Review of Constitutional Studies/Revue d'études constitutionnelles

Review of Constitutional Studies/Revue d'études constitutionnelles is published twice yearly by the Centre for Constitutional Studies.

Subscriptions
(Individual or Institutional)

Canadian orders:
$63.00 CDN (includes 5% GST) per volume (two issues)

US and other international orders:
$60.00 US per volume (two issues)

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Indexing
Review of Constitutional Studies/ Révue d'études constitutionnelles is indexed in: Index to Canadian Legal Periodical Literature, Index to Canadian Legal Literature, Current Law Index; it is available in Academic Search Complete, CPI.Q., LegalTrac, and HeinOnline.

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Canadian Publication Mail Product **Registration No.** 40064496

 978-0-9869365-9-3

The Centre gratefully acknowledges the continuing financial support of the **Alberta Law Foundation**.

Review of Constitutional Studies/Revue d'études constitutionnelles

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VOLUME 23 • NUMBER 1 • JUNE, 2018

review

Special Issue

Pipelines and the Constitution

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

*Nigel Bankes**

Introduction

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

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

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

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

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

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

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

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

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

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

5 *NEB Act, supra* note 1.

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

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

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

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

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

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

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

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

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

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

14 *Tsleil-Waututh, supra* note 4.

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

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

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

1.0 Energy systems

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

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

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

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

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

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

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

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

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

2.0 Existing interjurisdictional energy infrastructure

2.1 Pipelines

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

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

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

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

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

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

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

27 *Ibid* at 5.

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

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

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

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

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

30 *Ibid* at 72.

31 *Ibid* at 76.

32 *Ibid* at 79.

33 *Ibid* at 82.

34 *Ibid* at 85.

35 *Ibid* at 88.

36 *Ibid* at 91.

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

38 See *Ibid*, Part IV.

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

2.2 Powerlines

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

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

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

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

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

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

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

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

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

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

3.0 Jurisdiction over interjurisdictional energy infrastructure

3.1 The basis of jurisdiction

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

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

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

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

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

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

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

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

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

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

50 *Ibid* at para 45.

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

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

53 *Ibid* at para 52.

54 *Ibid* at para 69.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2 The exercise of jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.1 Recent events and current projects

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

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

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

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

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

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

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

83 Northern Gateway Project, *supra* note 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2 The NEB 'modernization' project

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

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

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

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

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

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

103 Common Ground, *supra* note 8.

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

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

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

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

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

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

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

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

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

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

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

111 *Ibid*, Part 5.

112 *Ibid*, s 10.

113 *Ibid*, ss 80-86.

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

5.0 Conclusions

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

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

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

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

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

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

*Alastair R. Lucas**

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

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

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review of certain matters including federalism and Aboriginal rights issues.

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

I. Introduction

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

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

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

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

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

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

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

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

6 George Hoberg, at p 53.

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

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

9 See discussion on Bill C-69, below.

II. NEB origins: a pipeline tribunal

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

A. The pipeline-building decade

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

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

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

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

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

12 RSC 1927, c 170.

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

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

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

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

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

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

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

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

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

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

18 SC 1959, c 46.

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

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

B. The context today

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

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

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

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

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

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

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

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

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

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

III. NEB structure, purpose, and powers

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

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

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

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

b) the existence of markets, actual or potential;

c) the economic feasibility of the pipeline;

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

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

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

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

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

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

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

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

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

A. Key structural elements

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

a) Expertise

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

b) Adjudicative powers and administrative procedures

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

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

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

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

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

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

B. Fundamental purposes

1. Energy resource development

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

2. Public interest

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

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

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

38 *Ibid* at para 30.

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

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

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

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

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

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

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

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

44 Hierlmeier, *supra* note 40 at 301.

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

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

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

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

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

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

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

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

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

3. Environmental effects

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

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

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

51 *Ibid*.

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

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

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

4. Aboriginal and treaty rights

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

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

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

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

56 *Ibid.*

57 *Ibid* at para 34.

58 *Supra* note 54.

59 *Ibid* at paras 325-32.

60 *Supra* note 30.

C. Regulating construction, operations, and abandonment

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

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

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

IV. Powerline jurisdiction distinguished

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

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

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

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

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

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

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

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

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

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

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

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

Section 58.19 defines which laws are contemplated:

> For the purposes of sections 58.2, 58.21 and 58.22, a law of a province is in relation to lines for the transmission of electricity from a place in the province to another place in the province if the law is in relation to any of the following matters:
>
> (a) the determination of their location or detailed route;
>
> (b) the acquisition of land required for the purposes of those lines, including its acquisition by expropriation, the power to so acquire land and the procedure for so acquiring it;

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

> (c) assessments of their impact on the environment;
>
> (d) the protection of the environment against, and the mitigation of the effects on the environment of, those lines; or
>
> (e) their construction and operation and the procedure to be followed in abandoning their operation.

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

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

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

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

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

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

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

V. Utility regulation: tolling

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

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

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

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

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

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

VI. Judicial supervision

A. Leave to appeal

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

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

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

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

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

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

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

B. Standing

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

C. Standard of review

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

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

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

94 *Supra* note 37.

95 *Supra* note 2, s 55.2.

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

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

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

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

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

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

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

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

100 *Ibid* at para 50.

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

102 *Dunsmuir*, *supra* note 98.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

125 *Supra* note 54.

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

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

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

XI. The expert panels and Bill C-69 2018

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

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

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

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

129 Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018, online: <www.parl.ca/DocumentViewer/en/42-1/bill/C-69/third-reading> [*Bill C-69 CERA*].

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

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

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

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

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

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

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

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

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

XII. National interest in 2018

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

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

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

135 *Ibid,* s 75.

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

XIII. Conclusions

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

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

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

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

Pipelines and the Politics of Structure: Constitutional Conflicts in the Canadian Oil Sector

*George Hoberg**

Constitutional conflicts over energy infrastructure are not confined to questions of law. They are also an object of political conflict among strategic actors pursuing their interests. This paper examines how different actors in pipeline disputes have sought to gain strategic advantage by advocating particular positions on constitutional arguments about regulatory jurisdiction, Indigenous rights, and participation in regulatory proceedings. Examples will be taken from the controversies over Line 9, Energy East, Northern Gateway, and the Trans Mountain Expansion Project.

Les conflits constitutionnels quant aux infrastructures énergétiques ne se limitent pas à des questions de droit. Ils font également l'objet de conflits politiques entre les acteurs stratégiques qui défendent leurs intérêts. Cet article examine la manière dont différents acteurs dans des litiges autour des pipelines ont cherché à obtenir un avantage stratégique en défendant des positions particulières sur des arguments constitutionnels concernant la compétence réglementaire, les droits des peuples autochtones et la participation à des procédures réglementaires. Des exemples seront tirés des controverses entourant la ligne 9, le pipeline Énergie Est, le pipeline Northern Gateway et le projet d'agrandissement du réseau de Trans Mountain.

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Overview[1]

Constitutional conflicts over energy infrastructure are not confined to questions of law. They are also an object of political conflict among strategic actors pursuing their interests. Strategic actors work to ensure that issues concerning them are addressed in the institutional venue most conducive to the realization of their interests. Independent regulatory tribunals, cabinets, courts, and different levels of government offer strategic actors different opportunities for and constraints on influencing regulatory outcomes. Actors also adopt rhetorical strategies or discourse that appeals to the values of those in the best position to assist them in successfully achieving their aims.

This article examines how different actors in disputes over pipelines and market access for Canadian oil sands producers have sought to gain strategic advantages by pursuing different venues for decision-making, or advocating particular rhetorical positions, in constitutional conflicts about rights to participation, regulatory jurisdiction, and Indigenous rights. Examples will be taken from four controversial oil sands pipeline decisions: Line 9, Energy East, Northern Gateway, and the Trans Mountain Expansion Project. Competing interests also clash over non-constitutional rules. Canadian pipeline policy has witnessed sharp conflicts over scoping decisions for environmental assessment and review in relation to these projects. For example, between 2014-2016, the credibility and independence of the federal pipeline regulator, the National Energy Board (NEB), came under fire from environmentalists and politicians. In 2012, the Harper government, concerned about expediting pipeline decision-making, shifted the final decision-making power on pipelines from the National Energy Board to the cabinet. These structural choices have been an important part of Canadian pipeline conflicts. This article, however, only examines issues that are constitutional in nature.

The following section provides an overview of the analytical framework guiding the analysis. The article then explores three Canadian constitutional issues involving oil sands pipelines, and picks illustrative examples from the pipelines referenced above. The three issues are: (1) participatory rights and the *Charter*, (2) division of powers and federal-provincial relations and the role of municipalities, and (3) two competing views of Indigenous rights.

1 The author would like to thank Sarah Froese for her invaluable research assistance with this article, and a SSHRC Partnership Development Grant for funding.

The politics of structure

The article is inspired by actor-centred analytical frameworks. Strategic actors are the central agents of policy. Actors each have their own interests and political resources. They adopt strategies designed to best pursue their interests given their resources. Strategic actors interact within a context of ideas and institutional rules. But, they also work to change ideas through reframing and to change institutional rules through venue-shifting or other means.[2] Institutional rules can be pivotal because when the location or form of authority changes, the balance of policy preferences guiding policy decisions could also change significantly. In many ways, these pipeline conflicts have been about "the politics of structure," or the struggle over defining the rules of the game.[3]

This article examines actor strategies at the nexus of framing and venue-shifting, where institutional rules at play and the discourse over those rules have become the focus of conflict among competing interests. Three types of institutional strategies emerge from the literature: procedural strategies that require agencies to follow specific procedures (e.g. performing an environmental assessment or consulting with affected interests); structural strategies on the organizational design of agencies; and venue-shifting strategies that move the location of authoritative decision-making to a different organization or level of government (for example, from an independent regulator to cabinet or from the federal level to the provincial level).[4] Depending on the circumstance, information resulting from complying with procedural requirements does influence decisions, and organizational structure can shape what information flows to decision-makers.[5] Others have explored the way different organizational structures "might shape learning about problems and solutions, policy choices, and conflict resolution in quite predictable ways."[6] Venue-shifting can influence

2 Frank R. Baumgartner & Bryan D. Jones, *Agendas and Instability in American Politics*, 2nd ed (Chicago: University of Chicago Press, 2010); George Hoberg, "Policy Cycles and Policy Regimes: A Framework for Studying Public Policy" cited in Benjamin Cashore et al, *In Search of Sustainability: British Columbia Forest Policy in the 1990s* (Vancouver: UBC Press, 2001); Sarah Pralle, *Branching Out, Digging In: Environmental Advocacy and Agenda Setting* (Washington, DC: Georgetown University Press, 2006).

3 Terry Moe & Scott Wilson, "Presidents and the Politics of Structure" (1994) 57:2 Law & Contemp Probs at 1-44.

4 Stuart Shapiro, "Structure and Process: Examining the Interaction between Bureaucratic Organization and Analytical Requirements" (2017) 34:5 Rev Pol'y Res at 682-699.

5 *Ibid*.

6 Morten Egeberg, "The Impact of Bureaucratic Structure on Policy Making" (1999) 77:1 Public Admin at 155-170.

policy outcomes because the values of decision-makers can vary from one setting to the next, giving each venue a "decision bias."[7]

Much of the literature focuses on how legislators, acting as principals, use requirements for procedure or structure to influence the outcomes from administrative agents.[8] But, strategic actors outside governments also have large stakes in structure and procedure. According to Moe and Wilson, "all political actors know that structure is the means by which policies are carried out or subverted, and that different structures can have enormously different consequences. As a result, there is inevitably a 'politics of structural choice.'"[9] In this structural politics, strategic actors in and out of government will advocate for rules and venues that give them the greatest likelihood of achieving policy outcomes that reflect their interests.

This politics of structure incentivizes various actors in pipeline conflicts to promote quite different procedural and structural rules. Proponents' interests are in a stable, certain process of manageable scale and duration, generally controlled by a single decision-maker, so that they can minimize process costs in project approval. These incentives create pressures for minimal process requirements, but this is balanced by proponents' interests in gaining sufficient public legitimacy to minimize political risks to their projects. Opponents obviously have quite different incentives. They prefer comprehensive information requirements, widespread public access to decision-making processes, consultation procedures, lengthy proceedings, multiple veto points, and clear rights to appeal unfavorable decisions. Opponents actually have a strategic interest in increasing process costs and delays as a way to discourage proponents.

Politicians designing regulatory processes, in addition to needing to balance these competing demands, have their own policy, budgetary, and, especially, electoral interests to keep in mind. They can be expected to want strong control over decisions where there is an opportunity to claim credit for favorable outcomes, and to keep an arm's length from decisions more likely to involve the imposition of unpopular political decisions.[10] All else being equal, they would

7 Frank Baumgartner & Bryan Jones, "Agenda Dynamics and Policy Subsystems" (1991) 53:4 J Politics at 1047.

8 Mathew McCubbins, Roger Noll & Barry Weingast, "Administrative Procedures as Instruments of Political Control" (1987) 3:2 JL Econ & Org at 243-277.

9 Terry Moe & Michael Caldwell, "The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems" (1994) 150:1 J Inst Theor Econ at 171-195.

10 R. Kent Weaver, "The Politics of Blame Avoidance" (1986) 6:4 J Pub Pol'y at 371-398; Kathryn J. Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy*, (Vancouver: UBC Press, 1996) [Harrison].

prefer to minimize process time and costs, but they also need to be attentive to political legitimacy. The political influence of interests opposed to or skeptical of new infrastructure projects leads both politicians and proponents to prefer regulatory processes that are more time-consuming, elaborate, and costly than they would ideally prefer. The remainder of this article explores how this politics of structure plays out in disputes over Canadian oil sands pipelines.

Participatory rights and the *Charter*

The first important dimension of the politics of constitutional structure in pipeline regulation is the set of interrelated issues of who can participate and what the scope of environmental assessment is. In attempting to influence the outcome, proponents used changes in procedural rules, while opponents attempted venue-shifting. In 2012, the Harper government changed regulatory review procedures in response to the political escalation over the Northern Gateway pipeline, among other developments.[11] One of the changes narrowed the right of participation in the process from the general category of "interested parties" to those who are "directly affected" or have, in the review panel's judgment, "relevant information and expertise."[12] Because the scope of project review is frequently contested, another important aspect of the politics of structure is the list of issues that are determined to be within the scope of the regulatory review. In the case of the Trans Mountain project, the NEB determined in its list of issues that it would consider only the greenhouse gas emissions resulting from construction and operation of the pipeline, and not the upstream emissions from the oil sands or downstream emissions when the products were refined and combusted.[13]

A number of individuals applied to participate for the express purpose of discussing climate impacts, with the expectation that they would be rejected by the NEB. Indeed, they were. The NEB says it received 2,118 Applications

11 George Hoberg, "The Battle Over Oil Sands Access to Tidewater: A Political Risk Analysis of Pipeline Alternatives" (2013) 39:3 Can Pub Pol'y at 371-391 [Hoberg, "The Battle"]; George Hoberg, "Unsustainable Development: Energy and Environment in the Harper Decade" cited in Jennifer Ditchburn & Graham Fox, *The Harper Factor: Assessing a Prime Minister's Policy Legacy* (Montrial: MQUP, 2016) 253, online: <www.jstor.org/stable/j.ctt1gsmw38> [Hoberg, "Unsustainable Development"].

12 Geoff Salomons & George Hoberg, "Setting Boundaries of Participation in Environmental Impact Assessment" (2013) 45 Envtl Impact Assess Rev at 69-75.

13 It is worth noting that in a similar environmental assessment, the United States' State Department's review of the Keystone XL pipeline, upstream and downstream impacts were considered with the scope of the review.

to Participate and denied 22% of those applications.[14] While issues about scope and rights of participation in regulatory tribunals would normally be considered administrative matters, environmentalists tried, unsuccessfully, to transform them into a *Charter* issue of freedom of expression. Thus, pipeline opponents tried to combat the restrictions on participation and scope by shifting the venue from the NEB hearing process to the courts.

A group of those denied their application to participate, led by SFU Professor Lynne Quarmby, renowned Canadian environmentalist Tzeporah Berman, and the group Forest Ethics Advocacy,[15] challenged the NEB decision in the Federal Court of Appeal with the novel claim that their *Charter* right to freedom of expression had been violated. The Federal Court of Appeal dismissed the appeal without giving reasons, and the Supreme Court of Canada denied a further application for leave, also without reasons. In October 2014, three months before the Federal Court of Appeal dismissed the case, that Court had ruled on a very similar *Charter* claim challenging the NEB's decision to deny standing to parties who sought to talk about climate change with respect to Enbridge's Line 9 application. In that case, the Court did issue a written decision that dismissed the application for judicial review. The court ruled that it was within "the margin of appreciation" for a regulatory tribunal like the NEB to exclude upstream and downstream greenhouse gas impacts in its assessment. It also found the board's decision to deny standing was reasonable, given the amended provisions of the *NEB Act*. The court rejected the argument that denial of standing was a violation of the applicants' right to freedom of expression because the plaintiffs had not brought the *Charter* issue to the NEB when it rejected their application to participate. The Court went so far as to denounce Forest Ethics as a "busybody."[16]

Strategic actors are always searching for better approaches to advance their interest. The Harper government, frustrated with delays from mass participation in the Northern Gateway case, narrowed the range of eligible participants. For environmentalists, it was very important to force a climate lens onto pipeline decision-making. When frozen out of NEB hearings by scoping rules and the new limits on participation, they attempted to shift the venue to the

14 Canada, National Energy Board, "Ruling on Participation, Hearing Order OH-001-2014", (Ottawa: National Energy Board, 2 April 2014), online: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/130635/2445932/Letter_-_Application_for_Trans_Mountain_Expansion_Project_-_Ruling_on_Participation_-_A3V6I5.pdf?nodeid=2445819&vernum=-2>.

15 The group changed its name to Stand.earth in 2016.

16 *Forest Ethics Advocacy Association v Canada (National Energy Board),* 2014 FCA 245, [2015] 4 FCR 75.

courts. They did this by attempting to constitutionalize the issue: turning the NEB's decision to deny them standing to discuss climate issues into a *Charter* challenge. The results demonstrate clearly that not every strategic choice will be successful. With the *Charter* challenge rejected by the courts on procedural grounds, pipeline opponents shifted to other strategies.

Division of powers: federal-provincial relations

While the venue-shifting effort to constitutionalize the right to participate failed, conflicts over the division of powers has been an important part of all the major pipeline conflicts. In Canada, the decision-making authority to approve inter-provincial pipelines rests with the federal government and its National Energy Board, a quasi-independent regulatory agency.[17] However, since pipeline and terminal construction and operation affects many areas under provincial jurisdiction, provinces have a potential role to play in assessment and permitting as well. As a result, pipeline conflicts have been disputes over venues — the relative balance of authority between the federal and provincial governments.

The industry and the Harper government were particularly concerned about reducing jurisdictional overlap and conflict, and promoted a one-project, one-process approach to regulatory reviews where feasible. The Harper government, with its strong pro-development orientation, was understandably reluctant to devolve regulatory authority to provinces with strong environmental sentiments. Because the pipelines at issue were all interprovincial, they preferred that the one process be a federal process.[18]

Normally, a provincial government is expected to be reluctant to give up any source of authority to influence the regulatory process. But the BC Liberal government, being pro-development generally but keenly aware of the strong environmental movement in the province, was happy to "pass the buck" to the federal government to avoid blame for making contentious decisions.[19] The province ceded authority to the federal government through an equivalency agreement whereby BC agreed to accept the NEB review process as its own

17 Nigel Bankes, "BC Court Confirms That a Municipality Has No Authority With Respect to the Routing of an Interprovincial Pipeline", *ABlawg* (17 December 2015), online: <https://ablawg.ca/2015/12/17/bc-court-confirms-that-a-municipality-has-no-authority-with-respect-to-the-routing-of-an-interprovincial-pipeline/> [Bankes, "BC Court Confirms"].

18 Hoberg, "Unsustainable Development", *supra* note 11.

19 Harrison, *supra* note 10.

environmental assessment process.[20] The two west coast pipelines, Northern Gateway and Trans Mountain, were both covered by this agreement but there were no such agreements with the relevant provinces that would cover the Energy East project.

Federal-provincial conflicts on Northern Gateway and Trans Mountain

The existence of the agreement did not reduce federal-provincial conflict over Northern Gateway and Trans Mountain. The equivalency agreement shifted the BC government from sharing regulatory authority to playing the role of an intervener in the regulatory proceedings. During the hearings over Northern Gateway, the British Columbia government adopted a position of conditional opposition, which it later extended to apply to Trans Mountain. In 2012, BC announced its position on heavy oil pipelines, stating that the following five conditions needed to be met to receive support from the provincial government:

1. Successful completion of the environmental review process…;
2. World-leading marine oil spill response, prevention and recovery systems for BC's coastline and ocean to manage and mitigate the risks and costs of heavy oil pipelines and shipments;
3. World-leading practices for land oil spill prevention, response and recovery systems to manage and mitigate the risks and costs of heavy oil pipelines;
4. Legal requirements regarding Aboriginal and treaty rights are addressed, and First Nations are provided with the opportunities, information and resources necessary to participate in and benefit from a heavy-oil project; and,
5. British Columbia receives a fair share of the fiscal and economic benefits of a proposed heavy oil project that reflects the level, degree and nature of the risk borne by the province, the environment and taxpayers.[21]

20 Canada, National Energy Board & BC Environmental Assessment Office, "Agreement between the National Energy Board and the Environmental Assessment Office of British Columbia", Environmental Assessment Equivalency Agreement (Ottawa: National Energy Board, 21 June 2010), online: <www.neb-one.gc.ca/bts/ctrg/mmrndm/2010bcnvssssmntffc-eng.html>.

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

Pipeline advocates claimed that BC had no constitutional ability to block the pipeline by establishing conditions.[22] The announcement led to a bitter conflict between BC Premier Christy Clark and Alberta Premier Alison Redford, who interpreted the fifth condition as demanding a share of oil sands royalties. This interprovincial conflict affected Alberta-led negotiations over a Canadian energy strategy, yet Prime Minister Harper studiously avoided involving the federal government either in the inter-provincial pipeline dispute or in the national energy strategy discussions.[23] BC formally took a position against the Trans Mountain project, emphasizing the lack of emergency response preparedness to address the second and third conditions.

Environmentalists and First Nations lobbied forcefully to have British Columbia reassert its jurisdiction over the project, and the provincial NDP adopted a "made-in-BC" environmental assessment process as a core part of its 2013 election platform.[24] Despite a formidable NDP lead going into the election, Christy Clark's BC Liberals defeated the NDP. The mid-campaign decision by NDP leader Adrian Dix to oppose the Trans Mountain project is credited with contributing to Clark's remarkable comeback.[25]

The equivalency agreement between BC and federal government was challenged by the Coastal First Nations in the context of the Northern Gateway pipeline. The BC Supreme Court ruled that the province had abdicated its decision-making authority under the *BC Environmental Assessment Act* by not issuing an Environmental Assessment Certificate. Justice Koenigsberg ruled that while the *Act* allows the province to defer to the federal government review process, it still must decide whether or not to issue an Environmental Assessment Certificate.[26] In a new twist on regulatory federalism in Canada, Justice Koenigsberg ruled that, despite federal paramountcy over interprovincial pipeline approvals, it would be permissible for the provincial government to impose certain conditions on interprovincial pipeline approvals. The province could not use its regulatory authority to deny an approval to a pipeline that the federal government had already approved, but it could add new conditions to the federal government's extant conditions.

22 Tom Flanagan, "To Connect the Pipeline, Connect the Dots", *The Globe and Mail* (4 August 2012), online: <www.theglobeandmail.com/opinion/to-connect-the-pipeline-connect-the-dots/article4461040/>.

23 Hoberg, "Unsustainable Development," *supra* note 11.

24 British Columbia, New Democratic Party, "Change for the Better: Practical Steps", (British Columbia: 2013), online: <www.poltext.org/sites/poltext.org/files/plateformes/bcndp2013_plt.pdf>.

25 Hoberg, "The Battle", supra note 11.

26 *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34, [2016] BCJ No 30. For a more detailed discussion of this case see the article by Martin Olszynski in this special issue.

The political implications of the ruling (not appealed by the BC government or Enbridge) were formidable because they shifted the intergovernmental politics of pipelines. For an equivalency agreement to pass muster, BC could allow the federal government the lead in conducting the assessment, but it would still need to make its own final decision on the basis of that assessment, thus forcing the provincial government to share accountability for the final decision. The pre-existing process, where BC submitted strenuous objections to the pipeline but then deferred the final decision to the federal regulator, was unlawful. This gives pipeline opponents another venue to question the legitimacy and validity of the process.

Pipelines and the 2017 BC election

The Trans Mountain pipeline expansion was a major issue in the BC election of 2017 that ended 16 years of BC Liberal Party rule. During the campaign, Premier Christy Clark's BC Liberals proudly used the slogan "Getting to Yes — Responsible Resource Development" — the latter phrase having been the label used by the Harper government. The BC Liberal platform denounced the BC NDP and Green parties for being the "parties of no" and specifically for opposing the Trans Mountain project, in addition to other major infrastructure projects.[27] The BC NDP platform minced no words in their opposition to the project:

> The Kinder Morgan pipeline is not in BC's interest. It means a seven-fold increase in tanker traffic. It doesn't, and won't, meet the necessary conditions of providing benefits to British Columbia without putting our environment and our economy at unreasonable risk. We will use every tool in our toolbox to stop the project from going ahead.[28]

In addition to adamant opposition to the pipeline, the BC NDP pushed the need for an environmental assessment process less deferential to the federal government: "We will update our environmental assessment legislation and processes to ensure that they respect the legal rights of First Nations, and meet the public's expectation of a strong, transparent process that results in the best outcomes as part of a *made in BC* assessment process".[29]

The BC Green Party had long been opposed to the project. Leader Andrew Weaver intervened in the NEB hearings on the project and consistently op-

27 British Columbia, BC Liberals, "Strong BC, Bright Future: Platform 2017", (British Columbia: 2017) online: <www.bcliberals.com/wp-content/uploads/2017/04/2017-Platform.pdf>.

28 British Columbia, BC New Democratic Party, "2017 BC NDP Platform", (British Columbia: 2017) online: <https://action.bcndp.ca/page/-/bcndp/docs/BC-NDP-Platform-2017.pdf> .

29 *Ibid* [emphasis added].

posed it.[30] This position of the two parties was reiterated in the Confidence and Supply Agreement, which was the formal agreement that permitted the Green Party to support a minority NDP government. The NDP committed to "Immediately employ every tool available to the new government to stop the expansion of the Kinder Morgan pipeline, the seven-fold increase in tanker traffic on our coast, and the transportation of raw bitumen through our province."[31]

Once the NDP, with the support of the three members of the Green Party caucus, replaced the BC Liberals as the government of BC, consultations with government lawyers convinced them that committing to "stop the pipeline" created legal risks for the province.[32] Thus, when Premier Horgan sent mandate letters to his cabinet, the phrasing changed from "stopping the pipeline" to the much more vague "defend BC's interest": "Employ every tool available to defend B.C.'s interests in the face of the expansion of the Kinder Morgan pipeline, and the threat of a seven-fold increase in tanker traffic on our coast."[33]

Constitutional conflict between BC and Alberta

Once in power, the BC NDP action appeared tentative at first but soon escalated in dramatic fashion. As the Horgan government unveiled their "tools," they stuck to the rhetoric of either "defending B.C.'s interests" or "protecting the coast." In August 2017, the government took the obvious step of announcing that it would seek intervener status in legal challenges against the project's approval in the Federal Court of Appeal.[34] The province dramatically escalated the conflict, in January 2018, by proposing a regulation to place "restrictions

30 British Columbia Green Party, Media Release, "Andrew Weaver Responds to Kinder Morgan Trans Mountain Approval" (29 November 2016), online: <www.bcgreens.ca/andrew_weaver_responds_to_kinder_morgan_trans_mountain_approval>.

31 Canada, BC Green Caucus & the BC New Democrat Caucus, "2017 Confidence and Supply Agreement between the BC Green Caucus and the BC New Democrat Caucus", (29 May 2017), online: <http://bcndpcaucus.ca/wp-content/uploads/sites/5/2017/05/BC-Green-BC-NDP-Agreement_vf-May-29th-2017.pdf>.

32 George Heyman, the British Columbia Minister of Environment and Climate Change Strategy, stated that the Premier told him, "Stopping the project was beyond the jurisdiction of BC and to talk about it or frame our actions around doing that, as opposed to defending BC's coast through a variety of measures that were within our jurisdiction, would be inappropriate and unlawful."; Natalie Obiko Pearson, "B.C. Premier knows he has no Legal Power to Block Trans Mountain. But that's not stopping him", *Financial Post* (13 April 2018), online <https://business.financialpost.com/commodities/energy/b-c-premier-knows-he-has-no-legal-power-to-block-trans-mountain-but-thats-not-stopping-him>.

33 Letter from John Horgan (18 July 2017) online: <www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/heyman-mandate.pdf>.

34 Government ofBritish Columbia, "Government Takes Action to Protect B.C. over Kinder Morgan Pipeline and Tanker Traffic Expansion", *BC Gov News* (10 August 2017), online: <https://news.gov.bc.ca/releases/2017ENV0046-001417>.

on the increase of diluted bitumen ("dilbit") transportation until the behaviour of spilled bitumen can be better understood and there is certainty regarding the ability to adequately mitigate spills." The press release and backgrounder were careful not to mention the Trans Mountain project, and instead emphasized areas of concern within provincial jurisdiction:

> The potential for a diluted bitumen spill already poses significant risk to our inland and coastal environment and the thousands of existing tourism and marine harvesting jobs. British Columbians rightfully expect their government to defend B.C.'s coastline and our inland waterways, and the economic and environmental interests that are so important to the people in our province, and we are working hard to do just that.[35]

Within a week of this announcement, Alberta Premier Rachel Notley, calling the BC action an "unprovoked and unconstitutional attack", retaliated by banning BC wines from the province. Three days later, Notley stated, "This is not a fight between Alberta and B.C. This is B.C. trying to usurp the authority of the federal government and undermine the basis of our Confederation."[36] A bit later, her criticism intensified: "That is completely unconstitutional, it's a made-up authority, it's a made-up law, it's ridiculous."[37]

After several weeks of heated rhetoric and threats of escalation, Premier Horgan decided to change course and refer the question of whether BC had the constitutional jurisdiction to regulate diluted bitumen to the courts. He stated, "We believe it is our right to take appropriate measures to protect our environment, economy and our coast from the drastic consequence of a diluted bitumen spill. And we are prepared to confirm that right in the courts."[38] Alberta responded by dropping its wine boycott. It took BC two months to prepare the reference question to the BC Court of Appeal, which it announced in April. In making the case for the reference question, Attorney General David

35 Government of British Columbia, News Release, "Additional Measures being Developed to Protect B.C.'s Environment from Spills" (30 January 2018), online: <https://news.gov.bc.ca/releases/2018ENV0003-000115>.

36 Government of Alberta, News Release, "Premier Notley: Further Measures to Defend Alberta" (9 February 2018), online: <www.alberta.ca/release.cfm?xID=52389DF7A690D-0626-F431-10F8D00BBA6AE467>.

37 Mia Rabson, "Canada will do What it Must to Keep B.C. from Blocking Trans Mountain: Carr", *CBC News* (12 February 2018), online: <www.cbc.ca/news/politics/carr-trans-mountain-bc-1.4531962>; Government of British Columbia, News Release, "Province Takes Further Action to Protect B.C. Wine Industry" (19 February 2018), online: <https://news.gov.bc.ca/releases/2018JTT0008-000236> . BC did challenge the wine ban through the Canadian Free Trade Agreement's (CFTA) dispute settlement process.

38 Government of British Columbia, News Release, "B.C. Government Moves Forward on Action to Protect Coast" (22 February 2018), online: <https://news.gov.bc.ca/releases/2018PREM0002-000252>.

Eby stated, "We believe B.C. has the ability to regulate movement of these substances through the province. This reference question seeks to confirm the scope and extent of provincial powers to regulate environmental and economic risks related to heavy oils like diluted bitumen."[39]

Earlier in April 2018, in the midst of this constitutional sparring between BC and Alberta, Kinder Morgan sent shockwaves through the Canadian political system by announcing it would cease all non-essential spending on the Trans Mountain Expansion Project, and gave an ultimatum of May 31 for governments in Canada to resolve their differences in a way "that may allow the Project to proceed." Kinder Morgan's media release stated:

> "… we have determined that in the current environment, we will not put KML shareholders at risk on the remaining project spend," said KML Chairman and Chief Executive Officer Steve Kean. The Project has the support of the Federal Government and the Provinces of Alberta and Saskatchewan but faces continued active opposition from the government of British Columbia. "A company cannot resolve differences between governments. While we have succeeded in all legal challenges to date, a company cannot litigate its way to an in-service pipeline amidst jurisdictional differences between governments," added Kean.[40]

The company squarely put the blame on the Government of BC:

> … Unfortunately BC has now been asserting broad jurisdiction and reiterating its intention to use that jurisdiction to stop the Project. BC's intention in that regard has been neither validated nor quashed, and the Province has continued to threaten unspecified additional actions to prevent Project success. Those actions have created even greater, and growing, uncertainty with respect to the regulatory landscape facing the Project….[41]

While the NDP has been careful to modify its rhetoric somewhat since it took power, pipeline proponents continue to refer back to the NDP's pre-election statement of intent. In its release announcing the ultimatum, the company stated, "since the change in government in June 2017, that government

39 Lauren Boothby, "B.C. Government Takes Pipeline Question to Court", *Burnaby Now* (26 April 2018), online: <www.burnabynow.com/news/b-c-government-takes-pipeline-question-to-court-1.23281968>. There is further discussion of the Reference and questions posed in the Reference in Martin Olyszinski's article in this special issue.

40 Kinder Morgan Canada Ltd., Media Release, "Kinder Morgan Canada Limited Suspends Non-Essential Spending on Trans Mountain Expansion Project" (8 April 2018), online: <https://ir.kindermorgancanadalimited.com/2018-04-08-Kinder-Morgan-Canada-Limited-Suspends-Non-Essential-Spending-on-Trans-Mountain-Expansion-Project>.

41 *Ibid*.

has been clear and public in its intention to use 'every tool in the toolbox' to stop the Project."[42]

In response to the Kinder Morgan ultimatum, Alberta's Premier Notley promised that "Alberta is prepared to do whatever it takes to get this pipeline built — including taking a public position in the pipeline. Alberta is prepared to be an investor in the pipeline."[43] On Twitter, she promised retaliation: "We will be bringing forward legislation giving our gov't the powers it needs to impose serious economic consequences on British Columbia if its government continues on its present course. Let me be absolutely clear, they cannot mess with Alberta."[44] She also suggested the conflict could amount to a constitutional crisis:

> There are those out there who are, at this point, calling this… a constitutional crisis for the country. And I don't know really if that's too far off. If the federal government allows its authority to be challenged in this way, if the national interest is given to the extremes on the left or the right, and if the voices of the moderate majority of Canadians are forgotten, the reverberations of that will tear at the fabric of Confederation for many many years to come.[45]

On April 16, 2018 Notley introduced Bill 12 (entitled *Preserving Canada's Economic Prosperity Act*) that created an export license requirement for crude oil, natural gas, and refined fuels, giving the Minister of Energy the authority to deny the issuance of a license if "it is in the public interest of Alberta to do so."[46] In announcing her intentions to introduce the legislation, Premier Notley declared, "Alberta must have the ability to respond. This is not an action that anyone wants to take. And it is one that I hope we never have to take. And it's not how Canada should work. And it's not how neighbours, frankly, should treat one other."[47] Sarah Hoffman, Alberta Deputy Premier, noted, "Their gov-

42 *Ibid*.

43 Government of Alberta, News Release, "Trans Mountain Pipeline Expansion: Premier Notley" (8 April 2018), online: <www.alberta.ca/release.cfm?xID=557308B866BAB-9A99-C601-19BC-D5A7237ECD71>.

44 Keith Baldrey, "Analysis: The Kinder Morgan Pipeline Row Is about to Get Real", *Global News* (11 April 2018), online: <https://globalnews.ca/news/4139323/analysis-kinder-morgan-pipeline-row/>.

45 Chris Hall, "Does Trudeau have a Trans Mountain Plan that goes Beyond Talk?" *CBC News* (9 April 2018), online: <www.cbc.ca/news/politics/kinder-morgan-pipeline-deadline-1.4611873>.

46 Alberta Bill 12, *An Act to preserve Canada's Economic Prosperity*, 4th Sess, 29th Leg, 2018, online: <www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_29/session_4/20180308_bill-012.pdf>.

47 Kelly Cryderman, Carrie Tait, & Mike Hager, "Notley Threatens to Turn off Oil Taps in Dispute with B.C. over Trans Mountain Pipeline", *The Globe and Mail* (8 March 2018), online: <www.theglobeandmail.com/news/alberta/notley-threatens-to-broaden-dispute-with-bc-over-trans-mountain-pipeline/article38253632/>.

ernment has caused pain to Alberta families. We can certainly do the same, and we've put a bill on the order paper that enables us to do that." Alberta's Minister of Justice, Kathleen Ganley, in a letter to David Eby declining to refer the legislation to the courts, affirmed, "Given B.C.'s transparent attempt to sow legal confusion by claiming constitutional authority it does not have in order to harass the pipeline investors into abandoning the project, the government of Alberta has a responsibility to its citizens to protect the interests of its citizens."[48]

In responding to the announcement, BC's Environment Minister, George Heyman expressed his dismay in these terms: "I see no reason for the government of Alberta to take any action when all B.C. has been doing is standing up for our interests in proposing some regulations that are well within our jurisdiction. We are determined to defend our environment, our economy and our coastline. We have tried to be the adults in the room here."[49] On May 22, 2018, BC launched a constitutional challenge to the Alberta legislation.[50] In justifying the move, BC's Attorney General David Eby decried the Alberta legislation as "blatantly unconstitutional":

> Today's filing came after we repeatedly called on Alberta not to move forward with blatantly unconstitutional legislation. We asked them instead to refer the matter to their courts as we had done with our legislation that they had concerns about. We also proposed that the federal government step in and bring all outstanding legal matters between B.C. and Alberta to the Supreme Court of Canada. This would fast track resolution of the inter-provincial dispute. It would bring finality and it would bring certainty. Unfortunately, both Alberta and Canada refused our proposals.[51]

BC's statement of claim argues that the *Act* is inconsistent with section 91(2) of the *Constitution Act* (giving the federal government exclusive authority over interprovincial trade, except where authorized by section 92A), and not

48 Attorney General of British Columbia, "Statement of Claim", No 1801 (Alberta: 2018), online: https://news.gov.bc.ca/files/Statement_of_Claim_Final.pdf> [Attorney General of BC]. British Columbia's statement of claim challenging the Alberta law contains a number of quotes by Alberta government officials explicitly referring to inflicting economic pain on BC to justify the legislation; Justine Hunter, "B.C. Prepares Court Challenge as Alberta Threatens to Cut off Oil Shipments", *The Globe and Mail* (17 May 2018), online: <www.theglobeandmail.com/canada/british-columbia/article-bc-prepares-court-challenge-as-alberta-threatens-to-cut-off-oil/>.

49 Richard Zussman, "British Columbians Could be Facing Gas at $2 to $3 per Litre without Alberta Oil," *Global News* (8 March 2018), online: <https://globalnews.ca/news/4071934/british-columbians-oil-ban-trans-mountain/>.

50 Attorney General of BC, *supra* note 48.

51 Amy Judd & Richard Zussman, "B.C. Taking Legal Action against Alberta over Bill Allowing Province to Cut off Gas," *Global News* (22 May 2018), online: <https://globalnews.ca/news/4224275/bc-legal-action-against-alberta-bill-cut-off-gas/>.

authorized by section 92A (because it allows discrimination among the provinces in export destination).[52]

The Government of Canada buys out Kinder Morgan Canada

While BC and Alberta clashed over the appropriate balance between federal and provincial venues, the federal government moved more decisively. On April 8, 2018, shortly after Kinder Morgan announced its May 31 ultimatum, federal finance minister Bill Morneau entered into negotiations with the company. After a month of apparently limited progress, he stated publicly that the federal government was prepared to offer Kinder Morgan, and any future owner of the project, an indemnity for any financial losses resulting from political opposition by the BC government.

Then on May 29, 2018, a new chapter in the Trans Mountain conflict began when Morneau made the stunning announcement that the government of Canada was purchasing Kinder Morgan Canada's Trans Mountain assets for $4.5 billion. Alberta would also contribute up to $2 billion to cover costs resulting from "unforeseen circumstances."[53] In response to the federal government buyout, BC Premier John Horgan made it clear that this did not change the province's position:

> It's not about politics. It's not about trade. It is about British Columbians' right to have their voices heard. To do so is squarely within our rights as a province, and our duty as a government. Ottawa has acted to take over the project…. At the end of the day, it doesn't matter who owns the pipeline. What matters is protecting B.C.'s coast — and our lands, rivers and streams — from the catastrophic effects of an oil spill.[54]

In her comments, Notley referred to the project as nation-building three times, and emphasized its pan-Canadian support and benefits: "I believe in Canada, not just as a concept, but as a country."[55] This shift in the project's organizational structure, from private sector to the federal government ownership, increases the Government of Canada's stakes in its success and could bol-

52 Attorney General of BC, *supra* note 48.

53 Canada, Department of Finance, "Backgrounder: Details of Agreement for the Completion of the Trans Mountain Expansion Project", (Ottawa: 29 May 2018), online: <www.canada.ca/en/department-finance/news/2018/05/backgrounder-details-of-agreement-for-the-completion-of-the-trans-mountain-expansion-project.html>.

54 John Horgan, "John Horgan: 'It Doesn't Matter Who Owns the Kinder Morgan Pipeline, the Risks Remain'", *Maclean's* (30 May 2018), online: <www.macleans.ca/opinion/john-horgan-kinder-morgan-op-ed/>.

55 Rachel Notley, "Rachel Notley on Trans Mountain: 'It's Time to Pick Those Tools Back Up, Folks'", *Maclean's* (30 May 2018, online: <www.macleans.ca/opinion/rachel-notley-trans-mountain-op-ed/>.

ster the political image of the project. But it doesn't change the constitutional conflicts over decision venues or how they are being framed by competing interests in the pipeline dispute.

Federal-provincial conflicts on Energy East[56]

Unlike the west coast pipelines, in the case of Energy East, there was no intergovernmental agreement between the federal government and the provinces to clarify the roles of the respective levels of government in the regulatory process. Both Québec and Ontario acted more as one might expect a jurisdiction-conscious province to act in this situation; they both chose to conduct their own reviews of the project. Taking a page from the book of BC Premier Christy Clark, in 2014, the Government of Québec sent TransCanada a list of seven conditions with which it expected the proponent to comply:

1. Compliance with the highest available technical standards for public safety and environmental protection;

2. Have world-leading contingency planning and emergency response programs;

3. Proponents and governments consult local communities and fulfill their duty to consult with Aboriginal communities;

4. Take into account the contribution to greenhouse gas emissions;

5. Provide demonstrable economic benefits and opportunities to the people of Ontario and Québec, in particular in the areas of job creation over both the short and long term;

6. Ensure that economic and environmental risks and responsibilities, including remediation, should be borne exclusively by the pipeline companies in the event of a leak or spill on ground or water, and provide financial assurance demonstrating their capability to respond to leaks and spills; and

7. Interests of natural gas consumers must be taken into account.[57]

56 This section is based on chapter a co-authored with Xavier Deschênes-Philion in a book manuscript in preparation.

57 Government of Ontario, News Release, "Agreements Reached at Québec-Ontario Joint Meeting of Cabinet Ministers" (21 November 2014), online: <https://news.ontario.ca/opo/en/2014/11/agreements-reached-at-quebec-ontario-joint-meeting-of-cabinet-ministers.html>.

Ontario Premier Kathleen Wynne joined Québec following a meeting between the province's two premiers. A month later, the two provinces agreed to remove the fourth condition on evaluating the pipeline's upstream greenhouse gas emissions after a meeting with Alberta premier Jim Prentice.[58]

Despite the display of accommodation, both provincial governments committed to their own reviews of the project, including its greenhouse gas implications.[59] The Ontario government directed the Ontario Energy Board to review the project, and public hearings were held in 2014. The Board's final report was published in 2015. The report expressed concerns about natural gas supply, impacts on aboriginal and other local communities, and the limited economic benefits for the province, but did not make any recommendations.[60] Ontario premier Kathleen Wynne expressed an accommodating position after a January 2016 meeting with Alberta premier Rachel Notley, stating "the people of Ontario care a great deal about the national economy and the potential jobs that this proposed pipeline project could create in our province and across the country."[61]

Due to different stakes, public attitudes, and its nationalist tradition, the government of Québec was less accommodating from the start. The Québec government sent TransCanada a letter in late 2014 informing the company that it was expected to comply with provincial laws and undergo a provincial assessment.[62] This put TransCanada in a challenging position. It wanted to avoid unduly complex procedures resulting from different requirements from different jurisdictions, and it had an interest in defending federal supremacy on pipeline regulation. But, it also understood the significance of gaining support from Québec; formal political opposition from the province could doom the project in the federal cabinet. Initially, TransCanada took the position that the

58 Adrian Morrow, "Wynne Drops Main Climate Change Requirement in Considering Energy East Pipeline", *The Globe and Mail* (3 December 2014), online: <www.theglobeandmail.com/news/politics/ontario-plays-down-climate-change-concerns-of-energy-east-pipeline/article21907743/>.

59 Ontario, Ontario Energy Board, "Giving a Voice to Ontarians on Energy East", (13 August 2015), online: <www.oeb.ca/sites/default/files/uploads/energyeast_finalreport_EN_20150813.pdf> [Ontario Energy Board]; Québec, Bureau d'audiences publiques sur l'environnement, "Greenhouse Gas Emissions and Climate Change Documents," (2016), online: <www.bape.gouv.qc.ca/sections/mandats/oleoduc_energie-est/documents/ges.htm> [BAPE].

60 Ontario Energy Board, *ibid*.

61 Postmedia News, "Kathleen Wynne Gives Tentative Backing to Energy East Pipeline as Rachel Notley Faces Criticism over Project", *Financial Post* (22 January 2016), online: <http://business.financialpost.com/news/economy/kathleen-wynne-gives-tentative-backing-to-energy-east-pipeline-as-rachel-notley-faces-criticism-over-project>.

62 BAPE, *supra* note 59.

supremacy of federal jurisdiction over pipelines meant that the company was not required to comply with provincial review requirements.[63]

In response, Québec decided to initiate a review of the project through the Bureau of Environmental Public Hearings (Bureau d'audiences publiques sur l'environnement — BAPE), with a starting date of January 2016. The province also decided to formally initiate the environmental assessment process under the *Environmental Quality Act*. At this point, TransCanada's refusal to participate in the provincial process became the subject of legal action. A coalition of environmental groups filed for an injunction that would require TransCanada to participate. Two weeks later, on March 1, 2016, Québec Environment Minister David Heurtel filed for an injunction to force TransCanada to comply with the provincial environmental assessment process. In justifying the action, Heurtal made a clear declaration of Québec's view of its jurisdiction:

> Today's motion is very simple and very clear: It signifies that whoever seeks to build a project in Québec must comply with all Québec laws and regulations. I clearly informed TransCanada Pipelines that it needed to table a project notice for Energy East. In the face of its inaction, the government has taken action. This is not only a matter of respect, but equally a question of fairness towards all companies that wish to do business in Québec.[64]

At this point, TransCanada reversed course and decided to comply with Québec's environmental assessment procedures, and committed to submitting an impact statement for the Québec portion of the pipeline. In exchange, Québec withdrew its application for an injunction.[65] But the company ran into numerous problems with the review, including its initial refusal to submit documents in French as required by Québec law. The assertion of Québec authority was an irritant to TransCanada, and one of a number of contributing factors which led the company to withdraw its application and terminate the project in

63 Daniel Gralnick, "Constitutional Implications of Québec's Review of Energy East", online: (September 2016) 4:3 Energy Reg Q, online: <www.energyregulationquarterly.ca/articles/repercussions-constitutionnelles-de-lexamen-du-projet-energie-est-par-le-quebec#sthash.KF4zKr4o.jrdlvHVC.dpbs>.

64 Québec, Bureau d'audiences publiques sur l'environnement, Press Release, "Energy East Pipeline – Motion for an Injunction against TransCanada: The Government Takes Action to Ensure Compliance with Québec Law" (1 March 2016), online: <www.mddelcc.gouv.qc.ca/infuseur/communique_en.asp?no=3398>.

65 Daniel Gralnick, "Constitutional Implications of Quebec's Review of Energy East", online: (September 2016) 4:3 Energy Reg Q <www.energyregulationquarterly.ca/articles/repercussions-constitutionnelles-de-lexamen-du-projet-energie-est-par-le-quebec>.

October 2017, four years after it was first proposed.[66] In its media release, the company was notably terse in explaining the decision: "After careful review of changed circumstances, we will be informing the National Energy Board that we will no longer be proceeding with our Energy East and Eastern Mainline applications."[67] One of those circumstances was unquestionably the persistence of public and governmental opposition in Québec.

The division of powers between the provinces and the federal government on energy and environmental policy has been highly contentious at different points in Canada's history. Pipeline opponents have worked to mobilize all potential tools to delay or block new oil sands pipelines, and have pushed sympathetic provincial governments to mobilize politically and legally against the pipeline. BC's reference case will provide greater clarity about the extent of provincial authority over interprovincial pipelines.

Division of powers: the role of municipalities

In addition to some provinces, local governments also tried to shift decision venues to grant them a great share of pipeline decision authority. In the Northern Gateway case, Kitimat, the city that would host the terminal on the BC coast, held a plebiscite that resulted in a vote against the project.[68] In the Energy East case, the 82 municipalities of the Montréal Metropolitan Community (MMC) unanimously voted to oppose the Energy East pipeline. It is the Trans Mountain case, however, that has addressed the issue of the legal, constitutional authority of municipalities to play a significant role in pipeline regulation. Before addressing the City of Burnaby case directly, it is useful to review how different actors sought to frame the political discourse about the role of local communities.

Community consent in pipeline conflict discourse

The issue of consent by affected communities has been a vital part of the discourse in pipeline conflicts. Indigenous groups have used the UN Declaration on the Rights of Indigenous Peoples, discussed below, to bring consent into the

66 Ron Wallace, "The Tortuous Path to NEB 'Modernization'", online: (2018) 6:2 Energy Reg Q <www.energyregulationquarterly.ca/articles/the-tortuous-path-to-neb-modernization#sthash.gWqr19I7.n6CVHL72.dpbs>.

67 TransCanada Corporation, "TransCanada Announces Termination of Energy East Pipeline and Eastern Mainline Projects", (5 October 2017), online: <www.marketwired.com/press-release/transcanada-announces-termination-energy-east-pipeline-eastern-mainline-projects-tsx-trp-2236161.htm>.

68 Paul Bowles & Fiona MacPhail, "The Town that Said 'No' to the Enbridge Northern Gateway Pipeline: The Kitimat Plebiscite of 2014" (January 2017) 4:1 Extractive Indus Soc'y at 15-23.

discourse. For non-Indigenous communities, the discourse has been dominated by a slogan introduced by Justin Trudeau well before the October 2015 election. Trudeau first used the phrase in public in October 2013 in a speech on energy policy to the Calgary Petroleum Club. Criticizing Prime Minister Stephen Harper for his inability to get new pipelines approved and built, Trudeau argued that Harper "needlessly antagonized" both the Obama administration and the Canadian public: "Times have changed, my friends. Social license is more important than ever. Governments may be able to issue permits, but only communities can grant permission."[69]

Despite knowing that, if transformed into an actual procedural rule, governance would be virtually unworkable, Trudeau adopted the slogan as a flagship frame for his energy policy from the start. This phrase was used frequently when talking to voters during the campaign about pipelines.[70] The Liberal Party of Canada's 2015 election platform clearly articulated the institutional rule with respect to decision venues: "While governments grant permits for resource development, only communities can grant permission."[71]

While this phrase was a "go to" slogan for the Liberals during the 2015 campaign, it virtually disappeared from their communications as soon as they were elected. In fact, after the election, there is only one instance where Trudeau seems to have used a version of the phrase in public, in March 2016:

> I think there is a desire by provinces across the country, understandably, that they want to ensure that they're acquiring the kind of social license that hasn't been acquired in the past. And that's where we're looking at working constructively and collaboratively with jurisdictions across the country for projects in the national interest in a way that understands that even though governments grant permits, ultimately only communities grant permission. And drawing in from voices and a range of perspectives, is going to lead us to a better number of, better kinds of solutions, and better outcomes for everyone across the country.[72]

The statement was not in prepared remarks, but in response to a reporter's question about his reaction to the government of Québec seeking an injunction

69 Liberal Party of Canada, "Liberal Party of Canada Leader Justin Trudeau's Speech to the Calgary Petroleum Club", (30 October 2013), *Liberal Party of Canada* (blog), online: <www.liberal.ca/liberal-party-canada-leader-justin-trudeaus-speech-calgary-petroleum-club/>.

70 Amy Minsky, "Fact Check: Did Justin Trudeau Break His Word by Approving Pipelines?", *Global News* (30 November 2016), online: <https://globalnews.ca/news/3097871/fact-check-justin-trudeau-break-promise-approving-pipelines/>.

71 Liberal Party of Canada, "Environmental Assessments", (2015), *Liberal Party of Canada* (blog), online: <www.liberal.ca/realchange/environmental-assessments/>.

72 CBC News, Trudeau: "Governments Grant Permits, Communities Grant Permission", *CBC News* (1 March 2016), online: <www.cbc.ca/player/play/2684686536>.

against the Energy East pipeline. The phrase cannot be found using the search function on the Prime Minister of Canada's news page (https://pm.gc.ca/eng/news). The phrase is also absent from the Government of Canada website, according to the search function. Searching Hansard for the 42nd Parliament beginning with the first Speech from the Throne of Trudeau's government, the phrase has been not used in Parliament by any member of Trudeau's government.[73] Given that the Trudeau government has taken a number of actions that are inconsistent with the slogan, it is a perfect case study of how rhetorical incentives differ when political parties are in campaign mode and when they are in governing mode.

While the slogan disappeared — other than Trudeau's one impromptu slip — from the Liberal government's discourse once in power, it has become a staple of opposition discourse. Not only does it clearly articulate a standard requiring community support, but it also punctuates the hypocrisy of the Trudeau government. In response to the Trudeau government's approval of the Trans Mountain pipeline in November 2016, Burnaby Mayor Derek Corrigan employed the slogan directly: "Prime Minister Trudeau said 'Governments grant permits; ultimately only communities grant permission.' We agree. He does not, however, have our permission and we will continue to make that clear."[74]

Burnaby vs Trans Mountain and the NEB

In the Trans Mountain case, the authority of municipalities to influence pipeline regulation through zoning or permitting authority became a major issue. While a number of Lower Mainland BC municipalities have taken positions against the project, the cities of Vancouver and Burnaby have been most active in fighting it. The City of Vancouver has taken a very vocal opposition role. It created an elaborate website that hosts 12 research reports supporting its position,[75] acted as a formal intervenor, and challenged several federal decisions

73 The Canadian House of Common's Parliamentary webpage enabled a keyword search of Hansard publications by "parliament", "session", and "speaker", among other categorical search tags. Searches in English and French for "grant permission" and "accordent la permission" returned zero related results for members of the Trudeau government. It was used three times by two different Liberal backbenchers but never by a member of cabinet.

74 City of Burnaby, News Release, "Mayor Derek Corrigan Statement in Response to Federal Government Approval of Kinder Morgan Pipeline Proposal" (29 November 2016), online: <www.burnaby.ca/About-Burnaby/News-and-Media/Newsroom/Mayor-Derek-Corrigan-Statement-in-Response-to-Federal-Government-Approval-of-Kinder-Morgan-Pipeline-Proposal_s2_p5957.html>.

75 "It's not worth the risk," online: City of Vancouver, <https://notworththerisk.vancouver.ca>.

in court. For the most part, it has acted like other interested parties in the sense that the project's physical location is not within the city's boundaries and thus it was not involved in any permitting decisions.[76]

The role of Burnaby, where the pipeline ends at the tanker terminal, has been the most controversial and involved the most jurisprudence. The conflict between Kinder Morgan and Burnaby erupted when the company decided, six months after its initial submission to the NEB, to amend its application to change the route of the pipeline through Burnaby. Thinking the route would be less disruptive to Burnaby residents, Kinder Morgan wanted to reroute the pipeline through Burnaby Mountain. The change led the NEB to request more information about route design, which in turn required the company to perform seismic testing by drilling on Burnaby Mountain in a park known as the Burnaby Mountain Conservation Area. The City of Burnaby sought to block the drilling by enforcing its bylaws against that type of disruption in the park without a permit. Conflict erupted in the regulatory tribunal, in the courts, and on the ground.

Kinder Morgan appealed to the NEB, and the NEB, referring to the doctrines of federal paramountcy and interjurisdictional immunity, ruled that the *National Energy Board Act* clearly gave Kinder Morgan the authority to perform the testing without the consent of the local government. Burnaby appealed that ruling to the Federal Court of Appeal, but that court refused to grant leave to appeal several times, without providing reasons. In response, Burnaby sought to shift the venue and appealed to the BC Supreme Court. In a December 2015 ruling, the court was clearly of the view that the case did not belong before it, and called Burnaby's application "an abuse of process." It gave reasons regardless, rejecting the city's argument and concluding that the doctrine of federal paramountcy was properly interpreted and applied by the NEB: "Where valid provincial laws conflict with valid federal laws in addressing interprovincial undertakings, paramountcy dictates that the federal legal regime will govern. The provincial law remains valid, but becomes inoperative where its application would frustrate the federal undertaking."[77]

76 The city of Burnaby did challenge the BC government's decision to issue an Environmental Assessment Certificate in court, which was rejected by the BC Supreme Court. *Vancouver (City) v. British Columbia* (Environment), 2018 BCSC 843, [2018] BCJ No 970. For further discussion of this decision see Martin Olszynski's contribution in this special issue. The city was also among the plaintiffs challenging the federal government's approval of Trans Mountain in the Federal Court of Appeal.

77 *Burnaby (City) v Trans Mountain Pipeline ULC*, 2015 BCSC 2140, [2015] BCJ No 2503; Bankes, "BC Court Confirms", *supra* note 17.

Despite protests and the arrest of over 100 demonstrators in November and December 2014, the conflict quieted for over a year until the Trans Mountain Expansion Project was approved with conditions in November 2016, and the company began preparing for preliminary construction activities around the terminal in mid-2017. One condition of the approval is that the company is required to "to apply for, or seek variance from, provincial and municipal permits and authorizations that apply to the Project."[78] Conflict quickly developed over whether or not the City of Burnaby was deliberately delaying the issuance of the necessary permits. Kinder Morgan applied to the NEB to be exempted from the requirement to obtain permits, and requested the establishment of a "process for Trans Mountain to bring similar future matters to the Board for its determination in cases where municipal or provincial permitting agencies unreasonably delay or fail to issue permits or authorizations in relation to the Project."[79]

In another major blow to municipal powers in influencing pipeline decision-making, the NEB ruled that, despite there being no evidence of "political interference or improper motives," Burnaby's processes "were not reasonable, resulting in unreasonable delay." That delay "constitutes a sufficiently serious entrenchment on a protected federal power," thus having the effect of being an impairment on federal power. As a result, the NEB declared the Burnaby bylaws in question "inapplicable."[80] Burnaby and the Government of BC applied for leave to appeal to the Federal Court of Appeal, but that application was dismissed, again without reasons given. In responding to this decision, Mayor Derek Corrigan took issue with the decision and announced an appeal to the Supreme Court of Canada:

> The federal court has refused to review the decisions made by the National Energy Board. They're not giving consideration to the arguments being made by the City and the provincial government that oppose the NEB ruling. The Court System should be the body that decides whether or not this is fair and just, but they dismissed our application without reasons. Very clearly, it's something the court should have dealt with and given reasons why it's not allowing the provincial government to exert its

78 Nigel Bankes & Martin Olszynski, "TMX v Burnaby: When do Delays by a Municipal (or Provincial) Permitting Authority Trigger Paramountcy and Interjurisdictional Immunity?" *ABlawg* (24 January 2018), online: <https://ablawg.ca/2018/01/24/tmx-v-burnaby-when-do-delays-by-a-municipal-or-provincial-permitting-authority-trigger-paramountcy-and-interjurisdictional-immunity/>.

79 Canada, National Energy Board, "Order MO-057-2017. Reasons for Decision", Trans Mountain Pipeline ULC (Ottawa: 2017), online: <https://apps.neb-one.gc.ca/REGDOCS/File/Download/3436250>.

80 *Ibid*.

> authority to protect the environmental interests of the province. We will, therefore, now ask the Supreme Court of Canada to perform this function.[81]

The city's news release emphasized that the NEB "found that there was no evidence of political interference or deliberate obstruction."[82]

Pipeline opponents have worked hard to mobilize affected communities against pipelines. For the most part, that opposition has been expressed politically, taking advantage of the ethic of community consent as well as the influence of local political leaders in swaying votes in elections in senior jurisdictions. The legal powers of municipalities are limited to local zoning and permitting authority; Burnaby's efforts to use those powers to throw a wrench in the gears of the Trans Mountain project have been resoundingly rejected by the NEB and the courts. But they have contributed to delays and cost increases for the project, and contributed to the political risks that forced Kinder Morgan to sell the project to the Government of Canada.

Indigenous rights: two competing visions

One of the most divisive conflicts on procedural rules in pipeline decision-making is the issue of what role Indigenous groups have in resource decision-making. Indigenous rights are protected by Section 35 of the Constitution, but there is still significant disagreement about the content of those rights. This disagreement is being played out in the court rooms, cabinets, and in public discourse about pipelines. The oil sands pipeline conflicts, like many other natural resource policy issues in Canada, reflect two competing visions of the appropriate role of Indigenous groups in decision-making on projects that potentially affect their rights and title. The establishment frame, employed by pipeline advocates, is based on current Canadian jurisprudence, and emphasizes a duty to consult Indigenous groups but explicitly stops short of according them a veto. The consent frame is based on the "free, prior, and informed consent" provisions of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In circumstances in which there is opposition from Indigenous groups, the two visions imply markedly different procedural rules with direct implications for the relative power of pro- and anti-pipeline coalitions. The

81 City of Burnaby, News Release, "Burnaby to Appeal NEB Decision on City Bylaws to the Supreme Court of Canada"(27 March 2018), online: <www.burnaby.ca/About-Burnaby/News-and-Media/Newsroom/Burnaby-to-Appeal-NEB-Decision-on-City-Bylaws-to-the-Supreme-Court-of-Canada_s2_p6446.html>.

82 *Ibid.* The Supreme Court of Canada denied leave August 23, 2018 online: <https://scc-csc.lexum.com/scc-csc/scc-l-csc-a/en/17240/1/document.do>.

establishment frame clearly authorizes governments to proceed with projects over the opposition of Indigenous groups so long as they can satisfy courts that their consultation process was sufficient. The consent frame accords authority to Indigenous groups to determine the outcome of resource decision-making related to their rights and title.

The establishment frame

The establishment frame has its roots in the 2004 *Haida*[83] and *Taku*[84] decisions by the Supreme Court of Canada. The *Haida* case built on the Court's 1997 ruling in *Delgamuukw*[85]:

> The Court's seminal decision in *Delgamuukw*,… in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation" on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.[86]

The *Haida* decision then went on to address an issue on which *Delgamuukw* was silent.

> 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.[87]

In *Haida,* the government did not consult the First Nation. The less celebrated *Taku* case, however, offers an example where the Court concluded that government consultation was adequate despite the continued opposition from the Taku First Nation. The case involved a mine in northern British Columbia and, in particular, a road to the mine that crosses lands of concern to the Taku River Tlingit First Nation (TRTFN). In this case, the government incorporated the TRTFN in the project committee that guided the environmental assessment. It also altered the control of access to the road in an effort to address the

83 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*].
84 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].
85 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997] SCJ No 108 [*Delgamuukw*].
86 *Haida*, *supra* note 83 at 24.
87 *Ibid* at 48.

concerns raised. These accommodation measures did not alter the opposition of the TFTRN, but the Court ruled that the measures were sufficient:

> …Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process. In this case, the Province accommodated TRTFN concerns by adapting the environmental assessment process and the requirements made of Redfern in order to gain project approval.[88]

The standards articulated by these 2004 case have been applied in a number of cases most recently in the 2017 *Chippewas of the Thames*[89] decision where the Court also reached the conclusion that the Crown (through the NEB) had met its duty to consult:

> …A decision to authorize a project cannot be in the public interest if the Crown's duty to consult has not been met. Nevertheless, this does not mean that the interests of Indigenous groups cannot be balanced with other interests at the accommodation stage. Indeed, it is for this reason that the duty to consult does not provide Indigenous groups with a "veto" over final Crown decisions (*Haida*, at para. 48). Rather, proper accommodation "stress[es] the need to balance competing societal interests with Aboriginal and treaty rights" (*Haida*, at para. 50).[90]

In the establishment vision, good faith consultation is sufficient, consent is not required. Pipeline proponents have emphasized the importance of consultation but also emphasize that First Nations are not accorded a veto. Shortly after approving Trans Mountain in late 2016, Prime Minister Trudeau spoke of the role of First Nations opposing the project: "No, they don't have a veto."[91] BC Premier Christy Clark, once she had come to support the pipeline, gave a perfect depiction of the establishment frame: "If we work hard to get consent and work to accommodate, we can move ahead with projects without it at the end of the day."[92]

88 *Taku River*, *supra* note 84 at 2.

89 *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 SCR 1099 [*Chippewas*].

90 *Ibid* at 59.

91 Postmedia News, "Trudeau Says First Nations 'Don't Have a Veto' over Energy Projects", *Financial Post* (20 December 2016), online: <http://business.financialpost.com/news/trudeau-says-first-nations-dont-have-a-veto-over-energy-projects>.

92 The Canadian Press, "Engage Early to Avoid First Nations Veto, Perry Bellegarde Tells Energy Conference", *CTV News* (6 October 2016), online: <www.ctvnews.ca/politics/engage-early-to-avoid-first-nations-veto-afn-chief-tells-energy-conference-1.3105035>.

Establishment cases on pipelines

This doctrine can be seen in four cases involving oil sands pipelines. The 2016 *Gitxaala Nation*[93] decision of the Federal Court of Appeal, involving the Northern Gateway Pipeline, established a standard for the type of consultation the courts would find inadequate. The 2017 *Chippewas of the Thames* Supreme Court of Canada case, involving the Line 9 reversal project, provided a guidepost for getting court endorsement of consultation processes despite the absence of consent. The 2018 *Squamish Nation* decision of the BC Supreme Court, involving the Trans Mountain project, reinforces the establishment doctrine.[94] And finally in the 2018 *Tsleil-Waututh Nation* case, the Federal Court of Appeal applied *Gitxaala* to quash the approval of the Trans Mountain Expansion Project.[95]

Gitxaala Nation

The Northern Gateway pipeline proposal experienced its greatest setback in June 2016. The Federal Court of Appeal, in reviewing eighteen challenges to the government's decision from First Nations and environmental groups, consolidated into one decision, quashed Enbridge's certificate of public convenience and necessity for the project. The decision reflected a stunning victory for pipeline opponents, but the legal reasoning underlying the decision contained quite mixed ammunition for critics of pipelines and other large infrastructure projects.

The Federal Court of Appeal's decision was based on its conclusion that the Harper government engaged in a deeply flawed consultation process with First Nations that did not meet the government's obligations. Aboriginal engagement for the project was guided by a framework document issued by the federal government in February 2009. The process outlined five phases of the consultations: (1) a preliminary phase of consultation about the terms and conditions of the review process; (2) a pre-hearing phase to inform Aboriginal groups about the process and encourage their participation; (3) the hearing phase where Aboriginal participation was encouraged and supported; (4) the post-hearing phase to consult groups after the release of the Joint Review Panel but before the cabinet's final decision; and (5) the permitting stage where additional consultations would be conducted on implementing the conditions

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

94 *Squamish Nation v British Columbia (Environment)*, 2018 BCSC 844, [2018] BCJ No 971 [*Squamish*].

95 *Tsleil-Waututh Nation v. Canada (Attorney General),* 2018 FCA 153 [*Tsleil-Waututh]*. These four cases are all discussed in more detail in David Wright's contribution to this special issue.

and other legal requirements for authorization.[96] While it lauded the federal government's consultations during the first three phases, it was the fourth, the post-hearing stage, where the Federal Court of Appeal found major flaws in the government's performance.

Two paragraphs from the decision effectively summarize the Court's rationale:[97]

> 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.
>
> We have applied the Supreme Court's authorities on the duty to consult to the uncontested evidence before us. We conclude that Canada offered only a brief, hurried and inadequate opportunity in Phase IV — a critical part of Canada's consultation framework — to exchange and discuss information and to dialogue. The inadequacies — more than just a handful and more than mere imperfections — left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored. Many impacts of the Project — some identified in the Report of the Joint Review Panel, some not — were left undisclosed, undiscussed and unconsidered. It would have taken Canada little time and little organizational effort to engage in meaningful dialogue on these and other subjects of prime importance to Aboriginal peoples. But this did not happen.

While these passages show the court was quite critical of the Harper government's consultation approach, the court emphasized it was merely applying existing law: "[I]n reaching this conclusion, we have not extended any existing legal principles or fashioned new ones. Our conclusion follows from the application of legal principles previously settled by the Supreme Court of Canada to the undisputed facts of this case."[98] The court did not see itself as advancing the duty of the Crown any closer to the "free, prior, and informed consent" advocated by many First Nations.

96 *Gitxaala*, *supra* note 89 at 14-15.
97 *Ibid* at 279, 325.
98 *Ibid* at 9.

The decision had the effect of putting the Trudeau government in the position of either accepting that pipeline certificates were quashed or restarting the phase 4, post-Joint Review Panel consultations with First Nations. Given his commitments in the 2015 election campaign and the lack of reasons to believe the position of any First Nation had changed since the Harper government process, it really was not much of a decision at all. The government declined to take any further steps.

Chippewas of the Thames

In a case involving Enbridge's Line 9, the Supreme Court of Canada's 2017 decision in *Chippewas of the Thames* reached a different conclusion while affirming "that the duty to consult does not provide Indigenous groups with a 'veto' over final Crown decisions (*Haida*, at para. 48). Rather, proper accommodation 'stress[es] the need to balance competing societal interests with Aboriginal and treaty rights' (*Haida*, at para. 50)."[99]

The Supreme Court described the Board's consultation practices in *Chippewas* as follows:[100]

> …the Chippewas of the Thames were given a sufficient opportunity to make submissions to the NEB as part of its independent decision-making process (consistent with *Haida*, at para. 44). Here, the NEB held an oral hearing. It provided early notice of the hearing process to affected Indigenous groups and sought their formal participation. As mentioned above, the Chippewas of the Thames participated as an intervener. The NEB provided the Chippewas of the Thames with participant funding which allowed them to prepare and tender evidence including an expertly prepared "preliminary" traditional land use study (C.A. reasons, at para. 14). Additionally, as an intervener, the Chippewas of the Thames were able to pose formal information requests to Enbridge, to which they received written responses, and to make closing oral submissions to the NEB.

In the Court's view, these practices met the constitutional standard:[101]

> …The NEB reviewed the written and oral evidence of numerous Indigenous interveners and identified, in writing, the rights and interests at stake. It assessed the risks that the project posed to those rights and interests and concluded that the risks were minimal. Nonetheless, it provided written and binding conditions of accommodation to adequately address the potential for negative impacts on the asserted rights from the approval and completion of the project.

99 *Chippewas*, *supra* note 86 at 59.
100 *Ibid* at 52.
101 *Ibid* at 64.

Squamish Nation

In the wake of the *Coastal First Nations* ruling (discussed above) that rejected BC's deferral to the federal government decision on Northern Gateway, the provincial government responded to the change in assessment requirements by launching its own environmental assessment process of the Trans Mountain project.[102] Having negotiated financial contributions to the province's budget from the proponent Kinder Morgan to satisfy her fifth "fair share" condition, Premier Clark's government issued an Environmental Assessment Certificate in January 2017. The Squamish Nation challenged that decision in court due to insufficient consultation, focusing in part on a number of uncertainties in the NEB's 2016 report.

The 2018 decision of the BC Supreme Court in *Squamish Nation* reinforces the establishment doctrine elaborated by *Chippewas of the Thames*. The Court declared that the precedents referred to by the Squamish should not be seen "as establishing as a principle of law that adequate consultation requires the resolution of all uncertainty before a decision is made".[103] The court concluded that the province had considered the Squamish's concerns in good faith and accommodate them appropriately:

> The question is not whether, for instance, British Columbia did everything possible to protect the marine and land environments from the risk of catastrophic spills. The question is whether, viewing the process as a whole, British Columbia adequately considered Squamish's concerns arising from the process in coming to its decision. I find that it did. Squamish was afforded ample opportunity to communicate those concerns, and to comment on the EAO's responses. The conditions recommended by the EAO after consultation, adopted by the Ministers, included a number addressing the marine environment, oil spill preparedness, access through traditional territory, land uses for cultural and spiritual purposes and requirements for ongoing consultation reports from Trans Mountain.[104]

The court took note of the Squamish Nation's continued strong opposition to the project, but endorsed the province's consultation nonetheless: "I must concern myself not with the result but with the process".[105] Hence, in the establishment frame and current doctrine, the ruling standard is good faith consultation, not consent.

102 British Columbia, Environmental Assessment Office, "Trans Mountain Expansion", (accessed 22 June 2018), online: <https://projects.eao.gov.bc.ca/p/trans-mountain-expansion/detail>.

103 *Squamish*, *supra* note 94 at 167.

104 *Ibid* at 172.

105 *Ibid* at 198.

Tsleil-Waututh Nation

In the primary court challenge to the Trans Mountain Expansion Project's approval, the Federal Court of Appeal again quashed the certificate of a pipeline to the west coast.[106] This outcome surprised many, because the Trudeau government claimed to have learned from, and be applying the principles of, the *Gitxaala* case involving the Northern Gateway Pipeline. In its decision, the court noted that the federal government had taken some specific steps to ensure "that the flaws identified by the Court in *Gitxaala* were remedied and not repeated…."[107] And the court agreed that there were "…significant improvements in the consultation process…."[108]

Nonetheless, the court found the consultation was "…unacceptably flawed and fell short of the standard prescribed by the jurisprudence of the Supreme Court…."[109] In making the finding, the court emphasized the importance of "meaningful two-way dialogue":

> I begin the analysis by underscoring the need for meaningful two-way dialogue in the context of this Project and then move to describe in more detail the three significant impediments to meaningful consultation: the Crown consultation team's implementation of their mandate essentially as note-takers, Canada's reluctance to consider any departure from the Board's findings and recommended conditions, and Canada's erroneous view that it lacked the ability to impose additional conditions on Trans Mountain. I then discuss Canada's late disclosure of its assessment of the Project's impact on the Indigenous applicants. Finally, I review instances that show that as a result of these impediments the opportunity for meaningful dialogue was frustrated.[110]

The *Gitxaala* and *Tsleil-Waututh* cases show that the establishment doctrine, while falling short of providing the right to consent favoured by the advocates of the consent doctrine, can be applied by courts with a sufficiently "hard look" to be extremely demanding.

The consent frame

In contrast to the establishment frame, the consent frame is based on the ethic of consent that asserts a different procedural rule. It derives from a vision of traditional Indigenous law under which First Nations governed their

106 *Tsleil-Waututh*, *supra* note 91.
107 *Ibid* at 551.
108 *Ibid* at 552.
109 *Ibid* at 557.
110 *Ibid* at 562.

own territories, endorsed by the modern day UNDRIP.[111] UNDRIP uses the standard "free, prior, and informed consent" (FPIC) to describe the role of Indigenous groups in decision-making related to their own territories. For example, Article 32 on resource and land development reads: "States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources…." The FPIC standard is referenced in five other UNDRIP articles.[112]

Canadian governments have increasingly expressed support for UNDRIP. When the Harper government reluctantly endorsed the Declaration in November 2010, the Government of Canada took pains to note that it objected to the provision of "free, prior and informed consent when used as a veto." The statement declared, "We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework."[113] Federal government discourse about UNDRIP changed with the election of the Trudeau Liberal administration in 2015. In his mandate letters to the Minister of Indigenous and Northern Affairs, as well as other ministers, Trudeau directed them to implement UNDRIP. In May of 2016, the Minister of Indigenous and Northern Affairs proclaimed that "Canada is now a full supporter, without qualification, of the declaration."[114] Yet, federal ministers continue to argue that it is permissible for projects to proceed without the consent of affected First Nations. Referring to the Trudeau government's purchase of the pipeline in May, 2018, Indigenous and Northern Affairs Minister Carolyn Bennett stated flatly, "We have been very clear that FPIC is not a veto."[115]

111 While Indigenous discourse in Canada tends to emphasize the links to UNDRIP in advocating consent, the consent has been referred to in Canadian jurisprudence as well. See *Delgamuukw*, *supra* note 85 at 161; *Haida*, *supra* note 83; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.

112 UNDESA Division for Inclusive Social Development Indigenous Peoples, "United Nations Declaration on the Rights of Indigenous Peoples" (September 2007), online: <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

113 Canada, Indigenous and Northern Affairs Canada, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples", (Ottawa: 10 May 2016), online: <www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html>.

114 *Ibid.*

115 Jorge Barrera, "Buying and Expanding Trans-Mountain Pipeline not a Violation of Indigenous Rights, Says Minister", *CBC News* (29 May 2018), online: <www.cbc.ca/news/indigenous/trans-mountain-pipeline-bc-first-nations-1.4682395>.

Yet, Indigenous leaders and their allies argue that "free, prior, and informed consent" means what it seems to mean. This standard of consent has become a core part of the opposition discourse. Referring to Trans Mountain, Assembly of First Nations Chief Perry Bellegarde argued, "Free, prior and informed consent means First Nations have the right to say yes or no and to determine conditions for development in their territories."[116] In talking about Energy East, Ghislain Picard, Regional Chief of the First Nation Chiefs of Québec-Labrador, stated: "Now that our Chiefs have decided to reject the pipeline, we will be asking that Québec and Canada respect such decision if they are to fulfil their Constitutional obligations and if they are to respect the United Nations *Declaration on the Rights of Indigenous Peoples*."[117] In early 2018, the House of Commons passed a private members bill, *An Act to Ensure that the Laws of Canada are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples*. Referring to that bill, Grand Chief Stewart Phillip of the Union of British Columbia Indian Chiefs maintained, "Bill C-262 further validates what we already know: Kinder Morgan cannot proceed without the consent of the First Nations along its path, so many of which oppose it."[118]

While pushing for the right to consent, pipeline opponents seem to scrupulously avoid the use of the term "veto" in their framing. For example, Roshan Danesh, a lawyer who works with Aboriginal peoples, argued: "'Consent' and 'veto' are distinct. The interchangeable use of the terms — whether out of ignorance, or as a deliberate attempt to create fear or confusion — is wrong and should stop."[119] Paul Joffe sets out key differences in these terms: "'Veto' implies an absolute power, with no balancing of rights. This is neither the intent nor interpretation of the UN Declaration [United Nations Declaration on the Rights of Indigenous Peoples], which includes some of the most comprehensive balancing provisions in any international human rights instrument." These balancing provisions include the "principles of justice, democracy, respect

116 Rachel Gilmore, "Bellegarde Breaks Silence on Kinder Morgan", *iPolitics*(10 April 2018), online: <https://ipolitics.ca/2018/04/10/bellegarde-breaks-silence-on-kinder-morgan/>.

117 Assembly of First Nations of Quebec and Labrador, "First Nations of Quebec Officially Oppose Energy East Pipeline", *Canadian Newswire* (15 June 2016), online: <www.newswire.ca/news-releases/first-nations-of-quebec-officially-oppose-energy-east-pipeline-583165411.html>.

118 Union of British Columbia Indian Chiefs, News Release, "As Trudeau Ramps Up Pressure to Build, First Nations from Across Canada Stand in Solidarity against Kinder Morgan Pipeline" (8 February 2018), online: <www.ubcic.bc.ca/nokm2018>.

119 Rosha Danesh, "Opinion: Understanding the Relationship between Consent and Veto," *Vancouver Sun* (24 December 2016), online: <http://vancouversun.com/opinion/opinion-understanding-the-relationship-between-consent-and-veto>; See also Jason Tockman, "Distinguishing Consent from Veto in an Era of Reconciliation", *Policy Note* (10 April 2017), online: <www.policynote.ca/distinguishing-consent-from-veto-in-an-era-of-reconciliation/>.

for human rights, equality, non-discrimination, good governance and good faith. These are core principles of both the Canadian and international legal systems."[120]

Tockman defines consent when speaking of free, prior, and informed consent as outlined in UNDRIP: "FPIC is defined as both a process and an endpoint that involves the 'cooperative agreement' of relevant parties. For consent to be obtained, affected Indigenous peoples must be brought in as partners early in the process and at various stages, and their agreement with the project or policy must be secured, free of any coercion." He continues: "… if an affected Indigenous nation withholds consent, consent has not been reached."[121] Regardless of what terms different parties prefer, the core question remains under what conditions, if any, settler governments might proceed in the absence of consent.

Indigenous groups in Canada have made significant strides in advancing their rights by focusing on the institutional venue of the courts. While their consent frame has been increasingly influential in political discourse about resource projects, it has not yet been adopted by Canadian courts. Until Canada either changes its legislation or Constitution, or the Supreme Court of Canada has a radical shift in doctrine, those advocating the paradigm of consent face an uphill battle in the courts.

Conclusion

This analysis has shown the politics of structure at work in the conflicts over Canadian oil sands pipelines. The most prevalent institutional strategies in this case have been venue-shifting among levels or branches of government, and procedural rules with respect to who can participate in hearings and the role of Indigenous groups in resource decision-making. While not a constitutional issue, changes in organizational structure also came to play a significant role in the Trans Mountain case when the federal government purchased the project from Kinder Morgan.

The two most divisive and challenging institutional conflicts have been over provincial rights and Indigenous rights. Opposition from the Government

120 Paul Joffe, "'Veto' and 'Consent' — Significant Differences"(31 July 2015) Unpublished Paper, online: <www.afn.ca/uploads/files/2015_usb_documents/veto-and-consent-significant-differences-joffe-final-july-31-15.pdf>.

121 Jason Tockman, "Eliding Consent in Extractivist States: Bolivia, Canada, and the UN Declaration on the Rights of Indigenous Peoples" (6 October 2017) 22:3 Intl JHR at 325-349.

of Québec, in combination with others, contributed to TransCanada's decision to terminate the project. BC's specification of conditions for support on pipelines put it sharply at odds with neighbouring Alberta and complicated efforts to develop a national energy strategy. After the 2017 election, the anti-pipeline NDP in BC significantly increased the political risks to proponent Kinder Morgan, so much so that it chose to sell the project to the Government of Canada.

On Indigenous rights, there remains a considerable gap between the establishment doctrine of consultation and accommodation and the aspirations of some Indigenous leaders to have the right to consent on projects affecting their rights and title. Clearly, law as interpreted by the courts constrains certain types of strategies. Without a change in legislation that enshrines consent principles in law, it is hard to see how a new political equilibrium could emerge.

The inability of advocates of an Indigenous right to consent to have that standard respected by governments and project proponents is an indicator of the ultimate power of law over discourse. Rhetorical strategies adopted by strategic actors can appeal to broad values and motivate activists, but their power is rarely a match for the hard reality of substantive and procedural rules in legal doctrine. This proposition is demonstrated clearly in the cases of participation rules and municipal jurisdiction. Pipeline opponents' attempts to transform their frustration with decisions on scoping and decisions limiting participation into a *Charter* case were quickly and decisively shut down by multiple court rulings. Burnaby's efforts to assert jurisdiction have been treated dismissively by reviewing courts, either in actual rulings or in their rejection of appeals. Trudeau's campaign promise that "only communities can grant permission" might have contributed modestly to his 2015 election victory, but it was merely a campaign slogan, not the policy of his government and certainly not reflected in constitutional law.

When not well grounded in legal rules, those asserting jurisdictional authority resort to political arguments. BC Premier Christy Clark expressed this view very well in talking about provincial power in the context of Northern Gateway in 2012. Speaking about the federal power of disallowance to override provincial opposition, she said:

> The reason [disallowance] is so rarely used is because citizens and provinces will no longer tolerate that kind of intrusion into provincial decisions. The thing is, this project can only go ahead if it has the social licence to do so. It can only get the social

> licence from the citizens of British Columbia. And that's what I'm representing as Premier.[122]

The constitutional conflicts over Canadian pipelines have created some strange political bedfellows. Much of the environmental opposition to the pipelines is founded on concerns about greenhouse gases. Yet, in advocating for strong provincial powers on environmental matters in relation to pipelines their arguments may be at odds with a broader Canadian climate strategy that, if it is to be successful, will inevitably have to rely on effective assertions of federal powers over reluctant provinces. The province of Alberta, traditionally only second to Québec in its defence of strong provincial powers, has teamed up with a Trudeau government to vigorously defend federal authority. The implications for the fate of provincial and federal political parties, and indeed the evolution of federalism in Canada, are immense.

122 Gary Mason, "B.C. Premier Christy Clark Warns of National Crisis over Pipeline", *The Globe and Mail* (22 October 2012), online: <www.theglobeandmail.com/news/british-columbia/bc-premier-christy-clark-warns-of-national-crisis-over-pipeline/article4627532/>.

Testing the Jurisdictional Waters: The Provincial Regulation of Interprovincial Pipelines

*Martin Z. Olszynski**

In light of increasing efforts by various provinces to regulate interprovincial pipelines, especially British Columbia, this article considers the constitutionality of provincial and municipal assertions of regulatory authority over such pipelines, which are otherwise regulated by the National Energy Board on the authority of the federal government pursuant to subparagraph 92(10)(a) of the Constitution Act, 1867. *The article begins by setting out some of these provincial efforts and then provides a primer on the applicable legal doctrines and principles: namely, federal paramountcy, interjurisdictional immunity, and co-operative federalism. It then identifies and summarizes the most important recent administrative and judicial decisions to consider the constitutionality of provincial and municipal regulation in the interprovincial pipeline context. As will be seen, although some uncertainty remains, when viewed in aggregate these decisions and judgments shed considerable light on the contours of provincial and municipal authority over such pipelines. The next part of the paper frames the analysis that is likely to be applied to British Columbia's most recent and ambitious efforts to enact spill response and recovery legislation that would*

À la lumière des récents efforts déployés par diverses provinces, en particulier la Colombie-Britannique, cet article examine la constitutionnalité de l'affirmation provinciale et municipale d'un pouvoir de réglementation sur les pipelines interprovinciaux autrement réglementés par l'Office national de l'énergie sous l'autorité du gouvernement fédéral en vertu du sous-paragraphe 92 (10) a) de la Loi constitutionnelle de 1867. *L'article commence par exposer quelques-uns de ces efforts provinciaux, puis fournit une introduction aux doctrines et principes juridiques applicables, à savoir la prépondérance fédérale, l'exclusivité des compétences et le fédéralisme coopératif. Ensuite, il identifie et résume les décisions administratives et judiciaires récentes les plus importantes pour examiner la constitutionnalité des réglementations provinciales et municipales dans le contexte des pipelines interprovinciaux. Bien qu'il subsiste certaines incertitudes, nous verrons que ces décisions et jugements, dans leur ensemble, dévoilent les grandes lignes de l'autorité provinciale et municipale sur ces pipelines. La section suivante de l'article présente l'analyse qui sera vraisemblablement appliquée aux efforts les plus récents et les plus ambitieux de la Colombie-Britannique*

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apply to interprovincial pipelines, including the contentious Trans Mountain expansion pipeline project approved by the federal government in 2016. The article concludes with some observations about Canada's current pipeline debate and environmental law and policy more generally.

visant à adopter une loi de préparation et d'intervention en cas de déversement qui s'appliquerait aux pipelines interprovinciaux, y compris le projet controversé d'agrandissement du réseau de Trans Mountain approuvé par le gouvernement fédéral en 2016. L'article se termine par quelques observations sur le débat en cours au Canada sur les pipelines et sur le droit et la politique de l'environnement de manière plus générale.

I. Introduction

On April 26, 2017, the provincial government of Premier John Horgan referred to the British Columbia Court of Appeal a set of three questions with respect to proposed amendments to that province's *Environmental Management Act,*[1] for an opinion as to their constitutionality. As further discussed below, these measures are intended to "improve liquid petroleum spill response and recovery,"[2] including those concerning interprovincial pipelines, a matter generally regulated by Canada's National Energy Board (NEB) pursuant to the *National Energy Board Act*.[3]

Although this most recent attempt to expand the provincial scope of interprovincial pipeline regulation is probably the most ambitious, it is by no means the first. It was Premier Horgan's predecessor, then-Premier Christy Clark, who initiated what would become a popular tactic of provincial governments in other provinces, including both Ontario and Québec. Back in 2012, while Enbridge's ill-fated Northern Gateway pipeline project was being reviewed by the NEB,[4] Premier Clark purported to impose five conditions for

1 *Environmental Management Act*, SBC 2003, c 53 [*EMA*].

2 Government of British Columbia, Press Release, "Province submits Court Reference to Protect BC's Coast" (26 April 2018), online: <https://archive.news.gov.bc.ca/releases/news_releases_2017-2021/2018PREM0019-000742.htm>.

3 *National Energy Board Act*, RSC 1985, c N-7 [*NEBA*].

4 *Gitxaala Nation v Canada,* 2016 FCA 187, [2016] 4 FCR 418. Briefly, although that project was approved by the then Conservative government of then Prime Minister Stephen Harper, that approval was subsequently quashed by the Federal Court of Appeal in *Gitxaala* due to the government's failure to properly discharge its constitutionally-based duty to consult affected Indigenous peoples. The subsequent Liberal government of Prime Minister Justin Trudeau chose not to appeal that judgment, nor to try to shore up consultation efforts in a bid to re-issue the project's approval. For commentary on the *Gitxaala* case, see Keith B Bergner, "The Northern Gateway Project and the Federal Court of Appeal: The Regulatory Process and the Crown's Duty to Consult", online:

securing British Columbia's "support" for the construction of heavy oil pipelines. These included not only a "world-leading marine oil spill response," and "world-leading practices for land oil spill prevention," but also "a fair share of the fiscal and economic benefits of any proposed heavy oil project that reflects the level, degree and nature of the risk borne by the province, the environment and taxpayers."[5] Subsequently, in 2014, Québec purported to impose its own seven conditions on TransCanada's equally ill-fated Energy East project,[6] most of which were similar to British Columbia's except that Québec had also insisted on conducting its own environmental assessment, which was to include an assessment of the project's upstream greenhouse gas (GHG emissions).[7] Shortly thereafter, Ontario signaled its support for Québec's position and signed a Memorandum of Understanding to that effect.[8]

The purpose of this article is to assess the extent to which such provincial forays into the regulation of interprovincial pipelines are constitutional (or not), focusing on the doctrines of federal paramountcy and interjurisdictional

(2016) 4:1 Energy Regulation Q <www.energyregulationquarterly.ca/case-comments/the-northern-gateway-project-and-the-federal-court-of-appeal-the-regulatory-process-and-the-crowns-duty-to-consult#sthash.5MrRFERk.dpbs>.

5 Government of British Columbia, Press Release "British Columbia Outlines Requirements for Heavy Oil Pipeline Consideration" (2012), online: <https://news.gov.bc.ca/stories/british-columbia-outlines-requirements-for-heavy-oil-pipeline-consideration>.

6 Although it is difficult to point to one single factor that brought about this project's demise, the revelation that former Premier Jean Charest, now acting as an agent on behalf of TransCanada, had an undisclosed meeting with two of the panel members assigned to review the Energy East project, effectively forcing the NEB to restart the hearings in the context of a rapidly shifting regulatory context, is widely considered to have played a significant role; see Mike De Souza, "What is the Charest Affair and Why Should I Care?", *The National Observer* (29 August 2016), online: <www.nationalobserver.com/2016/08/29/analysis/what-charest-affair-and-why-should-i-care>. This rapidly shifting regulatory context included a decision by the subsequent replacement panel to consider Energy East's upstream greenhouse gas emissions; see Deborah Yedlin, "Yedlin: Energy East Review Risks Regulators Reputation", *Calgary Herald* (12 September 2017), online: <https://calgaryherald.com/business/energy/yedlin-energy-east-review-risks-regulators-reputation>. TransCanada withdrew its application shortly thereafter. Professor Andrew Leach has suggested that the Trump Administration's approval of TransCanada's other major pipeline project, Keystone XL, which had not been approved by the previous Obama Administration, was also relevant; see Andrew Leach, "How Donald Trump Killed the Energy East Pipeline", *The Globe and Mail* (9 October 2017), online: <www.theglobeandmail.com/report-on-business/rob-commentary/how-donald-trump-killed-the-energy-east-pipeline/article36527153/>.

7 CBC News, "Environment Minister Sets Conditions for TransCanada in Québec", *CBC News* (20 November 2014), online: <www.cbc.ca/news/canada/montreal/environment-minister-sets-conditions-for-transcanada-in-Québec-1.2841677>.

8 Government of Ontario, News Release, "Memorandum of Understanding Between the Government of Ontario and Le Gouvernement Du Québec Concerning Concerted Climate Change Actions 2014" (24 November 2014), online: <https://news.ontario.ca/opo/en/2014/11/memorandum-of-understanding-between-the-government-of-ontario-and-le-gouvernement-du-Québec-concerni.html>.

immunity. Part II sets out the basic tests for these two doctrines as recently expressed by the Supreme Court of Canada, and also considers the principle of co-operative federalism. Part III moves on to recent administrative and judicial decisions with respect to provincial and municipal power to regulate interprovincial pipelines. As further set out below, although initially there appeared to be some uncertainty as to when and how the principles of paramountcy and interjurisdictional immunity would apply in the current regulatory context (*i.e.* when Premier Clark announced her five conditions), several recent decisions, including decisions from the National Energy Board and the British Columbia Supreme Court, have shed considerable light on these questions. Consequently, it is now possible to sketch out at least the rough contours of what kind of provincial action would — and would not — be constitutional in this context.

Lastly, Part IV draws on this discussion to frame the analysis that is likely to be applied to British Columbia's proposed spill response legislation. Briefly, the proposed spill amendments are unlikely to be found to actually conflict with the NEB regime under the first branch of the paramountcy doctrine, shifting the analysis to the second branch, which asks whether the proposed amendments frustrate Parliament's purpose as expressed in the *NEBA*. A strong argument can be made that when Parliament enacted the *NEBA* regime for interprovincial pipelines, it intended to confer what, in the context of the paramountcy doctrine, Canadian courts have described as a "positive entitlement" or "positive right" to pipeline proponents. The effect is to leave provincial, municipal, and other levels of government *some* room to supplement the regulation of interprovincial pipelines, but legislation that attempts to second-guess and recalibrate assessments made by the NEB, such as British Columbia's spill legislation, would appear to frustrate the *NEBA*'s purpose. With respect to interjurisdictional immunity, it is also arguable that spill-related issues, when viewed as part of a balancing exercise between fostering economic activity and ensuring environmental protection, are part of the protected "core" of the federal power over interprovincial pipelines, rendering provincial assertions of authority inapplicable. The article concludes with some observations and commentary about Canada's current pipeline debate and environmental law and policy more broadly.

II. A brief primer on paramountcy and interjurisdictional immunity

A. Paramountcy

The modern test for paramountcy was set out in *Canadian Western Bank v Alberta*[9] and recently re-affirmed in *Alberta (Attorney General) v Moloney*.[10] According to the Supreme Court in *Maloney*, paramountcy "recognizes that where laws of the federal and provincial levels come into conflict, there must be a rule to resolve the impasse."[11] To determine whether such a conflict exists, the Court applies the following framework (citations omitted):

1. "First and foremost, it is necessary to ensure that the overlapping federal and provincial laws are independently valid… This means determining the pith and substance of the impugned provisions by looking at their purpose and effect… If the legislation of one level of government is invalid, no conflict can ever arise, which puts an end to the inquiry…."[12]

2. If both are valid, a "conflict is said to arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment."[13]

3. With respect to the first branch, "…there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says 'yes' and the other says 'no'…."[14]

4. If there is no conflict under the first branch of the test, one may still be found where "the effect of the provincial law may frustrate the purpose of the federal law, even though it does 'not entail a direct violation of the federal law's provisions.'"[15] Previous jurisprudence "assists in iden-

9 2007 SCC 22, [2007] 2 SCR 3 [*Canadian Western*].
10 [2015] 3 SCR 327, 2015 SCC 51.
11 *Ibid*, at para 16.
12 *Ibid*, at para 17.
13 *Ibid*, at para 18
14 *Ibid*, at para 19 citing *Multiple Access Ltd. v McCutcheon*, [1982] 2 SCR 161, [1982] SCJ No 66 [underlining in the original].
15 *Ibid*, at para 25.

> tifying typical situations where overlapping legislation will not lead to a conflict. For instance, duplicative federal and provincial provisions will generally not conflict. Nor will a conflict arise where a provincial law is more restrictive than a federal law. The application of a more restrictive provincial law may, however, frustrate the federal purpose if the federal law, instead of being merely permissive, provides for a positive entitlement…."[16]

Thus, the first step is to assess the validity of the relevant legislation; only where both pieces of legislation are valid is conflict considered. Second, conflict can (i) be expressly operational, such as where one piece of legislation says "yes" but the other says "no," or (ii) purposive, in the sense that adherence to the provincial legislation, although not directly contradictory to the federal regime, frustrates the latter's purpose. In this latter context, it is useful to characterize the federal regime as merely permissive or as conferring a positive entitlement or right. Permissive regimes, such as the federal government's regime for pesticides,[17] are more tolerant of supplementation by stricter provincial regimes, whereas those that confer a positive entitlement are less so. As further discussed in Part IV, one indicia of a positive entitlement is the comprehensiveness of the relevant federal regime.

Where a province or municipality has purported to prohibit activity necessary to the planning or construction of an interprovincial pipeline, the result — a finding of express conflict under the first branch — has been relatively clear and certain. There remains some uncertainty under the second branch with provincial initiatives that purport to supplement the NEB regime.

B. Interjurisdictional Immunity

The current approach to interjurisdictional immunity was also set out in *Canadian Western Bank v Alberta* but more recently summarized in *Rogers Communications Inc. v Chateauguay (City)*.[18] The doctrine "…protects the 'core' of a legislative head of power from being impaired by a government at the other level…. The first [step] is to determine whether a statute enacted or measure adopted by a government at one level trenches on the 'core' of a power of the other level of government. If it does, the second step is to determine whether

16 *Ibid*, at para 26.

17 *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town),* 2001 SCC 40, [2001] 2 SCR 241 at para 35 [*Spraytech*].

18 2016 SCC 23, [2016] 1 SCR 467 [*Rogers*].

the effect of the… measure on the protected power is sufficiently serious to trigger the application of the doctrine."[19]

As further discussed below, the doctrine is to be applied with restraint since a broad application would be inconsistent with the trend towards flexible federalism.[20] According to the Supreme Court in *Rogers*, this is "why the application of the doctrine…is generally reserved for situations that are already covered by precedent…."[21] The Court cites the following passage from *Canadian Western Bank*:

> As we have already noted, interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent. This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction. . . .
>
> In the result, while in theory a consideration of interjurisdictional immunity is apt for consideration after the pith and substance analysis, in practice the absence of prior case law favouring its application to the subject matter at hand will generally justify a court proceeding directly to the consideration of federal paramountcy.[22]

As will become apparent from the discussion in Part III, there is a long history of applying the doctrine of interjurisdictional immunity to the matters falling under subsection 92(10) of the *Constitution Act, 1867*,[23] including interprovincial pipelines.

C. Co-operative Federalism

Before moving on from this part of the argument, it is necessary to reference the increasingly invoked, if also persistently vague,[24] principle of co-operative

19 *Ibid* at para 59.
20 *Ibid* at para 60.
21 *Ibid* at para 61.
22 *Ibid* 42 [emphasis in original].
23 Pursuant to section 92, "Local Works and Undertakings" fall under provincial jurisdiction, "other than such as are of the following Classes: (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and *other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province*…" [emphasis added].
24 See Fenner Stewart, "Interjurisdictional Immunity, Federal Paramountcy, Co-Operative Federalism, and the Disinterested Regulator: Exploring the Elements of Canadian Energy Federalism in the Grant Thornton Case" (2018) 33 BFLR 227 at 251, excerpting an exchange between counsel and

federalism. At present, co-operative federalism appears limited to a role in statutory interpretation that "favors, where possible, the concurrent operation of statutes enacted by governments at both levels…"[25] Referring to the doctrines of paramountcy and interjurisdictional immunity, the Supreme Court in *Canadian Western Bank* stated that their application "…must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called 'co-operative federalism'…."[26] In *Reference re Securities Act*,[27] a subsequent and unanimous Supreme Court "noted that the growing 'practice' of 'seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts' had become the 'animating force' of the 'federalism principle upon which Canada's constitutional framework rests.'"[28]

These passages suggest that the doctrines of paramountcy and interjurisdictional immunity ought to be applied with restraint. Most recently in *Rogers*, however, the Supreme Court cautioned against taking this approach too far: "… although co-operative federalism has become a principle that the courts have invoked to provide flexibility for the interpretation and application of the constitutional doctrines relating to the division of powers … *it can neither override nor modify the division of powers itself*…."[29] This caveat appears particularly relevant in the context of interprovincial works (*e.g.* pipelines), the legislative authority over which was explicitly carved out of provincial jurisdiction over local works and undertakings (as further set out in Part IV).

III. Recent decisions and jurisprudence with respect to interprovincial pipelines

When British Columbia first announced its five conditions in the context of the Northern Gateway Joint Review Panel (JRP) process, Professor Nigel Bankes expressed considerable doubt about their validity: "The general proposition is that a province will not be permitted to use its legislative authority or

Justice Brown during the *Grant Thornton* hearing, wherein Justice Brown suggested that "it just can't be the vibe of the thing" — presumably a reference to the classic phrase from the 1997 Australian film "The Castle," wherein a lawyer, unable to point to a specific section, argues that an eviction order was contrary to "the vibe" of the Australian constitution.

25 *Rogers, supra* note 18 at para 38.

26 *Canadian Western, supra* note 9 at para 24.

27 2011 SCC 66, [2011] 3 SCR 837 at paras 132-33.

28 Eric M Adams, "Judging the Limits of Cooperative Federalism" (2016) 76 SCLR 27 at 34.

29 *Rogers, supra* note 18 at para 39 [emphasis added].

even its proprietary authority to frustrate a work or undertaking which federal authorities consider to be in the national interest."[30] Professor Bankes cited *Campbell-Bennett Ltd. v Comstock Midwestern Ltd.* [31] — a 1954 case that he noted pertained to the original Trans Mountain pipeline.

In addition to being relatively dated, however, *Campbell-Bennett* involved a relatively straightforward issue: namely, the applicability of provincial legislation purporting to allow a third party to impose a construction lien on a portion of the original Trans Mountain pipeline. In other words, it is of limited value over half a century later, during which time Canada (as other developed economies) has witnessed a burgeoning of industrial and environmental regulation by governments at every level. The question increasingly on the minds of proponents, stakeholders, and observers is what "frustration" looks like in this modern context. The first new contribution to resolving this puzzle came in the NEB's *Ruling No. 40*.[32]

A. *Ruling No. 40*

The underlying context for this Ruling was Kinder Morgan's application for a certificate of public convenience and necessity under section 52 of *NEBA* for the expansion of its existing Trans Mountain pipeline from Alberta to British Columbia. In the summer of 2014, Kinder Morgan indicated that its preferred routing was through Burnaby Mountain. Consequently, the NEB determined that it required additional geotechnical, engineering, and environmental studies to be completed. Although section 73 of the *NEBA* gives the company the power of entry required to carry out these studies, Kinder Morgan sought Burnaby's consent to enter upon the relevant lands to do the work, which included borehole drilling and some site preparation. Burnaby refused to give its consent.

After a month of failed correspondence, Kinder Morgan began its work. Several days later, its employees were issued an Order to Cease Bylaw Contravention and a Bylaw Notice for violations of the *Burnaby Parks Regulation Bylaw 1979* (which prohibits damage to parks) and the *Burnaby*

30 Nigel Bankes, "British Columbia and the Northern Gateway Pipeline" (25 July 2012), *ABlawg* (blog), online: <https://ablawg.ca/2012/07/25/british-columbia-and-the-northern-gateway-pipeline/>.

31 [1954] SCR 207.

32 Canada, National Energy Board, "Ruling of the National Energy Board, Ruling No 40", File OF Fac-Oil-T260-2013-03-02 (Canada: 23 October 2014) [File OF Fac-Oil-T260-2013-02]. Much of what follows is based on my previous commentary on this ruling; see Martin Olszynski, "Whose (Pipe)line is it Anyway?" (3 December 2014), *ABlawg* (blog), online: <https://ablawg.ca/2014/12/03/whose-pipeline-is-it-anyway/> [Olszynski, "Whose"].

Street and Traffic Bylaw 1961 (which amongst other things prohibits excavation work without consent). Subsequently, Kinder Morgan filed a motion, including a notice of constitutional question, seeking an order from the NEB directing the City of Burnaby to permit temporary access to the required lands.

The NEB granted the order, on both paramountcy and interjurisdictional immunity grounds. After summarizing the relevant commentary and jurisprudence,[33] the NEB concluded that there was a "clear conflict" between the *Parks Bylaw* and *Traffic Bylaw* on the one hand, and paragraph 73(a) of the *NEBA* on the other. With respect to the *Parks Bylaw*,

> …Section 5 [contains] a clear prohibition against cutting any tree, clearing vegetation or boring into the ground… While the Board accepts that the *Parks Bylaw* has an environmental purpose, the application of the bylaws and the presence of Burnaby employees in the work safety zone had the effect of frustrating the federal purpose of the *NEB Act* to obtain necessary information for the Board….[34]

The NEB made the same finding with respect to the *Traffic Bylaw*: dual compliance was impossible, such that the doctrine of federal paramountcy applied and the bylaws were inoperable to the extent that they prevented Kinder Morgan from carrying out the necessary work. The NEB was clear, however, that this did not mean that "…a pipeline company can generally ignore provincial law or municipal bylaws. The opposite is true. Federally regulated pipelines are required, through operation of law and the imposition of conditions by the Board, to comply with a broad range of provincial laws and municipal bylaws."[35]

With respect to interjurisdictional immunity, which the NEB considered in the alternative, after acknowledging that its usage "has fallen out of favor to some degree" (as discussed in Part II), the NEB observed that "…it is still an accepted doctrine for dealing with clashes between validly-enacted provincial and federal laws…."[36] The effect of the doctrine is to "read down" valid provincial laws where their application would have the effect of impairing a core competence of Parliament or a vital part of a federal undertaking. Impairment is key: provincial laws may *affect* a core competence of Parliament or a federal undertaking (to varying degrees), but this is not sufficient. Applying this test to the facts before it,

33 File OF Fac-Oil-T260-2013-02, *supra* note 32 at 11.
34 *Ibid* at 12.
35 *Ibid* at 13.
36 *Ibid*.

> The Board finds that the Impugned Bylaws impair a core competence of Parliament…. the routing of the interprovincial pipeline is within the core of a federal power over interprovincial pipelines. Actions taken by Burnaby with respect to enforcing the Impugned Bylaws impair the ability of the Board to consider the Project and make a recommendation regarding on [*sic*] the appropriate routing of the Project…. Similar to the location of aerodromes being essential to the federal government's power over aeronautics, detailed technical information about pipeline routing is essential to the Board….[37]

The lessons to derive from *Ruling No. 40* could be summarized as follows: Generally speaking, provincial and municipal laws apply to federal undertakings such as interprovincial pipelines; they do not, in and of themselves, conflict with or frustrate the federal undertaking. Such laws will be deemed to conflict, however, where they prohibit a pipeline proponent from carrying out work necessary for the proposed routing and review of a pipeline.

Pursuant to section 22 of the *NEBA*, Burnaby sought leave to appeal the NEB's decision to the Federal Court of Appeal, but that leave was denied (without reasons).[38] Burnaby then sought to challenge the NEB's decision in British Columbia's Supreme Court. That challenge was dismissed as a collateral attack in *Burnaby (City) v Trans Mountain Pipeline ULC*[39] but the Court, mindful of possible further appeals, also addressed the constitutional merits of Burnaby's application, finding that there were none.[40]

Shortly after the NEB released *Ruling No. 40*, Québec announced its seven conditions, including a requirement for an environmental assessment under that province's environmental assessment legislation.[41] At the time, and on the basis of the NEB's analysis in *Ruling No. 40*, I suggested that such a requirement was probably constitutional, although what Québec could actually do with the results of such an assessment was another matter:

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37 *Ibid* at 14.

38 Professor Bankes has criticized this practice: "For the most part, [these] disputes belong in the Federal Court of Appeal when the NEB's procedures are exhausted. But if that Court fails to grant leave on important questions of law…and fails to provide reasoned judgments for its conclusions, then the door is cracked open for parties to seek relief in the provincial superior courts….": Nigel Bankes, "BC Court Confirms that a Municipality has no Authority with Respect to the Routing of an Interprovincial Pipeline" (17 December 2015), *ABlawg* (blog), online: <https://ablawg.ca/2015/12/17/bc-court-confirms-that-a-municipality-has-no-authority-with-respect-to-the-routing-of-an-interprovincial-pipeline/>.

39 2015 BCSC 2140, [2015] BCJ No 2503, affirmed 2017 BCCA 132, [2017] BCJ No 562 *[Burnaby (City)]*.

40 *Ibid* at paras 58-81. For commentary on this decision, see *supra* note 38.

41 *Environmental Quality Act*, CQLR 2018, c Q-2.

> [Environmental assessment] has long been understood in Canada as "simply descriptive of a process of decision-making" (*Friends of the Oldman River Society v. Canada (Minister of Transport* [1992] 1 SCR 3). There is no conflict between the requirements of the *NEB Act* and [Québec's *Environmental Quality Act*]; Trans Canada can comply with both. Doing so may seem duplicative but that is a matter of policy, not constitutional imperative…
>
> That being said, what Québec can actually do with the results of its EA is another matter entirely. The short answer is probably not very much. It might be able to secure some modifications to the project (*e.g.* that certain standards or 'best practices' be applied during construction and operation), but if the NEB makes a positive recommendation to the federal Cabinet then outright refusal of a certificate of authorization would seem off the table (or would be rendered inapplicable).[42]

Subject to the caveat that such provincial regimes must be implemented reasonably (as further discussed below), this view was more or less confirmed by the British Columbia Supreme Court in *Coastal First Nations v British Columbia (Minister of Environment),*[43] as the next section sets out.

B. *Coastal First Nations v British Columbia*

The underlying context to this case was Enbridge's application for a *NEBA* section 52 certificate of public convenience and necessity for its Northern Gateway pipeline project. Briefly, under then Premier Clark, British Columbia and the NEB entered into an equivalency agreement in June of 2010 to the effect that the NEB's review of Northern Gateway, as a joint review panel first under the *Canadian Environmental Assessment Act*[44] and then continued under the *Canadian Environmental Assessment Act 2012*,[45] would stand in the place of an environmental assessment under British Columbia's *Environmental Assessment Act*.[46] One of the main issues in this case was whether this agreement negated the need for British Columbia to issue an Environmental Assessment Certificate (EAC) pursuant to section 17 of that Act and, with it, the duty to consult the petitioning Coastal First Nations.[47]

42 Olszynski, "Whose", *supra* note 32.

43 2016 BCSC 34, [2016] BCJ No 30 [*Coastal First*].

44 *Canadian Environmental Assessment Act*, SC 1992, c 37.

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

46 *Environmental Assessment Act*, SBC 2002, c 43.

47 As set out in the foundational *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 SCR 511 decision, and most recently reiterated in *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 SCR 1069.

Justice Koenigsberg ruled that it did not.[48] Along the way, she had occasion to opine on the "pith and substance" of provincial environmental assessment legislation and its applicability to the Northern Gateway project. Citing the Supreme Court of Canada's landmark judgment in *Friends of the Oldman River Society v Canada (Minister of Transport)*,[49] Justice Koenigsberg noted that the "…Province has a known constitutional right to regulate environmental impacts within its provincial boundaries."[50]

She also rejected Northern Gateway's position, which she characterized as extreme, that the mere possibility that the Province could refuse to issue an EAC pursuant to section 17 rendered the entire regime inoperable: "…While I agree that the Province cannot go so far as to refuse to issue an EAC and attempt to block the Project from proceeding, I do not agree with the extreme position of NGP that this invalidates the *EAA* as it applies to the Project."[51]

Justice Koenigsberg was simply not convinced that the *EAA* should suffer the same fate as the municipal bylaws at issue in *Ruling No. 40*, distinguishing that decision on several grounds, including that the latter involved pipeline routing and location, which clearly falls within the core of the federal power,[52] and that the municipal bylaws were prohibitions.[53] Rather, in her view it was at least theoretically possible that British Columbia could issue an EAC with additional conditions without running afoul of the doctrines of paramountcy and interjurisdictional immunity, although she was quick to add that no such analysis was possible without having actual conditions before her:

> [72] …The mere existence of a condition does not amount to a prohibition. The conditions placed on the Project by the NEB are imposed in accordance with environmental protection legislation in an effort to balance the economic interests of the Project with important environmental protection concerns. Further conditions imposed by the Province that seek to advance environmental protection interests would therefore fall squarely in line with the purpose of federal environmental protection legislation governing the Project.

48 *Coastal First*, *supra* note 43 at para 182.
49 [1992] 1 SCR 3, 1992 CanLII 110 at para 64.
50 *Coastal First*, *supra* note 43 at para 51.
51 *Ibid* at para 55.
52 *Ibid* at para 64: "… The strength of Trans Mountain's case came from the fact that Burnaby's bylaws were effectively prohibiting the expansion of the pipeline in certain locations and trying to control routing of the pipeline, despite NEB being granted explicit jurisdiction over the routing and location of pipelines under ss. 31-40 of the *NEB Act: Trans Mountain* at para 22."
53 *Ibid* at para 65.

> [73] This is not to say that any or all conditions would be permissible. This is just to say that on its face there are no obvious problems with the imposition of provincial environmental protection conditions… While the federal law says "yes with conditions", the provincial law, if conditions were issued, could also say "yes, with further conditions".
>
> [74] Therefore, no further finding can be made unless and until specific conditions are imposed. The questions of "impairment" in the case of inter-jurisdictional immunity and "operational conflict" in the case of paramountcy cannot be effectively answered without an examination of any specific conditions imposed by the Province under s. 17 of the *EAA*.[54]

Before moving on from *Coastal First Nations*, there is one last aspect of the Court's analysis that requires noting in light of the discussion in Part II. Citing the Supreme Court of Canada's decision in *Maloney*, Enbridge argued that the *NEBA* was a "comprehensive" regime[55] that confers a "positive entitlement,"[56] and as such "a more restrictive provincial scheme would frustrate the federal purpose because any conditions would amount to a prohibition of a federal undertaking."[57] Justice Koenigsberg rejected this analysis: "In my view, the federal laws in question are merely permissive in that the Project is permitted to proceed so long as it complies with the federal conditions…."[58]

As further discussed below, the contrary characterization — that the NEB regime is comprehensive — was adopted in *Burnaby v Trans Mountain* and two more recent decisions of the British Columbia Supreme Court (in the context of a challenge to the EAC issued to Kinder Morgan for its Trans Mountain expansion project). Before considering those decisions, however, it is necessary to return to the NEB. Later in 2016, the federal Liberal cabinet of Prime Minister Justin Trudeau approved Kinder Morgan's Trans Mountain pipeline expansion project.[59] Following the teaching in *Coastal First Nations*, in January 2017 British Columbia (still under Premier Clark) issued an EAC under the *EAA*, imposing 37 additional conditions. Kinder Morgan then began to seek the various municipal permits that it had committed to obtaining — a commitment that the NEB had incorporated as a condition in its certificate for

54 *Ibid* at paras 72-74.
55 *Ibid* at para 59.
56 *Ibid* at para 70.
57 *Ibid*.
58 *Ibid* at para 71.
59 Canada, Government of Canada, "Orders in Council, PC Number 2016-1069", (Canada: 29 November 2016), online: <http://orders-in-council.canada.ca/attachment.php?attach=32744&lang=en>. As most readers will now, this approval was recently quashed in *Tsleil-Waututh Nation v Canada (Attorney General)* 2018 FCA 153 [Tsleil-Waututh].

the project.[60] Burnaby, however, remained staunchly opposed to the project, prompting Kinder Morgan to bring another motion before the NEB, this time asking the NEB to relieve it of its obligation to secure permits from that municipality. It also asked the Board to establish "an efficient, fair, and timely process for Trans Mountain to bring similar future matters to the Board for its determination in cases where municipal or provincial permitting agencies unreasonably delay or fail to issue permits or authorizations in relation to the Project." The NEB granted Kinder Morgan's request, issuing reasons for its decision in January of 2018, as set out below.

C. Reasons for Decision (MH-081-2017)[61]

At this stage in the analysis, the following contours of provincial authority over interprovincial pipelines have been made relatively clear: While provinces cannot refuse or otherwise block such undertakings, provincial and municipal laws — including environmental assessment laws — generally apply. These will only be rendered inoperable or inapplicable if they actually conflict with a federal law, frustrate the federal purpose, or impair a core function, respectively. Prohibiting pipeline proponents from carrying out work related to routing and location is one example of conflict, but courts are generally loath to engage in such an analysis in the abstract.

In its *Reasons re: MH-081*, the NEB was confronted with a slightly different problem: could the *implementation* of an otherwise applicable provincial or municipal regime cause the regime to run afoul of the principles of paramountcy and interjurisdictional immunity? The answer, according to the NEB, is yes. Before considering that analysis, however, it is appropriate to summarize some of the facts, as determined by the NEB, that informed it:

- Burnaby's review time was two to three times longer than its original estimate of six to eight weeks for a more complex review;
- The responsibility for the majority of review time was attributable to Burnaby's actions, inactions, and process decisions;

60 Canada, National Energy Board, *National Energy Board Report, Trans Mountain Expansion Project* (Canada: National Energy Board, 2016), online: <www.ceaa-acee.gc.ca/050/documents/p80061/114562E.pdf> [National Energy Board, "Report 2016"]Appendix 3, Condition 2: "Without limiting Conditions 3, 4 and 6, Trans Mountain must implement all of the commitments it made in its Project application or to which it otherwise committed on the record of the OH-001-2014 proceeding."

61 Canada, National Energy Board, "Reasons for Decision – National Energy Board (NEB or Board) Order MO-057-2017", (Canada: 6 December 2017), online: <https://apps.neb-one.gc.ca/REGDOCS/File/Download/3436250> [National Energy Board, "Reasons December 2017"].

- Burnaby's process made it very difficult for Trans Mountain to understand what the permitting requirements were and how they could be met;
- Burnaby repeatedly denied Trans Mountain's reasonable requests to aid in an efficient processing of the [preliminary plan approval, or PPA] applications;
- The review time was the cause of, or a contributing or exacerbating factor to, Project construction delay, and the prejudice associated with that delay; and,
- The overall trend did not indicate that Burnaby was getting closer to issuing PPAs or Tree Cutting Permits; rather, there was no clear indication of an imminent resolution.[62]

Burnaby, now joined by the new provincial government of Premier John Horgan, resisted Kinder Morgan's application. It argued that "…it is premature to make a finding of paramountcy because there is no operational conflict between the *NEB Act* and the bylaws *before Burnaby makes a decision*, or *rejects* the permitting applications…"[63] a position similar to my comments above (following Québec's announcement) about such regimes merely imposing decision-making *processes*, rendering decisions about conflict or impairment difficult pending an actual decision. The NEB, however, concluded that *delays* in such processes could be sufficient to engage such an analysis:

> … it is only logical that delay in processing municipal permit applications can, in certain circumstances, be sufficient in and of itself to engage the doctrines of paramountcy and interjurisdictional immunity. *To hold otherwise would allow a province or municipality to delay a federal undertaking indefinitely, in effect accomplishing indirectly what it is not permitted to do directly.*[64]

Beginning with paramountcy, the NEB concluded that there was no operational conflict under the first branch of the test, but that Burnaby's delays did "frustrate a federal purpose" under the second branch. With respect to operational conflict, the NEB explicitly referred to *Coastal First Nations* and the importance of co-operative federalism:

> In the Board's view, the fact that Burnaby's bylaws confer some discretion on decision-makers in terms of whether to grant a permit, or the fact that a discretionary

62 See Nigel Bankes & Martin Olszynski, "TMX v Burnaby: When do Delays by a Municipal (or Provincial) Permitting Authority Trigger Paramountcy and Interjurisdictional Immunity?" (24 January 2018), *ABlawg* (blog), online: <http://ablawg.ca/wp-content/uploads/2018/01/Blog_NB_MO_TMPL_v_Burnaby.pdf>.

63 National Energy Board, "Reasons December 2017", *supra* note 61 at 20 [emphasis added].

64 *Ibid* at 22 [emphasis added].

> variance of a bylaw may be required, is not in and of itself enough, in this case, to establish an operational conflict… The Board accepts that Burnaby cannot deny necessary municipal permits or variances thereto for the Project; however, this does not render the entire municipal permitting process inoperable. As was the case in *Coastal First Nations v. British Columbia (Environment)*, there are no obvious problems with the imposition of Burnaby's Zoning and/or Tree Bylaws on the Board-regulated Project. In the Board's view, concluding otherwise would be an overreach and inconsistent with the principles of cooperative federalism, which require that where regulatory authority might overlap between federal and provincial (in this case, delegated to the municipal level) jurisdictions, validly enacted legislative provisions should be applied harmoniously to the extent possible….[65]

That being said, the NEB was of the view that Burnaby's delay, which it had deemed unreasonable, was frustrating the purpose of the NEB regime under the second branch of the paramountcy doctrine, particularly with regard to the project's "orderly development and efficient operation"[66]:

> …The Board finds that Burnaby's unreasonable process and delay is frustrating Trans Mountain's exercise of its authorizations under the Certificate and other Board Order, and its powers under…the *NEB Act*. This is the case regardless of the nature of Burnaby's motives or intentions in applying its bylaws….[67]

The NEB's concern for orderly development and efficient operation was also manifest in its approach to interjurisdictional immunity. In addition to pipeline routing and location (*Ruling No. 40* and its surrounding jurisprudence), the NEB agreed with Kind

er Morgan that "the matters of *when and where* the project can be carried out, *and its orderly development*, fall within the 'core' of federal jurisdiction over interprovincial undertakings, and are vital to the project."[68]

This conclusion places the NEB in the unprecedented and relatively powerful role of arbiter with respect to "reasonable" regulatory implementation where interprovincial pipelines are concerned (subject to any review by the Federal Court of Appeal). It also provides the justification for the other relief that it granted to Kinder Morgan, which was to establish a process for bringing similar disputes to the NEB for its determination.[69] Finally, it also appears to signal a shift in the NEB's conception of co-operative federalism towards a more

65 *Ibid* at 24.
66 *Ibid* at 24, citing the Supreme Court of Canada's recent decision in *Rogers, supra* note 18.
67 *Ibid* at 25.
68 *Ibid* at 25 [emphasis added].
69 File OF Fac-Oil-T260-2013-02, *supra* note 32.

American orientation, where the term refers to programs wherein states play a role in the implementation of federal standards subject to federal supervision.[70]

Following the NEB's decision, British Columbia sought leave to appeal to the Federal Court of Appeal, but it again refused such leave (again, without reasons). Burnaby is currently seeking leave to appeal to the Supreme Court of Canada.[71] In the meantime, however, the British Columbia Supreme Court released the final two decisions to be considered in this part of this article. That court dismissed challenges brought by the City of Vancouver and by the Squamish Nation to the EAC issued to Trans Mountain back in January of 2016 (as noted above). Neither of these is a division of powers case *per se* but much of the analysis revolves around the constitutional issues and the nature of the NEB regime.

D. *Vancouver (City) v British Columbia (Environment)*[72] and *Squamish Nation v British Columbia (Minister of Environment)*[73]

Both of these challenges had the same objective: to set aside and remit for reconsideration the decision of British Columbia's Ministers of the Environment and of Natural Gas Development to issue an EAC with respect to the Trans Mountain expansion project. Vancouver alleged that British Columbia "failed to engage in proper public consultation, acted unreasonably and in breach of its duty of procedural fairness, and failed to follow the process set out in both the [EAA] and the *EAA Public Consultation Policy Regulation*."[74] The Squamish based their challenge on "…what it maintains was a fundamental failure of the process of consultation and accommodation to which it was constitutionally entitled in relation to the potential impacts of the [Trans Mountain Expansion] on its Aboriginal rights within areas of provincial jurisdiction… adequate consultation required British Columbia to take reasonable steps to fill the information deficiencies that remained from the NEB process, which the NEB had deferred through project conditions…."[75]

Justice Grauer released both judgments — dismissing both applications — concurrently. Though they differ in terms of their specific grounds for relief,

70 Robert L Fischman, "Cooperative Federalism and Natural Resources Law" (2005) 14 NYU Envtl LJ 179 at 188-93. In its reasons for granting this relief, *supra* note 61 at 8, the NEB attempts to clarify that "the Board will not serve the role of generally supervising and directing provincial and municipal permitting processes", but rather should only be invoked where there is conflict that is relevant to the conditions set out in Kinder Morgan's certificate.

71 *Burnaby (City), supra* note 39.

72 2018 BCSC 843, [2018] BCJ No 970 [*Vancouver*].

73 2018 BCSC 844, [2018] BCJ No 971 [*Squamish*].

74 *Vancouver, supra* note 72 at para 6.

75 *Squamish, supra* note 73 at para 5.

they also overlap in important ways, including a remarkable introductory passage that captures the controversy currently surrounding the Trans Mountain expansion project in Western Canada:

> [3] This case is not about whether the TMX [Trans Mountain Expansion] should or should not go ahead. It is not about whether the TMX is in the national interest, or presents an unacceptable risk of environmental harm. These are policy issues, to be determined by the elected representatives of the people.
>
> [4] This case is not about the adequacy of the National Energy Board [NEB] process, nor does it resolve or define beyond currently settled law the constitutional limits on what either British Columbia or Alberta can or cannot do in relation to the project. These are questions under consideration by higher courts than this one.[76]

The other way in which both judgments overlap is in Justice Grauer's discussion of the surrounding legal context — including most of the jurisprudence discussed above, and his characterization of the NEB regime. With respect to legal context, Justice Grauer reiterated (and all parties agreed) that "…because the [project] comprises an interprovincial undertaking, it comes within the jurisdiction of the federal government under the division of powers set out in the *Constitution Act, 1867*…"[77] From this, it followed that "as a matter of constitutional law, it was not open to the Ministers to withhold an EAC" (citing *Coastal First Nations*),[78] but that British Columbia "could impose appropriate conditions — so long as those conditions did not amount to an impairment of a vital aspect, or frustration of the purpose, of the [project] as a federal undertaking" (citing *Burnaby v Trans Mountain)*.[79]

With respect to the NEB regime, and contrary to Justice Koenigsberg's view in *Coastal First Nations*, Justice Grauer was of the same view as Justice Macintosh in *Burnaby v Trans Mountain*,[80] *i.e.* that it was comprehensive. He used that adjective six times in his judgment.[81] For example:

76 *Vancouver, supra* note 72 at paras 3-4; see also *Squamish, supra* note 73 at paras 2-3. Indeed, challenges to the adequacy of the NEB process are currently pending a decision from the Federal Court of Appeal (File No A-78-17). Similarly, and as noted at the outset of this article, the constitutional limits on what British Columbia can or cannot do is currently before the British Columbia Court of Appeal.

77 *Ibid* at para 8.

78 *Ibid* at para 9.

79 *Ibid* at para 10.

80 *Burnaby (City), supra* note 39 at para 60: "In the result, power over interprovincial pipelines rests with Parliament. The *NEB Act* is comprehensive legislation enacted to implement that power."

81 *Vancouver (City) v British Columbia (Minister of Environment)*, [2018] BCJ No 970 at paras 29, 128-29, 142, 149, 171.

> [29] For present purposes, it is sufficient to note that the NEB hearing was comprehensive. It granted participation status to more than 400 intervenors, including Vancouver and British Columbia, and 1,250 commentators. It heard procedural and constitutional motions by intervenors, and accepted filed written evidence. Both Vancouver and British Columbia took advantage of this. Vancouver's evidence exceeded 1,300 pages, addressing, among other things, project risks of a spill into Burrard Inlet or in the Fraser Valley, and the economic effects of a spill.[82]

As noted above, while this was not a division of powers case and Justice Grauer was not engaging in a paramountcy analysis specifically, his characterization of the NEB regime as comprehensive is at least relevant to such analysis.

In light of these parameters, and while acknowledging that British Columbia could have done more, Justice Grauer concluded that its decision to issue the EAC was reasonable:

> [171] Here, given the other factors I have discussed above concerning *the nature of the assessment comprehensively undertaken by the NEB*, which the Ministers were obliged to consider, the legislative and policy choices underlying the Equivalency Agreement, *and the constitutional limitations placed upon British Columbia's mandate and its regulatory process*, only one conclusion is possible. The Ministers' decision to order the issuance of an EAC without ordering a further assessment, a discretionary decision, fell within the range of possible, acceptable outcomes defensible in respect of the facts and law.[83]

E. Summary of Recent Administrative Decisions and Jurisprudence

Prior to the NEB's release of its *Reasons re: MH-08*, it was clear that provinces cannot refuse or otherwise block interprovincial pipelines, but also that provincial and municipal laws — including environmental assessment laws — generally apply. These laws will likely be rendered inoperable or inapplicable, however, if they prohibit a pipeline proponent from carrying on work that is necessary to the planning, construction, or review (by the NEB) of such a pipeline. Following *Reasons re: MH-08*, it appears that provincial and municipal regimes can also be rendered inoperable or inapplicable if their implementation results in unreasonable delay, and further that the "when, where," and "orderly development" of pipeline construction falls within the protected core of federal jurisdiction over such pipelines — at least according to the NEB. Finally, there is some disagreement as to the nature of the *NEBA* regime. The court in *Coastal First Nations* was of the view that it was merely permissive, while the courts in

82 *Ibid* at para 29.
83 *Ibid* at para 171 [emphasis added].

Burnaby v Trans Mountain and *Vancouver v British Columbia* described it as comprehensive (albeit not in the context of a paramountcy analysis).

IV. Assessing British Columbia's proposed spill legislation

The full text of British Columbia's proposed spill legislation, drafted as a set of amendments to its *Environmental Management Act,* is included at Appendix A to this article. Briefly, a new section 22.3 sets out a requirement for a hazardous substances permit for incremental increases of heavy oil (essentially, post 2017 volumes),[84] which a person may obtain in accordance with section 22.4 after submitting various kinds of information to the "satisfaction" of the relevant Director, including "the risks to human health or the environment that are posed by a release of the substance" and "the types of impacts that may be caused by a release of the substance and an estimate of the monetary value of those impacts."[85] The applicant must also "demonstrate to the satisfaction of the director" that it "has appropriate measures in place" to prevent a release of the substance, to ensure that any release can be minimized, and that it has "sufficient capacity" to be able to respond to a release "in the manner and within the time specified by the director."[86] Finally, the applicant must demonstrate that it has the financial resources to respond to and compensate "any person, the government, a local government or a First Nations government for damages resulting from a release of the substance," including not just economic losses but also the loss of non-use value.[87] Section 22.5 allows the Director to impose conditions on such permits, while section 22.6 allows the Director to cancel or suspend such a permit.

84 Through the combined operation of subs 22.3(1) and the proposed Schedule, a permit is only required for persons having possession, charge, or control of an annual amount of heavy oil exceeding the largest annual amount of heavy oil that the person had possession, charge, or control of in the period between 2013 to 2017.

85 Subparagraph 22.4(1)(a).

86 Subparagraph 22.4(1)(b).

87 Subparagraph 22.4(1)(c). "Non-use value", also referred to as "passive value" or "existence value", is a term in environmental economics used to describe the utility or satisfaction that people derive from simply knowing that an environmental asset or feature exists, such as blue whales or a pristine wilderness. The Supreme Court of Canada "opened the door" for governments to sue for the loss of both use and non-use values at common law in *British Columbia v Canadian Forest Products Ltd.*, [2004] 2 SCR 74, 2004 SCC 38; see Jerry V DeMarco, Marcia Valiante, & Marie-Ann Bowden, "Opening the Door for Common Law Environmental Protection in Canada: The Decision in *British Columbia v Canadian Forest Products Ltd.*" (2015) 27(2) Envtl L & Pr 233. Since that time, the loss of use and non-use values has been added to several federal environmental laws as relevant factors in sentencing, as well as compensable in the event of environmental harm, including in the *National Energy Board Act,* ; see *NEBA, supra* note 3, s 48.12(1)(c).

British Columbia has referred the following three questions to its Court of Appeal:

1. Is it within the legislative authority of the Legislature of British Columbia to enact legislation substantially in the form set out…?
2. If the answer to question 1 is yes, would the attached legislation be applicable to hazardous substances brought into British Columbia by means of interprovincial undertakings?
3. If the answers to questions 1 and 2 are yes, would existing federal legislation render all or part of the attached legislation inoperative?

As with any division of powers analysis, the Court of Appeal's first task will be to determine the validity of the legislation: whether it falls, in "pith and substance," within one of the relevant heads of legislative power as found in sections 91 and 92 of the *Constitution Act, 1867*. The second and third questions appear to engage interjurisdictional immunity (applicability) and paramountcy (inoperability), respectively.

A detailed assessment of the legislation's validity is beyond the scope of this paper; I pause only to note that its restricted application to incremental increases of heavy oil, combined with the current government's very public statements about trying to block the Trans Mountain pipeline,[88] is bound to give the Court of Appeal its own cause for pause.[89] I simply assume for present purposes that it is *intra vires* the province's jurisdiction over the environment through its jurisdiction with respect to purely local matters and property and civil rights. As for *NEBA*, no party has ever seriously questioned its constitutional validity under Parliament's jurisdiction over interprovincial works and undertakings pursuant to subparagraph 92(10)(a) of the *Constitution Act, 1867*.

To begin with paramountcy, it seems unlikely that a court would find that the proposed legislation runs afoul of the first branch of the doctrine.[90] The proposed regime is to a large extent duplicative of the NEB regime. For example, the NEB's Trans Mountain project report, which pursu-

88 See e.g. Linda Givetash, "NDP Case against Trans Mountain Pipeline may be Hurt by Previous Legal Arguments", *CBC News* (28 April 2018), online: <www.cbc.ca/news/canada/british-columbia/trans-mountain-ndp-legal-challenge-experts-conflict-constitution-environmental-battles-rare-1.4640653>.

89 In *Rogers*, supra note 18 at para 36, the Supreme Court of Canada made clear that ascertaining a law's purpose "…is determined by examining *both intrinsic evidence*, such as the preamble or the general purposes stated in the resolution authorizing the measure, *and extrinsic evidence, such as that of the circumstances in which the measure was adopted*…" [emphasis added].

90 National Energy Board, "Reasons December 2017", *supra* note 61 at 24.

ant to *CEAA, 2012* had to include an environmental assessment, discusses potential spills in considerable detail.[91] The report mentions the word "spill" over 1500 times and addresses pipeline spills, terminal spills, and shipping-related spills. In addition to the section on "accidents and malfunctions" in Chapter 10 (Environmental Assessment), two entire chapters were more or less devoted to the issue: Chapter 8 (Environmental Behavior of Spilled Oil) and Chapter 9 (Emergency Prevention, Preparedness and Response).

Of the 157 conditions imposed on Trans Mountain, eight are spill-related and require,[92] amongst other things, the filing of emergency response plans (including spill response) and an "emergency preparedness and response exercise and training program." Condition 121 requires the filing of a "Financial Assurances Plan" that includes "details of the financial resources and secured sources of funds that will be necessary to pay, without limitation, all actual loss or damage, costs and expenses, including cleanup and remediation, and loss of non-use value relating to non-use of a public resource associated with an unintended or uncontrolled release from the Project during the operations phase."[93] This last condition is consistent with sections 48.12 and 481.13 of *NEBA*, which provide for limited absolute liability and unlimited liability in the event of fault (*e.g.* negligence),[94] and also contains provisions for the loss of non-use value.[95] As noted in *Squamish v British Columbia*, these provisions were recently added to the *NEBA*: "…In June 2016 the federal *Pipeline Safety Act* came into effect, which introduced an additional level of accountability on companies, including absolute liability for all costs and damages irrespective of fault, and additional authority for the NEB, including the ability to order reimbursement of clean-up costs and take control of company incident response…."[96]

The obvious difference between the NEBA regime and the proposed BC regime is that it will be a Director pursuant to the *EMA*, not an NEB panel, who will determine whether to issue a hazardous substances permit and pursuant to what conditions. Applying the NEB's analysis in *Reasons re: MH-081* but substituting the *EMA* amendments for Burnaby's zoning bylaws, however,

91 As noted by Grauer J in *Vancouver, supra* note 72 at para 29. This is not to suggest that the NEB's treatment of this issue is without reproach, but that disagreements with respect to the NEB's report and conclusions are exactly that and were properly before the Federal Court of Appeal in *Tsleil-Waututh*, *supra* note 59.

92 National Energy Board, "Report 2016", *supra* note 60, conditions 17-18, 22, 89, 119, 121, 133, 136.

93 *Ibid*, condition 121.

94 *NEBA, supra* note 3, s 48.12(1), 48.12(4).

95 *NEBA, supra* note 3, s 48.12(1)(c).

96 *Squamish, supra* note 73 at para 118.

there may still be "no obvious problems" with this scenario under the first branch of paramountcy:

> …the fact that [the *EMA* amendments] confer some discretion on decision-makers in terms of whether to grant a permit… is not in and of itself enough… to establish an operational conflict… The Board accepts that [the Director] cannot deny necessary [hazardous substance] permits… for the Project; however, this does not render the entire… permitting process inoperable. As was the case in *Coastal First Nations v. British Columbia (Environment)*, there are no obvious problems with the imposition of [the *EMA* amendments] on the Board-regulated Project…

Thus, within the constraints set out by the decisions and judgments discussed in Part III (*i.e.* the Director could not refuse to issue Trans Mountain a hazardous substances permit and must implement the regime in a reasonably timely manner), it is unlikely that the proposed legislation results in explicit operational conflict. This would be the case even if the Director were to require Kinder Morgan to carry out further assessments or to impose stricter conditions than those imposed by the NEB; Kinder Morgan could theoretically comply with both.

In this type of situation, however, the second branch of the paramountcy doctrine would need to be considered. Requiring further assessments or imposing stricter conditions, whether with respect to spill response or financial security, appears to amount to a second-guessing and potential recalibration of the risk assessment and public interest determination delegated to, and carried out by, the NEB.[97] Would such a recalibration frustrate Parliament's purpose in enacting the *NEBA* regime?

What, then, is *NEBA*'s purpose? Aside from the cases discussed in Part III, there is actually limited jurisprudence on this question and some of that case law focuses on specific provisions rather than the interprovincial pipeline regime as a whole. Part V of the Act ("Power of Pipeline Companies") was described as a "complete code" in *Canadian Alliance of Pipeline Landowners'*

97 See e.g. National Energy Board, "Report 2016", *supra* note 60 at xiv: "The Board finds that there is a very low probability of a Project spill (i.e., from pipeline, tank terminals, pump stations, or WMT that may result in a significant effect (high consequence). *The Board finds this level of risk to be acceptable*" [emphasis added]; see also at 156: "Participants said that Trans Mountain had not demonstrated that its spill response would be effective. *Some had differing views as to what an effective spill response would entail*. The Board is of the view that an effective response would include stopping or containing the source of the spill, reducing harm to the natural and socio-economic environment to the greatest extent possible through timely response actions, and appropriate follow-up and monitoring and long-term cleanup. *The Board is of the view that these elements are addressed in Trans Mountain's design of its response plans*" [emphasis added].

Association v Enbridge Pipelines Inc.[98] The Court also described the *NEBA* regime more generally as follows:

> [12] To state the obvious, the *NEB Act* applies to all federally regulated pipelines. It establishes the National Energy Board (the "NEB") and confers responsibility and authority upon the NEB to promote the safe operation of pipelines. Subsection 48 (2) of the *NEB Act* confers upon the NEB authority to make regulations, with the approval of the Governor General in Council, which provide for the protection of property and the environment and the safety of the public and the companies' employees in the construction and operation of pipelines.
>
> [27] The *NEB Act* is *an elaborate statutory regime* governing pipelines that traverse this country. The importance of closely controlled regulations respecting pipelines is obvious.[99]

Similarly, in *R. v B. Cusano Contracting Inc.*,[100] the sentencing decision following Trans Mountain's guilty plea for offences under the *EMA* following it's 2007 spill in Burnaby, the Court observed that "the interprovincial pipeline sector is *highly regulated*. For a party to own and operate an interprovincial pipeline, a certificate of public convenience and necessity must be issued by the Federal Cabinet. Significant amendments to the certificate must be approved by Cabinet. Pipeline construction, tolls for pipeline use, and pipeline operational changes are all subject to NEB review."[101] In *Forest Ethics Advocacy Association v Canada (National Energy Board)*,[102] an administrative law case dealing with the issue of standing in certificate hearings, the Federal Court of Appeal noted that the NEB's "main responsibilities under the *National Energy Board Act*… include regulating the construction and operation of inter-provincial oil and gas pipelines (see Part III of the Act)."[103] In *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*,[104] the Supreme Court recognized the NEB's "expertise in the supervision and approval of federally regulated pipeline projects," describing the NEB as "particularly well positioned to assess the risks posed by such projects" and noting its "broad jurisdiction to impose conditions on proponents to mitigate those risks."[105] These remarks were cited with approval

98 [2006] OJ No 4999, 153 ACWS (3d) 1260 at para 26.
99 *Ibid* at paras 12, 27 [emphasis added].
100 2011 BCPC 348, [2011] BCJ No 2349.
101 *Ibid* at para 12 [emphasis added]. This case thus provides another example where a provincial law, namely ss 6(4) and 120(3) of the *Environmental Management Act*, has been applied to an interprovincial pipeline.
102 [2015] 4 FCR 75, 2014 FCA 245.
103 *Ibid* at para 69.
104 2017 SCC 41, [2017] 1 SCR 1099
105 *Ibid* at para 48.

by the Federal Court of Appeal in *Tsleil-Waututh Nation v. Canada (Attorney General)*,[106] wherein Cabinet's Trans Mountain approval was successfully challenged by several First Nations and environmental groups: "While the Supreme Court was particularly focused on the Board's expertise in the context of its ability to assess risks posed to Indigenous groups, the Board's expertise extends to the full range of risks inherent in the operation of a pipeline…."[107]

With the exception of *Coastal First Nations*, these characterizations are consistent with most of the cases discussed in Part III. In *Burnaby v Trans Mountain*, Justice Macintosh stated that "…power over interprovincial pipelines rests with Parliament" and that the "*NEB Act* is comprehensive legislation enacted to implement that power."[108] Alongside his remarks in *Vancouver v British Columbia* (discussed above), in *Squamish v British Columbia* Justice Grauer observed that "[p]ipeline safety is primarily managed and regulated through the NEB."[109]

In my view, a fair reading of Parts I ("Establishment of the Board"), III ("Construction, Operation and Abandonment of Pipelines"), and V ("Powers of Pipeline Companies") does suggest an intention to create a comprehensive regime for the regulation of interprovincial pipelines.[110] Part I sets out the powers of the NEB, which as illustrated in the decisions considered throughout this paper are extensive: it has the power to make rules;[111] it is a court of record;[112] it has broad jurisdiction to make orders, give directions, or issue sanctions, and in so doing may consider any matter of law and fact;[113] and, such orders and decisions are only reviewable on questions of law and only with leave from the Federal Court of Appeal.[114] Pursuant to Part III of the Act, no company may operate a pipeline without having a certificate and obtaining leave to open their

106 *Supra* note 59. For commentary on this case, see Martin Olszynski, "Federal Court of Appeal Quashes Trans Mountain Pipeline Approval: The Good, the Bad, and the Ugly" (September 6, 2018), *ABlawg* (blog), online: <http://ablawg.ca/wp-content/uploads/2018/09/Blog_MO_TMX_Sept2018.pdf>; David V Wright, "Tsleil-Waututh Nation v Canada: A Case of Easier said than Done" (September 11, 2018), *ABlawg* (blog), online: <http://ablawg.ca/wp-content/uploads/2018/09/Blog_DVW_TMX_Sept2018.pdf>.

107 *Ibid* at para 284.

108 *Burnaby (City), supra* note 39 at para 60.

109 *Squamish, supra* note 73 at para 118.

110 See also the more detailed discussion of the *National Energy Board Act* regime in Al Lucas' article in this special issue.

111 *NEBA, supra* note 3, s 8.

112 *Ibid*, s 11(1).

113 *Ibid*, s 12.

114 *Ibid*, s 22.

pipeline from the NEB.[115] Subsequent sections set out specific rules for detailed routing,[116] opening,[117] construction, operating, and abandonment,[118] liability (as discussed above),[119] and the powers of inspectors,[120] much of which is further supplemented through regulations.

The process for applying for a certificate of public convenience and necessity is set out in section 52, pursuant to which the NEB must prepare and submit to the Minister of Natural Resources a report setting out "its recommendation as to whether or not the certificate should be issued … taking into account whether the pipeline is and will be required by the present and future public convenience and necessity," and "all the terms and conditions that it considers necessary … in the public interest…"[121] In making its recommendation, the NEB shall "have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant," and may consider, in addition to economic considerations such as the existence of markets (actual and potential) and the economic feasibility of a pipeline, "*any public interest* that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application."[122] Where an application is in relation to a "designated project" pursuant to *CEAA, 2012*, the report must also set out the NEB's environmental assessment prepared under that Act.[123]

Finally, as noted above, the Court in *Canadian Alliance of Pipeline Landowners' Associations* has already held that "Part V of the *NEB Act*… reveals the intention on the part of Parliament to create a complete code, one which, first, provides for the powers of pipeline companies (s. 73); second, provides for compensation to be included in land acquisition agreements (s. 86) and also provides for a statutory right of compensation of general application (s. 75) as well as limitations upon that right (s. 84); and third, provides for a range of

115 *Ibid*, s 30(1).
116 *Ibid*, s 34.
117 *Ibid*, s 47.
118 *Ibid*, s 48.
119 *Ibid*, s 48.12.
120 *Ibid*, ss 49-51.3.
121 *Ibid*, ss 52(1)(a), 52(1)(b).
122 *Ibid*, s 52(2) [emphasis added].
123 The analysis might be different as between the *Environmental Management Act* amendments and *CEAA, 2012*, alone (without the *National Energy Board Act*), bearing in mind the *CEAA, 2012*'s restricted focus, pursuant to section 5, on "components of the environmental that are within the legislative authority of Parliament," but even this restriction is half-hearted; s 5(2) also captures effects that are "directly linked or necessarily incidental to a federal authority's exercise of a power," rendering virtually all pipeline-related effects as federal.

dispute resolution mechanisms including assisted negotiations (ss. 88-89) and arbitration proceedings (ss. 90-103)."[124]

Returning to the distinction discussed in Part II of this article between permissive regimes and those considered as conferring a positive entitlement or right, the NEB regime is clearly different from the federal regime for pesticides considered permissive by the Supreme Court in *Spraytech*:

> Federal legislation relating to pesticides extends to the regulation and authorization of their import, export, sale, manufacture, registration, packaging and labeling. *The [Pest Control Products Act] regulates which pesticides can be registered for manufacture and/or use in Canada. This legislation is permissive, rather than exhaustive….* Analogies to motor vehicles or cigarettes that have been approved federally, but the use of which can nevertheless be restricted municipally, well illustrate this conclusion. There is, moreover, no concern in this case that application of By-law 270 [which prohibited certain cosmetic uses] displaces or frustrates "the legislative purpose of Parliament."[125]

It is also different than the federal restrictions on tobacco advertising at issue in *Rothmans, Benson & Hedges Inc. v Saskatchewan*.[126] The Supreme Court did not accept that Parliament intended for the *Tobacco Act* to grant retailers a positive entitlement to display tobacco products in large part because it was enacted pursuant to the federal criminal law power: "…As the criminal law power is essentially prohibitory in character, provisions enacted pursuant to it, such as s. 30 of the *Tobacco Act*, do not ordinarily create freestanding rights that limit the ability of the provinces to legislate in the area more strictly than Parliament…."[127]

A consideration of the interprovincial works power, on the other hand, suggests that the *NEBA* regime cannot be merely permissive. Otherwise, the decision to confer jurisdiction over such works to the federal government could be thwarted. In *Consolidated Fastfrate Inc. v Western Canada Council of Teamsters*,[128] the Supreme Court traced the history of this head of power as follows:

> [36] Thus, while the preference in s. 92(10) was for local regulation of works and undertakings, some works and undertakings were of sufficient national importance that *they required centralized control*. The works and undertakings specifically excepted in

124 Supra note 98.
125 *Spraytech, supra* note 17 at para 35.
126 2005 SCC 13, [2005] 1 SCR 188.
127 *Ibid* at para 19.
128 [2009] 3 SCR 407, 2009 SCC 53 at paras 31-39.

> s. 92(10)(*a*) include some of those most important to the development and continued flourishing of the Canadian nation….
>
> [37] The fact that works and undertakings that physically connected the provinces were subject to exceptional federal jurisdiction is not surprising. *For example, it would be difficult to imagine the construction of an interprovincial railway system if the railway companies were subject to provincial legislation respecting the expropriation of land for the railway right of way or the gauge of the line of railway within each province*. If the legislature of the province did not grant railway companies the power of expropriation or if they refused to agree to a uniform gauge, the development of a national railway system would have been stymied.[129]

This logic can be applied directly to the planning, construction, operation, and abandonment of interprovincial pipelines, and explains why Parliament vested the NEB and interprovincial pipeline proponents with the powers that it did. Stepping back into the broader discussion regarding co-operative federalism and the principle of subsidiarity that tends to be invoked in favor of local environmental regulation in particular,[130] it can also be said that the interprovincial works power itself reflects a general preference for subsidiarity but then explicitly carves out certain works for centralized federal control. To ignore this carve-out through an enthusiastic embrace of co-operative federalism would be to "override [or] modify the division of powers itself" — precisely what the Supreme Court cautioned against in *Rogers*.[131]

The only difficulty with characterizing the *NEBA* regime as a comprehensive one that confers a positive right is that the NEB itself, in its various decisions, appears to have ceded *some* regulatory authority to provinces and municipalities, such that it could not be said to constitute a "complete code."[132] Upon closer examination, however, and certainly after its ruling in *Reasons re: MH-081,* its clear that such yielding is not unconditional. Whether driven by pragmatic considerations (*e.g.* the NEB could not hope to replicate all of their functions itself) or by an ethos of co-operative federalism, or most likely both, the NEB is willing — keen even — for local governments to play a role in regu-

129 *Ibid* at paras 36-37 [emphasis added].

130 *Spraytech, supra* note 17 at para 3: "…This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity…".

131 *Rogers, supra* note 18 at para 39.

132 The federal banking provisions at issue in *Bank of Montreal v Hall*, [1990] 1 SCR 121, [1990] SCJ No 9 at para 64 were described as a "…*complete code* that at once defines and provides for the realization of a security interest. *There is no room left for the operation of the provincial legislation* and that legislation should, accordingly, be construed as inapplicable to the extent that it trenches on valid federal banking legislation." [emphasis added].

lating certain aspects of interprovincial pipelines (*e.g.* local ones) within limits; attempts to thwart projects deemed by project approval to be in the public interest, whether directly or indirectly, exceed that limit.[133]

Viewed this way, the characterization of the *NEBA* regime as an essentially comprehensive one intended to confer a positive right to proponents remains largely intact. If that is correct, then it seems plain that legislation that second-guesses a substantial part of that regime (*i.e.* spill assessment, prevention, response, financial assurance, and liability) and purports to authorize a recalibration of the risk assessment made by the NEB frustrates Parliament's purpose.

With respect to interjurisdictional immunity, the question will be whether the spill-related issues addressed by the *EMA* amendments (*i.e.* spill assessment, prevention, response, financial assurance, and liability) are protected "essential parts" of the federal undertakings.[134] On the one hand, the jurisprudence already supports the application of provincial pollution legislation to spills caused by interprovincial pipelines: in *R. v B. Cusano Contracting Inc. et al* (the sentencing decision discussed above), Trans Mountain plead guilty to contravening subsection 6(4) of the *EMA,* which prohibits "…introduc[ing] waste into the environment in such a manner or quantity as to cause pollution"[135] to a maximum fine of $1,000,000.[136] And *Coastal First Nations* established that provincial environmental assessment legislation can apply to interprovincial pipelines, which suggests that assessing the effects of a potential spill may also not be an essential or core element.

On the other hand, if such assessments, response plans, financial assurance, and liability provisions are viewed *collectively*, as a series of tools used by legislators and regulators in striking a balance between fostering economic activity and ensuring a certain level of environmental protection, then an argu-

133 This dynamic is almost on all fours with federal government's approach to the siting of radiocommunication antennae systems that was at issue in *Rogers*, *supra* note 18 at para 9, which the Supreme Court described as follows: "Before installing its system, Rogers also had to obtain the Minister's approval for a specific site under s. 5(1)(f) of the *Radiocommunication Act*. To do this, it had to submit to a 120-day public consultation process, as was required by circular *CPC-2-0-03* … published by Industry Canada. The *Circular* required that both the public and the land-use authority ("LUA") — Châteauguay in this case — be consulted. The purpose of this consultation was to identify concerns about the proposed installation and ensure that the licence holder reached an understanding with the LUA. Following the consultation process, the Minister … could also resolve any impasse reached in the discussions between the parties regarding the construction of the antenna system by making a final decision in that regard."

134 *Canadian Western, supra* note 9 at para 44.

135 *EMA, supra* note 1, s 6(4).

136 *EMA, supra* note 1, s 120(3).

ment could be made that they do form an essential part of the NEB regime. Simply put, where that balance is struck has real practical consequences for proponents. As noted by Canada's Ecofiscal Commission in its latest report, "Responsible Risk: How putting a price on environmental risk makes disasters less likely":

> Policies aimed at … deterrence and compensation … carry real economic costs. They divert scarce resources that could otherwise be productively employed in the economy. For example, requiring firms to earmark funds to cover their liability for a potential disaster ties up a portion of their available capital. They are unable to invest these funds in improved production efficiency, greater capacity, or an altogether new project.[137]

As noted above, Parliament has very recently participated in striking this balance, especially through amendments to the *NEBA* through the *Pipeline Safety Act* (discussed above). In addition, the recently promulgated *Pipeline Financial Requirements Regulations*[138] set out acceptable forms of financial instruments for demonstrating proof of sufficient financial resources (which for major oil pipelines includes absolute liability in the amount of $1 billion) and a requirement to hold a portion of such financial resources in readily accessible form. Bearing in mind the amounts involved, it is not difficult to see how a subsequent recalibration of this balance, *e.g.* requiring greater financial assurance, could change the economics of a project — one of the few considerations that the NEB is explicitly invited to consider in preparing its section 52 report.[139] Viewed this way, these matters may be deemed to fall within the protected core of Parliament's jurisdiction over interjurisdictional pipelines.

V. Conclusion

Spurred on by recent assertions of provincial authority over interprovincial pipelines otherwise regulated by the NEB, this article set out the constitutional doctrines and principles that determine whether such assertions (assuming validity) are operative and applicable in the face of federal legislation, namely the doctrines of paramountcy and interjurisdictional immunity. It also identified and discussed several recent administrative and court decisions that shed some light on the application of these doctrines in the interprovincial pipeline con-

137 Canada's Ecofiscal Commission, "Responsible Risk: How Putting a Price on Environmental Risk makes Disasters Less Likely", (July 2018) at 11, online: <https://ecofiscal.ca/wp-content/uploads/2018/06/Ecofiscal-Commission-Risk-Pricing-Report-Responsible-Risk-July-11-2018.pdf>.

138 SOR/2018-142, as recently published in the *Canada Gazette*, Part II, Volume 152, Number 14.

139 *NEBA, supra* note 3, s 52(2)(b).

text. Drawing on this discussion, Part IV sketched out the analysis that is likely to be applied to British Columbia's recently proposed spill legislation.

In my view, while British Columbia's proposed spill regime is unlikely to result in an operational conflict pursuant to the first branch of the paramountcy doctrine, an argument can be made that, by authorizing a second-guessing and potential recalibration of the assessment carried out by the NEB, its mere existence frustrates Parliament's purpose in enacting the *NEBA* under the second branch of that doctrine. With respect to interjurisdictional immunity, arguments can be made both ways. To the extent that spill-related provisions, including those with respect to financial assurance and potential liability, are recognized as impacting on the economic feasibility of a given interprovincial pipeline, they may be said to fall within the core of federal jurisdiction, rendering British Columbia's proposed legislation inapplicable.

None of this is to suggest that the NEB regime is perfect or that NEB reviews are without problems; indeed, the Federal Court of Appeal's decisions in *Gitxaala* and *Tsleil-Waututh* are opposite.[140] It does suggest, however, that such concerns lie with the NEB, the Federal Court of Appeal, or with Parliament — as the proposed replacement of the NEB with the Canadian Energy Regulator (CER) pursuant to Bill C-69 makes clear.[141] If and when passed, that legislation will alter considerably Canada's environmental (soon to be simply "impact") assessment regime, including with respect to interprovincial pipelines. Unlike the current NEB, the future CER will not have exclusive authority over such assessments; rather, these will be carried out by joint review panels,[142] which in addition to a project's adverse environmental effects will have to consider its contribution to "sustainability"[143] and whether the project contributes to or hinders Canada's ability to meet its climate change commitments.[144] Following amendments by the Standing Committee on Environment and Sustainable Development during second reading, such panels and all federal authorities will also have to adhere "to the principles of scientific integrity, honesty, objectivity, thoroughness and accuracy."[145] All of these proposed changes can be

140 See *supra* notes 4 (*Gitxaala*) and 59 (*Tsleil-Waututh*).

141 See 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 [Bill C-69].

142 *Ibid*, s 43.

143 *Ibid,* ss 22, 63. Sustainability is defined in s 2 as "the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations."

144 *Ibid* ss 22, 63.

145 Bill C-69, *supra* note 137, 3rd reading, as passed by the House of Commons, June 20, 2018, s 6(3).

traced back directly to public concerns expressed during and after the previous Conservative government's tenure with respect to the review of major resource projects in Canada — including interprovincial pipelines.[146]

In the broader context of Canadian environmental and natural resource law and policy, such responsiveness is exceedingly rare, with several commentators pointing to uncertainty about jurisdiction over environmental matters as a contributing factor. As noted by Professor Mark Walter almost thirty years ago,

> …Strong arguments can be made that the Constitution, instead of instilling a sense of rule of law into environment and resource management, suffocates the ideal with a fog of jurisdictional ambiguity, thereby frustrating the goals of openness and accountability. *Public participation and interest group access to those who formulate policy requires a clear understanding by both those in power and those attempting to sway those in power of just who is responsible for what*. In the area of environmental management, however, confusion prevails on the part of both officials and the public in this regard.[147]

In my view, the rare clarity of responsibility and potential for democratic accountability that comes with recognizing Parliament's comprehensive jurisdiction over interprovincial pipelines is an important counterpoint to arguments in favor of local jurisdiction and the overlap and ambiguity that would inevitably come with it.[148]

146 See e.g. Canada, Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada*, (Ottawa: Canada Environmental Assessment Agency, 2017), online: <www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>; Canada, Expert Panel for Modernization of the National Energy Board, *Forward Together: Enabling Canada's Clean, Safe, and Secure Energy Future*, (Ottawa: NRCA, 2017), online: <www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf>.

147 Mark Walters, "Ecological Unity and Political Fragmentation: The Implications of the Brundtland Report for the Canadian Constitutional Order" (1991) 29 ALR 420 at 430 [emphasis added].

148 The prospects for democratic accountability have been further augmented recently with the federal government having announced in late May of this year that it will purchase Kinder Morgan's Trans Mountain assets for $4.5 billion to ensure that the pipeline is built: see Kathleen Harris, "Liberals to Buy Trans Mountain Pipeline for $4.5B to Ensure Expansion is Built", *CBC News* (29 May 2018), online: <www.cbc.ca/news/politics/liberals-trans-mountain-pipeline-kinder-morgan-1.4681911>. Whether or not this purchase affects the legal analysis set out above is beyond the scope of this paper, but at the very least it is unlikely to make British Columbia's case any stronger.

Appendix A

Environmental Management Act

1 The following Part is added to the *Environmental Management Act*, S.B.C. 2003, c. 53:

PART 2.1 — HAZARDOUS SUBSTANCE PERMITS

Purposes

22.1 The purposes of this Part are

(a) to protect, from the adverse effects of releases of hazardous substances,

(i) British Columbia's environment, including the terrestrial, freshwater, marine and atmospheric environment,

(ii) human health and well-being in British Columbia, and

(iii) the economic, social and cultural vitality of communities in British Columbia, and

(b) to implement the polluter pays principle.

Interpretation

22.2 The definition of "permit" in section 1 (1) does not apply to this Part.

Requirement for hazardous substance permits

22.3 (1) In the course of operating an industry, trade or business, a person must not, during a calendar year, have possession, charge or control of a substance listed in Column 1 of the Schedule, and defined in Column 2 of the Schedule, in a total amount equal to or greater than the minimum amount set out in Column 3 of the Schedule unless a director has issued a hazardous substance permit to the person to do so. (2) Subsection (1) does not apply to a person who has possession, charge or control of a substance on a ship.

Issuance of hazardous substance permits

22.4 (1) Subject to subsection (2), on application by a person, a director may issue to the applicant a hazardous substance permit referred to in section 22.3 (1).

(2) Before issuing the hazardous substance permit, the director may require the applicant to do one or more of the following:

(a) provide information documenting, to the satisfaction of the director,

(i) the risks to human health or the environment that are posed by a release of the substance, and

(ii) the types of impacts that may be caused by a release of the substance and an estimate of the monetary value of those impacts;

(b) demonstrate to the satisfaction of the director that the applicant

(i) has appropriate measures in place to prevent a release of the substance,
(ii) has appropriate measures in place to ensure that any release of the substance can be minimized in gravity and magnitude, through early detection and early response, and
(iii) has sufficient capacity, including dedicated equipment and personnel, to be able to respond effectively to a release of the substance in the manner and within the time specified by the director;

(c) post security to the satisfaction of the director, or demonstrate to the satisfaction of the director that the applicant has access to financial resources including insurance, in order to ensure that the applicant has the capacity

(i) to respond to or mitigate any adverse environmental or health effects resulting from a release of the substance, and
(ii) to provide compensation that may be required by a condition attached to the permit under section 22.5 (b) (ii);

(d) establish a fund for, or make payments to, a local government or a first nation government in order to ensure that the local government or the first nation government has the capacity to respond to a release of the substance;

(e) agree to compensate any person, the government, a local government or a First Nations government for damages resulting from a release of the substance, including damages for any costs incurred in responding to the release, any costs related to ecological recovery and restoration, any economic loss and any loss of non-use value.

Conditions attached to hazardous substance permits

22.5 A director may, at any time, attach one or more of the following conditions to a hazardous substance permit:

(a) conditions respecting the protection of human health or the environment, including conditions requiring the holder of the permit

(i) to implement and maintain appropriate measures to prevent a release of the substance,

(ii) to implement and maintain appropriate measures to ensure that any release of the substance can be minimized in gravity and magnitude, through early detection and early response, and

(iii) to maintain sufficient capacity, including dedicated equipment and personnel, to be able to respond effectively to a release of the substance in the manner and within the time specified by the director;

(b) conditions respecting the impacts of a release of the substance, including conditions requiring the holder of the permit

(i) to respond to a release of a substance in the manner and within the time specified by the director, and

(ii) to compensate, without proof of fault or negligence, any person, the government, a local government or a First Nations government for damages referred to in section 22.4 (2) (e).

Suspension or cancellation of hazardous substance permits

22.6 (1) Subject to this section, a director, by notice served on the holder of a hazardous substance permit, may suspend the permit for any period or cancel the permit.

(2) A notice served under subsection (1) must state the time at which the suspension or cancellation takes effect.

(3) A director may exercise the authority under subsection (1) if a holder of a hazardous substance permit fails to comply with the conditions attached to the permit.

Restraining orders

22.7 (1) If a person, by carrying on an activity or operation, contravenes section

2.3 (1), the activity or operation may be restrained in a proceeding brought by the minister in the Supreme Court.

(2) The making of an order by the court under subsection (1) in relation to a matter does not interfere with the imposition of a penalty in respect of an offence in relation to the same contravention.

Offence and penalty

22.8 A person who contravenes section 22.3 (1) commits an offence and is liable on conviction to a fine not exceeding $400 000 or imprisonment for not more than 6 months, or both.

Power to amend Schedule

22.9 The Lieutenant Governor in Council may, by regulation, add substances, their definitions and their minimum amounts to the Schedule and delete substances, their definitions and their minimum amounts from the Schedule.

2 The following Schedule is added:

SCHEDULE *[section 22.3 (1)]*

Substance: Heavy Oil

Definition of Substance:

a) a crude petroleum product that has an American Petroleum Institute gravity of 22 or less, or

(b) a crude petroleum product blend containing at least one component that constitutes 30% or more of the volume of the blend and that has either or both of the following:

(i) an American Petroleum Institute gravity of 10 or less,

(ii) a dynamic viscosity at reservoir conditions of at least 10 000 centipoise.

Minimum Amount of Substance:

The largest annual amount of the annual amounts of the substance that the person had possession, charge or control of during each of 2013 to 2017.

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

*Nathalie J. Chalifour**

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

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

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

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

Part I: Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018 (third reading 20 June 2018) [Bill C-69].

16 *Ibid*, Part 2.

17 *Ibid*, Part 1.

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

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

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

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

Part II: background and context

1. Parliament's jurisdiction over interprovincial pipelines

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

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

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

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

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

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

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

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

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

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

25 *Ibid* at para 85.

26 *Ibid.*

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

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

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

2. Overview of federal regulatory context for pipeline reviews

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

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

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

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

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

31 Walton, *supra* note 21 at 537.

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

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

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

35 *Ibid*, s 52(3).

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

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

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

A. Bill C-69

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

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

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

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

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

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

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

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

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

B. CER Act

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

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

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

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

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

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

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

C. Impact Assessment Act

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

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

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

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

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

60 *Ibid*, s 63(e).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Part III: jurisdictional analysis

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

72 *Ibid*.

73 *Ibid*.

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

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

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

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

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

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

1. The trigger

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

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

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

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

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

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

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

84 *Ibid*, s 91(12).

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

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

87 *Ibid*, s 91.

88 *Ibid*, s 92A.

89 *Ibid*, s 92(13).

90 *Ibid*, s 92(10).

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

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

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

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

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

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

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

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

99 *Ibid*, s 7(1).

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

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

102 *Ibid*, s 2.

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

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

2. Phase 2: scope and reach of pipeline reviews

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

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

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

i. Line 9B proposal and Forest Ethics decision

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

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

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

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

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

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

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

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

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

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

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

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

116 *Ibid* at 3.

117 Canada, National Energy Board, Sheri Young, "Ruling No. 25 – Motions Requesting that the Board Include in the List of Issues the Environmental and Socio-Economic effects Associated with Upstream Activities and Downstream Use", (Ottawa: National Energy Board, 23 July 2014) at 1, online: <https://apps.neb-one.gc.ca/REGDOCS/File/Download/2487522> [Young, "Ruling No. 25"].

118 *Ibid* at 2.

119 *Ibid*.

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

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

120 *Ibid* at 3.

121 *Ibid*.

122 *Ibid*.

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

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

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

126 *Ibid* at 2.

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

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

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

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

iii. Energy East pipeline

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

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

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

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

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

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

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

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

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

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

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

135 *Ibid*.

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

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

138 Flanagan & Demerse, *supra* note 76.

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

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

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

142 Young, "Letter", *ibid*.

143 *Ibid* at 2.

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

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

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

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

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

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

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

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

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

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

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

153 *Ibid* at 1-2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

179 *Ibid*.

180 *Ibid* at para 39.

181 *Ibid*.

182 *Ibid* at para 26.

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

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

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

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

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

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

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

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

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

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

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

3. Phase 3: decision-making

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

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

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

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

199 *Ibid*, s 63(e).

200 *Ibid*, s 64.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

215 SC 1999, c 33.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

238 *Ibid* at para 33.

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

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

239 *Ibid*.

240 *Ibid* at paras 37-38.

241 *Ibid* at para 64.

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

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

Part VI: conclusion

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

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

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

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

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

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

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

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

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

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.

* Assistant Professor of Law, University of Calgary. Sincere thanks to Professors Nigel Bankes, Fenner Stewart, Robert Hamilton, Martin Olszynski and two anonymous referees for their input on earlier drafts of this article. Thank you also to Kiara Brown for valuable research assistance. Any errors are the author's alone.

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-

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

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.

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/rgltrsnpsht/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

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.

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.

Rights in the Balance

*Jud Mathews**

Review of Francisco J. Urbina, *A Critique of Proportionality and Balancing* (Cambridge, 2017), 267 pp.

Proportionality analysis — the *Oakes* test to Canadians[1] — is the dominant approach globally for adjudicating human rights claims today, and currently a subject of intense interest to legal academics. The sheer volume of books on the subject published in the last several years is enough to threaten the structural integrity of the stoutest bookshelf.[2] Most of the books are broadly approving of proportionality's use by courts, but some have taken a more critical view.[3] Notable among the latter is Francisco J. Urbina's recent *Critique of Proportionality and Balancing*, which promises "a comprehensive critique of the proportionality test."[4] Distinguished by its ambition and the sophistication of

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1 *R v Oakes*, [1986] 1 SCR 103.

2 Important recent titles include Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) [Barak]; Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge: Cambridge University Press, 2013); Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge: Cambridge University Press, 2013) [Porat]; Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2016); Vicki C Jackson & Mark Tushnet, eds, *Proportionality: New Frontiers, New Challenges (Comparative Constitutional Law and Policy)* (Cambridge: Cambridge University Press, 2017); Matthias Klatt & Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012); Kai Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012) [Möller]; Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge: Cambridge University Press, 2017); Liora Lazarus, Christopher McCrudden & Nigel Bowles, eds, *Reasoning Rights: Comparative Judicial Engagement* (Sussex, England: Hart Publishing, 2016); Alexander Tischbirek, *Die Verhältnismäßigkeitsprüfung: Methodenmigration zwischen öffentlichem Recht und Privatrecht* (Germany: Mohr Siebeck, 2017); Grégoire C N Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, Cambridge University Press, 2009); Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge: Cambridge University Press, 2016). Proportionality is the subject of a huge number of articles as well.

3 *See, e.g.*, Webber, *supra* note 2.

4 Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 2 [Urbina].

its arguments, Urbina's book is essential reading for those engaged in the debates over proportionality.

The structure of Urbina's argument is elegant, revolving around a pair of binaries. Urbina argues that there are two main accounts of proportionality: maximization and proportionality as unconstrained moral reasoning. On the maximization account, the object of the proportionality test is to maximize the interests, values, or principles at stake. Under "proportionality as unconstrained moral reasoning," proportionality is an invitation for judges to engage in "open-ended moral reasoning, unconstrained by legal sources."[5] Urbina also argues that one can evaluate legal categories — including the doctrines used to adjudicate rights claims — from two perspectives: moral and technical. The moral perspective asks whether the doctrine captures the moral considerations that properly bear on a matter. The technical perspective asks how well it can translate the demands of morality into the real world: can courts reliably apply the doctrine to reach appropriate results?

Urbina's argument lines up the two binaries. The chief problem with the maximization account, he claims, is that it fails to capture what is morally relevant about rights. The defects of proportionality as unconstrained moral reasoning, for its part, are principally technical: proportionality as moral reasoning is incapable of providing the kind of legal direction that courts require. What is more, Urbina contends, since the flaws he flags are deeply rooted in these two dominant conceptions, no amount of tinkering can save proportionality. Ultimately, he argues, "there can be no understanding of proportionality that escapes objections of the kind offered here," and "there can be no single method for deciding whether an interference with a human right … is substantively justified."[6]

The book develops this argument, engaging more with academic treatments of proportionality than judicial decisions. In the end, Urbina argues for an alternative approach to rights adjudication, which he calls simply "legal human rights," that favors categorical reasoning. Is Urbina's case against proportionality convincing? For reasons I give below, I conclude that it is not.[7] But I will argue that his book helps to uncover what is at stake in the proportionality wars: to show where the core disagreements between proportionality

5 *Ibid* at 9.

6 *Ibid* at 2.

7 I do not come to this issue with a blank slate. For my own views on proportionality, see Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford: Oxford University Press, 2019).

proponents and skeptics lie. And, I will argue, his critique of proportionality highlights some peculiarities of his rival conception of legal human rights.

Before going further, it is worth reviewing what the proportionality test is. The core idea of proportionality is that measures limiting a fundamental right are invalid if they go too far. Courts determine whether a challenged measure is excessive by subjecting it to a battery of tests, administered in a predefined sequence. First, the court asks what the objective of the challenged measure is, and whether it is legitimate. Next, the court considers whether the measure is a suitable means for achieving that objective. Courts typically require only a rational relation between means and ends at this stage. Then, the court performs a least restrictive means test, asking whether the objective identified in the first step could be achieved using a measure that limited rights less. Finally, if the measure survives these tests, the court moves to "proportionality in the strict sense," a balancing test that asks whether the measure's impact on rights is excessive in relation to the contribution it makes towards its objective. There is substantial variation in how courts in different jurisdictions actually conduct proportionality review,[8] but this is the canonical version of the test.

The two accounts of proportionality that Urbina describes differ in what happens in the fourth and final stage of the test. On the maximization account, which is the subject of the four chapters following the introduction, the court engages in a balancing exercise, choosing to uphold or strike down the challenged measure depending on which outcome strikes the better balance between the interests at stake. Urbina's "maximization" is essentially what Robert Alexy terms "optimization" in his landmark *Theory of Constitutional Rights*, and Urbina uses Alexy's work, along with Aharon Barak's and David Beatty's, to illustrate maximization.[9]

Urbina has two lines of attack against maximization. The first is an incommensurability argument. To determine whether a limitation on a right is justifiable, proportionality requires that courts weigh the positive and negative impacts on the values at stake.[10] But different values are incommensurable. For Urbina:

8 *See ibid* ch 3.

9 Robert Alexy & Julian Rivers, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2010); Barak, *supra* note 2; David M Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

10 On different versions of proportionality, it may be values, interests, or principles that are weighed. The purported problem is the same in any case.

> two things are incommensurable with respect to X when X is not a property by which they can be compared quantitatively, that is, X is not a property by which it can be judged that one of the things is (overall, net) more or less X than, or just as X as, the other — whether or not there is a unit of measurement that can express X.[11]

Suppose the government prevents the publication of sensitive military documents on national security grounds. This action could ground a rights claim sounding in freedom of expression or freedom of the press. Depending on how the court rules, it will sacrifice some amount of national security for some freedom of communication, or vice versa. Even if, as Alexy proposes, the court grades the importance of the two values in the abstract, and assesses how severely each stands to be affected, the problem remains: there is no common currency for comparing the values at stake. Nor does it avail the court to assess the stakes with reference to some broader property, such as importance for the Constitution (as in Alexy's theory) or marginal social importance (as in Barak's). If these portmanteau properties depend on component properties that are themselves incommensurable, the incommensurability objection applies with undiminished force.

But even setting aside the problem of incommensurability, Urbina maintains that proportionality is still not equal to the task of deciding rights claims. We want judicial review to capture what is morally relevant about the rights claims at issue, and there is no reason to suppose that a balancing test does. Indeed, Urbina argues, "rights are about justice," and "[j]ustice is not about aggregating or maximising preferences or interests effectively or efficiently, but about distribution, that is, about who is entitled to what."[12] What distinguishes rights from other norms is their special priority, their claim to "pre-eminence,"[13] and a balancing framework, where the right is simply placed on one side of the scale, necessarily shortchanges this.

One way out of these difficulties, for proponents of proportionality, is to conceptualize the final stage of proportionality review as something other than a balancing test. Some scholars, including Moshe Cohen-Eliya and Iddo Porat, Mattias Kumm, and Kai Möller, consider the last stage to be more of an open-ended assessment of a challenged measure's justification.[14] The limitation of a right is permissible if the reasons for it are strong enough.

11 Urbina, *supra* note 4 at 40.

12 Urbina, *supra* note 4 at 81-82.

13 *Ibid* at 95.

14 See Porat, *supra* note 2, Mattias Kumm, "The Idea of Socratic Contestation and the Rights to Justification: the Point of Rights-Based Proportionality Review" (2010) 4 *Law & Ethics Hum Rts* 142, Möller, *supra* note 2.

But according to Urbina, this approach, which he calls "proportionality as unconstrained moral reasoning," creates its own problems. To illustrate them, Urbina imagines a community of shipwrecked survivors who choose one of their number to be their judge. The judge is untrained in law, but she seeks to resolve disputes justly. Urbina catalogues the problems that will arise as she decides cases, including confusion over what count as relevant considerations, the possibility of improper influence, excessive discretion, questions of legitimacy, and the unpredictability of outcomes. These, he argues, are the practical problems that result when cases are decided by means of unconstrained moral reasoning.

The solution lies in legal direction, and legal direction comes from authoritative legal categories. Legal categories supply direction because they "make a claim to control the behaviour, reasoning, and decision of whoever is applying them, or is ruled by them."[15] Legally directed adjudication not only serves rule of law values by constraining judges, but is more likely to achieve just outcomes than unconstrained moral reasoning, because the different legal categories can be tailored to the specific moral issues of the areas of law where they are employed.

The final chapter sketches an alternate vision for a human rights regime, with custom doctrinal tests for different areas of law, widespread use of categorical reasoning, and strict priority for rights, effectively eliminating the need for limitations analysis. As Urbina acknowledges, his idealized rights regime bears more than a passing resemblance to the constitutional jurisprudence of the United States.[16] At least in certain areas of U.S. constitutional law, how a claim is handled depends substantially on which doctrinal box it is slotted into. In First Amendment law, for instance, rights adjudication revolves around the application of categories such as "limited public forum," "expressive conduct," "viewpoint discrimination," and "fighting words," each of which is associated with a different test or outcome.

The critique of proportionality offered in this important book is thoughtful and wide-ranging. Certainly it won't settle the debates over proportionality, but by making his case in detail, Urbina throws into relief some core differences that underlie the disagreements between proportionality fans and critics. Ultimately, in my view, proportionality comes out looking better than the alternative. Urbina's critique ends up highlighting features of his own con-

15 Urbina, *supra* note 4 at 150.
16 *Ibid* at 247-48.

ception of rights and rights review that I anticipate many readers will reject as unreasonable.

The most controversial aspect of proportionality is that it requires courts to engage in some form of balancing analysis. Those lined up on opposite sides of the proportionality debate differ so sharply on the appropriateness of balancing in part because they tend to disagree, if only implicitly, over what level of rational justifiability it is fair to expect from judicial decision-makers. More than two decades ago, Jürgen Habermas charged that there are no rational standards for balancing,[17] and Robert Alexy countered that there are: judgments about proportionality are grounded in reasoned judgments about the relative stakes of completing interests.[18] Disputes over incommensurability are manifestations of a similar divide. Virgílio Afonso da Silva has argued that incommensurability does not mean incomparability — even if the values at stake in a rights case can't be reduced to a common metric, a judge can still meaningfully compare the concrete alternatives in front of her, and the trade-offs they entail.[19] This is not good enough for Urbina, because "whatever is good in realising one of the values at stake is different from whatever is good in realising the other value."[20] This deep incommensurability thwarts judgments about trade-offs: "that one value could be realised to a great degree and another to a reasonably small degree is no conclusive reason for choosing any of the alternatives."[21]

The key phrase here, the one that expresses the standard of reasoned decision-making to which Urbina holds courts, is "conclusive reason." For Urbina, a decision-maker facing a choice between incommensurables has a reason to pick either option: each realizes something of value. But a comparison of the options cannot yield a *conclusive* reason for either, because the options cannot be commensurated. Urbina gives the example of a prospective homeowner who is looking for two things in a house: size and beauty. Suppose she must choose between a smaller, prettier house and a larger, uglier one. She could make the choice based on some external reason — say, a promise to her mother that she buy one of them — or based on a feeling or other subrational motive, or by flipping a coin. But, according to Urbina's conception of decision-making, she could not rationally choose one house over the other on the basis of a judgment

17 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (New Baskerville: MIT Press, 1996) [translated by William Rehg].

18 Robert Alexy, "Constitutional Rights, Balancing, and Rationality" (2003) 16:2 *Ratio Juris* 131.

19 Virgílio Afonso da Silva, "Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision" (2011) 31:2 *Oxford J of Leg Stud* 273.

20 Urbina, *supra* note 4 at 63.

21 *Ibid.*

that it was the best house overall, taking into account its size and beauty, because size and beauty are incommensurable.

It is worth noting that Urbina is not making the more modest point that courts as institutions are not well-positioned to judge these kinds of trade-offs. Urbina's critique implies that *no actor* can make a reasoned choice between alternatives with incommensurable features, on the basis of a comparative judgment about those features. Suppose the prospective homebuyer concludes, "I think House A is a better choice overall, because it's only slightly less attractive than House B but has twice the number of bedrooms." Urbina's conception of decision-making, built around conclusive reasons for action, gives him no way to credit that statement.[22] He concedes that readers will have a "common sense intuition … that we decide by commensurating what incommensurability theorists would consider incommensurable values or principles."[23] His response is that "[i]ntuitions can be wrong," and he suggests that something else, besides a comparative judgment, must be doing the work in such cases. This formalistic conception of decision-making is one that I suspect most readers will find unrealistic and irreconcilable with their own experiences. We make reasoned judgments all the time based on comparative assessments of different states of affairs that are not formally commensurable. Courts can too.

Urbina's critique of proportionality as unconstrained moral reasoning also reveals some curious features of his own view. It is worth noting, first, that his characterization of "proportionality as unconstrained moral reasoning" is tendentious: few would argue that proportionality reduces to an open-ended instruction to courts to do justice.[24] In fact, the moral reasoning involved in proportionality is constrained by several sources, starting with the constitutional provision at issue. Precedent also provides guidance, even in systems where it is not formally binding.[25] But perhaps most significantly, in the versions of

22 It is worth noting in passing that, by Urbina's logic, we should be unable to make comparative judgments even about the beauty of homes, if beauty depends on subsidiary, incommensurable properties. Suppose one house has better proportioned rooms, and another is painted a nicer color. Or that the dining room is more attractive in one house, and the living room in another. Which is the prettier house? Many of the properties relevant to legal decision making may plausibly be composite properties in the way that beauty is — consider desert, fault, or even justice itself — which by Urbina's reasoning would defeat the possibility of a decision maker advancing a reasoned argument that one state of affairs is better than the other when one or more is at play.

23 Urbina, *supra* note 4 at 64.

24 *Ibid* at 125-31. The scholars Urbina discusses with the broadest conceptions of the proportionality test, Kai Möller and Mattias Kumm, do not go that far.

25 *Ibid* at 130. Citing Kumm, Urbina notes that text and precedent provide only weak constraints in proportionality, but there is a difference between weakly constrained reasoning and unconstrained reasoning.

proportionality actually practiced by many courts, moral reasoning is squarely directed towards the question at hand: whether the infringement of a right is justified by the countervailing values or interests at stake. Courts need a theory of the right at stake to give content to the analysis: to inform their judgments about what reasons count in favor of the parties' claims, and how much. Urbina is clear at the outset that his critique engages with accounts of proportionality put forth by legal scholars. But the dichotomy around which he builds his critique, between maximization and unconstrained moral reasoning, fails to capture plausible ways in which courts in fact incorporate moral reasoning into a balancing analysis.

In truth, the problem with proportionality, for many critics, is not that the moral reasoning it invites is *un*constrained, but that it is not constrained *enough*. One of the chief selling points for Urbina's preferred categorical approach to adjudicating rights, in his view, is that it confines judicial discretion more than proportionality, with its reliance on balancing.[26] His position is emblematic of another broad difference between the pro- and anti-proportionality factions: constraining judges tends to be more important, relative to other goals, for proportionality's critics than for its proponents. The questions of how and how much constitutional judges should be constrained are important and enduring ones. But some features of Urbina's case for constraint are questionable, and worth examining more closely.

Urbina writes mainly about the value of constraint in law in general, and not in the context of constitutional rights adjudication. No one would dispute the value of constraint in many legal contexts. No one would suggest, for instance, that we would be better off if courts would develop income tax law themselves through case-by-case rulings. One reason the question never comes up is that the legislature has drafted a detailed tax code which the court applies. But constitutional rights norms are different. They are different, not least, in that they are typically framed quite broadly. For example, Canada's *Charter of Rights and Freedoms* guarantees, among other things, "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

Two things follow from the generality of rights as they are framed in charters. The first is that, if constitutional rights decisions are going to be made according to legal categories, it will be the courts that come up with them. As new

26 Debates over the use of categorical and balancing approaches in rights review have obvious affinities to the broader scholarly discussion about rules and standards in the law.

cases arise, presenting new legal questions or factual situations, courts will create new categories, or craft exceptions to existing ones. Urbina seems satisfied that it is the categories that are doing the work, as his choice of the term "*legally directed* adjudication" suggests.[27] But is adjudication really "directed" by categories whose creators and custodians are courts? While deciding cases with reference to legal categories offers the appearance of constraint, I question whether it provides meaningfully more constraint than proportionality as a practical matter.

Second, the use of open-ended rights provisions is part of a set of design choices that characterize most modern constitutions. Another, related feature shared by many modern constitutions is a limitations clause, laying out conditions under which rights can be limited. Together with the commitment of judicial review to a court, these provisions express a particular approach to rights adjudication: courts are to give rights a broad scope, and to determine when limitations on those broad rights are justified. Many courts choose proportionality because it is well suited to performing the kind of rights adjudication the constitutional design envisions.

Urbina argues instead that the scope of rights should be narrowly defined, and that rights should have conclusive force within that scope. At several points in the book, he suggests that the categorical nature of rights and their special priority derive from the nature of rights themselves, or the rule of law: that this is just what rights are, and how they work.[28] How convincing readers find this claim will likely depend on how well it fits with their prior assumptions about what rights are, because Urbina offers little in the way of argument to support it. But however well Urbina's view comports with the best conception of rights as a theoretical matter, it is plainly out of step with the choices made by the drafters and ratifiers of many constitutions in effect today. This is simply not what rights are, or how rights work, in contemporary systems of constitutional justice around the world.

These criticisms should not detract from the bottom line, which is that this is a challenging, important book, elegantly structured and rigorously argued. Urbina's case against proportionality, if unlikely to win over every reader, demands to be taken seriously. It deserves a place on many groaning bookshelves.

27 Urbina, *supra* note 4 at 160 [emphasis added].

28 See, for instance, Urbina, *supra* note 4 at 95, 97, 149. This characterization of rights undergirds Urbina's second objection to maximization, that it fails to capture what is morally relevant about rights, as well as his claim that categorical rights can yield morally better outcomes than unconstrained moral reasoning.