Testing the Jurisdictional Waters: The Provincial Regulation of Interprovincial Pipelines

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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.