THE CRUDE POLITICS OF CARBON PRICING, PIPELINES, AND ENVIRONMENTAL ASSESSMENT

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> *Therefore, whilst the unity and consolidation connected with Legislative Unity was obtained on the one hand, due care and attention to the local matters interesting to each Province were provided for by the preservation of local parliaments, and those powers were so arranged as to prevent any conflict or struggle which might lead to any difficulty between the several sections.*[1]

> *The Attorney General submits that the Court should not be swayed by arguments about the importance of climate change in today's world ... Maintaining the jurisdictional balance of the division of powers is always more important.*[2]

> *No country would find 173 billion barrels of oil in the ground and just leave them.*[3]

Introduction: Courting Delay, Distraction, and Disaster

In the fall of 2018, the United Nations Intergovernmental Panel on Climate Change (IPCC) issued a special report on the climate science and policy implications of 1.5 ºC or higher of global warming above the pre-industrial norm.[4] Its conclusions are disturbing. There are significant climate and sustainability differences between holding warming to 1.5 ºC as opposed to merely below 2 ºC; the latter being the original primary target of the United Nations Paris Agreement on climate change, the former originally being the more ambitious, aspirational target.[5] Rapid, systemic, and

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[1] Charles Tupper, "Union of the Colonies" (10 April 1865), online (blog): *Macdonald-Laurier Institute* <macdonaldlaurier.ca/union-colonies-speech-honourable-provincial-secretary-charles-tupper-april-10-1865/>.

[2] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [*Greenhouse Gas Reference*] (Factum of the Attorney General of Saskatchewan at para 50 [AG Saskatchewan, "Factum"). See also Dwight Newman, "Wrecking the Federation to Save the Planet", *C2C Journal* (3 April 2019), online: <c2cjournal.ca>.

[3] Prime Minister Justin Trudeau, quoted in Jeremy Berke, "No Country Would Find 173 Billion Barrels of Oil in the Ground and just Leave Them", *Business Insider* (10 March 2017), online: <businessinsider.com>.

[4] United Nations Intergovernmental Panel on Climate Change, "Special Report: Global Warming of 1.5 ºC" (November 2018), online (pdf): <ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf>.

[5] *Paris Agreement, being an Annex to the Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015 — Addendum Part two: Action taken by the Conference of the Parties at its twenty-first session*, 29 January 2016, Dec 1/CP.21, CP, 21st Sess, UN Doc FCCC/CP/2015/10/Add.1 at 21–36, online (pdf): <unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>

unprecedented changes to international and local socioeconomic systems are required to hold warming to 1.5 ºC and stave off the most disastrous consequences of climate change.

The consequences of climate change, of course, are no longer exclusively the concern of future generations; the planet, including Canada, is already contending with climate change and its costs. According to the Canadian installment[6] of the Lancet's global project[7] tracking climate change's public health impacts, climate change is contributing to increased wildfires, extreme heat events, unstable Arctic ice conditions, changes in Lyme disease distribution, and impacts on food insecurity and mental health across Canada. The Canadian Public Health Association argues that the delayed response to climate change over the past 25 years has jeopardized human life and livelihoods. While these effects will disproportionately impact the most vulnerable in our society, every community will be affected, and present emissions pathways are heading toward levels of warming and associated climatic changes that will very likely exceed our ability to adapt.[8]

However, neither climate change nor sustainability is a binary, either/or phenomenon; a range of outcomes is possible. Similarly, the direction and pace of emissions pathways are highly contingent on policy choices. The International Energy Agency's (IEA) 2018 world energy outlook underscores this point. Regarding the "huge gap" between the IEA's "current policies scenario" (i.e. "business as usual") and its "sustainable development scenario," whereby accelerated clean energy transitions put the world on track to meet the goals related to climate change, universal access to energy, and clear air, the IEA notes that "[n]one of these potential pathways is preordained; all are possible. *The actions taken by governments will be decisive in determining which path we follow*."[9]

What path will Canada follow? Canada's rhetoric aside, it remains more a climate laggard than leader. Were the world to adopt Canada's current greenhouse gas reduction ambitions as a global benchmark, for example, the world would be on pace for a staggering 5.1 ºC of warming by the end of the century.[10]

[*Paris Agreement*].

[6] Lancet Countdown, Canadian Medical Association & Canadian Public Health Association, "Lancet Countdown 2018 Report: Briefing for Canada's Policymakers" (November 2018), online (pdf): <lancetcountdown.org/media/1418/2018-lancet-countdown-policy-brief-canada.pdf> [CPHA, "Lancet Countdown 2018"].

[7] Nick Watts et al, "The 2018 Report of the *Lancet* Countdown on Health and Climate Change: Shaping the Health of Nations for Centuries to Come" (2018) 392:10163 Lancet 2479, online: <thelancet.com/journals/lancet/article/PIIS0140-6736(18)32594-7/fulltext>.

[8] CPHA, "Lancet Countdown 2018", *supra* note 6.

[9] International Energy Agency, "World Energy Outlook 2018: Executive Summary" (2018) at 1, online: <iea.org/weo2018/> [emphasis added].

[10] Yann Robiou du Pont & Malte Meinshausen, "Warming Assessments of the Bottom-up Paris Agreement Emissions Pledges" (2018) 9:4810 Nature Communications 1 at 5. This should not necessarily be taken as an indictment of either the bottom-up architecture of the Paris Agreement or the flexible and cooperative nature of Canada's Pan-Canadian Framework on Clean Growth and Climate Change policy, including its

In this article, I attempt to unpack a particularly problematic "peril of pipelines and riddle of resources," the theme of this special issue: namely, the simultaneous acknowledgement of the need to act urgently and ambitiously on climate change, on the one hand, and on the other hand the decision – taken over and over again – to delay meaningful action by disputing narrow but largely settled questions of jurisdiction and responsibility while steadfastly supporting and subsidizing *expanded* fossil fuels production and export. These disputes delay and distract us from the kinds of complex and controversial policy choices that we need to debate and decide. Delay courts – quite literally – disaster.

The rest of this article unfolds as follows. In Part I, I examine the constitutional challenge to the federal government's carbon-pricing framework referred to the Saskatchewan Court of Appeal by the Saskatchewan provincial government. By examining the inconsistent and misleading legal submissions advanced by both Saskatchewan and Ottawa, I argue that this judicial reference, formally and ostensibly focused on constitutional law, serves to effectively mask the underlying ineffectiveness of each of these government's climate change policies.

In Part II of the article, I examine British Columbia's referral to the BC Court of Appeal of a series of interrelated constitutional law questions about its proposed regulation of the flow and potential spills of heavy crude oil in the province, and the federal government's assertion of its paramount jurisdiction over interprovincial pipelines. Once again, I argue that these governments' legal submissions – and their public statements – about their jurisdiction over matters of environmental protection serve to belie the underlying ineffectiveness of their actual environmental policies and regulations.

In Part III of the article, I attempt to bring these tensions and contradictions into even clearer relief by examining the controversy over the federal government's tabling of Bill C-69 and the bill's proposed *Impact Assessment Act*. I argue that the law-reform dispute over the bill masks its true deficiency: its failure to meaningfully contribute to climate change mitigation and sustainability. I conclude the article by discussing the need to prioritize the interdisciplinary analysis of the *political* barriers to urgent and ambitious climate policy.

My argument in this article is that the constitutional law and law reform arguments made in respect of carbon pricing, pipeline approvals and regulations, and environmental assessment processes are *inescapably political*. On the one hand, legal arguments about the "pith and substance" of each are necessarily normative and ineluctably bound up in competing ideologies, values, and public policy perspectives on Canada's social and economic priorities. On the other hand, those same legal "pith and substance" arguments are being "weaponized," not out of genuine, good faith

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implementing legislation, the *Greenhouse Gas Pollution Pricing Act*, which is discussed in the next section of this article. The challenge is how to enhance the ambition of each, which is ultimately a political question.

disagreements over legal doctrine, but as indirect, collateral attacks on the very prospect of urgent and ambitious climate change policymaking.[11]

My focus, in other words, is simultaneously concentrated on the economic and environmental politics of constitutional law, and the constitutional law of economic and environmental politics; either approach on its own is insufficient to make sense of Canada's crude politics of carbon pricing, pipelines, and environmental assessment.[12] By drawing inspiration and guidance from the legal-pluralist theory-*cum*-methodology utilized with so much illumination by Macdonald and Wolfe in their magisterial analysis of the relationship obtaining between the Constitution and Canada's changing national policies,[13] I examine extant case law and doctrine, formal legal submissions, the statements of public officials in the news media, and the law-and-policy discourse of a wide variety of stakeholders in order to show that the "peril of pipelines and the riddle of resources" is inextricably bound up in our understandings and invocations of constitutional law doctrines and law reform disputes, and vice versa. The result is endemic climate inaction, distraction, and delay that we can no longer afford.

I. Not your Father's Federalism: The Resistance to Carbon Pricing

In 2018, Parliament passed the *Greenhouse Gas Pollution Pricing Act*.[14] The *GGPPA* implements the federal government's Pan-Canadian Approach to Pricing Carbon Pollution plan[15] issued in 2016, which arose out of a First Ministers' meeting convened

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[11] A preliminary version of this argument in response to the Saskatchewan Court of Appeal's advisory opinion on the constitutionality of the federal government's carbon-pricing framework is suggested in Jason MacLean, Nathalie Chalifour & Sharon Mascher, "Work on Climate, Not Weaponizing the Constitution", *The Conversation* (8 May 2019), online: <theconversation.com>.

[12] Nathalie Chalifour suggests, for example, that provincial objections to the federal government's carbon-pricing framework "appear to be at least partly driven by Parliament's choice of carbon pricing as a policy instrument." She further argues—and this is beyond dispute—that once the matter of jurisdiction is settled, the choice of instrument "is a political one that is outside the constitutional analysis." I agree, and seek to extend Chalifour's brilliant doctrinal analysis to show that *all* of the putatively legal arguments surrounding not only carbon pricing but also pipeline approvals and regulations as well as environmental assessment processes are political and fall outside the traditional boundaries of doctrinal constitutional analysis: see Nathalie J Chalifour, "Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's *Greenhouse Gas Pollution Pricing Act*" (2019) 50:2 Ottawa L Rev at 27 [Chalifour, "Jurisdictional Wrangling over Climate Policy"].

[13] Roderick A Macdonald & Robert Wolfe, "Canada's Third National Policy: The Epiphenomenal or the Real Constitution" (2009) 59:4 UTLJ 469; for an initial application of Macdonald & Wolfe's national policy theory and method to Canada's climate change policies, see Jason MacLean, "Will We Ever Have Paris? Canada's Climate Change Policy and Federalism 3.0" (2018) 55:4 Alta L Rev 889.

[14] *Greenhouse Gas Pollution Pricing Act,* being Part 5 of the *Budget Implementation Act, 2018, No 1,* SC 2018, c 12. The long title of the *Act* is *An Act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources and to make consequential amendments to other Acts* [*GGPPA*].

[15] Canada, Environment and Climate Change Canada, "Pan-Canadian Approach to Pricing Carbon Pollution, online: <canada.ca/en/environment-climate-change/news/2016/10/canadian-approach-pricing-carbon-pollution.html>.

earlier in 2016 by the government – resulting in the Vancouver Declaration[16] – before the government signed the UN Paris Agreement on climate change.[17]

Pursuant to the First Ministers' agreement expressed in the Vancouver Declaration to cooperatively collaborate on a national approach to climate change policy, the Working Group on Carbon Pricing Mechanisms was established. The Working Group's consensus-based final report – supported by all provinces and territories – concluded that pricing carbon is among the most efficient policy approaches to reducing greenhouse gas emissions. Pricing carbon allows industries and individual consumers to identify how they will reduce their own emissions, and encourages innovation to find new ways to do so.[18] Based on the Working Group's conclusion, the federal government's Pan-Canadian Approach to Pricing Carbon Pollution explains that "economy-wide carbon pricing is the most efficient way to reduce emissions, and by pricing pollution, will drive innovative solutions to provide low-carbon choices for consumers and businesses."[19] On this basis the government established the pan-Canadian Benchmark for carbon pricing.[20] The Benchmark establishes carbon pricing as a foundational component of Canada's national climate policy. Specifically, the Benchmark embodies the policy objective of ensuring "that carbon pricing applies to a broad set of emissions throughout Canada with increasing stringency over time to reduce GHG emissions."[21] The Benchmark further provides that the federal government will implement a "backstop" carbon pricing system in provincial and territorial jurisdictions that fail to implement regulations that align with the Benchmark (or where a province or territory requests the government's backstop).[22]

In May 2017 the federal government released a technical paper outlining the operation of the Benchmark and the backstop.[23] The technical paper, along with the government's additional documents Guidance on the Pan-Canadian Carbon Pollution

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[16] Canadian Intergovernmental Conference Secretariat, "Vancouver Declaration on Clean Growth and Climate Change" (3 March 2016), online: <pm.gc.ca/eng/news/2016/03/03/communique-canadas-first-ministers>.

[17] See Catherine Cullen, "Justin Trudeau Signs Paris Climate Treaty at UN, Vows to Harness Renewable Energy", *CBC News* (22 April 2016), online: <cbc.ca/news>.

[18] Canada, Environment and Climate Change Canada., *Working Group on Carbon Pricing Mechanisms: Final Report*, (Gatineau, QC: ECCC, 2016), online: <publications.gc.ca/pub?id=9.822040&sl=0>.

[19] *Ibid*.

[20] *Ibid*.

[21] Canada, Environment and Natural Resources, "Supplemental Benchmark Guidance", online: <canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework/guidance-carbon-pollution-pricing-benchmark/supplemental-benchmark-guidance.html> [Government of Canada, "Supplemental Benchmark Guidance"].

[22] *Ibid*.

[23] Canada, Environment and Climate Change Canada, *Technical Paper on the Federal Carbon Pricing Backstop* (Ottawa: 18 May 2017), online (pdf): <canada.ca/content/dam/eccc/documents/pdf/20170518-2-en.pdf> [Government of Canada, *Technical Paper on Carbon Pricing Backstop*].

Pricing Benchmark[24] and Supplemental Benchmark Guidance,[25] set out the two complementary components of the backstop: (1) a fuel charge; and (2) an Output-Based Pricing System.[26]

The *GGPPA* was enacted in June 2018 and implements the foregoing policy commitments and mechanisms: Part 1 of the *Act* implements the fuel charge; Part 2 implements the Output-Based Pricing System and an excess-emissions charge for large industrial emitters. Parts 1 and 2 of the *GGPPA* apply in provinces and territories that do not implement a sufficiently stringent carbon-pricing regime relative to the federal government's Benchmark.[27]

The fuel charge under Part 1 applies to 22 kinds of greenhouse-gas-emitting fuels that are produced, delivered, or used in Canada, including common fuels such as gasoline, diesel, and natural gas, as well as less common fuels such as methanol and coke oven gas; the subject fuels and their corresponding charges are set out in Schedule 2 of the *GGPPA*. The charge rate represents $20 per tonne of $C0_2e$ from each fuel in 2019, rising to $50 per tonne of $C0_2e$ in 2022.[28] Part 1 also sets out exemptions, including gasoline and diesel used by farmers for farming, and industrial facilities subject to the Output-Based Pricing System under Part 2 of the *GGPPA*.[29]

Part 2 of the *GGPPA* administers the Output-Based Pricing System applicable to large industrial emitters, or those statutorily "covered facilities" whose emissions exceed a minimum industry-specific threshold. Initially, covered facilities are those that emit 50 kilotonnes of $C0_2e$ or more annually.[30] Moreover, instead of paying the fuel charge under Part 1, industrial emitters qualifying as covered facilities must pay compensation for the portion of their emissions that exceed the prescribed industrial-sector limit. As of this writing, subject to the future development of supporting regulations, most sectors' output-based standard will be set at 80% of the sector's average greenhouse gas emissions intensity; a subset of trade-exposed sectors will be

[24] Canada, Environment and Natural Resources, "Guidance on the Pan-Canadian Carbon Pollution Pricing Benchmark" online: <canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework/guidance-carbon-pollution-pricing-benchmark.html>.

[25] Government of Canada, "Supplemental Benchmark Guidance", *supra* note 21.

[26] Government of Canada, *Technical Paper on Carbon Pricing Backstop*, *supra* note 23. The government also published a document explaining that the aim of the system is to minimize adverse impacts on economic competitiveness and "carbon leakage" (emitters moving to jurisdictions with relatively less stringent carbon regulations) for emissions-intensive, trade-exposed industrial facilities while retaining the carbon price signal and incentive to reduce greenhouse gas emissions: see Canada, Environment and Natural Resources, "Carbon Pricing: Regulatory Framework for the Output-based Pricing System", online: <canada.ca/en/services/environment/weather/climatechange/climate-action/pricing-carbon-pollution/output-based-pricing-system.html>.

[27] *GGPPA*, *supra* note 14.

[28] *Ibid*, Schedule 2, Table 2, Item 6.

[29] *Ibid*, s 36.

[30] *Ibid*, s 169 at Schedule 3.

subject to a standard set at 90% of average emissions intensity.[31] Accordingly, in normal sectors, covered facilities will provide compensation only for emissions that exceed 80% of their specific sector's average; in highly trade-exposed sectors, facilities will provide compensation only for emissions that exceed 90% of their specific sector's average.[32] Although these thresholds have received relatively little attention to date, owing largely to the disproportionate amount of attention paid to the ongoing legal dispute over constitutional jurisdiction, they are plainly favourable to heavy industrial emitters of greenhouse gas emissions. They also squarely contravene Canada's commitment under the Paris Agreement to undertake *economy-wide* – as opposed to sector-by-sector – reductions in greenhouse gas emissions.[33]

In the fall of 2018, the federal government announced the result of its Benchmark stringency assessments of provincial and territorial climate policies: the fuel charge under Part 1 of the *GGPPA* will apply in Saskatchewan, Ontario, Manitoba, New Brunswick, the Yukon, and Nunavut (the latter two at their own request) beginning in April 2019; the Output-Based Pricing System under Part 2 will apply in Ontario, Manitoba, New Brunswick, Prince Edward Island, the Yukon, Nunavut (the latter four at their own request), and – partially – Saskatchewan.[34]

Before many of the foregoing regulatory policies were specifically established, the province of Saskatchewan referred a constitutional challenge to the *GGPPA* to its Court of Appeal.[35] The province's reference has been dubbed the "Saskatchewan strategy," and is part of what *Maclean's* magazine rather notoriously characterized as "the resistance" (see Figure One below) to the federal government's carbon pricing plan.[36]

[31] *Ibid*, s 174.

[32] *Ibid*, ss 174, 175, 184, Schedule 4.

[33] *Paris Agreement*, *supra* note 5, art 4.4.

[34] Part 2 will apply to the emissions not covered by Saskatchewan's own planned output-based system, which will cover large industrial facilities that collectively account for approximately 11% of the province's greenhouse gas emissions. Because Saskatchewan's plan excludes electricity generation and natural gas transmissions pipelines, Part 2 will apply to facilities in those sectors that emit 50 kilotonnes or more of $C0_2e$ annually.

[35] Saskatchewan, News and Media, "Province Challenges Federal Government's Ability to Impose a Carbon Tax", online: <saskatchewan.ca/government/news-and-media/2018/april/25/carbon-tax-case>.

[36] Paul Wells, "Just Try Them: Powerful Conservative Leaders from across the Country are Suddenly United against Justin Trudeau's Carbon Tax Plan. And they're Spoiling for a Fight", *Maclean's* (1 December 2018), online: <macleans.ca>.

Figure One. The resistance. *

* *Maclean's* (December 2018), cover image.

Notwithstanding the pronouncements of media and political pundits, it is trite law that the federal government has ample jurisdiction to regulate greenhouse gas emissions.[37] The government may do so under its criminal law power, its taxation power, and its residual peace, order, and good governance (POGG) jurisdiction over matters of national concern.[38] In the reference initiated by Saskatchewan before the Saskatchewan Court of Appeal, the federal government relies on POGG and, in the alternative, its taxation power.[39] In its oral submissions before the Court, counsel for the Attorney General of Canada emphasized that rising greenhouse gas emissions – and climate change more generally – are a matter of national concern that the provinces are incapable of addressing on their own.[40]

The federal government also argues that its carbon-pricing Benchmark applies nationally; neither Saskatchewan nor any other province is singled out.[41] When asked by the Court during oral arguments why Ottawa opted for only a "half measure" and declined to set a single national carbon price, counsel for the Attorney General of Canada explained that the federal government's establishment of a national Benchmark against which each province and territory is assessed respects the provinces' jurisdiction to enact their own legislation.[42] As the Attorney General of Canada expressed this balance in its written submissions, "[t]he legislation at issue encourages the provinces to come up with a made-in-the-province solution, but responds to provincial inaction."[43]

This is the core of the federal government's constitutional argument: its carbon-pricing plan accords with the interpretive principle of "cooperative federalism."[44] At the same time, however, the federal government's cooperative approach does not mean that provinces can choose not to cooperate where the federal government's jurisdiction is already established, an additionally trite principle of

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[37] See e.g. Nathalie J Chalifour, "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax" (2016) 36 NJCL 331.

[38] *Ibid*; but see Eugénie Brouillet & Bruce Ryder, "Key Doctrines in Canadian Legal Federalism" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 415; Jean LeClair, "The Elusive Quest for the Quintessential National Interest" (2005) 38:2 UBC L Rev 353; and Kai D Sheffield, "The Constitutionality of a Federal Emissions Trading Regime" (2014) 4:1 Western J Leg Studies 1.

[39] *Greenhouse Gas Reference*, *supra* note 2 (Factum of the Attorney General of Canada at paras 65–68 [AG Canada, "Factum"]).

[40] Justin Giovannetti, "Federal Lawyers Say Provinces Aren't Able to Manage Greenhouse Gas Levels Alone", *The Globe and Mail* (14 February 2019), online: <theglobeandmail.com>.

[41] *Ibid*.

[42] *Ibid*.

[43] AG Canada, "Factum", *supra* note 39 at para 101. Support for this position is found in the majority reasons for decision in *R v Hydro-Québec,* [1997] 3 SCR 213 at paras 131, 153, 151 DLR (4th) 32 [*Hydro-Québec*].

[44] AG Canada, "Factum", *supra* note 39 at paras 100–03, 105.

constitutional law that Saskatchewan elsewhere accepts.[45] As the Attorney General of Canada argues in respect of the federal government's jurisdiction to regulate greenhouse gas emissions, it is well-settled law that it may do so under its criminal law power.[46]

Saskatchewan is thus no more constitutionally entitled to choose not to cooperate with the federal government on regulating greenhouse gas emissions than it is free to withhold cooperation on any other matter under federal jurisdiction. Indeed, the very *lack* of provincial cooperation in such matters further supports the recognition of Parliament's exercise of jurisdiction. As Hogg explains in his commentary on the Supreme Court of Canada's decision in *Munro v National Capital Commission*,[47] the failure of either Quebec or Ontario to cooperate in the development of the national capital region would have – absent federal intervention – deprived all Canadians the symbolic value of a suitable national capital. Indeed, the Court in *Munro* took judicial notice of the fact that the zoning of the national capital region was only undertaken by the federal government *after* its unsuccessful efforts to secure the cooperation of Quebec and Ontario.[48] The parallel to the carbon pricing reference is plain.

Saskatchewan insists, however, that its judicial reference is not about greenhouse gas emissions and climate change, but rather, the nature and future of federalism in Canada. Before the Saskatchewan Court of Appeal, the province's written submissions to this effect border on the absurd: "[i]n fact, regulations with respect to the release of carbon (*ie, smoke*) into the atmosphere have existed for centuries and have always been considered to be a local matter."[49] In support of its analogy between smoke resulting from fires and the burning of coal, on the one hand, and on the other hand the emission of carbon dioxide and other greenhouse gases resulting from everyday industrial and individual consumer activities (and the local regulation of the same), Saskatchewan cites the British *Smoke Nuisance Abatement (Metropolis) Act* of 1853 along with a single academic article on the social movement for smoke abatement in nineteenth-century Britain.[50]

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[45] See the text associated with *infra* at nn 64–70.

[46] AG Canada, *supra* note 39 at para 101, citing *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160, and *Hydro-Québec*, *supra* note 47. For further background on the application of Parliament's criminal law power to the regulation of greenhouse gas emissions, see Sharon Mascher, "Prime Minister Trudeau You've Got the Power (the Criminal Law Power): *Syncrude Canada Ltd v Canada* and Greenhouse Gas Regulation" (21 June 2016), *ABlawg.ca* (blog), online (pdf): <ablawg.ca/wp-content/uploads/2016/06/Blog_SM_Syncrude_FCA_June2016.pdf>.

[47] *Munro v National Capital Commission,* [1966] SCR 663, 57 DLR (2d) 753.

[48] Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2006, release 1) at 17.3(b), 17–14.

[49] AG Saskatchewan, "Factum", *supra* note 2 at para 24 [emphasis added].

[50] *Smoke Nuisance Abatement (Metropolis) Act 1853* (UK), 16 & 17 Vict, c 128; Carlos Flick, "The Movement for Smoke Abatement on 19th Century Britain" (1980) 21:1 Technology & Culture 29, cited in AG Saskatchewan, "Factum", *supra* note 2 at para 24, n 22.

Regrettably, it appears that the Attorney General of Saskatchewan failed to appreciate the history lesson offered by its sole academic source. In the article exploring the nineteenth-century social movement for smoke abatement in Britain relied on by the province, the article's author offers the following conclusions, which I quote at length in order to underscore the degree to which they fail to offer any support for Saskatchewan's historical claim about the rightful *local* level of smoke abatement regulation:

> Despite the powers given to local governments to curtail commercial smoke pollution, the general verdict by the 1880s was that *little improvement had resulted*.
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> […]
>
> Parliament passed laws giving local authorities the power to act; the local authorities, forced to confront the polluters at close quarters in the councils and courts, *wavered and passed responsibility back to the central government*. In the end, little abatement was achieved.[51]

In any event, perhaps the ineffectiveness of local carbon – "ie, smoke"[52] – regulation in nineteenth-century Britain is as beside-the-point as it would otherwise appear insofar as Saskatchewan insists that its reference is not about climate change policy at all, but rather federalism: "[t]he Attorney General [of Saskatchewan] submits that the Court should not be swayed by arguments about the importance of climate change in today's world … Maintaining the jurisdictional balance of the division of powers is always more important."[53]

In its oral submissions before the Court of Appeal, the Attorney General of Saskatchewan reiterated this curious position, maintaining that "the government of Saskatchewan is not made up of a bunch of climate-change deniers […] and recognizes that climate change is a serious issue that has to be addressed and that effective measures are required to deal with greenhouse gas emissions."[54] Having said that, however, the Attorney General proceeded to argue that unless the Court strikes down the *GGPPA*, "the federation, over time, will wither and cease to exist."[55]

I characterize this argument as "curious" (charitably) for two reasons; the first, which should be obvious, is the conclusively-established existential threat that climate change poses to humanity and countless other species, while the second requires a little more unpacking. Both are telling.

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[51] Flick, *ibid* at 37, 50 [emphasis added].

[52] AG Saskatchewan, "Factum", *supra* note 2 at para 24.

[53] *Ibid* at para 50.

[54] Counsel for the Attorney General of Saskatchewan, quoted in Justin Giovannetti, "Federal Carbon Tax Violates Canada's Founding Principles, Saskatchewan's Lawyers Argue", *The Globe and Mail* (14 February 2019), online: <theglobeandmail.com>

[55] *Ibid*.

First, the presumably obvious argument: Climate change is an existential threat to human and much non-human life on Earth.[56] The *original* balance of federal and provincial powers in Canada formalized in 1867, leaving aside for the moment the *settled* interpretive principle that those powers evolve as our society changes, will be of little importance if we fail to mitigate climate change and avoid its most catastrophic consequences. Surely the Attorney General of Saskatchewan does not believe that the original constitutional division of powers is more important than effectively mitigating climate change. Yet that was the thrust of its submissions to the Saskatchewan Court of Appeal.

Second, upon a little unpacking of Saskatchewan's interpretation of the constitutional division of powers in *other* cases, it becomes clear that its commitment to an originalist interpretation in the carbon price reference is entirely insincere, and has more to do with crude politics than constitutional law.

Beginning with its factum before the Saskatchewan Court of Appeal in the carbon pricing reference, the Attorney General of Saskatchewan advances the following originalist interpretation of the constitutional division of powers:

> It is the Attorney General's position that under our Constitution the federal government has no authority to second guess provincial decisions with respect to matters within provincial jurisdiction. Such a position is fundamentally at odds with the very nature of our federation. It represents the federal government taking a big brother or an "Ottawa knows best" role *which was never envisioned by the framers of our Constitution* and which strikes at the very *bedrock foundations* of our Constitution.[57]

The Attorney General of Saskatchewan further argues that "the historical evidence supports the view that Canada was intended to be a federal state with a strong federal government and with strong provincial governments, each intended to act independently within the realms of their respective jurisdictions."[58]

However, as an Intervener before the Supreme Court of Canada in the recent interprovincial beer case of *Comeau*,[59] the Attorney General of Saskatchewan advanced an altogether antithetical legal argument. The province characterized the case before the Court as follows: "[t]his appeal confronts the Court with an approach to constitutional interpretation best described as 'originalist,' deployed to overturn decisions of this Court and the Judicial Committee [of the Privy Council] in foundational cases on the scope of section 121 and the trade and commerce power."[60]

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[56] See e.g. IPCC, *supra* note 4.

[57] AG Saskatchewan, "Factum", *supra* note 2 at para 13 [emphasis added].

[58] *Ibid* at para 29.

[59] *R v Comeau*, 2018 SCC 15 [*Comeau*].

[60] *Comeau*, *supra* note 59 (Factum of the Attorney General of Saskatchewan at para 2) [AG Saskatchewan, "*Comeau* Intervention Factum"].

Moreover, citing approvingly the position of the Honourable Ian Binnie, who was no constitutional originalist as a justice of the Supreme Court of Canada, the Attorney General of Saskatchewan proceeded to argue in *Comeau* that "[t]he historical records of Canada's confederation are notoriously poor".[61] Yet more problematic, the Attorney General of Saskatchewan argued, the use of original intent as an interpretive method "renders the law inherently uncertain, and new historical evidence (or, more likely, new interpretations or inferences from the same body of pre-existing evidence) could redesign the architecture of our federation in every case."[62]

Accordingly, the Attorney General of Saskatchewan advised the Supreme Court in *Comeau* thus: "[d]espite careful appreciation for historic extrinsic evidence, this Court has issued many abjurations against 'originalism,' a doctrine which is 'flatly inconsistent' with purposive interpretations … Both the Courts and the partners of Confederation have tended to the 'living tree.'"[63]

The inconsistency of the Attorney General of Saskatchewan's *methodological approach* to constitutional interpretation in *Comeau* as compared with its submissions before the Saskatchewan Court of Appeal in the carbon pricing reference is nothing short of astonishing, and cannot be explained away by the different parts and provisions of the Constitution at issue in each of these cases. The arguments about constitutional interpretation advanced by Saskatchewan are flatly inconsistent and irreconcilable. Nor can the Province's legal positions be explained away as mere examples of the kinds of strategic and self-interested choices routinely made by litigants. Given the Attorney General's responsibility to promote justice and protect the public interest, and given the stakes of the carbon pricing reference (namely, Canada's ability to effectively respond to the existential threats posed by climate change), the Province's selective and self-serving approach to constitutional interpretation is profoundly irresponsible.

Yet the province's inconsistency does not end there. In the reference presently pending before the BC Court of Appeal concerning the regulation of "heavy oil," which is discussed below in the next section of this article, the Attorney General of Saskatchewan has intervened in order to support Ottawa's position that the federal government's jurisdiction to approve and regulate interprovincial undertakings, no matter how disproportionately provincial the potential environmental effects of such undertakings, is paramount and plenary. According to the Attorney General of Saskatchewan in the "Heavy Oil" reference,

> Saskatchewan supports federal environmental regulation of inter-provincial works and undertakings. Saskatchewan recognises the need for rigorous federal environmental review of such projects. That too is an important part of the federal jurisdiction: *to ensure environmental protection in the*

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[61] *Ibid* at para 13, citing Hon Ian Binnie, "Constitutional Interpretation and Original Intent" in Grant Huscroft & Ian Brodie, eds, *Constitutionalism in the Charter Era* (Toronto: LexisNexis, 2004) at 370–72.

[62] AG Saskatchewan, "*Comeau* Intervention Factum", *supra* note 60 at para 13 [citations omitted].

[63] *Ibid* at paras 17–18 [citations omitted].

> *interests of all Canadians*, *with respect to projects, that affect all Canadians*.
>
> […]
>
> The federal government has *exclusive jurisdiction* over the environmental issues relating to the operation of the [Trans Mountain] pipeline and the product being shipped, as part of the *national regulatory framework over all aspects* of an inter-provincial undertaking.[64]

The Attorney General of Saskatchewan additionally acknowledges in the BC Heavy Oil reference that a "key area" of "federal environmental jurisdiction" relates to, among other things, its criminal law power.[65] Saskatchewan then proceeds to affirm the already-settled issue of the federal government's constitutional jurisdiction to regulate greenhouse gas emissions under its criminal law power by admitting that "a cooperative and consultative approach by the federal government does not mean that the province has jurisdiction to regulate the environmental aspects of matters within federal jurisdiction."[66]

Now that is hardly your father's federalism!

Saskatchewan's kaleidoscopic approach to constitutional interpretation may be summed up thus: original intent is relevant – and legally fatal – to the regulation of greenhouse gas emissions and climate change, but not to the trade and commerce power, to which original intent has no application whatsoever; provinces may not regulate the environmental aspects of interprovincial oil pipelines, which are subject to the federal government's national regulatory framework, but provinces can ignore the federal government's national regulatory framework for climate change mitigation (indeed, the future of the federation depends on it); Ottawa "knows best" when the issue is the environmental review of interprovincial oil pipelines, but Ottawa inappropriately plays the role of "big brother" when it tries to establish a pan-Canadian climate pricing framework.

In an opinion-editorial defending Saskatchewan's constitutional challenge to the federal government's carbon pricing plan, Saskatchewan Premier Scott Moe

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[64] *Reference re Environmental Management Act (British Columbia),* 2019 BCCA 181 (Factum of the Attorney General of Saskatchewan at v) [emphasis added].

[65] *Ibid* at para 15.

[66] *Ibid* at para 18. A reviewer of this article raised the potential counter-argument that Saskatchewan's position with respect to jurisdiction over interprovincial undertakings is consistent with its more traditional understanding of federalism and, as such, aligns with its position in the carbon pricing reference. This counter-argument must be rejected, however, because it altogether ignores the irreconcilable inconsistency of Saskatchewan's position regarding the scope of the federal government's jurisdiction to regulate in respect of environmental protection—limited, if not non-existent in respect of GHG emissions, but ample and exclusive in respect of interprovincial pipelines. The concern underlying these irreconcilable positions is political, not doctrinal.

declared that "our province will never stand down to the Trudeau carbon tax."[67] While such rhetoric may – regrettably – make for good politics, it is a poor proxy for public policy. After all, the court challenge will eventually conclude, be it with the Saskatchewan Court of Appeal's advisory opinion or, almost assuredly, with the Supreme Court of Canada having the final word. The matter of jurisdiction over the regulation of greenhouse gas emissions, already largely settled, will be settled (again), leaving Saskatchewan to finally reckon with the far more complex and controversial issue: how to wean itself off of its economic and fiscal dependence on fossil fuels and transition to a sustainable, renewable-energy-based economy and society. No court opinion concerning legislative jurisdiction can contribute much – if anything – to this fateful reckoning.[68]

Ottawa, however, fares no better by comparison. As I discuss in the next section of this article, in contrast to its cooperative approach to environmental regulation offered in defence of its carbon-pricing framework, it is simultaneously advancing a unilateral approach to the regulation of interprovincial crude oil pipelines, despite the disproportionate environmental risks borne by particular provinces and local Indigenous communities, let alone the outsized and unsustainable climate impacts of new pipelines and expanded oil sands production.

Meanwhile, as the federal government defended its jurisdiction to cooperatively implement a national price on carbon before the Saskatchewan Court of Appeal, it misleads the courts and the country when it advances the overly-generalized claims that (1) "carbon pricing works"[69] and (2) its proposed carbon-pricing framework is capable of "making a significant contribution towards meeting Canada's *Paris Agreement* targets".[70] While the evidence is clear that in jurisdictions having a

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[67] Scott Moe, "Why Saskatchewan is Fighting the Trudeau Carbon Tax in Court", *Regina Leader-Post* (11 February 2019), online: <leaderpost.com>.

[68] Indeed, the Saskatchewan Court of Appeal's eventual advisory opinion affirming the constitutionality of the *GGPPA* is almost entirely irrelevant from a climate-policy perspective. (*Greenhouse Gas Reference*, *supra* note 2.) While the majority's recognition of climate change as a major threat to Canada and the planet is welcome, and will help bring Canada in line with the growing number of countries whose courts are acting as bulwarks supporting the urgent political action required to mitigate climate change, the Court's recognition alone is likely to have little-to-no impact on policymaking. Tellingly, *on the very same day* the Court of Appeal issued its 151-page advisory opinion (including both the reasons of the majority of the Court along with a dissenting opinion), Saskatchewan's premier immediately vowed to seek leave to appeal from the Court of Appeal's opinion to the Supreme Court of Canada: see Creeden Martell, "Saskatchewan Premier Plans to Appeal Carbon Tax Decision to Supreme Court", *CBC News* (3 May 2019), online: <cbc.ca/news>. The immediacy of the Premier's announcement belies any reasonable interpretation of this dispute as being about a genuine disagreement over the fine points of constitutional law doctrine. The majority of the Court of Appeal itself recognized the true importance of the issue before it as being one of climate policy and not constitutional law when it explained (at para 144) that "[i]f it is necessary to apply established doctrine in a slightly different way to ensure both levels of government have the tools essential for dealing with something as pressing as climate change, that would seem to be entirely appropriate." For an initial analysis—both legal and political—of the Court of Appeal's opinion, see MacLean, Chalifour & Mascher, *supra* note 11.

[69] AG Canada, "Factum", *supra* note 39 at para 44.

[70] *Ibid* at para 43.

carbon price, carbon emissions are lower than they would otherwise be,[71] the federal government's claim nonetheless belies the more precise point that Canada's proposed pricing scheme starts at too low of a price and its price will not rise fast enough either to meet Canada's already unambitious emissions-reduction targets under the Paris Agreement or to more meaningfully contribute to climate change mitigation. As the IPCC explains in its path-breaking special report on 1.5 ºC global warming, an effective carbon price will begin at a *minimum* of US$135 per tonne of $C0_2$e, and, depending on a series of other variables, an effective price might have to reach as high as US$5,500.[72] The carbon pricing reference serves only to distract from and delay Canada's far more complex and controversial public policy reckoning. I will return to this more foundational question in the concluding section of the article.

II. Crying Over Spilled Oil

The Trans Mountain pipeline system was originally constructed in 1953; it carries oil from Strathcona County, Alberta to a coastal marine terminal in Burnaby, British Columbia.[73] The Texas-based company Kinder Morgan originally owned the pipeline, but in 2018 the company's shareholders approved the sale of Trans Mountain to the Government of Canada.[74] Since 2012, Kinder Morgan had been seeking the approval of British Columbia and the federal government for its proposed $7.4-billion expansion of Trans Mountain (i.e. "twinning" the pipeline by constructing an additional pipeline along the existing pipeline's route).[75] Trans Mountain's present capacity is approximately 300,000 barrels per day of "batched" petroleum products, including crude, semi-refined, and refined oil.[76] If the expansion project is ultimately completed, Trans Mountain will have the capacity to transport approximately 890,000

[71] *Ibid* at para 44.

[72] IPCC, *supra* note 4. For a discussion of the implications of the IPCC's special report for Canada's climate policy, see Jason MacLean, "The Problem with Canada's Gradual Climate Policy", *Policy Options* (26 October 2018), online: <policyoptions.irpp.org> [MacLean, "Canada's Gradual Climate Policy"]. For further discussion of Canada's proposed pricing framework in relation to the concept of the social cost of carbon, see Jason MacLean, "Trudeau's Carbon Price Clever Politics, not Credible Policy", *Policy Options* (14 October 2016), online: <policyoptions.irpp.org>. More generally, see also Carbon Pricing Leadership Coalition, *Report of the High-Level Commission on Carbon Prices* (Washington: International Bank for Reconstruction and Development and International Development Association & The World Bank, 2017), online (pdf): <static1.squarespace.com/static/54ff9c5ce4b0a53decccfb4c/t/59b7f2409f8dce5316811916/1505227332748/CarbonPricing_FullReport.pdf>.

[73] Canada, National Energy Board, "Trans Mountain Pipeline ULC – Trans Mountain Expansion Project", online: <neb-one.gc.ca/pplctnflng/trnsmntnxpnsn/index-eng.html>.

[74] "Trans Mountain, Trudeau and First Nations: A Guide to the Political Saga so far", *The Globe and Mail* (24 May 2019), online: <theglobeandmail.com>.

[75] *Ibid*.

[76] Trans Mountain Corporation, "Product", online: <transmountain.com/product>.

barrels of oil per day, nearly a threefold increase.[77] Notably, the expanded pipeline will be designed to transport heavy, highly corrosive bitumen crude oil.[78]

Kinder Morgan submitted its expansion proposal to the National Energy Board (NEB) in 2013. In the spring of 2016, the NEB issued a report to the federal Cabinet recommending the project's approval subject to a number of technical conditions.[79] Soon thereafter, the federal Minister of Natural Resources convened a ministerial panel to further review the expansion proposal, particularly the concerns of Indigenous peoples and other Canadians situated along the pipeline's right of way and shipping route that may not have been fully considered under the NEB's original review.[80] Following the conclusion of the government's supplemental review in the fall of 2016, the Cabinet directed the NEB to issue a Certificate of Public Convenience and Necessity – effectively, an approval – pursuant to the *National Energy Board Act* for the Trans Mountain expansion project.[81]

In early 2018, the BC provincial government announced its intention to develop additional regulatory measures to improve its "preparedness, response and recovery" relating to spills of heavy oil, including diluted bitumen, the grade of oil to flow through the expanded Trans Mountain pipeline.[82] The BC government explained that its proposed regulations would (1) ensure immediate and geographically-specific responses to heavy oil spills, whether from a pipeline or from the rail or truck transport of oil; (2) maximize the application of regulations to marine oil spills by complementing existing federal measures; (3) restrict the transportation of heavy oil following a spill until the behaviour and effects of spilled heavy oil can be better understood and managed; and (4) allow for compensation for the loss of public and

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[77] Trans Mountain Corporation, "Expansion Project", online: <transmountain.com/project-overview>.

[78] *Ibid*.

[79] NEB, *supra* note 73.

[80] *Ibid*.

[81] Canada, "Prime Minister Justin Trudeau's Pipeline Announcement", online: <pm.gc.ca/eng/news/2016/11/29/prime-minister-justin-trudeaus-pipeline-announcement>. The Trans Mountain expansion project was also subject to review by the Environmental Assessment Office (EAO) of British Columbia, and in December 2016, the EAO issued a summary report recommending that an Environmental Assessment Certificate be issued in respect of Trans Mountain subject to 37 conditions; in January 2017 the BC government issued the Certificate in accordance with the EAO's recommendations. The federal government's approval of the project would later be quashed, however, by the Federal Court of Appeal because (1) the NEB unreasonably concluded that Trans Mountain's expansion was unlikely to cause adverse environmental effects, and (2) the government failed to satisfy its constitutional duty to consult and accommodate affected Indigenous groups: See *Tsleil-Waututh Nation v Canada (Attorney General),* 2018 FCA 153 [*Tsleil-Waututh*].

[82] BC Gov News, "Environment and Climate Change Strategy: Additional Measures Being Developed to Protect B.C.'s Environment from Spills", online: <news.gov.bc.ca/releases/2018ENV0003-000115> [BC Gov News, "Additional Measures"]. For an initial analysis of BC's proposed measures, see Jason MacLean, "The Trans Mountain Saga as a Public Policy Failure", *Policy Options* (13 April 2018), online: <policyoptions.irpp.org>.

cultural use of lands, resources, and public amenities resulting from spills of heavy oil.[83]

Following a pointed political reaction to British Columbia's proposal,[84] the province referred what was considered to be the most controversial of its proposed measures – its authority to restrict the flow of heavy oil following a spill – as a constitutional question to the B.C. Court of Appeal.[85] British Columbia's "Order-in-council and Reference Question" asks whether its proposed amendment (see below) of the B.C. *Environmental Management Act*[86] is *intra vires* the legislative authority of British Columbia, and if so, whether its legislative amendment applies to hazardous substances brought into the province by means of interprovincial undertakings.[87] The reference question further asks whether existing federal legislation renders all or part of the proposed legislative amendment inoperative.[88]

British Columbia's proposed legislation provides, in relevant part, as follows. It sets out a definition of "heavy oil" in well-established terms of gravity and viscosity, and adds this defined term to a class of hazardous substances, the possession, charge, or control of which above certain minimum levels requires a provincial permit from the provincial director of waste management.[89] The legislation stipulates conditions for the issuance (with or without conditions attached), suspension, and cancellation of such "hazardous substance permits."[90] Permits may be cancelled or suspended if the permit-holder fails to comply with the conditions attached to the permit, which may include

> (a) conditions respecting the protection of human health or the environment, including conditions requiring the holder of the permit
>
> > (i) to implement and maintain appropriate measures to prevent a release of the substance,
> >
> > (ii) to implement and maintain appropriate measures to ensure that any release of the substance can be minimized in gravity and magnitude, through early detection and early response, and

[83] BC Gov News, "Additional Measures", *supra* note 82.

[84] For further background, see Jason MacLean, "The Constitutional Complexity of Pipelines: It's as Clear as Bitumen", *The Globe and Mail* (5 February 2018), online: <theglobeandmail.com> [MacLean, "The Constitutional Complexity of Pipelines"]; Jason MacLean, "Trans Mountain's Only Certainty – Death and Carbon Taxes", *Vancouver Sun* (17 April 2018), online: <vancouversun.com> [MacLean, "Trans Mountain's Only Certainty"].

[85] BC Gov News, "Province Submits Court Reference to Protect B.C.'s Cast" online: <news.gov.bc.ca/releases/2018PREM0019-000742> [BC Gov News, "Court Reference"].

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

[87] BC Gov News, "Court Reference", *supra* note 85.

[88] *Ibid*.

[89] *Ibid*.

[90] *Ibid*.

> (iii) to maintain sufficient capacity, including dedicated equipment and personnel, to be able to be able to respond effectively to a release of the substance in the manner and within the time specified by the director;
>
> (b) conditions respecting the impacts of a release of the substance, including conditions requiring the holder of the permit
>
> (i) to respond to a release of a substance in the manner and within the time specified by the director, and
>
> (ii) to compensate, without proof of fault or negligence, any person, the government, a local government or a First Nations government for damages […].[91]

British Columbia premises its proposed legislation on two principal purposes: (1) the protection of British Columbia's environment (including the terrestrial, freshwater, marine, and atmospheric environment), human health and well-being, and the economic, social, and cultural vitality of BC communities; and (2) the implementation of the polluter pays principle.[92] In the same vein, British Columbia argues that its reference "is not about the desirability of interprovincial pipelines or about the undisputed federal authority to decide whether they should be built or operated (subject, of course, to entrenched rights, including under s. 35 of the *Constitution Act, 1982*)."[93] Rather, the province argues that its constitutional reference "is about the ordinary operation of principles of Canadian federalism to proposed amendments to an indisputably constitutional provincial environmental statute".[94]

Critics of the province's proposed regulations, however, spy an alternative – *political* – purpose. Alberta premier Rachel Notley reacted to British Columbia's announcement of its intention to develop the above regulations by stating "[t]he government of Alberta will not – we cannot – let this unconstitutional attack on jobs and working people stand."[95] Prime Minister Justin Trudeau reacted similarly by stating in a radio interview "[l]ook, we're in a federation. We're going to get that pipeline built."[96] Alan Ross, a lawyer who acts for Kinder Morgan and is lead counsel to the Canadian Energy Pipeline Association on the "Heavy Oil" reference before the B.C. Court of Appeal, argued that "[t]o the extent that this is meant to imperil Trans Mountain, there really is a very clear federal jurisdiction with respect to matters such

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[91] *Ibid*. British Columbia also intends to establish an independent scientific panel to help address the scientific uncertainties in respect of the behaviour of heavy oil when it is spilled in water.

[92] *Ibid*. For a detailed discussion of the adverse effects of heavy oil spills in oceans, estuaries, rivers, lakes, ponds, or on land, see *Reference re Environmental Management Act (British Columbia),* 2019 BCCA 181 (Factum of the Attorney General of British Columbia at paras 36-46) [AG British Columbia, "Factum"].

[93] AG British Columbia, "Factum", *supra* note 96 at para 134.

[94] *Ibid*.

[95] Quoted in MacLean, "The Constitutional Complexity of Pipelines", *supra* note 84.

[96] *Ibid*.

as pipelines or railways that cross provincial borders and are federally regulated."[97] Fueling these reactions, of course, were the earlier political campaign remarks made by B.C. NDP leader John Horgan, who promised to use "every tool in the toolbox" to prevent the completion of the Trans Mountain expansion.[98]

Echoing and amplifying these claims, *The Globe and Mail*, Canada's national newspaper of record, alleged that British Columbia's regulatory proposal was little more than – pun presumably intended – a crude tactic in its "guerrilla war designed to subject Trans Mountain to a death by a thousand cuts."[99] In a subsequent editorial following Kinder Morgan's decision to suspend all non-essential spending on the Trans Mountain expansion and demand a guarantee from the federal government that the project would be approved, the *Globe* accused British Columbia of "naked hypocrisy."[100] After noting that the B.C. provincial government's opposition to the Trans Mountain expansion is based on the government's "stated desire to protect the environment",[101] the *Globe* observed – not incorrectly – that the province was at the same time "supporting the development of the province's natural-gas reserves, offering tax breaks to a $40-billion project that includes, wait for it, a new pipeline and a new tanker terminal on the B.C. coast."[102] British Columbia, in the *Globe*'s estimation, was precipitating a constitutional crisis "in the name of environmental principles it only adheres to when it is in its political interest, but abandons when it sees a dollar in it."[103]

In light of these competing interpretations, how should the B.C. Court of Appeal resolve the province's "Heavy Oil" reference?

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[97] *Ibid*.

[98] See Andrew MacLeod, "Death of Kinder Morgan Project a Campaign Promise, Premier Says", *The Tyee* (10 April 2018), online: <thetyee.ca>. While such remarks are not admissible as evidence of legislative intent as part of a court's statutory interpretation (including the constitutional interpretation of legislation's "pith and substance"), it is equally true that such remarks cannot be unheard. On the evidentiary point, see *Tesla Motors Canada ULC v Ontario (Ministry of Transportation),* 2018 ONSC 5062 at para 58, citing *Reference re Upper Churchill Water Rights Reversion Act,* [1984] 1 SCR 297 at 318, 8 DLR (4th) 1. Perhaps rendering this technical evidentiary point moot, however, is the "Confidence and Supply Agreement" concluded between the BC NDP and BC Green Party, under which, among other things, the caucuses of the two parties agreed to "employ every tool available to the new government" to stop the Trans Mountain project: See British Columbia, Legislative Assembly, *Official Report of Debates*, 41-3, Issue 104 (14 March 2018) at 3534 (Hon G Heyman).

[99] "Globe Editorial: Trudeau Must Stand up to B.C.'s Crude Tactics", *The Globe and Mail* (1 February 2018), online: <theglobeandmail.com>.

[100] "Globe Editorial: Trans Mountain is Now an Economic and Constitutional Disaster", *The Globe and Mail* (8 April 2018), online: <theglobeandmail.com>.

[101] *Ibid*.

[102] *Ibid*.

[103] *Ibid*.

The province's legal position relies in large part on the ruling of the B.C. Supreme Court in *Coastal First Nations v British Columbia (Environment)*.[104] In *Coastal First Nations,* the Court affirmed the right – indeed, the *responsibility* – of provinces to regulate the territorially-based impacts of economic projects, even if those projects constitute federal undertakings (in *Coastal First Nations*, the project was the controversial Northern Gateway oil pipeline proposal). The province places significant weight on the following explanation provided by the Court: "[t]o disallow any provincial regulation over the project because it engages a federal undertaking would significantly limit the province's ability to protect social, cultural and economic interests in its lands and waters. It would go against the current trend in the jurisprudence favouring, where possible, co-operative federalism."[105]

The principle of co-operative federalism was similarly utilized by the Federal Court to uphold *federal* jurisdiction in respect of an environmental assessment of an open-pit copper and gold mine in British Columbia.[106] In *Taseko Mines Limited v Canada (Environment)*, the Court held that "a project of such magnitude as the one considered in the present case will likely have impacts on areas of both provincial and federal responsibility."[107] This decision accords not only with the interpretive principle of cooperative federalism, but also with the contextual constitutional analysis the Supreme Court of Canada has taken to environmental protection legislation. The Court has recognized that environmental concerns are a matter of "superordinate importance" not assigned expressly or exclusively to either the federal or provincial heads of power.[108] The Court's constitutional interpretation of environmental protection legislation is further premised on the recognition that "our common future, that of every Canadian community, depends on a healthy environment."[109] More specifically, given that the impacts of environmental harms and pollution are diffuse, pervasive, cumulative, and have long-term implications, the Supreme Court of Canada has ruled that "the Constitution should be so interpreted as to afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution."[110]

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[104] *Coastal First Nations v British Columbia (Environment),* 2016 BCSC 34 [*Coastal First Nations*]. For an initial discussion of the application of this decision to the Trans Mountain pipeline expansion, see Chris Tollefson & Jason MacLean, "Here is Why B.C. Must Do its Own Review of the Trans Mountain Pipeline", *The Globe and Mail* (23 May 2017), online: <theglobeandmail.com>.

[105] *Coastal First Nations*, *supra* note 104 at para 53, quoted in BC Gov News, "Court Reference", *supra* note 85. See also *Rogers Communication v Châteauguay*, 2016 SCC 23 at para 38: when "courts apply the various constitutional doctrines, they must take into account the principle of co-operative federalism, which favours, where possible, the concurrent operation of statutes enacted by governments at both levels" [*Rogers Communication*].

[106] *Taseko Mines Limited v Canada (Environment),* 2017 FC 1100 [*Taseko Mines*]. The leading case on co-operative federalism is *Canadian Western Bank v Alberta,* 2007 SCC 22 [*Canadian Western Bank*].

[107] *Taseko Mines*, *supra* note 106 at para 160.

[108] *Hydro-Québec*, *supra* note 43 at para 85.

[109] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town),* 2001 SCC 40 at para 1.

[110] *Hydro-Québec*, *supra* note 43 at para 116, citing *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 88 DLR (4th) 1.

Moreover, as the Supreme Court of Canada recently observed in *Comeau* (which is also discussed in the previous section), the scope of federal authority granted over interprovincial economic matters must be carefully circumscribed so as not to invalidate "[a]gricultural supply management schemes, public health-driven prohibitions, *environmental controls*, and innumerable comparable regulatory measures that incidentally impede the passage of goods crossing provincial borders".[111]

Based on these foundational precedents, British Columbia argues that the true pith and substance of its proposed heavy oil spill regulations is to protect the province's environment falling under its broad power over property and civil rights under section 92(13), supplemented by its authority over matters of a local or private nature under section 92(16) and its responsibility to manage public lands under 92(5) of the *Constitution Act, 1867*.[112]

British Columbia also argues that provincial environmental legislation may have "incidental effects" outside the province's jurisdiction, including effects on interprovincial undertakings.[113]

British Columbia further argues that its regulations are validated by the "double aspect" doctrine, whereby both the federal and provincial governments may adopt valid legislation in respect of a single matter.[114] Its proposed regulations do not seek to prevent the construction or operation of any interprovincial undertaking, the province argues (notwithstanding the campaign rhetoric of the Premier that would appear to suggest otherwise), and there is no precedent suggesting that only the federal government may enact environmental protection regulations in relation to the accidental discharges of an interprovincial undertaking such as the Trans Mountain pipeline.[115]

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[111] *Comeau, supra* note 59 at para 3 [emphasis added]. While *Comeau* concerned the scope of section 121 of the *Constitution Act, 1867*, the Court's reasoning is equally applicable to the interpretation of the division of powers under sections 91 and 92.

[112] AG British Columbia, "Factum", *supra* note 92 at para 84.

[113] *Ibid* at paras 87–88.

[114] *Ibid* at paras 93–96, citing *Canadian Western Bank*, *supra* note 106 at para 30. Here it is important to note that the Supreme Court of Canada's decision in *Rogers Communication*, *supra* note 105, does not pose an obstacle to British Columbia's reliance on the double aspect doctrine. As Nathalie Chalifour shows, *Rogers Communication* does not limit the ambit of the double aspect doctrine. Rather, the Court declined to apply the doctrine in *Rogers Communication* because it found that the pith and substance of the municipal measure in question concerned radiocommunications, a matter that cannot be assigned to a provincial head of power and is therefore incapable of having a double aspect. British Columbia's "Heavy Oil" regulations, by contrast, are distinguishable because their pith and substance concern environmental protection, a matter over which federal and provincial jurisdiction is shared. Only in the event of an operational core conflict between otherwise valid federal and provincial laws will paramountcy displace the double aspect doctrine: see Chalifour, "Jurisdictional Wrangling over Climate Policy", *supra* note 12 at 25.

[115] AG British Columbia, "Factum", *supra* note 92 at para 96. In the alternative, British Columbia argues that its proposed regulations are saved by the ancillary powers doctrine because they are rationally and

British Columbia further argues that the federal government cannot invoke the doctrine of interjurisdictional immunity in respect of its proposed regulations. While the federal government has legislative authority over "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, extending beyond the Limits of the Province" under sections 91(29) and 92(10)(a) of the *Constitution Act, 1867*, there is no precedent stipulating that *discharges* from any such undertakings are within the core of the federal government's power.[116] On the contrary, courts have consistently held that interprovincial undertakings are not immune from provincial environmental protection laws.[117] In light of the Supreme Court of Canada's promotion of cooperative federalism generally and its contextual constitutional approach to environmental protection legislation specifically, British Columbia argues that it is appropriate to permit multiple levels of government to regulate the resources over which they have jurisdiction, and to allow any conflicts to be resolved through the application of the doctrine of paramountcy.[118]

Regarding the federal government's paramountcy argument, British Columbia argues that it too must fail. The province's proposed heavy oil spill regulations are either duplicative or establish higher environmental standards in respect of potentially conflicting federal provisions.[119] This is insufficient to establish federal paramountcy, a situation where compliance with one jurisdiction's laws amounts to defiance of another's.[120] Permissive federal legislation or action – such as its *conditional* approval of the Trans Mountain pipeline expansion – is not frustrated for paramountcy purposes by provincial legislation that restricts the scope of the federal permission.[121]

British Columbia's arguments are compelling, at least *on their face*; they reside comfortably within the Supreme Court of Canada's cooperative federalism and environmental protection jurisprudence. What is arguably the province's most compelling legal argument is also telling politically. As the Supreme Court of Canada observed in *Canadian Western Bank*, Parliament holds in reserve the ultimate legal power to make absolutely clear its intention to immunize aspects falling within federal authority under the doctrine of paramountcy.[122] The federal government's decision *not*

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functionally related to the larger and constitutionally-valid legislative scheme to which they are to be added: see paras 98–102.

[116] *Ibid* at para 105.

[117] *Ibid*, citing *Regina v TNT Canada Inc* (1986), 58 OR (2d) 410, 37 DLR (4th) 297 (CA), and *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031, 24 OR (3d) 454.

[118] *Ibid* at para 122.

[119] *Ibid* at para 129.

[120] *Ibid* at para 127, citing, *inter alia*, *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53.

[121] *Ibid* at para 130, citing *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 66.

[122] *Ibid* at para 121, citing *Canadian Western Bank*, *supra* note 106 at para 45.

to do so in respect of the Trans Mountain pipeline tells us more about its *political* position than it does about its legal powers.

Indeed, what is striking about the federal government's position in the Heavy Oil reference is its abandonment of the cooperative approach to environmental-*cum*-economic policy and regulation that it proudly trumpets in the Saskatchewan carbon pricing reference.[123] The government's opening statement in the Heavy Oil reference, by contrast, expresses a view of the matter that is markedly unilateral and surprisingly shorn of its environmental implications:

> After promising to use "every tool" in its legislative "toolbox" to stop the expansion of the Trans Mountain Pipeline, the Government of British Columbia received legal advice that it would be unconstitutional for it to do so. The BC Government then developed a proposed regulatory regime that prohibits heavy oil shipment increases unless the Provincial Government, in its discretion, issues an authorization permit. Concerned that this regime would also be found *ultra vires* or inapplicable to federally-regulated undertakings like the Trans Mountain Pipeline, the BC Government now asks the Court to opine on its constitutionality before the legislation is enacted.[124]

The federal government's legal argument is threefold: (1) the true pith and substance of British Columbia's heavy oil spill regulations – despite their stated purpose of environmental protection – is a colourable and ultimately *ultra vires* attempt to regulate interprovincial oil transportation;[125] (2) even if the regulations were *intra vires* the province, the regulations would be inapplicable to interprovincial undertakings like Trans Mountain by virtue of the doctrine of interjurisdictional immunity because the regulations significantly impair the federal government's ability to regulate such undertakings;[126] and (3) the regulations are constitutionally inoperable by virtue of the paramountcy doctrine because they conflict with and frustrate existing federal legislation that is designed to comprehensively regulate the safe and efficient operation of interprovincial oil transportation systems.[127]

The federal government's narrowly-framed legal arguments are credible only if one accepts the government's speculative *political* premise, which is the basis for its artificial characterization of the issue as a dispute about jurisdiction over

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[123] And elsewhere as well. In *Comeau* for example, the Supreme Court of Canada notes that the Attorneys General that intervened in the case concerning the scope of section 121 of the *Constitution Act, 1867*, including among others both Canada and Saskatchewan, argued in favour of a narrow interpretation of section 121 in order "to give governments expansive scope to impose barriers on goods crossing their borders" as a "natural consequence of their position that 'cooperative federalism' is a distinct foundational principle for constitutional interpretation": see *Comeau*, *supra* note 59 at para 87.

[124] *Reference re Environmental Management Act (British Columbia)* 2019 BCCA 181 (Factum of the Attorney General of Canada at iii) [AG Canada, "Heavy Oil Factum"].

[125] *Ibid*.

[126] *Ibid*.

[127] *Ibid*.

interprovincial oil transportation: "[r]egulating the *nature* and *volume* of goods that flow through interprovincial undertakings is at the core of Canada's power under s. 92(10)(a) of the *Constitution Act, 1867*."[128] However, the means by which the federal government casts aspersions on British Columbia's heavy oil regulations as political and thus constitutionally colourable can also be turned on the government's central argument.

Repeating statements made by Premier Horgan and other members of the BC NDP government, the federal government argues that "[t]he only way to make sense of the provisions is to appreciate them against the backdrop of the BC Government's true purpose: to block the TMX Project."[129] As a matter of politics, this may well be true. As a matter of law, however, it is speculative at best. As speculation, it is no more revealing of British Columbia's "true purpose" than the equally speculative and yet entirely reasonable explanation that, having received a legal opinion to the effect that the province could not constitutionally block the completion of the Trans Mountain pipeline expansion itself, the province pursued its second-best regulatory option: "to ensure (as far as reasonably possible) that no harm will be done to persons or property in BC by the (storage or) carriage of Heavy Oil, and that if such harm does occur, there will be adequate and accessible funds to mitigate, remediate and compensate."[130]

Moreover, apart from any political machinations at play, British Columbia's proposed regulations have a sound scientific basis. The NEB's recommendation and the federal Cabinet's approval of the Trans Mountain pipeline expansion ignored the existence of established and troublesome gaps in the scientific understanding of how diluted bitumen behaves in cold-water environments.[131] According to a recent assessment of the peer-reviewed scientific knowledge about bitumen and marine environments, there is a "relative paucity of information on the ecological consequences of spill response methods".[132] The NEB's own reconsideration of the marine ecosystem impacts of the Trans Mountain pipeline expansion preliminarily recommended that the federal government "should review and update federal marine shipping oil spill response requirements," and added that this review should consider (1) "updating response organization standards"; (2) "response planning methodologies"; (3) "public reporting by response organizations to promote transparency of information"; (4) "inclusion of Indigenous peoples and local communities in response planning"; and (5) "a requirement for additional response

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[128] *Ibid* at para 100 [emphasis added].

[129] *Ibid* at para 91.

[130] AG British Columbia, "Factum", *supra* note 92 at para 89.

[131] See MacLean, "Trans Mountain's Only Certainty", *supra* note 84; Thomas Sisk, "Science is a Casualty of the Trans Mountain Pipeline Debate", *Vancouver Sun* (16 April 2018), online: <vancouversun.com>.

[132] Stephanie J Green et al, "Oil Sands and the Marine Environment: Current Knowledge and Future Challenges" (2017) 15:2 Frontiers in Ecology & Environment 74 at 79. Green et al conclude overall that "[r]egulations to protect marine environments are hindered by a lack of available science and require holistic, ecosystem-based frameworks to assess cumulative and co-occurring stresses": see *ibid* at 74).

resources on all ocean-going vessels."[133] The NEB's preliminary, draft recommendations made pursuant to its reconsideration of its own deficient review of the Trans Mountain project (more on this below) does not even consider spill-prevention and spill-response concerns and methodologies relating to estuaries, rives, lakes, ponds, or land. Political or not, British Columbia's heavy oil spill regulations can nevertheless be taken at face value as being grounded in and motivated by legitimate scientific concerns.[134]

Relatedly, the federal government's legal strategy in the Heavy Oil reference of making repeated reference to the B.C. government's public and political comments about the Trans Mountain pipeline, besides being an incomplete – if not legally-questionable – means of establishing the true purpose of the legislation in question,[135] also shines a decidedly less-than-flattering light on the NEB, on whose presumptive expertise and effectiveness the government relies extensively in its written submissions before the B.C. Court of Appeal.[136] The federal government notes, for example, that the *National Energy Board Act* is "the primary federal legislative enactment that regulates the interprovincial transportation of petroleum by pipeline. It ensures that federally-regulated pipelines are designed, constructed, operated and abandoned in a manner that is *safe for the public and the environment*."[137] After providing a lengthy recounting of the establishment of the NEB in 1959 and the key provisions of its controlling legislation, the federal government proceeds to describe how the *Pipeline Safety Act* "modernized the *NEB Act* in 2016."[138] The federal government quotes approvingly remarks made by the Minister of Natural Resources Canada to the effect that the purpose of introducing the *Pipeline Safety Act* was to find "new and better ways to improve our *world-class* regulatory system" and "ensure that

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[133] Canada, National Energy Board, "Trans Mountain Pipeline ULC (Trans Mountain) Application for the Trans Mountain Expansion Project (Project), National Energy Board (Board) reconsideration of aspects of its Recommendation Report as directed by Order in Council PC 2018-1177 (Reconsideration) MH-052-2018" at 39, online (pdf): <neb-one.gc.ca/pplctnflng/mjrpp/trnsmntnxpnsn/trnsmntnxpnsnrprt-eng.pdf>.

[134] Nor is the federal government's oft-cited (by itself) "Oceans Protection Plan" an effective counter to the established gaps in scientific knowledge about how to understand and effectively respond to spills of diluted bitumen. The Federal Court of Appeal in *Tsleil-Waututh* described the 11-page plan as "inchoate" and at an "early planning" stage: see *Tsleil-Waututh*, *supra* note 81 at paras 471, 661.

[135] See the caselaw cited at *supra* note 98. But see *Rogers Communication*, *supra* note 105 at para 36, where the Supreme Court of Canada explains that the purpose of a law or regulatory measure is determined by examining both intrinsic evidence (such as the preamble of a statute, or the general purposes stated in the resolution authorizing a measure) and extrinsic evidence, "such as that of the circumstances in which the measure was adopted" (citations omitted). That said, the facts in *Rogers Communication* are once again distinguishable from the circumstances surrounding the introduction of the "Heavy Oil" regulations. In *Rogers Communication*, the Court found that the only conclusion possible was that the purpose of the municipal measure was to prevent Rogers from installing its radiocommunication antenna system on a particular property (at para 44). Notwithstanding the BC Premier's political rhetoric about stopping the Trans Mountain pipeline expansion, the environmental-protection purpose of the "Heavy Oil" regulations is credible, and finds support in the reasons for decision in *Coastal First Nations*, *supra* note 104 at para 53.

[136] AG Canada, "Heavy Oil Factum", *supra* note 124 at paras 4-6, 8, 10, 13, 15, 17–34, 39–42, 107, 114–31.

[137] *Ibid* at para 17 [emphasis added].

[138] *Ibid* at para 123.

we have a world-class, in fact, elements of it are *world-leading*, pipeline safety system."[139]

All of which is marshaled by the federal government to support its key argument in the B.C. Heavy Oil reference: "[t]he *NEB's role as Canada's national energy regulator* would be seriously undermined if provinces could, under the guise of environmental legislation, stymie Canada's national energy policy and impose a patchwork of regulations based on the political ideologies of particular provincial governments."[140]

So much for cooperative federalism.

The federal government's emphasis on the role played by the NEB is profoundly puzzling in light of the government's own very public acknowledgement that the NEB had lost the trust of Canadians and was in need of reform (reform, I hasten to add, extending far beyond the enactment of the *Pipeline Safety Act*). After all, as late as 2014, the NEB refused to consider the climate change impacts of pipelines and the continued development of the oil sands.[141] Following its election in 2015, the new federal Liberal government conducted a systematic review of the NEB and called for its modernization.[142] The expert panel convened by the Minister of Natural Resources reported, among other things, that "Canadians have serious concerns that the NEB has been 'captured' by the oil and gas industry, with many Board members who come from the industry that the NEB regulates, and who – at the very least appear to – have an innate bias toward that industry."[143] It is crucial here to acknowledge that in respect of what is supposed to be an arms-length regulatory body, this is a damning indictment.

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[139] *Ibid* [emphasis added].

[140] *Ibid* at 129 [emphasis added].

[141] *Forest Ethics Advocacy Association v National Energy Board,* 2014 FCA 88; for further background and analysis of the NEB's position on climate change, see Jason MacLean "Like Oil and Water? Canada's Administrative and Legal Framework for Oil Sands Pipeline Development and Climate Change Mitigation" (2015) 2 Extractive Industries & Society 785. It should be noted that, as of this writing, neither the NEB nor the federal government appears to have conducted any analysis of how both its own and broader international efforts to avert the worst impacts of climate change will affect the long-term profitability of an expanded Trans Mountain pipeline: see Shawn McCarthy, "Lack of Climate Clarity Threatens Oil Reserve Values, Report Says", *The Globe and Mail* (17 January 2019), online: <theglobeandmail.com>; Shawn McCarthy & Bill Curry, "Ottawa Sought Insider Industry Analysis for Trans Mountain Deal, Documents Reveal", *The Globe and Mail* (21 January 2019), online: <theglobeandmail.com>. It has been disclosed, however, that the federal government may have *overpaid* for the expansion project by as much as $800 million: see John Paul Tasker, "Ottawa May Have Overpaid for Trans Mountain by up to $1B, Parliamentary Budget Officer Says", *CBC News* (31 January 2019), online: <cbc.ca/news> [Tasker, "Trans Mountain"].

[142] 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* (15 May 2017), online (pdf): <nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf>.

[143] *Ibid* at 7.

Accordingly, the expert panel's report recommended that, among other things, "the National Energy Board must align itself to the government's environmental (*particularly climate change*), energy, social, and economic policy goals."[144]

This recommendation was made in respect of the very same and as yet unreformed NEB whose review of the Trans Mountain pipeline expansion project not only failed to assess the project's cumulative greenhouse gas emissions and those emissions' impact on Canada's ability to meet its emissions-reduction pledges under the Paris Agreement, but also failed to assess the environmental effects of pipeline-related marine shipping under the *Canadian Environmental Assessment Act, 2012*.[145]

Unsurprisingly, perhaps, in light of the NEB's consistently poor and not-infrequently controversial conduct,[146] the federal government subsequently introduced Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other acts*.[147] The *Canadian Energy Regulator Act* introduced by the bill would supersede the *National Energy Board Act* and replace the NEB with a new administrative agency, the Canadian Energy Regulator.

This is all the federal government's own very public doing. Yet the federal government refuses to acknowledge the patent inconsistency of criticizing, reviewing, and ultimately completely reshaping the NEB and its governing legislative framework, on the one hand, while redoubling its reliance on the NEB's incomplete and inadequate review and recommendation of the Trans Mountain pipeline expansion project on the other.

Indeed, and not a little ironically, the federal government has exposed *itself* to the allegation that it is using every *political* tool in its toolbox to proceed with the Trans Mountain expansion project by publicly and emphatically repeating that it will ensure that the pipeline will get built, particularly in response to the decision of the

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[144] *Ibid* at 12 [emphasis added].

[145] *Tsleil-Waututh, supra* note 81 at paras 765–66. As of this writing, the environmental nongovernmental organization Stand.earth (formerly Forest Ethics Advocacy Association), has—once again—filed a motion before the NEB requesting that the Board "meaningfully consider the general impact (up and downstream) the Trans Mountain Expansion Project, if approved, would have on greenhouse gas emissions and climate change" (short forms omitted). See Stand.earth, "Notice of Application of the Intervenor Stand.earth" (21 January 2019), NEB File-OF-Fac-Oil-T260-2013-03 59, Hearing Order MH-052-2018. For additional background, see Tracy Sherlock, "IPCC Authors Urge NEB to Consider Climate Impacts of Trans Mountain Pipeline Expansion", *National Observer* (21 January 2019), online: <nationalobserver.com>; Ian Bailey & Shawn McCarthy, "International Environmental Group Seeks Broader NEB Review of Trans Mountain Expansion", *The Globe and Mail* (21 January 2019), online: <theglobeandmail.com>.

[146] For a further analysis of the NEB and abuses of administrative discretion, see Jason MacLean, "Autonomy in the Anthropocene? Libertarianism, Liberalism, and the Legal Theory of Environmental Regulation" (2017) 40:1 Dal LJ 279 at 320–21.

[147] Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 42-1 (presently in its Second Reading and referral to Committee before the Senate) [*Bill C-69*].

Federal Court of Appeal in *Tsleil-Waututh* quashing Cabinet's approval of the pipeline, not only because of the NEB's deficient and unreasonable marine impacts assessment, but also because the federal government itself failed to satisfy its constitutional duty to consult and accommodate affected Indigenous groups.[148] The Federal Court of Appeal held that the federal government failed to "engage, dialogue meaningfully and grapple with the concerns expressed to it in good faith by the Indigenous applicants so as to explore possible accommodations of these concerns."[149] In particular, the Court found that the government declined to make a genuine and sustained effort "to pursue meaningful, two-way dialogue."[150] Nor did the government give serious consideration to whether any of the findings arising out of the NEB's review of Trans Mountain were unreasonable or incorrect, or to amending or supplementing the NEB's recommended conditions, which it had ample and uncontroversial legal authority to do.[151]

As of this writing, the federal government's renewed consultation of Indigenous peoples in respect of the Trans Mountain pipeline is ongoing, with no fixed date for its conclusion. No matter how ably this additional consultation is coordinated by former Supreme Court of Canada justice Frank Iacobucci, whom the federal government engaged to lead the process, the government's repeated assertions that "the pipeline will be built" do little to quell the concern that the government's "mind" throughout the consultations remains insufficiently "open" to satisfy the standard of meaningful consultation under section 35 of the *Constitution Act, 1982*: "[m]eaningful consultation 'entails testing and being prepared to *amend* policy proposals in light of information received.'"[152] In this sense, Trans Mountain's past consultation – throughout which the government displayed a "closed-mindedness"[153] – may well be prologue.

No matter how the renewed reconsideration of the Trans Mountain project concludes, additional judicial review is a virtual certainty. What really emerges from this dispute between the federal government and British Columbia over spilled oil, however, is the high hypocrisy of both parties' equally high-minded appeals to cooperation, reconciliation, and meaningful climate action. The reaction of the B.C. NDP Member of Parliament Nathan Cullen to the Parliamentary Budget Office's estimate that the federal government may have significantly overpaid for the Trans Mountain pipeline is apt. According to Mr. Cullen, the government needs to "stop this

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[148] *Tsleil-Waututh*, *supra* note 81 at para 754. See e.g. David George-Cosh, "Morneau Vows Trans Mountain 'Will Be Built' Despite Court Ruling", *BNN Bloomberg* (30 August 2018), online: <bnnbloomberg.ca>.

[149] *Tsleil-Waututh*, *supra* note 81 at para 754.

[150] *Ibid* at para 756.

[151] *Ibid* at para 757.

[152] *Ibid* at para 501, citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 46 [emphasis added].

[153] *Ibid* at para 603.

nightmare" and focus instead on investing in green technology and renewable resources.[154] And yet the federal government shows no signs of doing so.[155]

Nor can it be said, however, that British Columbia is pursuing a consistent and meaningful policy in respect of either climate change mitigation or reconciliation with Indigenous peoples. While the present B.C. NDP government opposes the Trans Mountain expansion project, not only because of its heavy oil spill risks, but also because – so it has claimed – the project is opposed by several Indigenous First Nations and communities and poses significant climate risks.[156]

Regarding reconciliation, B.C. premier John Horgan made the following comparison of his government to the federal government after the latter announced its intention to purchase the Trans Mountain pipeline: "[b]oth governments have professed to embrace genuine reconciliation, and I'm not convinced you can necessarily do that when you're *disregarding the rights of Indigenous communities*."[157]

Regarding climate change policy, Premier Horgan remarked in respect of the federal government's purchase of Trans Mountain that "I have difficulty understanding, as [Washington State] Governor Inslee does, how investing in *significant fossil fuel infrastructure*, at a time when we're trying to reduce our dependence on that infrastructure source, makes any sense. For me, and for British Columbians, we're going to assert our jurisdiction."[158]

Yet the B.C. government has championed the construction of a natural gas liquefaction terminal in Kitimat, British Columbia, and a natural gas pipeline that will connect the terminal to hydraulic fracturing – or "fracking" – operations in and around Dawson Creek, British Columbia; the liquefaction terminal will convert the natural gas to liquefied natural gas (LNG), and the terminal project goes by the name LNG Canada; the natural gas pipeline, owned as of this writing by TransCanada Corp., is called the Coastal GasLink pipeline.[159]

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[154] Nathan Cullen, quoted in Tasker, "Trans Mountain", *supra* note 141.

[155] See e.g. MacLean, "Canada's Gradual Climate Policy", *supra* note 72.

[156] See e.g., Andrew Weichel, "B.C. Premier, Indigenous Groups Respond to Trans Mountain Purchase", *CTV News Vancouver* (29 May 2018), online: <bc.ctvnews.ca>; Mychaylo Prystupa, "Federal Ministers Argue Trans Mountain Expansion is Necessary Part of Climate Plan", *The Tyee* (21 March 2018), online: <thetyee.ca>.

[157] Weichel, *supra* note 156 [emphasis added].

[158] Prystupa, *supra* note 156 [emphasis added].

[159] For project background and details, see LNG Canada, online: <lngcanada.ca/>. See also Brent Jang, "LNG Canada CEO Vows to Press Ahead with Gas Project Facing Protests", *The Globe and Mail* (22 January 2019), online: <theglobeandmail.com> [Jang, "LNG Canada CEO"].

The Coastal GasLink pipeline component of LNG Canada faces significant opposition from the hereditary leaders of the Wet'suwet'en First Nation;[160] while the pipeline has support from elected First Nations Band councilors, the territory is unceded, and pursuant to the Supreme Court of Canada's landmark decision in *Delgamuukw v British Columbia*, the legal title holders are the hereditary leaders, not Band-level leaders, whose jurisdiction pursuant to the *Indian Act* is limited to reserves.[161]

Andy Calitz, the CEO of LNG Canada, which is part of a larger consortium headed by Royal Dutch Shell, expressed little interest in the distinction between hereditary governance and Band-level governance: "I'm not convinced that it's possible for major infrastructure projects in British Columbia to get unanimous support. Our project is a case in point. The conversation about hereditary versus elected systems of governance, and which hereditary leaders speak for Indigenous people, is a conversation I will leave to other people to resolve."[162]

Premier Horgan's initial reaction to this governance dispute, however, seemed merely to restate the problem, if not beg the question entirely: "[i]t is my view that LNG Canada has shown they understand the importance of consultation and meaningful reconciliation with First Nations, and that is why they have signed agreements with every First Nation along the corridor."[163]

How to reconcile the B.C. NDP government's incongruent position on reconciliation with First Nations? It is hard to improve upon the interpretation offered by an evidently exasperated reader of *The Globe and Mail*, who wrote the following letter to the paper's editor:

> For those confused about B.C. Premier John Horgan's stance on Indigenous consent regarding pipelines, I believe it to be as follows: LNG Canada directly affects his NDP government's finances and therefore does not require unanimous consent. Trans Mountain does not directly affect Mr. Horgan's government's finances, just Canada's, and therefore requires unanimous Indigenous consent.[164]

LNG Canada's climate impacts are equally difficult to square with British Columbia's commitments to reducing greenhouse gas emissions, including methane emissions,

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[160] *Ibid*.

[161] *Delgamuukw v British Columbia,* [1997] 3 SCR 1010, 153 DLR (4th) 193.

[162] Jang, "LNG Canada CEO", *supra* note 159.

[163] Richard Zussman, "B.C. Premier John Horgan Expecting 'Peaceful Resolution' to Natural Gas Pipeline Protest", *Global News* (9 January 2019), online: <globalnews.ca>.

[164] Dan Petryk, "Another Oh-so-Canadian Pipeline mess. Plus Other Letters to the Editor", *The Globe and Mail* (10 January 2019), online: <theglobeandmail.com>. Nor is this an isolated case. The BC government's decision to approve the construction of Site C mega-dam to produce hydroelectricity has drawn significant criticism from Indigenous communities and environmental advocates: See e.g. David Schindler & Faisal Moola, "Opinion: Decision to Approve Site C Undermines Reconciliation with Indigenous Peoples and Long-term Action on Climate Change", *Vancouver Sun* (20 December 2017), online: <vancouversun.com>.

and its reliance on long-term fossil fuels infrastructure. It is estimated that LNG Canada's completion would render British Columbia's greenhouse gas emissions targets under its current climate change plan impossible to meet.[165] Moreover, like other jurisdictions, British Columbia has yet to resolve the natural gas sector's ongoing inability to prevent methane leaks and ensure that hydraulic fracturing does not contaminate local water supplies and contribute to public health problems.[166]

The jurisdictional knots that the federal government and the provincial governments of British Columbia and Saskatchewan (and others) continue to tie themselves into have little – if anything – to do with genuine disagreements about the division of powers under the Constitution. Nor can any of these governments legitimately ground their positions on pipelines – or carbon prices – in a genuine concern to act urgently and ambitiously on climate change, environmental protection, or reconciliation with Indigenous peoples. These governments' positions instead reflect an unabated commitment to a fiscal and economic development policy rooted, not in the promotion of renewable energy, green technology, and a just transition toward sustainability, but rather in the extraction and exportation of non-renewable fossil fuels. This unsustainable policy commitment – neatly illustrated by Figure Two below – comes into even clearer view in the context of the controversy surrounding the reform of Canada's environmental assessment processes embodied by Bill C-69, dubbed by its critics as the "no pipelines bill,"[167] which is discussed in the next section.

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[165] See e.g. Brent Jang, "B.C.'s Climate Targets Will Be Impossible to Reach if LNG Canada Project Goes ahead, Critics Say", *The Globe and Mail* (21 September 2018), online: <theglobeandmail.com>; Justine Hunter, "Now It's the BC NDP's Turn to Square the Circle on LNG and Greenhouse-gas Emissions", *The Globe and Mail* (16 September 2018), online: <theglobeandmail.com>.

[166] Karen Tam Wu, "LNG Canada's Announcement Presents Big Challenge to B.C.'s Clean Growth" (2 October 2018), *Pembina Institute* (blog), online: <pembina.org/media-release/lng-canada-fid>.

[167] See Shawn McCarthy, "Senators Challenge Efficacy of Liberals' Resource Project Assessment Plan", *The Globe and Mail* (6 February 2019), online: <theglobeandmail.com>.

Figure Two. Pipeline knots.*

*Editorial cartoon, *The Globe and Mail* (10 January 2019) at A12.

III. Kill Bill C-69 (the "no pipelines bill")

Bill C-69[168] is the surprisingly controversial (in some quarters) legislative response of the federal Liberal government to the widespread public perception that the regulatory framework for assessing the environmental impacts of economic projects in Canada is broken (see Figure Three below). I say "surprisingly" because, at first glance, the bill would seem to offer industrial project proponents everything they could wish for in terms of environmental assessment legislation. As the Deputy Minister of Environment and Climate Change Canada describes it, Bill C-69's proposed *Impact Assessment Act* "provides a predictable, time-bound process, from early planning through to the decision, to ensure that companies know what to expect and when."[169]

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[168] *Bill C-69*, *supra* note 147.

[169] Stephen Lucas, Deputy Minister of Environment and Climate Change, quoted in McCarthy, *supra* note 167.

Figure Three. Bill C-69 is an absolutely devastating piece of legislation.*

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THE GLOBE AND MAIL | MONDAY, FEBRUARY 18, 2019

OPINION & ANALYSIS

The language of Bill C-69 is confusing, and some of its critics – seen rallying outside an event Prime Minister Justin Trudeau attended in Calgary in November, 2018 – are wondering what it means to assess a project's effects in light of sex, gender and other identity factors. JEFF MCINTOSH/THE CANADIAN PRESS

* *The Globe and Mail* (18 February 2019) at B4.

Given these defining features, including assessment timeframes tighter than those provided by the current legislation, the *Canadian Environmental Assessment Act, 2012*,[170] environmental advocates were initially critical of the legislation, whereas one major industry sector subject to the new bill strongly supported it. These initial reactions are telling. The environmental nongovernmental organization, MiningWatch Canada, reacted to Bill C-69 – especially the bill's proposed *Impact Assessment Act* – in the following, highly skeptical terms: "the worst outcome for both sustainability and democracy would be a process that gives the government adequate credibility with enough specific sectors of the public to allow it to make and enforce decisions that

[170] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52. For a discussion of the legislative changes to the environmental assessment regime introduced by this Act in 2012, see Meinhard Doelle, "CEAA 2012: The End of Federal EA as We Know It?" (2012) 24 J Envtl L & Prac 1.

may have nothing to do with sustainability and evidence, or climate commitments, or environmental protection, or Indigenous peoples' rights and livelihoods."[171]

Unsurprisingly, perhaps, in light of MiningWatch Canada's reaction to Bill C-69, the Mining Association of Canada, which represents and speaks on behalf of Canada's largest mining companies, cautiously supported the bill. According to the Association, the bill's *Impact Assessment Act* will increase the likelihood of timelier decisions, reduce uncertainty, and enable federal, provincial, and Indigenous government collaboration to deliver on the perennial industry desire for "one project, one assessment."[172] Overall, the Association's view is that "if well implemented, Bill C-69 holds the promise of improving upon predecessor legislation [*CEAA, 2012*] for most mines and the status quo".[173]

The Mining Association's reasoning is hardly radical. Yet the Association's CEO, Pierre Gratton, reports having received "hate mail" from opponents of the bill.[174] A number of industry organizations have mobilized to lobby the Senate against the bill, including the Canadian Association of Petroleum Producers, the Chemistry Industry Association of Canada, the Association of Canadian Port Authorities, and the Canadian Energy Pipeline Association, which claims that if Bill C-69 is enacted, Canada will "never see another pipeline built."[175]

Perhaps the most pointed opposition to the bill is expressed by an astroturf organization that calls itself "Suits and Boots."[176] Of Suits and Boots' "10 Reasons to Kill Bill C-69 in Canada's Senate,"[177] three in particular provoked a response from environmental advocates and scholars, who, despite their earlier criticisms of the bill's failures to meaningfully promote climate change mitigation, sustainability, or reconciliation with Indigenous peoples, among other pressing objectives,[178] have, in a volte-face, attempted to defend the bill against its industry critics.

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[171] Jamie Kneen, "Bill C-69: New Federal Environmental Review Laws Fall Short of Promises" (9 February 2018), *MiningWatch Canada* (blog), online: <miningwatch.ca>. A substantially similar conclusion was reached by a consortium of environmental nongovernmental organizations, not only in respect of the federal government's proposed new *Impact Assessment Act*, but also in respect of its overall performance in attempting to enhance environmental protection and related Indigenous rights and interests. See Ėquiterre et al, "Clock is Ticking: A Mid-Term Report Card on the Federal Government and its Work on the Environment" (May 2018), online (pdf): <equiterre.org/sites/fichiers/gvt_midterm_report_eng.pdf >.

[172] Pierre Gratton, "Bill C-69: A Step Forward for Canada's Mining Sector", *The Globe and Mail* (16 September 2018), online: <theglobeandmail.com>. (Mr. Gratton is the CEO of the Mining Association of Canada.)

[173] *Ibid*.

[174] Gabriel Friedman & Geoffrey Morgan, "Bill C-69 Fuels Battle", *Financial Post* (16 February 2019) C1.

[175] *Ibid*.

[176] Online, <suitsandboots.ca>. For an initial reaction to Suits and Boots' claims about Bill C-69, see Martin Olszynski, "Bill C-69's Detractors Can Blame Harper's 2012 Omnibus Overreach", *Calgary Herald* (26 September 2018), online: <calgaryherald.com>.

[177] *Ibid*.

[178] Meinhard Doelle, "Bill C-69: The Proposed New Federal Impact Assessment Act (IAA)" (9 February 2018), *Environmental Law News* (blog), online: <blogs.dal.ca/melaw/2018/02/09/bill-c-69-the-proposed-

Suits and Boots argues, for example, that Bill C-69 will furnish the Minister of the Environment and Climate Change with too much discretionary power to reject projects. Some of the bill's environmentalist defenders counter that the current regime under the *Canadian Environmental Assessment Act, 2012* is even more discretionary, and that under the bill's new *Impact Assessment Act* the government will have to give detailed reasons for its project decisions.[179] In reality, however, because the Federal Court of Appeal has established such an excessively low bar for the standard of reasonableness of environmental assessment decision-making on judicial review,[180] the government need only document that it gave "some consideration"[181] to the *Impact Assessment Act*'s public interest factors (about which more below). So long as the government formally ticks those statutory boxes, the courts will continue to defer to the government's discretionary policy decisions.[182]

Suits and Boots further argues that Bill C-69 is biased because it was introduced by the Minister of the Environment and Climate Change, while the bill's defenders counter that the Minister of Natural Resources was significantly involved throughout the bill's gestation (which is true), and that the bill reflects the results of two years of extensive public engagement and hearings (which is untrue).[183] Once again, the reality is more nuanced. After the expert panel on environmental assessment reform appointed by the federal government released its comprehensive final report based on its broad engagement with a diverse array of stakeholders across Canada,[184] the federal government immediately distanced itself from the expert panel's report in

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new-federal-impact-assessment-act/>; Chris Tollefson, "Environmental assessment Bill as a lost opportunity", *Policy Options* (14 February 2018), online: <policyoptions.irpp.org>; Jason MacLean, "Kill Bill C-69 – it Undermines Efforts to Tackle Climate Change", *The Conversation* (25 October 2018), online: <theconversation.com>.

[179] See e.g. the defence of Bill C-69 offered by Mark Winfield, Deborah Curran & Martin Olszynski, "How Post-truth Politics is Sinking Debate on Environmental Assessment Reform", *The Conversation* (11 October 2018), online: <theconversation.com>.

[180] *Ontario Power Generation Inc v Greenpeace Canada et al*, 2015 FCA 186 at para 130 [*Ontario Power Generation*]. For a commentary on the decision, see Martin Olszynski & Meinhard Doelle, "*Ontario Power Generation Inc. v Greenpeace Canada*: Form over Substance Leads to a 'Low Threshold' for Federal Environmental Assessment" (23 September 2015), *ABlawg.ca* (blog), online (pdf): <ablawg.ca/wp-content/uploads/2015/09/Blog_MOandMD_Ontario-Power-Generation-Inc-_FCA_20Sept2015.pdf>.

[181] *Ontario Power Generation*, *supra* note 180 at para 130.

[182] For an analysis of Canadian courts' tendency to excessively defer to governmental decisions in respect of environmental matters, see Jason MacLean & Chris Tollefson, "Climate-Proofing Judicial Review Post-Paris: Judicial Competence, Capacity, and Courage" (2018) 31:3 J Envtl L & Prac 245; Lynda Collins & Lorne Sossin, "In Search of an Ecological Approach to Constitutional Principles and Environmental Discretion in Canada" (2019) 52:1 UBC L Rev 293.

[183] Winfield, Curran & Olszynski, *supra* note 179.

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

response to industry criticism.[185] The expert panel's recommendations are barely recognizable in Bill C-69. The bill *follows* two years of consultations, but it is neither *based on* nor *reflective of* those consultations.[186]

Finally, Suits and Boots argues that Bill C-69 will transform Canada's voluntary climate commitments into enforceable legal obligations that our trading partners could use against us. Relatedly, Conservative Senator Michael MacDonald describes industry representatives' – and some of his fellow Senators' – concerns "that the complexity and detail and long prescriptive lists of factors to be considered in evaluating projects in this voluminous bill will enhance the risk of litigation that could drag on forever. This complexity and detail in the bill could not only kill viable projects, but will drive investment away from Canada."[187]

The mandatory factors to be considered in the Bill's *Impact Assessment Act* are set out in sections 22 and 63 of that Act, which respectively provide – as of this writing – as follows:

> Factors – impact assessment
>
> 22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:
>
> (a) 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, including
>
> > (i) the effects of malfunctions or accidents that may occur in connection with the designated project,
> >
> > (ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and
> >
> > (iii) the result of any interaction between those effects;
>
> (b) mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project;
>
> (c) 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

[185] Martin Olszynski et al, "Sustainability in Canada's Environmental Assessment", *Policy Options* (5 September 2017), online: <policyoptions.irpp.org>.

[186] For an analysis of the oil and gas industry's capture of the regulatory review process leading up to the tabling of Bill C-69, see Jason MacLean, "Regulatory Capture and the Role of Academics in Public Policymaking: Lessons from Canada's Environmental Regulatory Review Process" 52:2 UBC L Rev (forthcoming in 2019).

[187] Conservative Senator Michael MacDonald, quoted in McCarthy, *supra* note 167.

of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;

(d) the purpose and need for the designated project;

(e) alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means;

(f) any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;

(g) Indigenous knowledge provided with respect to the designated project;

(h) the extent to which the designated project contributes to sustainability;

(i) 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;

(j) any change to the designated project that may be caused by the environment;

(k) the requirements of the follow-up program in respect of the designated project;

(l) considerations related to Indigenous cultures raised with respect to the designated project;

(m) community knowledge provided with respect to the designated project;

(n) comments received from the public;

(o) comments from a jurisdiction that are received in the course of consultations conducted under section 21;

(p) any relevant assessment referred to in section 92, 93 or 95;

(q) any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project;

(r) any study or plan that is conducted or prepared by a jurisdiction – or an Indigenous governing body not referred to in paragraph (f) or (g) of the definition of *jurisdiction* in section 2 – that is in respect of a region related to the designated project and that has been provided with respect to the project;

(s) the intersection of sex and gender with other identity factors; and

> (t) any other matter relevant to the impact assessment that the Agency or – if the impact assessment is referred to a review panel – the Minister requires to be taken into account.[188]

Before proceeding to the Act's mandatory "public interest" factors, notice that, in respect of the factors to be considered under section 22, the Agency or review panel, neither of which is the decision-maker under the Act, must merely take the foregoing factors into account in conducting its assessment; it need not *base* its assessment on any one of these factors, let alone on *all* of them taken together.

In the same vein, the federal Cabinet's ultimate decision in respect of a project designated for assessment must be based on (1) the Impact Assessment Agency's report taking into account the section 22 factors, and (2) the Minister's consideration of the following public interest factors under section 63 of the *Impact Assessment Act*:

> Factors – public interest
>
> 63 The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors:
>
> (a) the extent to which the designated project contributes to sustainability;
>
> (b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are adverse;
>
> (c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;
>
> (d) the impact that the designated project many have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*; and
>
> (e) 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.[189]

Regarding these "public interest" factors guiding project approval decisions under the Act, three observations are pertinent. First, like the factors enumerated under section 22 of the Act, the public interest factors under section 63 guiding Cabinet determinations of the public interest must be based, not directly on the enumerated factors themselves, but on a *consideration* of those factors. The distinction is subtle,

[188] Bill C-69, *Impact Assessment Act*, *supra* note 151, s 22.

[189] *Ibid* at s 63.

but significant. Given that the Cabinet is the decision-maker, its consideration of the factors will be paid considerable deference by reviewing courts,[190] particularly insofar as those factors disclose highly factual and polycentric policy issues, and environmental assessments characteristically do.[191]

Second, notice that the factors (a), (b), (d), and (e) enumerated under section 63 are also included in section 22. This effectively invites Cabinet to give *its own consideration* to each of these factors already considered by the assessment agency or panel, whose consideration will be reflected in its report, which Cabinet will also consider; this interpretation is supported by paragraph 63(c), which explicitly provides that the Minister or Cabinet may substitute its own view of the implementation of appropriate mitigation measures. While this certainly broadens the discretion of Cabinet, contrary to industry concerns raised in respect of this Act, that discretion has overwhelmingly favoured project proponents throughout the history of Canadian environmental assessment legislation.[192] Moreover, there is little to no evidence capable of supporting industry's presumptive concern that the winds of the government's discretion are about to change direction anytime soon.

Third, contrary to the claims of Suits and Boots, nothing in sections 22 and 63 of the Act make Canada's climate commitments legally binding. As Bill C-69's defenders observe, the requirement to *consider* Canada's climate commitments is "wobbly" at best.[193] As the Minister of the Environment and Climate Change herself asserted, ostensibly to allay the concerns of Canada's oil and gas industry, she would have approved the Trans Mountain pipeline expansion project under the new *Impact Assessment Act* set out in Bill C-69. According to Minister McKenna: "[y]ou can expect that it would have been approved. It's going to create good jobs. We need this project to go ahead."[194]

So much for Bill C-69 as the "no pipelines bill."

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[190] The leading case for this proposition is *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36. In *Agraira*, the Supreme Court of Canada held that the relevant Minister had considerable latitude in interpreting a statutory provision mandating decisions be made in the "national interest". See *ibid* at para 50.

[191] See e.g. *Gitxaala Nation v Canada*, 2016 FCA 187 [*Gitxaala Nation*], leave to appeal refused, [2016] SCCA No 386. Writing for a unanimous Federal Court of Appeal, Stratas JA observed that "[i]n conducting its assessment [of the Northern Gateway oil pipeline project proposal], the Governor in Council has to balance a broad variety of matters, *most of which are more properly within the realm of the executive, such as economic, social, cultural, environmental and political matters*": at para 140 [emphasis added]. According to Stratas JA, "[t]he standard of review for decisions such as this—discretionary decisions founded upon the widest considerations of policy and public interest—is reasonableness": *ibid* at para 145.

[192] See Olszynski et al, *supra* note 185.

[193] Martin Olszynski, "Bill C-69's Detractors Can Blame Harper's 2012 Omnibus Overreach (Blog Edition)" (25 September 2018), *ABlawg.ca* (blog), online (pdf): <ablawg.ca/wp-content/uploads/2018/09/Blog_MO_Bill_C_69_Sept2018.pdf>.

[194] Minister Catherine McKenna, quoted in Zi-Ann Lum, "Kinder Morgan Pipeline Would Still Get Green Light Under New Rules", *Huffington Post* (8 February 2018), online: <huffingtonpost.ca>.

As the bill's academic defenders argue, its legislation "represents incremental – not radical – changes to the regime that now exists."[195]

The trouble with this tepid defence is that it is entirely true. As the UN IPCC's special report on 1.5 ºC global warming released in 2018 makes clear, the time for incremental changes has passed. The IPCC's report calls for rapid, systemic, and unprecedented changes in how governments, industries, and societies function in order to limit global warming to 1.5 ºC above the pre-industrial norm and thereby avoid the most catastrophic consequences of climate change.[196] While the industry and political critics of Bill C-69 appear to effectively deny that Canada has any responsibility to take aggressive and ambitious action on climate change,[197] let alone reconciliation with Indigenous peoples, the bill's NGO and academic defenders appear not to understand the urgency of radically reorienting our regulatory processes toward greater sustainability and reconciliation. Rather, they remain rooted in the taken-for-granted staples ideology[198] of Canada's Prime Minister, who remarked to an approving audience of oil and gas industry participants in Houston, Texas that "[n]o country would find 173 billion barrels of oil in the ground and just leave them."[199] In the concluding section of the article, I discuss the implications of this ideology for the future of Canada's climate and sustainability policies.

Conclusion

As the year 2018 drew to a close, the discount at which the sour (sulphuric) and heavy Alberta oil sands bitumen crude – Western Canadian Select – typically trades relative to the sweeter and lighter North American benchmark – West Texas Intermediate – ballooned to an historic high, nearly CDN$50.[200] The discrepancy between the two market rates was likely due to a number of factors, including maintenance issues at some US oil refineries and the anticipation of the coming-into-force in 2020 of the International Maritime Organization's rule limiting the sulphur content of bunker fuels.[201] Canadian observers, however, emphasized the lack of oil transport capacity (rail and pipeline) relative to increasing levels of oil sands production.[202]

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[195] Winfield, Curran & Olszynski, *supra* note 179.

[196] IPCC, *supra* note 4.

[197] See e.g. Gary Mason arguing that "Conservative political leaders in this country simply do not believe climate change is their problem to solve" in "Carbon-tax Opponents Don't Let Facts Get in the Way", *The Globe and Mail* (15 February 2019), online: <theglobeandmail.com>.

[198] See e.g. Jason MacLean characterizing Canada as a "carbon democracy" in "Paris *and* Pipelines? Canada's Climate Policy Puzzle" (2018) 32:1 J Envtl L & Prac 47 at 49–57.

[199] Prime Minister Justin Trudeau, quoted in Berke, *supra* note 3.

[200] Kyle Bakx, "3 Reasons Why Alberta Oil Prices Have Sunk", *CBC News* (4 October 2018), online: <cbc.ca/news>.

[201] *Ibid*.

[202] *Ibid*.

The mainstream media and prominent public figures characterized the abnormally high Canadian crude discount as a full-blown national economic crisis,[203] notwithstanding financial analyses such as the Royal Bank of Canada's assessment indicating that the "near-term impact to the Canadian economy is less than some may believe" (i.e. no more than 0.4% of Canadian gross domestic product, and likely less).[204] Rather than calling for the oil-dependent economies of Alberta and Saskatchewan to diversify while at the bottom of the boom-bust cycle typical of volatile natural resource commodities, consistent with the policy analysis of the International Energy Agency,[205] the typical Canadian response was to redouble calls for new oil pipeline construction. For example, Canada's leading (and generally sober) newspaper, *The Globe and Mail*, characterized the problem and its solution thus: "Canada is living in an energy nightmare. The only solution is for Ottawa to focus on getting the Trans Mountain expansion approved in the shortest time possible",[206] climate change consequences be hanged. Remarkably, just as the carbon pricing and Heavy Oil references are framed as being about the constitution, and just as Bill C-69 is framed as being about certainty, efficiency, and approving new pipelines, the crude crisis's climate policy implications were entirely ignored.

Early in 2019, the crude crisis having largely dissipated and returned to its normal level absent the addition of rail or pipeline capacity (although attributable in part to modest production cuts temporarily mandated by the Alberta government), direct calls for pipeline construction, along with indirect calls expressed as opposition to Bill C-69, the "no pipelines bill," continued unabated. Jason Kenney, the leader of the United Conservative Party of Alberta, promised that if elected in the province's spring 2019 election, he would adopt a much more combative approach against Ottawa, other provinces, and environmental advocates over the fate of new oil pipelines.[207] Kenney's argument was that the Trans Mountain expansion has been stalled in part because the governing provincial NDP party has not been aggressive enough.[208] Kenney argued that the federal government ought to constitutionally declare the Trans Mountain pipeline expansion to be in "the general advantage of Canada."[209]Alberta's United Conservative Party's 2018 "Policy Declaration" similarly asserts that the Alberta government should "facilitate private sector pipeline, energy corridor and infrastructure developments that maximize value and opportunities in the

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[203] Dan Healing, "'This is Very Much a Crisis': Prime Minister Justin Trudeau Says of Low Alberta Oil Price", *Global News* (22 November 2018), online: <globalnews.ca>.

[204] Royal Bank of Canada, "Lost in Transportation: Putting the Discount on Canadian Heavy Oil in Context" (9 May 2018), online (pdf): <rbc.com/economics/economic-reports/pdf/other-reports/WCS%20spread_May2018.pdf>.

[205] IEA, *supra* note 9.

[206] "Globe Editorial: Alberta's Disastrous Oil Price Discount? Blame Canada", *The Globe and Mail* (23 November 2018), online: <theglobeandmail.com>.

[207] James Keller, "UCP's Kenney Vows to Take Tougher Stand on Pipelines than Notley's NDP", *The Globe and Mail* (17 February 2019), online: <theglobeandmail.com>.

[208] *Ibid*.

[209] *Ibid*.

extraction, utilization and export of Alberta's energy products."[210] The United Conservative Party's policy platform is silent, tellingly, on the issue of climate change.[211]

The continued support and subsidization of expanding oil and gas production extends beyond Canada. Demand for oil and gas continues to rise globally, and the industry is planning multi-trillion-dollar investments to meet it, far surpassing the global annual investment of approximately US$300 billion.[212] As *The Economist* magazine observes, echoing the IPCC's special report on 1.5 ºC global warming, the next decade will be critical for mitigating climate change. Further observing the failures of technological innovation, activist financial investors, enlightened corporate self-interest, and litigation commenced against major investor-owned oil companies to curb the production and consumption of fossil fuels, *The Economist* resigned itself to the conclusion that "the burden must fall on the political system."[213]

The political system in Canada does not provide grounds for optimism. As discussed in this article, the most prominent public policy issues relevant to fossil fuels and climate change – narrowly-drawn legal disputes over carbon pricing, pipeline approvals, and project assessment more generally – serve only to distract from and delay the far more complex policy questions about how to reconcile demands for robust economic growth and ambitious climate change mitigation.[214] A stunningly candid – if calculated – admission of the federal government's failure to date to meaningfully address climate change was recently expressed as a "non sequitur" in the widely-reported resignation in early 2019 of Gerald Butts, the Principal Secretary and primary political advisor of the Prime Minister. According to Mr. Butts:

> I also need to say this (and I know it's a non sequitur). Our kids and grandkids will judge us on one issue above all others. That issue is climate change. I hope the response to it becomes the collective, non-partisan, urgent effort that science clearly says is required. *I hope that happens soon*.[215]

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[210] United Conservative Party, "Policy Declaration 2018" at 8, online (pdf): <unitedconservative.ca/Content/UCP%20Policy%20Declaration.pdf>.

[211] Following his election as provincial premier in the spring of 2019, Kenney began publicly contemplating a constitutional challenge to Bill C-69. For further background, see John Paul Tasker, "Kenney Warns of Constitutional Challenge if Environmental Assessment Overhaul is Passed as Written", *CBC News* (2 May 2019), online: <cbc.ca/news>.

[212] "Crude Awakening: ExxonMobil and the Oil Industry are Making a Bet that Could End up Wrecking the Climate", *The Economist* (9–15 February 2019) at 9.

[213] *Ibid*.

[214] See e.g. Nathalie Chalifour & Jason MacLean, "Courts Should Not Have to Decide Climate Policy", *Policy Options* (21 December 2018), online: <policyoptions.irpp.org>; Jason MacLean, "The Carbon Tax Case is a Dangerous Political Game", *The Globe and Mail* (13 February 2019), online: <theglobeandmail.com>; MacLean, Chalifour & Mascher, *supra* note 11.

[215] The Canadian Press, "Full Text of Gerald Butts's Resignation Letter", *The Globe and Mail* (18 February 2019), online: <theglobeandmail.com> [emphasis added].

Such is the "peril of pipelines and the riddle of resources," the theme of this timely special issue: Despite the clear scientific and moral basis for urgent and ambitious action on climate change, we continue to delay meaningful action while we support and subsidize fossil fuels production.[216]

How to break this paradoxical and perverse cycle? This is *the question* that climate science, law, and policy research must answer, and soon.[217] Doing so will require interdisciplinary collaboration both among academics and practitioners at all levels of policy intervention. Indeed, this urgent question calls for an entirely new field of its own.[218]

[216] As of this writing, it has been ten years since the federal government promised to eliminate subsidies to fossil fuels production and export in Canada, which is estimated to exceed $3 billion annually. So extensive is the extent of the Canadian government's subsidization of oil and gas activities, and so reluctant is the government to fully disclose the full extent of its subsidization of the industry while it defends its approach to mitigating climate change, over 20 months after the Auditor General of Canada observed that the government could not identify and itemize its non-tax-based support for the industry, the government has still yet to do so: see Carl Meyer, "'It's Like Pulling Teeth': Catherine McKenna Accused of Stalling on Fossil Fuel Subsidies", *National Observer* (14 February 2019), online: <nationalobserver.com>.

[217] Answering this question is beyond the scope of this or any one article. Indeed, it deserves a special issue all its own. The central importance and urgency of this question is illustrated, for example, by the theme of the upcoming tenth International Sustainability Transitions Conference, whose theme is the challenge of accelerating such transitions, especially in light of (1) the challenges faced by countries like Canada, Australia, and many developing states with substantial—and politically influential—export-oriented resource-extraction sectors, and (2) the need to integrate the experience and self-governance of Indigenous peoples into sustainability transitions research and policy. For more information on this especially pertinent conference, see the call for submissions, online: <carleton.ca/istconference/call-for-papers/>. See also Jason MacLean, Meinhard Doelle & Chis Tollefson, "The Science, Law, and Politics of Canada's Pathways to Paris: Introduction to the *UBC Law Review's* Special Section on Canada and Climate Change" (2019) 52:1 UBC L Rev 225.

[218] Thomas Sterner et al, "Policy Design for the Anthropocene" (2019) 2:1 Nature Sustainability 14 at 20.