

Forging Partnerships Building Relationships

**Aboriginal Canadians and
Energy Development**

**Report to the Prime Minister
By Douglas R. Eyford**

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LETTER TO THE PRIME MINISTER

29 November 2013

Dear Prime Minister:

RE: Report on West Coast Energy Infrastructure

Enclosed for delivery is my final report, *Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Development*.

I am grateful for the opportunity to contribute to the discussion about Crown-Aboriginal relations in the context of the west coast energy infrastructure projects. This is an opportunity for Canada and Aboriginal communities in Alberta and British Columbia to constructively address and reconcile their respective interests.

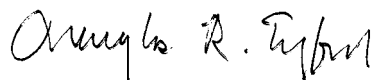
Key observations include:

- Canada and Aboriginal communities need to build effective relationships and this is best achieved through sustained engagement;
- Aboriginal communities view natural resource development as linked to a broader reconciliation agenda;
- Aboriginal communities will consider supporting natural resource development if it is undertaken in an environmentally sustainable manner; and
- these projects would contribute to improving the socio-economic conditions of Aboriginal communities.

Progress requires leadership, commitment, and action by governments, Aboriginal communities, and industry. I am optimistic that collaborative efforts by each of the parties can advance their respective interests.

I trust this report will be helpful in your government's deliberations.

Yours truly,



Douglas R. Eyford

Executive Summary

On 25 March 2013, I accepted an appointment as Canada's special federal representative on west coast energy infrastructure to identify approaches that could meet Canada's goals of expanding energy markets and increasing Aboriginal participation in the economy. I was asked to identify Aboriginal interests in and opportunities related to the development of west coast energy projects.

Energy represents 25% of Canada's total exports. At present, Canada depends almost entirely on the United States market for our energy exports. Global demand for oil and natural gas is increasing, and if Canada is to capitalize on this immediate opportunity, it would need to construct pipelines and terminals to deliver oil and natural gas to tidewater.

Aboriginal communities hold constitutionally protected rights. The law requires potential impacts on those rights to be taken into account in project development. The failure to do so may result in projects being delayed or not proceeding.

Over the past eight months, I met many representatives from Aboriginal communities, industry, and local and provincial governments, and heard their perspectives.

Aboriginal Canadians understand the value of the proposed energy projects to their communities. However, they emphasize that environmental sustainability and prevention of significant environmental harm are necessary conditions for their support; conditions that many believe will not be met. Aboriginal Canadians also expect long-term economic benefits for their communities and a meaningful role in project-related activities including environmental monitoring and protection.

Industry understands the necessity of working with Aboriginal communities to meet mutual interests. Project proponents described the substantive steps they are taking to address environmental concerns and include Aboriginal Canadians in employment and business opportunities. Industry views Canada as having a role in addressing matters that go beyond project-specific proposals and regulatory reviews, such as improving educational outcomes, preparing Aboriginal people to be job ready, and addressing unresolved Aboriginal rights and title claims in British Columbia.

The governments of Alberta and British Columbia both highlighted the need for Canada to collaborate with them on flexible and innovative approaches to address Aboriginal issues.

Three themes emerged during my engagement. Canada must take decisive steps to build trust with Aboriginal Canadians, to foster their inclusion into the economy, and to advance the reconciliation of Aboriginal people and non-Aboriginal people in Canadian society.

In the context of west coast energy projects, I have made recommendations in each of these areas.

Building Trust identifies the efforts needed to establish constructive dialogue about energy development, to demonstrate commitment to environmental sustainability, and to enhance understanding of and participation in pipeline and marine safety.

Fostering Inclusion proposes focused efforts to realize Aboriginal employment and business opportunities, to establish collaborations among Aboriginal communities that allow for better outcomes, and to facilitate the financial participation of Aboriginal communities in energy projects.

Advancing Reconciliation recommends targeted efforts to build effective relationships including refinements to Canada's current approach to consultation and engagement, to explore mutually beneficial initiatives that support reconciliation, and to encourage Aboriginal communities to resolve shared territory issues.

Taking Action recommends the establishment of a Crown-First Nations tripartite energy working group to create an open and sustained dialogue and action on energy projects. I have also identified a need for Canada to build its internal capacity and to adopt an integrated approach to address Aboriginal interests in relation to west coast energy projects.

This report comes at a critical juncture in the relationship between governments and Aboriginal Canadians, and also in the development of west coast energy infrastructure. Both are works in progress, with many unresolved issues. My recommendations serve as a challenge to the parties to work together more effectively and to take collaborative steps to realize the opportunities these projects present. Commitments from governments, Aboriginal leaders, and industry are required to translate these recommendations into concrete actions. Canada, as the senior level of government, needs to assert leadership to achieve these objectives.

Social and economic gaps between Aboriginal and other Canadians remain. Aboriginal participation in the proposed projects provides one opportunity to help close this gap. There has not been a constructive dialogue about energy projects. Aboriginal leaders are prepared to engage and Canada will need to address issues on their agenda. We are all presented with a choice: to maintain the status quo or embrace the opportunities and potential offered by a different path. The people I met have expressed an interest in working together to move forward which leads me to believe progress can be achieved.

Introduction

INTRODUCTION

On 25 March 2013, I accepted an appointment as Canada's special federal representative on west coast energy infrastructure to identify approaches to meet Canada's goals of expanding energy markets and increasing Aboriginal¹ participation in the economy.

My mandate identifies four areas of enquiry about several proposed oil and natural gas projects in Alberta and British Columbia. I have been asked to report on:

- how those projects would affect Aboriginal interests;
- Aboriginal interest in pipeline and marine safety initiatives;
- options to create employment and business opportunities for Aboriginal Canadians; and
- the environmental and socio-economic factors that may affect Aboriginal participation in the projects.

My mandate is attached at Appendix A.

I travelled across Alberta and British Columbia to meet representatives of Aboriginal communities and organizations, industry, and provincial and local governments. I met with over 80 groups. The energy infrastructure projects that were the subject of discussion include two proposed oil pipelines — Enbridge Inc.'s Northern Gateway Pipeline and the expansion of Kinder Morgan, Inc.'s existing Trans Mountain Pipeline — several proposed natural gas pipelines and related upstream developments, and the development of liquefied natural gas ("LNG") facilities in Kitimat and Prince Rupert. These proposed projects are referred to collectively throughout the report as the "Projects". A complete list is included as Appendix B.

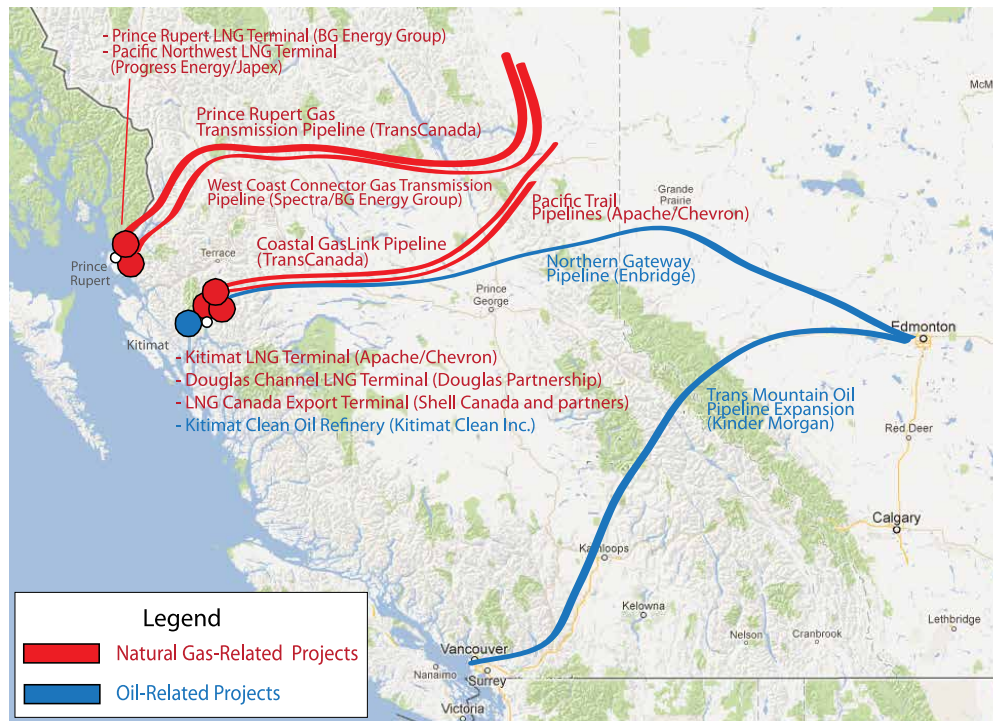
My discussions have not been part of Crown consultation for any of the Projects.

I have focused my attention on factors affecting Aboriginal participation in project development, and in this report outline collaborative steps that can be taken by Canada,² Aboriginal communities, the provinces of Alberta and British Columbia, and industry to address common interests and avoid conflict and confrontation.

Summarized following are key messages delivered by Aboriginal groups, the governments of Alberta and British Columbia, and industry.

¹ The term "Aboriginal" is used throughout this report to denote First Nations, Métis, and other Aboriginal people in Alberta and British Columbia.

² The Government of Canada is identified throughout this report as "Canada".



ENVIRONMENTAL CONSIDERATIONS

There is a range of views among Aboriginal groups about the Projects. Most Aboriginal representatives delivered a clear message that their communities understand the value and opportunities associated with economic development. However, they contend that developments must be environmentally sustainable and undertaken in a manner that acknowledges the constitutionally protected rights of Aboriginal peoples.

Some Aboriginal groups do not support the Projects because they consider the transportation of oil and natural gas by pipelines and tankers to be both intrusive and dangerous, and feel that industry and governments cannot guarantee there will never be an accident. Other Aboriginal groups accept the inevitability of resource development in their traditional territories, but insist that substantial efforts be made to manage environmental risks and to involve them in project planning and decision making.

Aboriginal communities argue that the legislative changes associated with Canada's *Responsible Resource Development* initiative³ have eroded environmental protection measures and were made to facilitate project development. At the same time, few Aboriginal groups were aware of Canada's appointment of a tanker safety expert panel to review ship-source oil spill preparedness and response. Similarly, recent initiatives to strengthen the regulatory framework for pipelines under federal jurisdiction have gone largely unnoticed.

Aboriginal representatives have expressed an interest in participating in partnership with Canada and industry to direct research and publish objective scientific information about pipeline and marine-related risks, the impact of spills on the terrestrial and marine environments, oil clean-up technologies, and the effect of vessel traffic on the marine environment and coastal communities.

³ See <http://actionplan.gc.ca/en/initiative/responsible-resource-development>.

Aboriginal groups and industry urge governments to engage in land and marine use planning on a regional basis to identify and manage the cumulative effects of industrialization, urbanization, and Project development.

EMPLOYMENT, BUSINESS, AND FINANCIAL OPPORTUNITIES

“If poverty is the only lifestyle you know, it is very difficult to realize there is a way out. Any band member who is watching development and wealth generation in his territory without having an opportunity to be a part of it is going to grow resentful.”

Ellis Ross, Chief Councillor, Haisla Nation, “Economic Opportunity Ends First Nation Culture of Dependence”, *Vancouver Sun*, 20 November 2013.

Aboriginal groups are far from uniform and each has its own opportunities, challenges, and constraints. Many are integrated in regional economies. Others are not. However, all Aboriginal Canadians want to share in the wealth and prosperity of this country.

The Projects offer skills training, employment, business opportunities, and financial benefits. Aboriginal groups emphasize the importance of long-term employment and business opportunities for their members.

Industry has demonstrated that it is prepared to invest in Aboriginal communities to develop a capable and educated workforce and seeks a greater commitment from governments to achieve these goals.

Governments, industry, and Aboriginal groups agree there is a need to coordinate efforts to ensure the transformative opportunities offered by the Projects are not lost.

CROWN-ABORIGINAL RELATIONS

Aboriginal representatives contend that Canada has neglected relationship building with their communities and needs to better address Aboriginal interests. Recent engagement meetings between federal ministers, deputy ministers, and Aboriginal leaders in British Columbia were viewed positively, but those efforts must continue. Aboriginal communities remain cautious and require Canada to continue to demonstrate its commitment to improving the relationship.

Given the pace and breadth of developments in Alberta and British Columbia, and the corresponding consultation demands placed on Aboriginal communities, many are facing “process fatigue”. They are also encountering challenges in terms of their capacity to participate in project assessments and reviews.

Industry understands, perhaps more directly than governments, that Projects may be placed at risk if Aboriginal and treaty rights are not addressed. Industry questions why Canada is not doing more to address unresolved Aboriginal rights claims in British Columbia, and why it does not engage with Aboriginal groups on project development in advance of or outside regulatory processes. Industry also seeks greater federal attention to the issue of overlapping territorial claims in British Columbia.

The governments of Alberta and British Columbia have observed that Canada could do more to collaboratively address Aboriginal issues in their respective provinces. Both provinces have a sustained, on-the-ground presence in Aboriginal communities and are able to demonstrate flexible and innovative approaches to managing Aboriginal and treaty rights. They perceive the federal system as comparatively leaden or indifferent and are working together, without Canada, on matters within federal jurisdiction.⁴

THEMES

The Projects provide Canada and Aboriginal communities in Alberta and British Columbia with an opportunity to re-set the relationship. However, the Projects are time-sensitive, and important opportunities will be missed if relations continue on their current course.

Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by judgments of this Court, that we will achieve... a basic purpose of s. 35(1) — “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.

Lamer C.J., *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

National Chief Shawn A-in-chut Atleo of the Assembly of First Nations has mapped a path forward for governments and Aboriginal groups in relation to economic development. In a recent speech to the Vancouver Board of Trade, he proposed three initiatives to build Crown-Aboriginal relationships and avoid lost opportunities:

- empower Aboriginal communities through capacity support, socio-economic measures, and access to capital;
- engage in environmental planning that incorporates Aboriginal knowledge and principles; and
- facilitate shared decision making that is inclusive and accountable.⁵

Mr. Atleo has identified a constructive framework for dialogue and action.

I have outlined three themes that help focus action: building trust, fostering inclusion, and advancing reconciliation. In the section entitled *Taking Action*, I identify steps that Canada should implement to address Aboriginal issues about the Projects. It is critical for Canada to become more involved and demonstrate leadership in its relations with Aboriginal groups, industry, and provincial governments.

⁴ Premiers Redford and Clark announced the appointment of an Alberta-British Columbia deputy ministers working group in July 2013. The working group is mandated to develop recommendations about energy exports and is reviewing issues relating to marine spill response, shipments of bitumen by rail, port infrastructure development, and the economic, environmental, and social impacts of pipeline and rail transportation. The working group is to complete its final report by 31 December 2013. Canada and British Columbia have recently established a joint working group to address LNG development. Canada and British Columbia are also working together on pipeline safety and spill response, and are consulting on marine safety issues.

⁵ *Resources, Risks and Responsibilities: A First Nations Perspective on Canada's Resource Agenda*, 27 September 2013.

THE ECONOMIC CONTEXT

Canada can no longer rely on the view that our neighbour to the south will always be a willing buyer of Canadian energy commodities. In addition, because we do not have access to diversified markets for our energy products, we cannot command the highest international prices. As a result, it is estimated by the Pacific Economic Cooperation Council that Canada loses \$28 billion in revenues from oil sales alone.

The Standing Senate Committee on Energy, the Environment and Natural Resources, *Now or Never, Canada Must Act Urgently to Seize its Place in the New Energy World Order*, 2012.

Canada is the fifth largest oil and natural gas producer in the world, with the third largest proven oil reserves. Energy exports are an important component of our economy, totalling \$110 billion in 2012, which represented approximately 6% of Canada's total gross domestic product and roughly 25% of total exports.⁶

International energy markets are shifting rapidly, and this has major consequences for Canada. While virtually all of our petroleum exports currently go to the United States (the "U.S.") — 99% of crude oil and 100% of natural gas — the U.S. is developing new domestic supplies of oil and natural gas that are anticipated to replace Canadian exports. Because of Canada's reliance on the U.S. market, and transportation bottlenecks in the delivery of oil and natural gas to that country, Canadian producers receive significantly less for their products than they would if they could access global markets. At the same time, global energy demand is expected to increase by a third by 2035, with developing countries accounting for 90% of that increase, led by China and India.⁷

These anticipated global trends mean declining U.S. demand for Canadian oil and natural gas and rapidly expanding opportunities for energy exports overseas, particularly in Asia.⁸

Canada's existing export market for natural gas will largely disappear over the next few years as the U.S. becomes a net exporter. Global demand for LNG is growing quickly, and world trade in LNG is projected to almost double by 2040.⁹ Multiple LNG export projects are being proposed on Canada's west coast that are at different stages of business planning and regulatory review. These projects are in competition with LNG projects from the U.S., Middle East, East Africa, and Australia. Worldwide, there are 12 LNG export plants under construction today and more are planned. While not all of these competing projects will proceed, it demonstrates the time-sensitive, competitive nature of the global LNG market.

In order to pursue export opportunities in emerging markets, pipelines and terminals will be needed to deliver its landlocked oil and natural gas resources to tidewater.

⁶ National Energy Board, *Energy Briefing Note, Canadian Energy Overview 2012*, <http://www.neb-one.gc.ca/clf-nsi/nrngynfntn/nrgyrprt/nrgyvrw/cndnrgyvrw2012/cndnrgyvrw2012-eng.pdf>.

⁷ International Energy Agency, *World Energy Outlook 2013*.

⁸ Natural Resources Canada, *Average Prices for Crude Oil, Natural Gas and Petroleum Products*, 17 October 2013.

⁹ U.S. Energy Information Administration, *International Energy Outlook 2013*, http://www.eia.gov/forecasts/ieo/more_highlights.cfm.

Building Trust

BUILDING TRUST

“The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people’s concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.”

Binnie, J., *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.

The Projects are being developed in the context of longstanding relationships between Aboriginal communities, governments, and non-Aboriginal Canadians. Although many efforts are underway to address the problems created by our history, progress is difficult to measure.

Relationships that prosper require a foundation of trust, built on constructive dialogue, understanding interests, and a commitment to find solutions.

Three steps are necessary to build trust between Canada and Aboriginal communities: initiation of a more productive dialogue about energy development, a commitment to environmental sustainability, and action to implement the highest standards of pipeline and marine safety.

CONSTRUCTIVE DIALOGUE ON ENERGY

“With trust we can remove fear, we can create momentum, and we can generate hope. Building trust is never easy. It requires the best of all of us. It requires listening, creativity and understanding.”

National Chief Shawn A-in-chut Atleo, remarks to the Vancouver Board of Trade, 27 September 2013.

Energy use and development have become topical political, environmental, and economic issues in Canada, particularly the extraction and transport of oil and natural gas. However, studies reveal that Canadians lack basic knowledge about energy resources

and associated environmental impacts.¹⁰ Concurrently, Canadians are sceptical about the information they obtain from stakeholders in the energy arena, including industry, governments, and environmental groups.¹¹ As a result, many observers believe that improving energy literacy should be a priority.

Energy Facts

- Canadians rely on natural gas and products made from crude oil to meet more than two-thirds of their energy needs every day;
- 94% of all Canadian transportation energy comes from petroleum products; and
- natural gas meets more than half of our residential energy needs and almost half of the energy needed to run our industries.

Source: Canadian Energy Petroleum Association

For Aboriginal groups in Alberta and British Columbia, energy information and awareness have become fundamentally important issues. Aboriginal leaders are being relied on to evaluate the risks and benefits of oil and natural gas extraction, transportation, and processing. Communities in the path of these developments require reliable and unbiased information to assess the socio-economic impacts of project development in their territories. The debate, however, has been positional and lacks objectivity. There is uncertainty in Aboriginal communities about who to trust and which sources of information are reliable. Television and print advertising is not advancing the discussion but appears to perpetuate divisions. Nor is it helpful that some in the media rely on a small group of commentators with narrow perspectives.

Constructive dialogue would be a better approach. Canada can assist by promoting forums where Aboriginal groups in Alberta and British Columbia can share knowledge, best practices, skills, experience, and capacity through community exchanges, workshops, and conferences. The objective is to inform Aboriginal communities so they can effectively engage in project reviews and development.

Recommendation

Canada should promote a principled dialogue about resource development with Aboriginal communities in Alberta and British Columbia. This can be accomplished, in conjunction with provincial and local governments and industry, by convening conferences, workshops, and community forums to improve knowledge about the energy sector and major projects.

“Because citizens are divorced from the realities of wealth creation and uninformed about the process of getting resources out of the ground, transforming them into something of value, and their transport to markets, it becomes easy to oppose major resource projects.”

Jean-Sebastien Rioux, *The Energy Literacy Gap and its Potential Consequences for Canada*, University of Calgary, The School of Public Policy, 27 February 2013.

¹⁰ Andre Turcotte, Michael C. Moore, and Jennifer Winter, “Energy Literacy in Canada”, University of Calgary, *The School of Public Policy SPP Research Papers*, volume 5, issue 32, October 2012.

¹¹ *Ibid.*

COMMITMENT TO ENVIRONMENTAL SUSTAINABILITY

Aboriginal representatives insist that environmental sustainability is a necessary precondition for energy development, regardless of the potential benefits that may be realized from the Projects. Aboriginal Canadians view themselves as connected to the environment and as its stewards; this is an integral aspect of their culture. The Projects, by their nature, create potential hazards in the terrestrial and marine environments.

Aboriginal groups have expressed concern about the cumulative effects of developments and their impact on the exercise of their Aboriginal and treaty rights. The term “cumulative effects” has been defined as the combined effects of past, present, and foreseeable human activities over time on the environment, economy, and society in a particular place.¹² Aboriginal groups expect governments to ensure the cumulative effects of developments in their territories are assessed and taken into account beyond a project-specific review. Further, project proponents have advised that Aboriginal concerns about cumulative effects are frustrating consultation efforts.

While the *Canadian Environmental Assessment Act, 2012* (“CEAA 2012”) requires the consideration of cumulative environmental effects, in practice it is difficult to identify and assess cumulative effects in the environmental assessment of a single project. Cumulative effects are best addressed on a regional basis to account for the combined environmental impacts of proposed and existing developments.

The treatment of cumulative effects is an evolving legal issue in relation to the duty to consult. Aboriginal groups consulted on individual projects have increasingly expressed concern over aggregate adverse cumulative effects of developments on their asserted or established section 35 rights. The courts have held that only new adverse impacts trigger a duty to consult but that the cumulative effects of past events must be considered as “contextual evidence” to determine the seriousness of the potential impacts of the proposed development under consideration.

See *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650.

Regional planning establishes desired environmental outcomes and identifies environmental thresholds to manage subsequent land and marine use decisions. It requires a collaborative effort among governments, Aboriginal communities, and other stakeholders. Regional plans may identify the need for stewardship activities to be undertaken by governments, Aboriginal groups, and industry. The government of British Columbia, in conjunction with Aboriginal communities, has engaged in regional planning on provincial Crown lands in strategic areas of the province. The government of Alberta also undertakes regional planning and incorporates consideration of cumulative effects on air, water, and biodiversity.

Canada is currently involved in collaborative regional planning approaches. One example is the 2012 Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring, which was developed with input from industry. The purpose of this initiative is to gain a better understanding of the potential cumulative environmental effects related to the rapid expansion of the oil sands, to more rigorously monitor impacts on air, water, wildlife, and land quality, and to ensure environmentally sustainable future developments. Aboriginal communities are being engaged in the implementation of this plan.

¹² Government of Alberta, Department of Environment and Sustainable Resource Development, <http://environment.alberta.ca/0890.html>.

There are additional opportunities for Canada to collaboratively address regional planning objectives with Aboriginal communities and other stakeholders, particularly in areas of intense natural gas extraction, proposed pipeline routes, as well as the terrestrial and marine environments in and around Burrard Inlet, Douglas Channel, and Prince Rupert harbour.

Recommendations

Where federal jurisdiction is engaged, Canada should collaboratively participate in regional planning with provincial governments, Aboriginal communities, local governments, and other stakeholders to effectively assess cumulative effects and encourage sustainable development.

Canada should establish a joint initiative with Aboriginal groups for environmental stewardship and habitat enhancement to address concerns about cumulative effects of major resource projects.

UNDERSTANDING AND PARTICIPATING IN PIPELINE AND MARINE SAFETY SYSTEMS

Canada seeks to implement world class standards to safely transport oil and natural gas. Critics contend that an oil spill is inevitable and will cause irreparable harm. Lost in the debate is the recognition that no one wants a spill and all parties share the common objective of developing and implementing advanced technologies and systems to manage the risks of, and to respond effectively to accidents. Canada's resolve to implement world class standards will be closely watched by Aboriginal communities.

A recent Senate report provides a useful summary of Canada's pipeline and marine safety regulatory regimes.¹³

Several recent studies have reviewed pipeline and marine safety in Canada, notably:

- Transport Canada's Tanker Safety Expert Panel's initial report entitled *A Review of Canada's Ship-source Oil Spill Preparedness and Response Regime*;
- The Standing Senate Committee on Energy, the Environment and Natural Resources entitled *Moving Energy Safely: A Study of the Safe Transport of Hydrocarbons by Pipelines, Tankers and Railcars in Canada*; and
- Nuka Research and Planning Group, LLC's report for the Government of British Columbia entitled *West Coast Spill Response Study*.

¹³ Standing Senate Committee on Energy, the Environment and Natural Resources report entitled *Moving Energy Safely: A Study of the Safe Transport of Hydrocarbons by Pipelines, Tankers and Railcars in Canada*, August 2013.

Pipelines

According to the Canadian Energy Pipeline Association, 97% of natural gas and crude oil that is produced in Canada is transported by transmission pipelines, and between 2002 and 2011, 99.9994% of that product was transported safely.¹⁴

Nevertheless, Canadians are expressing concerns about the potential effects of pipeline spills, particularly in light of heightened media attention to recent incidents.

Federal Measures to Strengthen Canada's Pipeline Safety Regime

Over the last two years, Canada has taken a number of steps to strengthen pipeline safety:

- a 50% increase in the number of inspections of oil and gas pipelines, and a doubling of the number of annual audits;
- amendments to the National Energy Board's *Onshore Pipeline Regulations* adding greater personal accountability within companies for existing and new safety systems and programs;
- new regulations to enable the National Energy Board to issue administrative monetary penalties for companies and individuals that violate the *National Energy Board Act*; and
- proposed legislation that will:
 - enshrine in law the polluter pays principle, stating that polluters will be held financially responsible for the costs and damages they cause,
 - require pipeline operators to maintain minimum financial capacity to respond to leaks, spills, and ruptures. For major crude oil pipelines, a minimum of \$1 billion will be expected,
 - ensure that pipeline operators are responsible for abandoned pipelines,
 - improve transparency by ensuring company's emergency and environmental plans are easily available to the public.



¹⁴ Canadian Energy Pipeline Association, Maintaining Safe Pipelines, <http://www.cepa.com/about-pipelines/maintaining-safe-pipelines>.

Aboriginal Participation

The Projects impact a large number of Aboriginal communities and their asserted traditional territories (see Project descriptions in Appendix B).

Aboriginal communities may be the most geographically proximate to incidents requiring emergency response. Therefore, they want to be informed of and engaged in the safety systems that are in place, including spill response.

The challenge for governments, industry, and Aboriginal communities is integrating Aboriginal people into pipeline safety processes and plans given the differing jurisdictions of the federal and provincial governments, the varying stages of development for each of the proposed pipelines, and how project proponents implement regulatory requirements.

In Alberta, industry has created its own associations, such as Enform and Western Canadian Spill Services (“WCSS”), to support its members’ safety management systems and oil spill preparedness and response support. Aboriginal communities are not an integral component of these organizations or their systems.

In British Columbia, WCSS provides its response services to existing companies in the northeast of the province. Whether WCSS provides response services to the proposed Northern Gateway Pipeline and the Trans Mountain expansion project will only be decided when the projects proponents know if their projects are proceeding. Both proponents propose to engage, and where possible integrate, Aboriginal communities in their emergency planning and spill response systems. Kinder Morgan, Inc. has collaborated with the First Nation Emergency Services Society (“FNESS”) to jointly deliver a pilot training package on emergency management for Aboriginal groups in two locations along its pipeline corridor.

Aboriginal communities have the potential to contribute to geographic response planning and to augment a company’s spill response capabilities, including as first responders, with the appropriate training and equipment. Therefore, industry and governments should work with Aboriginal groups to integrate their members in emergency response planning and to train and equip them for spill preparedness and response. Given the technical and organizational requirements of effective emergency response, the role of FNESS could be expanded to provide technical support and training to Aboriginal communities in emergency management.¹⁵

Aboriginal communities can further contribute to a company’s pipeline safety management programs by providing on the ground “eyes and ears” monitoring services along a pipeline right of way.

¹⁵ FNESS provides Aboriginal communities with assistance on emergency planning and preparedness, fire safety, and wildfire protection planning.

Marine Transportation

Some commentators assert that marine oil spills are inevitable. However, statistics show a steep decline internationally in both the number and severity of marine spills over the last 20 years, even as the number and size of marine tankers have increased.¹⁶ Although the probability of a major spill is remote, the consequences of such a spill, should one occur, could be significant.

In British Columbia, oil tankers have loaded at the Westridge Marine Terminal in Burrard Inlet for 60 years without a tanker-based spill. Regulations to ensure the safe transport of product by tanker require that, among other things, only double-hulled tankers that have been inspected can access Westridge Marine Terminal, they must have local pilots on board, and have two tugs assisting them when laden, one of which is tethered.

Over 3,000 large vessels enter Port Metro Vancouver each year, of which 50 to 60 are oil tankers.¹⁷ If the Trans Mountain expansion project proceeds, oil tanker traffic could increase by up to 350 additional tankers per year. This represents a modest increment on existing vessel traffic into the Port, and a 50% increase in the number of oil tankers that transit the Strait of Juan de Fuca. Projected increases in vessel traffic on the north coast are significant. At present, no crude oil tankers call at northern British Columbia ports. If the Northern Gateway Pipeline proceeds, up to 250 oil tankers per year could visit Kitimat. The two proposed LNG terminals in Kitimat might together result in LNG carrier traffic of approximately 230 to 430 vessels per year.¹⁸ The Prince Rupert Port Authority estimates that large vessel traffic will increase from approximately 400 per year at present to over 1,100 per year by 2018, of which 200 could be LNG carriers.¹⁹

Federal Measures to Strengthen Canada's Tanker Safety System

In 2013, Canada announced, in addition to the Tanker Safety Expert Panel, a series of initiatives relating to increased oil tanker inspections, ship surveillance and monitoring, establishing an Incident Command System implemented by the Canadian Coast Guard that is integrated with private sector marine spill response systems, enhanced pilotage requirements, designation of additional public ports with enhanced marine traffic management, conducting research on the behaviour of bitumen in marine environments, enhanced navigational aids, and strengthening provisions of the *Canada Shipping Act*.

Aboriginal Participation

The marine transportation corridors leading to the Projects are adjacent to a large number of Aboriginal communities on the south and north coasts. These communities expect to be informed of marine safety systems and may want to participate in them, including oil spill preparedness planning and response. Aboriginal communities have considerable marine expertise and local knowledge, and have expressed an interest in marine environmental protection and response.

¹⁶ The total volume of oil released in spills of over 7 tonnes has declined from 3.2 million tonnes between 1970–1979 to around 200,000 tonnes between 2000–2009. Comparatively, in 2012, oil released in spills of over 7 tonnes was the lowest on record for a single year — 1,000 tonnes. The International Tanker Owners Pollution Federation Limited, Worldwide, *Oil Tanker Spill Statistics 2012*, www.itopf.com.

¹⁷ Port Metro Vancouver, *Statistics Overview 2012*.

¹⁸ Nuka Research and Planning Group, LLC, *West Coast Spill Response Study, Volume 2: Vessel Traffic Analysis*, 2013, pp. 70–71.

¹⁹ Prince Rupert Port Authority, *Commercial Vessel Call Projections*, 2013.



Industry and Western Canadian Marine Response Corporation (“WCMRC”), the company responsible for oil spill response planning and preparedness, could facilitate the participation of Aboriginal groups in:

- the preparation of geographic response plans to identify critical marine resources that should be protected in the event of a spill, and required protection measures; and
- WCMRC’s response regime by:
 - consulting with Aboriginal communities to determine their interests in participating in an expanded marine safety regime;
 - expanding Aboriginal participation in Fishers Oil Spill Emergency Team and as contracted resources;
 - identifying employment opportunities and the related training requirements for appropriate certification;
 - locating facilities for the staging of response equipment in Aboriginal communities;
 - training community members as first responders; and
 - training key communities in the ICS.

The *Pacific Pilotage Act* governs the use of pilots in Canadian coastal waters, and sets out the extensive training, experience, and testing required. The Pacific Pilotage Authority will need to recruit a significant number of pilots for marine traffic management over the next decade. That organization, in conjunction with Aboriginal organizations, should explore and develop opportunities for Aboriginal Canadians to train and qualify as pilots.²⁰

All of these opportunities have a unique applicability for Aboriginal communities on the north coast because of the relative lack of response capability and the potential development of energy projects in that region. There will likely be an expansion of tug assist capabilities, which may involve several tugs permanently stationed in Kitimat or Prince Rupert.

Given the large number of coastal Aboriginal communities, the technical and organizational requirements for effective oil spill response preparedness and response, and the intermittent nature of emergency response training and activities, a small Aboriginal-led technical unit could assist in the training of Aboriginal responders, coordinate community activities in the event of a spill, participate in the ICS, and act as a clearing house for information and collaboration with Aboriginal communities.

²⁰ In order to build up sea time, pilotage candidates must have a watch-keeping mate certification. Many Aboriginal fishers who have extensive training provided through Fisheries and Oceans Canada are only a few courses short of this certification.

Recommendations

Canada should coordinate and convene the participation of key stakeholders including Aboriginal groups, governments, industry, non-governmental organizations, and scientists, to advance pipeline and marine safety and strategies to mitigate potential impacts of oil spills on the terrestrial and marine environment.

Canada, in conjunction with industry and provincial governments, should support:

- a. Aboriginal participation in marine traffic management and emergency response planning;
- b. training and coordination of Aboriginal communities in terrestrial and marine monitoring and emergency response, using existing organizations where appropriate, such as FNESS and WCMRC;
- c. acquisition of appropriate equipment and infrastructure by Aboriginal communities for terrestrial and marine monitoring and emergency response; and
- d. invest in technologies for oil spill clean-up.

Canada should ensure that marine preparedness and response plans are publicly available.





Fostering Inclusion

FOSTERING INCLUSION

Historically, Aboriginal Canadians have not benefited from natural resource developments in their traditional territories to the same degree as non-Aboriginal Canadians. The Projects provide an opportunity to do better, offering Aboriginal communities the chance to improve long-term economic outcomes and close the socio-economic gap. By having a real stake in regional economies, over time a “community of interests” will emerge among Aboriginal communities and their neighbours. Shared interests encourage constructive relationships.

To foster inclusion, Aboriginal employment and business opportunities must translate into real jobs and successful businesses. The likelihood of this outcome will increase if governments, Aboriginal communities, and industry work collaboratively to advance shared goals. Another strategy to foster participation is the provision of financial opportunities for Aboriginal communities and businesses.

ACHIEVING EMPLOYMENT AND BUSINESS OPPORTUNITIES

Employment Opportunities

Aboriginal Canadians constitute a comparatively young and growing component of the Canadian population.²¹ Further, many Aboriginal communities are in close proximity to the Projects thereby providing employment opportunities for their members. Nevertheless, many Aboriginal Canadians face chronic barriers to employment. Several studies identify the challenges affecting Aboriginal participation in the workforce.²²

The 2012 *Aboriginal Economic Benchmarking Report* identifies an education gap between Aboriginal and non-Aboriginal Canadians.²³ The high school completion rate for Aboriginal people is 56%, compared to 77% for non-Aboriginals. On-reserve high school completion rates are even lower at 40%. There is a clear linkage between education and employment

²¹ Based on the 2011 Census, 4.3% of the total Canadian population identifies as Aboriginal, compared to 2.8% in the 1996 Census. Forty-six percent of the Aboriginal population is under age 25, compared to 30% of the non-Aboriginal population.

²² Public Policy Forum, *Building Authentic Partnerships: Aboriginal Participation in Major Resource Development Opportunities*, 2012; The National Aboriginal Economic Development Board, *Increasing Aboriginal Participation in Major Resource Projects*, October 2012; The National Aboriginal Economic Development Board, *The Aboriginal Economic Benchmarking Report*, June 2012; and Senate Standing Committee on Aboriginal Peoples, *Sharing Canada's Prosperity — A Hand Up, Not a Handout*, March 2007.

²³ Failure to complete basic education is a barrier to employment for many Aboriginal Canadians. According to the 2006 Census, 34% of the Aboriginal population aged 25 to 64 did not have a high school diploma compared to 15% of the non-Aboriginal population of the same age group. Human Resources and Skills Development Canada, *Indicators of Well-Being in Canada*, 2011.

outcomes. In 2011, 81% of employed Aboriginal Canadians obtained at least a high school diploma.²⁴

Other factors that affect the ability of Aboriginal Canadians to take advantage of employment and business opportunities include:

- whether a community has leadership and vision that emphasizes the importance of education and skills development;
- community well-being and individual health;
- community support for economic development;
- proximity to urban areas and major transportation infrastructure;
- willingness to relocate; and
- availability of secondary and post-secondary education.

The Standing Senate Committee on Aboriginal Peoples confirmed these challenges when it observed that “...closing the education gap is one of the most important pre-conditions for successful, long-term economic and community development. Inadequate levels of education, combined with insufficient training and inadequate work experience, are key impediments to greater Aboriginal participation in the economy. In addition, because a great number of Aboriginal people have been involved in business for only one or two generations, there is still a lack of role models and mentors in this area.”

Sharing Canada's Prosperity — A Hand Up, Not a Hand Out, March 2007.

Aboriginal Canadians desire long-term, well paid employment. They want careers, not short-term jobs. In order to achieve this objective, some Aboriginal Canadians who have little or no work experience will require pre-employment life skills education, including literacy and numeracy, in order to benefit from employment training.

The Projects offer Aboriginal communities an immediate opportunity to achieve their objectives in relation to training, employment, and business development. However, many employment opportunities require specific skills that take time to develop.

The scale of potential employment opportunities is unprecedented. The government of British Columbia estimates that if five LNG projects and associated pipelines proceed, 21,600 jobs will be needed at the peak of construction as well as a further 2,400 operational jobs.²⁵ Based on information from the Project proponents, the two oil pipeline projects will create up to 7,500 construction jobs and 200 operational jobs in Alberta and British Columbia. Construction of pipelines, terminals, and related infrastructure is scheduled to commence as early as 2014, and many Projects may proceed simultaneously. These are tight timelines; realizing opportunities will take careful planning and focused concerted actions by all parties.

Project proponents have demonstrated a willingness to work with Aboriginal communities and service delivery providers to implement training and employment initiatives. Proponents have shown they are capable of acknowledging and responding flexibly to the individual circumstances of Aboriginal communities. Nevertheless, Project proponents expressed frustration about the criteria for program funding and the nature of program delivery given their needs and Project timelines. Even experienced human resource professionals commented about having to navigate the “plethora of federal programs”.

²⁴ Centre for the Study of Living Standards, *Aboriginal Labour Market Performance in Canada: 2007–2011*, 2012.

²⁵ B.C. Natural Gas Workforce Strategy and Action Plan, July 2013.

Canada's training and economic development programs have, in general, not met the needs of proponents in specific regions. The Strategic Partnerships Initiative has had some success in terms of addressing gaps in federal programs, targeting a limited number of sectors. However, it has insufficient funding to provide the training necessary to meet the employment opportunities associated with the Projects.

Current Programs and Providers for Aboriginal Education, Training, and Employment

Canada's *Federal Framework for Aboriginal Economic Development* was launched in 2009 with a focus on building strategic partnerships with Aboriginal groups, the private sector, and the provinces and territories in order to promote Aboriginal economic development. Canada has created many programs that support the framework. Although many programs exist, three have been identified by Aboriginal communities and industry as particularly useful:

The **Strategic Partnerships Initiative** identifies where market and demand opportunities exist in key sectors of the economy to overcome gaps in federal programming.

The **Skills and Partnership Fund** targets labour force development initiatives. It is set to expire in 2015 and all funding has been fully allocated.

The **Aboriginal Skills and Employment Training Strategy** ("ASETS") fosters partnerships with the private sector, provinces, and territories for skills development, and funds local service delivery organizations which design their own training and employment programs. All funding for ASETS has been allocated through to 2015.

Both Alberta and British Columbia have Aboriginal-targeted training programs that are funded from their respective Canada labour market agreements.

Many educational and training institutions prepare Aboriginal people for available job and business opportunities. In Alberta, the Northern Alberta Institute of Technology offers a number of programs directed specifically at Aboriginal students. In British Columbia, there are numerous examples of targeted educational and training programs for Aboriginals, including: the Jim Kassen Industry Training Centre at Northern Lights College in Fort St. John, and the Ch'nook Indigenous Business Education Program at the Sauder School of Business at the University of British Columbia.

There are 13 ASETS service delivery organizations in Alberta and 15 in British Columbia. They provide job-finding skills and training, wage subsidies to encourage employers to hire Aboriginal workers, financial subsidies to help individuals access employment or obtain skills, entrepreneurial skills development, supports to help with returning to school, and child care for parents in training.



To respond effectively to the issues raised by industry and Aboriginal communities, Canada should consider a collaborative approach based on regional strategic planning to ensure coordination of training efforts, efficiencies, and economies of scale. Regional plans are designed to identify:

- the range of opportunities available during the planning, construction, and operational phases for all Projects in that region;
- related indirect opportunities or ancillary services (e.g. nurses, teachers);
- the capacity and time-sensitive realities of both Aboriginal communities and industry; and
- the resources required to implement the plan.

British Columbia has commenced regional planning for LNG workforce development. The province, industry, and training providers have begun planning to meet the skills training requirements through the LNG workforce strategy and implementation committee. The Projects present an opportunity for Canada to leverage and build on these efforts.

Canada has undertaken strategic planning in partnership with Ontario, industry, and affected Aboriginal communities in the Ring of Fire.²⁶ Similarly, the Canadian Northern Economic Development Agency fosters growth and development in the three territories by delivering economic development programs, and by collaborating with and aligning the efforts of partners in northern and southern Canada to respond to economic challenges and opportunities in the north.²⁷ These strategic planning partnerships may be useful models to follow in Alberta and British Columbia.

Canada should use available information about Aboriginal labour market participation to link training and employment requirements to labour market demand for the oil and natural gas sector, and measure outcomes.

Implementing strategic regional plans will require capable, on the ground resources. Existing service delivery organizations that provide access to employment and business counselling services, community supports, and office infrastructure need to be incorporated into the implementation of a plan. An assessment will be necessary to determine what additional resources will be required to support service delivery providers. In addition, these organizations require assistance to increase capacity to expand and develop their presence in local Aboriginal communities.

²⁶ The Ring of Fire is the name given to a mineral rich area in northern Ontario.

²⁷ <http://www.cannor.gc.ca/index-eng.asp>.



Canada cannot do this alone. Aboriginal leaders and industry also have a role. Aboriginal leaders must become active partners in developing regional strategic plans, and encourage education and personal responsibility to create or build upon a culture of community success. Some communities are well on their way and could share their experiences and knowledge with others through information exchanges, mentoring, job shadowing, and other Aboriginal-to-Aboriginal initiatives. Project proponents should share best practices with each other to improve Aboriginal training and employment outcomes.

Business Opportunities

Successful economies stand on the shoulders of legitimate, culturally grounded institutions of self-government. Indigenous societies are diverse; each nation must equip itself with a governing structure, economic system, policies, and procedures that fit its own contemporary culture.

The Harvard Project on American Indian Economic Development Overview.

Significant business opportunities will be available during Project construction and operation.²⁸ There will also be indirect business opportunities as a result of increased economic activity and population growth.

Many Aboriginal Canadians have created successful businesses, including in the energy sector but barriers affect Aboriginal participation, including:

- limited access to capital;
- limited business and financial knowledge, entrepreneurial capacity, and business acumen;
- lack of relevant education, including advanced education and technical skills and certification of potential Aboriginal employees; and
- inadequate physical infrastructure.

Canada's Aboriginal business development programs were not designed to address the scale and scope of opportunities provided by the Projects.

²⁸ During the construction phase, direct procurement opportunities could include camp services, catering, clearing and brushing, heavy equipment operations, and habitat restoration. Once projects are operational, on-going service contracts include electrical and mechanical system maintenance, environmental monitoring, and spill response services.

Federal Support for Aboriginal Business Development

The Aboriginal Business Development Program supports Aboriginal entrepreneurs and Aboriginal community-owned businesses for a range of activities including business planning, start-up, acquisition, expansion, and marketing. The program provides capital for Aboriginal businesses which have difficulty obtaining funding from traditional sources, and is delivered through Aboriginal Financial Institutions (“AFIs”). Under this program, financing through the AFIs is limited to \$99,999 for Aboriginal individuals and incorporated businesses and up to \$250,000 for community owned businesses.

Regional strategic planning and better resourced service delivery organizations would also enhance Aboriginal capacity in business development.

Although Canada has an important role in ensuring that programs and services adequately support Aboriginal economic development, the success of businesses rests with Aboriginal entrepreneurs and business owners.

Canada could encourage and promote forums where Aboriginal groups can share knowledge, best practices, skills, experience, and capacity through community exchanges, workshops, and conferences. Mentoring, job shadowing, and the transfer of business knowledge among Aboriginal groups will be critical to entrepreneurial success.

Canada, Aboriginal business organizations, and industry should establish an annual recognition initiative to acknowledge successful or innovative Aboriginal business collaborations and partnerships.

Recommendations

Aboriginal leaders should engage in community-based strategic planning to:

- a. undertake existing community skills and training needs;
- b. encourage members to pursue training, education, employment, and business opportunities where they exist; and
- c. identify suitable business development and entrepreneurial opportunities.

Canada should sponsor and coordinate regional strategic planning with Aboriginal groups, industry, and local and provincial governments, educational institutions, and training providers, to ensure education, skills, and employment training are coordinated, flexible, and targeted to meet the needs of Aboriginal people and employers in areas impacted by the Projects.

Canada should target funding for Aboriginal education, pre-employment skills development, and skills training in a manner that is responsive to the needs and timelines identified in the regional strategic plans, and sufficiently flexible to address chronic barriers to employment.

Canada should collaborate with its partners to enhance access to employment and business counselling services, community supports, and office infrastructure, to support Aboriginal people and to implement regional strategic plans. This includes establishing direct relationships and accountability between regional service providers and neighbouring Aboriginal communities to support their members.

Canada, Aboriginal communities, and industry should create a forum to share best practices about successful training, employment, and procurement initiatives to improve Aboriginal training and employment outcomes.

Canada should ensure that federal programs address the need for capital and other financial support for Aboriginal businesses participating in opportunities related to major projects.

COLLABORATIONS TO ACHIEVE BETTER OUTCOMES

Canada should encourage and be prepared to support regional or sectoral organizations that represent a number of Aboriginal communities to achieve defined objectives. The Pacific Trail Pipelines project is an example of Aboriginal communities working together to achieve collectively what none of them could have achieved on their own.

In Alberta, there are 45 *Indian Act* bands falling within three historic treaty associations (Treaties 6, 7, and 8). Each tribal association represents the collective political interests of the member communities when engaging governments and industry.

There are 203 *Indian Act* bands in British Columbia (approximately one-third of the total in Canada) and, other than the Treaty 8 Tribal Association, there are no comparable historical associations. There are 21 tribal associations in British Columbia that represent Aboriginal collectives, providing their constituent communities and Canada with established structures that represent regional Aboriginal interests. In many instances, Aboriginal communities work together on a sectoral basis to achieve their goals in areas such as fisheries, marine use planning, emergency services, and employment training.

One hundred and sixty-six of the 203 bands in British Columbia have fewer than 500 people resident on reserve. A further benefit of aggregations is that small communities that would not otherwise have the financial means to acquire specialized expertise will benefit from the knowledge transfer and further develop their capacity.



Collaborations between Aboriginal groups do not diminish each community's autonomy, ability to pursue its own interests, and govern its affairs. There are examples of Aboriginal associations providing value for their members and Canada. For example, Fisheries and Oceans Canada has facilitated the creation of effective Aboriginal aggregations that deal with regional fisheries management issues and are funded through its Aboriginal Aquatic Resources and Ocean Management Program. The Assembly of First Nations and the First Nations Energy and Mining Council represent collective Aboriginal interests and have provided a conduit for Canada to engage on discrete and crosscutting issues.

Recommendation

Canada should facilitate and support tribal and sectoral associations to achieve defined objectives in areas such as marine and land use planning, capacity building, energy literacy, strategic planning, employment, and business opportunities.

ABORIGINAL FINANCIAL PARTICIPATION

Natural resource projects require significant upfront capital. Aboriginal communities face barriers in accessing financing to participate in large scale developments.

Reports suggest there is a role for governments to provide loan guarantees or other financing measures to enable Aboriginal communities to become equity owners in major projects.²⁹ Loan guarantees would provide Aboriginal groups with security that would enable them to borrow at lower than commercial interest rates, thereby making potential investments more feasible and profitable. Under this approach, governments would serve as a financial backstop should the borrower be unable to repay the loan. Loan guarantees have also been proposed to enable Aboriginal communities to acquire a non-equity economic interest, such as debt financing, thereby generating a regular revenue stream while avoiding many of the risks associated with equity ownership.

Aboriginal communities have not expressed an interest in obtaining a federal loan guarantee to obtain an equity interest in pipelines or LNG facilities. However, Canada has been approached by the First Nations Financial Management Board³⁰ to explore the concept of a First Nations entity acquiring an equity interest in major energy projects backed by a federal loan guarantee. Interest has also been expressed in using a similar approach to enable Aboriginal participation in major ancillary projects associated with oil and gas development, such as the development of renewable energy. In future Canada may be asked to consider such proposals. However, at the moment, the concept of equity participation facilitated by a federal loan guarantee remains a proposal without a project.

Industry is addressing the financial interests of Aboriginal groups without seeking Canada's involvement. For example, Northern Gateway Pipelines has offered potentially affected Aboriginal communities the opportunity to acquire an equity stake in its project as well as financing for those who want to purchase a share of the 10% offering but would

²⁹ Two examples of the reports that are making this recommendation include: *Building Authentic Partnerships: Aboriginal Participation in Major Resource Development Opportunities* and *Increasing Aboriginal Participation in Natural Resource Projects*.

³⁰ Established under the *First Nations Fiscal Management Act*, the First Nations Financial Management Board is an independent, non-profit institution through which First Nations may apply to obtain certification necessary to access lower cost borrowing to support economic and community development.

otherwise be unable to access the capital to invest in the project.³¹ Some Aboriginal groups have accepted this offer. Other proponents are proposing alternatives to equity participation, such as debt financing, to facilitate Aboriginal financial participation.

In addition to industry's efforts, the government of British Columbia is providing financial incentives for Aboriginal groups to participate in natural gas pipeline developments. For instance, the province provided funding to the First Nations Group Limited Partnership to acquire an economic interest in the Pacific Trail Pipelines project.³²

I also understand some Aboriginal representatives are meeting with foreign investors who may be interested in financing Aboriginal participation in project development.

Recommendations

Canada should continue to encourage industry and Aboriginal groups to develop flexible and innovative models to facilitate Aboriginal participation in economic development projects.

Canada should consider conditions for access to capital where an Aboriginal group or collective brings forward a proposal to obtain an economic interest in a Project.



³¹ Northern Gateway Pipelines is structured as a limited partnership, with Enbridge owning a 50% stake, 10% being set aside for purchase by Aboriginal communities, and the remainder is owned by several other investors, including large energy companies such as Suncor, Cenovus and Nexen. "Enbridge Questions Northern Gateway pipeline critics over foreign funding", Canadian Press, October 8, 2012. Enbridge projects that the 10% equity offer will generate \$280 million in net income for Aboriginal communities over the next 30 years.

³² The First Nations Group Limited Partnership ("FNLP") is a special purpose partnership of 15 communities along the proposed Pacific Trail Pipelines route in northern British Columbia, formed (with seed funding from the province) to negotiate as a collective with the proponents. In February 2013, the FNLP, the proponents, and the province announced a benefits agreement that provides up to \$200 million in financial benefits over the life of the project, along with business and training opportunities. FNLP also agreed to roughly \$32 million from the province to leverage the benefits package from the proponent.

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Advancing Reconciliation

ADVANCING RECONCILIATION

Progress on economic opportunities can be achieved through targeted efforts and effective relationships between Aboriginal Canadians and the Crown. In practice, this requires concrete action, not statements of intention.

Measures that advance reconciliation include refinements to Canada's approach to consultation and engagement, exploring mutually beneficial initiatives that support reconciliation, and encouraging Aboriginal communities to resolve shared territory issues.

CONSULTATION AND ENGAGEMENT

“The government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples... It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown’.”

McLachlin, C.J., *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

Aboriginal and treaty rights exist in Canada and have implications for the way in which governments, industry, and Aboriginal communities interact. Canada focuses on fulfilling its legal obligation to consult as the way to address Aboriginal interests in economic development. Canada needs to adopt a broader approach rather than strictly satisfying the legal duty if it hopes to obtain greater Aboriginal support for projects. A broad approach involves identifying and balancing competing claims, interests, and ambitions prior to the commencement of regulatory processes.



Section 35 Rights and the Legal Duty to Consult

Existing Aboriginal and treaty rights, including those contained in modern land claims agreements, are constitutionally “recognized and affirmed” in section 35 of the *Constitution Act, 1982*.³³ A series of Supreme Court of Canada decisions have outlined the nature and scope of Aboriginal rights. Aboriginal rights are site, fact, and group specific and relate to elements of the practices, customs, and traditions that are integral to the distinctive culture of a particular Aboriginal group.³⁴ Aboriginal title is a unique subset of Aboriginal rights, which the Supreme Court of Canada has defined as “a right to the land itself”. It is a right that, where proven, provides for the exclusive use of the land, including a right to choose the uses to which the land can be put. Amongst the types of Aboriginal rights protected by section 35, it is Aboriginal title that most closely resembles outright ownership of land in fee simple.

The duty to consult is grounded in the core precept of the honour of the Crown and the recognition of the unique relationship that exists between the Crown and Aboriginal Canadians. The Supreme Court of Canada has identified the duty as part of the reconciliation process mandated by section 35.

The duty to consult is engaged when the Crown contemplates conduct that may adversely impact potential or established Aboriginal or treaty rights.

Consultation, and where appropriate accommodation, about potential adverse impacts on claimed or established section 35 rights is required before federal decisions about natural resource development can be made. Canadian courts have clarified that strategic and high level government decisions can also engage the duty.³⁵ They have also encouraged early consultation.³⁶ The courts have confirmed that the duty to consult does not give an Aboriginal group a veto over potential Crown conduct.³⁷ Procedural aspects of the duty may be delegated by the Crown to third parties, including project proponents. However, ultimate responsibility for fulfilling the duty to consult remains with the Crown.

³³ Section 35(1) states: “the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.”

³⁴ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 74.

³⁵ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650.

³⁶ *Ibid.* See also *Sambaa K’e Dene Band v. Duncan*, 2012 FC 204, and *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14.

³⁷ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 45.

The United Nations Declaration on the Rights of Indigenous Peoples

Many Aboriginal leaders raised the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) in meetings to make the point that the declaration ought to inform the approach of governments in their relations with Aboriginal communities. UNDRIP is an aspirational document and was endorsed by Canada in 2010 in a statement which, among other things, indicated support for the principles set out in the declaration. Canada has stated that UNDRIP does not change Canadian law or represent customary international law. However, some Aboriginal leaders contend that the UNDRIP principle of “free, prior, and informed consent” requires governments and project proponents to obtain Aboriginal approval in advance of project development. The Supreme Court of Canada has established that good faith is required of both the Crown and Aboriginal communities during the process of consultation, furthermore the process does not give Aboriginal communities a veto over what can be done with land pending final proof of a claim (see *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511). A recent decision commenting on UNDRIP is *Simon v. Canada (Attorney General)*, 2013 FC1117, where Scott, J. noted that while UNDRIP does not create any substantive rights, the court nonetheless favoured an interpretation that would embody its values.

Courts have provided general directions about the process of consultation, but have left a fair degree of discretion in the hands of the Crown to determine how the obligation ought to be discharged. The scope and content of the duty and how it is discharged are highly contextual. Ultimately, meeting the duty requires flexible processes that demonstrate a genuine effort to understand Aboriginal concerns, and where appropriate undertake efforts to address adverse impacts on potential or established Aboriginal or treaty rights. Courts have been clear that complex or difficult cases may require flexible processes, particularly where deeper consultation is required owing to the high level of complexity of the specific situation.³⁸ The overriding objective is to ensure the process followed maintains the honour of the Crown and advances the principle of reconciliation with respect to the interests at stake.³⁹

The concept of “engagement” is distinct from “consultation”. The term consultation is based in the body of law dealing with Aboriginal and treaty rights and relates to the Crown’s duty to consult whereas engagement refers to a more general concept of support and relationship-building between the parties. For resource development, while the Crown’s strict obligation is to meet the duty to consult, in a practical sense, engagement by Canada with Aboriginal communities is a necessary condition for relationship-building and furthering the process of reconciling Aboriginal interests with those of Canadians as a whole.

³⁸ *Ibid.*, at para. 44.

³⁹ *Ibid.*, at para. 45.

Canada's Approach to Consultation

A 2007 cabinet directive⁴⁰ mandated Canada with implementing a “whole-of-government approach” to Aboriginal consultation for major resource projects. Canada seeks to fulfill its obligations in a coordinated manner that is integrated in environmental assessments and regulatory review processes. The applicable regulatory authority is responsible for coordinating consultation.

CEAA 2012 provides for environmental assessments by a responsible authority or a review panel.⁴¹ Canada relies, to the extent possible, on these regulatory processes and industry to discharge the Crown's consultation obligations on major projects. These panels and boards provide predictability and consistency of process for participants and industry.

CEAA 2012 focuses environmental assessments on major projects with the greatest potential for significant adverse environmental effects. It establishes new powers of enforcement of federal decisions, sets beginning to end timelines for federal environmental assessments, allows substitution or equivalency with the provinces (where provinces meet all federal requirements), and enables the results of a regional environmental study to, among other things, facilitate the consideration of cumulative effects in an environmental assessment.

While the integrated whole-of-government approach has been endorsed by the courts,⁴² Aboriginal communities have expressed concern about it. An unintended consequence is that the formality of environmental assessments inhibits Crown-Aboriginal dialogue. It is costly for Aboriginal communities to participate, the focus is often technical, and the process can be time consuming. Further, the joint panel review for the Northern Gateway Pipeline project demonstrates how regulatory processes can turn into adversarial proceedings damaging relations between the Crown and industry on one hand, and Aboriginal communities on the other.

One of the objectives of CEAA 2012 is to legislate timelines for environmental assessment processes. These timeframes have created challenges for Aboriginal groups, particularly those involved in consultations for multiple project developments. In addition, Aboriginal groups contend that the timelines have impacted their ability to participate fully in environmental assessments, creating unfair and inadequate Crown consultations.

Aboriginal people also feel that the limited scope of the issues that can be addressed in an environmental assessment process does not adequately consider the breadth of potential impacts to their section 35 rights, e.g., the inability to discuss cumulative effects beyond the context of a single project.

⁴⁰ The full title of the cabinet directive is *Cabinet Directive on Improving the Performance of the Regulatory System for Major Projects*.

⁴¹ Reviews are conducted by the National Energy Board for international and inter-provincial pipelines and transmission lines; the Canadian Nuclear Safety Commission for nuclear projects; and the Canadian Environmental Assessment Agency for all other projects.

⁴² *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484 at para. 25; *Standing Buffalo Dakota First Nation v. Enbridge Pipeline Inc.*, 2009 FCA, 308; *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, 2012 FCA 73; *Katlocheeche First Nation v. Canada (Attorney General)*, 2013 FC 458. However, this early positive support from the courts has been tempered by a caution in *Gitxaala Nation v. The Minister of Transport, Infrastructure and Communities et al.*, 2012 FC 1336 that courts could subsequently intervene if they find that the Crown has failed ultimately to fulfill its overarching duty to consult with affected Aboriginal groups.

Aboriginal communities expect the Crown and project proponents to involve them at the earliest possible stage in project planning and decision making. Canada engages with project proponents in advance of environmental assessments. Canada relies procedurally on the consultation efforts of proponents, but does not directly consult with potentially affected Aboriginal groups until regulatory processes have begun. Canada takes an active role once a project description is filed with a regulator and the regulatory process starts, but for major projects that may be many months or years after a proponent has undertaken Aboriginal engagement and project planning efforts.

Industry accepts its role in Aboriginal consultations, but requires more clarity from Canada about the respective roles of industry and the federal Crown. In some instances, industry has expressed frustration, objecting to the scope of responsibilities it is expected to assume. For example, some proponents have identified overlapping territorial disputes as an issue best addressed by the Crown.

Canada's reliance on industry creates risk because companies have different cultures, experiences, and expertise in Aboriginal relations. Some project proponents are better than others at consulting with Aboriginal communities and addressing Aboriginal interests. There are compelling examples of projects being compromised prior to the commencement of an environmental assessment because Aboriginal communities were not effectively engaged at the outset. Governments have a vested interest to ensure that a proponent's consultation efforts and activities are effective.

Similarly, it may be necessary for the Crown to consider intervening in situations where, for instance, an Aboriginal group refuses to engage in good faith consultations.

Ultimately, the Crown must satisfy the duty to consult.

Refinements to Canada's Approach

In light of these issues, there are adjustments that Canada could consider to refine its approach. I believe there is a need for Canada to take on an earlier and more expansive role.

Canada can do this by focusing on relationship-building, engaging outside the consultation process, and addressing Aboriginal interests beyond project-specific issues.

Canada can also develop a policy framework clearly setting out the respective roles and responsibilities of Canada and industry with respect to Aboriginal consultations.

Canada should oversee industry's consultation efforts at an earlier stage in order to assess the progress being made. Where Canada determines that those efforts are lacking, it should be prepared to guide the project proponent in order to achieve a better outcome.

Recommendations

For major projects, Canada should develop a federal framework and timeframe for Crown engagement with Aboriginal groups. This framework will ensure that engagement is implemented in a consistent manner across all federal departments and agencies.

Canada should consider undertaking early engagement to address Aboriginal interests that may not be dealt with in a regulatory process.

Canada should define and articulate its view about the Crown's and industry's respective roles and responsibilities with respect to the duty to consult.

For major projects, Canada should advise or guide project proponents where Canada determines a proponent is not effectively discharging the procedural aspects of the duty to consult.

Canada should engage, and conduct consultations in addition to those in regulatory processes, as may be required, to address issues and facilitate resolutions in exceptional circumstances, including where:

- a. Aboriginal territorial disputes are intractable;
 - b. despite reasonable efforts, industry is unable to meet Aboriginal expectations in relation to a matter under federal jurisdiction; or
 - c. for other strategic reasons, Canada determines it is necessary to engage with a particular Aboriginal group.
-



RECONCILIATION INITIATIVES

Canadian courts have admonished the Crown and Aboriginal communities to reconcile their respective interests through a process of negotiation not litigation.

In Alberta, where there are historic treaties, the provincial government has described its approach to reconciliation in a recently revised consultation policy: "...Alberta will seek to reconcile First Nations' constitutionally protected rights with other societal interests with a view to substantially address adverse impacts to Treaty rights and traditional uses through a meaningful consultation process."⁴³

In British Columbia, where the majority of Aboriginal groups have not negotiated treaties, Crown reconciliation efforts have been primarily focused on the negotiation of comprehensive claims. Given the length of time it takes to conclude treaties, governments and Aboriginal groups recognize that interim steps towards reconciliation, as contemplated by treaty making, are required.

Over the last decade, the government of British Columbia and strategically-placed Aboriginal communities have transformed their relationships by establishing government-to-government frameworks through bilateral non-treaty agreements that address Aboriginal rights and respond to a range of resource development issues, including land and resource planning, decision making, and revenue sharing. British Columbia has been willing to try different approaches to reconciliation, and to adjust its approach to achieve mutually beneficial arrangements. The government of British Columbia and some Aboriginal groups are proposing that Canada replicate this model in areas of federal jurisdiction.

Until recently, Canada has focused its reconciliation efforts solely on negotiating comprehensive treaties, and has not pursued other approaches that could be seen as disincentives to treaty-making. Canada could meet its interests by negotiating reconciliation protocols with Aboriginal communities that establish government-to-government arrangements in areas of federal jurisdiction and decision making.

In the last two years, Canada has undertaken several initiatives intended to advance the reconciliation agenda, including:

- the Crown-First Nations Gathering in January 2012, and the follow-up meeting on January 11, 2013 between the Prime Minister and Assembly of First Nations Chiefs;
- the New Approach to Comprehensive Claims and Self-Government Negotiations;⁴⁴ and
- the Senior Oversight Committee on Comprehensive Claims.⁴⁵

⁴³ *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management*, 2013, <http://www.aboriginal.alberta.ca/documents/GoAPolicy-FNConsultation-2013.pdf>.

⁴⁴ The New Approach is focused on a recommitment to expediting treaty negotiations where there are prospects for reaching agreement and a recognition there may be other processes or agreements for recognition and reconciliation in addition to comprehensive treaties. See <http://www.aadnc-aandc.gc.ca/eng/1346437606032/1346437640078>.

⁴⁵ The Senior Oversight Committee is tasked with the reform of treaty negotiations policy to greater reflect the themes of reconciliation and recognition. See <http://www.aadnc-aandc.gc.ca/eng/1365801483477/1365801579040>.

These efforts are encouraging and have the potential to improve the relationship between Canada and Aboriginal groups. It is important to recognize that advancing Crown-Aboriginal relations cannot be done in isolation. When governments seek to advance their interests in issues such as energy infrastructure, they have to be prepared to address subjects on the agendas of Aboriginal communities. In British Columbia, there is an overriding Aboriginal interest in fish and Canada has been slow to address that issue both in and out of treaty. In the context of the overall relationship, Canada needs to demonstrate both interest and resolve to tackle difficult issues.

Coastal First Nations, who represent Aboriginal communities on the central coast of British Columbia, and Haida Nation have each made proposals to Canada to establish shared decision-making frameworks in federal areas of jurisdiction over fisheries and marine management. The proposals are different but both support the concept of establishing a government-to-government relationship where Aboriginal groups have direct input into federal decision making that could affect their Aboriginal rights.

Recommendations

Canada should take steps to negotiate non-treaty, government-to-government arrangements such as consultation protocols, incremental treaty measures, and reconciliation agreements with Aboriginal groups, independent of or in collaboration with British Columbia.

Canada should enter into negotiations to advance reconciliation measures in areas of federal jurisdiction and responsibility in response to proposals from Coastal First Nations and Haida Nation.

FACILITATING THE RESOLUTION OF SHARED TERRITORIES

Conflict over traditional territorial boundaries is a longstanding issue among Aboriginal communities. The preoccupation in Canadian law with defined geographical boundaries has perpetuated existing divisions among Aboriginal groups. It also creates winners and losers. Aboriginal communities that are in the path of developments are eligible for a range of benefits: those on the periphery are not.

The impact of overlapping claims should not be underestimated — the spectre of endless conflict among Aboriginal groups, including litigation, may influence final investment decisions. Industry is not equipped nor should it be expected to resolve competing claims, and looks to the Crown to facilitate resolution of these disputes. Ultimately, shared territory disputes are best resolved by Aboriginal communities, whether through negotiations or an acceptable dispute resolution process.

Aboriginal organizations in British Columbia have been trying to address overlapping claims for some time. More than fifteen years ago, the First Nations Summit adopted a protocol to deal with shared territory issues. As recently as 2013, the First Nations Summit declared overlapping territories a priority and directed a task group to develop principles, a process, and a dispute resolution mechanism. Although finding solutions to shared territory disputes is challenging, Aboriginal groups should take steps to resolve them.

Proposed developments in areas of overlapping claims may crystallize or escalate territorial disputes given the potential benefits at stake. In such instances, Aboriginal groups can either maintain the dispute or participate in approaches to seek a collaborative outcome.

If Aboriginal communities are unable or unwilling to resolve disputes, Canada may be compelled to intervene by undertaking strength of claim assessments to identify the scope and depth of consultation and potentially advise on the apportionment of benefits. The Crown's assessment may also have longer-term implications in other areas for those Aboriginal groups. However, collaborative approaches are preferred because they place solutions in the hands of the participants and do not require determinations of territorial boundaries or government intervention.

Recommendations

Canada should encourage and support Aboriginal initiatives that have the potential to address shared territory disputes including processes between Aboriginal groups and broader proposals from Aboriginal organizations.

In areas impacted by major projects, where territorial overlap disputes exist, Canada should undertake strength of claim assessments (in conjunction with provincial governments where appropriate) to advise on the required level of consultation and apportionment of benefits.

Canada should establish a federal policy framework and guidelines to address shared territory disputes in the context of major project developments in a consistent manner across all federal departments and agencies.



Taking Action

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TAKING ACTION

In order to build on the momentum created by the initial engagement between Aboriginal leaders and senior federal officials, I recommend Canada take action to work with its partners and enhance its ability to work effectively.

CROWN-FIRST NATIONS TRIPARTITE ENERGY WORKING GROUP

This report encourages Canada to advance its interests in the Projects in collaboration with Aboriginal communities, local and provincial governments, and industry. Many of the recommendations contemplate Canada working in concert with these parties. However, it is apparent that each of the parties has been neither attentive nor effective in addressing the others' interests.

Representatives from the government of British Columbia and Aboriginal leaders have proposed that a Crown-First Nations tripartite energy working group be mobilized to advance energy-related issues. Canada and British Columbia would designate senior officials to coordinate each government's participation. Aboriginal representatives would alternate depending on a specific Project or regional focus.

Although the interests of each of the parties differ in many important respects, there is a broader shared interest that can bring the parties together. The working group would provide an effective venue for Canada to engage and coordinate with the other parties on the basis of this shared interest as it implements recommendations I have made in the following areas:

- promoting a principled and informed dialogue about resource development;
- participating in regional planning;
- facilitating environmental stewardship and habitat enhancement initiatives;
- advancing pipeline and marine safety strategies;
- supporting regional or sectoral collaborations among Aboriginal communities;
- encouraging flexible and innovative models to facilitate Aboriginal participation in economic development, including Aboriginal training, employment, and business opportunities; and
- where appropriate, pursuing reconciliation measures to address key areas of federal and provincial jurisdiction.

Operating principles for a Crown-First Nations tripartite energy working group, proposed for Canada's consideration, are outlined below:

- create a process to engage Canada, British Columbia, and Aboriginal communities on a government-to-government basis in a productive approach to reconciliation and effective relationship building in relation to the Projects;
- seek out interest-based solutions in relation to the Projects for the benefit of all parties, recognizing shared short-term and long-term interests;
- develop approaches to address legal requirements about Aboriginal and treaty rights;
- establish a framework to allow energy infrastructure projects and related interests and concerns to be considered through respectful and sustained dialogue. The framework will identify:
 - desired outcomes,
 - possible tools and approaches,
 - roles and responsibilities of the involved parties;
- be adequately resourced;
- participate in discussions that are open, transparent, and without prejudice;
- obtain and disseminate relevant information on a timely basis to Canada, British Columbia, and Aboriginal communities;
- identify local, regional, and national interests that can be addressed through the development of economic, social, and environmental stewardship initiatives;
- recognize and respect government-to-government relationships and responsibilities; and
- explore the varied options and possibilities to facilitate Aboriginal participation in energy development.

Canada and the government of Alberta should consider this or other collaborative approaches.

Recommendation

Canada, represented by senior officials, should participate in a working group with Aboriginal leaders and the government of British Columbia as a venue to advance open and practical dialogue about each party's issues and interests including the recommendations in this report.

INTERNAL FEDERAL INITIATIVES

Aboriginal groups, provincial governments, and industry want Canada to address their respective varied and at times competing interests through a coordinated approach.

Canada has responded to this concern for industry by creating the Major Projects Management Office, but has yet to find an effective approach to address Aboriginal interests. Although Canada has already implemented initiatives to address specific resource development issues (e.g., Transport Canada's Tanker Safety Expert Panel, the LNG working group with British Columbia, and engagement by Ministers and Deputy Ministers with Aboriginal communities in British Columbia), this approach has yet to effectively address the broad range of Aboriginal issues associated with these Projects in Alberta and British Columbia.

Canada therefore needs to strategically coordinate its activities at both the political and departmental level to address Aboriginal interests in relation to projects of national importance.

There is an opportunity to adopt a whole of government approach that is regionally-based and takes advantage of local federal officials who have developed relationships with Aboriginal groups.

It would also be useful, in my view, for federal officials to undertake cultural awareness training to enable more effective relationships with Aboriginal communities. Industry has adopted such training which promotes a greater awareness and understanding of Aboriginal culture, practices, and protocol.

Recommendations

Canada should designate one or more senior officials to implement the broad vision, take the lead, and be responsible for federal engagement with provincial government, Aboriginal groups, and industry, and to be accountable for outcomes.

Canada should build on the model it has developed with the Major Projects Management Office, and establish a sustained presence of senior officials on the ground in British Columbia with capacity to coordinate and enable Crown engagement and consultations with Aboriginal communities on key issues related to the development of energy infrastructure.

Canada should develop its internal capacity to engage effectively with Aboriginal groups and individuals by providing cultural awareness training for federal officials at all levels.



SUMMARY

Canada and Aboriginal communities are at a critical juncture in their relationship. The development of west coast energy infrastructure provides an opportunity to forge partnerships and build relationships.

There is a strong interest and real opportunity for Canada and Aboriginal Canadians to more effectively collaborate to address their respective interests. Three integral components to meet this objective are establishing trust, fostering inclusion, and advancing reconciliation. This will require practical steps and concrete action.

Although this report is being delivered to the Government of Canada, it is my hope that it will be viewed by interested parties as an objective assessment of the current environment, and that the proposed recommendations will be accepted as a constructive starting point.

APPENDIX A — MANDATE

MY MANDATE IS TO:

- communicate directly with Aboriginal communities, industry stakeholders, and provincial and local government authorities to gain a better understanding of issues and opportunities related to the development of west coast energy infrastructure, including factors that would affect Aboriginal interests in relation to this development;
- share information with Aboriginal communities on the federal pipeline and marine safety initiatives, including the review by the Tanker Safety Experts Panel, and identify factors and propose options to facilitate Aboriginal participation in new initiatives proposed to ensure world class marine and pipeline safety;
- identify factors affecting Aboriginal participation in employment and business opportunities arising from the development of west coast energy infrastructure and propose options to address and promote Aboriginal interests and to enable Aboriginal communities to create more business and employment opportunities; and
- identify factors affecting Aboriginal participation in addressing environmental and socio-economic issues in relation to the development of west coast energy infrastructure and propose options to increase that participation.

APPENDIX B — PROPOSED PROJECTS

Status of West Coast Energy Infrastructure Projects¹

OIL PROJECTS

NORTHERN GATEWAY PIPELINE / ENBRIDGE NORTHERN GATEWAY

Enbridge is proposing to construct and operate a 525,000 barrels per day petroleum export pipeline from Edmonton, Alberta to Kitimat, BC. The proposed project consists of a 1,170 km-long petroleum export pipeline, a condensate import pipeline, and a marine terminal. The project has an anticipated capital cost of \$6.5 billion, and is expected to generate 3,000 construction jobs, and provide 1,150 long-term jobs.

Aboriginal Interest: The proponent has engaged 70 Aboriginal groups

Planned In-Service Date: 2018

TRANS MOUNTAIN PIPELINE EXPANSION / KINDER MORGAN

Kinder Morgan is proposing a \$5.4 billion expansion of the Trans Mountain Pipeline system that would increase capacity from 300,000 barrels per day (b/d) to 890,000 b/d of crude oil and petroleum products from Alberta to Burnaby, BC. Approximately 30% of the existing Trans Mountain Pipeline was looped or twinned in 2008. The proposed expansion would twin the remainder of existing pipeline within the existing right-of-way, where possible, and add approximately 981 kms of new pipeline. The project would employ approximately 4,500 people during construction and 100 people once in operation.

Aboriginal Interest: 103 potentially-impacted Aboriginal groups identified

Planned In-Service Date: 2017

KITIMAT CLEAN REFINERY / KITIMAT CLEAN

Kitimat Clean has proposed the construction and development of an export-oriented 550,000 barrel per day petroleum refinery, approximately 25 km north of Kitimat, BC. Refined products would be shipped from a marine terminal located on the Douglas Channel, near Kitimat. The project would require an estimated \$18 billion capital investment and, once built, would be the largest petroleum refinery in Canada and western North America.

Aboriginal Interest: TBD

Planned In-Service Date: TBD

NATURAL GAS PROJECTS / PRINCE RUPERT

PACIFIC NORTHWEST LNG TERMINAL / PROGRESS ENERGY CANADA / JAPAN PETROLEUM EXPLORATION

Progress Energy Canada (a subsidiary of Petronas) and Japan Petroleum Exploration (Japex) are proposing to construct and operate a \$9–11 billion natural gas liquefaction project on Lelu Island within the Port of Prince Rupert. The proposed project is anticipated

¹ Information provided by project proponents, for example through project descriptions or regulatory documents.

to have an initial two train design of 12 million tonnes per annum (MTPA) with the potential to add a third train for up to 18 MTPA. The project would employ approximately 3,500 people at the peak of construction, and 200-300 people during operations. The proposed Prince Rupert Gas Transmission Pipeline would supply gas to the terminal.

Aboriginal Interest: 5 potentially-impacted Aboriginal groups identified

Planned In-Service Date: Late 2018

PRINCE RUPERT LNG TERMINAL / BG ENERGY GROUP

BG Energy Group is proposing to construct and operate an \$11–16 billion natural gas liquefaction project on Ridley Island within the Port of Prince Rupert. The proposed project is anticipated to have an initial two train design of 14 MTPA with the potential to add a third train for up to 21 MTPA. The project would provide approximately 9,000 person-years of employment for the construction of trains one and two, and an additional 3,500 person-years for train three. Once all three trains are in place, that facility would provide employment for approximately 250 employees. The proposed West Coast Connector Gas Transmission project would supply gas to the terminal.

Aboriginal Interest: 6 potentially-impacted Aboriginal groups identified

Planned In-Service Date: Early 2020

WEST COAST CONNECTOR GAS TRANSMISSION / SPECTRA AND BG GROUP

Spectra Energy and the BG Group are proposing to construct and operate a \$6–9 billion gas pipeline from northeastern British Columbia to the Prince Rupert LNG facility located in the Port of Prince Rupert (~900 km). The proposed project will consist of either one or two adjacent pipelines of 36" to 48" pipe with a capacity of up to 4.2 billion cubic feet per day (bcf/d). The proposed project would employ approximately 3,500 people during peak construction and 200 to 300 over a 30 year project lifespan.

Aboriginal Interest: Approximately 20 potentially-impacted Aboriginal groups identified

Planned In-Service Date: Late 2018

PRINCE RUPERT GAS TRANSMISSION PIPELINE / TRANSCANADA PIPELINES

TransCanada Pipelines is proposing to construct and operate a \$5 billion natural gas pipeline from northeast of Hudson's Hope, BC to the Pacific Northwest LNG facility in Prince Rupert (~750 km). The proposed project will consist of a 48" pipe with a capacity of up to 3.6 bcf/d. Anticipated employment associated with the pipeline is 4,400–5,500 person years during construction and 30–40 permanent jobs during operations.

Aboriginal Interest: 24 potentially-impacted Aboriginal groups identified

Planned In-Service Date: Late 2018

NATURAL GAS PROJECTS / KITIMAT

LNG CANADA TERMINAL / SHELL CANADA AND PARTNERS

Shell Canada and its partners (Korea Gas, Mitsubishi and PetroChina) are proposing to construct and operate a \$10–15 billion natural gas liquefaction project near Kitimat, BC. The proposed project is anticipated to have an initial two-train design of 12 MTPA with the potential to add 2 additional trains for up to 24 MTPA. The project would employ approximately 5,500 employees during peak construction and 200-400 employees after full build. The proposed Coastal GasLink Pipeline would supply gas to the terminal.

Aboriginal Interest: 9 potentially-impacted Aboriginal groups identified

Planned In-Service Date: 2019 (for initial design)

KITIMAT LNG TERMINAL / CHEVRON AND APACHE

Chevron and Apache are proposing to construct and operate a \$4.5 billion natural gas liquefaction project near Kitimat, BC. The proposed project is anticipated to have an initial plant capacity of 5 MTPA with the potential to expand capacity to 10 MPTA or more. The project would employ approximately 700 people during construction and 50 people once in operation. The proposed Pacific Trail Pipelines would supply gas to the terminal.

Aboriginal Interest: 1 potentially-impacted Aboriginal group identified

Planned In-Service Date: 2017

DOUGLAS CHANNEL LNG TERMINAL / BC LNG EXPORT CO-OP AND DOUGLAS CHANNEL ENERGY PARTNERSHIP

BC LNG Export Co-operative and Douglas Channel Energy Partnership are proposing to construct and operate a \$400 million barge-based natural gas liquefaction project near Kitimat, BC. The project is anticipated to have an initial capacity of 0.9 MTPA of natural gas with a total capacity of 1.8 MTPA.

Aboriginal Interest: 1 potentially-impacted Aboriginal group identified

Planned In-Service Date: Unknown

COASTAL GASLINK PIPELINE / TRANSCANADA PIPELINES

TransCanada Pipelines is proposing to construct and operate a \$4 billion pipeline to deliver natural gas from the area west of Dawson Creek, BC to the LNG Canada Project in Kitimat, BC (~650 km). The project will initially have the capacity to flow approximately 1.7 bcf/d of natural gas and could deliver up to approximately 5.0 bcf/ day. The pipeline would provide 2,000 to 2,500 direct jobs during construction and 15–20 permanent positions once in operation.

Aboriginal Interest: 18 potentially-impacted Aboriginal groups identified

Planned In-Service Date: 2018

PACIFIC TRAIL PIPELINES / APACHE AND CHEVRON

Apache and Chevron are proposing to construct and operate a \$1.3 billion natural gas pipeline from Summit Lake, BC to Kitimat (~470 km). The project will consist of a 42" pipe with a capacity of up to 1.4 bcf/d.

Aboriginal Interest: 15 potentially-impacted Aboriginal groups identified

Planned In-Service Date: 2018

OTHER PROPOSED PROJECTS IN BRITISH COLUMBIA

PACIFIC NORTHERN GAS LOOPING PROJECT / PACIFIC NORTHERN GAS

Pacific Northern Gas is proposing a \$1.3 billion upgrade to its transmission pipeline capacity by looping (twinning) its existing natural gas transmission system between Summit Lake, BC and Kitimat, BC (~525 km). The pipeline would transport approximately 600 million cubic feet per day (mcf/d), and provide between 1,800 and 2,400 direct person years of work during construction.

Aboriginal Interest: 24 potentially-impacted Aboriginal groups identified

Planned In-Service Date: Late 2016

WOODFIBRE LNG TERMINAL / WOODFIBRE NATURAL GAS

Woodfibre Natural Gas Limited (WNLG) is proposing the development and operation of a LNG production, storage and marine carrier LNG transfer facility located on the previous Woodfibre Pulp and Paper Mill site in Squamish, BC. The proposed project is anticipated to have a capacity of 2.1 MTPA of LNG. The project would provide approximately 600 person years of direct employment during construction and 2,500 person years of employment during operations. Natural gas will be delivered to the Woodfibre site through the existing and expanded FortisBC pipeline.

Planned In-Service Date: 2017

WCC LNG PROJECT / EXXON / MOBIL / IMPERIAL OIL

Exxon/Mobil/Imperial Oil are proposing to construct and operate a natural gas liquefaction project in either Kitimat or Prince Rupert, BC. The project is anticipated to export up to 30 MTPA of LNG.

Planned In-Service Date: 2021

TRITON LNG / ALTAGAS AND IDEMITSU KOSAN

Triton LNG LP, an equal partnership between Canadian AltaGas Ltd. and Japanese Idemitsu Kosan Co., Ltd., is proposing a Floating Liquefaction Storage and Offloading (FLSO) vessel, with two liquefaction trains and storage capacity. It is anticipated that the FLSO vessel will have an annual production capacity of approximately up to 2.3 MTPA. The project site has not yet been selected, but locations have been identified in the vicinity of Kitimat and Prince Rupert, BC. Natural gas will be delivered to the site through the existing and expanded Pacific Northern Gas pipeline.

Planned In-Service Date: 2017

AURORA LNG / NEXEN ENERGY

Nexen Energy, a wholly-owned subsidiary of CNOOC Limited, has entered into an exclusive agreement with the Government of British Columbia to examine the viability of constructing a LNG plant and export terminal at Grassy Point near Prince Rupert, BC.

DISCOVERY LNG / QUICKSILVER RESOURCES CANADA

Quicksilver Resources is considering the development of a project involving the construction and operation of natural gas liquefaction, storage and on-loading facilities on the north side of Campbell River, BC.

Planned In-Service Date: 2019 (Phase I)

EAGLE MOUNTAIN WOODFIBRE GAS PIPELINE PROJECT / FORTISBC

FortisBC is planning a \$350 million upgrade to its natural gas pipeline running from Coquitlam to the Woodfibre industrial site near Squamish, BC. The expansion includes the addition of an approximately 52 km long 20" diameter natural gas pipeline. Anticipated employment during the construction phase is 500–650 person years.

Aboriginal Interest: 4 potentially-impacted Aboriginal groups identified

Planned In-Service Date: Late 2016

APPENDIX C — CONSOLIDATED LIST OF RECOMMENDATIONS

Canada should promote a principled dialogue about resource development with Aboriginal communities in Alberta and British Columbia. This can be accomplished, in conjunction with provincial and local governments and industry, by convening conferences, workshops, and community forums to improve knowledge about the energy sector and major projects.

Where federal jurisdiction is engaged, Canada should collaboratively participate in regional planning with provincial governments, Aboriginal communities, local governments, and other stakeholders to effectively assess cumulative effects and encourage sustainable development.

Canada should establish a joint initiative with Aboriginal groups for environmental stewardship and habitat enhancement to address concerns about cumulative effects of major resource projects.

Canada should coordinate and convene the participation of key stakeholders including Aboriginal groups, governments, industry, non-governmental organizations, and scientists, to advance pipeline and marine safety and strategies to mitigate potential impacts of oil spills on the terrestrial and marine environment.

Canada, in conjunction with industry and provincial governments, should support:

- a. Aboriginal participation in marine traffic management and emergency response planning;
- b. training and coordination of Aboriginal communities in terrestrial and marine monitoring and emergency response, using existing organizations where appropriate, such as FNESS and WCMRC;
- c. acquisition of appropriate equipment and infrastructure by Aboriginal communities for terrestrial and marine monitoring and emergency response; and
- d. invest in technologies for oil spill clean-up.

Canada should ensure that marine preparedness and response plans are publicly available.

Aboriginal leaders should engage in community-based strategic planning to:

- a. undertake existing community skills and training needs;
- b. encourage members to pursue training, education, employment, and business opportunities where they exist; and
- c. identify suitable business development and entrepreneurial opportunities.

Canada should sponsor and coordinate regional strategic planning with Aboriginal groups, industry, and local and provincial governments, educational institutions, and training providers, to ensure education, skills, and employment training are coordinated, flexible, and targeted to meet the needs of Aboriginal people and employers in areas impacted by the Projects.

Canada should target funding for Aboriginal education, pre-employment skills development, and skills training in a manner that is responsive to the needs and timelines identified in the regional strategic plans, and sufficiently flexible to address chronic barriers to employment.

Canada should collaborate with its partners to enhance access to employment and business counselling services, community supports, and office infrastructure, to support Aboriginal people and to implement regional strategic plans. This includes establishing direct relationships and accountability between regional service providers and neighbouring Aboriginal communities to support their members.

Canada, Aboriginal communities, and industry should create a forum to share best practices about successful training, employment, and procurement initiatives to improve Aboriginal training and employment outcomes.

Canada should ensure that federal programs address the need for capital and other financial support for Aboriginal businesses participating in opportunities related to major projects.

Canada should facilitate and support tribal and sectoral associations to achieve defined objectives in areas such as marine and land use planning, capacity building, energy literacy, strategic planning, employment, and business opportunities.

Canada should continue to encourage industry and Aboriginal groups to develop flexible and innovative models to facilitate Aboriginal participation in economic development projects.

Canada should consider conditions for access to capital where an Aboriginal group or collective brings forward a proposal to obtain an economic interest in a Project.

For major projects, Canada should develop a federal framework and timeframe for Crown engagement with Aboriginal groups. This framework will ensure that engagement is implemented in a consistent manner across all federal departments and agencies. The opinions expressed are those of the authors and do not necessarily reflect the views of the Government of Canada.

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Canada should consider undertaking early engagement to address Aboriginal interests that may not be dealt with in a regulatory process.

Canada should define and articulate its view about the Crown's and industry's respective roles and responsibilities with respect to the duty to consult.

For major projects, Canada should advise or guide project proponents where Canada determines a proponent is not effectively discharging the procedural aspects of the duty to consult.

Canada should engage, and conduct consultations in addition to those in regulatory processes, as may be required, to address issues and facilitate resolutions in exceptional circumstances, including where:

- a. Aboriginal territorial disputes are intractable;
- b. despite reasonable efforts, industry is unable to meet Aboriginal expectations in relation to a matter under federal jurisdiction; or
- c. for other strategic reasons, Canada determines it is necessary to engage with a particular Aboriginal group.

Canada should take steps to negotiate non-treaty, government-to-government arrangements such as consultation protocols, incremental treaty measures, and reconciliation agreements with Aboriginal groups, independent of or in collaboration with British Columbia.

Canada should enter into negotiations to advance reconciliation measures in areas of federal jurisdiction and responsibility in response to proposals from Coastal First Nations and Haida Nation.

Canada should encourage and support Aboriginal initiatives that have the potential to address shared territory disputes including processes between Aboriginal groups and broader proposals from Aboriginal organizations.

In areas impacted by major projects, where territorial overlap disputes exist, Canada should undertake strength of claim assessments (in conjunction with provincial governments where appropriate) to advise on the required level of consultation and apportionment of benefits.

Canada should establish a federal policy framework and guidelines to address shared territory disputes in the context of major project developments in a consistent manner across all federal departments and agencies.

Canada, represented by senior officials, should participate in a working group with Aboriginal leaders and the government of British Columbia as a venue to advance open and practical dialogue about each party's issues and interests including the recommendations in this report.

Canada should designate one or more senior officials to implement the broad vision, take the lead, and be responsible for federal engagement with provincial government, Aboriginal groups, and industry, and to be accountable for outcomes.

Canada should build on the model it has developed with the Major Projects Management Office, and establish a sustained presence of senior officials on the ground in British Columbia with capacity to coordinate and enable Crown engagement and consultations with Aboriginal communities on key issues related to the development of energy infrastructure.

Canada should develop its internal capacity to engage effectively with Aboriginal groups and individuals by providing cultural awareness training for federal officials at all levels.

ACKNOWLEDGEMENTS

I wish to express my gratitude to the many Aboriginal communities I visited in Alberta and British Columbia. I was always warmly welcomed by community members who generously shared their time.

As well, I am grateful for the constructive advice and assistance provided by representatives of the Alberta and British Columbia governments and industry.

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