

THE NO MORE PIPELINES ACT?

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On 28 August 2019, both the Impact Assessment Act (IAA) and the Canadian Energy Regulator Act (CERA) came into force, and Canada's environmental assessment process and its regulatory regime for major energy projects were fundamentally changed. With this new legislation in place, is it fair to say that no new pipelines will be approved in Canada? The answer is likely yes but not solely or even largely as a result of this legislation.

Changes in global oil markets have led to significant reductions in forecast production from Alberta's oil sands. This implies that, with no new pipelines permitted, and assuming those with permits in hand are built, the network will be sufficient to cover forecast oil export demand well into the 2030s. As such, there is a tautological answer to whether new pipelines will be approved in Canada: they likely will not be, unless market conditions change substantially, because new pipelines beyond those currently approved will not be needed.

Tautologies notwithstanding, Canada's new regulatory regime represents a significant departure from previous legislation. This article asks whether it is likely that a new pipeline project could achieve approval under the combined process implemented in the CERA and the IAA. The answer is complicated but likely turns on two issues already prevalent in Canada's pipeline debates. The first issue facing any new pipeline review would be the ability to reconcile such development with Canada's responsibilities to Indigenous peoples. The second is the collision between Canada's climate change commitments, cumulative local environmental effects, and new oil sands production enabled by new pipelines. While approval has been — and will continue to be — a political decision, the analysis presented herein shows that the combined consideration of cumulative environmental effects, greenhouse gas emissions, and the link between pipelines and oil sands growth is likely to make it more difficult to approve a pipeline. This is because, when combined with recent changes to judicial review doctrine in Canada, the new regime will make it much more difficult for regulators and political decision-makers to justify such approvals.

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I. INTRODUCTION

On 28 August 2019, both the *Impact Assessment Act (IAA)* and the *Canadian Energy Regulator Act (CERA)* came into force and Canada's environmental assessment process and

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its regulatory regime for major energy projects were fundamentally changed.¹ The IAA created a new agency, the Impact Assessment Agency of Canada (IAAC), and enacted a new approach to impact assessment in Canada.² The CERA introduced both superficial and significant changes to our national energy regulator, the former including changing its name from the National Energy Board (NEB) to the Canada Energy Regulator (CER), the latter including modifications to the process through which new interprovincial and international pipelines would be approved. This article focuses on the potential impacts of this legislation on new pipeline capacity to serve Alberta's oil sands region and asks whether this legislation will amount to what Alberta Premier Jason Kenney has termed a "no more pipelines act."³

The IAA and CERA were enacted at a time of generational if not unprecedented conflict over energy and, in particular, oil sands related infrastructure in Canada.⁴ Four major pipeline projects intended to transport Alberta's oil sands production to export markets have been delayed, cancelled, or abandoned in recent years. Enbridge's Northern Gateway pipeline was approved by the Conservative government of Stephen Harper in 2015, only to then see that approval quashed by the Federal Court of Appeal in *Gitxaala Nation v. Canada* and the project subsequently cancelled by the federal government of Prime Minister Justin Trudeau.⁵ The Energy East Pipeline, proposed by TransCanada, saw a project review reset due to improper process and the proponent later cancelled the project in the face of regulatory uncertainty and declining prospects for oil sands production.⁶ The Keystone XL pipeline, also proposed by TransCanada and intended to connect Alberta's oil sands region to the United States Gulf of Mexico coast, was vetoed twice by President Barack Obama, only to emerge from the ashes with an approval from President Trump.⁷ Construction was materially underway when the Presidential Permit for the project was revoked by newly elected President Joe Biden in January 2021.⁸ Finally, the Trans Mountain Expansion project, a

¹ *Impact Assessment Act*, SC 2019, c 28, s 1 [IAA]; *Canadian Energy Regulator Act*, SC 2019, c 28, s 10 [CERA]. Both pieces of legislation were passed under *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*, SC 2019, c 28 [Bill C-69]. The validity of the legislation is currently before the Alberta Court of Appeal in *Reference Re Impact Assessment Act*, ABCA, File Number 1901-0276-AC [C-69 Reference], a Reference brought by the Government of Alberta.

² For a comprehensive review of the IAA, see Meinhard Doelle & A John Sinclair, "The New IAA in Canada: From Revolutionary Thoughts to Reality" (2019) 79 *Environmental Impact Assessment Rev. Senate of Canada, Standing Committee on Energy, the Environment and Natural Resources, Proceedings of the Standing Senate Committee on Energy, the Environment and Natural Resources*, 42-1, No 68 (2 May 2019). The regulatory regime enacted under the CERA and the IAA applies to other types of pipelines. For example, there is currently a regulatory process underway for the Gazoduk natural gas pipeline project (see Impact Assessment Agency of Canada, *Gazoduk Project: Tailored Impact Statement Guidelines Pursuant to the Impact Assessment Act and the Canadian Energy Regulator Act* (Ottawa: Impact Assessment Agency of Canada, 17 July 2020), online: <iaac-aeic.gc.ca/050/documents/p80264/135390E.pdf>).

³ See generally Nigel Bankes, "Pipelines and the Constitution: A Special Issue of the *Review of Constitutional Studies*: Introduction" (2018) 23:1 *Rev Const Stud* 1 [Bankes, "Pipelines and the Constitution"].

⁴ *Gitxaala Nation v Her Majesty the Queen*, 2016 FCA 187 [Gitxaala]. For a discussion of the regulatory process with respect to the Northern Gateway pipeline, see Alastair R Lucas & Chidinma B Thompson, "Infrastructure, Governance and Global Energy Futures: Regulating the Oil Sands Pipelines" (2016) 28:3 *J Envtl L & Prac* 355 at 361-64.

⁵ Bankes, "Pipelines and the Constitution," *supra* note 4 at 19.

⁶ Dufferin Harper, "Pipe Dreams: A Canadian Perspective on the Keystone XL Pipeline Rejection" (2015) 47:4 *Trends* 12; President of the United States, "Presidential Permit for the Keystone XL Pipeline" (29 March 2019), online: <trumpwhitehouse.archives.gov/presidential-actions/presidential-permit/>.

⁷ The Canadian Press, "TC Energy to Start Building Keystone XL Pipeline after Alberta Government Invests \$1.1B US," *CBC News* (31 March 2020), online: <www.cbc.ca/news/business/tc-energy-keystone-xl-pipeline-1.5515850>; Government of the United States, "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" (20 January 2021), online: <www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/>.

pipeline connecting Alberta's oil sands to the British Columbia coast, saw repeated delays and spirited opposition from the Government of British Columbia and eventually too had its approval from the Liberal government of Justin Trudeau quashed by the Federal Court of Appeal in *Tsleil-Waututh Nation v. Attorney General of Canada*.⁹ In early 2019, the pipeline's approval was reissued after a renewed environmental assessment, and this time the approval was upheld by the Federal Court of Appeal in *Coldwater Indian Band v. Attorney General of Canada*.¹⁰

Issues relating to climate change and Canada's relationship with Indigenous peoples are at the heart of the Canadian conflict over new oil sands pipelines.¹¹ Pipelines, insofar as they improve the financial viability of future oil sands production, have become a focus of the fight to reduce greenhouse gas (GHG) emissions from the oil sands.¹² Canada has consistently been projected to fall well short of its GHG emissions targets, and oil sands emissions represent a large and fast growing contribution to Canada's emissions inventory.¹³ The need to wrestle with this dichotomy is now explicit in legislation, with the *CERA* and the *IAA* each stipulating that regulators must assess "the extent to which the effects of the pipeline hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change."¹⁴ The new legislation also mandates broader consideration of impacts on Indigenous communities including "the impact ... on any Indigenous group and any adverse impact ... on the rights of the Indigenous peoples of Canada."¹⁵ The legislation requires that decision-makers consider relevant Indigenous knowledge and document their consideration of impacts on Indigenous cultures and communities.¹⁶

These changes should lead to more comprehensive and credible assessments for new projects and perhaps to more judgment-proof approvals. But there are questions as to whether a review under these new guidelines could lead to an approval at all. The *IAA* and *CERA* have been painted by opponents, including Alberta Premier Jason Kenney, as "*no more pipelines*" laws.¹⁷ In its submission to the Parliamentary Committee on Environment and Sustainable Development on Bill C-69, the Canadian Energy Pipeline Association (CEPA) claimed that, "[i]t is difficult to imagine that a new major pipeline could be built in Canada

⁹ 2018 FCA 153 [*Tsleil-Waututh*].

¹⁰ 2020 FCA 34 [*Coldwater*].

¹¹ For a general discussion of the conflict over pipelines, see George Hoberg, "How the Battles over Oil Sands Pipelines have Transformed Climate Politics" (Prepared for delivery at the Annual Meeting of the American Political Science Association, Washington, DC, 29 August – 1 September, 2019); George Hoberg, "Pipelines and the Politics of Structure: Constitutional Conflicts in the Canadian Oil Sector" (2018) 23:1 *Rev Const Stud* 53.

¹² Jim Robbins, "As Alberta's Tar Sands Boom, Foes Target Project's Lifelines" (5 July 2011), online: <e360.yale.edu/features/as_albertas_tar_sands_boom_foes_target_projects_lifelines>.

¹³ See generally Environment and Climate Change Canada, *Canada's 4th Biennial Report to the United Nations Framework Convention on Climate Change (UNFCCC)*, Catalogue No En4-73/2020E-PDF (Gatineau: Environment and Climate Change, 2020), online: *UNFCCC* <unfccc.int/sites/default/files/resource/br4_final_en.pdf>, but in particular emissions projections at 29. New carbon pricing and other policy initiatives launched in 2020 (see: "Pricing Carbon Pollution" (1 December 2020), online: <www.canada.ca/content/dam/eccc/documents/pdf/climate-change/climate-plan/annex_pricing_carbon_pollution.pdf>) have the potential to reverse this trend of over promising and under delivering, but implementation plans remain vague at the time of this writing.

¹⁴ *CERA*, *supra* note 1, s 183(2)(j). See also *IAA*, *supra* note 1, s 22(1)(i).

¹⁵ *IAA*, *ibid*, s 22(1)(c).

¹⁶ *Ibid*, ss 22(1)(g), 22(1)(l), 22(1)(q), 22(1)(r).

¹⁷ Senate of Canada, *supra* note 3 [emphasis added].

under the [IAA].”¹⁸ The Canadian Association of Petroleum Producers (CAPP) claimed that the legislation would drive “away investment into Canada by making it extremely difficult to approve major projects like pipelines in the future.”¹⁹ Conversely, while the government cannot commit to future approvals, it has claimed that the most recently approved pipeline, the Trans Mountain expansion project, would have been approved under the combined *CERA* and *IAA* regime.²⁰

Did Bill C-69 constitute a *no more pipelines act*? This article seeks to answer this question to the extent possible. First, I discuss the relationship between oil sands production and pipeline capacity, as well as the evolving market landscape for oil sands bitumen. This analysis opens the possibility that a lack of new pipeline proposals may be correlated with but not caused by the coming into force of the *IAA* and the *CERA*. This extension beyond legal analysis into economics anchors some of the important conclusions of the article. I next discuss the relevant legislative changes between the as repealed versions of the *NEB Act*, 2012 and the *Canadian Environmental Assessment Act* and the current legislation.²¹ I conclude that the regulatory framework will likely make it significantly more challenging to approve pipelines, in particular given constraints on justification of decision-making and the mandatory consideration of climate change and cumulative environmental effects, but that approvals under the new regime may be more judgment proof. The related administrative law changes brought to bear by the Supreme Court in *Vavilov* imply more stringent review of the required justification as well.²² Many of the questions that regulators and political actors have sought to avoid in previous assessments are now within the mandated scope of assessment, and the *Vavilov* standards for assessment and transparency amplify the impact of these changes. Overall, I find that the practical effects of the new legislation likely make new oil sands pipelines more challenging to approve, but that the impacts of this are tempered by the slim likelihood that another greenfield pipeline project will be proposed in addition to pipelines operating or under construction today. It is more likely that market forces will dictate that no new oil export pipeline projects will be proposed in Canada, irrespective of our regulatory regime.

¹⁸ Canadian Energy Pipeline Association, “Submission to the Parliamentary Committee on Environment and Sustainable Development: Bill C-69” (March 2018) at 2, online: <cepa.com/wp-content/uploads/2018/03/Submission-to-Parliamentary-Committee-Bill-C-69-Final.pdf>.

¹⁹ Canadian Association of Petroleum Producers, “What is Bill C-69?” (15 October 2018), online: <context.capp.ca/energy-matters/2018/og101_what-is-bill-c69>.

²⁰ Zi-Ann Lum, “Kinder Morgan Pipeline Would Still Get Green Light Under New Rules: McKenna,” *HuffPost Canada* (8 February 2018), online: <www.huffingtonpost.ca/2018/02/08/kinder-morgan-pipeline-would-still-get-green-light-under-new-rules-mckenna_a_23356857/>. For general discussion, see also Martin Olszynski, “Bill C-69’s Detractors Can Blame Harper’s 2012 Omnibus Overreach” (25 September 2018), online (blog): <ablawg.ca/wp-content/uploads/2018/09/Blog_MO_Bill_C_69_Sept_2018.pdf> [Olszynski, “Bill C-69’s Detractors”].

²¹ *National Energy Board Act*, RSC 1985, c N-7 [*NEB Act*, 2012], as repealed by *CERA*, *supra* note 1, s 44; *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52 [*CEAA*, 2012], as repealed by *IAA*, *supra* note 1.

²² *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. See also Paul Daly, “The *Vavilov* Framework and the Future of Canadian Administrative Law” (2020) Ottawa Faculty of Law Working Paper No 2020-09 for more discussion of the impact of the decision on administrative law in Canada.

II. THE OIL SANDS INDUSTRY AND THE ROLE FOR PIPELINES

To understand the impact of the *IAA* and *CERA* on new oil sands pipeline approvals, it is first important to consider why pipelines are important to the oil sands industry, the current state of pipeline capacity, and prospects for new oil sands development with and without regulatory constraints on new pipeline capacity.

Oil is a globally traded commodity and, for exporting regions, the local value of oil is determined by the cost of shipping products to global markets: more expensive or capacity-constrained transportation will make oil deposits less attractive for development, all else equal. The oil sands region of Alberta, as well as the province and prairie region as a whole, produces more crude oil and bitumen than it uses, and is thus dependent on exports to fully monetize its reserves.²³ In December 2020, Alberta exported over 3.7 million barrels per day (almost 600,000 cubic metres per day) of crude oil and equivalent products.²⁴ The CER estimates that, by 2050, supply available for export could grow by up to an additional 70 percent.²⁵ The higher the costs of delivering this production to market, the lower will be the value of produced oil in Alberta. A corollary to this is that, if transport costs are expected to be higher, all else equal, less oil will be produced. Pipelines are the most cost-effective means to transport crude oil. Shipping crude oil and bitumen by rail is the primary alternative to shipping by pipeline, and is generally more expensive, and so regulatory constraints to pipeline expansion can curtail development of the resource.²⁶

Alberta's existing export pipelines are at capacity. There are three major pipeline systems providing export capacity out of Alberta. The largest of these export pipelines is the Enbridge Mainline, which consists of several pipelines transporting light and heavy crude oil to delivery points east of Gretna, Manitoba, in both Canada and the US. Combined, the Mainline has a delivery capacity of 2.89 million barrels (453,000 cubic metres) per day.²⁷ The Trans Mountain Pipeline to Burnaby, British Columbia, has a capacity of approximately 300,000 barrels (47,700 cubic metres) per day and carries a mix of refined products as well as light and heavy crudes for delivery to a refinery in Burnaby, an export terminal at

²³ See generally, Alberta Energy Regulator, "Alberta Energy Outlook: ST-98 – Executive Summary" (22 September 2020), online: <static.aer.ca/prd/documents/sts/ST98/2021/st98-2020-executive-summary.pdf>; Canada Energy Regulator, *Canada's Energy Future 2020*, Catalogue No NE2-12E-PDF (Calgary: Canada Energy Regulator, 2020), online: <www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2020/canada-energy-futures-2020.pdf> [Canada Energy Regulator, "Energy Futures 2020"].

²⁴ Statistics Canada, "Supply and Disposition of Crude Oil and Equivalent: Table 25-10-0063-01" (2020), online: <www150.statcan.gc.ca/t1/tb11/en/tv.action?pid=2510006301>.

²⁵ Canada Energy Regulator, "Energy Futures 2020," *supra* note 23, figure ES.8. The analysis develops two scenarios, the Reference and Evolving cases, which respectively predict increases of 68 percent and 35 percent in supply available for export. See also Canada Energy Regulator, *Canada's Energy Future 2019: Energy Supply and Demand Projections to 2040*, Catalogue No NE2-12E-PDF (Calgary: Canada Energy Regulator, 2019) at 7, online: <www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2019/index.html> [Canada Energy Regulator, "Energy Futures 2019"] which predicted a 40 percent increase in supply available for export by 2040.

²⁶ Shipping by rail is estimated to increase the cost of shipment to US refineries to \$15–22 per barrel, compared to \$5–10 per barrel by pipeline. See National Energy Board, *Optimizing Oil Pipeline and Rail Capacity out of Western Canada: Advice to the Minister of Natural Resources*, Catalogue No NE23-201/2019E-PDF (Calgary: National Energy Board, March 2019) at 2, online: <www.cer-rec.gc.ca/en/data-analysis/energy-commodities/crude-oil-petroleum-products/report/2019-optimizing-capacity/index.html> [NEB, *Optimizing Oil Pipeline and Rail Capacity*].

²⁷ Canada Energy Regulator, "Pipeline Profiles: Enbridge Mainline" (2020), online: <www.cer-rec.gc.ca/en/data-analysis/facilities-we-regulate/pipeline-profiles/oil-and-liquids/pipeline-profiles-enbridge-mainline.html>. Conversion to metric units is 6.2898 barrels per cubic metre. In discussing capacities, both units are provided for ease of comparison to published information.

Westridge, British Columbia, and for export to the US via Sumas, British Columbia.²⁸ The Keystone pipeline is the newest of the three, and provides 580,000 barrels (93,000 cubic metres) per day of capacity to Steele City, Nebraska, for both light and heavy crude oil.²⁹ As of September 2019, before the COVID-19 pandemic effects were felt, the Mainline, Keystone, and Trans Mountain systems had trailing 12 month average utilization rates of 95 percent, 99 percent, and 99 percent respectively.³⁰ The common carrier volumes on each of these pipelines were also in apportionment during all of 2018, 2019 and pre-pandemic 2020, and returned to congestion by mid-2020.³¹ Since rail is, on a per barrel basis, a more expensive means of transportation, the increased use of rail as a means of exports is a proxy for pipeline constraints.³² Before the COVID-19 downturn, Canadian crude oil exports by rail had also increased to a record volume of over 400,000 barrels per day in February of 2020.³³

The pipeline network is being expanded. The CER estimates that a total of 4.65 million barrels (740,000 cubic metres) per day of pipeline capacity will be available once the Enbridge Line 3 and Mainline expansions are completed in 2021, increasing further to 5.53 million barrels (879,000 cubic metres) per day once the Trans Mountain Expansion project is fully in-service in 2024.³⁴ While oil production and export supply growth forecasts are more measured than in previous years, the CER estimates that supplies available for export will exceed the expanded pipeline network capacity in 2033 in their 2020 Reference Case outlook. Strikingly, the CER 2020 Evolving Case which considers more aggressive domestic and global action on climate change shows sufficient pipeline capacity with no new pipelines beyond projects already under construction and supply available for export declining after 2035.³⁵ In 2019, the CER estimated a larger shortfall in export capacity of 1,515 million barrels (241,000 cubic meters) per day by 2040, but the combined impact of lower oil prices and the COVID pandemic has downgraded future growth forecasts.³⁶

Oil sands growth forecasts have been substantially reduced as long-term oil price expectations have eroded since 2014, and there is substantial uncertainty with respect to how much new oil sands investment would occur in the absence of any regulatory risks to pipeline

²⁸ Canada Energy Regulator, “Pipeline Profiles: Trans Mountain” (2020), online: <neb-one.gc.ca/en/data-analysis/facilities-we-regulate/pipeline-profiles/oil-and-liquids/pipeline-profiles-trans-mountain.html>.

²⁹ Canada Energy Regulator, “Pipeline Profiles” (2020), online: <www.cer-rec.gc.ca/nrg/ntgrtd/pplnprtl/pplnprfls/index-eng.html>. Author’s calculations compiled utilization and capacity data to compute 12 month rolling averages. Data available upon request. The Express (44,500 cubic metres per day) and Milk River (15,087 cubic metres per day) pipelines also serve to export crude from Alberta but are regulated as Group 2 pipelines by the CER, so less detailed and less up-to-date information on capacity and throughput is available for them.

³⁰ *Ibid.*

³¹ Canada Energy Regulator, “Canadian Crude Oil Pipeline Apportionment” (25 January 2021), online: <www.neb-one.gc.ca/open/energy/throughput-capacity/apportionment-dataset.csv>. On each of the three major pipeline systems, some or all of the shipping volumes are managed as common carrier pipelines, such that shippers *nominate* volumes for shipment each month, and if nominated volumes exceed shipping capacity, the available capacity is *apportioned* based on each shipper’s share of total nominated volumes.

³² NEB, *Optimizing Oil Pipeline and Rail Capacity*, *supra* note 26 at 2.

³³ Canada Energy Regulator, “Canadian Crude Oil Exports by Rail” (21 May 2021), online: <www.cer-rec.gc.ca/en/data-analysis/energy-commodities/crude-oil-petroleum-products/statistics/canadian-crude-oil-exports-rail-monthly-data.html>. Levels dropped to a low of 38,000 barrels per day in July 2020, but have recovered to almost 200,000 barrels per day in January 2021.

³⁴ Canada Energy Regulator, “Energy Futures 2020,” *supra* note 23, fig ES.8, with detailed figures in data appendix. Small expansions on the Express and Keystone systems also contribute to this total.

³⁵ *Ibid.*

³⁶ Canada Energy Regulator, “Energy Futures 2019,” *supra* note 25, Data Appendix for Figure 19.

expansion. The lowest cost new oil sands projects are viable only with global long-term oil prices at or above approximately \$50 US per barrel for West Texas Intermediate (WTI) crude once transportation costs and product quality differentials are taken into account.³⁷ Oil sands projects also tend to be more emissions-intensive and have longer life cycles than other oil investment opportunities and so are more likely to be affected by concerns about either peak global oil demand or climate change policy risk.³⁸ Since oil prices dropped in late-2014 and early-2015, there has been a dearth of new oil sands project construction, and recent forecasts suggest limited near-term potential for a reversal of this trend, irrespective of new pipeline construction.³⁹ Without a sustained recovery in long-term oil price expectations, pipeline constraints are unlikely to bind in Alberta, again assuming that pipeline projects under construction are completed and no existing capacity is shut-in.

The relationship between existing and proposed pipeline capacity as well as forecast export demand is shown in Figure 1. Figure 1 plainly shows how much export supply growth forecasts have been reduced since 2014, and with a slow recovery from the pandemic, these forecasts are likely to dip further, reducing demand for incremental pipeline capacity.⁴⁰ However, Figure 1 also shows that pipeline constraints remain a significant threat to Western Canadian oil production if capacity is reduced on Enbridge's system as a result of legal challenges facing Lines 3 and 5 in that network, or if there are any further delays in the construction of the Trans Mountain expansion.⁴¹ These risks were amplified with the

³⁷ Canada Energy Regulator, "Energy Futures 2020," *supra* note 23; Branko Bošković & Andrew Leach, "Leave It in the Ground? Oil Sands Development Under Carbon Pricing" (2018), University of Alberta School of Business Research Paper No 2920341; Kevin Birn, "Four Years of Change: Oil Sands Costs and Competitiveness in 2018" (April 2019), online: <ihsmarkit.com/products/energy-industry-oil-sands-dialogue.html>; Canadian Energy Research Institute, "Canadian Oil Sands Supply Costs and Development Projects (2019-2039): Study No 183" (July 2019), online: <ceri.ca/studies/canadian-oil-sands-supply-costs-and-development-projects-2019-2039>; Alberta Energy Regulator, *supra* note 23 at 98 which all reach broadly similar conclusions on the supply costs of new oil sands projects, with estimates varying between the high \$40s to low \$50s for WTI-equivalent prices required to guarantee a reasonable return on investment for new oil sands projects.

³⁸ See e.g. discussion of the impacts of peak oil demand in BP, "Energy Outlook 2020 Edition" (2020) at 72, online: <www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/energy-outlook/bp-energy-outlook-2020.pdf>. A shift toward more aggressive action on climate change is shown to lead to more dramatic impacts on oil supplies in the top quartile of global carbon intensity and a negative impact on supplies from the 25th through 75th percentiles of global supply by carbon intensity. Analysis in Mohammad S Masnadi et al, "Global Carbon Intensity of Crude Oil Production" (2018) 361:6405 Science 851, places all oil sands projects surveyed in the top half of global oil production by carbon intensity.

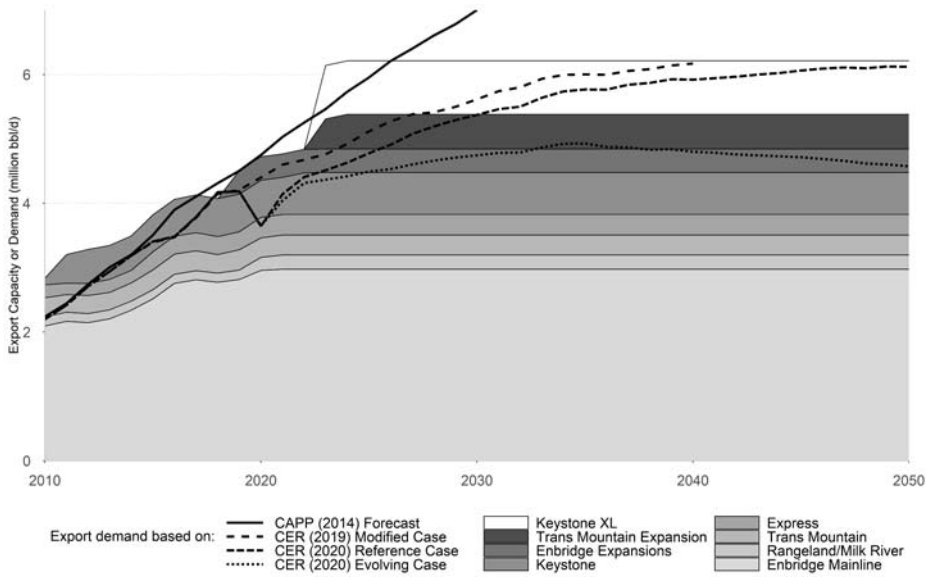
³⁹ See e.g. Alberta, Ministry of Treasury Board and Finance, *2020-21 Mid-year Fiscal Update and Economic Statement* (November 2020), online: <open.alberta.ca/dataset/9c81a5a7-cdf1-49ad-a923-d1ecb42944e4/resource/b778a0d7-7828-42cf-9bbb-69c9be3dfce6/download/2020-21-mid-year-fiscal-update-and-economic-statement.pdf>, which forecast investment in oil and gas production in Alberta to be 40 percent below 2014–2019 levels on average for the next 4 years, with 2014–2019 levels already being almost 50 percent below 2013–2014 peak levels.

⁴⁰ See e.g. Emma Graney & James Keller, "Historic Low Prices Threaten Alberta's Oil Industry as Province, Ottawa Promise Help Is Imminent," *The Globe and Mail* (18 March 2020), online: <www.the Globeandmail.com/business/article-historic-low-prices-threaten-albertas-oil-industry-as-province/>. The 2020 CER Reference case export demand shown in Figure 1 assumes long-term West Texas Intermediate oil prices of \$71 plus inflation, while the Evolving Case posits oil prices of \$51 plus inflation through 2038, with prices declining in real terms thereafter. Canada Energy Regulator, "Energy Futures 2019," *supra* note 25. West Texas Intermediate crude oil contracts for longer-term delivery (2023 and beyond) were trading below \$50 per barrel on 5 February 2021, per CME Group, "Crude Oil Futures – Settlements" (5 February 2021), online: <www.cmegroup.com/trading/energy/crude-oil/light-sweet-crude_quotes_settlements_futures.html#>.

⁴¹ The most recent of many lawsuits filed to stop the Enbridge Line 3 replacement project is detailed in Mike Hughlett, "Lawsuit Seeks to Halt Line 3 Pipeline, Alleging Faulty Approval Process," *Star Tribune* (28 December 2020), online: <www.startribune.com/lawsuit-seeks-to-halt-line-3-pipeline-alleging-faulty-approval-process/573491162/>. Michigan's Governor Gretchen Whitmer is also suing to force the abandonment of Enbridge's Line 5 pipeline. See Laura Sanicola, "Michigan Governor Files

cancellation of the Presidential permit for the Keystone XL pipeline in early 2021.⁴² Figure 1 also shows how pipeline constraints and global and domestic action on climate change are related, since the CER (2020) Evolving Case which models oil production expansion in a world of more aggressive action on climate change shows no demand for incremental pipeline capacity beyond the TransMountain Expansion project. This contrasts with the Reference Case from CER (2020) which assumes no incremental action on climate change and predicts a need for pipeline capacity that would have been provided by Keystone XL.

FIGURE 1:
CANADIAN OIL EXPORT PIPELINE CAPACITY AND EXPORT DEMAND⁴³



It is challenging to estimate how large the costs of pipeline capacity constraints are since the eventual costs depend on investments made to mitigate the constraints. In 2016, the NEB estimated that a *no new pipelines* scenario would lead to an incremental \$9.20 per barrel discount on Canadian oil relative to global benchmark prices.⁴⁴ The NEB estimated that this would reduce Canadian crude oil production by eight per cent relative to their Reference Case by 2040, owing to a reduction in capital investment in Western Canadian oil production

Lawsuit to Terminate Enbridge Line 5 Easement,” *Reuters* (13 November 2020), online: <www.reuters.com/article/us-pipelines-enbridge-easement/michigan-governor-files-lawsuit-to-terminate-enbridge-line-5-easement-idNKBN27T2M0>.

⁴² See Government of the United States, *supra* note 8, which revoked the Presidential Permit issued by President Donald Trump.

⁴³ Canada Energy Regulator, “Energy Futures 2020,” *supra* note 23; Canada Energy Regulator, “Energy Futures 2019,” *supra* note 25; Canadian Association of Petroleum Producers, “Crude Oil Forecast, Markets & Transportation” (June 2014), online: <globaltrends.thedialogue.org/wp-content/uploads/2014/11/Crude-Oil-Forecast-Markets-Transportation.pdf>.

⁴⁴ National Energy Board, *Canada’s Energy Future 2016: Energy Supply and Demand Projections to 2040*, Catalogue No NE2-12/2015E-PDF (Calgary: National Energy Board, 2016) at 92–100, online: <www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2016-update/index.html>.

of \$106 billion between 2015 and 2040.⁴⁵ These changes in production and investment decisions would have knock-on effects including reducing GHG emissions and other environmental impacts. However, impacts like these assume no actions taken in response to the constraints other than reductions in production or shipping by rail. Impacts can also be mitigated by investments in infrastructure to ship bitumen by rail with fewer diluents or investments in technology to partially upgrade bitumen in Alberta.⁴⁶

In summary, pipeline capacity is valuable and important to oil sands development so long as there is no significant overbuild.⁴⁷ Oil sands production is still forecast to grow between now and 2040 but at lower rates than were previously forecast, and the pandemic has introduced substantially more uncertainty into global oil markets. Assuming that pipeline projects currently under construction are completed, and no existing lines are shut down or curtailed, forecast oil sands production is not dependent on new pipeline approvals before the mid-2030s, and new pipelines may not be required at all if the world acts aggressively on climate change.⁴⁸ The negative outlook for oil sands development calls into question whether there will be new, greenfield pipeline applications with sufficient financial support to seek regulatory approval, at least in the coming decade, regardless of the regulatory regime in place. Some of the same factors that make it less likely that new pipelines will be approved under the new legislation discussed below, notably domestic and global action on climate change, also make it less likely that proponents will seek to build new pipelines. Overall, there is a substantial probability that no new pipelines will be proposed irrespective of changes in the Canadian regulatory regime, which raises the risk that correlation between this market outcome and the introduction of the *CERA* and the *IAA* will be misinterpreted as causation.

III. BILL C-69: HOW DOES IT CHANGE THE REGULATORY PROCESS?

The overall regulatory scheme for pipelines in Canada under the *IAA* and *CERA* remains conceptually the same as it has been for decades, but there have been important changes to various parts of the process.⁴⁹ Since 1959, the federal government has regulated the construction and operation of interprovincial pipelines through an arm's-length regulatory agency, the NEB, created via the *NEB Act*, 1959.⁵⁰ Prior to this legislation, pipelines were administered by the Board of Transportation Commissioners for Canada under *The Pipe Lines Act*.⁵¹ The *NEB Act*, 1959, required the approval of the Governor in Council for the

⁴⁵ *Ibid.*

⁴⁶ G Kent Fellows et al, "Public-Interest Benefit Evaluation of Partial-Upgrading Technology" (2017) 10:1 SSP Research Papers; NEB, *Optimizing Oil Pipeline and Rail Capacity*, *supra* note 26.

⁴⁷ Excess capacity means that pipelines cost more per unit volume to operate. In 2010, oil sands firms attempted to prevent regulators from approving excess capacity. See Nathan Vanderklippe, "Oil Sands Awash in Excess Pipeline Capacity," *The Globe and Mail* (23 April 2010), online: <www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/oil-sands-awash-in-excess-pipeline-capacity/article4328129/>.

⁴⁸ This conclusion is tempered by the recent cancellation of the Presidential Permit for the Keystone XL pipeline.

⁴⁹ Alastair R Lucas, "The National Energy Board and Energy Infrastructure Regulation: History, Legal Authority, and Judicial Supervision" (2018) 23:1 Rev Const Stud 25 at 27.

⁵⁰ *National Energy Board Act*, SC 1959, c 46, s 44 [*NEB Act*, 1959].

⁵¹ 1949, c 20, s 21.

construction of a pipeline.⁵² This authority remained through the last version of the *NEB Act*, 1985 which, though amended from time to time, was not repealed until 2019.⁵³ Pipelines that cross provincial or international borders continue to be assessed federally, now under the rules set by the *CERA* and the *IAA*, and final approval for construction and operation still rests with the Governor in Council.⁵⁴

Bill C-69 did implement some significant changes within this regulatory construct.⁵⁵ Many of the changes follow recommendations of two expert panels from which the Trudeau government sought advice: the *Building Common Ground* report on environmental assessment and the *Forward Together* report on modernizing energy regulation.⁵⁶ The *CERA* and the *IAA* introduce a more formalized project scoping and assessment process, much more specific considerations to be taken into account in decision-making, and increased transparency requirements. They also introduce significant changes to rules governing public participation and process timelines. The IAAC also takes on a more prominent role in the assessment process, undertaking primary responsibility for assessment that had previously been the role of the NEB. Many of the changes have raised concerns among industry groups. Below, each of the significant changes are discussed as they relate to major export pipelines.

A. DECISION-MAKING: HOW DO PIPELINES GET APPROVED?

As has been the case since 1959, final decisions on pipeline approval under the *CERA* are made by the Governor in Council on the basis of analysis by the relevant regulator. The *NEB Act*, 1959, listed conditions to be considered prior to the approval of a pipeline which included:

- (a) the availability of oil or gas to the pipeline ...;
- (b) the existence of markets, actual or potential ...;
- (c) the economic feasibility of the pipeline;

⁵² See *NEB Act*, 1959, *supra* note 50, s 44. Prior to the *NEB Act*, 1959, approval from the Governor in Council was required for the taking up of Crown lands which provided an effective but not explicit approval function for cabinet (see *The Pipe Lines Act*, *ibid*).

⁵³ For the purposes of this analysis, *National Energy Board Act*, RSC 1985, c N-7 as it appeared on 5 July 2012 [*NEB Act*, 1985] will be used as the pre-2012 version of the *National Energy Board Act*, 1985. *NEB Act*, 2012, *supra* note 21, will be used when discussing the 2012 amendments to the legislation.

⁵⁴ While Alberta's government has filed a reference with the Alberta Court of Appeal challenging the validity of Bill C-69 (see *C-69 Reference*, *supra* note 1), Alberta's challenge does not dispute federal authority to legislate in relation to interprovincial pipelines.

⁵⁵ Nigel Bankes, "Some Things Have Changed but Much Remains the Same: The New Canadian Energy Regulator" (15 February 2018), online (blog): <ablawg.ca/wp-content/uploads/2018/02/Blog_NB_Much_Remains_The_Same.pdf>.

⁵⁶ Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada*, Catalogue No EN106-158/2017E-PDF (Ottawa: Canadian Environmental Assessment Agency, 2017), online: <www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf>; Expert Panel on the Modernization of the National Energy Board, *Forward, Together: Enabling Canada's Clean, Safe, and Secure Energy Future: Report of the Expert Panel on the Modernization of the National Energy Board*, Catalogue No M4-149/2017E-78 (Ottawa: Natural Resources Canada, 2017), online: <www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Annex-EN-Web_Ready.pdf>.

(d) the financial responsibility and financial structure of the applicant, the methods of financing the line and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the line; and

(e) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.⁵⁷

The modern *NEB Act*, 1985 retained this general structure, and preserved the roles of the Board and the Governor in Council.⁵⁸ The Board was a gatekeeper — a project could not be approved without the Board's recommendation — but the Governor in Council had the final decision on the issuance of a certificate.⁵⁹ The *NEB Act*, 2012 altered this structure significantly as shown in the left-hand panel below. First, the role of the regulatory board was reduced to making a recommendation to the Minister in section 52.⁶⁰ A certificate could still only be issued with Governor in Council's approval, but notwithstanding the recommendations of the NEB, the Governor in Council could direct the Board to issue (or not issue) a certificate (section 54) or direct the board to reconsider their recommendation (section 53).⁶¹

NEB Act, 2012

52 (1) If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare ... a report setting out

(a) its recommendation as to whether or not the certificate should be issued for all or any portion of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation.

...

53 (1) ... the Governor in Council may, by order, refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration.

...

CERA

183 (1) If the Commission considers that an application for a certificate in respect of a pipeline is complete, it must prepare ... a report setting out

(a) its recommendation as to whether or not the certificate should be issued for all or any part of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation.

...

184 (1) ... the Governor in Council may, by order, refer the recommendation, or any of the conditions, set out in the report back to the Commission for reconsideration.

⁵⁷ *NEB Act*, 1959, *supra* note 50, s 44. Omissions are of references to power lines the certificates for which were covered by the same section in the *NEB Act*, 1959.

⁵⁸ *NEB Act*, 1985, *supra* note 53, s 52.

⁵⁹ Lucas, *supra* note 49 at 32.

⁶⁰ *NEB Act*, 2012, *supra* note 21, s 52.

⁶¹ Sonya Savage, "Bill C-38 and the Evolution of the National Energy Board: The Changing Role of the National Energy Board from 1959 to 2015," (2016) Canadian Institute of Resources Law Working Paper No 52. Savage quotes then Minister of Natural Resources Joe Oliver from *House of Commons Debates*, 41-1, vol 146, No 115 (2 May 2012) at 1600 (Hon Andrew Sheer) saying that "the ultimate decision-making should rest with elected members who are accountable to the people rather than with unelected officials."

NEB Act, 2012

54 (1) ... the Governor in Council may, by order,

(a) direct the Board to issue a certificate in respect of the pipeline ...; or

(b) direct the Board to dismiss the application for a certificate.⁶²

CERA

186 (1) ... the Governor in Council must,

(a) in the case of a recommendation that a certificate be issued,

(i) refer the recommendation, or any of the conditions, set out in the report back for reconsideration ...;

(ii) direct the Commission, by order, to issue a certificate in respect of the pipeline ...; or

(iii) direct the Commission, by order, to dismiss the application for a certificate; or

(b) in the case of a recommendation that a certificate not be issued,

(i) refer the recommendation, or any of the conditions, set out in the report back for reconsideration ...; or

(ii) direct the Commission, by order, to dismiss the application for a certificate.⁶³

The *CERA* re-establishes some of the pre-2012 decision-making sequence, with the role of the regulator as gatekeeper partially restored, as shown in the key sections excerpted above. In a virtual carbon copy of the sections 53 and 54 of the *NEB Act, 2012*, the regulatory agency provides a recommendation to the Governor in Council per section 183(1) and the Governor in Council may direct the agency to reconsider their recommendations or suggested conditions per section 184(1).⁶⁴ The key changes come in the discretion of the Governor in Council which under *CERA* is bounded based on the recommendation of the regulatory body.⁶⁵ Unlike in the *NEB Act, 2012*, the Governor in Council may no longer direct the issuance of a certificate against the recommendation of the regulator. Rather, if the recommendation of the regulator is not to issue a certificate, the Governor in Council may only refer the recommendation for reconsideration or direct the dismissal of the application per section 186(1)(b) shown above.⁶⁶ Only in the case that the Commission recommends that a certificate be issued can the Governor in Council direct the Commission to issue a certificate in section 186(1)(a)(ii).⁶⁷

The decision-making process under *CERA* has not changed in such a way that would necessarily increase or decrease the likelihood of pipeline approval, but it has restored some of the power of the regulatory agencies. The final decision rests, as it has since 1959, with elected officials. Other than the 2012–2019 timeframe, it has also always been the case that the decisions of elected officials are limited to approving projects deemed to be in the national interest by a relevant agency. The *CERA* returns to that structure. What has changed,

⁶² *NEB Act, 2012*, *supra* note 21, ss 52–54.

⁶³ *CERA*, *supra* note 1, s 183–86.

⁶⁴ *Ibid*, ss 183(1), 184 (1).

⁶⁵ *Ibid*, s 186.

⁶⁶ *Ibid*, s 186(1)(b)(i).

⁶⁷ *Ibid*, s 186(1)(a)(ii).

as discussed at length below, are the factors that must be taken into account in the decisions made both by the regulatory agency and the Governor in Council and the degree to which transparent reasons must be provided for these decisions. The mandatory consideration of some of these factors does have the potential to materially impact the likelihood of pipeline approvals.

B. ASSESSMENT BY THE REGULATOR

The core of the regulatory process for pipelines remains the assessment of the regulator as to the *public convenience and necessity* of the new infrastructure.⁶⁸ The factors which must be considered by the regulator had not evolved significantly since 1959 but do change significantly between the *NEB Act*, 2012 and the *CERA*. Omitting sections 183(2)(f) through 183(2)(f)(i) which mirror sections 44(a) through 44(d) in the *NEB Act*, 1959,⁶⁹ section 183(2) of the *CERA* mandates the following new factors for consideration:

The Commission must make its recommendation taking into account ... all considerations that appear to it to be relevant and directly related to the pipeline, including

- (a) the environmental effects, including any cumulative environmental effects;
- (b) the safety and security of persons and the protection of property and the environment;
- (c) the health, social and economic effects, including with respect to the intersection of sex and gender with other identity factors;
- (d) the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes;
- (e) the effects on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;
- ...
- (j) the extent to which the effects of the pipeline hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;
- (k) any relevant assessment referred to in section 92, 93 or 95 of the *Impact Assessment Act*; and
- (l) any public interest that the Commission considers may be affected by the issuance of the certificate or the dismissal of the application.⁷⁰

⁶⁸ *Ibid*, s 183 (1) retains this language which has been present since the *NEB Act*, 1959, *supra* note 50.

⁶⁹ *NEB Act*, 1959, *ibid*.

⁷⁰ *CERA*, *supra* note 1, s 183(2).

Mandatory consideration of the cumulative environmental effects of the project (a) and the extent to which the pipeline impacts Canada's ability to meet its climate change objectives (j) has led to significant concern among pipeline proponents.⁷¹

Nathalie Chalifour explores the question of whether the federal government has the jurisdiction to consider broader environmental or GHG emissions implications of pipelines in a recent article and concludes that including such considerations is within federal authority, by virtue of the fact that the federal government is the relevant decision-making authority on interprovincial pipelines.⁷² The division of powers does not bind the federal government with respect to what factors it may consider in making a decision within its powers. Support for this position can be found in the opinion of Justice La Forest in *Friends of the Oldman River Society v. Canada (Minister of Transport)* (here discussing railroads):

it cannot be seriously questioned that Parliament may deal with biophysical environmental concerns touching upon the operation of railways so long as it is legislation relating to railways. This could involve issues such as emission standards or noise abatement provisions.⁷³

Justice La Forest expands significantly on this line of reasoning, discussing the degree to which an ability to consider the impacts of railway construction on the environment, in addition to broader socio-economic impacts, is the only rational interpretation of federal decision-making authority. He concludes that "it defies reason to assert that Parliament is constitutionally barred from weighing the broad environmental repercussions, including socio-economic concerns, when legislating with respect to decisions" within its authority.⁷⁴ Justice La Forest later cites an Australian case, *Murphyores Incorporated Pty. Ltd. v. Commonwealth of Australia*, to illustrate his views on the integration of environmental concerns into project decision-making:

The [*Murphyores*] case points out the danger of falling into the conceptual trap of thinking of the environment as an extraneous matter in making legislative choices or administrative decisions. Clearly, this cannot be the case. Quite simply, the environment is comprised of all that is around us and as such must be a part of what actuates many decisions of any moment.⁷⁵

The federal authority over railways derives from the same section 92(10)(a) exception in the *Constitution Act, 1867* as federal authority over interprovincial and international

⁷¹ In *Canadian Energy Pipeline Association*, *supra* note 18 at 4, CEPA states that a requirement to consider whether a project hinders or contributes to Canada's ability to meet climate change commitments is now hard-wired into the scope of factors to consider under s. 22. It is also one of the five factors that the Minister or Cabinet must consider under s. 63 when making a decision at the very end of the process. It is hard to imagine anything more politicized than that.

⁷² The provisions in question are *CERA*, *supra* note 1, ss 183(2)(a), (j).
⁷³ Nathalie J Chalifour, "Drawing Lines in the Sand: Parliament's Jurisdiction to Consider Upstream and Downstream Greenhouse Gas (GHG) Emissions in Interprovincial Pipeline Project Reviews" (2018) 23:1 *Rev Const Stud* 129 at 133–34, 173–74.

⁷⁴ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 66 [*Oldman River*].

⁷⁵ *Ibid.*

⁷⁵ *Ibid* at 70, citing *Murphyores Incorporated Pty Ltd v Commonwealth of Australia* (1976), 136 CLR 1 (HC).

pipelines, so there should be no doubt that the same rationale would apply.⁷⁶ The consideration of induced impacts is further supported by the decision of the Supreme Court of Canada in *Quebec (Attorney General) v. Canada (National Energy Board)* which held that the NEB was well within its jurisdiction to consider the environmental effects of the future construction of generating facilities required to fulfil an export permit. In fact, the Court held that such effects must be taken into account.⁷⁷

Dealing with indirect, environmental effects was also a key question in the deliberations of the Expert Panel on the Modernization of the NEB:

On the one hand, if [the NEB] denies a project because it deems the underlying activity (energy extraction) to be inconsistent with emissions reduction, it is exceeding its mandate, making government policy, and issuing judgments that run up against provincial jurisdiction for natural resources and energy. On the other hand, if the NEB retreats to being “just” a regulator, and ignores the larger concerns it loses legitimacy and is accused of being tone deaf and buck-passing, and undermining the government’s policy goals around climate change.⁷⁸

Unfortunately, while the *Forward Together* report found such a situation to be untenable, the Expert Panel did not offer a clear path forward. They held that a regulator cannot be in the position of setting climate change policy for the country, but can only interpret existing policies and clear guidance.⁷⁹

While multiple assessments have determined a link between GHG emissions from pipeline-induced oil production and pipeline construction, the decision to include these impacts in an assessment had previously been at the discretion of the regulator.⁸⁰ Discretion not to include these impacts in assessments has been tested by the courts.⁸¹ For example, in *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, the NEB’s decision to ignore the indirect GHG emissions implications of Enbridge’s Line 9 expansion project was tested.⁸² In *Forest Ethics*, the Federal Court of Appeal found that the NEB’s exclusion of these effects was reasonable, granting what Chalifour calls a wide margin of discretion to the NEB.⁸³ Similarly, in *City of Vancouver v. NEB and Trans Mountain Pipeline ULC*, the Federal Court of Appeal denied an appeal of the NEB’s decision to exclude consideration

⁷⁶ Recall that the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(29), assigns to Parliament the authority to make laws in relation to “Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.” Section 92(10) defines provincial jurisdiction over “Local Works and Undertakings other than such as are of the following Classes,” and subsection (a) stipulates that “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,” are exempt from the conference of provincial authority.

⁷⁷ *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159 at 197.

⁷⁸ Expert Panel on the Modernization of the National Energy Board, *supra* note 56 at 18.

⁷⁹ *Ibid* at 12.

⁸⁰ *NEB Act*, 2012, *supra* note 21, s 52(2)(e).

⁸¹ Chalifour, *supra* note 72 at 151–58 provides a more detailed summary of the jurisprudence on the scoping of pipeline reviews than is provided below.

⁸² *Forest Ethics Advocacy Association, and Donna Sinclair v The National Energy Board, The Attorney General of Canada and Enbridge Pipelines Inc*, 2014 FCA 245 [*Forest Ethics*].

⁸³ Chalifour, *supra* note 72 at 152.

of upstream emissions impacts of the Trans Mountain Expansion.⁸⁴ Chalifour points out that the NEB in their ruling acknowledged that a connection exists between the NEB's approval of a pipeline and future oil production decisions but that this was not sufficient to persuade the NEB to consider these impacts in its analysis of the project.⁸⁵ On the other hand, the second review panel for the Energy East pipeline project had proposed to consider upstream GHG emissions.⁸⁶ The decision to consider indirect GHG emissions is often cited as one of the reasons that TransCanada decided to cancel the project.⁸⁷

Future review panels will have to address the emissions impacts of new development, although the details and scoping of future assessments are not clear.⁸⁸ In the ongoing assessment of the Gazoduc project, a natural gas pipeline from Ontario to eastern Quebec, the Tailored Impact Statement Guidelines stipulate that the review panel should undertake assessments of both the total upstream emissions associated with the project (that is, the emissions associated with producing and processing the gas that would be shipped in the pipeline) and an assessment of the degree to which these emissions are incremental results of the project.⁸⁹ This assessment would include the impact on global markets, with the terms of reference stating that an assessment should include impacts from incremental upstream production in Canada, noting that this would result from "a combination of shifting production and its emissions from elsewhere and increasing the total amount of production."⁹⁰ The Strategic Assessment of Climate Change (SACC) methodology also notes that a project's potential to reduce global emissions could also be included.⁹¹ The assessment must also assess project plans to achieve net zero emissions by 2050, although in this case only the direct emissions of the project are considered, so the scope of assessment is narrower.⁹² Finally, the Gazoduc assessment criteria includes the mandated consideration of

⁸⁴ *City of Vancouver v National Energy Board and Trans Mountain Pipeline ULC*, FCA, File Number 14-A-55 (preliminary non-action, leave to appeal denied; 17 October 2014), online: <apps.fca-caf.gc.ca/pq/IndexingQueries/infp_RE_info_e.php?court_no=14-A-55> [*Vancouver v TMX*]. For a definition of upstream emissions, see *Order 2016-87-04-02 Amending the Non-Domestic Substances List*, (2016) C Gaz I, 786 at 786–87 [*Amending the Non-Domestic Substances List*]:

"Upstream" includes all industrial activities from the point of resource extraction to the project under review.... As an illustrative example, a crude oil pipeline project may include the following upstream activities:

Extraction — crude oil and gas wells and oil sands mining and *in situ* facilities;

Processing — field processing and upgrading, if occurring;

Handling — product transfer at terminals; and

Transportation — any pipeline operation in advance of the project.

⁸⁵ Chalifour, *supra* note 72 at 153–54.

⁸⁶ *Ibid* at 156–57.

⁸⁷ Geoffrey Morgan, "'Unprecedented' Supreme Court Decision on Trans Mountain Should Be Message for Quebec: Kenney," *Financial Post* (27 January 2020), online: <financialpost.com/commodities/unprecedented-supreme-court-decision-on-trans-mountain-should-be-message-for-quebec-kenney>.

⁸⁸ *IAA*, *supra* note 1, s 51(1)(d)(ii.1), stipulates that a review panel for a CER-regulated pipeline must identify impacts which "are likely to be caused by the carrying out of the designated project." It does not directly specify whether these are to be evaluated against a null alternative or against other feasible alternative projects.

⁸⁹ Impact Assessment Agency of Canada, *supra* note 3, s 28, pt 2, Appendix 1.

⁹⁰ *Ibid*.

⁹¹ Government of Canada, *Strategic Assessment of Climate Change*, Catalogue No En14-417/2020E-PDF (Gatineau: Environment and Climate Change Canada, 2020) at 13, online: <www.canada.ca/en/services/environment/conservation/assessments/strategic-assessments/climate-change.html> [Government of Canada, *Strategic Assessment*]. For example, proponents of LNG export terminals have argued that LNG exports reduce global emissions by displacing coal power use. See Canadian Association of Petroleum Producers, "What Is Article 6, and Why Does it Matter to Canada?" (2019), online: <context.capp.ca/energy-matters/2019/og101_what-is-article-6>.

⁹² Impact Assessment Agency of Canada, *supra* note 3, s 1.9, referring to the scope of assessment in equation (1) in Government of Canada, *Strategic Assessment*, *ibid* at 5.

“the extent to which the effects of the project could contribute to or hinder Canada’s ability to meet its [international climate change] obligations,” although with minimal detail on how this assessment would be weighed in the overall project decision.⁹³

Any review of a new oil sands pipeline is likely to find a positive contribution to GHG emissions. The general conclusion of assessments into the Keystone XL and Trans Mountain expansion projects, for example, was that more pipeline capacity increases total emissions.⁹⁴ Insofar as such assessments provide a barrier to approval, formalizing their inclusion in the assessment would, at a minimum, make it more challenging for a regulator to approve a pipeline than if they were given sufficient discretion to ignore these impacts. However, the degree to which the emissions associated with any one pipeline project would be sufficient to derail an approval or lead a regulator to recommend against approval is speculative. The *CERA* explicitly requires that these factors be considered but does not mandate the type or level of consideration that must be given, nor that the conclusions drawn from consideration of these factors must carry the day.⁹⁵ The legislation itself does not set specific thresholds or quantitative public interest criteria. It stipulates only that the review consider impacts within the specified categories and report on that consideration in a transparent manner.⁹⁶ Similar requirements in the *IAA* are discussed in Part III.C.

The combined requirements to consider Canada’s climate commitments, the supply of oil available for the pipeline, and the financial viability of the project raises interesting issues regarding stranded assets for future review panels.⁹⁷ The future viability of oil sands operations will be affected by national and global action on climate change.⁹⁸ Insofar as these operations underpin both the volumes of oil produced and available for shipment via any new pipeline and underpin the contracts which allow for the financing of such new pipeline projects, their future prosperity is material to the application for new pipelines.⁹⁹ For example, in considering the risks of new climate change policies, Suncor, one of Alberta’s largest oil sands companies, considered three scenarios for future energy markets.¹⁰⁰ When they considered the combined effects of new energy technology and stringent emissions regulation, they found that new oil sands projects “are challenged and unlikely to proceed”

⁹³ Impact Assessment Agency of Canada, *ibid*, s 23.

⁹⁴ United States Department of State, “Final Supplemental Environmental Impact Statement for the Keystone XL Project: Volume 1” (December 2019), online: <www.energy.gov/sites/prod/files/2019/12/f70/final-seis-eis-0433-s3-keystone-xl-pipeline-2019-12-vol-1_0.pdf>; Environment and Climate Change Canada, *Trans Mountain Pipeline ULC – Trans Mountain Expansion Project: Review of Related Upstream Greenhouse Gas Emissions Estimates* (Gatineau: Environment and Climate Change Canada, 2016), online: <iaac-aeic.gc.ca/050/documents/p80061/116524E.pdf>.

⁹⁵ Recall that in *Ontario Power Generation Inc v Greenpeace Canada*, 2015 FCA 186 [*Greenpeace* 2015], the judgment of Justices Trudel and Ryer held that, “the type or level of consideration that the Panel was required to give to [environmental] effects was simply ... ‘some consideration’” (at para 130). The *IAA* does, in section 6(3), impose a duty of scientific integrity which may alter review of reasonableness in such assessments.

⁹⁶ See Olszynski, “Bill C-69’s Detractors,” *supra* note 20 for discussion of the implications of similarly specified criteria in the *IAA*. Olszynski writes that the *IAA* “does not draw an environmental — or any other — line in the sand. It merely requires the government to *identify and consider* impacts in a transparent manner.”

⁹⁷ *CERA*, *supra* note 1, ss 183(2)(f)–(j).

⁹⁸ Bošković & Leach, *supra* note 37.

⁹⁹ Andrew Leach, “Is Canada Headed for a Pipeline Bubble?,” *Macleans* (27 May 2014), online: <www.macleans.ca/economy/economicanalysis/is-canada-headed-for-a-pipeline-bubble/>.

¹⁰⁰ Suncor, “Climate Risk and Resilience Report 2019” (15 July 2019) at 18, online: <sustainability-prd-cdn.suncor.com/-/media/project/ros/shared/documents/climate-reports/2019-climate-risk-and-resilience-report-en.pdf?modified=20191113000826&_ga=2.234794972.310886080.1585935024-90632892.1585935024>.

under those circumstances.¹⁰¹ Globally, there is strong evidence that oil consumption will decrease as the world acts on climate change.¹⁰² The International Energy Agency forecasts that, in a world acting on climate change, oil demand will decrease substantially and at an increasing rate into the 2030s and 2040s, a period which would have to be covered by contractual shipping agreements for a new oil sands pipeline.¹⁰³ In Canada, as shown in Figure 1, the CER estimates materially lower oil supply in a scenario with stronger global and domestic action on climate change.¹⁰⁴ The statutory requirements in the *IAA* and the *CERA* should require review panels to consider not just the impacts of a new pipeline on Canada's emissions inventories but also the impact of actions domestically and internationally on the viability of the project being assessed. If they do so, it will prove increasingly difficult to find assurance of the long-term viability of new oil sands pipelines and render approval more fraught.

C. IMPACT ASSESSMENT AND THE APPROVAL OF NEW PIPELINES

The most significant process change with respect to pipelines introduced by Bill C-69 is the priority of the IAAC in undertaking impact assessments in pipeline reviews.¹⁰⁵ For all pipelines meeting the criteria for a *designated project*, *CERA* section 185 transfers the energy regulator's decision-making powers under sections 183(1) and (2) to a review panel established under the *IAA* as well as transferring Ministerial discretionary responsibility under the *CERA* to the Minister of Environment.¹⁰⁶ Additionally, all guidelines with respect to public participation, time limits, Ministerial directives, and publication in *CERA* are replaced by comparable clauses in the *IAA*.¹⁰⁷

1. WHAT IS A DESIGNATED PROJECT?

Under the *IAA*, any new interprovincial or international pipeline that requires 75km or more of new right-of-way would require an impact assessment.¹⁰⁸ Expansion projects like Keystone XL (approximately 400km of new right-of-way in Canada) and the Trans Mountain expansion (approximately 265km of new right-of-way) would have fit this description for a designated project, while the Enbridge's Line 3 replacement project would likely not have fit by default, although it did have some new right of way. This is a less stringent standard than that from *CEAA*, 2012 which stipulated a 40-km minimum length to trigger an

¹⁰¹ *Ibid.*

¹⁰² International Energy Agency, "World Energy Outlook 2019" (November 2019) at 133, online: <www.iea.org/reports/world-energy-outlook-2019>, in particular the decrease in oil demand and stable, low real prices for oil under the Sustainable Development Scenario.

¹⁰³ International Energy Agency, "The Oil and Gas Industry in Energy Transitions" (January 2020) at 56, online: <www.iea.org/reports/the-oil-and-gas-industry-in-energy-transitions>.

¹⁰⁴ The Evolving Scenario in Canada Energy Regulator, "Energy Futures 2020," *supra* note 23, is described as follows: "[t]he core premise of the scenario is that action to reduce the GHG intensity of our energy system continues to increase at a pace similar to recent history, in both Canada and the world. This evolution implies less global demand for fossil fuels, and greater adoption of low carbon technologies." *CERA*, *supra* note 1, s 185.

¹⁰⁵ *Ibid.*, ss 185(a)-(b).

¹⁰⁶ *Ibid.*, s 185.

¹⁰⁷ *Physical Activities Regulations*, SOR/2019-285. The definition for a new right-of-way is not particularly specific, holding that a new right-of-way means "land that is to be developed for ... a pipeline ... that is not alongside and contiguous to an area of land that was developed for ... a pipeline."

assessment,¹⁰⁹ and as with previous regimes, there is discretion for the Governor in Council to designate any particular project for assessment regardless of whether the regulatory *designated project* triggers are met.¹¹⁰ It is thus likely, but not guaranteed, that any new or significantly expanded oil sands pipeline would be designated for review leading to the transfer of assessment authority to the IAA.¹¹¹ The analysis below proceeds assuming that this would be the case.

2. PLANNING, INFORMATION GATHERING, AND PROJECT SCOPING

The impact assessment of a pipeline begins with the planning and information gathering stages as outlined in sections 10–20 of the IAA.¹¹² In the planning phase, the project proponent must seek approval for their project description, and once the description has been approved, a 180-day period of initial consultation with stakeholders is triggered. As part of the planning process, the scoping of the project for assessment is determined, as is a plan for public engagement, indigenous consultation, and an inventory of required permits for the project. The regulator, at this point, also determines what documentation or studies are required of the proponent.¹¹³

The statutory scoping of assessments has changed significantly under the IAA relative to CEAA, 2012. The IAA stipulates consideration of a broader range of impacts including “the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project.”¹¹⁴ Like CEAA, 2012, the definition of a project in this context includes “any ‘physical activity that is incidental’” to it.¹¹⁵ Assessment under CEAA, 2012 was mostly limited to environmental damage, with modest consideration of socio-economic consequences of identified effects and with only an implicit weighing of these damages against positive impacts when a decision was taken as to whether significant adverse impacts were justified *under the circumstances*.¹¹⁶ There is also a broader lens applied under the IAA through the consideration of “the extent to which the designated project contributes to sustainability,” which the IAA defines 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.”¹¹⁷ These broader considerations apply to the scoping and review panel assessment as well as to the eventual decision by the Governor in Council discussed below. Given that pipeline hearings have already become a

¹⁰⁹ *Regulations Designating Physical Activities*, SOR/2012-147, s 47.

¹¹⁰ IAA, *supra* note 1, s 9.

¹¹¹ Sharon Mascher, “Bill C-69 and the Proposed *Impact Assessment Act*: Rebuilding Trust or Continuing the ‘Trust Us’ Approach to Triggering Federal Impact Assessment?” (29 March 2018), online (blog): <ablawg.ca/wp-content/uploads/2018/03/Blog_SM_BillC69.pdf> points out that there is “there is no statutory threshold, criteria or process to guide the exercise of this discretion.”

¹¹² For more detail on this process, see Doelle & Sinclair, *supra* note 2 at 3.

¹¹³ See generally, IAA, *supra* note 1, s 18.

¹¹⁴ *Ibid*, s 22(1)(a).

¹¹⁵ Martin Z Olszynski, “Impact Assessment” in William A Tilleman et al, eds, *Environmental Law and Policy*, 4th ed (Toronto: Emond Montgomery, 2020) 453 at 475 [Olszynski, “Impact Assessment”] points out that it “was this [part of the project definition] that in part compelled the Federal Court of Appeal to overturn [the approval of the Trans Mountain pipeline expansion] in *Tsleil-Waututh Nation v Canada (Attorney General)*” [citations omitted].

¹¹⁶ CEAA, 2012, *supra* note 21, s 31(1)(a)(ii).

¹¹⁷ IAA, *supra* note 1, s 22(1)(h) with definition quoted from s 2.

forum for broader policy conversation around issues such as climate change, opening the door further to health, social, and economic issues will present a challenge for timely and comprehensive assessment. Notable additions to the mandatory scoping of particular relevance to pipeline projects are discussed below, including the addition of strategic and regional assessments considered in more detail in Part III.C.3.¹¹⁸

In a return to the content of *CEAA*, 1992, the *need* for the project is again part of the scope of assessment, although in this case its inclusion is not solely at the discretion of the Minister as was the case in the earlier statute.¹¹⁹ The *IAA* also adds a stronger and more explicit requirement to consider the use of *best available technology* as part of the analysis of alternative means of carrying out the project so long as alternatives are technically and economically feasible.¹²⁰ In combination, these should require much broader consideration of evolving energy market conditions, global GHG emissions policy impacts, and the long-term financial viability of a pipeline within an environmental assessment. Canadian jurisprudence gives us mixed signals as to how such a requirement may play out. Historically, courts have allowed for significant discretion by review panels in how they assess these types of questions. For example, in *Alberta Wilderness Assn. v. Express Pipelines Ltd.*, the Federal Court of Appeal was asked to consider whether a review panel had performed a sufficiently extensive consideration of alternative options. The Court there held that this was “a question of judgment” and saw no grounds for “interfering with the panel’s expression of satisfaction with the adequacy of the information provided to it.”¹²¹ However, on the specific question of alternative means of carrying out the project, the Federal Court opened the door wider to considering uncertain future technologies in *Pembina Institute for Appropriate Development v. Canada (Attorney General)*.¹²² While this case focused on the question of whether a review panel could consider the role of unproven technology in mitigating a project’s environmental impacts, it did lower the bar for how alternative technologies are considered in general.¹²³ As discussed above in Part III.B, the *need* for any new pipeline project will necessarily be contingent on global and domestic action on climate change.¹²⁴

¹¹⁸ The addition of the consideration of “the intersection of sex and gender with other identity factors” to the mandatory factors to be considered under section 183(2) of the *CERA*, *supra* note 1, has also generated some controversy. See e.g. Canadian Energy Pipeline Association, *supra* note 18 at 3. It is beyond the scope considered here but is addressed at length in Jennifer Koshan, “Bills C-68 and C-69 and the Consideration of Sex, Gender and Other Identity Factors” (2 May 2018), online (blog): <ablawg.ca/wp-content/uploads/2018/05/Blog_JK_Bills_C68_69.pdf>.

¹¹⁹ *IAA*, *supra* note 1, s 22(1)(d). Prior to amendments in 2012, *Canadian Environmental Assessment Act*, SC 1992, c 37 [*CEAA*, 1992], s 16(1)(e) stipulated that factors such as the need for the project and alternatives to the project could be considered at the direction of the Minister.

¹²⁰ *IAA*, *supra* note 1, s 22(1)(g).

¹²¹ *Alberta Wilderness Association v National Energy Board* (1996), 137 DLR (4th) 177 at para 11 [*Express Pipelines*].

¹²² *Pembina Institute for Appropriate Development, Prairie Acid Rain Coalition, Sierra Club of Canada, and Toxics Watch Society of Alberta v Attorney General of Canada, Minister of Fisheries and Oceans, Minister of Environment, and Imperial Oil Resources Ventures Limited*, 2008 FC 302 at paras 50–58 [*Pembina Institute*].

¹²³ Nathalie J Chalifour, “A [Pre]Cautionary Tale about the Kearl Oil Sands Decision: The Significance of *Pembina Institute for Appropriate Development et al. v. Canada (Attorney-General)* for the Future of Environmental Assessment” (2009) 5:2 *JSDLP* 251 at 269–71 has an extensive treatment of this aspect of *Pembina Institute*, *ibid*.

¹²⁴ See generally Leach, *supra* note 99; Bošković & Leach, *supra* note 37, for a discussion of the viability of oil sands projects under stringent GHG emissions policies. The Evolving scenario in Canada Energy Regulator, “Energy Futures 2020,” *supra* note 23, captures this relationship, as does recent analysis in International Energy Agency, “Net Zero by 2050: A Roadmap for the Global Energy Sector” (2021), online: <iea.blob.core.windows.net/assets/4482cac7-edd6-4c03-b6a2-8e79792d16d9/NetZeroBy2050-

The IAA also mandates broader consideration of impacts on Indigenous communities including “the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada.”¹²⁵ There are further requirements to consider relevant Indigenous knowledge and concerns relating to Indigenous cultures as well as requirements to consider project or regional level assessments conducted by or on behalf of Indigenous governing bodies.¹²⁶ CEAA, 2012 stipulated only that the assessment “may take into account community knowledge and Aboriginal traditional knowledge”¹²⁷ and that environmental damages would include, with respect to Indigenous peoples, effects on health and socio-economic conditions, physical and cultural heritage, the use of lands and resources for traditional purposes, or items of historical, archaeological, paleontological, or architectural significance.¹²⁸

Conflicts between pipeline construction and Indigenous rights have been a consistent theme of the previous decade in Canada and the US, with conflicts over the Northern Gateway, Keystone XL, Coastal Gas Link, Dakota Access, and Trans Mountain pipelines all having significant intersection with Indigenous issues. Consideration of these issues from the early stages of pipeline assessments in an explicit and broad way cannot hurt the credibility and durability of our regulatory process, although neither the IAA nor the CERA explicitly address nor do they formalize the duty to consult as some have suggested would clarify the requirements. While proponents have expressed concerns over these additions, the recent decisions in *Gitxaala*, *Tsleil-Waututh*, and *Coldwater* all demonstrate the importance of comprehensive attention to Indigenous rights and knowledge in the regulatory process: adding a statutory requirement for their consideration is unlikely to change much on the ground given this recent history.¹²⁹ While it is certainly the case that a regulatory process could not confer legitimate or judgment proof approval of a new pipeline without substantially better inclusion of Indigenous considerations, some including David V. Wright have argued that the legislation does not go far enough to internalize the lessons of recent conflicts in this regard.¹³⁰ Wright notes that the IAA contains “no hard line with respect to Indigenous rights and interests” and makes mention of the *United Nations Declaration on the Rights of Indigenous Peoples* only in the preamble.¹³¹ Wright concludes by reminding readers that the legislation is still far from a veto for affected Indigenous groups opposed to a project:

[A] “no” from an Indigenous group during the course of Crown consultation does not necessarily mean no under the [IAA]. Rather, all the enhanced measures and consideration of Indigenous peoples still boil down

ARoadmapfortheGlobalEnergySector.pdf> at 101, which states that “[t]he trajectory of oil demand in [a net zero emissions scenario] means that no exploration for new resources is required and, other than fields already approved for development, no new oil fields are necessary.” At a minimum, proving the need for new pipelines to support new oil sands development would be challenged in any scenario of aggressive global action on climate change.

¹²⁵ IAA, *supra* note 1, s 22(1)(c).

¹²⁶ *Ibid*, ss 22(1)(g), 22(1)(l), 22(1)(q), 22(1)(r).

¹²⁷ CEAA, 2012, *supra* note 21, s 19(3).

¹²⁸ *Ibid*, s 5(c).

¹²⁹ *Gitxaala*, *supra* note 5; *Tsleil-Waututh*, *supra* note 9; *Coldwater*, *supra* note 10.

¹³⁰ David V Wright, “Indigenous Engagement and Consideration in the Newly Proposed Impact Assessment Act: The Fog Persists,” online (blog): <ablawg.ca/wp-content/uploads/2018/02/Blog_DVW_Indigenous_IAA.pdf>.

¹³¹ *Ibid* at 6; *United Nations Declaration on the Rights of Indigenous Peoples*, Adopted by the General Assembly (13 September 2007), A/RES/61/295, online: <www.un.org/development/desa/indigenous-peoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf> [UNDRIP].

to essentially procedural rights (notwithstanding potential accommodation and associated mitigation measures) that lead to Indigenous rights, interests and concerns being placed within the broader public interest determination to be made by [the Governor in Council] (even if Indigenous rights constitute a “special public interest that supersedes other concerns”, as so characterized in *Clyde River*, at para 40).¹³²

Next, there are significant changes to consideration of climate change effects in the *IAA* which parallel changes in the *CERA* discussed above in Part III.A. Here too, the impact assessment must consider “the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change.”¹³³ In contrast, the words *climate change* did not appear in *CEAA*, 2012.

Despite the obvious importance of GHG emissions in any modern environmental review, there is a checkered history of attention to climate impacts and implications in recent Canadian environmental reviews: in *Pembina v. Imperial Oil (Kearl)*, the Federal Court found that the Review Panel for the Kearl mine erred in not explaining its conclusions with respect to climate change impacts of the project.¹³⁴ However, this was a process finding and did not signal a requirement for more future scrutiny in assessing emissions from similar projects. Subsequent assessments of both the Joslyn oil sands mine and the Jackpine (oil sands) Mine Expansion Project each held that the induced increase in GHG emissions did not constitute significant adverse environmental effects.¹³⁵ This trend continued in the environmental assessment for the Teck Frontier oil sands mine which did not conclude that the 4.1 million tonnes (Mt) of GHG emissions from the project were one of the significant, adverse impacts of the mine.¹³⁶ That review panel also concluded that “establishing policies and programs to meet Canada’s international commitments to reducing [GHG] emissions or the implementation of Alberta’s [climate change] regulations are beyond the scope of this proceeding or the authority of this panel.”¹³⁷ Under the *IAA*, establishing or implementing policies would remain beyond the scope, but a panel would be required to address the degree to which a proposed project, taking account of extant and planned policies, would contribute to meeting Canada’s commitments, and the final decision-maker must take account of this when reaching a decision.¹³⁸

The SACC provides a window into what the practical effects of the additional considerations of climate change impacts might be. In terms of the review, regulators will be expected to address the policies which will apply to the project and assess the mitigation measures that will be applied in executing the project.¹³⁹ Regulators are also expected to consider mitigation measures implemented in similar projects, and provide “a comparison

¹³² Wright, *supra* note 130, citing *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*].

¹³³ *IAA*, *supra* note 1, s 22(1)(i).

¹³⁴ *Pembina Institute*, *supra* note 122 at para 79.

¹³⁵ Mark Friedman, “Assessing Greenhouse Gas Emissions in the Oil Sands: Legislative or Administrative (in) Action?” (2016) 6:3 UWO J Leg Stud 5 at 11; 13–14, online: <ir.lib.uwo.ca/uwojls/vol6/iss3/5>.

¹³⁶ Alberta Energy Regulator & Canadian Environmental Assessment Agency, “Decision 2019 ABAER 008: Teck Resources Limited, Frontier Oil Sands Mine Project, Fort McMurray Area” (25 July 2019), online:<iaac-aeic.gc.ca/050/documents/p65505/131106E.pdf> at 179–85.

¹³⁷ *Ibid* at 185.

¹³⁸ *IAA*, *supra* note 1, s 22(1)(i) and 63(e).

¹³⁹ Government of Canada, *Strategic Assessment*, *supra* note 91, s 5.

of the project's projected GHG emission intensity to the emission intensity of similar, high-performing, energy-efficient project types in Canada and internationally."¹⁴⁰ These requirements were all fulfilled in the assessment of the Teck Frontier project, for example.¹⁴¹

A requirement to assess climate change impacts will not necessarily lead to significant changes in the overall assessment of a project, but decision-makers will have to wrestle with the question of whether new pipelines, or any other project under assessment, implies increases in emissions. Since even a large and relatively emissions-intensive project like Teck's Frontier mine was expected to account for well less than 1 percent of Canada's emissions, it is unlikely that a review panel will be in a position to conclude that any one project will make or break Canada's emissions commitments, or even that any single project will meeting those commitments substantially more or less likely. But that may not be sufficient to carry the day in the future. In fact, the recent majority decision of the Supreme Court in *References re: The Greenhouse Gas Pollution Pricing Act* cautions against ignoring individually small contributions to national and global emissions.¹⁴² Chief Justice Wagner cites an Australian environmental assessment case, *Gloucester Resources*, in which the rejection of a development application for a coal mine was upheld and in which the decision on appeal explicitly rejects the argument that the project was too small to matter.¹⁴³ Instead, the reasons of Chief Justice Preston in *Gloucester Resources* held that "[t]here is a causal link between the Project's cumulative GHG emissions and climate change and its consequences."¹⁴⁴ And so, while the guidelines and requirements in the *IAA* do not, in any way, stipulate that projects resulting in increased emissions cannot be approved unless Canada's emissions are expected to be below our national commitments, it may be both politically and legally untenable to argue that the emissions from any one project are too small to matter in an assessment.

It seems safe to say that, given the scientific and political consensus with respect to climate change, there cannot be a credible impact assessment of a new pipeline that does not include these considerations, and codifying these considerations in the statute provides some assurance of greater credibility. This should be tempered with the recognition that the legislation "does not draw an environmental — or any other — line in the sand. It merely requires the government to *identify and consider* impacts in a transparent manner."¹⁴⁵ In an assessment conducted under the previous legislation, a transparent admission that a project would make it less likely for Canada to meet its climate change commitments did not prevent approval: in the Joint Review Panel Report for Shell's Jackpine Expansion, it was found that,

¹⁴⁰ *Ibid*, s 5.1.4.

¹⁴¹ Alberta Energy Regulator & Canadian Environmental Assessment Agency, *supra* note 136 at 179–85.

¹⁴² *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GGPPA Reference*] at paras 188–89. Chief Justice Wagner held that "I reject the notion that because climate change is 'an inherently global problem', each individual province's GHG emissions cause no 'measurable harm' or do not have 'tangible impacts on other provinces,'" quoting from the majority reasons in *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 at para 324.

¹⁴³ *Gloucester Resources Limited v Minister for Planning*, [2019] NSWLEC 7 at para 516 [*Gloucester Resources*], as cited in *GGPPA Reference*, *ibid* at para 189.

¹⁴⁴ *Gloucester Resources*, *ibid* at para 525. At para 516 of the decision, which held that "[m]any courts have recognised this point that climate change is caused by cumulative emissions from a myriad of individual sources, each proportionally small relative to the global total of GHG emissions, and will be solved by abatement of the GHG emissions from these myriad of individual sources," was cited by Chief Justice Wagner in *GGPPA Reference*, *ibid* at para 189.

¹⁴⁵ Olszynski, "Bill C-69's Detractors," *supra* note 20.

“the Project’s GHG emissions ... will increase GHG emissions from the oil sands industry and make it more difficult for Alberta and Canada to meet their GHG reduction targets.”¹⁴⁶ In that case, the panel concluded that this was not likely to result in “significant adverse cumulative environmental effects from GHG emissions,” and concluded that the project was in the public interest.¹⁴⁷

Finally, the discretion over scoping decisions beyond the required elements to be considered has changed in the new legislation as well. *CEAA*, 2012 stipulated that “the scope of the factors to be taken into account ... is determined by” the Minister, in the case of a review panel assessment.¹⁴⁸ In the *IAA*, “the scope of the factors referred” to be considered, is determined by the *IAAC*, which should lead to more expert driven decisions as to assessment scoping.¹⁴⁹ The *IAAC*, in performing this assessment, would be bound by the new *IAA* requirement to adhere “to the principles of scientific integrity, honesty, objectivity, thoroughness and accuracy.”¹⁵⁰

The *IAA* broadens the minimum scope of impact assessment and mandates the consideration of a wider array of project impacts than would have been the case under *CEAA*, 2012; however, as above, the degree to which that materially changes the likelihood of approval is speculative. The scoping of environmental assessments is a consistent source of strife between project proponents and environmental groups and other intervenors, and has a significant legal history in Canada.¹⁵¹ Courts have considered the degree to which indirect effects of the project including those due to increased production or consumption of fossil fuels is to be considered in project reviews.¹⁵² More recently, the Federal Court of Appeal in *Tsleil-Waututh* found that the NEB had erred in failing to include marine shipping activities in the scope of the environmental assessment of the Trans Mountain expansion project:

The [NEB]’s reasons do not well-explain its scoping decision, do not grapple with the relevant criteria and appear to be based on a rationale that is not supported by the statutory scheme.... [The NEB] failed to comply with its statutory obligation to scope and assess the Project so as to provide the Governor in Council with a “report” that permitted the Governor in Council to make its decision.¹⁵³

This scoping error led to a cascading series of errors relating to the Governor in Council’s discharge of its duties under *CEAA*, 2012 and the *Species at Risk Act* as well as a failure to adequately fulfil its duty to consult with affected First Nations.¹⁵⁴ Combined, these led the

¹⁴⁶ Canadian Environmental Assessment Agency & Alberta Energy Regulator, “Joint Review Panel Report, Shell Canada Energy, Jackpine Mine Expansion Project: Application to Amend Approval 9756, Fort McMurray Area” (2013) at para 298, online: <static.aer.ca/prd/documents/decisions/2013/2013-ABAER-011.pdf>.

¹⁴⁷ *Ibid* at paras 300, 21.

¹⁴⁸ *CEAA*, 2012, *supra* note 21, s 19(2)(b).

¹⁴⁹ *IAA*, *supra* note 1, ss 18(1.2), 22(2).

¹⁵⁰ *Ibid*, s 6(3).

¹⁵¹ See Olszynski, “Impact Assessment,” *supra* note 115 at 464–65, and in particular the discussion of the decision of the Supreme Court in *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 [*MiningWatch*].

¹⁵² See e.g. *Express Pipelines*, *supra* note 121.

¹⁵³ *Tsleil-Waututh*, *supra* note 9 at para 409. The Court later concludes that “the [NEB] erred by unjustifiably excluding Project-related marine shipping from the Project’s definition” (at para 468).

¹⁵⁴ SC 2002, c 29 [*SARA*].

Federal Court of Appeal to quash the approval for the Trans Mountain expansion which in turn led to multiple years' delay in the project and substantial escalation in costs.¹⁵⁵ The decision in *Tsleil-Waututh* found fault with the NEB's scoping decision, but other decisions by the NEB to significantly limit the scope of assessments have survived judicial review (see, for example, *Forest Ethics*).¹⁵⁶ The difference between these two cases seems to lie in the degree to which the final decision-making authority would reasonably have required the information which was not provided as a result of an overly limited scoping decision in order to make a decision. In *Tsleil-Waututh*, the Court found that it was unreasonable for the Governor in Council to make its final decision given the incomplete information provided by the regulatory body.¹⁵⁷

3. STRATEGIC AND REGIONAL ASSESSMENTS

A potentially important addition to the scope of assessment in the *IAA* is the mandated consideration of strategic and regional assessments of relevance to the project.¹⁵⁸ Strategic assessments are novel in the *IAA*, but regional assessments were included in *CEAA*, 2012.¹⁵⁹ The *IAA* contains no specific triggers for strategic or regional assessments, so they will happen at the discretion of the Minister of Environment and Climate Change.¹⁶⁰ Individuals may request such assessments, and the Minister must respond, with reasons, if they deny such a request.¹⁶¹ The purpose of the strategic and regional assessments is to allow broader policy issues, the combined impacts of past and future developments, and broader cumulative effects to be evaluated in a forum external to the assessment of a particular project.¹⁶²

The first strategic assessment conducted for the purposes of the *IAA* is the SACC referenced above for which a draft was published in late 2019, and a revised version posted in October of 2020.¹⁶³ This assessment is less of an assessment of the overall issue as it is a regulatory guidance on considering climate change in impacts assessments, although it does not add a lot to previous guidance.¹⁶⁴ The existing SACC does not address what has become a key concern of pipeline proponents and proponents of fossil fuel projects: that projects have had to answer at the project level for what should really be broader policy questions.¹⁶⁵

¹⁵⁵ Vassy Kapelos & John Paul Tasker, "Cost of Trans Mountain Expansion Soars to \$12.6B," *CBC News* (7 February 2020), online: <www.cbc.ca/news/politics/vassy-trans-mountain-pipeline-1.5455387>.

¹⁵⁶ *Forest Ethics*, *supra* note 82.

¹⁵⁷ *Tsleil-Waututh*, *supra* note 9 at paras 395–404. See also the Court's conclusions in regards to the Governor in Council's reliance on the Board's improperly scoped report at paras 457–71.

¹⁵⁸ *IAA*, *supra* note 1, s 22(1)(p). See also Doelle & Sinclair, *supra* note 2 at 5.

¹⁵⁹ See Olszynski, "Impact Assessment," *supra* note 115 at 474–75 for a discussion of regional and strategic assessments. Regional assessments were included in *CEAA*, 2012, *supra* note 21, ss 73–74.

¹⁶⁰ Meinhard Doelle, "The Proposed New Federal Impact Assessment Act (*IAA*) Under Bill C-69: Assessment & Reform Proposals" (2018) Dalhousie University, Schulich School of Law Working Paper at 1.

¹⁶¹ *IAA*, *supra* note 1, s 97(1).

¹⁶² Doelle, *supra* note 160 at 20.

¹⁶³ Government of Canada, *Draft-Strategic Assessment of Climate Change* (Ottawa: Environment and Climate Change Canada, 2019), online: *Impact Assessment Agency of Canada* <www.canada.ca/content/dam/eccc/documents/pdf/sacc/Draft_Strategic_Assessment_of_Climate_Change.pdf>; Government of Canada, *Strategic Assessment*, *supra* note 91.

¹⁶⁴ Recall that guidance was issued in 2016 in *Amending the Non-Domestic Substances List*, *supra* note 84.

¹⁶⁵ See e.g. Canadian Energy Pipeline Association, *supra* note 18 at 2, which states that, "We are concerned that the government has effectively frustrated Regulatory Reform in order to advance their climate change agenda and has baked broad policy subject matters into an otherwise very technical decision-making process."

In addition to the SACC, Environment and Climate Change Canada launched a strategic assessment of thermal coal mining in late 2019.¹⁶⁶ The three main areas of analysis in this assessment presage what might be seen in a future strategic assessment of oil sands extraction or pipeline infrastructure. The assessment will examine:

- 1) Environmental and health impacts of thermal coal mining and end use of thermal coal such as the impacts on air, water, wildlife, greenhouse gas emissions and climate change, and related health impacts.
- 2) Market analysis of projected demand for thermal coal. This will include an overview of Canada's current and proposed thermal coal mines, an assessment of the economic importance of the thermal coal mining sector in Canada, and projections of future domestic and global demand for thermal coal mined in Canada.
- 3) The use of thermal coal, including the export of thermal coal and its impact on Canada's international commitments and initiatives. This strategic assessment will consider the implications of thermal coal mining and export on Canada's related domestic and international policies, commitments and objectives, including the Powering Past Coal Alliance.¹⁶⁷

Many of the issues raised in the context of pipeline opposition, including the pace and scale of oil sands expansion and the relationship of oil sands emissions projections to Canada's national climate change goals would be perhaps better suited to a strategic assessment than to assessment as part of the regulatory process for pipelines. At the same time, such a strategic assessment could inform future pipeline assessments in a consistent and clear way.

To date, two regional assessments have also been announced: the first, now completed, was the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador, and the second involves the Ring of Fire Region in Ontario.¹⁶⁸ A similar regional assessment could allow for a broader examination of the cumulative effects of development in Alberta's oil sands region and, if carried out, would inform future assessment of the upstream effects of pipelines.¹⁶⁹

On the surface, the use of strategic and regional assessments could address the concerns of project proponents with respect to more clarity on broader policy issues being provided before project level assessments.¹⁷⁰ Whether such information makes it more likely that a proposed pipeline would be approved is questionable, however. A true test will come when

¹⁶⁶ Environment and Climate Change Canada, "Draft Terms of Reference for Conducting a Strategic Assessment of Thermal Coal Mining" (10 August 2020), online: <www.canada.ca/en/environment-climate-change/corporate/transparency/consultations/draft-terms-reference-conducting-strategic-assessment-thermal-coal-mining.html#shr-pg0>.

¹⁶⁷ *Ibid* [emphasis omitted].

¹⁶⁸ Impact Assessment Agency of Canada, *Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador: Report of the Committee* (Gatineau: Environment and Climate Change Canada, 2020), online: <iaac-aeic.gc.ca/050/documents/p80156/134068E.pdf>; Impact Assessment Agency of Canada, "Announcement of a Regional Assessment of the Ring of Fire Area" (10 February 2020), online: <iaac-aeic.gc.ca/050/evaluations/proj/80468>.

¹⁶⁹ Recall the definition of upstream for the purposes of pipelines provided in *Amending the Non-Domestic Substances List*, *supra* note 84. A regional assessment of the oil sands region would inform such analysis in a broader context than simply the emissions impacts of pipelines.

¹⁷⁰ Canadian Energy Pipeline Association, *supra* note 18 at 5.

(or if) an assessment of regional impacts from oil sands development is triggered under the IAA or perhaps when one is requested and denied.¹⁷¹

4. ASSESSMENT BY A REVIEW PANEL

Pipelines which fit the criteria for a designated project will automatically advance to an impact assessment by a review panel.¹⁷² This is not a major change in and of itself since recent pipeline projects have been subject to review panel assessments under *CEAA*, 1992 or had similar responsibilities discharged by the NEB following the 2012 amendments to the *NEB Act* and the *CEAA*. The make-up and decision-making requirements imposed on a review panel have changed, however.

The review panel for a pipeline must contain at least three members, and at least one member must be appointed from a roster of commissioners of the CER, but CER representatives may not constitute a majority of the panel.¹⁷³ This is explicitly an IAAC panel; the IAAC cannot enter an agreement for a joint review with the CER.¹⁷⁴ Pipeline proponents argue that this will lead to a dearth of relevant expertise in the assessment.¹⁷⁵ CEPA argued that this legislation “side-lined” the traditional regulators for energy projects and expressed concern that the IAAC “does not have the rich history of administrative decision-making and technical expertise of the NEB.”¹⁷⁶

While the impact of this change could be significant, it is not possible to say, *ex ante*, that review panel members drawn from the life cycle regulator for energy projects (the CER, in this case) would be more sympathetic to pipeline projects than members chosen by the IAAC nor that reviews would be of lower quality under the new structure. To suggest as much definitely raises concerns over regulatory capture.¹⁷⁷ Furthermore, there is reason to believe that the previous regime under the 2012 amendments to the *NEB Act* and *CEAA* contributed to challenges rather than advantages for pipeline approvals. Recall that in *Tsleil-Waututh*, the NEB review panel was found to have made significant errors in the execution of their duties under environmental assessment and species at risk legislation.¹⁷⁸ A long-running tendency toward overly narrow project scoping and intransigence with respect to the assessment of induced GHG emissions was a major driver of the loss of trust in Canadian energy regulators prior to these legislative amendments.¹⁷⁹

¹⁷¹ Olszynski, “Impact Assessment,” *supra* note 115 at 474. Olszynski argues that the ability for individuals to request an assessment and the requirement for the Minister to respond with reasons may be the most significant change in the IAA.

¹⁷² IAA, *supra* note 1, s 43.

¹⁷³ *Ibid*, s 47.

¹⁷⁴ *Ibid*, s 39(2)(b).

¹⁷⁵ Canadian Energy Pipeline Association, *supra* note 18 at 8.

¹⁷⁶ *Ibid* at 3.

¹⁷⁷ Stephen Bird, “The Policy-Regulatory Nexus in Canada’s Energy Decision-Making: From Best Practices to Next Practices” (Pre-workshop Discussion Paper for the Positive Energy Workshop on The Policy-Regulatory Nexus in Canadian Energy Decision Making, Ottawa, June 2017) at 5.

¹⁷⁸ *Tsleil-Waututh*, *supra* note 9 at para 780. See Martin Z Olszynski & David V Wright, “Tsleil-Waututh Nation v. Canada (Attorney General): Clarifying the (F)Laws in Canada’s Pipeline Approval Process” (2019) 22 CELR (4th) 8 for a summary of the judicial review of the NEB’s report.

¹⁷⁹ See e.g. *Forest Ethics*, *supra* note 82. For discussion on these general lines, see Meinhard Doelle, Karine Péloffy & Bob Gibson, “Strategic Impact Assessment on Climate Change in Project and Regional IA” (18 October 2017), online: *Environmental Law News* <blogs.dal.ca/melaw/2017/10/18/strategic-impact-assessment-on-climate-change-in-project-and-regional-ia/>, and also Martin Z Olszynski, “A(nother) New Federal Regime for Assessing Interprovincial Pipeline Projects: The Proposed Impact Assessment Act” (2018) 6:2 Energy Regulation Quarterly at 3, 12.

The assessment of the review panel is guided by the factors outlined in the scoping decision, and the panel must provide reasons for their decisions. The review panel then must prepare a report which:

- (i) [S]ets out the effects that ... are likely to be caused by the carrying out of the designated project,
 - (ii) indicates which of [these] effects ... are adverse effects within federal jurisdiction and which are adverse direct or incidental effects, and specifies the extent to which those effects are significant,
- ...
- (ii.1) sets out how the review panel ... took into account and used any Indigenous knowledge provided with respect to the designated project,
 - (iii) sets out a summary of any comments received from the public, and
 - (iv) sets out the review panel's rationale, conclusions and recommendations.¹⁸⁰

The review panel's report must also discharge responsibilities under section 183 of the *CERA* including the specific considerations outlined above in Part III.B above.¹⁸¹

The explicit requirements to document decision-making are consistent with previous decisions on judicial review, for example in *Pembina Institute*.¹⁸² The Court held that in not documenting its rationale, "the Panel short circuits the two step decision making process envisioned by the CEAA which calls for an *informed decision* by a responsible authority."¹⁸³ The courts have been very hesitant to impose more than consideration and justification through judicial review. In *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, the federal court applied a very deferential standard that only some consideration of each listed factor was mandatory.¹⁸⁴ In *Greenpeace 2015* and again in *Greenpeace Canada v. Canada (Attorney General)*, the Courts allowed substantial deference to review panel decisions on the degree to which listed factors were considered.¹⁸⁵

Here again, Canadian jurisprudence on what counts as appropriate consideration does not lend itself to the conclusion that review panels will require extensive and detailed examination of all factors on the scoping list.¹⁸⁶ The *IAA* does add requirements for decision makers to "exercise their powers in a manner that adheres to the principles of scientific integrity, honesty, objectivity, thoroughness and accuracy."¹⁸⁷ It is not clear, however, how

¹⁸⁰ *IAA*, *supra* note 1, s 51(1)(d).

¹⁸¹ *Ibid*, s 51(3).

¹⁸² *Pembina Institute*, *supra* note 122 at para 75.

¹⁸³ *Ibid* at para 79. For more extensive discussion on this point, see Chalifour, *supra* note 123 at 286.

¹⁸⁴ *Minister of Fisheries and Oceans, Director, Marine Programs, Canadian Coast Guard v The Friends of the West Country Association*, [2000] 2 FC 263 at para 26 [*West Country*].

¹⁸⁵ *Greenpeace 2015*, *supra* note 95; *Greenpeace Canada v Attorney General of Canada*, 2016 FCA 114 [*Greenpeace 2016*].

¹⁸⁶ See Olszynski, "Impact Assessment," *supra* note 115 at 500. Olszynski cites *Greenpeace 2015*, *ibid*, as an example of the "Canadian judiciary's current formalistic and highly deferential approach to adequacy and completeness."

¹⁸⁷ *IAA*, *supra* note 1, s 6(3).

this additional, subjective requirement will impact future analysis and decision-making. Alana Westwood and co-authors argue that the inclusion of this clause “has the potential to address a considerable part of the [IAA]’s science deficit,” leading to potentially better decision making, but that it is limited in that it applies only to decision-makers and not to proponents or intervenors.¹⁸⁸ Even assuming that the analysis is more robust and transparent, the inclusion of a particular factor for analysis in no way implies that a negative finding with respect to that factor by the review panel would preclude approval. The IAA does not include any such bright line test. It does require a much more transparent process and more explicitly documented, scientifically informed decision-making.¹⁸⁹

D. TIMING AND PUBLIC PARTICIPATION IN THE IAA AND THE CERA

Pipeline proponents also generally have concerns over the timing of project reviews.¹⁹⁰ There are limited differences in the timing of reports provided to decision makers between the 2012 and 2019 legislation as they relate to pipelines. The same is generally true for the timing of Governor in Council decisions. Under *NEB Act*, 2012, the report to the Minister in respect of a pipeline had to be submitted within 15 months.¹⁹¹ Under the *CERA*, that limit is a slightly shorter 450 days. However, assuming the pipeline is a designated project for the purposes of the IAA, the limit for impact assessment related to the project could stretch up to 600 days if “the Agency is of the opinion that the review panel requires more time and it establishes those time limits before it posts a copy of the notice of the commencement of the impact assessment on the Internet site.”¹⁹² Given that both the 2019 and 2012 legislation provided for extensive opportunities to revise and extend timelines, it is not possible to say with certainty that one regime would necessarily lead to longer reviews for federally-regulated pipelines, but it is certainly the most likely outcome.

Bill C-69 also introduced significant changes to the regulatory process with respect to public participation compared to the *CEAA*, 2012 and *NEB Act*, 2012 that they replaced. Some context here is important. Canadian regulators have struggled with public participation in pipeline hearings since the early 2010s.¹⁹³ The Northern Gateway Joint Review Panel had become significantly bogged down by public participation requests, in part due to a campaign called *Mob the Mic* which encouraged members of the public to register to make oral statements.¹⁹⁴ The process, which had invited such oral submissions, was overwhelmed with thousands of applications to participate. These delays prompted, among other things, an infamous open letter from then Natural Resources Minister Joe Oliver which stated that “radical groups” were “stacking public hearings with bodies to ensure that delays kill good

¹⁸⁸ AR Westwood et al, “The Role of Science in Contemporary Canadian Environmental Decision Making: The Example of Environmental Assessment” (2019) 52:1 UBC L Rev 243 at 281–82.

¹⁸⁹ See generally Aerin L Jacob et al, “Cross-Sectoral Input for the Potential Role of Science in Canada’s Environmental Assessment” (2018) 3 FACETS 512, online: <www.facetsjournal.com/doi/10.1139/facets-2017-0104>.

¹⁹⁰ See Canadian Energy Pipeline Association, *supra* note 18 at 6.

¹⁹¹ *NEB Act*, 2012, *supra* note 21, s 52(4).

¹⁹² *IAA*, *supra* note 1, s 37.1(2).

¹⁹³ Lucas & Thompson, *supra* note 5 at 359.

¹⁹⁴ Savage, *supra* note 61 at 9.

projects.”¹⁹⁵ As part of the federal government response to these challenges, the *NEB Act*, 2012 included amendments to significantly reduce public participation.¹⁹⁶ Section 55.2 of the *NEB Act*, 2012 stipulated that “the Board shall consider the representations of any person who, in the Board’s opinion, is directly affected by the granting or refusing of the application [or any person who] has relevant information or expertise.”¹⁹⁷ Similar stipulations were included in *CEAA*, 2012.¹⁹⁸

The *IAA* opens a far wider door to public participation.¹⁹⁹ First, comments received from the public must be considered in the scoping of the environmental assessment.²⁰⁰ In a review panel assessment, the *IAA* requires that hearings be held “in a manner that offers the public an opportunity to participate meaningfully, in the manner that the review panel considers appropriate and within the time period that it specifies, in the impact assessment,” and the comments from the public must form part of the report.²⁰¹ While these stipulations are less restrictive in theory than those imposed via statute in the *NEB Act*, 2012 and *CEAA*, 2012, there is still significant discretion on the part of the review panel to restrict public participation so that it does not significantly affect the timing of the assessment.

The potentially increased opportunity for public participation afforded under the new legislation relative to the 2012 legislation has raised concerns among pipeline proponents and energy industry advocates. For example, the *IAA/CEAA* framework has been described by energy executive Mac Van Wielingen as “unconstrained public participation,” and both Van Wielingen and CEPA have raised the possibility of public participation being used strategically to slow the regulatory process.²⁰² While pipeline proponents have traditionally sought to limit public participation in hopes of shortening the regulatory process, more public participation has the potential for a long-term positive impact. Kirsten Mikadze argues that public participation is an important element to a legitimate decision in a democratic society.²⁰³ Her summary of the advantages of enhanced public participation also points to learning opportunities for proponents, opponents and regulators as well as the fact that a more open process avoids disenfranchisement of some of the communities likely to be most affected by environmental harms. Her review also highlights the importance of participation

¹⁹⁵ Joe Oliver, “An Open Letter from Natural Resources Minister Joe Oliver,” *The Globe and Mail* (9 January 2012), online: <www.theglobeandmail.com/news/politics/an-open-letter-from-natural-resources-minister-joe-oliver/article4085663/>. See also Savage, *ibid* at 9–11.

¹⁹⁶ Savage, *ibid* at 11, writes that the Harper “Federal government was clearly frustrated [by the anti-oil sands campaigns]. What followed were substantial amendments to the [*NEB Act*] that set off a wave of reaction from every corner of the country that eventually evolved into a direct assault on the NEB itself.”

¹⁹⁷ *Supra* note 21, s 55.2.

¹⁹⁸ *CEAA*, 2012, *supra* note 21, s 2.

¹⁹⁹ See generally Carol Hunsberger, Sarah Froese & George Hoberg, “Toward ‘Good Process’ in Regulatory Reviews: Is Canada’s New System Any Better than the Old?” (2020) 82 *Environmental Impact Assessment Rev* 106379, but in particular page 4 on this issue.

²⁰⁰ *IAA*, *supra* note 1, s 22(1)(n).

²⁰¹ *Ibid*, ss 51(1)(c), 51(1)(d)(iii) [emphasis added].

²⁰² Mac Van Wielingen, “Executive Summary & Background Context: Submitted to the Senate Committees on Bill C-48 and Bill C-69” (2019) at 5, online: <canadianenergynewsnetwork.ca/wp-content/uploads/2019/04/Mac-Van-Wielingen-Bill-C-69-and-Bill-C-48-Written-Testimony-Submission-April-22-2019.pdf> [emphasis added]; Canadian Energy Pipeline Association, *supra* note 18 at 7.

²⁰³ Kirsten Mikadze, “Pipelines and the Changing Face of Public Participation” (2016) 29 *J Envtl L & Prac* 83 at 89.

in the pipeline context, where benefits and costs may be distributed very differently.²⁰⁴ There is no reason to believe, *ex ante*, that the enhanced public participation stipulations in the *IAA* and *CERA* will lead to a less robust final outcome or to a significantly longer process, even if they do create more challenges for the review panel and project proponents in the near term. More importantly, as Mark Winfield argues, previous efforts to limit public participation have led, along with other changes, to a collapse of trust in the decision-making process and have also led opponents of projects to “continue their opposition through other means — legal challenges, protests, demonstrations and blockades.”²⁰⁵ Winfield’s thesis suggests that, in the longer term, limits to public participation reduce the legitimacy of the regulatory process. In that sense, the changes in the *IAA* are likely to lead to improvements.

E. GOVERNOR IN COUNCIL DECISION-MAKING

The *CERA* and the *IAA* introduce more formal structure to the decision-making by the Governor in Council. After the *IAA* review panel report is completed, the Governor in Council must make decisions both with respect to whether adverse effects within federal jurisdiction and adverse direct or incidental effects of the project are in the public interest, and with respect to the issuance of a certificate of public convenience and necessity under the *CERA*.²⁰⁶

The *NEB Act*, 1959 specified no factors to be considered by the Governor in Council in approving pipelines, only that the issuance of a certificate by the board was subject to approval.²⁰⁷ This remained true through the *NEB Act*, 1985.²⁰⁸ As discussed above, under the *NEB Act*, 2012, the Governor in Council could direct the Board to issue a certificate regardless of the panel’s recommendations. The legislation specified no factors which needed to be considered in making such a decision, only that reasons for making the order must be set out.²⁰⁹ Because of the role of the NEB in discharging environmental assessment responsibilities under *CEAA*, 2012, the decision report delivered under section 54 of the *NEB Act*, 2012 would also include a decision under section 31 of the *CEAA*, 2012 as to whether the project’s environmental effects were significant or whether these effects were justified in the circumstances, again with reasons required but with no specific factors for consideration.²¹⁰

The new legislation enacted by Bill C-69 is far more explicit. The *CERA* requires that reasons must be set out, and that “reasons must demonstrate that the Governor in Council took into account all the considerations referred to in subsection 183(2) [of the *CERA*] that

²⁰⁴ *Ibid* at 92. Mikadze cites the particular example discussed in Kaitlyn Mitchell & Zachary D’Onofrio, “Environmental Injustice and Racism in Canada: The First Step is Admitting We Have a Problem” (2016) 29 J Envtl L & Prac 305 of the effects on the Aamjiwnaang First Nation, from petrochemical development near Sarnia, Ontario. This development would normally be cited as a benefit of pipeline expansions, but the costs may not be adequately valued without enhanced public participation.

²⁰⁵ Mark Winfield, “Decision-Making, Governance and Sustainability: Beyond the Age of ‘Responsible Resource Development’” (2016) 29 J Envtl L & Prac 129 at 145–46.

²⁰⁶ *IAA*, *supra* note 1, ss 61(1), 61(2)(a) respectively. For the terms of the decision with respect to the issuance of the Certificate of Public Convenience and Necessity, see *CERA*, *supra* note 1, s 186(1).

²⁰⁷ *NEB Act*, 1959, *supra* note 50, s 44.

²⁰⁸ *NEB Act*, 1985, *supra* note 53 s 52.

²⁰⁹ *NEB Act*, 2012, *supra* note 21, s 54.

²¹⁰ *Ibid*, s 31(1)(a).

appeared to the Governor in Council to be relevant and directly related to the pipeline.”²¹¹ A similar requirement is imposed with respect to the Governor in Council’s decision making with respect to the *IAA*.²¹² As with the list of factors in the *CERA*, the *IAA* also specifies a more expansive list of considerations than previous legislation.²¹³ There is also an much more explicit requirement to document the link between the information in the report, the consideration of each of the specified factors, and the final decision of the Governor in Council.²¹⁴ These requirements are in line with the findings of Aerin Jacob and co-authors who found broad support for improving open access to EA-related information, evaluating cumulative effects, and transparent decision-making.²¹⁵

What these new requirements in *CERA* and the *IAA* will mean for future judicial reviews of pipeline approvals is uncertain. Judicial review has, of course, become a major concern of pipeline proponents in the wake of decisions in *Gitxaala* and *Tsleil-Waututh*.²¹⁶ In *Vavilov*, the Supreme Court revised the standards for administrative judicial review, and these standards would apply to new pipeline reviews.²¹⁷ The *Vavilov* regime interacts in important ways with the regulatory framework in the *IAA* and *CERA* because of the specific requirements imposed in the legislation with respect to reasons and the consideration of factors discussed above. First, passages in *Vavilov* on the “governing statutory scheme” suggest that there is not much room for governments to manoeuvre where the legislation sets out specific steps to take and measures to follow.²¹⁸ The decision-making of both the review panel and the Governor in Council would remain subject to a *reasonableness* standard of review under the *Vavilov* framework, but the burden placed on reasons is more extensive: “where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts.”²¹⁹ The *Vavilov* framework remains largely deferential to the expertise of the administrative entity but only insofar as the reviewing entity justifies that deference through its reasoning. *Vavilov* holds that it is not for the Courts to impose their own decision on the process but also establishes that “an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.”²²⁰ Finally, the Court cites *Dunsmuir* as it holds that deference to expertise is not automatic. Rather, “[a]n administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear.”²²¹ Similar rationale with respect to deference

²¹¹ *CERA*, *supra* note 1, s 186 (2).

²¹² *IAA*, *supra* note 1, s 62.

²¹³ *Ibid*, s 63.

²¹⁴ *Ibid*, s 65(2).

²¹⁵ Jacob et al, *supra* note 189 at 522.

²¹⁶ *Gitxaala*, *supra* note 5; *Tsleil-Waututh*, *supra* note 9.

²¹⁷ *Vavilov*, *supra* note 22; See Daly, *supra* note 22, for a detailed review of the *Vavilov* framework for judicial review. For judicial interpretation, see the reasons of Justice Wakeling in *Alexis v Alberta (Environment and Parks)*, 2020 ABCA 188 at paras 137–38 [*Alexis*].

²¹⁸ *Vavilov*, *ibid* at paras 108–10.

²¹⁹ *Ibid* at para 81. Among the first applications of the *Vavilov* standard of judicial review came in *Alexis*, *supra* note 217, an environmental impact assessment case. While the legal requirement for reasons was potentially at issue in *Alexis*, it was not argued by the appellants and the decision held that the actions of the delegated official were unreasonable on their face, and thus the requirement for reasons was not explicitly addressed.

²²⁰ *Vavilov*, *ibid* at paras 86, 93.

²²¹ *Ibid* at para 93. The Supreme Court here cites *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 49.

to expertise being justified only where reasons demonstrate the role of expertise in decision-making was used to decide *Pembina Institute*:

I am fully aware of the level of expertise possessed by the Panel. The record shows that they had ample material before them relating to the issue of [GHG] emissions and climate change, and thus any articulated conclusions drawn from the evidence should be accorded a high measure of deference. However, this deference to expertise is only triggered when those conclusions are articulated.... Thus, *deference to expertise is based on the cogent articulation of the rationale basis for conclusions reached*.²²²

There are other aspects of the *Vavilov* framework which may also impact the judicial review of pipeline approvals, in particular with respect to the link between the decision and the record, statutory interpretation, the “requisite degree of justification, intelligibility and transparency” in a decision, the need for responsiveness to arguments raised during the regulatory process and perhaps appeal standards, but these are beyond the scope of this article.²²³ There is also a question of how parts of the *Vavilov* framework relating to decisions with “harsh consequences” will be relied upon with respect to pipelines given the economic and environmental stakes at play in any regulatory review decision.²²⁴

The combination of explicit statutory requirements to consider key, salient issues, and the requirement to justify such consideration should lead to better and more robust decisions and more confidence in the process, but will also make it much more challenging to approve new pipelines.

IV. CONCLUSIONS: DOES A VALID C-69 MEAN NO MORE PIPELINES?

The combined regulatory regime for new pipelines in the *IAA* and *CERA* is the new law of the land in Canada. While the Alberta government is currently challenging the constitutional validity of the *IAA*, it is unlikely that such a court challenge would successfully render invalid the sections of the *IAA* and *CERA* relating to new oil pipelines considered in this article. As Alastair Lucas writes, the “NEB (and now CER) authority over interjurisdictional pipelines remains plenary.”²²⁵ The use of an environmental impact assessment to inform federal decision making on a matter of federal jurisdiction is exactly the use envisioned in the *Oldman River* decision which established the validity of such regimes.²²⁶ Moreover, the exclusive jurisdiction of the federal government to make laws in relation to interprovincial pipelines was upheld in the recent *Bitumen Reference* in British Columbia.²²⁷ Absent new legislation, the *IAA* and the *CERA* are the gatekeepers of new pipeline capacity in Canada.

²²² *Pembina Institute*, *supra* note 122 at para 75 [emphasis added].

²²³ *Vavilov*, *supra* note 22 at para 100. The reader is again referred to the excellent discussion of the *Vavilov* framework in Daly, *supra* note 22.

²²⁴ *Vavilov*, *ibid* at para 133.

²²⁵ Lucas, *supra* note 49 at 27.

²²⁶ *Oldman River*, *supra* note 73.

²²⁷ *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 [*Bitumen Reference*]. Upheld on appeal to the Supreme Court of Canada in *Reference re Environmental Management Act*, 2020 SCC 1.

With the *CERA* and the *IAA* now in place, is it fair to say that no new oil sands export pipelines will be approved in Canada? The answer is likely yes, but not solely or even largely as a result of this legislation.

Combined, the *CERA* and *IAA* regime represents a significant departure from previous legislation under the *NEB Act, 2012* and *CEAA, 2012*, and the differences are such that the approval of new pipelines would be more difficult but not impossible. However, the combined forces of global energy markets and domestic and global action on climate change will likely imply no need for new oil sands pipelines. These trends also make it much more difficult for regulators to justify their approval under the new regime.