

Schulich School of Law, Dalhousie University

## Schulich Law Scholars

---

Articles, Book Chapters, & Popular Press

Faculty Scholarship

---

2016

### **Polyjural and Polycentric Sustainability Assessment: A Once-in-a-Generation Law Reform Opportunity**

Jason MacLean

Meinhard Doelle

Chris Tollefson

Follow this and additional works at: [https://digitalcommons.schulichlaw.dal.ca/scholarly\\_works](https://digitalcommons.schulichlaw.dal.ca/scholarly_works)



Part of the [Environmental Law Commons](#)

---

**POLYJURAL AND POLYCENTRIC SUSTAINABILITY ASSESSMENT:  
A ONCE-IN-A-GENERATION LAW REFORM OPPORTUNITY**

**Jason MacLean**, Assistant Professor, Bora Laskin Faculty of Law, Lakehead University  
([jmaclea4@lakeheadu.ca](mailto:jmaclea4@lakeheadu.ca))

**Meinhard Doelle**, Professor of Law, Associate Dean, Research, and Director of the  
Marine & Environmental Law Institute, Schulich School of Law, Dalhousie University  
([mdoelle@dal.ca](mailto:mdoelle@dal.ca))

**Chris Tollefson**, Professor of Law, University of Victoria; and Executive Director of the  
Pacific Centre for Environmental Law and Litigation ([ctollef@uvic.ca](mailto:ctollef@uvic.ca))

DRAFT. Please do not cite or quote without the permission of the authors.

*Forthcoming (2016) 30:1 Journal of Environmental Law and Practice*

**ABSTRACT**

The Canadian environmental assessment (EA) regime is broken. At a time when the Canadian economy is both increasingly sluggish and unsustainable, we have an obligation – and perhaps a once-in-a-generation opportunity – to fundamentally reform EA to enable it to finally live up to its promise of promoting sound and sustainability-based decisions. This task is even more pressing in light of the global commitment under the Paris Climate Change Agreement to rapidly transition to greenhouse gas emissions neutrality. Among the many priorities of meaningful EA reform – moving beyond project-level assessments, focusing on net positive contributions to sustainability, avoiding costly trade-offs among interdependent economic, ecological, and social objectives – we focus on the overarching need for polyjural collaboration and polycentric consensus-based decision-making. We argue that any serious effort to move from project-level EAs focused exclusively on adverse biophysical impacts towards a fully integrated, sustainability-based assessment (SA) regime requires a polyjural and polycentric approach capable of facilitating collaborative experimentation among multiple jurisdictional actors, including the federal government, provinces, territories, municipalities, Indigenous peoples, NGOs, academia, project proponents and industry groups, and the Canadian public. After examining the constitutional and political dimensions of the federal and provincial governments' role in EA, we provide two compelling rationales for transitioning to a SA regime. The paper concludes by setting out a series of possible forms of SA for the purpose of informing the federal government's review of its EA regime. In particular, we identify and analyze the competing options for jurisdictional cooperation, collaboration, and consensus-based assessment processes along with the constitutional and practical policy implications of each.

**POLYJURAL AND POLYCENTRIC SUSTAINABILITY ASSESSMENT:  
A ONCE-IN-A-GENERATION LAW REFORM OPPORTUNITY**

*... the level of ambition set by the Paris Agreement will require global emissions to approach zero by the second half of the century and that all governments, Indigenous peoples, as well as civil society, business and individual Canadians, should be mobilized in order to face this challenge, bringing their respective strengths and capabilities to enable Canada to maximize the economic growth and middle class job opportunities of a cleaner, more resilient future[.]*<sup>1</sup>

**I. INTRODUCTION**

Considered by some as “faddish and fuzzy,” the idea of sustainability is nonetheless “here to stay.”<sup>2</sup> According to *The Economist*, a newspaper that champions “individual freedom, free markets and a limited state”,<sup>3</sup> “there is no getting away from the subject.... Last year the UN’s Sustainable Development Goals were adopted. Many investors increasingly fret over environmental risks, and are demanding policies that lessen them. Consumers care more, too, as a rash of examples attests.”<sup>4</sup> But as *The Economist* also observes, after two decades of many worthy initiatives, “acting to implement sustainable practices in a meaningful way is still far harder than gushing about it.”<sup>5</sup> Or as the Body Shop’s Director of International Campaigns puts it, “sustainability is just being slightly less awful.”<sup>6</sup>

Enter environmental assessment (EA). In a recent presentation on the future of EA in Canada, the 40-year legacy of federal EAs was characterized as “making bad projects a little less bad.”<sup>7</sup> More recently, another commentary on EA observed that the ability of EA to “alter the trajectory of economic activities in the direction of sustainability has never been fully realized.”<sup>8</sup>

---

<sup>1</sup> Canadian Intergovernmental Conference Secretariat, “Vancouver Declaration on clean growth and climate change”, (3 March 2016), online: <<http://www.scics.gc.ca/english/conferences.asp?a=viewdocument&id=2401>> [emphasis added].

<sup>2</sup> “Companies’ green strategies: In the thicket of it”, *The Economist*, (30 July 2016) at 52.

<sup>3</sup> “Liberal blues: The many meanings of liberalism”, *The Economist*, (30 July 2016) at 70.

<sup>4</sup> “Companies’ green strategies”, *supra* note 2.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> Robert B. Gibson, Meinhard Doelle & A. John Sinclair, “Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment,” Paper Presented at the *Journal of Environmental Law and Practice’s* 5<sup>th</sup> Biennial Conference, “Après ... le Déluge”: Future Directions of Environmental Law and Policy in Canada,” University of Calgary Faculty of Law, Calgary, Alberta, June 5-7, 2015.

<sup>8</sup> Mark Winfield, “A New Era of Environmental Governance in Canada: Better Decisions Regarding Infrastructure and Resource Development Projects” (May 2016), Metcalf Foundation Green Prosperity Papers, online: <<http://www.metcalf.com>>. The concepts of sustainability and EA are closely related, both chronologically and conceptually. Moreover, as Winfield explains, there is a sense shared among many that sustainability and EA are concepts that have promised much while delivering little. Our aim in this paper is to bring these concepts together in a novel way that is capable of fulfilling their shared promise.

The Canadian EA regime is broken, a regrettable fact recognized by the federal government's comprehensive review of the federal EA regime announced in 2016.<sup>9</sup> At a time when the Canadian economy is both increasingly sluggish and unsustainable, we have an obligation – and perhaps a once-in-a-generation opportunity – to fundamentally reform EA to enable it to finally live up to its promise of promoting sound and sustainability-based decisions. This task is even more pressing in light of the global commitment under the Paris Climate Change Agreement to rapidly transition to greenhouse gas (GHG) emissions neutrality.<sup>10</sup> The implications of this agreement for Canada are profound: not only must we determine how to radically reduce our economy-wide GHG emissions, but we must also determine how to adapt to and take advantage of the economic challenges and opportunities that will arise in association with this global transition.

Among the many priorities of meaningful EA reform – moving beyond project-level assessments, focusing on net positive contributions to sustainability, avoiding costly trade-offs among interdependent economic, ecological, and social objectives – we focus on the overarching need for polyjural collaboration and polycentric consensus-based decision-making. In our view, any serious effort to move from project-level EAs focused exclusively on adverse biophysical impacts towards fully integrated strategic and regional assessments (SEA and REA) and, ultimately, sustainability-based assessments (SA), requires a polyjural and polycentric SA regime capable of facilitating collaborative experimentation among multiple jurisdictional actors, including the federal government, provinces, territories, municipalities, Indigenous peoples, NGOs, academia, project proponents and industry groups, and the Canadian public.

Our paper unfolds as follows. Part II describes the federal government's role in EA. We argue that federal jurisdiction to conduct comprehensive EAs must be examined at three key stages: (1) in deciding whether to conduct an assessment; (2) in deciding the scope of an assessment; and (3) in post-EA decision-making processes. Examining EA at these three stages reveals a significant gap between the perceived and real constitutional constraints on the federal government's ability to base its EA processes and post-assessment decision-making on the principle of sustainability. The federal government's jurisdiction to make decisions based on the integration of social, economic, and environmental considerations is far broader than commonly understood.

---

<sup>9</sup> Government of Canada, "Environmental assessment processes: Draft Terms of Reference for Expert Panel", online: <<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/share-your-views/eap-draft-terms-reference.html>>. See also Chris Tollefson, "Canada's current environmental assessment law: a tear-down not a reno", *Policy Options*, (13 July 2016), online: <<http://policyoptions.irpp.org/magazines/july-2016/canadas-current-environmental-assessment-law-a-tear-down-not-a-reno/>>; see also Jason MacLean, "How to restore trust in Canada's environmental regulations", *Toronto Star*, (23 June 2016), online: <<http://policyoptions.irpp.org/magazines/july-2016/canadas-current-environmental-assessment-law-a-tear-down-not-a-reno/>>.

<sup>10</sup> *Paris Agreement*, being an Annex to the *Report of the Conference of the Parties on its twenty-first session, held in parties 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, Decision 1/CP.21, CP, 21st Sess., FCCC/CP/2015/10/Add.1 at 21-36, online: <<http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>>. For an overview of the agreement, see Meinhard Doelle, "The Paris Agreement: Historic Breakthrough or High Stakes Experiment?" (2016) 6(1-2) *Climate Law*, forthcoming.

Part III explores the present and future role of the provinces in EAs over which the federal government has jurisdiction. It considers three issues: (1) the relevant constitutional principles and case law where federal and provincial EA jurisdiction intersect; (2) the recent retreat of the federal government from taking a lead role in multijurisdictional EAs through a cluster of new initiatives characterized by some EA scholars as federal “retrenchment”; and (3) potential alternatives to retrenchment that set the stage for managing polyjural and polycentric SAs capable of delivering efficient, effective, and socially-licensed policy outcomes.

Part IV argues that the move from EA to SA depends on moving from bi-jural federal-provincial cooperation and so-called “harmonization” to polyjural and polycentric decision-making, or legal ordering that emerges from formal and informal interactions and collaborations among multiple levels of government and interested stakeholders. We proceed by providing two closely related rationales for this conceptual move: (1) a substantive rationale, and (2) a “realpolitik” rationale grounded in high-profile disputes over natural resources projects in Canada, including the Federal Court of Appeal’s recent decision in the Northern Gateway case.<sup>11</sup>

Part V concludes by setting out a series of possible forms of SA for the purpose of informing the federal government’s review of its EA regime. In particular, it identifies and analyzes the competing options for jurisdictional cooperation, collaboration, and consensus-based assessment processes along with the constitutional and practical policy implications of each.

## **II. THE FEDERAL GOVERNMENT’S ROLE IN EA: CONSTITUTIONAL LAW AND POLITICS**

The jurisdictional landscape as it applies to EA is complex as the environment touches on many federal and provincial areas of jurisdiction. An inherent part of this complexity is the fact that the full implications of proposed activities cannot be properly understood, if at all, until an assessment is well underway if not completed.<sup>12</sup> This complexity is exacerbated as EA shifts from a process focused on a technical assessment of biophysical effects to the consideration of a broader range of impacts, benefits, risks, and uncertainties. The complexity is further amplified as EA moves from a focus on individual projects to the consideration of broader policies, plans, and programs through the addition of strategic and regional assessments to the EA toolbox.

In light of these layers of complexity, it is not surprising that federal law-makers and administrators have been reluctant to apply the federal EA process and to broaden the scope of federal EA to the full extent of federal jurisdiction. The effect, unfortunately, has been to seriously hamstring the effectiveness of federal EA as a tool for sound decision-making. Most relevant to the issue at hand, a limited understanding of the extent

---

<sup>11</sup> *Gitxaala Nation v. Canada*, 2016 FCA 187 (CanLII).

<sup>12</sup> This creates the potential for different conclusions at the triggering and the decision-making stages of the EA process about the basis for and scope of federal jurisdiction over the assessed activity.

of federal jurisdiction can eliminate otherwise effective approaches to jurisdictional harmonization of EA.

A thorough understanding of the full jurisdiction of each level of government to carry out EA is critical for EA to realize its potential as a tool for good decision-making to facilitate and accelerate the transition to sustainability, including through jurisdictional cooperation. As federal EA moves to the consideration of economic, social, and cultural implications of proposed human activities at project, strategic, and regional levels, the consideration of the limits of federal jurisdiction must similarly broaden.<sup>13</sup>

In this Part, we consider the jurisdiction of the federal government over EA in light of the key elements of next generation EA. The extent and limits of federal jurisdiction in Canada are critical to an understanding of the jurisdiction of other levels of government, such as provincial, municipal, and Aboriginal governments. Federal jurisdiction in an environmental context is considered through the interplay among federal territorial powers (*i.e.*, powers attaching to federal lands and offshore areas), functional powers, and conceptual powers.<sup>14</sup>

From a territorial perspective, it is helpful to think of Canada as made up of two types of territory, territory in which significant areas jurisdiction have been assigned to the provinces, and territory where the federal government is assigned comprehensive jurisdiction.<sup>15</sup> Areas of broad provincial jurisdiction are limited by the territorial boundaries of each province, and generally do not include federal lands within the provinces.

Areas of comprehensive federal constitutional jurisdiction include all parts of Canada beyond the boundaries of the provinces, including the three northern Territories, and offshore areas beyond the boundaries of the provinces. Federal lands within the territory of the provinces are also subject to comprehensive federal jurisdiction. For EA, this means, as a starting point, that there is broad federal power to carry out comprehensive EAs of activities on federal lands within the provinces, as well as in the three Territories and offshore.<sup>16</sup>

---

<sup>13</sup> The need for this transition to the next generation EA is explored elsewhere. For a detailed assessment of the importance of these transitions for the effectiveness of EA, see Robert B. Gibson, Meinhard Doelle & A. John Sinclair, “Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment” (2015) 29 *Journal of Environmental Law and Practice* 257, which summarizes the working conclusions of a lengthier monograph posted at <<https://uwaterloo.ca/next-generation-environmental-assessment/research-contributions/dissertations-theses-monographs-and-major-reports>> [“Next Generation EA”].

<sup>14</sup> These issues are explored in more detail elsewhere. See e.g. Meinhard Doelle & Chris Tollefson, *Environmental Law: Cases and Materials 2<sup>nd</sup> ed.* (Toronto: Thomson/Carswell, 2013). See also Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham, Ont.: LexisNexis Butterworths, 2008), and Peter W. Hogg, *Constitutional Law of Canada, 5<sup>th</sup> ed.* (Toronto: Thomson/Carswell, 2007).

<sup>15</sup> They can be thought of as provincially- and federally-controlled territory, respectively.

<sup>16</sup> The issue is somewhat more complicated as jurisdiction will not only be affected by the location of the activity, but also by the location of the impacts of the activity.

Federal functional and conceptual powers are equally critical to understanding the extent and limits of federal constitutional jurisdiction to carry out EAs of activities in the remaining territory of Canada, *i.e.* within the boundaries of Canada's provinces not on federal land. In these areas, provinces have broad jurisdiction to carry out EAs, but the federal level of government still has considerable jurisdiction, which, in many instances, will lead to broad jurisdiction to carry out EAs.

Functional powers, which refer to subject matters that could be affected by activities proposed in the context of EA, establish federal jurisdiction over specific subject matters. Some are focused on specific biophysical issues, such as "Navigation and Shipping" and "Sea Coasts and Inland Fisheries."<sup>17</sup> Others provide a basis for consideration of a broader range of issues, such as jurisdiction over Aboriginal communities and interprovincial transportation.<sup>18</sup>

Conceptual powers, which can be thought of as tools for the exercise of federal power, add to the issues that may warrant a federal assessment of proposed activities. They include powers over federal spending, taxation, trade and commerce, federal works and undertakings, works declared to be for the advantage of multiple provinces, interprovincial and international aspects of activities, and the residual power over peace, order, and good government (POGG). The criminal law power is also considered a conceptual power, as it can be utilized to address societal challenges in a range of subject areas, including environmental protection.

The extent of federal jurisdiction to carry out an EA, the appropriate scope of an assessment, and the jurisdiction to make decisions about proposed activities have been the subject of much discussion among academics and policy-makers. Given the generally very cautious approach by federal law-makers and administrators, litigation on federal jurisdiction over EA has been relatively rare. There are, however, two Supreme Court of Canada cases that considered federal jurisdiction over EA. They involved disputes over the Oldman River Dam and the Red Chris Mine, respectively.<sup>19</sup> These two Supreme Court of Canada decisions are considered next.

In its 1992 landmark case brought by the Friends of the Oldman River, the Supreme Court of Canada considered, for the first time, the extent of federal jurisdiction over EA. It did so in the context of the application of Environmental Assessment and Review Process (EARP) Guidelines Order to the Oldman River Dam project. One of the key issues in the case was whether the federal government had jurisdiction to carry out an environmental assessment of the project before deciding whether and under what conditions to issue federal fisheries and navigation licenses to permit the project to proceed.

---

<sup>17</sup> *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), ss. 91(10) and 91(12) [*"Constitution Act, 1867"*].

<sup>18</sup> *Ibid.*, s. 91(2) "The Regulation of Trade and Commerce," and s. 91(24) "Indians, and Lands required for Indians."

<sup>19</sup> *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 [*"Oldman"*], and *Mining Watch Canada v. Canada (Fisheries and Oceans)*, [2010] 1 S.C.R. 6 [*"Red Chris"*].

The Supreme Court in *Oldman* recognizes that there are three key decision points in an EA from a constitutional perspective: (1) the decision whether to require a federal EA; (2) the decision about the scope of the federal EA; and (3) federal project decisions after the completion of the EA. *Oldman* offers considerable clarity on the first two, but leaves some uncertainty about the third.

With respect to the ability to require a federal EA, the Supreme Court of Canada clarifies that federal jurisdiction to carry out the EA can either be in the form of jurisdiction over the activity itself, or over a potential impact of the project. The court uses an interprovincial railway project as an example of the former, and a project with potential impacts on fisheries and navigation as examples of the latter. In case of the railway project, the federal jurisdiction arises from the federal jurisdiction over the project under section 91(10) of the *Constitution Act, 1867*. In this case, it does not matter what the impact of the project might be. In case of the impact on fisheries and navigation, it does not matter what the project is, what matters is that it has the potential to affect fisheries or navigation.

With respect to the scope of a federal assessment, the Supreme Court clarifies that if there is jurisdiction to carry out an assessment, the assessment can be comprehensive, and can, at least in cases such as railway projects where the jurisdiction is over the project, include impacts, benefits, risks, and uncertainties that otherwise fall within the jurisdiction of the provinces. The case has created some ambiguity about whether the scope of an assessment is more limited where the federal jurisdiction is based on specific impacts rather than jurisdiction over the activity itself.<sup>20</sup>

It is clear that the project decision has to be separated from the decision to carry out an EA in the first place because the decision to carry out an EA has to be made in the face of uncertainty and information gaps (that are to be filled through the EA), whereas the project decision is made after at the conclusion of the information gathering and assessment process. Jurisdictional issues relating to the post-assessment project decision are not fully resolved in *Oldman*. In particular, if there is jurisdiction to make a project decision, *Oldman* does not decide whether a federal decision-maker can consider all impacts, benefits, risks, and uncertainties in deciding whether and under what conditions to allow the activity to proceed, or whether there are constitutional limits on what can be considered. Views on the interpretation of the *Oldman* decision in this regard differ.<sup>21</sup>

Twenty years after the *Oldman* decision, the Supreme Court of Canada had the opportunity to again consider the extent of federal jurisdiction over EA, this time in the context of the application of the *Canadian Environmental Assessment Act* (1992) to the proposed Red Chris mine project. The case centered on the question of the scope of the project to be assessed and related process decisions, but the court also considered

---

<sup>20</sup> See Doelle, *The Federal Environmental Assessment Process*, *supra* note 14. See also *Quebec (Attorney General) v. Moses*, [2010] 1 S.C.R. 557 at paras. 36-40; Marie-Ann Bowden & Martin Olszynski, "Old Puzzle, New Pieces: Red Chris and Vanadium and the Future of Federal Environmental Assessment" (2011) 89 Can. Bar. Rev. 445 at 479.

<sup>21</sup> See the analysis of Kennett & Doelle in *ibid.*

jurisdictional issues and related questions about multijurisdictional cooperation. The court rejected narrow scoping as an efficient approach to inter-jurisdictional cooperation. Instead, it re-enforced the *Oldman* principle that if there is federal jurisdiction to assess a proposed activity, there is jurisdiction to do a comprehensive assessment of impacts, benefits, risks, and uncertainties. The *Red Chris* decision does not, however, explicitly address the key area of uncertainty left in *Oldman*, whether there are limits at the decision-making stage of the process, and if so, what those limits are.

Other cases, while not directly dealing with EA, have continued to shape our understanding of federal jurisdiction over the broad range of issues that are relevant in a modern EA process. Cases such as *Zellerbach*,<sup>22</sup> *Hydro Québec*,<sup>23</sup> and the recent Federal Court of Appeal ruling in *Syncrude*<sup>24</sup> have demonstrated consistently that the federal government is to be given considerable latitude in its efforts to deal with the many serious environmental challenges we face.

*Syncrude* in particular, while dealing with regulatory powers under the *Canadian Environmental Protection Act*<sup>25</sup> rather than EA, confirms the important role of the criminal law power for federal jurisdiction over environmental protection, and notably concludes that federal efforts to protect the environment can be integrated with economic and other factors without overstepping the limits of federal jurisdiction over environmental protection under the criminal law power. This would suggest much broader powers to make decisions and impose conditions to implement the results of a comprehensive, sustainability-based assessment (SA) than assumed in the design and implementation of the current federal EA regime. The court makes the point that integrated solutions are not colourable attempts to invade provincial jurisdiction, but are essential elements of effective environmental governance.<sup>26</sup>

Similarly, a long list of cases has helped to clarify the federal government's role with respect to Aboriginal rights and title.<sup>27</sup> Added to this are recent developments, such as Canada's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the federal government's commitment to a Nation-to-Nation relationship with Aboriginal peoples, and the federal government's endorsement of the recommendations of the Truth and Reconciliation Commission.<sup>28</sup> While much remains to

<sup>22</sup> *R. v. Crown Zellerbach Canada Ltd.*, [1981] 1 S.C.R. 401 ["Zellerbach"].

<sup>23</sup> *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 ["Hydro Québec"].

<sup>24</sup> *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160 ["Syncrude"].

<sup>25</sup> *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.

<sup>26</sup> *Syncrude*, *supra* note 24 at paras. 91-93.

<sup>27</sup> See e.g. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 73, ["Haida"]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 ["Taku River"]; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, ["Mikisew"]; *Ka'A'Gee Tu First Nation v. Canada (Attorney General)*, 2012 FC 297, ["KTFN"]; and *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257 ["Tsilhqot'in"].

<sup>28</sup> While the current federal government recently embraced UNDRIP, it subsequently stated that it will not adopt UNDRIP directly into Canadian law. See James Munson, "Ottawa won't adopt UNDRIP directly into Canadian law: Wilson-Raybould", *iPolitics*, (12 July 2016), online: <<https://ipolitics.ca/2016/07/12/ottawa-wont-adopt-undrip-directly-into-canadian-law-wilson-raybould/>>. Details regarding the Truth and

be worked out, it is clear that the federal government's responsibility with respect to Aboriginal peoples provides it with considerable powers to carry out comprehensive assessments of proposed activities to ensure that the government respects Aboriginal rights and title, the duty to consult and accommodate, and the opportunity to work cooperatively with Aboriginal governments on the assessment of proposed activities.

So where does this leave us with respect to federal jurisdiction to carry out EA? It suggests that we need to consider federal jurisdiction at three key stages: (1) in deciding whether to do an assessment; (2) in deciding the scope of an assessment, and (3) in the post-assessment decision-making processes. With respect to the decision to carry out a federal assessment, the process would need a trigger that gives careful consideration to the potential of a proposed activity to affect an area of federal jurisdiction. It seems clear that in principle, the federal government has the constitutional authority to carry out an assessment where a proposed activity has a realistic potential to affect an area of federal jurisdiction. With respect to the scope of the assessment, it seems unlikely in light of cases such as *Oldman*, *Red Chris*, and *Syncrude* that once a federal EA is triggered, courts would impose limits on its scope. And with respect to post-assessment decision-making, there is some uncertainty about the precise limits of federal jurisdiction, but it is clear that the results of the assessment need to lay a proper foundation for federal decision-making. If the assessment identifies clear impacts on areas of federal jurisdiction, there would be a solid basis for federal jurisdiction that implements an integrated approach to addressing the impacts identified. However, where an assessment discloses no impacts triggering federal jurisdiction, the federal government's jurisdiction may be more circumscribed (e.g., limited to information gathering but not extending to post-assessment decision-making). In short, the results of the assessment will necessarily help determine the decision-making authority of the federal government.

It is clear from the above analysis that there is a significant gap between the perceived and real constitutional constraints on the federal government's ability to base its project, strategic, and regional assessment processes and post-assessment decision-making on the principle of sustainability. The gap between perceived and actual constitutional powers is particularly wide with respect to the scope of assessments, and with post-assessment decision-making. The pre-2012 *Canadian Environmental Assessment Act* offered a solid (but cautious) approach to federal-provincial harmonization that was comfortably within federal jurisdiction at the project level with a focus on biophysical effects. It could have been more comprehensive in the information-gathering phase, and could have considered a broader range of issues in its post-assessment decision-making.

For REA and SEA, there seems to be an underlying assumption that beyond the assessment of federal policies, plans, and programs, regional and strategic assessments can only be carried out with the cooperation of provinces. What has been missing from the discussion, however, is a clear separation of the information gathering and assessment process from the decision-making process. Assuming that REAs and SEAs are primarily intended to offer appropriate background and contextual information for valid federal

policy-making and for project assessments and project decision-making, there is no reason to conclude that even a “federal only” REA or SEA would be challenged successfully on constitutional grounds, as long as the REA or SEA includes issues within federal jurisdiction. At the project decision-making stage following a project assessment that considered the results of an REA or SEA, on the other hand, the critical question will be whether the issues raised in *Oldman* and *Syncrude* lead to a conclusion that the project decision is also a valid exercise of federal jurisdiction. Clearly, these two cases suggest that federal government has considerable latitude here, but there will be limits that have yet to be clearly established by the courts.

### III. THE PROVINCIAL ROLE IN BI-JURAL EAS: OPTIONS AND OPPORTUNITIES

In Part II above, we explored the jurisdictional scope and limits of the federal government’s constitutional authority over EA. In Part III, we now consider the current and potential future role of the provinces in EAs over which the federal government has jurisdiction.

In a federal state, it is virtually inevitable that there will be projects that are subject to *dual jurisdiction*, in addition to those that fall exclusively within the jurisdiction of either the national or, alternatively, a sub-national level of government. In this paper, we are primarily interested in the challenges associated with EAs for projects that fall under dual jurisdiction.

The discussion in Part III is in two sections. First, we consider the relevant constitutional principles and case law that govern instances where federal and provincial EA jurisdiction intersects. This discussion includes a consideration of two recent court decisions that are helpful in understanding the judicial attitude to EA and interjurisdictional conflict.

We then offer an overview of the recent history of governmental efforts to grapple with the practical and political challenges associated with managing EAs for projects that are under dual federal-provincial jurisdiction. In the early days of federal EA, this challenge was largely addressed in an *ad hoc* fashion, through bilateral federal-provincial agreements entered into under the auspices of “harmonization.” During the Harper years, however, a new approach took hold which, among other things, saw the federal government retreat from taking a lead role in many multijurisdictional EAs through a cluster of new initiatives that Fitzpatrick and Sinclair call “retrenchment.”<sup>29</sup> We consider and critique the philosophy and recent experience under “retrenchment” with a view to setting the stage for exploring alternative approaches to managing multijurisdictional EAs capable of delivering more effective, efficient, and socially licensed policy outcomes.

---

<sup>29</sup> See P.J. Fitzpatrick & A. John Sinclair, “Multi-jurisdictional environmental assessment” in K.S. Hanna, ed, *Environmental Impact Assessment: Practice and Participation*, 3<sup>rd</sup> ed. (Toronto: Oxford University Press, 2016) at 354-372.

**(a) Multijurisdictional EAs: Constitutional and practical realities**

In Part II above, we argued that the constitutional authority of the federal government to engage in EAs pertaining to issues or subject matter in which it has an interest is quite broad and robust; and certainly more broad and robust than it is commonly credited with. The parameters of this constitutional jurisdiction are defined by the courts, which have, for the most part, employed a liberal approach.<sup>30</sup>

At the same time, it would be fair to say that Canadian provinces also enjoy broad and robust constitutional authority over EA. This jurisdiction is largely a reflection of the fact that our constitutional regime endows the provincial Crown with ownership of most public lands and resources. With this endowment comes legislative authority to regulate, among other things, in relation to “property and civil rights,” “matters of a merely local or private nature,” “mines and minerals,” “non-renewable natural resources, forestry and electrical energy,” “municipal institutions,” and “local works and undertakings.”<sup>31</sup>

There are some important constraints on the ability to legislate, and hence the ability to conduct EAs, in relation to matters falling within these various heads of power. For one thing, a province’s ability to regulate under an EA regime is limited territorially to projects or activities that physically take place within the province. This has implications in terms of interprovincial projects, as well as those that are proposed to take place in certain federal or international coastal waters.

Other limitations arise where the provincial jurisdiction over a project or activity intersects with a competing federal jurisdictional authority such as “fish and fish habitat,” “navigation and shipping,” or “interprovincial undertakings.” In EAs that involve intersecting federal and provincial authorities, the courts are sometimes enlisted to adjudicate the conflict. Depending on the situation, such conflicts may be resolved by allowing for both levels of government concurrently to regulate or, alternatively, to give exclusive jurisdiction over the matter to a single government.

Recent controversies over interprovincial pipelines have served to generate some useful precedents that illuminate the applicable principles where EA jurisdiction overlaps.

The first of these cases arose out of efforts by the City of Burnaby to enforce its bylaws against Kinder Morgan, the proponent of a pipeline proposed to traverse the municipality. Burnaby claimed that engineering work being done by the proponent to determine the viability of pipeline routing violated City bylaws. The B.C. Supreme Court held the key authority at stake here was the federal power over interprovincial work, including pipelines.<sup>32</sup> In this situation, a provincial law (including a municipal bylaw) that conflicts with federal law governing the undertaking to the extent that the undertaking might be frustrated, is inoperative to the extent of the inconsistency by virtue of the doctrine of

---

<sup>30</sup> Refer back to the discussion in Part II above.

<sup>31</sup> *Constitution Act, 1867*; ss. 92(10), (13), and 16, 92A, and 109; see also Doelle & Tollefson, *Environmental Law*, *supra* note 14 at 167.

<sup>32</sup> *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2015 BCSC 2140 at paras. 65, 75 [“Burnaby”].

federal paramountcy. Likewise, the court held that the Burnaby bylaws were also inoperative by virtue of the doctrine of interjurisdictional immunity, due to extent to which they impaired the core of a federal undertaking.<sup>33</sup>

Even more directly relevant to a consideration of intersecting federal and provincial jurisdiction over EA is a challenge brought by the Coastal First Nations (CFN) to an agreement entered into by the province of British Columbia with the National Energy Board.<sup>34</sup> This so-called “equivalency agreement” purported to fully delegate to the federal regulator all provincial authority to conduct an EA and render an EA “decision” on a broad range of energy projects – including both the Northern Gateway and Kinder Morgan pipeline projects – that were subject to federal and provincial assessments. CFN argued that the province did not have statutory authority to abdicate its authority to make an EA decision on the Northern Gateway project, and that the agreement should be declared invalid to the extent that it purported to delegate this authority to the National Energy Board.

Northern Gateway argued that due to its interprovincial character the pipeline was within the exclusive jurisdiction of the federal government, and accordingly that there was no provincial power to make an EA decision that imposed conditions or requirements on the project. In the alternative, Northern Gateway relied on *Burnaby* to contend that the province’s statutory authority to conduct a provincial assessment and make a provincial decision on the project should be read as inoperative on the basis of federal paramountcy and interjurisdictional immunity.

The B.C. Supreme Court rejected all of Northern Gateway’s submissions. In its view, unlike in *Burnaby*, the province’s EA law did not trench on or impair the core of the federal undertaking. Moreover, the court distinguished the cases where federal jurisdiction over a project has been held to be exclusive on the basis that proposed pipeline and terminal “extends more than 600 kilometres across the Province on predominantly [provincial] Crown land...[and] will have substantial impact on British Columbia’s coastal lands and water.”<sup>35</sup> In the words of the court:

This project...while interprovincial, is not national and it disproportionately impacts the interests of British Columbians. To disallow provincial environmental 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 also go against the current trend in the jurisprudence favouring, where possible, co-operative federalism...<sup>36</sup>

---

<sup>33</sup> *Ibid* at paras. 78-81.

<sup>34</sup> *Coastal First Nations v. British Columbia (Environment)* 2016 BCSC 34 [“CFN”].

<sup>35</sup> *Ibid* at para. 52.

<sup>36</sup> *Ibid* at para. 53.

For federal EA law reform, the take-away lessons from *Burnaby* and *CFN* are that courts will tend to uphold provincial EA laws even where they trench on federal jurisdiction if they are enacted in a bona fide manner to identify and protect provincial interests. Only where the challenged law or measure substantially impairs a core feature or function of a federal law will the courts intervene. Among other things, this non-interventionist posture is founded on an emerging judicial appreciation of the value of co-operative federalism, particularly in the orchestration of public policy in a realm as polyjural and polycentric as environmental assessment.

**(b) From harmonization to retrenchment: Evolving federal policy governing the provincial role in ‘federal’ EAs**

During the first decade-and-a-half after the *Canadian Environmental Assessment Act* was enacted, considerable political energy and attention was focused on addressing the dual or multijurisdictional EA overlap through EA *harmonization*. The goal of harmonization is to rationalize EA processes with a view to reducing duplication, easing the burden on project proponents, and marshaling resources in a more effective and efficient manner.<sup>37</sup> Rhetorically, the ideal of harmonization is a model in which proponents can satisfy all their EA duties by liaising through “one window” with all necessary governmental entities.<sup>38</sup>

These harmonization efforts have been guided and inspired by a national accord on environmental harmonization, signed by Canadian Council of Ministers of Environment (CCME) in 1998.<sup>39</sup> This accord has led to bilateral harmonization agreements between Canada and seven provinces and one territory.<sup>40</sup> Leading EA scholars offer an ambivalent judgment on the efficacy of these agreements. While, over time, these agreements have lent some new administrative consistency to EA processes,<sup>41</sup> in some key areas – most notably, public participation – significant interjurisdictional differences remain.<sup>42</sup> More importantly, progress towards harmonizing the legal architecture and requirements of Canadian EA regimes has been at best modest.<sup>43</sup>

One province that has grown particularly impatient with these harmonization efforts is British Columbia. According to data gathered by the B.C. government, under the former *Canadian Environmental Assessment Act*, EA projects in British Columbia were subject to comprehensive federal EA studies at nearly twice the rate of any other province.

---

<sup>37</sup> Fitzpatrick & Sinclair, “Multi-jurisdictional environmental assessment”, *supra* note 29 at 184.

<sup>38</sup> *Ibid.*

<sup>39</sup> Quebec did not sign the accord. See Canadian Council of Ministers of Environment, *Canada-wide Accord on Environmental Harmonization* (1998), online: <<http://www.ccme.ca/en/resources/harmonization/index.html>>.

<sup>40</sup> Fitzpatrick & Sinclair, *supra* note 29 at 185-186.

<sup>41</sup> *Ibid* at 186.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid* at 188.

Moreover, of the projects that are subject to an EA under B.C. provincial law, about 60% (or 42 out of 71) are also subject to federal EA requirements.<sup>44</sup>

When the former *Canadian Environmental Assessment Act* came up for parliamentary review in 2011, the B.C. government argued forcefully that economic development in the province was being severely hampered by these overlapping requirements.<sup>45</sup> In its view, a new approach to managing overlap was needed. Instead of harmonization, British Columbia argued that the federal government should exempt most projects from federal EA requirements if the project was also subject to a B.C.-led EA. Under this approach, proponents would only be required to undergo “a single (provincial) assessment.”<sup>46</sup>

As a *quid pro quo*, British Columbia would agree not to conduct its own provincial assessment in “certain circumstances” where the federal government was “best suited to conduct the assessment.” Such circumstances would include projects involving “matters of national significance (e.g., interjurisdictional projects).<sup>47</sup> In such cases, the role of the province would be limited to “providing technical input, and administering subsequent provincial permits.”<sup>48</sup>

In support of its argument that the federal government should stand aside and allow British Columbia to lead a single EA under provincial law for most projects falling under dual jurisdiction, the B.C. government claimed that the EA process in British Columbia “meets or exceeds the rigor of the federal environmental assessment process.”<sup>49</sup> To bolster this claim, it submitted a tabular comparison of B.C. and federal EA processes that purported to show that both processes had analogous elements and requirements.<sup>50</sup>

The B.C. government’s submissions on EA reform in 2011 proved highly influential. The following year, when the Harper government unveiled the *Canadian Environmental Assessment Act, 2012*,<sup>51</sup> British Columbia’s proposed changes were embodied, largely intact, in the new law.

---

<sup>44</sup> As of 2011 British Columbia was the location of 32% of all federal-led “Comprehensive Studies”; the next highest percentage of comprehensive studies occurred in Ontario (18%). See the Submission of the B.C. Government to the CEAA Parliamentary Review, online: <[http://www.eao.gov.bc.ca/pdf/BC\\_Submission\\_5Yr\\_Review\\_Nov\\_28\\_2011.pdf](http://www.eao.gov.bc.ca/pdf/BC_Submission_5Yr_Review_Nov_28_2011.pdf)> at 4.

<sup>45</sup> “The current framework has meant billions of dollars in potential projects and thousands of jobs have been lost or tied up due to delays. Addressing the significant problems with the current legislative regimes is a critical factor for BC’s economic success”; *ibid* at 4. It is also notable that in this submission the B.C. government also complained about the volume of federal EA screenings. Ultimately, of course, in the *Canadian Environmental Assessment Act, 2012*, the Harper government responded to this complaint by radically reducing the number of screening reviews, particularly relating to navigation and shipping, and fish and fish habitat protection.

<sup>46</sup> *Ibid* at 6.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid* at 7.

<sup>50</sup> *Ibid* at 12-13 (Appendix 1).

<sup>51</sup> *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 [“CEAA, 2012”].

Fitzpatrick and Sinclair describe the *CEAA, 2012* reform package as federal EA “retrenchment,” a term they employ to characterize a deliberate strategy of “limiting the application of federal EA.”<sup>52</sup> In the realm of multijurisdictional EAs, the package created three new avenues through which the federal government could hand off its EA duties: (1) delegation;<sup>53</sup> (2) substitution;<sup>54</sup> and (3) exemption.<sup>55</sup>

Under both the delegation and substitution powers, the federal government is now empowered to hand off its EA duties to a province or territory in relation to particular projects that would otherwise require a federal EA. In these two situations, the federal government retains the right to make an ultimate decision based on the delegated or substituted EA. The exemption power goes even further. Where this power is exercised, the federal government forfeits its right to make a final EA decision.

Not surprisingly, the province of British Columbia has been quick to take advantage of these new provisions. Since 2012, the province has persuaded the federal government to exercise its new delegation and substitution powers repeatedly. British Columbia has been particularly successful in securing federal agreement to EA substitutions, which now total fourteen and are primarily used in respect of mining and LNG-related projects.<sup>56</sup>

British Columbia has also followed through on its commitment to stand aside and let the federal government go it alone on certain projects of national significance.<sup>57</sup> The B.C. government has entered into two agreements that fall into this category.<sup>58</sup> By far the most controversial of these, of course, is the equivalency agreement concluded in 2010 with the National Energy Board. By virtue of this agreement, as discussed above, the B.C. government purported to give up both its right to conduct an EA of current and future energy projects falling under the jurisdiction of the National Energy Board, but also its authority to make a final EA decision on such projects, including the power to impose conditions on project approval.

Throughout the Northern Gateway hearings, there were loud and persistent calls for the province to repudiate this agreement, and undertake its own made-in-British-Columbia EA. Ultimately, some six years after signing on to this agreement, due to the CFN’s successful legal challenge, the B.C. Environmental Assessment Office is now being required to conduct its own *ex post facto* EAs of both the Northern Gateway and Kinder Morgan projects.

---

<sup>52</sup> Fitzpatrick & Sinclair, “Multi-jurisdictional environmental assessment”, *supra* note 29 at 189.

<sup>53</sup> *CEAA, 2012*, *supra* note 51 at s. 26.

<sup>54</sup> *Ibid* at s. 32.

<sup>55</sup> *Ibid* at s. 37.

<sup>56</sup> For further details, see the website of the B.C. Environmental Assessment Office, online: <<http://www.eao.gov.bc.ca/>>.

<sup>57</sup> *CFN*, *supra* note 34 at paras. 52-53.

<sup>58</sup> The B.C. government refers to these as “equivalency” agreements. To date there are two: (1) the Fairview Terminal Expansion Project – Prince Rupert; and (2) the National Energy Board/B.C. Environmental Assessment Office agreement governing the review of interprovincial energy projects. See B.C. Environmental Assessment Office, online: <[http://www.eao.gov.bc.ca/federal\\_relations.html](http://www.eao.gov.bc.ca/federal_relations.html)>.

Given the reciprocal economic development-related benefits that both the Harper government and the B.C. government secured through *CEAA, 2012*, not only does this package reflect federal EA retrenchment, it also reflects a strong element of “rapprochement” between Ottawa and Victoria. Among other things, this is a clear illustration of why so-called cooperative federalism and harmonization do not necessarily result in improved environmental governance.<sup>59</sup> A new approach is needed, one that moves from uncoordinated and often contentious EAs to an integrated and consensus-based sustainability assessment (SA) regime. In Part IV below, we provide two rationales for this transition; Part V then concludes with a discussion of the possible forms SA might take.

#### **IV. BEYOND B-JURAL FEDERAL-PROVINCIAL EA TO POLYJURAL AND POLYCENTRIC SUSTAINABILITY ASSESSMENT (SA): INDIGENOUS PEOPLES, MUNICIPALITIES, AND CIVIL SOCIETY PARTICIPATION**

In order to move from EA to SA,<sup>60</sup> we must also move beyond the unfulfilled promise of bijural federal-provincial cooperation to the potential of *polyjural* and *polycentric* decision-making. By *polyjural*, we mean legal ordering that emerges, not only out of explicit federal and provincial government initiatives, but also from a broad array of other actors – local communities and municipalities, Indigenous Nations and communities, environmental nongovernmental organizations (ENGOS), various industry participants, consultants, and lobbyists, academic commentators, and other members of the public – and an equally broad array of interactions, formal and informal in nature.<sup>61</sup> By *polycentric*, we mean decision-making that facilitates responsibility, trust, and experimentation with potential solutions among multiple actors at multiple levels of social and political organization.<sup>62</sup> Below we offer two interrelated rationales for

---

<sup>59</sup> See e.g. Mark Haddock, “Comparison of the British Columbia and Federal Environmental Assessments for Prosperity Mine”, online: <[http://northwestinstitute.ca/images/uploads/NWI\\_EAreport\\_July2011.pdf](http://northwestinstitute.ca/images/uploads/NWI_EAreport_July2011.pdf)>.

<sup>60</sup> As the following discussion will hopefully make clear, our view of a polyjural and polycentric SA regime would largely incorporate the core aspects of REA and SEA. However, a complete articulation of the relationship of REA and SEA to SA is beyond the scope of this paper.

<sup>61</sup> Our understanding of polyjurality – and legal pluralism generally – is immeasurably indebted to the work of Rod Macdonald. See in particular Roderick A. Macdonald, “Understanding Regulation by Regulations” in I. Bernier & A. Lajoie, eds, *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) at 81-154. In the Canadian EA context, Gibson, Doelle & Sinclair’s call for “an expansion of basic resources by mobilizing more players, expertise, tools and motivations (in the public government sector, private sector and civil society and among individuals)” prefigures our call here for a polyjural approach to sustainability assessment. See Gibson, Doelle & Sinclair, “Next Generation EA”, *supra* note 13. So too does the First Ministers’ “Vancouver Declaration on clean growth and climate change,” which recognizes that “the level of ambition set by the Paris Agreement will require global emissions to approach zero by the second half of the century and that all governments, Indigenous peoples, as well as civil society, business and individual Canadians, should be mobilized in order to face this challenge, bringing their respective strengths and capabilities to enable Canada to maximize the economic growth and middle class job opportunities of a cleaner, more resilient future”. See *Vancouver Declaration*, *supra* note 1.

<sup>62</sup> A leading exponent of polycentric decision-making is the Nobel-Prize-winning economist Elinor Ostrom. See e.g. Elinor Ostrom, “A Polycentric Approach for Coping with Climate Change” (2009), Background Paper to the 2010 World Development Report, The World Bank, online:

adopting a polyjural and polycentric approach to SA: (1) a substantive rationale, and (2) a “realpolitik” rationale.

### (a) The substantive rationale for polyjural and polycentric SA

The substantive rationale for moving beyond bijural federal-provincial EA harmonization to a polyjural and polycentric SA model stems from the core elements of sustainability itself. Although a contested concept, the core elements of sustainability have been well established by decades of deliberation, experimentation, and social learning.<sup>63</sup> Current conditions and prevailing trends in the biophysical and socioeconomic dimensions of human wellbeing are not sustainable.<sup>64</sup> Moreover, the biophysical and socioeconomic dimensions of our wellbeing are inextricably interlinked.<sup>65</sup>

Driving *unsustainability* are three contributing factors: (1) excessive demands on our planetary boundaries, including unprecedented and still rising atmospheric greenhouse gas emissions, biodiversity loss, groundwater and soil depletion, ocean acidification, and the depletion of fish stocks; (2) insufficient nutrition, clean water, sanitation, and access to health care for much of the world’s population; and (3) the reproduction of manifestly unjust political and legal structures that perpetuate and deepen the first two drivers of unsustainability. These factors are simultaneously cultural, economic, political, legal, and biophysical.<sup>66</sup>

Sustainability is thus at once an analytic and a normative concept.<sup>67</sup> Analytically, the concept of sustainability encompasses the complex interactions among and effects of economic activity, cultural, political, and legal arrangements, and the Earth’s biophysical environment, including the planetary boundaries we are currently exceeding.<sup>68</sup> Normatively, sustainability expresses an aspirational view of the future characterized by social inclusivity and equality coupled with respect for and maintenance of our planet’s biophysical boundaries.<sup>69</sup>

---

<<http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-5095>>; see also Elinor Ostrom, “Beyond Markets and States: Polycentric Governance of Complex Economic Systems” (2010) 100 *American Economic Review* 1. Insofar as polycentrism also emphasizes the importance of making decisions as close to the scene of events and responsible actors as possible, polycentrism complements the principle of subsidiarity. See e.g. the Supreme Court of Canada’s discussion of this principle in *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at para. 3. Once again, Gibson, Doelle & Sinclair anticipate the need for polycentric assessment in their call for “expanding understanding, engagement and collaborative ability, in part by combining decision making with mutual learning, consensus building, and fostering the skills needed in democratic deliberation and decision making.” Gibson, Doelle & Sinclair, “Next Generation EA”, *supra* note 13.

<sup>63</sup> Gibson, Doelle & Sinclair, “Next Generation EA”, *supra* note 13.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Jeffrey D. Sachs, *The Age of Sustainable Development* (New York: Columbia University Press, 2015) at 3.

<sup>68</sup> Johan Rockström *et al.*, “A safe operating space for humanity” (2009) 461.7263 *Nature* 472.

<sup>69</sup> Sachs, *The Age of Sustainable Development*, *supra* note 67 at 3. Sachs’ conception is slightly different, calling for “socially inclusive and environmentally sustainable economic growth.” We are not so sure, however, that perpetual economic growth can be reconciled with the other core elements of sustainability.

To effectively integrate the social, economic, and environmental elements of sustainability and realize its aspirations, we must add a fourth element: good governance.<sup>70</sup> Sachs notes – rightly – that good governance cannot refer only to governments;<sup>71</sup> it must also include corporate actors, who often exert an outsize influence on the political process.<sup>72</sup> Sachs’ point is correct, but incomplete. In order to achieve the aspirational goals of sustainability – including *social inclusivity and equality* – the analytic governance model of sustainability must also be socially inclusive and equal – *i.e., polyjural and polycentric*.<sup>73</sup> As Gibson, Doelle, and Sinclair observe, “current governance resources and approaches are insufficient, and [...] authoritarian alternatives lack the potential for complex understanding and lasting credibility required for the job.”<sup>74</sup> Polyjural and polycentric governance, by contrast, not only reflects the analytic and normative nature of sustainability, but it also produces better substantive decisions.

It is well established, for example, that enhanced opportunities for public participation have improved the quality of environmental decision-making.<sup>75</sup> Structures for public participation were originally significant features of EA.<sup>76</sup> These structures have typically included public notices and invitations to comment on proposed projects, opportunities to make depositions and, in some cases, more formal presentations of evidence before EA panels and hearings.<sup>77</sup> Significant as these opportunities have proven in some instances, “*their ability to alter the trajectory of economic activities in the direction of sustainability has never been fully realized.*”<sup>78</sup>

The unrealized potential of public participation in EA can be traced to the predominantly “bipartite bargaining” nature of environmental decision-making in Canada, whereby decisions are influenced primarily by the relevant government agencies and the private-sector actors involved (or, in some cases, between the different levels of government

---

<sup>70</sup> *Ibid* at 3-4.

<sup>71</sup> *Ibid* at 4. Recall as well that in Part III above we adverted to leading Canadian research demonstrating that federal-provincial harmonization of EA has proven unable to deliver on the inherent promise of EA as a means of facilitating and accelerating sustainability, particularly when it comes to encouraging and enabling public participation in environmental decision-making.

<sup>72</sup> *Ibid*; see also Jason MacLean, “Striking at the Root Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture” (2016) 29 *Journal of Environmental Law and Practice* 111.

<sup>73</sup> See e.g. Chris Tollefson, Anthony R. Zito & Fred Gale, “Symposium Overview: Conceptualizing New Governance Arrangements” (2012) 90(1) *Public Administration* 3, at p. 5. For a closely related analysis which also highlights the tension between new governance’s *potential* and its *practice*, see Roderick A. Macdonald & Robert Wolfe, “Canada’s Third National Policy: The Epiphenomenal or the Real Constitution?” (2009) 59 *U. Toronto L.J.* 469.

<sup>74</sup> Gibson, Doelle & Sinclair, “Next Generation EA”, *supra* note 13.

<sup>75</sup> See e.g. Winfield, “A New Era of Environmental Governance in Canada”, *supra* note 8.

<sup>76</sup> A. John Sinclair & Alan P. Diduck, “Public participation in Canadian environmental assessment: enduring challenges and future directions” in K.S. Hanna, ed, *Environmental Impact Assessment Process and Practices in Canada*, 3<sup>rd</sup> ed. (Toronto, Oxford University Press, 2015).

<sup>77</sup> Winfield, “A New Era of Environmental Governance in Canada”, *supra* note 8 at 11. In the U.S. context, “legitimizing public participation, and demanding openness in planning and decision-making, has been indispensable to a permanent and powerful increase in environmental protection”: Joseph Sax, “Introduction,” (1986) 19 *Michigan Journal of Law Reform* 797, at 804 and n. 28.

<sup>78</sup> Winfield, “A New Era of Environmental Governance in Canada”, *supra* note 8 at 7 [emphasis added].

involved).<sup>79</sup> Bipartite bargaining has increasingly been perceived by the public – not unjustly – as deficient due to its tendency to exclude local knowledge and the interests of affected communities.<sup>80</sup>

Hence the need for polyjural and polycentric SA. Public participation in sustainability-based decision-making has the potential to facilitate the meaningful inclusion of diverse perspectives, which are in turn capable – arguably *most* capable – of thoroughly and reliably reviewing project proposals.<sup>81</sup> According to a recent analysis of eight case studies of EAs involving Indigenous groups, for instance, greater Indigenous participation resulted in improved project design, the integration of new knowledge about potential impacts, discovery of new ways to mitigate environmental damage and community impacts, and the opportunity for greater collaboration.<sup>82</sup> Greater collaboration, however, will only be achieved by encouraging and enabling the equal and ongoing participation of a plurality of voices. While the traditional “notice and comment” approach is capable of furnishing decision-makers with more information, a better understanding of the competing interests at stake, and the likely consequences of different courses of action, this approach neither accounts for nor alters the inequality of resources, power, and influence among different social and political groups. Indeed, reliance on notice-and-comment-style public participation may actually *further entrench* this inequality. Decision-makers are rarely if ever legally obligated to respond to issues raised in public comments, and in practice, the most influential comments tend to be those that provide decision-makers with the kinds of data and sophisticated analyses that may be used to justify decisions.<sup>83</sup> Representative government “has given way to a world in which the prime minister’s courtiers talk to a handful of senior Cabinet ministers, a few carefully selected deputy ministers, lobbyists, former public servants turned consultants, heads of friendly associations, and some CEOs of larger private firms. *This permeates all aspects of government – even regulation.*”<sup>84</sup>

---

<sup>79</sup> *Ibid* at 9; see also George Hoberg, “Environmental Policy: Alternative Styles” in M. Atkinson, ed, *Governing Canada: Institutions and Public Policy* (Toronto: Harcourt Brace Javanovich, 1993) at 307-42.

<sup>80</sup> *Ibid* at 10; see also Mark Winfield, *Blue-Green Province: The Environment and the Political Economy of Ontario* (Vancouver: UBC Press, 2012) at 17-39; R. O’Connor, *The First Green Wave: Pollution Probe and the Origins of Environmental Activism in Ontario* (Vancouver: UBC Press, 2015).

<sup>81</sup> Gibson, Doelle & Sinclair, “Next Generation EA”, *supra* note 13.

<sup>82</sup> Bram Noble, “Learning to Listen: Snapshots of Aboriginal Participation in Environmental Assessment” (2016), A Macdonald-Laurier Institute Publication, online: <[http://www.macdonaldlaurier.ca/files/pdf/Noble\\_StewardshipCaseStudies\\_F\\_web.pdf](http://www.macdonaldlaurier.ca/files/pdf/Noble_StewardshipCaseStudies_F_web.pdf)>.

<sup>83</sup> See generally Mariano-Florentino Cuellar, “Rethinking Regulatory Democracy” (2005) 57 *Administrative Law Review* 411. In the context of U.S. banking reform, one commentator observed that in responding to public comments, financial “regulators crave data that can be used to justify decisions” while “historically, industry groups have dominated these information wars, plying regulators with exhaustive studies and detailed analyses of the options at hand. Trade groups have more money and more people, and they often produce and control the relevant information about business and customers.” See Binyamin Appelbaum, “On Finance Bill, Lobbying Shifts to Regulations” *The New York Times*, (27 June 2010), at A1, online: <[http://www.nytimes.com/2010/06/27/business/27regulate.html?\\_r=0](http://www.nytimes.com/2010/06/27/business/27regulate.html?_r=0)>.

<sup>84</sup> Donald J. Savoie, *What is Government Good At? A Canadian Answer* (Montreal: McGill-Queen’s University Press, 2015) at 266 [emphasis added].

A polyjural and polycentric approach to SA calls for more balanced inclusion, involvement, and influence of affected interests and stakeholders.<sup>85</sup> SA decision-making must move beyond the passive interest group pluralism of the notice-and-comment model by institutionalizing the ongoing involvement of underrepresented interests throughout the SA process. This inclusion and the resulting balance of competing interests will allow SA decision-makers to open up the SA process to multiple forms of data and experiment with a variety of potential solutions. While this proposal may appear to run counter to prevailing norms of centralized coordination, administrative efficiency, and market certainty, increased interaction and experimentation among multiple actors at multiple levels of social organization has the potential to facilitate the emergence of common standards, practices, and commitments over time.<sup>86</sup> This, of course, is not an entirely new idea. The federal government, for instance, once relied on multi-stakeholder regulatory advisory committees – such as the National Roundtable on the Environment and Economy – that were often able to achieve a remarkable level of consensus on complex issues.<sup>87</sup> In fact, the advice received and the credibility gained by the involvement of independent voices have stood up well over time.<sup>88</sup>

### **(b) The realpolitik rationale for polyjural and polycentric SA**

The substantive benefits (*i.e.*, better decisions) of polyjural and polycentric SA aside, there is also a compelling “realpolitik” rationale for this more expansive approach to facilitating and accelerating sustainability. As discussed above, decisions that ignore local knowledge and the perspectives of affected stakeholders are increasingly viewed – again, not unjustly – as democratically unaccountable and politically illegitimate. In the parlance of our times, such decisions lack “social license.”<sup>89</sup> To cite a recent and

---

<sup>85</sup> This involvement ought to be enshrined in legislation and upheld by robust judicial review. As Olszynski argues, “the polycentric nature of the exercise [of EA] underscores the important role of both the Act [CEAA, 2012] and the courts in ensuring that environmental concerns are not ignored or marginalized in the face of traditionally predominant considerations (*e.g.* economic ones).” Martin Olszynski, “Northern Gateway: Federal Court of Appeal Applies Wrong CEAA Provisions and Unwittingly Affirms Regressiveness of 2012 Budget Bills”, *Ablawg.ca*, (5 July 2016), online: <<http://ablawg.ca/2016/07/05/northern-gateway-federal-court-of-appeal-wrong-ceaa-provisions/>>.

<sup>86</sup> This, generally, is the argument of “democratic experimentalism.” See *e.g.* Michael C. Dorf & Charles F. Sabel, “A Constitution of Democratic Experimentalism” (1998) 98 *Columbia Law Review* 267.

<sup>87</sup> National Roundtable on the Environment and Economy, “National Roundtable on the Environment and Economy”, (22 March 2013), online: <<http://collectionscanada.gc.ca/webarchives2/20130322140948/http://nrtee-trnee.ca/>>, discussed in Gibson, Doelle & Sinclair, “Next Generation EA”, *supra* note 13. Another notable example is the multi-stakeholder Regulatory Advisory Committee (RAC) established to help guide the Canadian Environmental Assessment Agency in respect of federal EA. During its operation it was held up as *the* example of how to engage a full range of stakeholders in regulatory design and operation. Efforts are currently underway to revive this committee.

<sup>88</sup> Jeffrey Simpson, “Ottawa kills the emissions messenger”, *The Globe and Mail*, (20 June 2012), online: <<http://www.theglobeandmail.com/globe-debate/ottawa-kills-the-emissions-messenger/article4350552/>>, discussed in Gibson, Doelle & Sinclair, “Next Generation EA”, *supra* note 13.

<sup>89</sup> Jason Prno & D. Scott Slocombe, “Exploring the origins of ‘social license to operate’ in the mining sector: Perspectives from governance and sustainability theories” (2012) 37:3 *Resource Policy* 346; see also Jason MacLean, “Gateway to Nowhere: Environmental Assessment, the Duty to Consult, and the Social License to Operate in *Gitxaala Nation v. Canada* (Northern Gateway)”, *Toronto Law Journal*, (July 2016), online:

prominent example, the federal Liberal Party's 2015 election platform repeatedly stated that oil pipeline projects must obtain "social license," and that while governments grant permits, "only communities can grant permission" for projects to proceed.<sup>90</sup>

Since their inception, EA processes have been viewed as a means of managing the political risks and resolving the social conflicts around major infrastructure and resource extraction projects.<sup>91</sup> Major project reviews remain at the forefront of social, political, and legal conflicts in Canada, including conflicts among Indigenous peoples, multiple levels of government, ENGOs and concerned citizens, and industry interests about not only how to exploit natural resources, but also about *whether* to exploit them at all.<sup>92</sup> A polyjural and polycentric approach to SA is ideally suited to resolving such "super wicked" problems involving "enormous interdependencies, uncertainties, circularities, and conflicting stakeholders."<sup>93</sup>

A case in point is the political and legal struggle over Northern Gateway (discussed briefly in Part III above), a 1,178 kilometre and \$7.9-billion oil pipeline that would carry approximately 525,000 barrels per day of oil sands crude from Alberta through the Great Bear Rainforest to the coast of British Columbia for export to Pacific markets.<sup>94</sup> Characterized as a "critical infrastructure project" by Northern Gateway's president and supported explicitly and enthusiastically by the former Harper government at the federal level and tacitly by the Notley government in Alberta, the project would also entail the construction of tanker and marine terminals in Kitimat, British Columbia to accommodate some 190-250 tanker calls per year. The estimated operational life of Northern Gateway, were it ever to be approved, is approximately 50 years.

---

<<http://archive.constantcontact.com/fs158/1107293291635/archive/1125455087928.html#LETTER.BLOC.K57>>; Sharon Mascher, "Note to Canada on the Northern Gateway Project: This is NOT What Deep Consultation With Aboriginal People Looks Like", *ABlawg*, (12 August 2016), online: <<http://ablawg.ca/2016/08/12/northern-gateway-deep-consultation-with-aboriginal-people/>>.

<sup>90</sup> Quoted in Peter O'Neil, "West Coast public has pipelines veto: Vancouver mayor", *Vancouver Sun*, (7 June 2016), online: <<http://vancouver.sun.com/news/local-news/west-coast-public-has-pipelines-veto-vancouver-mayor>>; see also Claudia Cattaneo, "Justin Trudeau aims to strike balance between environment, economy with carbon policy", *Financial Post*, (6 February 2015), online: <[http://business.financialpost.com/news/energy/justin-trudeau-aims-to-strike-balance-between-environment-economy-with-carbon-policy?\\_lsa=f9cf-82ae](http://business.financialpost.com/news/energy/justin-trudeau-aims-to-strike-balance-between-environment-economy-with-carbon-policy?_lsa=f9cf-82ae)>.

<sup>91</sup> Winfield, "A New Era of Environmental Governance in Canada", *supra* note 8 at 11.

<sup>92</sup> Noble, "Learning to Listen", *supra* note 82; see also Shawn McCarthy, "Western mayors clash over Trans Mountain pipeline expansion", *The Globe and Mail*, (7 June 2016), online: <<http://www.theglobeandmail.com/news/politics/western-mayors-clash-over-kinder-morgans-proposed-pipeline/article30318848/>>; Daniel Leblanc, "Quebec hopping mad over federal intervention to protect frog", *The Globe and Mail*, (23 June 2016), online: <<http://www.theglobeandmail.com/news/politics/quebec-slams-ottawa-for-unilateral-action-to-protect-frog-habitat/article30565269/>>; Shawn McCarthy & Jeff Lewis, "Court overturns Ottawa's approval of Northern Gateway pipeline", *The Globe and Mail*, (1 July 2016), online: <<http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/federal-court-overturns-ottawas-approval-of-northern-gateway-pipeline/article30703563/>>.

<sup>93</sup> Richard J. Lazarus, "Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future" (2009) 94:5 *Cornell Law Review* 1153 at 1159.

<sup>94</sup> Technically, the project actually entails two pipelines. The other would run from the Pacific coast at Kitimat, B.C. back to Alberta carrying condensate removed from the oil tankers at Kitimat for distribution to Alberta markets. See *Gitxaala Nation v. Canada*, *supra* note 11.

In *Gitxaala Nation v. Canada*, a majority of the Federal Court of Appeal quashed the Governor-in-Council (Cabinet) Order directing the National Energy Board to issue a certificate of public convenience and necessity to Northern Gateway on the ground that the federal government failed to fulfill its constitutional duty to consult affected First Nations.<sup>95</sup> The majority's reasoning is a remarkable indictment of the Harper government's consultation of First Nations: "we are satisfied that Canada failed" during the project's consultation process "to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations. Missing was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report, or to provide meaningful feedback in response to the material concerns raised. *Missing was a real and sustained effort to pursue meaningful two-way dialogue.*"<sup>96</sup>

The majority was also critical (if obliquely) of the Joint Review Panel, which was formed under the former *Canadian Environmental Assessment Act* and later modified under *CEAA, 2012* and the *National Energy Board Act*.<sup>97</sup> According to the majority, "legitimate and serious concerns about the effect of the Project upon the interests of the affected First Nations" remained even after the pipeline proponent's voluntary undertakings and the 209 conditions imposed on the project. "Some of these were considered by the Joint Review Panel but many of these were not, given the Joint Review Panel's terms of reference."<sup>98</sup>

The legal and political saga of Northern Gateway illustrates both the "realpolitik" rationale of polyjural and polycentric decision-making, as well as its realistic limits. First, consider the sheer number and diversity of stakeholders involved. First, there is the proponent, Northern Gateway Pipelines Limited Partnership and Northern Gateway Pipelines Inc., which are backed by Enbridge Inc. as well as Suncor Energy Inc., Cenovus Energy Inc., MEG Energy Corp., Nexen Energy ULC, and Total SA. As noted above, the project was supported by the former federal government and the current Alberta provincial government; both the National Energy Board and the Attorney General of British Columbia intervened in the case before the Federal Court of Appeal, along with the Canadian Association of Petroleum Producers. The project also has 26 Aboriginal equity partners representing almost 60% of the Aboriginal communities along the pipeline's right of way, approximately 60% of the area's First Nations' population, and approximately 80% of the area's combined First Nations and Métis population.<sup>99</sup>

Opposed to the project are a number of First Nations, including Gitxaala Nation, Haisla Nation, Gitga'at First Nation, Kitasoo Xai'Xais Band Council, Heiltsuk Tribal Council, Nadleh Whut'en and Nak'azdli Whut'en, and Haida Nation.<sup>100</sup> Also opposed to the

---

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid* at para. 279 [emphasis added].

<sup>97</sup> *National Energy Board Act*, R.S.C. 1985, c. N-8, as amended.

<sup>98</sup> *Gitxaala Nation v. Canada*, *supra* note 11 at para. 326.

<sup>99</sup> *Ibid* at para. 16.

<sup>100</sup> *Ibid* at para. 17.

project are a number of NGOs, including ForestEthics Advocacy Association, Living Oceans Society, Raincoast Conservation Foundation, B.C. Nature, Amnesty International, and the labour union Unifor.<sup>101</sup> A number of individuals also appeared before the court on their own behalf. The municipality of Kitimat, meanwhile, previously held a plebiscite over Northern Gateway and voted against the project by a margin of 58.4% to 41.6%.<sup>102</sup>

The previous federal government's authoritarian, top-down approach to Northern Gateway "fell short of the mark."<sup>103</sup> Given the plurality of stakeholders having a serious interest in the project and its effects, how could such an approach have turned out otherwise?

The majority of the Federal Court of Appeal appears to have recognized this complicating factor in Northern Gateway, explaining that the Governor in Council's assessment of the project had to grapple with a broad variety of matters, including economic, social, cultural, environmental, and political matters, which are "of a polycentric and diffuse kind."<sup>104</sup> A decision-making process that excludes or effectively ignores the concerns and perspectives of affected stakeholders runs the very real risk, not only of being substantively incomplete and wrongheaded, but also democratically unaccountable and politically illegitimate (as well as legally invalid, under particular circumstances). Northern Gateway is anything but a special case. Northern Gateway is an avatar of the "realpolitik" of sustainability assessment in Canada today.

However, an important caveat is in order. *Genuine* polyjural and polycentric SA must ask, not only *how* a proposed project should proceed, but also *whether* it should proceed at all. The opening up of sustainability-based decision-making to a broader array of interests and interactions ought not to be a procedural substitute for substantive sustainability. While the majority of the court in Northern Gateway appears to understand the polycentric nature of the project's assessment and the failure of the government to engage in meaningful consultation with affected First Nations stakeholders, its articulation of the constitutional duty to consult falls far short of the principles of polyjural and polycentric decision-making. According to the majority,

[327] However, the Phase IV consultations did not sufficiently allow for dialogue, nor did they fill the gaps. In order to comply with the law, Canada's officials needed to be empowered to dialogue on all subjects of genuine interest to affected First Nations, to exchange information freely and candidly, to provide explanations, and to complete their task to the level of reasonable fulfilment. Then recommendations, including any new proposed conditions, needed to be formulated and shared with Northern Gateway for input. And, finally, these recommendations and any necessary information needed to be

---

<sup>101</sup> *Ibid* at para. 18.

<sup>102</sup> Robin Rowland, "Kitimat residents vote 'no' in pipeline plebiscite", *The Globe and Mail*, (12 April 2014), online: <<http://www.theglobeandmail.com/news/british-columbia/kitimat-residents-vote-in-northern-gateway-oil-pipeline-plebiscite/article17949815/>>.

<sup>103</sup> *Gitxaala Nation v. Canada*, *supra* note 11 at para. 332.

<sup>104</sup> *Ibid* at paras. 139-140. But see Olszynski, "Northern Gateway", *supra* note 85, arguing convincingly that the majority of the court seems to misconstrue the nature of EA generally.

placed before the Governor in Council for its consideration. In the end, it has not been demonstrated that any of these steps took place.

[328] In our view, this problem likely would have been solved if the Governor in Council granted *a short extension of time* to allow these steps to be pursued. But in the face of the requests of affected First Nations for more time, there was silence. As best as we can tell from the record, these requests were never conveyed to the Governor in Council, let alone considered.

[329] Based on this record, *we believe that an extension of time in the neighbourhood of four months—just a fraction of the time that has passed since the Project was first proposed—might have sufficed.* Consultation to a level of reasonable fulfilment might have further reduced some of the detrimental effects of the Project identified by the Joint Review Panel. And it would have furthered the constitutionally-significant goals the Supreme Court has identified behind the duty to consult—the honourable treatment of Canada’s Aboriginal peoples and Canada’s reconciliation with them.<sup>105</sup>

“It would have taken Canada little time and little organizational effort to engage in meaningful dialogue on these and other subjects of prime importance to Aboriginal peoples,” the majority added.

Contrast this reasoning – which curiously conjoins “meaningful dialogue” and “little time and little organizational effort” – with Gitga’at First Nation elder Art Sterritt’s response to the court’s judgment. According to Mr. Sterritt, additional consultation will not pave the way to his nation’s acceptance of the project. “The Gitga’at people are absolutely against this project. There is really no good that can come of the Northern Gateway project.... Just one spill from this project basically wipes out our access to our food, wipes out our economy, wipes out our culture.”<sup>106</sup>

In a polyjural and polycentric model of SA, “no” must be on the table as a legitimate outcome from the very outset of any assessment. No amount of process or “best practices” can substitute for a lack of substantive sustainability as determined through a genuinely plural and structurally balanced learning and decision-making process.<sup>107</sup>

While Northern Gateway is now all but off the table, this does little to change the popular perception that “Canada needs a way to get Albertan oil to new markets, and that the most efficient and safest way to do that is via pipeline.”<sup>108</sup> Following the Federal Court of Appeal’s decision in *Gitxaala Nation*, *The Globe and Mail*’s editorial board declared that the “best bet now is Kinder Morgan’s Trans Mountain project, which would bring

<sup>105</sup> *Ibid* at paras. 327-329 [emphasis added].

<sup>106</sup> Quoted in McCarthy & Lewis, “Court overturns Ottawa’s approval of Northern Gateway”, *supra* note 92.

<sup>107</sup> Where Aboriginal title is implicated, this is also true as a matter of recently settled Aboriginal law. In *Tsilhqot’in Nation*, *supra* note 27 at para. 86, the Supreme Court of Canada held that “incursions on Aboriginal title [and arguably other rights] cannot be justified if they would substantially deprive future generations of the benefit of the land.”

<sup>108</sup> Globe Editorial, “Ottawa has to prove it can get a pipeline built”, *The Globe and Mail*, (4 July 2016), online: <<http://www.theglobeandmail.com/opinion/editorials/ottawa-has-to-prove-it-can-get-a-pipeline-built/article30747419/>>.

Alberta crude to the Port of Vancouver.”<sup>109</sup> The trouble with this assessment, however, is that Vancouver wants nothing to do with the Trans Mountain pipeline, and has commenced a judicial review of the National Energy Board’s conditional recommendation of the project.<sup>110</sup> The municipality of Burnaby, British Columbia also opposes the project because the pipeline would run through a significant local conservation area. A number of First Nations (including Tsleil-Waututh, Squamish, and Musqueam), ENGOs, and a large number of concerned citizens also oppose the project.<sup>111</sup> A number of other major natural resources projects – TransCanada’s Energy East pipeline, Petronas’ LNG terminal, British Columbia’s Site C hydroelectric dam, any number of proposed industrial wind turbine projects – raise substantially similar sustainability concerns and face equally significant opposition. The need for a renewed, polyjural, and polycentric SA model in Canada, particularly after Canada’s ratification of the Paris climate change agreement, is urgent.

## V. CONCLUSION: POTENTIAL FORMS OF POLYJURAL AND POLYCENTRIC SA

In Part II above, we argued that the federal jurisdiction to conduct comprehensive EAs integrating social, economic, and environmental considerations is far broader than commonly understood. In Part III, however, we showed that the federal EA jurisdiction is also far from all-encompassing, and may be successfully challenged if it limits a province’s ability to protect its own social and economic interests. As a result of this inevitable constitutional complexity, many have called for a cooperative federalism and harmonized EA. But as Part II also illustrates, EA processes carried out under the banner of cooperation and harmonization have not resulted in sound, sustainable, or socially licensed EA processes or decisions. Accordingly, in Part IV we proposed a shift from bi-jural EA to polyjural and polycentric SA embodying collaborative and consensus-based decision-making.

In order to tie the insights of Parts III-IV together and offer practical law reform guidance, below we describe five principal options for jurisdictional collaboration and consensus in conducting project reviews with the aim of facilitating sustainability:

1. Each jurisdiction conducts its own comprehensive SA, including the federal government and any potentially affected provincial, territorial, municipal, and Aboriginal governments, and each jurisdiction makes its own project decision based on its own assessment;
2. A single jurisdiction conducts a comprehensive SA, and all other affected levels of government use the SA to make their own project decisions;

---

<sup>109</sup> *Ibid.*

<sup>110</sup> Laura Kane, “Vancouver takes legal action to block Kinder Morgan pipeline plan”, *The Globe and Mail*, (20 June 2016), online: <<http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/vancouver-takes-legal-action-to-block-kinder-morgan-pipeline-plan/article30523616/>>.

<sup>111</sup> Gordon Hoekstra, “First Nations vow to fight Trans Mountain despite NEB approval”, *Vancouver Sun*, (20 May 2016), online: <<http://vancouversun.com/news/local-news/first-nations-vow-to-fight-on-despite-neb-approval-for-trans-mountain-pipeline>>.

3. A single jurisdiction carries out a comprehensive SA, and that jurisdiction alone makes the project decision;
4. All affected jurisdictions cooperate in carrying out a joint and comprehensive SA, and each jurisdiction involved makes its own decision; and
5. All affected jurisdictions cooperate in carrying out a joint and comprehensive SA, and each jurisdiction involved engages in a good faith negotiation aimed at achieving a consensus decision (failing which the process reverts to option four above).

Each of the foregoing five options involves different constitutional and practical policy implications. Option one – call it the multiple silos approach to SA – is plainly inefficient. If affected jurisdictions respond by focusing on the core and constitutionally uncontested areas of their jurisdiction, project decisions run the risk of being based on an incomplete understanding of the project’s public policy implications. Moreover, the complexity of the multiple silos approach to SA will be confusing, burdensome, and ultimately inaccessible to Canadians. The multiple silos option may also lead to a lack of clarity and a legal dispute over who has the jurisdiction to decide what. In other words, this option suffers from a lack of coordination at not only the assessment stage but also at the decision and post-decision stages of project reviews.

Option two – call it the follow-the-leader approach to SA – may in certain circumstances be unconstitutional. In Part II above we canvassed the constitutionality of the delegation and substitution of EAs between the federal government and provincial governments. For the most part, courts will uphold provincial EA laws, even if they trench on federal powers, so long as they are enacted in a *bona fide* manner to identify and protect genuinely provincial interests; only where an impugned law substantially impairs a core function of federal law will the courts intervene. More importantly, the follow-the-leader approach to SA runs the serious risk of producing poor and socially unlicensed decisions. As Canada’s largely disappointing EA legacy illustrates,<sup>112</sup> because some decision-makers will not have been sufficiently engaged in the assessment process to properly appreciate the subtleties and complexities of the issues at stake. Given this complexity, it would be a significant challenge for a single jurisdiction to carry out a comprehensive SA without the full engagement of other affected governments and communities.

Option three – call it the authoritarian approach to SA – may well be problematic from a constitutional perspective under certain circumstances in addition to leading to unsound decision-making. In Part II above we noted that British Columbia’s equivalency agreement with the National Energy Board was determined to be unconstitutional in *Coastal First Nations* because it violated the B.C. *Environmental Assessment Act* (as well as the duty to consult under s. 35 of the constitution); were the statutory language clear and unequivocal with respect to British Columbia abdicating its responsibility to conduct

---

<sup>112</sup> See generally Gibson, Doelle & Sinclair, “Next Generation EA”, *supra* note 13, and Winfield, “A New Era of Environmental Governance in Canada”, *supra* note 8.

an EA and its power to make a decision on projects otherwise within its jurisdiction, however, the British Columbia Supreme Court was quite clear that the arrangement would be constitutional. Accordingly, equivalency agreements of this kind are most likely not *per se* unconstitutional. The principal problem with the authoritarian approach, rather, is that it will produce poor policy results, particularly when viewed through the polyjural and polycentric lenses of sustainability, which call for a diametrically opposed approach – plural, not singular and isolationist; collaborative and consensus-based, not authoritarian and unilateral. Canada’s approach to the Northern Gateway review is an example *par excellence* of the authoritarian approach. The disastrous result was neither effective, nor efficient, nor socially licensed.

Option four, by contrast, is polyjural – if not entirely polycentric – and offers an enhanced combination of effectiveness, efficiency, and social license. By emphasizing polyjural collaboration and comprehensiveness at the assessment stage in particular, this approach is unlikely to produce the kind of controversial and socially unacceptable decision-making that excludes relevant issues and interests and that has become the norm of late in Canada. However, not unlike the multiple silos approach of option one, this form of SA nonetheless runs the risk of leading to a lack of clarity and possibly legal disputes over which jurisdiction has ultimate project decision-making authority. In a federal system such as Canada’s, this particular risk can never be eliminated entirely, and the perfect can be the enemy of the more than good enough. When it comes to the ambitious agenda of facilitating and accelerating sustainability through SA, option four may well be more than good enough.

Before concluding, however, a word about the perfect form of SA – SA that is equally polyjural and polycentric (option 5) – is in order. In a perfectly polyjural and polycentric SA regime, collaboration and comprehensiveness are married to consensus-based decision-making and constitutional clarity. While collaboration and comprehensiveness may appear to run counter to the federal government’s stated preference for efficiency and the elimination of duplication,<sup>113</sup> this approach has the potential to be the most efficient option of all. While its costs – both in terms of resources and time – are not negligible, they are largely up-front costs, which are likely to be far lower than the considerable back-end costs associated with community opposition and court challenges. The polycentric nature of decision-making aimed at consensus, where successful, is capable of virtually eliminating such back-end costs owing to a lack of social license.<sup>114</sup>

In our view, a combination of options five and four is the ideal form for SA to take – call it perfectly polyjural and polycentric SA (option five) with a safety net (reversion to option four where consensus cannot be reached).

---

<sup>113</sup> Government of Canada, “Environmental assessment processes”, *supra* note 9 (calling for the federal government to work “with provinces and territories to avoid duplication”).

<sup>114</sup> An example suggestive of the potential of this form of SA is the Voisey’s Bay nickel mine and mill development EA. See Canadian Environmental Assessment Agency, *Voisey’s Bay Mine and Mill Environmental Assessment Panel Report*, online: <http://www.ceaa-acee.gc.ca/default.asp?lang=En&xml=0a571a1a-84cd-496b-969e-7cf9cbea16ae>.

\* \* \*

We are at a crossroads. As we conclude this paper, Canada has ratified the Paris climate change agreement but has yet to propose – much less enact and implement – a climate change policy capable of meeting our hugely ambitious commitments under that agreement. Last year, more than 150 countries – including Canada – adopted the UN’s 2030 Agenda for Sustainable Development, which includes a set of 17 Sustainable Development Goals (SDGs) designed to end poverty, fight inequality and injustice, and tackle climate change by 2030.<sup>115</sup> The federal government insists – repeatedly – that Canada must get its resources to market in a *sustainable* manner, but it has yet to explain what a sustainable manner would be. The 2008 *Federal Sustainable Development Act*, on its face a promising piece of legislation intended to facilitate the incorporation of sustainability considerations into all government decision-making and operations, is set to expire in 2016 without even remotely approaching the accomplishment of its objectives.<sup>116</sup> The past ten years are widely regarded as a “lost decade” from the perspective of advancing sustainability in Canada.<sup>117</sup> We may not be able to afford another. Not unlike the Mackenzie Valley Pipeline Inquiry, which was effectively Canada’s first EA and which was designed to resolve societal disputes over the distribution of the benefits, costs, and risks of a major natural resources project,<sup>118</sup> polyjurial and polycentric SA has the potential not only to resolve intensifying multijurisdictional disputes over the direction of energy and economic development in Canada in a manner that is effective, efficient, and socially inclusive, but also to develop widely-shared commitments about Canada’s future.

---

<sup>115</sup> For further details about the SDGs, see the United Nations Development Programme’s summary, online: <<http://www.undp.org/content/undp/en/home/sdgoverview/post-2015-development-agenda.html>>.

<sup>116</sup> See G. Toner, J. Meadowcroft & D. Cherniak, “The Struggle of the Canadian Federal Government to Institutionalize Sustainable Development” in D. VanNijnatten, ed, *Canadian Environmental Policy and Politics: The Challenges of Austerity and Ambivalence* (Toronto: Oxford University Press, 2015) at 116-129. See also Commissioner for Environment and Sustainable Development, *Review of the Draft 2013-2016 Sustainable Development Strategy* (Ottawa: Minister of Supply and Services, 2013); Commissioner for Environment and Sustainable Development, *Fall 2015 Report 3: Implementing Sustainable Development Strategies Strategy* (Ottawa: Minister of Supply and Services, 2015).

<sup>117</sup> Winfield, *supra* note 8 at 36.

<sup>118</sup> *Ibid.*