Muldoon et al, *An Introduction to Environmental Law and Policy in Canada*, 2nd ed (Regina: University of Regina Press, 2013) at 78.

11 See e.g. Ian Bickis & Dan Healing, "Trans Mountain Ruling Increases Uncertainty among Resource Industry Groups", *The Canadian Press* (31 August 2018), online: <www.nationalnewswatch.com/2018/08/31/trans-mountain-ruling-increases-uncertainty-among-resource-industry-groups/#.W41MUehKjD4>; e.g. Gary Mason, "Trans Mountain Pipeline Ruling Creates a Big Political Mess for Trudeau and Notley", *The Globe and Mail* (30 August 2018), online: <www.theglobeandmail.com/opinion/article-trans-mountain-pipeline-ruling-creates-a-big-political-mess-for/>; Martin Lukacs, "Indigenous Rights 'Serious Obstacle' to Kinder Morgan Pipeline, Report says", *The Guardian* (16 October 2017), online: <www.theguardian.com/environment/true-north/2017/oct/16/indigenous-rights-serious-obstacle-to-kinder-morgan-pipeline-report-says>; See also, Jeffrey Jones, "New National Energy Board Chairman find Himself in the Eye of the Storm", *The Globe and Mail* (6 October 2014), online: <www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/new-national-energy-board-chairman-finds-himself-in-the-eye-of-the-storm/article20951201/>; Peter Watson, "NEB takes its Obligation Extremely Seriously", *NEB News Archives* (16 February 2018), online: <www.neb-one.gc.ca/bts/nws/whtnw/archive/2014/2014-11-07-eng.html?=undefined&wbdisable=true>; Peter Watson, Chair of the NEB, has explained on numerous occasions that during the 2008 Trans Mountain Anchor Loop Project through Jasper National Park there were only eight intervenors involved in the hearing compared to the more than 400 in the recent Trans Mountain Expansion project hearings.

12 The term "Aboriginal rights" and "Aboriginal and treaty rights" and "Aboriginal Law" are used throughout the paper to refer to the body of Canadian that pertains to Indigenous peoples. In this way, these terms refer to "settler law" or "non-indigenous law," which stands in contrast to the past, present and future laws of Indigenous Peoples. For an in-depth discussion of Indigenous law and laws in Canada, see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) [Borrows, "Recovering Canada"].

the *National Energy Board Act*[13] (NEB Act) and the *Canadian Environmental Assessment Act, 2012*[14] (CEAA 2012) will soon be repealed and replaced by new statutes.[15] At the same time, the Trudeau government is also pursuing a multitude of law reforms and policy changes as part of the broader reconciliation agenda and a purported "renewed nation-to-nation" relationship with Indigenous peoples.[16] A major part of this work is the government's commitment to full adoption and implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*,[17] a move that the government has described as "breathing life into Section 35 and recognizing it now as a full box of rights for Indigenous peoples of Canada."[18] Equally significant is the evolving jurisprudence of Aboriginal law.[19] These foundational changes are not playing out in isolated, parallel tracks. Rather, legal regimes for review and approval of major

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

14 *Canadian Environmental Assessment Act*, SC 2012, c 19 [*CEAA, 2012*].

15 Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act, and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018 (third reading 20 June 2018) [*Bill C-69*]; Canada, Expert Panel on the Modernization of the National Energy Board, *Forward, Together: Enabling Canada's Clean, Safe and Secure Energy Future* (Ottawa: Expert Panel on the Modernization of the National Energy Board, 2017) vol 1, online: <www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf> [NEB "Modernization"].

16 See e.g. Canada, Department of Justice, "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples", (Ottawa: Department of Justice, 14 February 2018), online: <www.justice.gc.ca/eng/csj-sjc/principles-principes.html> [Department of Justice, "Principles Respecting"]; Indigenous and Northern Affairs Canada, "A New Fiscal Relationship: Engagement 2017", (21 March 2018), online: <www.aadnc-aandc.gc.ca/eng/1510835199162/1510835298783>; Canada, Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Ottawa: Truth and Reconciliation Commission of Canada, June 2015), online: <www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf>; Letter from Justin Trudeau, Prime Minister of Canada (4 October 2017), online: <https://pm.gc.ca/eng/minister-crown-indigenous-relations-and-northern-affairs-mandate-letter>.

17 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, UN Doc A/61/295 (13 September 2007).

18 Carolyn Bennett, Minister of Indigenous and Northern Affairs Canada, "Announcement of Canada's Support for the United Nations Declaration of Indigenous Peoples" (Speech delivered at the 15th Session of the United Nations Permanent Forum on Indigenous Issues, New York, 10 May 2016) [unpublished], online: <www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/> [Bennett]; See also Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, "Realizing a Nation-to-Nation Relationship with the Indigenous Peoples of Canada" (Cambridge Lectures, Walnut Tree Court, University of Cambridge, United Kingdom, 3 July 2017) [unpublished], online: <www.canada.ca/en/department-justice/news/2017/07/realizing_a_nation-to-nationrelationshipwiththeindigenouspeoples.html>; Department of Justice, "Principles Respecting", *supra* note 16.

19 See e.g. *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41, [2017] 1 SCR 1099 at para 59 [*Thames*]; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40, [2017] 1 SCR 1069 at paras 19-22 [*Clyde*]; *Grassy Narrows First Nation v. Ontario (Natural Resources)* 2014 SCC 48, [2014] 2 SCR 447 [*Grassy Narrows*]; *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58,

energy projects and recognition and implementation of Indigenous rights are closely linked and significantly influence each other.[20] Cutting across these developments is a context in which the public and Indigenous groups lack trust and confidence in federal resource project reviews,[21] and concerns are escalating with respect to regulatory certainty and investor confidence.[22]

At this time of heightened interest and rapid change, this article first takes stock of the current legal landscape and then discusses emerging changes in the law. Part I discusses Indigenous rights in the varied legal terrain across the country, including historical treaties, modern treaties, and non-treaty areas.[23] Part II describes the legislative scheme for review and approval of federally regulated pipelines, with particular attention to the roles, authorities and processes of the National Energy Board. Part II also includes in-depth discussion of the duty to consult and accommodate, including situations of infringement of Indigenous rights and associated justification by the Crown. Part III turns to the current evolving context, setting out recent changes the federal government has put forward in relation to Aboriginal law and policy, and then discussing changes to come through the passing 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*.[24]

[2017] 2 SCR 576 at para 34 [*Nacho Nyak Dun*]; *Gitxaala*, *supra* note 4. These cases will be discussed throughout.

20 See e.g. Claudia Cantanneo, "Former NEB Chair says Politicians should stay out of Pipeline Reviews as Energy Watchdog comes under Siege", *Financial Post* (10 February 2016), online: <https://business.financialpost.com/commodities/energy/former-neb-chair-says-politicians-should-stay-of-pipeline-reviews-as-energy-watchdog-comes-under-siege>; See also, Jordan Flagel and Trevor McLeod, Why It's Time to Rethink Pipeline Protests", *Maclean's* (1 June 2017), online: <www.macleans.ca/news/canada/why-its-time-to-rethink-pipeline-protests/>; Nigel Bankes, "Clarifying the Parameters of the Crown's Duty to Consult and Accommodate in the Context of Decision-Making by Energy Tribunals" (2017) 36:2 J Energy & Nat Resources L at 163 [Bankes, "Clarifying the Parameters"].

21 NEB "Modernization", *supra* note 15 at 7; Brandi Morin, "Indigenous NEB Panelist says There's a lot of Work to do to Gain Trust from First Nation and Métis Communities", *APTN National News* (10 March 2017), online: <http://aptnnews.ca/2017/03/10/indigenous-neb-panelist-says-theres-a-lot-of-work-to-do-to-gain-trust-from-first-nation-and-metis-communities/>; See also Michael Cleland, "A Matter of Trust: The Role of Communities in Energy Decision-Making", online: (2016) 4:4 ERQ <www.energyregulationquarterly.ca/articles/a-matter-of-trust-the-role-of-communities-in-energy-decision-making#sthash.CdEu5K32.HoFi8IfV.dpbs>.

22 See e.g. Jason Clemens & Niels Veldhuis, "Trans Mountain Shows that Investor Confidence is Collapsing in Canada", *Maclean's* (11 April 2018), online: <www.macleans.ca/opinion/trans-mountain-shows-that-investor-confidence-is-collapsing-in-canada/>; See also Bernard Roth, "Reconciling the Irreconcilable: Major Project Development in an Era of Evolving Section 35 Jurisprudence" (2018) 83 SCLR (2d); Bankes, "Clarifying the Parameters", *supra* note 20.

23 All three contexts are discussed in detail below.

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

This article takes the relatively modest approach of describing the current content of federal law in Canada as it pertains to Indigenous peoples while acknowledging that there is an important continuing need for analysis and commentary with a normative approach to the field of Aboriginal law,[25] particularly given the goals of reconciliation and decolonization. The focus here is primarily on "settler law."[26] However, the conclusion of this article identifies the need for further coherence across federal law and policy pertaining to Indigenous peoples and linear energy projects. The conclusion also emphasizes the importance of reinvigorating Indigenous laws in contemporary and future contexts.

Part I: Indigenous rights contexts across "Canada"

Existing Aboriginal and treaty rights are protected under section 35 of Canada's Constitution:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.[27]

The succinctness of this provision belies its complexity. Clarifying the content of these rights is ongoing, often involving Indigenous peoples turning to the courts.[28] In contemporary Canadian jurisprudence, these rights, even when recognized (typically by courts, by treaty, by statute, or a mix) are not absolute and may be infringed by the Crown if it can meet a justification test in certain circumstances.[29]

25 As noted above, "Aboriginal law" is used to refer to this field within Canadian law, whereas "Indigenous law" will be used to refer to Indigenous peoples' own laws. For a comprehensive overview of Aboriginal Law in Canada; See John Borrows & Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 4th ed (Markham, Ontario: LexisNexis, 2012) [Borrow & Rotman, "Aboriginal Legal Issues"]; See also Borrows, "Recovering Canada", *supra* note 12, for an in-depth discussion of Indigenous law and laws in Canada.

26 See Fraser Harland, "Taking the "Aboriginal Perspective" Seriously: The (Mis)use of Indigenous Law in Tsilhqot'in Nation v British Columbia", online: (2017) Indigenous LJ <https://ilj.law.utoronto.ca/news/taking-aboriginal-perspective-seriously> (For a discussion of settler law in relation to Indigenous legal traditions).

27 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; Prior to this change in 1982, treaty rights were subject to unilateral infringement by the Crown.

28 See generally, Sebastien Grammond , *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Toronto: Carswell, 2013) at Chapter 1 [Grammond].

29 See Part II, Accommodation (and Infringement and Justification), *below*; For examples of courts applying the infringement analysis see *R v Lefthand*, 2007 ABCA 206, [2007] 10 WWR 1; *R v Douglas*, 2007 BCCA 265, [2007] CNLR 277; *R v Bombay*, [1993] 1 CNLR 92, 61 OAC 312.

This section discusses "historic" treaty, "modern" treaty, and non-treaty contexts, noting that both the historic and non-treaty contexts may include areas subject to asserted or proven Aboriginal title.[30] The focus here is on the land and land-related resources in which Indigenous communities have an interest, including with respect to activities such as hunting, fishing, trapping and gathering, as these are of fundamental importance in relation to federal linear energy infrastructure projects.[31]

Historic treaties

Treaty-making activities by the Imperial Crown — and subsequently by the colonial and now federal government — have a long history. From 1700 to the early 1900s, a series of treaties covering most of today's provinces and some parts of the territories were signed by the Crown and Indigenous peoples.[32] While all of these treaties may be referred to as "historic treaties," [33] particularly for the purposes of applying interpretive principles,[34] there are significant differences between them. The sub-categories of historic treaties are typically grouped as the Treaties of Peace and Neutrality (1701-1760), Peace and Friendship Treaties (1725-1779), Upper Canada Land Surrenders and the Williams Treaties (1781-1862/1923), Robinson Treaties and Douglas Treaties (1850-1854), and the Numbered Treaties (1871-1921).[35] The numbered treaties are perhaps the best known because they cover most of western Canada and northern Ontario. The historic treaties are also sometimes categorized as pre-Confederation and post-Confederation treaties.[36]

30 Distinguishing between legal frameworks that give rise to these rights can be done a number of different ways – see Grammond, *supra* note 28 at 172; It should be noted at the outset that generalizing or categorizing the rights of different Indigenous groups is to be avoided but is nevertheless helpful in the present analysis.

31 It must be noted that interests and concerns of Indigenous communities extend far beyond this oft-cited list of activities, including deeper spiritual connections to the land and waters and inherent rights, title and legal authority. See Gordon Christie, "Indigenous Authority, Canadian Law, and Pipeline Proposals" (2013) 25 J Envtl L & Prac 189 (For discussion of Indigenous self-determination and authority in relation to pipeline proposals and the legal regime in Canada).

32 While the word "signed" is used here, in come treaty contexts there remains uncertainty about whether there was a unilateral crown declaration or whether Indigenous signatories fully comprehended the treaty content and Crown's intent.

33 See Thomas Isaac, *Aboriginal Law*, 5th ed (Toronto: Carswell, 2016) [Isaac]; Borrows, "Recovering Canada", *supra* note 12.

34 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 at paras 114-16 [*Beckman*].

35 For a detailed discussion of these different types, see DN Sprague, "Canada's Treaties with Aboriginal Peoples" cited in John Borrows & Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 4th ed (Markham, Ontario: LexisNexis, 2012) 296-98.

36 See Isaac, *supra* note 33 at 150-64.

Treaties are formal mechanisms that outline Crown — Indigenous relations and set out Indigenous rights[37]. Described broadly, treaties can give rise to procedural rights (e.g. consultation) and, depending on the text of the treaty, substantive rights (e.g. hunting, fishing, trapping, gathering). Such rights are not frozen in time;[38] in some cases, they may provide a basis for modern practices.[39] However, the Supreme Court has been clear in finding that treaty rights are not absolute and can be infringed.[40] As well, treaties are subject to geographic limits, either expressly by the terms of the treaty or by interpretation.[41]

In the case of *R v Badger*, the Supreme Court clarified how treaties are to be regarded:

> [...] a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. [...] Treaties are analogous to contracts, albeit of a very solemn and special nature, public nature. They create enforceable obligations based on the mutual consent of the parties.[42]

Beyond the treaties themselves, the legal landscape is largely a product of case law. Courts have set out important principles that are relevant in the context of review and approval of linear energy projects and beyond. A complete survey is outside the scope of this paper,[43] but several points are worth reciting here.

Given the historical nature of these treaties, interpretation is central to the question of what rights exist and how such rights may be affected.[44] As succinctly stated in *Marshall*: "the goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed."[45] In this context, it is always assumed that the Crown intends to fulfil its promises,[46] and limitations constraining Indigenous rights must be narrow-

37 *R v Marshall*, [1999] 3 SCR 456, 177 DLR (4th) 513 at para 78 [*Marshall*, 1999].

38 *Ibid*; *R v Bernard*, 2003 NBCA 55, [2003] 4 CNLR 48 at para 201 [*Bernard*].

39 *R v Marshall*, 2005 SCC 43, [2005] 2 SCR 220 [*Marshall*, 2005].

40 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 at para 58 [*Mikisew*].

41 *Ibid* at para 42.

42 [1996] 1 SCR 771, [1996] 2 CNLR 77 at 41, 76.

43 See Borrow & Rotman, "Aboriginal Legal Issues", *supra* note 25 (For a comprehensive discussion of historical treaty case law); Isaac, *supra* note 33; Grammond, *supra* note 28; Olthius, Kleer, Townshend LLP, *Aboriginal Law Handbook*, 4th ed (Toronto: Carswell, 2012).

44 For a detailed discussion of treaty implementation, see Isaac, *supra* note 33 at 112-24.

45 *Marshall*, 1999, *supra* note 37 at para 78.

46 *Supra* note 42 at para 41.

ly construed.[47] Overall, any ambiguity is to be resolved in favour of Indigenous peoples.[48]

Discussion of each sub-group of historic treaties is also beyond the scope of this paper; however, a critical differentiating feature within this group is whether or not the treaty contains a land-cession provision.

Land-cession treaties

A land-cession treaty is a treaty that includes a clause concerning the surrender of land. Treaty 3 (covering northwestern Ontario and eastern Manitoba), which was at issue in *Grassy Narrows First Nation v Ontario (Natural Resources),*[49] provides as follows:

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, *and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes* by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.[50]

Treaty 8, the territory that includes oil and gas rich regions of northern Alberta and north eastern BC, similarly reads:

> And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and *saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.*[51]

Courts have held that these provisions cede any Aboriginal title to the land and are a legitimate basis upon which the Crown may take up lands.[52] However,

47 *Ibid.*

48 *Ibid* at para 52.

49 *Grassy Narrows*, *supra* note 19.

50 *Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions,* 3 October 1873 (Ottawa: Queen's Printer, 1966), online: <www.aadnc-aandc.gc.ca/eng/1100100028675/1100100028679> [Emphasis added].

51 *Treaty No 8 made June 21, 1899 and Adhesions, Reports* (Ottawa: Queen's Printer, 1966), online: <www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853> [Emphasis added.

52 See e.g. *Grassy Narrows*, *supra* note 19 at paras 41-42. There remain, however, open questions as to whether Aboriginal title may still existing in these contexts. Some commentators and Indigenous peoples make the point that the treaties contemplated *sharing* of the land. See e.g. John Long, *Treaty*

the Crown's power to take up lands is not unconditional.[53] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* clarified that the Crown owes a duty to consult and accommodate if it contemplates taking up lands that are still subject to an Indigenous group's continued harvesting rights.[54] *Grassy Narrows* confirmed that the Crown "must exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests."[55] In the context of the Treaty 3 hunting rights that were at issue in *Grassy Narrows*, for example, the court ruled that, for land to be taken up under Treaty 3, the harvesting rights of the Ojibway must be respected and must meet the conditions set out in *Mikisew*.[56]

Further, the Crown must inform itself of the impact a proposed project may have on the exercise of any Indigenous treaty rights to hunt, trap, and fish.[57] In doing so, the Crown must deal with the Indigenous group in good faith and with the intention of substantially addressing the Indigenous group's concerns.[58] The duty to consult is discussed in further detail in Part III below; however, it is important to note that *Grassy Narrows* clarified that if the taking up of treaty land leaves an Indigenous group with no meaningful right to hunt, fish, or trap on their traditional territories, then a potential action for infringement will arise.[59] As such, under *Grassy Narrows* there is a substantive limit on the Crown's power to take up lands (as well as a procedural obligation — the duty to consult).[60] Put another way, there is a duty on the Crown to protect the continued exercise of rights to hunt, fish, and trap in order to avoid infringement. While the legal and institutional implications of this limit remain unclear to date, a logical extension is a requirement that the Crown conduct landscape-scale assessments to monitor the extent to which development is po-

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No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905 (Kingston, Ontario: McGill-Queen's University Press, 2010); Rene Fumoleau, *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Calgary: University of Calgary Press, 2004); Harold Johnson, *Two Families: Treaties and Government* (Vancouver: UBC Press, 2007); Aimee Craft, *Breathing Life into the Stone Fort Treaty: An Anishnabe Understanding of Treaty One* (Vancouver: UBC Press, 2013) (For commentary that suggests numbered treaties may not have extinguished title).

53 *Grassy Narrows*, *supra* note 19 at para 50.

54 *Mikisew, supra* note 40 at para 56.

55 *Grassy Narrows*, *supra* note 19 at para 50.

56 *Ibid* at para 51 (It should be noted that the main issue in Grassy Narrows was whether it was the Province or Federal government that had the authority take up treaty lands and the associated duty to consult. It was ruled that it was the Province, not the federal government).

57 *Ibid* at para 52.

58 *Ibid* (Citing *Mikisew*, *supra* note 40 at para 55 and *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997] SCJ No 108 at para 168 [*Delgamuukw*]).

59 *Ibid*.

60 *Ibid*. It should be noted, however, that a court may allow an infringement, subject to a proportionality analysis, as discussed in Part II below in relation to accommodation and infringement.

tentially infringing the meaningful exercise of Indigenous treaty parties' rights hunt, fish, or trap on their traditional territories.[61]

Treaty rights in land-cession treaties have been at issue in numerous federally regulated linear energy infrastructure projects, leading to several notable cases involving the National Energy Board, including *Bigstone Cree Nation v Nova Gas Transmission Ltd.*[62] and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*[63] These cases are discussed in Part II.

Historic treaties without land cession

Significant portions of eastern Canada, including all of the Maritime provinces, are covered by historic treaties that did not include land cession provisions; these are typically referred to as the "peace treaties."[64] In these areas, Aboriginal rights continue to exist.[65]

Such rights are relevant in a federal linear energy infrastructure context if there is potential for them to be adversely affected. They are typically rights rooted in land-based activities such as hunting, trapping, fishing, and gathering. For example, the joint federal-provincial review of the Deep Panuke gas project in Nova Scotia's offshore recognized and considered the possibility that government approval of the project might infringe Aboriginal and treaty rights, including the use of lands for traditional purposes.[66]

61 For related discussion on this point, see See Nigel Bankes, "The Implications of the *Tsilhqot'in (William)* and *Grassy Narrows (Keewatin)* Decisions of the Supreme Court of Canada for the Natural Resources Industries" (2015) 33:3 J Energy & Nat Resources L at 188 [Bankes, "Implications"].

62 2018 FCA 89, 16 CELR (4th) at 1 [*Bigstone*].

63 *Thames, supra* note 19.

64 See e.g. *Marshall*, 1999, *supra* note 37; See also Canada, Department of Indigenous and Northern Affairs, "Peace and Friendship Treaties", (10 December 2015), online: <www.aadnc-aandc.gc.ca/eng/1100100028589/1100100028591> ("Unlike later treaties signed in other parts of Canada, the Peace and Friendship Treaties did not involve First Nations surrendering rights to the lands and resources they had traditionally used and occupied").

65 See *Marshall,* 1999, *supra* note 37; *Bernard, supra* note 38 at para 5; Though Aboriginal title in these areas is unproven in court to date, post *Tsilhqot'in* there is a strong legal basis for a court to find that title existed in areas covered by the peace treaties and that such title was never extinguished. While title was argued and not proven in *Marshall*, 2005, *supra* note 39 or *Bernard*, *supra* note 38, the decision left open the possibility; See Robert Hamilton, "After *Tsilhqot'in Nation*: The Aboriginal Title Question in Canada's Maritime Provinces" (2016) 67 UNBLJ at 58; As discussed below, this has implications in relation to federal energy projects and beyond [Hamilton].

66 See Canada, National Energy Board, *Joint Environmental Report – Deep Panuke Offshore Gas Development Project*, NEB File Number: OF-Fac-Gas-E112-2006-02 01, CNSOPB File Number: EDP40,002 (11 April 2007) at 17, 46, 70, online: <www.cnsopb.ns.ca/pdfs/Deep_Panuke_Joint_Env_Report_11_April_2007.pdf> ("The consultations have included discussions of potential infringement of existing and claimed Mi'kmaq rights, Aboriginal title, and mitigation action taken by the Proponent" at 17) (As described in the final project report, the consultations "included

Aboriginal and treaty rights were also implicated in the Maritimes Northeast Pipeline Project, approved in 1997.[67] While the Joint Review Panel did not explicitly enumerate the Aboriginal and treaty rights in its final report, it did generally consider potential impacts on "aboriginal land use" and noted mechanisms for compensation in situations of "damages to aboriginal interests."[68] Most anticipated impacts on Indigenous peoples were dealt with through conditions attached to the final project approval. One such condition was the subject of litigation in *Union of Nova Scotia Indians v Maritimes & Northeast Pipeline Management Ltd*.[69] In that case (on grounds of breach of procedural fairness) the representative body for the Indigenous rights holders successfully challenged the NEB's acceptance of the proponent's version of a communication and cooperation protocol, which had been developed without full input from Indigenous groups.[70]

In addition to Aboriginal rights that exist in historical treaty areas where land was not ceded under the treaty, there are open legal questions as to whether and where Aboriginal title exists, possibly on a large scale.[71] Indeed, when faced with the proposed (but now cancelled) Energy East pipeline project,[72] several Indigenous groups asserted that their title had not been extinguished;[73] however, this was not litigated. In short, the legal test for title in the context of the peace treaties would be substantially similar to that discussed further below in relation to non-Treaty areas.[74] If title is someday declared by a Court in these treaty areas, the result would be an additional set of rights that the

discussions of potential infringement of existing and claimed Mi'kmaq rights, Aboriginal title, and mitigation action taken by the Proponent").

67 Canada, The Joint Public Review Panel, *The Joint Public Review Panel Report – Sable Gas Projects*, (October 1997) at 90, online: <http://publications.gc.ca/collections/Collection/NE23-91-1997E.pdf>.

68 Canada, The Joint Public Review Panel, *The Joint Public Review Panel Report – Sable Gas Projects*, (October 1997) at 90, online: <http://publications.gc.ca/collections/Collection/NE23-91-1997E.pdf>.

69 92 ACWS (3d) 559, 19 Admin LR (3d) 223.

70 *Ibid*.

71 And a related question would be whether any such title has been extinguished. Such a claim for title was one of the main issues in the *Marshall*, 2005, *supra* note 39 and *Bernard, supra* note 38 Supreme Court decisions, where Mclachlin CJ rejected the claims (along with claims to treaty rights to commercial logging); For recent commentary on title claims in such treaty areas in the Maritimes, see Hamilton, *supra* note 65.

72 See Canada, National Energy Board, "Energy East and Eastern Mainline Projects", (22 November 2017), online: <www.neb-one.gc.ca/pplctnflng/mjrpp/nrgyst/index-eng.html>.

73 See Brent Patterson, "Wolastoq Nation says No to the Energy East Pipeline", *The Council of Canadians* (8 February 2016), online: <https://canadians.org/blog/wolastoq-nation-says-no-energy-east-pipeline>.

74 As discussed below, the Supreme Court recently issued its first ever declaration of Aboriginal title in the landmark case of *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in*].

Crown would be required to engage with as part of any review and approval of a federal linear energy infrastructure project.

Modern treaties

Canada continues to enter into treaties with Indigenous Peoples.[75] In recent decades, these agreements are typically referred to as "Modern Treaties" or comprehensive land claim agreements.[76] This contemporary period of treaty-making began with the *James Bay and Northern Québec Agreement of 1975*.[77] Canada and Indigenous peoples have now completed 26 such agreements, and the federal government reports that there are currently approximately 100 comprehensive land claim and self-government negotiation tables across the country.[78] Most modern treaties are in Yukon, Northwest Territories and Nunavut, although modern treaties also cover significant portions of Québec and Labrador and smaller areas of British Columbia.[79] A prominent and fundamentally important feature of most modern treaties is inclusion of provisions through which Indigenous peoples surrender Aboriginal rights and title in exchange for the explicit rights and protections set out in the agreement.[80]

75 The desire of the Crown to negotiate modern treaties was sparked by the Supreme Court's 1973 decision in *Calder v British Columbia (AG),* [1973] SCR 313, [1973] 4 WWR [*Calder*], wherein the Supreme Court acknowledged the existence of (but did not make a declaration of) Aboriginal title. Following *Calder*, the federal government wished to generate more legal certainty by formally recognizing and codifying Indigenous rights and entitlements in comprehensive agreements. For detailed commentary on *Calder* see Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the* Calder *Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007). See also Canada, *Report of the Standing Committee on Indigenous Affairs: Indigenous Land Rights: Towards Respect and Implementation*, 42nd Parl, 1st Sess, (2018) at 42.

76 See e.g. Isaac, *supra* note 33; Borrows, "Recovering Canada", *supra* note 12.

77 *Beckman, supra* note 34.

78 See Indigenous and Northern Affairs Canada, "Comprehensive Claims", online: <www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578>; Also see Land Claims Agreement Coalition, *Modern Treaty Territories Map*, online: <http://landclaimscoalition.ca/treaty/map.html> (For a contemporary map of all modern treaties); Land Claims Agreement Coalition, "What is a Modern Treaty: Modern Treaty Timeline", online: <http://landclaimscoalition.ca/modern-treaty/> (For a succinct visual chronology of modern treaties).

79 Indigenous and Northern Affairs Canada, "Modern Treaties – Comprehensive Land Claims and Self-Government Agreements", online: <www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/mprm_pdf_modrn-treaty_1383144351646_eng.pdf>.

80 See e.g. Canada, Indigenous and Northern Affairs Canada, *Gwich'in Comprehensive Land Claim Agreement*, (Ottawa: 1992) at Chapter 3, online: <www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/gwichin_Land_Claim_Agreement_PDF_1427372111130_eng.pdf>. Such cede and surrender provisions are highly contentious, resulting in some land claims following a "non-assertion" model whereby the Indigenous group commits to not exercise or assert any Aboriginal or treaty right that is not provided for in the modern treaty; See Canada, Indignous and Northern Affairs Canada, *Tlicho Agreement*, (Ottawa: 2003) at s 2.6, online:

Like their historic counterparts, modern treaties are constitutionally protected.[81] The courts, however, have recognized that modern treaties are fundamentally different from historic treaties. In *Beckman v Little Salmon/Carmacks First Nation*, Justice Binnie characterized the difference as a "quantum leap."[82] These treaties are lengthy, sophisticated, comprehensive legal agreements that include chapters on heritage resources, land management, wildlife management, development assessment, land use planning, economic development, resource royalties, parks and protected areas, expropriation, and more.[83]

As such, modern treaties have led courts to adopt interpretive approaches that are different from the historic treaty context.[84] In general, modern treaties are to be interpreted generously but within the terms of the treaty.[85] Individual provisions should be interpreted in light of the treaty text as a whole and the treaty's objectives.[86] As succinctly summarized in the 2017 Supreme Court decision in *First Nation of Nacho Nyak Dun v Yukon*, "because modern treaties are meticulously negotiated by well-resourced parties, courts must pay close attention to [their] terms… and deference to their text is warranted".[87] However, such deference to the "handiwork" of the modern treaty parties is always subject to conformity with the honour of the Crown.[88] Modern treaties are not to be regarded as complete codes.[89] The honour of the Crown and the duty to

<www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/ccl_fagr_nwts_tliagr_tliagr_1302089608774_eng.pdf>.

81 See e.g. *Beckman, supra* note 34 at para 2; *Québec (Attorney General) v Moses*, 2010 SCC 17, [2010] 1 SCR 557 at para 15; *Nacho Nyak Dun*, *supra* note 19; This is also explicitly set out in subsection 35(3) of the *Constitution Act, 1982*, which states, "[f]or greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired."

82 *Beckman*, *supra* note 34 at para 12.

83 See Canada, Indigenous and Northern Affairs Canada, *Umbrella Final Agreement*, (Ottawa: 1993), online: <www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al_ldc_ccl_fagr_ykn_umb_1318604279080_eng.pdf> (For an illustrative example, which is essentially a template agreement on which 11 Yukon First Nations have based their specific agreements).

84 See Julie Jai, "The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference" (2010) 26:1 NJCL at 25 (For detailed commentary); Dwight Newman, "Contractual and Covenantal Conceptions of Modern Treaty Interpretation" (2011) 54:1 SCLR 475 (For detailed commentary).

85 *Beckman, supra* note 34 at paras 10-12; See also *Eastmain Band v Robinson*, [1992] FCJ No 1041, [1993] 1 FC 501 (*sub nom Eastmain Band v Canada (Federal Administrator)*) at paras 19-23 (For explaining that the principle of doubtful expressions being construed in favour of Indigenous peoples does not necessarily apply in the modern treaty context).

86 *Nacho Nyak Dun*, *supra* note 19 at paras 36-38.

87 *Ibid* at para 36.

88 *Ibid* at para 37 (citing *Beckman* at para 54).

89 *Beckman, supra* note 34 at para 38.

consult exist independently of contract or treaty, and the duty is a continuing one in service of the broader objective of reconciliation.[90]

In the context of federal energy infrastructure in modern treaty jurisdictions, Indigenous rights dimensions of the assessment and decision-making regime are fundamentally different and more comprehensively codified than in historical treaty or non-treaty contexts. The approach of the modern treaties is premised on integration of Indigenous rights and interests directly into the regulatory regime based on requirements set out in land claims agreements and associated statutes that define specific development assessment regimes across the North.[91] In each modern treaty jurisdiction there are co-management boards responsible for land and resource management;[92] these boards are a form of administrative tribunal. Members of these boards are nominated by the three treaty parties respectively (federal government, territorial government, and Indigenous group, or Indigenous government if that group has finalized a self-government agreement). Depending on the specific modern treaty jurisdiction, these boards are then integrated into the larger regulatory system.

The Mackenzie Gas Project illustrates the implications of these modern treaties for large federal linear energy infrastructure projects. Decades after the Berger Inquiry, proponents seeking to develop the area's natural gas resources proposed the Mackenzie Gas Project ("MGP").[93] The MGP would have run from Inuvik in the northwest corner of the NWT to just inside the northern Alberta border,[94] where it would have connected with Nova Gas Transmission Limited facilities.[95] The route crossed the modern treaty territories of the

90 *Ibid* at para 119.

91 For example, the modern treaties in the NWT are integrated with the regime under the Mackenzie Valley Resource Management Act; See John Donihee et al, "Resource Development and the Mackenzie Valley Resource Management Act: The New Regime" (2000) CIRL.

92 See Graham White, "Not the Almighty": Evaluating Aboriginal Influence in Northern Land-Claim Boards" (2008) 61:1 Arctic Institute NA at 71 (For an evaluative discussion of co-management boards in Canada's north).

93 Canada, National Energy Board, *Reasons for Decision – Mackenzie Gas Project – GH-1-2004, Volume 1*, (Ottawa: 16 December 2010), online: <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A27695> [NEB, "Reasons for Decision MGP"].

94 *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354, [2006] FCJ No 1677 at para 1 [*Dene Tha'*] (Described by the Federal Court as a "massive industrial project").

95 After the very lengthy review and approval process discussed in this section, the MGP was approved. However, in December 2017 the proponents walked away from the project citing lack of economic feasibility. The future of the project is uncertain, if not unlikely. See Jeffrey Jones, "End of Arctic Pipeline Leaves Indigenous Promise Unfulfilled", *The Globe and Mail* (28 December 2017), online: <www.theglobeandmail.com/report-on-business/rob-commentary/end-of-arctic-pipeline-leaves-indigenous-promise-unfulfilled/article37450536/>.

Invuialuit, Gwichin, and Sahtu,[96] as well as non-treaty areas in southern NWT and northern Alberta.[97]

As such, the project triggered numerous regulatory regimes, including those set up under the modern treaties, as well as federal review under the *NEB Act* and the *Mackenzie Valley Resource Management Act*.[98] There were seven major regulatory and environmental layers, including the Cooperation Plan, the Regulator's Agreement, the Joint Review Panel Agreement, the Environmental Impact Terms of Reference, the Joint Review Panel Proceedings, the National Energy Board Proceedings, and the Crown Consultation Unit.[99] The land claim agreements provided the Indigenous treaty parties with direct involvement and representation in the project review process.[100] Despite changes in the intervening years to the *NEB Act*[101] and the finalizing of the NWT Devolution Agreement,[102] the MGP remains relevant and illustrative in the modern treaty context.

Pursuant to the Cooperation Plan and Regulator's Agreement, the governments and Indigenous groups struck a Joint Review Panel (JPR) under a Joint

96 See Canada, National Energy Board, "Imperial Oil Resources Ventures Limited – Mackenzie Gas Project – Request for Extension to Sunset Clause", (Ottawa: 11 August 2017), online: <www.neb-one.gc.ca/pplctnflng/mjrpp/mcknzgsxtnsn/index-eng.html> [NEB, "MGP Request for Sunset Clause"] (For a route map).

97 See *Dene Tha'*, *supra* note 94.

98 *Mackenzie Valley Resource Management Act*, SC 1998, c 25.

99 See *Dene Tha'*, *supra* note 94 at para 19 (For a succinct summary of the regime).

100 See NEB, "Reasons for Decision MGP", *supra* note 93 at 104-05 (In the Mackenzie Valley context, the Inuvialuit, Gwich'in and Sahtu were directly involved in the MGP regulatory process through respective co-management boards, the Mackenzie Valley Environmental Impact Review Board (MVEIRB), and the Joint Review Panel. The relevant land claim institutions included the Invuialuit Game Council, and the Gwich'in Land and Water Board, the Sahtu Land and Water Board. Land use planning boards under land claims were also involved in parallel); Section 47 of the *Mackenzie Valley Resource Management Act* requires a planning board to determine whether an activity that has been referred to it or applied for, is in accordance with the land use plan. A referral or application must be made before the issuance of any authorization by the federal body. The NEB ultimately found that the Proponents had provided reasonable assurance that they were working with the appropriate authorities to ensure that the MGP would conform to the land use plans approved or drafted pursuant to the *Mackenzie Valley Resource Management Act* at 107).

101 See e.g. *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19 (For amendments requiring the NEB take into account project effects on navigation and navigation safety for NEB-regulated pipeline and power line crossings of navigable waters before recommendations or decisions are made on applications under s 52 and 58 of the *National Energy Board Act*.

102 Canada, Indigenous and Northern Affairs Canada, *Northwest Territories Land and Resources Devolution Agreement*, (Ottawa: 25 June 2013), online: <https://devolution.gov.nt.ca/wp-content/uploads/2013/09/Final-Devolution-Agreement.pdf>; See also NEB, "MGP Request for Sunset Clause", *supra* note 96 (For a short summary of the post-devolution regime with respect to oil and gas at NEB/OROGO Application Assessment Process); Thomas McInerney et al, "Recent Regulatory and Legislative Developments of Interest to Energy Lawyers" (2014) 52:2 Alberta L Rev 453 at 517-18.

Review Panel Agreement.[103] That Agreement provided the Indigenous groups with a direct say in JRP panel appointments, as well as the selection of the Chairperson.[104] As is common with other JRPs, this panel for the MGP had an objective of reducing duplication.[105] There were three primary entities: the JRP, the NEB, and the Crown Consultation Unit (CCU).[106] In short, the JRP was responsible for environmental assessment of the entire pipeline project, including such assessment required under land claim agreements;[107] the NEB had jurisdiction over what had been applied for under the *NEB Act*, and would rely on the JRP report to inform its final recommendations to Cabinet; and the CCU was responsible for coordinating and conducting consultation with Indigenous groups.[108] The Joint Review Panel, which included one member of the NEB, held sessions in 25 communities, and completed its report in 2009. The NEB public hearing began in January 2006, included sessions in 15 northern communities in the North, and ended in April 2010.

Notwithstanding consultation problems throughout the assessment phase, including a successful legal challenge by the *Dene Tha'* in Alberta,[109] the NEB ultimately found that the MGP was in the public interest and recommended to Cabinet that the project be approved.[110] The NEB recommended that the proponents meet 264 conditions, 76 of which were focused on the pipeline specifically.[111] This was a unique regulatory regime that included the *NEB Act*,

103 Canada, National Energy Board, "Agreement for an Environmental Impact Review of the Mackenzie Gas Project", (Ottawa: 1 September 2004), online: <http://reviewboard.ca/upload/project_document/EIR0405-001_Agreement_for_the_Environmental_Impact_Review_of_the_Mackenzie_Gas_Project.pdf>.

104 This was via the MVEIRB, which is and was composed of delegates from the Indigenous groups, having the power to appoint three panelists, and also having a role as one of the bodies that would jointly appoint the Chairperson; *Dene Tha'*, *supra* note 94 at para 28.

105 *Ibid* at para 24, 26.

106 See *ibid* at paras 39-41.

107 The JRP had the authority to fulfill the responsibilities of the MVEIRB and associated requirements under the relevant land claim agreements. See Kirk Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada*, (Regina: University of Regina Press, 2013) at 78-94 [Lambrecht] (For a detailed account of the MGP review process, including land claim agreement MVEIRB interplay).

108 However, as noted by the Federal Court in *Dene Tha'*, *supra* note 94, the CCU authority did not extend to determining the existence of Indigenous rights; it could only consider impacts. The Court characterized the CCU as a "traffic cop" directing issues to other persons and bodies; *Ibid* at para 41.

109 *Ibid*; See also *Her Majesty the Queen in Right of Canada v Deh Cho First Nations* (2005), North West Territories, S-0001-CV-2004000291 (Settlement Agreement), online: <https://dehcho.org/docs/DFN_NEG_SettlementAgreement_2005.pdf> (For a full summary of the settlement agreement for the legal challenge by the Deh Cho).

110 NEB, "Reasons for Decision MGP", *supra* note 93.

111 *Ibid* at Appendices I-Q (NEB conditions on the pipeline in Appendix K).

the MVRMA, the CEAA and the direct representation of Indigenous groups on the JRP.

Aboriginal rights and title in non-treaty areas

Notwithstanding Crown treaty-making activities since the 1700s, significant portions of Canada are not covered by any treaties at all. This is particularly the case in British Columbia, as well as parts of Québec, Newfoundland, and the Yukon and Northwest Territories. In such areas, the Courts have found that Aboriginal rights and title may exist.[112] In 2014, the court issued its first ever declaration of Aboriginal title in the landmark case of *Tsilhqot'in Nation v British Columbia*.[113] The court described the nature of Aboriginal title as follows:

> Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.[114]

While Aboriginal title may be the "highest form of Aboriginal rights," [115] it is still subject to infringement by the Crown. If Aboriginal title is proven, then the Indigenous group's consent must be obtained.[116] In the absence of consent, however, the Crown may still authorize an activity that infringes the rights at issue as long as the infringement can be justified. In *Tsilhqot'in*, the court explained:

> The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s.35 of the *Constitution Act, 1982*. [117]

Building on its prior decision in *Delgamuukw*, the court went on to outline restrictions on aboriginal title:

112 Discussion here is focused on Aboriginal Title. For a comprehensive overview of Aboriginal Rights, including in non-treaty areas, see Grammond, *supra* note 28 at 203-75.

113 *Tsilhquot'in*, supra note 74; This case is the latest in a long line of evolving jurisprudence, including the notable cases of *Calder*, *supra* note 75; *Marshall*, 2005, *supra* note 39*; Bernard*, *supra* note 38; and *Delgamuukw*, *supra* note 58.

114 *Tsilhqot'in*, *supra* note 74 at para 73.

115 Isaac, *supra* note 33.

116 *Ibid* at para 90; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 40 [*Haida*].

117 *Tsilhqot'in*, *supra* note 74 at para 76.

> Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes — to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.[118]

To summarize, in the post-*Tsilhqot'in* context where Aboriginal title has been proven, consent is now the standard. Any linear energy infrastructure project crossing such territory requires consent of the title-holding Indigenous community. Or, if consent cannot be obtained, the authorization must be justified under the test set out in *Tsilhqot'in*. In non-treaty areas where title has been asserted but not proven, consent would not be required; rather, that situation would only trigger Crown consultation and possibly accommodation. For example, the Northern Gateway Project crossed numerous Indigenous traditional territories but no areas where title had been proven (nor any areas where a land claim agreement had been finalized).[119] As such, under current law, the Crown was not required to obtain consent;[120] it only had to fulfill its obligations to consult and accommodate in a manner consistent with the Honour of the Crown.[121] Such Crown obligations are the subject of Part II below.

Part II — the duty to consult in federal linear energy infrastructure projects

Before turning to the duty to consult and accommodate, it is important to briefly set out the relevant terms of the *National Energy Board Act,*[122] and the *Canadian Environmental Assessment Act, 2012*.[123] In most major international and interprovincial linear energy infrastructure projects, it is the Governor in

118 *Ibid* at para 74. Significantly, in *Tsilhqot'in*, the court extended this "inherent limit" to the Crown and adopted a territorial conception of title. See Kent McNeil, "Aboriginal Title and the Provinces after Tsilhqot'in Nation", online: (2015) 71 SCLR <https://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/4/>.

119 Canada, National Energy Board, *Joint Review Panel Report on the Enbridge Northern Gateway Project, Volume 2 – Considerations*, (Ottawa: 20 December 2013), online: <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2396699>.

120 *Gitxaala*, *supra* note 4 at para 228.

121 *Ibid* at para 359.

122 *NEB Act*, *supra* note 13.

123 *CEAA, 2012*, *supra* note 14 (As discussed further below, the *Canadian Environmental Asessment Act* is relevant if the pipeline or transmission power line is a "designated project" under that Act).

Council rather than the NEB that is the final decision-maker. The *NEB Act* and *CEAA, 2012* work in tandem to give authority to the National Energy Board to review such projects and, with the approval of federal cabinet, issue a certificate of public convenience and necessity (CPCN, or "certificate") for the construction or expansion of such projects. *CEAA, 2012* requires only a recommendation report from the NEB to the Governor in Council; there is no certificate issued under that statute.

Following the issuance of a certificate, the NEB typically conducts further regulatory processes under the *NEB Act*, including routing approvals[124] and acquisition of lands,[125] as well as approvals to start constructions and operations.[126] Other approvals may also be required under other provincial or federal legislation (e.g. the *Fisheries Act* or the *Navigation Protection Act*), and as explained in Part I above, the regime may differ in modern treaty contexts where co-management boards play important roles.

The duty to consult — overview

Major linear energy infrastructure projects in Canada typically cross through or near a mix of the treaty and non-treaty lands. Federal decision-making on such projects gives rise to Crown obligations to consult and, if appropriate, accommodate with respect to established and asserted rights of Indigenous peoples who are potentially affected by such projects. The landmark Supreme Court cases of *Haida*[127] and *Taku*[128] in 2004 laid out the duty to consult for the first time.[129] In the intervening years, courts have clarified Crown obligations through an expanding body of case law such that the main legal principles are relatively settled.[130] A number of these cases relate to NEB-regulated linear energy infrastructure projects, such as the Northern Gateway Project (NGP) and

124 See generally, *Ibid* at ss 33-40.

125 See generally, *Ibid* at ss 75, 77, 84, 87-103.

126 See *Gitxaala*, *supra* note 4 (For a succinct description of these further regulatory processes at para 67).

127 *Haida*, *supra* note 116.

128 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku*].

129 Though, of course, the role and importance of consultation was certainly put forward by the courts prior to these cases. See e.g. *R v Sparrow* [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*] (SCC affirmed a duty to consult with west-coast Salish asserting an unresolved right to fish, cited in *Haida*, *supra* note 116 at para 21).

130 See Lambrecht, *supra* note 107 (For a succinct overview); See also Dwight Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Vancouver: UBC Press, 2009); Keith Bergner, "The Crowns Duty to Consult and the Role of the Energy Regulator", online: (2014) 2 Energy Regulation Q <www.energyregulationquarterly.ca/articles/the-crowns-duty-to-consult-and-the-role-of-the-energy-regulator#sthash.gG3Ehj4G.dpbs>.

the Trans Mountain Expansion Project (TMX).[131] The 2016 Federal Court of Appeal decision in *Gitxaala Nation v Canada*,[132] which dealt with legal challenges to the NGP, set out the following succinct summary of the duty to consult:

> The duty to consult is grounded in the honour of the Crown. The duties of consultation and, if required, accommodation form part of the process of reconciliation and fair dealing: *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 (CanLII), [2004] 3 S.C.R. 511, at paragraph 32.
>
> The duty arises when the Crown has actual or constructive knowledge of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect those rights or title: *Haida Nation*, at paragraph 35.
>
> The extent or content of the duty of consultation is fact specific. The depth or richness of the required consultation increases with the strength of the prima facie Aboriginal claim and the seriousness of the potentially adverse effect upon the claimed right or title: *Haida Nation*, at paragraph 39; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (CanLII), [2010] 2 S.C.R. 650, at paragraph 36.
>
> When the claim to title is weak, the Aboriginal interest is limited or the potential infringement is minor, the duty of consultation lies at the low end of the consultation spectrum. In such a case, the Crown may be required only to give notice of the contemplated conduct, disclose relevant information and discuss any issues raised in response to the notice: *Haida Nation*, at paragraph 43. When a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high, the duty of consultation lies at the high end of the spectrum….[133]

Specific requirements for the duty to consult will vary depending on the circumstances. In some situations, where the Crown's proposed decision may adversely affect rights in a significant way, addressing Indigenous concerns may give rise to a duty to accommodate. As articulated in *Haida,* this would include "taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim."[134]

131 These projects, including Northern Gateway and Trans Mountain, are discussed in turn throughout this part of the paper.

132 *Gitxaala, supra* note 4 at para 171-74.

133 *Ibid* at paras 170-74. See also *Tsleil-Waututh Nation v. Canada (Attorney General),* 2018 FCA 153, [2018] ACF No 876 at paras 486-97 [*Tsleil-Waututh*].

134 *Ibid* at para 47.

However, the courts, beginning with *Haida*, have consistently held that the duty does not provide Indigenous groups with a veto: "This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal 'consent' spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take."[135] Similarly, there is no duty to agree: "A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them."[136]

Since *Haida* and *Taku*, courts have further clarified the legal contours of the duty to consult and accommodate, including where and how it applies in the treaty context. *Mikisew* clarified that the duty to consult arises in historic treaty contexts[137] and in *Beckman* the Supreme Court clarified that the duty also arises in modern treaty contexts.[138]

Before turning to the specifics related to the duty to consult and the NEB, it is important to highlight several other features and principles associated with the duty:

- The duty to consult must be discharged before the government proceeds with approval of a project that could adversely affect Aboriginal or treaty rights.[139]
- If the duty to consult is not met, a project cannot be in the public interest; but interests of Indigenous rights can be balanced against other interests.[140]
- The Crown is required to consult on "adverse impacts flowing from the specific Crown proposal at issue — not [on] larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration."[141]
- The duty is not triggered by historical impacts; it is not the place to address historical grievances.[142]

135 *Ibid* at para 48; See also *Tsleil-Waututh, supra* note 133 at para 494; See also *Thames*, *supra* note 19.

136 *Haida*, *supra* note 116 at para 49.

137 *Mikisew*, *supra* note 40.

138 *Beckman, supra* note 34 at para 54; *Clyde*, *supra* note 19.

139 *Thames*, *supra* note 19 at para 36 (Citing *Tsilhqot'in, supra* note 74 at para 78).

140 *Thames*, *supra* note 19 at para 59 (Citing *Clyde*, *supra* note 19 at para 40 and *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 at para 70 [*Carrier Sekani*].

141 *Ibid* (Citing *Ibid* at para 53).

142 *Ibid* at para 41.

- The project assessment process and consultation in relation to major projects is not a proper forum for negotiation of Aboriginal Title and governance matters[143]

- In assessing whether the duty has been fulfilled, courts examine the process of consultation and accommodation, not the outcome.[144]

- Duties may also be delegated to third parties, such as resource development project proponents;[145] however, the ultimate duty belongs to the Crown and "[t]he Crown alone remains legally responsible for the consequences of its actions."[146]

- The Crown is not held to a standard of perfection in fulfilling its duty to consult.[147]

A crucial issue in the context of the NEB has been the question of to what extent regulatory processes and associated administrative bodies can fulfill the duty to consult and also whether such a body has the authority to assess whether or not the duty has been fulfilled. This is discussed in the next section below with a particular focus on the NEB.

The duty to consult and the National Energy Board

Since the very earliest of the duty to consult cases, the courts have had to confront the relationship between the duty to consult and administrative law processes and associated bodies and tribunals. In *Haida*, the court stated, "[i]t is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts."[148] Consistent with that finding, in *Taku* the court held that the unique environmental assessment process that was applicable in that case was sufficient to meet the procedural requirements of the duty to consult and that the province didn't have to develop special consultation measures outside of the EA process.[149]

143 *Gitxaala*, *supra* note 4 at para 309.
144 *Haida*, *supra* note 116 at para 63.
145 *Ibid* at para 53.
146 *Ibid*.
147 *Ibid* at para 182; See also *Tsleil-Waututh, supra* note 133 at para 508; See also *Clyde*, *supra* note 19 at para 47.
148 *Ibid* at para 51.
149 *Taku*, *supra* note 128 at para 40, and indeed the EA process was sufficient in the Taku case to fulfill the duty.

In the years following *Haida* and *Taku*, there was considerable confusion regarding the role of the NEB in fulfilling the duty to consult.[150] While not all questions have been answered by the courts, significant clarity has emerged. In short, questions hinged on whether and to what extent the NEB's process could be relied on by the Crown to fulfill the duty to consult, and to what extent the NEB itself could assess whether the duty had been fulfilled.[151]

The answers to these two questions are now relatively clear. The Crown need not set up a separate process for fulfilling the duty to consult (though the Crown may do so, as discussed further below). Rather, participation by affected Indigenous communities in a forum created for other purposes, such as an environmental assessment, can fulfill the Crown's duty to consult.[152] Further, the Crown may rely on an administrative body to fulfill the duty to consult "*so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances*".[153]

The court provided some degree of clarity in *Carrier Sekanni*[154] and further confirmed and clarified this aspect in the 2017 decisions in *Thames*[155] and *Clyde*.[156] It is now relatively clear that "Tribunals that consider resource issues that impinge on Aboriginal interests may be given: the duty to consult; the duty to determine whether adequate consultation has taken place; both duties; or, no duty at all."[157] Building on this principle, if the Crown intends to rely on the regulatory body to fulfill the duty to consult, it must make that clear to the affected Indigenous groups(s).[158] In recent years, this is a practice that has indeed been followed by the Crown.[159]

150 See e.g. *Brokenhead Ojibway Nation v Canada (Attorney General)*, 2009 FC 484, [2009] 3 CNLR 36 at para 16 (Court considered whether and to what extent "the duty may be fulfilled by the NEB acting essentially as a surrogate for the Crown"); Janna Promislow, "Irreconcilable? The Duty to Consult and Administrative Decision Makers" (2013) 22:1 Const Forum Const at 63; Sari Graben & Abbey Sinclair, "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board" (2015) 65:4 UTLJ at 382.

151 There were also questions about whether the Crown had to be a party in the NEB process in question in order to trigger the duty to conult. This dimension was also clarified in *Thames* but is not discussed in detail here. In short, the Crown does not need to be a party; See *Thames, supra* note 19 at para 36.

152 This principle was stated in *Taku*, *supra* note 128 and followed in more recent cases of *Carrier Sekani*, *supra* note 140 and *Gitxaala*, *supra* note 4; *Gitxaala*, *supra* note 4 at para 214 (Citing *Cerrier Sekani*, *supra* note 140 at para 56).

153 *Thames, supra* note 19 (Citing *Cerrier Sekani*, *supra* note 140 at para 60 and *Clyde, supra* note 19 at para 32) [Emphasis added].

154 *Carrier Sekani*, *supra* note 140.

155 *Thames*, *supra* note 19 at para 32.

156 *Clyde*, *supra* note 19 at para 30.

157 *Gitxaala*, *supra* note 4 at para 175.

158 *Thames*, *supra* note 19 at para 44; See also *Bigstone*, *supra* note 62 at para 51.

159 See *Tsleil-Waututh, supra* note 133 at para 548; See *Bigstone*, *supra* note 62 at para 51.

Applying this to the NEB specifically, the Supreme Court has now clearly stated that the Crown may, subject to circumstances discussed below, rely on the NEB review process to *completely* fulfill the duty.[160] However, as discussed below in relation to the *Gitxaala* and *Tsleil-Waututh* decisions, the Crown has an obligation to undertake further consultation (and, if appropriate, accommodation) in a situation where there was inadequate consultation in the regulatory forum. In all situations, the court has been clear in stating that the duty to consult must be fulfilled before the Governor in Council gives its approval for the issuance of a certificate by the NEB.[161]

A complexity faced by the NEB is that under the current legislative scheme for review and approval of federally regulated linear energy infrastructure the NEB may have different responsibilities depending on the project. For some projects, the NEB is the final decision-maker; for others, it is not. These two contexts are discussed in the next sections, followed by a short summary of specific consultation processes and activities the NEB employs in engaging Indigenous peoples.

The NEB as final decision-maker

Under section 58 of the *NEB Act*, the NEB may make orders exempting smaller pipeline projects (less than 40km in length) or project modifications[162] on terms and conditions that the Board considers proper.[163] For such a project (which is also not a "designated project" under *CEAA, 2012*, as discussed below), the NEB is the final decision-maker.[164] In this context, the Supreme Court in *Thames* has now made it clear that it is open to the Crown to rely entirely on the NEB process to meet its duty to consult, and that NEB also has authority to assess whether the duty to consult has been fulfilled.[165]

Thames involved Enbridge's Line 9 pipeline project which crossed the traditional territory of the Chippewas of the Thames First Nation in what is today southwestern Ontario. This project involved the reversal of the flow of the line to transport oil from western Canada to eastern refineries and ports.[166]

160 *Thames*, *supra* note 19 at para 1; *Clyde*, *supra* note 19 at para 34.

161 *Gitxaala*, *supra* note 4 at para 237; See also *Clyde*, *supra* note 19 at para 39.

162 *CEAAm 2012, supra* note 13, s 58(1)(a).

163 *Ibid*, s 58(3).

164 *Thames*, *supra* note 19 at para 10.

165 *Clyde*, *supra* note 19 at paras 34, 37; *Thames*, *supra* note 19 at paras 32-34.

166 Canada, National Energy Board, *Application for Line 9B Reversal and Line 9 Capacity Expansion Project*, A49446 (Ottawa: 29 November 2012) at 1, online: <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A49446>.

Enbridge applied to the NEB for exemptions under section 58 of the *NEB Act* such that, as the court put it, "the NEB would have the final word on the project's approval."[167]

On its way to upholding the NEB approval, the court clarified the role of the NEB in relation to the duty to consult in contexts where the NEB is the final decision-maker:

> As acknowledged in its reasons, the NEB, as a quasi-judicial decision maker, is required to carry out its responsibilities under s. 58 of the *NEB Act* in a manner consistent with s. 35 of the *Constitution Act, 1982*. In our view, this requires it to take the rights and interests of Indigenous groups into consideration before it makes a final decision that could impact them. Given the NEB's expertise in the supervision and approval of federally regulated pipeline projects, the NEB is particularly well positioned to assess the risks posed by such projects to Indigenous groups. Moreover, the NEB has broad [page1121] jurisdiction to impose conditions on proponents to mitigate those risks. Additionally, its ongoing regulatory role in the enforcement of safety measures permits it to oversee long-term compliance with such conditions. Therefore, we conclude that the NEB's statutory powers under s. 58 are capable of satisfying the Crown's duty to consult in this case.[168]

The court also confirmed that if the NEB is the final decision-maker then the NEB has both the authority and the duty to assess whether the duty to consult has been fulfilled: "As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation with respect to a project was adequate if the concern is raised before it."[169] That said, the court emphasized that the obligation to ensure that the Honour of the Crown is upheld remains with the Crown.[170]

The court confirmed the same points in the *Clyde* decision, which involved an NEB approval under the *Canada Oil and Gas Operations Act*[171] for offshore seismic testing (not a linear energy project), released on the same day as *Thames*. After noting the NEB's broad statutory powers that permit extensive consultation, its institutional expertise, and broad powers to accommodate Indigenous concerns (through imposing terms and conditions, as discussed further below),

167 *Thames*, *supra* note 19 at para 14.

168 *Ibid* at para 48.

169 *Ibid* at para 37(Citing *Clyde*, *supra* note 19 para 36). It should be noted that at the time of writing there is a case in the Ontario courts that may clarify whether the duty to consult is triggered in a context where the NEB orders or approves pipeline maintenance work such as integrity digs or hydrostatic testing. See *Aroland First Nation v. Transcanada Pipelines Ltd.,* 2018 ONSC 4469, [2018] OJ No 4069.

170 *Ibid.*

171 *Canada Oil and Gas Operations Act*, RSC 1985, c O-7.

the court concluded that the NEB process "can therefore be relied on by the Crown to completely or partially fulfill the Crown's duty to consult."[172]

The NEB in an "advisory role"

For major pipeline projects regulated under section 52 of the *NEB Act* or transmission lines regulated under section 58.16 of the *NEB Act*, the NEB is not the final decision-maker.[173] Rather, its role is advisory in nature and it is the Governor in Council that is the final decision-maker.[174] In this context the Crown may need to engage in direct consultation with Indigenous groups in advance of the final decision.

This issue has been examined by the Federal Court of Appeal in a series of three cases: *Gitxaala* (involving the Northern Gateway Project), *Bigstone*[175] (NGTL facilities), and *Tsleil-Waututh (*the consolidated cases pertaining to the Trans Mountain Expansion pipeline project).[176]

Gitxaala[177] was the first case to consider the federal pipeline review and approval legislative scheme after the 2012 legislative amendments, which integrated elements from the *National Energy Board Act* and the *Canadian Environmental Assessment Act, 2012* and placed all final substantive decision-making power with the Governor in Council.[178] The duty to consult and accommodate was a central issue in the case, with numerous Indigenous communities, from both treaty and non-treaty areas, arguing that the Crown had not fulfilled its obligations. In the 2-to-1 ruling, the majority ruled that the Crown had breached its duty, quashing the certificate and remitting the matter

172 *Clyde*, *supra* note 19 at para 34.

173 In the power line context, the NEB may, under s 58.16(4), decide that no certificate is to be issued and dismiss the application in respect of the line. A similar power existed with respect to pipelines prior to the 2012 legislative changes. In effect, "no" by the NEB meant no project; however, following the 2012 changes that NEB "no" is now just a recommendation to federal Cabinet indicating that the project is not in the public interest.

174 *Thames*, *supra* note 19 at para 9.

175 As well as the Energy East and Line 3, for example. The focus here will be on projects that led to notable reported cases.

176 See *Tsleil-Waututh, supra* note 133 at para 548; See also Canada, National Energy Board, "Consolidated Trans Mountain Expansion Project Judicial Reviews", online: <www.neb-one.gc.ca/pplctnflng/crt/index-eng.html>.

177 In this case, the Federal Court of Appeal consolidated 18 legal challenges against the Northern Gateway Project. Nine applications were for judicial review of the Order in Council requiring the NEB to issue Certificates of Public Convenience and Necessity; five applications were for judicial review of the report of the Joint Review Panel; and there were four appeals of the Certificates issued by the NEB; See *Gitxaala*, *supra* note 4 at paras 1-3.

178 *Ibid* at para 92.

back to the Governor in Council for redetermination in accordance with the consultation principles and parameters set out in the decision.[179] On its way to reaching that conclusion, and in addition to confirming and applying key duty to consult principles cited above,[180] *Gitxaala* provided further clarifications with respect to how Crown consultation obligations may be fulfilled under the amended legislative scheme. The majority emphasized that the legislative scheme is to be viewed as a "complete code for decision-making regarding certificate applications,"[181] and that "no one but the Governor in Council decides anything."[182] The unanimous court in *Tsleil-Waututh* adopted and applied this characterization.[183]

With respect to the environmental assessment dimension of the scheme specifically, the court in *Gitxaala* stated that, "in particular, the environmental assessment under the *Canadian Environmental Assessment Act, 2012* plays no role other than assisting in the development of recommendations submitted to the Governor in Council…," which the court noted to be "a much attenuated role" from the role played by environmental assessments under other federal decision-making regimes.[184] On this point, the majority concluded that "any deficiency in the Report of the Joint Review Panel was to be considered only by the Governor in Council, not this Court," and then proceeded to dismiss the applications for judicial review that challenged the JRP report.[185] This too was adopted and applied by the unanimous court in *Tsleil-Waututh.*[186]

In both *Gitxaala* and *Tsleil-Waututh*, the court found that the consultation process, which was structured as a phased approach, was reasonable and appropriate.[187] However, in the later consultation phase in both cases, which entailed

179 *Ibid* at para 333; See also para 329 for an estimate of 'four months' additional consultation required.

180 See especially, *Ibid* at paras 170-86.

181 *Ibid* at para 119.

182 *Ibid* at para 121.

183 *Tsleil-Waututh, supra* note 133 at para 173.

184 *Ibid* at para 122-123.

185 *Ibid* at para 125; Note that the NGP assessment commenced prior to the 2012 amendments but was continued under the amended regime. The assessment process was led by a Joint Review Panel that had authority to fulfill the NEB Act requirements. See Canada, National Energy Board, *Report of the Joint Review Panel for the Enbridge Northern Gateway Project, Volume 1* (Ottawa: December 2013) online: <http://publications.gc.ca/site/eng/456575/publication.html>.

186 *Tsleil-Waututh, supra* note 133 at para 173.

187 *Gitxaala*, *supra* note 4 at paras 192-228 (Reviewed in detail by the court in relation to different claims by Indigenous groups; These claims included that the Governor in Council prejudged the approval of the Project, the framework of the consultation process was unilaterally imposed upon the First Nations, there was inadequate funding for participation in consultation processes, the consultation process was over-delegated, that Canada either failed to conduct or failed to share with affected First Nations its legal assessment of the strength of their claims to Aboriginal rights or title, and that the

Crown consultation after the final recommendation report but before any response or decision by the Governor in Council, the court found the consultation process to be "unacceptably flawed," falling "well short of the mark."[188] As described in *Gitxaala*, that later consultation phase was "Canada's first opportunity — and its last opportunity before the Governor in Council's decision — to engage in direct consultation and dialogue with affected First Nations on matters of substance, not procedure, concerning the Project."[189] After reviewing the process and its shortcomings in detail, the court concluded:

> Based on our view of the totality of the evidence, we are satisfied that Canada failed in Phase IV to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations. Missing was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report, or to provide meaningful feedback in response to the material concerns raised. Missing was a real and sustained effort to pursue meaningful two-way dialogue. Missing was someone from Canada's side empowered to do more than take notes, someone able to respond meaningfully at some point.[190]

The Court went on to provide valuable guidance regarding how that consultation phase ought to be conducted:

> …In order to comply with the law, Canada's officials needed to be empowered to dialogue on all subjects of genuine interest to affected First Nations, to exchange information freely and candidly, to provide explanations, and to complete their task to the level of reasonable fulfilment. Then recommendations, including any new proposed conditions, needed to be formulated and shared with Northern Gateway for input. And, finally, these recommendations and any necessary information needed to be placed before the Governor in Council for its [page548] consideration. In the end, it has not been demonstrated that any of these steps took place.
>
> In our view, this problem likely would have been solved if the Governor in Council granted a short extension of time to allow these steps to be pursued…
>
> Based on this record, we believe that an extension of time in the neighbourhood of four months — just a fraction of the time that has passed since the Project was first proposed — might have sufficed. Consultation to a level of reasonable fulfilment might have further reduced some of the detrimental effects of the Project identified

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Crown consultation did not reflect the terms, spirit and intent of the Haida Agreements). *Tsleil-Waututh, supra* note 133 at para 518.

188 *Ibid* at para 230, 347-63 (It should be noted that in his dissent, Ryer J.A. found that the Crown's duty to consult had been met). *Tsleil-Waututh, supra* note 133 at paras 4, 6, 561, 762.

189 *Ibid* at para 242.

190 *Ibid* at para 279.

> by the Joint Review Panel. And it would have furthered the constitutionally-significant goals the Supreme Court has identified behind the duty to consult — the honourable treatment of Canada's Aboriginal peoples and Canada's reconciliation with them.[191]

Despite acknowledging "significant improvements in the consultation process,"[192] the court in *Tsleil Waututh* came to similar conclusions and issued a similar prescription to address the shortcomings.[193] In doing so, the court provided clarifying commentary on several points that will be important going forward. First, the Governor in Council has the power to impose additional conditions on any certificate of public convenience and necessity it directs the National Energy Board to issue.[194] The Governor in Council must look beyond the NEB findings and impose additional conditions or measures if warranted. Second, meaningful two-way dialogue means that, in the later consultation phase, there should be someone representing Canada who has the confidence of Cabinet, who can: engage interactively and discuss required accommodation measures; identify possible flaws in the Board's process, findings, and recommendations; and address how those flaws could be corrected.[195] Overall, the court in *Tsleil Waututh* emphasized the importance of the Governor in Council responding to each Indigenous community's concerns in a genuine, meaningful, and specific way, and in a way that gives serious consideration to amending or supplementing the Board's recommended conditions.

Notably, in *Bigstone Cree Nation v Nova Gas Transmission Ltd.*,[196] which was decided by the Federal Court of Appeal in the time between *Gitxaala* and *Tsleil Waututh*, the Court applied the majority decision in *Gitxaala* but concluded that Crown obligations had been fulfilled. *Bigsone Cree* involved a $1.29 billion dollar pipeline expansion project in Treaty 8 territory, including one section located directly in Bigstone Territory.[197] The project required a CPCN pursuant to sections 31, 52, and 54 of the NEB Act, and was a designated project under *CEAA 2012*.[198] As with the NGP, the consultation process was carried out in four phases: early engagement, NEB hearing, NEB Recommendation, and Post-NEB Report.[199] The Crown acknowledged early

191 *Ibid* at paras 327-29.
192 *Tsleil-Waututh, supra* note 133 at para 552.
193 *Ibid* at paras 754-66.
194 *Ibid* at para 634.
195 *Ibid* at para 759.
196 *Supra* note 62.
197 Bigstone's ancestors were signatories to Treaty 8, which covers a portion of Bigstone Territory.
198 *Bigstone*, *supra* note 62 at para 7.
199 *Ibid* summarized by the court at paras 9-21.

in the process that it had a duty to consult given that Bigstone had established Treaty Rights and that the potential impact on the rights of Bigstone would be "moderate to high."[200] In fulfilling its consultation obligations, the Crown acted on the guidance provided by the court in *Gitxaala*, extending the time limit in Phase IV and engaging in further consultation with Bigstone.

Gitxaala, *Bigstone*, and *Tsleil Waututh* have significant implications for Crown consultation in relation to federal linear energy infrastructure projects where the NEB plays its "advisory role" under Parts III and III.1 of the NEB Act. Notwithstanding the clarity offered by *Thames* and *Clyde* regarding the NEB process in fulfilling the duty to consult, *Gitxaala*, *Bigstone*, and *Tsleil Waututh* emphasise that further Crown consultation (and, if appropriate, accommodation) will be required following the NEB's recommendation to the Governor in Council and before the response or decision of the Governor in Council. The ultimate legal question will, of course, continue to be whether Crown has exercised its powers (including through reliance on NEB processes) in conformity with the honour of the Crown.

Accommodation (and infringement and justification)

The Crown may also have a duty to accommodate with respect linear energy projects that impact Indigenous rights. In *Haida* in the non-treaty context the Court observed that:

> … the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, [page535] and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: "… the process of accommodation of the treaty right may best be resolved by consultation and negotiation."[201]

Accommodation is about balancing and compromising, as described in *Taku*: "there is no ultimate duty to reach agreement. Rather, accommodation requires that aboriginal concerns be balanced with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent in the reconciliation process."[202]

200 *Ibid* at para 35.
201 *Haida*, *supra* note 116 at para 47; See also *Taku*, *supra* note 128 at para 22.
202 *Taku*, *supra* note 128 at para 2.

The existence of a duty to accommodate has also been recognized in the historical treaty context,[203] and in the modern treaty context.[204] It is available to the Crown, as Thomas Isaac describes it, "as a tool for government to adjust, adapt, and compromise in the face of infringements to existing Aboriginal and treaty rights."[205]

In the context of federally regulated energy projects, important means of accommodation include modifying the project design (including route) and attaching conditions to project approvals. The NEB has broad authority to attach or recommend such conditions under sections 58 and 52 of the *NEB Act*,[206] respectively. For example, the Northern Gateway project approval included conditions requiring identification of traditional land use sites,[207] incorporation of traditional knowledge into environmental effects monitoring,[208] incorporation of Indigenous concerns into a marine mammal protection program, and [209] creation of a caribou habitat restoration plan.[210] In considering consultation and accommodation in *Gitxaala*, the court noted that, "laudably, many of the potentially-detrimental effects appear to have been eliminated or mitigated as a result of Northern Gateway's design of the Project, the voluntary undertakings it has made, and the 209 conditions imposed on the Project…."[211]

Similarly, 30 conditions were imposed on the Line 9 pipeline reversal project,[212] several of which were focused on Indigenous concerns.[213] In its *Thames* decision, the Court found that "in order to mitigate potential risks to

203 See e.g. *Mikisew*, *supra* note 40 at para 147.

204 *Supra* note 34 at para 81 (Although the SCC found there was no duty to accommodate in that case).

205 Isaac, *supra* note 33 at 398.

206 *CEAA, supra* note 13 (As discussed above, s 58 is where the NEB occupies the "final decision-maker role" and s 52 is its "advisory role" at s 52 and 58).

207 Canada, National Energy Board, *Joint Review Panel Report on the Enbridge Northern Gateway Project, Volume 2 – Considerations*, A56136 (Ottawa: 20 December 2013), online <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2396699> (NGP condition 27-29 at 371; See also the related condition pertaining to detailed routing and final design at NGP conditions 53-56 at 374).

208 *Ibid* at 371 (NGP conditions 33-35).

209 *Ibid* at 373 (NGP condition 50).

210 *Ibid* at 376 (NGP conditions 60-62).

211 *Gitxaala*, *supra* note 4 at para 326; Note that the proponent also more than 450 voluntary commitments at para 51; See also OC 060 and OC 061, (2014) C Gaz I, (Certifcates of Public Convenience and Necessity, Northern Gateway Pipelines Inc for the Northern Gateway Pipelines Project, PC 2014-809, *National Energy Board Act*).

212 Canada, National Energy Board, *Reasons for Decision – Enbridge – Line 9B Reversal and Line 9 Capacity – OH-002-2013* (Ottawa: 6 March 2014), online: <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A59170>.

213 *Ibid* at 132, 137-40 (Conditions 6, 24, 25, 26 and 29); See also 87-99; Note that the NEB decision was determinative in this case because it was a s 58 pipeline project where the NEB occupies the "final decision-maker" role discussed above.

the rights of Indigenous groups, the NEB provided appropriate accommodation through the imposition of conditions on Enbridge" and went on to cite several conditions specifically.[214] The Court also reiterated the NEB's broad jurisdiction to impose conditions on proponents to mitigate impacts on Indigenous communities and its ongoing regulatory role in the enforcement of safety measures to oversee long-term compliance with such conditions.[215]

And, more recently, the pipeline approval at issue in *Bigstone* included 36 conditions,[216] several of which were in response to Indigenous concerns.[217] The Court observed that it was "apparent from the numerous accommodation measures imposed on NGTL through the Conditions that the NEB seriously considered Bigstone's rights and concerns."[218]

Conditions were a key consideration in *Tsleil Waututh*, which offers further clarity on the role conditions play in consulation and accomodation. In TMX, the NEB had included 157 conditions in its recommendation to approve the project.[219] However, the court emphasized that the Crown must dialogue meaningfully and grapple with the concerns expressed to it in good faith by the Indigenous applicants so as to explore possible accommodation of such concern.[220] In some circumstances, such as those in TMX, the Governor in Council may need to impose additional conditions on those recommended by the NEB.[221]

Where the duty to consult and accommodate has not been fulfilled, the Court will quash the resulting CPCN or other approval as illustrated by *Tsleil Waututh*, *Gtixaala*, and *Clyde River*. The Court has been clear in stating in the context of NEB regulated energy projects that if there are shortcomings on the consultation and accommodation front, then a project will be found not to be in the public interest.[222]

214 *Thames*, *supra* note 19 at para 51.

215 *Ibid* at para 48.

216 See Canada, National Energy Board, *Report – NOVA Gas – 2017 System Expansion – GH-002-*2015 (Ottawa: 1 Jun 2016), online: <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A77316> (NEB recommended Certificate of Public Convenience and Necessity be issued incorporating terms and conditions set out in Appendix III at xvi).

217 *Bigstone*, *supra* note 62 (The Court summarizes the most relevant conditions at para 16).

218 *Ibid* at para 53, 73-76.

219 *Tsleil-Waututh, supra* note 133 at para 68.

220 *Tsleil-Waututh, supra* note 133 at para 754.

221 *Ibid* at para 759.

222 *Thames*, *supra* note 19 at para 59 (Citing *Clyde*, *supra* note 19 para 40 and *Carrier Sekani*, *supra* note 140 at para 70).

A different situation may arise if the consent of the Indigenous group is required (i.e. proven Aboriginal Rights or Title will be infringed) and where deep consultation and accommodation have not led to consent. In such a case, the Crown will need to demonstrate that the infringement can be justified under the test set out in *Sparrow*[223] and as discussed in *Tsilhqot'in*.[224] To justify infringement of rights or title, the government must show that it has discharged its duty to consult and accommodate, that its actions were backed by a compelling or substantial legislative objective, and that the governmental action is consistent with any Crown fiduciary obligation to the group.[225] As explained by the Court in *Tsilhqot'in*, serious infringement will not be lightly justified.[226]

In the federal linear energy infrastructure context, if consent of the Indigenous group is required but cannot be obtained, the proponent would have to engage the expropriation provisions of the *NEB Act*[227] with a view to asserting that infringements are justified under the *Sparrow* legal test. Such a justification analysis would be heavily fact-specific and dependent on the specific rights and project at issue.[228]

NEB consultation processes and activities

Given that the Crown relies on the NEB process to the extent possible to meet its consultation obligations, the NEB has put in place systems and practices to engage with Indigenous groups in relation to proposed linear energy infrastructure projects.[229] This section provides a short summary of the NEB processes.

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223 *Sparrow*, *supra* note 129 (Justification Test: 1) Does the infringement serve a valid legislative objective?; 2a) If no, not justified; 2b) If yes, can the legislation be justified in light of the Crown's responsibility to, and trust relationship with, aboriginal peoples? This can be shown through the government employing means consistent with their fiduciary duty: (i) Was the infringement as minimal as possible?; (ii) Were their claims given priority over other groups?; (iii) Was the effected aboriginal group consulted?; and (iv) If there was expropriation, was there fair compensation?).

224 *Tsilhqot'in*, *supra* note 74 at paras 77-88.

225 See generally Isaac, *supra* note 33.

226 *Tsilhqot'in*, *supra* note 74 at para 127. See Bankes, "Implications", *supra* note 61 (For related discussion).

227 *CEAA, supra* note 13 at s 73.

228 See Bankes, "Implications", *supra* note 61 at 207-08 (For commentary on infringement and justification in the linear energy infrastructure context in relation to Aboriginal title).

229 See generally Canada, National Energy Board, "Engagement With Indigenous Peoples", online: <www.neb-one.gc.ca/bts/nws/rgltrsnpshts/2016/25rgltrsnpsht-eng.pdf> [NEB, "Engagement With Indigenous Peoples"].

Early in the process, the NEB identifies and contacts Indigenous groups whose rights and interests may be impacted by the proposed project.[230] When doing so, the NEB provides information about its role, the assessment process, and how to participate in NEB proceedings.[231] In these early stages, the NEB provides participant funding to support Indigenous involvement in the hearing process.[232] Also early in the process, the NEB advises proponents regarding Indigenous consultation, including integrating local and traditional information and knowledge into the design of the project.[233] Once an NEB hearing is underway, the NEB, in its quasi-judicial functions, receives direct evidence, including oral traditional evidence, from Indigenous groups outlining concerns about the project, potential impacts to Indigenous rights and interests, and possible avoidance or mitigation measures to address adverse impacts on these rights and interests.[234] The hearing process typically allows for the testing of evidence through either oral cross-examination, written information requests, or both.[235] The NEB then assesses all the information provided to it, including with respect to Indigenous rights and interests as associated mitigation measures and accommodation, to determine possible residual impacts.[236] Based on this assessment, the NEB then develops enforceable measures (typically through conditions to be attached to the project approval, as referenced above) to reduce potential impacts on Indigenous rights and interests.[237] If the NEB is acting in its advisory role rather than as a final decision-maker, then measures are included in the recommendation report that goes to the GIC to be used as a basis for final decision-making.[238] If a project is approved and construction proceeds, the NEB conducts follow-up monitoring and enforcement of regulatory requirements, including project conditions.[239] Most recently, for example in the TMX

230 Canada, National Energy Board, "Discussion Paper: Indigenous Engagement and Consultation", online: <www.neb-modernization.ca/system/documents/attachments/056bc2855364bd0657ef51664d86811479031664/000/005/336/original/Discussion_Paper-Indigenous_Engagement_and_Consultation_EN.pdf?1484939349>; See also Canada, National Energy Board, "Factsheet: Engagement of and Participation by Aboriginal People", online: <www.neb-one.gc.ca/prtcptn/nfrmtn/brgnlpplfs-eng.html>; *Ibid*.

231 *Ibid.*

232 *Ibid.*

233 *Ibid.*

234 *Ibid.*

235 *Ibid.*

236 *Ibid.*

237 *Ibid.*

238 *Ibid.*

239 However, the Fall 2015 report of the Commissioner of the Environment and Sustainable Development found that the NEB was not adequately fulfilling this role; Canada, Commissioner of the Environment and Sustainable Development, *Report 2 – Oversight of Federally Regulated Pipelines*, (Ottawa: Office of the Auditor General, 2015) at 2.15-2.54, online: <www.oag-bvg.gc.ca/internet/English/parl_cesd_201601_02_e_41021.html#hd3c>.

and Line 3 projects, the NEB cooperated with Indigenous groups to establish "Indigenous Advisory and Monitoring Committees" to facilitate the involvement of Indigenous groups in monitoring throughout project life-cycles.[240]

Depending on the project (and whether the NEB is the final decision-maker or not), the Crown may undertake further consultation steps such as tracking issues raised by Indigenous groups throughout the process, holding supplemental in-person meetings with Indigenous groups, and in some cases, providing separate participation funding. This was the case, for example, in *Bigstone*.[241] Overall, the Crown must take any steps necessary to fulfill the duty to consult and accommodate in a manner that is consistent with the Honour of the Crown.

Part III: recent developments in federal law and policy

The federal regime for reviewing and permitting energy infrastructure exists within a wider field of Aboriginal law and associated federal laws and policies that are undergoing rapid and fundamental change. Notable developments include implementation of the Truth and Reconciliation Commission's Calls to Action,[242] implementation of UNDRIP,[243] Bill C-262 — *An Act to Ensure that the Laws of Canada are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples*,[244] the federal "Review of Laws and Policies Related to Indigenous Peoples,"[245] the federal government's "Principles respecting the

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240 Letter from Peter Watson, Chair and CEO National Energy Board (27 April 2018) to Honourable Minister Jim Carr, "Update Letter to Minister Carr on NEB Regulatory Oversight for Trans Mountain Expansion and Line 3 Replacement", online: <www.neb-one.gc.ca/bts/nws/whtnw/2017/2017-08-24-eng.html>; See also TransMountain, News Release, "Indigenous Advisory and Monitoring Committee to Monitor Pipeline Construction" (25 January 2018), online: <www.transmountain.com/news/2018/indigenous-advisory-and-monitoring-committee-to-monitor-pipeline-construction>; See also Canada, National Resources Canada, "Line 3 Replacement Project" (Ottawa: 24 July 2017), online: <www.nrcan.gc.ca/energy/resources/19188>.

241 *Bigstone*, *supra* note 62 at paras 17, 44.

242 Canada, Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Ottawa: 2015), online: <www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf> [Canada, "Truth and Reconcilliation"].

243 *Supra* note 17; See also supra note 18 (Minister Bennett's Speech at the United Nations announcing Canada as a "full supporter of the Declaration without qualification").

244 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2018 (third reading 30 May 2018) [Bill C-262].

245 Justin Trudeau, Prime Minister of Canada, Press Release, "Prime Minister Announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples" (22 February 2017), online: <https://pm.gc.ca/eng/news/2017/02/22/prime-minister-announces-working-group-ministers-review-laws-and-policies-related>.

Government of Canada's relationship with Indigenous peoples"[246] announced in July 2017, and a new federal "recognition and implementation of rights framework" announced in February 2018. This Part provides a brief description of these important contemporary changes in Aboriginal law and policy, and then discusses the proposed repeal and replacement of the *National Energy Board Act* and the federal environmental assessment regime. Developments are presented in roughly chronological order.

The Truth and Reconciliation Commission's Calls to Action

While the primary focus of the TRC was the tragic Indian Residential School legacy,[247] the TRC's Calls to Action, released in June 2015, are broad and far reaching. [248] Action number 45 is particularly relevant in the energy infrastructure context (and, indeed, in the broader constitutional order of Canada, including all major project review and approval processes).[249] This Action, titled "Royal Proclamation and Covenant of Reconciliation" calls upon the Government of Canada to jointly develop with Indigenous peoples a new "Royal Proclamation of Reconciliation" to be issued by the Crown. The Action goes on to call for adoption and implementation of UNDRIP,[250] repudiation of the Doctrine of Discovery and *terra nullius*,[251] and reconciliation of Indigenous and Crown constitutional orders to ensure Indigenous peoples are full partners in Confederation.[252] Similar calls are included in Actions 46, 47, and 48.[253]

Action number 92 is also relevant in the energy infrastructure context, though it is directed toward industry as opposed to the Crown. This action, titled "Business and Reconciliation," calls upon the corporate sector to adopt UNDRIP as a reconciliation framework, including committing "to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects."[254]

If implemented, the Actions would result in fundamental changes in Canada's legal foundation, perhaps requiring constitutional reform.

246 Department of Justice, "Principles Respecting", *supra* note 16.

247 *Indian Residential Schools Settlement Agreement, Schedule N – Mandate for the Truth and Reconciliation Commission*, online: <www.trc.ca/websites/trcinstitution/File/pdfs/SCHEDULE_N_EN.pdf>.

248 Canada, "Truth and Reconcilliation", *supra* note 242.

249 *Ibid* at 4, Action 45.

250 *Ibid* at 5, Action 45(ii).

251 *Ibid* at 5, Action 45(i).

252 *Ibid* at 5, Action 45(iv).

253 *Ibid* at 5.

254 *Ibid* at 10.

United Nations Declaration on the Rights of Indigenous Peoples

In May 2016, after years of objection and then guarded support, Canada became a full supporter of the Declaration without qualification. In announcing full support, Minister Bennett expressed the view of the federal government that "[b]y adopting and implementing the Declaration, we are excited that we are breathing life into Section 35 and recognizing it now as a full box of rights for Indigenous peoples in Canada."[255]

Precisely what the government means by this is unclear, but some guidance can be found in subsequent announcements and initiatives. For example, in the ten *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* ("Ten Principles),[256] the preamble records that "[t]he implementation of the United Nations Declaration on the Rights of Indigenous Peoples requires transformative change in the Government's relationship with Indigenous people."[257] Meanwhile, commentary and speculation has proliferated among practitioners, scholars, and Indigenous groups.[258] Perhaps the most relevant feature of UNDRIP in relation to the federal linear energy infrastructure context is the concept of Free, Prior, Informed Consent (FPIC), which appears in several provisions of UNDRIP.[259] While the notion of consent and veto power has been commented on by Canadian courts,[260] to date the Supreme Court has not offered any clarity on FPIC specifically in relation to UNDRIP and major resource projects and Indigenous rights.[261] Similarly, the Court has

255 Bennett, *supra* note 18.

256 Department of Justice, "Principles Respecting", *supra* note 16.

257 *Ibid*.

258 See e.g. Blaine Favel & Ken Coates, *Understanding UNDRIP: Choosing action on priorities over sweeping claims about the United Nations Declaration on the Rights of Indigenous Peoples* (Ottawa, Ontario: MacDonald Laurier Institute, May 2016), online: <www.macdonaldlaurier.ca/files/pdf/MLI-10-UNDRIPCoates-Flavel05-16-WebReadyV4.pdf> [Favel]; Gib van Ert, "Three Good Reasons Why UNDRIP Can't be Law – And One Good Reason Why It Can" (2017) 75:1 Advocate at 29; Cheryl McKenzie, "UNDRIP Powering Need for Consent: A Duty that's already Within the Constitution, the Treaties and the Royal Proclamation – Cheryl Maloney", *APTN News* (18 February 2016), online: <http://aptnnews.ca/2016/02/18/undrip-powering-for-need-for-consent-a-duty-thats-already-within-the-constitution-the-treaties-and-the-royal-proclamation-cheryl-maloney/>; Dwight Newman, *Political Rhetoric Meets Legal Reality: How to Move Forward on Free, Prior and Informed Consent in Canada*, (Ottawa, Ontario: MacDonald Laurier Institute, August 2017), online: <https://macdonaldlaurier.ca/files/pdf/MLIAboriginalResources13-NewmanWeb_F.pdf>.

259 *Supra* note 17 at 10-11, 19, 28-29, 32; The most frequently cited is Article 28 because of its linkage to resource development; See Favel, *supra* note 258 at 11.

260 See e.g. *Haida*, *supra* note 116; *Tsilhqot'in*, *supra* note 74; *Thames*, *supra* note 19 at para 59; See also Part II, above.

261 For example, there was no mention of this in *Clyde*, *supra* note 19 nor *Thames*, *supra* note 19; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40, [2017] 1 SCR 1069 (Factum

yet to clarify the nuanced difference between the concepts of veto and consent in this context.[262]

In parallel with efforts of the Trudeau government, a private member's bill, *Bill C-262, An Act to Ensure that the Laws of Canada are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, has been passed by the House of Commons and will soon be considered by the Senate.[263] After previously opposing the bill and characterizing it as "unworkable in Canadian law,"[264] the Trudeau government expressed its support in November 2017.[265] Once passed, the new law will require the Government of Canada to "take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples" and to develop a national action plan for implementation of the Declaration.[266] The first national action plan should provide direction as to any specific implications for review and approval of federal energy projects.

Federal review of laws and policies related to Indigenous peoples

On February 22, 2017, Prime Minister Trudeau announced the establishment of a Working Group of Ministers that would be responsible for reviewing federal laws, policies and practices to help further a nation-to-nation, Inuit–Crown and government-to-government relationship with Indigenous

of the Intervenor, Inuvialuit Regional Corporation), online: <www.scc-csc.ca/WebDocuments-DocumentsWeb/36692/FM040_Intervener_Inuvialuit-Regional-Corporation.pdf>; See also Oonagh Fitzgerald et al, "UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws" (31 May 2017), online: <www.cigionline.org/publications/undrip-implementation-braiding-international-domestic-and-indigenous-laws>; But see *Taku*, *supra* note 128 at para 100; *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981, [2015] FCJ No 969 at para 103; *Snuneymuxw First Nation . School District No 68*, 2014 BCSC 1173, 243 ACWS (3d) 364 at para 59; *Elsipogtog First Nation v Canada (Attorney General)*, 2013 FC 1117, [2013] FCJ No 1203 at para 121 (*sub nom Simon v Canada (Attorney General)*) (For lower courts commenting on whether UNDRIP is binding, generally holding that it can be used as an interpretive tool, but is not binding law).

262 For commentary on this point, including helpful identification of the key issues and international dimensions, see Paul Joffe, "Veto and Consent – Significant Differences", (3 October 2017), online: <https://quakerservice.ca/wp-content/uploads/2017/12/Veto-and-Consent-Significant-differences-Joffe-2017.pdf>.

263 Bill C-262, *supra* note 244.

264 James Munson, "Ottawa won't adopt UNDRIP directly into Canadian law: Wilson Raybould", *iPolitics* (12 July 2016), online: <https://ipolitics.ca/2016/07/12/ottawa-wont-adopt-undrip-directly-into-canadian-law-wilson-raybould/>.

265 James Munson, "Liberals will back UN Indigenous rights bill", *iPolitics* (20 November 2017), online: <https://ipolitics.ca/2017/11/20/liberals-will-back-u-n-indigenous-rights-bill/>.

266 Bill C-262, *supra* note 244 at s 4.

peoples.[267] The government's stated aim with this work is to take a principled approach to reviewing federal laws and policies to ensure that the Crown is meeting its constitutional obligations with respect to Aboriginal and treaty rights; adhering to international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples; and supporting the implementation of the Truth and Reconciliation Commission's Calls to Action.[268] The vision is that the rights of Indigenous peoples will be recognized in all federal laws, policies and operational practices that impact First Nations, Inuit, and Métis.[269] The initiative has been characterized as a means to "decolonize" relevant federal laws and policies.[270] This review will be guided by the set of principles released by the Trudeau government in July 2017, [271] discussed below. In terms of federally regulated energy projects, this review may well result in further changes to key statutes, including and most obliviously the *Indian Act*.[272] It is unclear whether or to what extent this Ministers' Working Group was involved in finalizing Bill C-69 and associated reform of the federal regime for review and approval of linear energy projects although there is overlap between Ministers on the Working Group and the Ministerial portfolios affected by the law reform.[273]

Principles respecting the Government of Canada's relationship with Indigenous peoples

In July 2017, the government released its *Principles Respecting The Government of Canada's Relationship with Indigenous Peoples* ("Ten Principles").[274] Prominent

267 Privy Council Office, "Working Group of Ministers on the Reviews of Laws and Policies Related to Indigenous Peoples" (21 February 2018), online: <https://www.canada.ca/en/privy-council/services/review-laws-policies-indigenous.html>.

268 Canada, Privy Council Office, "Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples"), online: <https://pm.gc.ca/eng/news/2017/02/22/prime-minister-announces-working-group-ministers-review-laws-and-policies-related>.

269 *Ibid*.

270 Mike De Souza, "Trudeau to Proceed with Wide Federal Review to 'Cecolonize' Canada", *National Observer* (12 December 2016), online: <www.nationalobserver.com/2016/12/12/news/trudeau-proceed-wide-federal-review-decolonize-canada>.

271 "Government of Canada Sets a Principled Foundation for Advancing Renewed Relationships with Indigenous Peoples based on the Recognition of Rights," *Newswire* (14 July 2017), online: <www.newswire.ca/news-releases/government-of-canada-sets-a-principled-foundation-for-advancing-renewed-relationships-with-indigenous-peoples-based-on-the-recognition-of-rights-634518303.html>.

272 *Indian Act,* RSC 1985, c I-5.

273 Canada, Government of Canada, "Members of the Working Group of Ministers" (21 September 2017), online: <www.canada.ca/en/privy-council/services/review-laws-policies-indigenous/members.html>.

274 Department of Justice, "Principles Respecting", *supra* note 16.

in these principles are commitments to Indigenous self-determination, reconciliation, the honour of the Crown, mutual respect, and meaningful engagement with Indigenous peoples.[275] According to the government, "[t]hese Principles are rooted in section 35, guided by the UN Declaration, and informed by the Report of the Royal Commission on Aboriginal Peoples (RCAP) and the Truth and Reconciliation Commission (TRC)'s Calls to Action."[276] In addition, they reflect a commitment to good faith, the rule of law, democracy, equality, non-discrimination, and respect for human rights."[277]

The legal and practical implications of these principles remain unclear but the document may be seen as the Trudeau government's overarching framework to provide coherence across the government's many different initiatives.[278] John Borrows suggests that this document is a significant development given the commitments and changes it contains and given that "these principles have never been gathered as concisely and holistically as occurs in this federal document."[279]

Recognition and implementation of Indigenous rights framework

In February 2018, Prime Minister Trudeau announced the creation of a new "recognition and implementation of Indigenous rights framework" to be developed through consultation with Indigenous and non-Indigenous Canadians.[280] This initiative is intended to accelerate progress toward self-determination, develop legislation to anchor Canada's relationship with Indigenous groups in rights recognition and develop tools for the recognition of Indigenous governments, as well as elements of a new policy to replace the current Comprehensive Land Claims and Inherent Right to Self-Government policies.[281] The Prime

275 *Ibid*.

276 *Ibid*.

277 *Ibid*.

278 See Joshua Nichols & Robert Hamilton, "Is Canada Really Moving Beyond Its Colonial Past?", *Center for International Governance Innovation* (28 September 2017), online: <https://www.cigionline.org/articles/canada-really-moving-beyond-its-colonial-past> (For a discussion of the Constitutional implications).

279 John Borrows, "Why Canada's Indigenous Principles Document Matters", *Maclean's* (2 August 2017), online: <www.macleans.ca/opinion/why-canadas-indigenous-principles-document-matters/>.

280 Justin Trudeau, Prime Minister of Canada, Press Release, "Government of Canada to create Recognition and Implementation of Rights Framework" (14 February 2018), online: <https://pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework>.

281 Indigenous and Northern Affairs Canada, *National engagement on the recognition of Indigenous rights*, online: < https://www.rcaanc-cirnac.gc.ca/eng/1512679042828/1539886236551> [INAC, "National Engagement"];. John Paul Tasker, "Trudeau Promises New Legal Framework for Indigenous People," *CBC News* (14 Februrary 2018), online: <www.cbc.ca/news/politics/trudeau-speech-indigenous-rights-1.4534679> [Tasker]. For a critical perspective on this new federal framework, see Hayden

Minister's announcement was contextualized further by comments from the Minister of Justice, who described the move as a means of "ensuring that Section 35 [of the Constitution] is a full box of rights to be filled up by First Nations, Metis and Inuit across the country" and motivated by the government's desire to "empower Indigenous communities to have 'control of their lives,' so they can 'draw down jurisdiction'… and craft their own laws on everything from elections to fisheries."[282]

Consultation to flesh out this new framework began soon after the announcement;[283] however, to date, any specific changes to law and policy remain unclear. Preliminary commentary from the private bar notes that the framework could provide additional clarity to assist the Crown in satisfying its duty to consult and accommodate, and in turn decrease the number of cases before the courts that allege insufficient consultation.[284] This is a logical inference given that the content of the duty to consult (i.e. "deep consultation" or less, as discussed above) varies depending on the strength of claim to Aboriginal rights or title at issue (including in relation to NEB-regulated projects, for example), and uncertainties in status of those actual or asserted rights makes it difficult for Indigenous groups and the Crown alike to understand associated Crown obligations.[285]

Bill C-69

Perhaps the most significant changes to federal rules pertaining to pipelines and power lines, and certainly the most concrete, are those proposed in Bill C-69.[286] The bill proposes to repeal and replace the two cornerstone statutes in the federal regime: the *NEB Act* and *CEAA, 2012*. Full consideration of the proposed changes in relation to Indigenous peoples is beyond the scope of this

King & Shiri Pasternak, "Canada's Emerging Indigenous Right's Framework: A Critical Analysis," Yellowhead Institute (05 June 2018), online: <https://yellowheadinstitute.org/wp-content/uploads/2018/06/yi-rights-report-june-2018-final-5.4.pdf>.

282 Tasker, *supra* note 281.

283 INAC, "National Engagement", *supra* note 281.

284 Charlotte Teal et al, "Canada: A New Federal Framework On The Recognition And Implementation Of Indigenous Rights," *Bennett Jones* (2 March 2018), online: <www.mondaq.com/canada/x/678824/Human+Rights/A+New+Federal+Framework+on+the+Recognition+and+Implementation+of+Indigenous+Rights>.

285 See *Gitxaala*, *supra* note 4 at paras 220-25, 288-309 (For a discussion of the importance of the Crown's "strength of claim" analysis with respect to specific Indigenous groups and associated consultation and accommodation obligations, including disclosure and privilege dimensions of the matter).

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

paper;[287] but several preliminary perspectives are set out below, as well as brief comments about how these changes relate to the above-described wider shifts in federal law and policy pertaining to Indigenous peoples.

The new *Canadian Energy Regulator Act* (*CERA*) and *Impact Assessment Act* (*IAA*) retain the basic architecture of the *NEB Act* and *CEAA, 2012*, including the interconnection between them; however, there are several significant changes that would alter the review and approvals process for major federal linear energy infrastructure projects. In cases of major pipeline and power line approvals that are "designated projects" under the *IAA*, the new statutes would change *who* does the assessment, *how* the assessment is conducted, *what* is within the scope of assessment, and *how* the final determination is made.

In terms of who does the assessment, the *CERA* and the *IAA* would work in tandem. *CERA* requires that pipeline and power line projects that are classified as "designated projects" under the *IAA* will require an assessment under the *IAA*.[288] This is similar to the current requirement for such projects to be subject to assessment under *CEAA, 2012*. What is fundamentally different, however, is that whereas under the *CEAA, 2012* regime the assessment was conducted by the NEB as a responsible authority,[289] in the new regime the review of a designated project must be conducted by a review panel[290] under the *IAA*.[291] In the course of doing so, the *IAA* review panel would fulfil obligations under *CERA*.[292] To put this in today's terms, the NEB would no longer be conducting the reviews for major pipeline and power line projects. This is a significant

287 For preliminary perspectives, see David V Wright, "Indigenous Engagement and Consideration in the Newly Proposed Impact Assessment Act: The Fog Persists", (27 February 2018), *ABlawg* (blog), online: <https://ablawg.ca/2018/02/27/indigenous-engagement-and-consideration-in-the-newly-proposed-impact-assessment-act-the-fog-persists/>; See also David Laidlaw, "Bill C-69, the *Impact Assessment Act*, and Indigenous Process Considerations" (15 March 2018), *ABlawg* (blog), online: <https://ablawg.ca/2018/03/15/bill-c-69-the-impact-assessment-act-and-indigenous-process-considerations/>; See also Bridge Gilbride, Emilie Bundock & Hannah Roskey, "Bill C-68 and Bill C-69 Propose Bigger Role for Indigenous Groups in Environmental Review" (13 March 2018), *Fasken Indigenous Law Bulletin*, online: <www.fasken.com/en/knowledgehub/2018/03/2018-03-05-indigenous-bulletin>; Martin Ignasiak, Sander Duncanson & Jessica Kennedy, "Changes to Federal Impact Assessments, Energy Regulatory and Waterway Regulation (Bills C-68 and C-69)" (12 February 2018), *Osler Resources, Canadian Legislation & Regulations*, online: <www.osler.com/en/resources/regulations/2018/changes-to-federal-impact-assessments-energy-regulator-and-waterway-regulation-bills-c-68-and-c-1>.

288 *Bill C-69, supra* note 15, *CERA* s 185.

289 *CEAA, supra* note 14, s 15.

290 See *Bill C-69, supra* note 15 (Pursuant to *IAA* s 47, one member of the review panel must be selected from a roster of CER Commissioners).

291 *Ibid* (Pursuant to *CERA* s 185).

292 *Ibid* at s 185(a).

change in the process and associated roles. In addition, one member of the review panel must be selected from a roster of CER Commissioners[293] and at least one of the full-time Commissioners must be an Indigenous person.[294]

The substance of the assessment will also be significantly changed under the *CERA* and *IAA*. The *CERA* contains legislative direction to the Commission (or review panel) that did not exist in the *NEB Act*. Whereas the *NEB Act* contains just five considerations listed in section 52(2), the *CERA* contains twelve in the new section 183(2), two of which explicitly reference Indigenous peoples.[295] These twelve factors would have to be considered by the review panel, in addition to (by virtue of the linkage between the *CERA* and the *IAA*) the twenty factors listed in section 22 of the *IAA* (although there is significant overlap between these factors).[296] The factors in the *IAA* contain additional requirements with respect to Indigenous peoples, including, for example, mandatory consideration of traditional knowledge[297] and the results of any parallel assessment that has been completed by an Indigenous group.[298] Additionally, the *IAA* contains a new "planning phase" that has explicit requirements for engagement of Indigenous peoples.[299]

The most salient dimension for present purposes is how the proposed regime would or could be used by the Crown in fulfilling its obligations where there may be potential adverse impacts on Indigenous rights. In short, the *CERA* and *IAA* retain similar decision-making architecture to the *NEB Act* and *CEAA, 2012*, leaving final decision making for designated projects with the Governor in Council. [300] This suggests that *Tsleil Waututh*, *Gitxaala*, and *Bigstone* will continue to provide useful guidance. Furthermore, in terms of the phased approach to consultation discussed in those cases, it is the review panel (or Joint Review Panel) — not the Commission (i.e. the NEB's successor) — that would lead consultations during the pre-hearing, hearing, and recommendation phases. Under this new legislative scheme, the "advisory role" described above in relation to the NEB would be occupied by review panels, and the "attenuated role" of environmental assessments carries on,[301] albeit it with a wider scope of issues to be factored into the assessment.

293 *Ibid* at *IAA* s 47(3).
294 *Ibid* at *CERA* s 26(2).
295 *Ibid* at *CERA* s 183(2)(d) and (e).
296 *Ibid* at *IAA* s 22(1).
297 *Ibid* at s 22(1)(g).
298 *Ibid* at s 22(1)(q).
299 *Ibid* at s 12.
300 Under the IAA, this is provided for in s.62.
301 As so characterized in *Gitxaala*, *supra* note 4 at para 123.

At the final stage of the process under the *IAA*, the review panel's recommendation would be provided to the Governor in Council for its consideration prior to making a final determination[302] within 30-days (although the Governor in Council can extend this by any number of 30-day periods).[303] At this stage, the Governor in Council may also establish any conditions it deems appropriate or necessary to accommodate Indigenous rights and interests (as discussed in Part II above).[304] The *IAA* provides a list of five mandatory factors that must be taken into consideration by the Governor in Council in making a final determination as to whether the designated project is in the public interest.[305] Additionally, section 65(2) will require the Governor in Council to provide "detailed reasons" in the decision statement for the designated project. Taken together, this part of the proposed regime creates space for significant additional Crown consultation to take place following referral of the recommendation report to the Governor in Council. This provides the opportunity for the Crown to fill any gaps or shortcomings in fulfilling its duty to consult during the impact assessment, as it did in *Bigstone* and *Tsleil Waututh*.

What the new regime in its proposed form leaves unclear is to what extent a review panel (or Joint Review Panel, as the case may be), may fulfill, and assess fulfillment of, the duty to consult. As set out in Part II above, the case law is quite clear in saying that the Crown may rely on an administrative body to fulfill the duty to consult so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances.[306] Yet, despite this clarity from the courts, the *IAA* is ambiguous as to whether a review panel will have the statutory powers to do what the duty to consult requires. The new *IAA* does not explicitly include the type of broad powers granted to the NEB under in *NEB Act*[307] (and equivalent provisions that are retained in the *CER Act*[308]) and it is those provisions that courts have pointed to when determining and clarifying that the NEB could indeed fulfill and assess

302 *Bill C-69, supra* note 15, *IAA* s 61.

303 *Ibid* at *IAA* s 65(5).

304 *Ibid* at s 64.

305 *Ibid* at s 63 (These are the operative factors for the GIC consideration and determination for CER regulated projects that are designated projects under the IAA. For CER regulated projects not under the IAA, the decision would follow the sequence set out in CERA sections 183, 184 and 186. Those provisions provide a mechanism for the GIC to require reconsideration of the report (i.e. reconsideration of the recommendation or conditions or both) by the Commission, similar to the process that exists under the current regime).

306 *Thames*, *supra* note 19 at para 32.

307 *Supra* note 13, s 12(2).

308 *Bill C-69, Supra* note 15, CERA s 32(3).

fulfillment of the duty to consult.[309] While it is open to the government "to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts,"[310] the proposed *IAA* does not fully embrace this space. The *IAA* contains no provision similar or equivalent to the broad Commission powers set out in section 32(3) of *CERA*, and it is not clear that such powers of the commission would be assigned to a review panel by virtue of section 185 of the *CERA*. Instead, the *IAA* leaves ambiguity and risks thereby generating confusion and the possibility of litigation (not to mention regulatory uncertainty). If nothing else, it may well generate more work (and delay) during the final phase when the Governor in Council is making its final determination and ensuring Crown obligations have been fulfilled.

Regarding the NEB's current "final decision-maker" role, the CER will continue on as the final decision-maker for non-designated projects, much as under *NEBA*, and thus in such cases the Crown may be able to rely completely on the CER to discharge its duty to consult and accommodate much as discussed in Part II.[311]

In general, with respect to Bill C-69, it is important to note the heightened prominence given to Indigenous considerations in the proposed *IAA* and *CERA*. Both proposed statutes include many references to Indigenous peoples and their rights throughout, beginning with in the preamble of both statutes.[312] The explicit factors cited above requiring consideration of Indigenous dimensions are another example. As well, both statutes require key bodies to include at least one indigenous person, such as on the advisory committee under the *IAA*[313] and on the CER board of directors[314] and in the cadre of full-time CER Commissioners.[315] Overall, the new regime is relatively careful in establishing requirements for Indigenous engagement and *consideration* of Indigenous dimensions at every stage of the review and approval process.

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309 *Clyde*, *supra* note 19 at paras 34, 37; *Thames*, *supra* note 19 at paras 32-34.

310 As so described in *Haida*, *supra* note 116 at para 51.

311 This is a function of a virtual copy and paste of most of the NEB Act into the proposed CERA. Noting, again, that in practical terms for the federal regime to apply to a power line the facility requires designated by Order in Council (NEBA ss 58(24)(c) and 58.4; CERA s 261) but no facility has ever been designated.

312 Though CERA notably omits such reference in the purpose provisions, where the IAA includes such in s 6.

313 *Bill C-69, supra* note 15, *IAA* s 157(2).

314 *Ibid*, *CERA* s 14(2).

315 *Ibid*, *CERA* s 26(2).

It is this "consideration," however, that reveals a gap between the broader federal policy shifts discussed above and the proposed (and existing) regime. The architecture of the new regime will leave in place Crown decision-making that is ultimately unilateral in nature, albeit with enhanced requirements for collaboration with Indigenous groups en route to that final decision. That final Crown decision turns on what is in the "public interest," which is to be based on the factors set out in the new statute. Impacts on the rights of Indigenous peoples are but one factor in this public interest determination. As such, the enhanced measures and consideration of Indigenous peoples' rights and interests still only equate to what are essentially procedural rights (notwithstanding potential accommodation through approval conditions) that lead to Indigenous rights, interests and concerns being placed within the broader public interest determination to be made by the Governor in Council. While this may be in line with the process of balancing interest envisioned by the courts, it likely falls short of the expectations of Indigenous peoples.

Since the tabling of Bill C-69, Indigenous groups have raised concerns regarding inclusion of section 35 rights as a section 22 'factor to be considered' and as a consideration to be balanced against others in the broader public interest determination.[316] Given this design, it is perhaps not surprising that Bill C-69 initially contained no reference to UNDRIP (it was later added in the preamble). Changes to the bill's fundamental architecture are unlikely: it has now proceeded through the House of Commons and will likely be passed by the Senate in spring 2019. It should be noted, however, that the new regime to be brought in through Bill C-69 will have to be read together with UNDRIP implementation measures in Bill C-262.

Conclusions

Few areas of law in Canada are evolving as quickly as the intersection of Indigenous rights and federal rules for review and approval of linear energy infrastructure projects. As the preceding discussion illustrates, the legal issues are complex, the Indigenous communities and associated rights and interests are diverse, and the statutory context is changing rapidly. This article has set out

316 See eg Chief Kluane Adamek, *Submission on Bill C-69*, Environment Committee on April 17th, 2018, *Open Parliament*, online: <https://openparliament.ca/committees/environment/42-1/103/chief-kluane-adamek-1/>; See also British Columbia Assembly of First Nations, *British Columbia Assembly of First Nations Submission to House of Commons Standing Committee on Environment and Sustainable Development On Bill C-69* at 6 (6 April 2018), online: <www.ourcommons.ca/Content/Committee/421/ENVI/Brief/BR9819242/br-external/BritishColumbiaAssemblyOfFirstNations-e.pdf>.

the legal regime as it exists today, as well as emerging changes in the federal law and policy context. At the present time, any coherence and clarity in the case law is subject to uncertainty created by current law reform and political forces.

Though recent cases such as *Tsleil Waututh, Thames*, *Gitxaala*, and *Bigstone* have provided some clarity, further change is certain. On one hand, change will be driven by legislative changes pursued by the federal government. For example, Bill C-69 is poised to overhaul the statutory regime in the near future, locking in significant changes to the federal rules applicable to linear energy infrastructure projects. At the same time, court decisions, such as the recent FCA decision in the Trans Mountain pipeline case, build on the decisions in *Gitxaala* and *Bigstone* to provide more judicial consideration of the current regime. Meanwhile, evolution in the law will also be pushed by Indigenous peoples exercising the inherent right of self-determination and related efforts to revitalize Indigenous jurisprudence.

How the high-level initiatives of the Trudeau government play out and affect the legal landscape remains to be seen. The gap between expectations of Indigenous peoples and the law as stated by the courts and in legislation is likely to lead to further litigation. For example, the proposed legislative reform in Bill C-69, which is among the most concrete legislative steps taken by the Trudeau government to date, is unlikely to satisfy the interests of concerned Indigenous communities. By retaining a structure that leaves the ultimate locus of authority with federal cabinet, keeping Indigenous rights as one "consideration" in the final public interest determination, Bill C-69 is unlikely to dissipate current tensions in any substantial way. Future litigation is particularly foreseeable in situations where Indigenous communities assert that consent is required in today's context of Bill C-262 and "full implementation" of UNDRIP. All of this is likely to have a continuing impact on trust in regulatory processes and investor confidence.

In the years ahead, Canada, Indigenous peoples, and the broader set of public and private actors in the federally regulated energy infrastructure sphere would benefit from commentary from the Supreme Court regarding UNDRIP implementation, and FPIC specifically. It seems almost inevitable that the Supreme Court will have to confront and consider UNDRIP implementation head-on, possibly within the context of federal linear energy infrastructure projects. Such views from the court would be of substantial value to (though not necessarily to the liking of) all actors involved, especially the NEB's successor: the new CER, which will begin its work in this unprecedented mix of expectations, law and policy changes, and political attention. To what extent

new federal rules and institutions for linear energy infrastructure project help or hinder the pursuit of overarching objectives of regulatory certainty, reconciliation and a renewed nation-to-nation relationship between Canada and Indigenous Peoples remains to be seen.