



# THE ENBRIDGE NORTHERN GATEWAY PIPELINE: GETTING THE DECISION RIGHT

## WEST COAST ENVIRONMENTAL LAW – 2009

The proposed Enbridge Northern Gateway pipeline project is a massive undertaking. If it proceeds it will involve two parallel 1,170 kilometre pipelines that will facilitate the expansion of the Alberta tar sands and open our northern coastal waters to oil tanker traffic. The Enbridge Gateway pipeline project raises significant environmental, social, legal and economic issues. It demands a decision-making process comparable in scope – one that honours the laws and responsibilities of First Nations, addresses the perspectives of affected communities, and considers the pipeline in the context of the much larger policy issues it raises. There are serious concerns as to whether the review process proposed for the project is up to the task. This publication outlines the issues and makes recommendations for a better path forward. In doing so, lessons from past experience with environmental assessment and proposed pipeline development are instructive.

### 1. Listening to Northern voices – the origins of environmental assessment

In the 1970s, people in the Northwest Territories and the Yukon faced a proposed natural gas pipeline that would have run 1200 kilometres along the Mackenzie River Valley, from the Beaufort Sea to Alberta. At the time, it was considered to be the largest private construction project ever proposed in the world.<sup>1</sup>

Because of the massive scope of the project, Ottawa established a public inquiry headed by Mr. Justice Thomas Berger to examine its potential environmental impact, and the social, cultural and economic effects on northern communities. The Berger Inquiry changed the way Canadians think about resource development projects. It looked at the cumulative impact of the project in the broadest possible terms, understanding that the construction of a pipeline and energy corridor would intensify oil and gas exploration all the way along its length, and would mean immense

and irreversible changes to the Western Arctic.<sup>2</sup> As Mr. Justice Berger said in one of his rulings: “this inquiry is not just about a gas pipeline; it relates to the whole future of the North.”<sup>3</sup> Perhaps most significantly, in addition to its holistic, regional focus, the Berger Inquiry also delved deeply into the broader policy issues raised by the proposed development, including federal land claims policy.

For three years, Mr. Justice Berger held hearings in every affected community, to listen to the voices of citizens speaking in their own communities and in their own ways. Communities were empowered to participate, and were provided with resources so that they could participate effectively and gather community evidence. The Inquiry’s hearings were open and inviting to everyone who wanted to participate, not just lawyers and experts.<sup>4</sup> Of course, the oil and gas industry participated too.

Mr. Justice Thomas Berger listening to Kakisa elders. Photomontage courtesy of Patrick Scott.



Due to the significant environmental consequences,<sup>5</sup> Berger recommended that no pipeline be built in the Mackenzie River valley until First Nations claims were settled.<sup>6</sup> He recommended that the federal government should abandon its extinguishment policy with respect to Aboriginal Title and instead embark on “a fundamental re-ordering” of relations with Aboriginal Peoples, based on reaching settlements that entrench rather than extinguish

<sup>1</sup> Berger, *Northern Frontier, Northern Homeland: The report of the Mackenzie Valley Pipeline Inquiry* (Ottawa: Ministry of Supply and Services Canada, 1977), Vol. 1, at ix.

<sup>2</sup> *Ibid.*

<sup>3</sup> Berger, Vol. 2, App. 2, Preliminary Ruling 1 at 242.

<sup>4</sup> Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham, ON: LexisNexis Canada, 2008) at 8.

<sup>5</sup> Berger, vol. 1 at 75.

<sup>6</sup> *Ibid.* at 196.

rights to land as the foundation for “native self-determination under the Constitution of Canada.”<sup>7</sup>

He concluded that the pipeline would bring no lasting economic benefits for northern First Nations communities, and had the potential to destroy the region’s renewable resource economy<sup>8</sup> and to impose enormous social costs.<sup>9</sup> Berger’s conclusions were not determined in advance, and the government was willing to listen to the results.<sup>10</sup> In the end, no pipeline was built (though thirty years later, one is now being considered).

Today’s federal environmental assessment process has been influenced by the Berger Inquiry. In 1995, the Parliament passed the *Canadian Environmental Assessment Act*, a law that requires social, economic and cultural factors to be considered along with both the direct and cumulative environmental effects of projects and activities.<sup>11</sup> It also includes opportunities for public participation, assisted in some cases by participant funding. Environmental assessment legislation today is an essential tool intended to ensure that projects receive precautionary scientific scrutiny before they may proceed with regulatory approvals.

However, in significant ways, Canada’s current environmental assessment regime for projects like the Enbridge Gateway pipeline lags far behind the example that was set by the Berger Inquiry more than thirty years ago. In particular, the big picture implications that Mr. Justice Berger identified are not considered in the federal legislation, and citizens often find that the issues of greatest concern to them are beyond the scope of the assessment.<sup>12</sup> In practice environmental assessments tend to ignore big questions such as whether a project is necessary at all, how it fits with Canada’s international environmental commitments, and whether a project is consistent with justice towards First Nations. Perhaps because these questions are ignored, ninety-nine percent of projects submitted for environmental assessment are approved.

## 2. The West Coast Oil Ports Inquiry

Today, British Columbians face the prospect of a similar pipeline cutting through their communities, forests and rivers: the Enbridge Gateway pipeline. However, this is not the first time that a crude oil pipeline has been considered to run to the coast. In 1976, in response to a proposed oil port at Kitimat, the federal government

<sup>7</sup> Berger, vol.1 at xxii.

<sup>8</sup> *Ibid.* at 200.

<sup>9</sup> *Ibid.* at 161.

<sup>10</sup> Puxley, *A Model of Engagement: Reflections on the 25<sup>th</sup> Anniversary of the Berger Report*, Research report of the Canadian Policy Research Networks, August 2002, available at <http://www.cprn.com/doc.cfm?doc=41&l=en>.

<sup>11</sup> The *Canadian Environmental Assessment Act* (“CEAA”) applies when a physical project (e.g., mine, a pipeline, or a dam) or an activity is on ‘federal’ land, receives federal funds, is carried out by the federal government or requires certain federal permits (which are listed in a regulation). Provincial EA legislation may also apply.

<sup>12</sup> Doelle at 29.

appointed the West Coast Oil Ports Inquiry, under Commissioner Andrew Thompson, to inquire broadly into the issue. West Coast Environmental Law was a major participant in the Inquiry.

Thompson concluded that, because the risk of a major oil spill could not be dismissed, “this Inquiry is not merely about the mitigation of adverse environmental, social, and navigational safety impacts – it is about whether an oil port should be built at all!”<sup>13</sup> The Inquiry was asked not only to address the individual Kitimat project, but the broader concerns of Canadians about oil tanker traffic on the west coast.<sup>14</sup> Thompson was clear that the environmental and social effects of the proposed oil port had to be considered simultaneously with the bigger question of whether such a port was necessary for Canada’s energy future.<sup>15</sup>

Photo courtesy of Rick Steiner



But before the Inquiry could complete its work, the oil company withdrew the Kitimat proposal. Instead, it focused on building an oil port in Washington State, an idea that was rejected by the United States Congress as being environmentally unacceptable. The Canadian government anticipated that there could be another northern BC pipeline and oil port proposal in the future. When the Inquiry was adjourned, the government made it clear that the Oil Ports Inquiry could be reactivated. Andrew Thompson, in his report, stated that if a future pipeline and port were built without a full inquiry, “the concerns of British Columbians about the risks of oil spills would have been given short shrift. The need for an oil port, though inconclusively determined, would have carried the day without the risks ever having been assessed. Such an outcome is not the kind that binds the country together. . . . The people of British Columbia are entitled to better treatment.”<sup>16</sup>

Today, oil tankers and pipelines are once again threatening B.C.’s northern lands and waters. British Columbians need answers to the

<sup>13</sup> Andrew Thompson, *West Coast Oil Ports Inquiry: Statement of Proceedings*, February 23, 1978, at 1.

<sup>14</sup> *Ibid.*, letter of transmittal.

<sup>15</sup> *Ibid.* at 98.

<sup>16</sup> *Ibid.* at 100-102.

questions that were left hanging more than thirty years ago. But will the process being proposed today be able to do so?

Tanker at Kitimat, Photo credit: Headwaters Initiative



### 3. The proposed Enbridge Gateway assessment process

The Canadian Environmental Assessment Agency (CEAA) plans to conduct an environmental assessment of the Enbridge Gateway pipeline project. In addition, pipelines like Enbridge Gateway that cross provincial boundaries are regulated by the federal government through the National Energy Board (NEB). In 2006 the federal Minister of the Environment decided that the assessment would be done by a “joint review panel” (JRP) to meet the requirements of both agencies.

The draft JRP agreement and terms of reference<sup>17</sup> are currently open for review. Once they are finalized, public hearings will be scheduled in various communities along the pipeline route to listen to evidence about the project, possibly beginning in late 2009 or 2010. Individuals and groups could apply to be an “intervenor” at the hearings, and may be eligible to receive public funding to participate in the process.<sup>18</sup> Open public sessions may also be planned in the pre-hearing phase to allow for public comment on what issues should be covered, and the kinds of information that Enbridge must provide.

The draft agreement envisions that the hearings would follow the procedures of the NEB, which provide for a formal process involving sworn evidence and cross-examination. Informal opportunities for written and oral statements from the public and

<sup>17</sup> The draft agreement and terms of reference are available at: [www.ceaa-acee.gc.ca/050/document-eng.cfm?DocumentID=31297](http://www.ceaa-acee.gc.ca/050/document-eng.cfm?DocumentID=31297)

<sup>18</sup> You can also express your views to the joint review panel without coming to a hearing by sending a “Letter of Comment” to the panel at any time until final arguments begin at the end of the public hearings. The joint review panel will take these views into account but it is not required to respond directly to these letters.

First Nations would also be provided, although it is not clear that they will be given the same weight as sworn evidence.

After the hearings and public comments, the JRP would prepare a report to the federal Minister of the Environment and responsible authorities such as Fisheries and Oceans Canada, Transport Canada and Indian and Northern Affairs Canada setting out its rationale, conclusions and recommendations related to the environmental assessment of the project. The federal Cabinet must approve those agencies’ responses to the report. If Cabinet considers, based on the report, that “the project is not likely to cause significant adverse environmental effects” after appropriate mitigation measures are implemented, or if Cabinet decides that the project’s significant negative environmental impacts can be “justified in the circumstances,” then Cabinet can authorize the responsible government agencies to issue permits that would allow the pipeline project to proceed.<sup>19</sup>

The JRP would also be the decision-maker under the *National Energy Board Act* as to whether a “certificate of public convenience and necessity” should be issued to allow the project to go ahead. Terms and conditions may be imposed on the National Energy Board’s approval of the project.<sup>20</sup> The National Energy Board requires federal Cabinet approval to issue a certificate approving the pipeline.

Although limited provision has been made for First Nations consultation on the JRP report prior to Cabinet approval, the Crown otherwise expects First Nations to participate as intervenors in the JRP process along with stakeholders and members of the public.<sup>21</sup>

At the end of the day, although the proposed JRP process is substantial compared to most environmental assessments carried out under CEAA, it has a number of limitations that make it problematic in the case of the Enbridge Gateway pipeline project.

### 4. Scope of the proposed process ignores the “big picture” issues

The proposed JRP process is too limited in its focus. It is designed solely to examine how the Enbridge Gateway pipeline project should be implemented. It fails to consider whether this pipeline is needed or desirable in the first place. To answer these questions, a number of big-picture policy issues need to be considered first, so that people and their governments can make an informed decision about whether this pipeline fits with the broader policy choices that we should be making in British Columbia and in Canada.

<sup>19</sup> CEAA, s. 5(2) and 37(1) (1.1)

<sup>20</sup> National Energy Board Act, R.S.C. c. N-7, s. 30

<sup>21</sup> *Approach to Crown Consultation for the Northern Gateway Project* (CEAA, February 2009).

**BC's energy future:** First, British Columbians need to understand the role of the tar sands in B.C.'s and Canada's energy future. British Columbians are increasingly concerned about climate change. Government needs to ensure that our available fossil fuel resources are used both responsibly and for the maximum benefit of Canadians. Our energy decisions should also promote the transition away from the use of fossil fuels and towards sustainable and renewable sources of energy to meet Canada's needs, and encourage energy efficiency. The decision on the merits of a pipeline from the tar sands to the coast needs to take these factors into account.

Tailings pond, photo courtesy of David Dodge, Pembina Institute, oilsandswatch.ca



**Greenhouse gases, water, and land:** Second, Canada needs to consider the significant impact of tar sands expansion on Canada's global warming record, an expansion that would be greatly facilitated by a distribution infrastructure of pipelines. Canada has international commitments to reduce greenhouse gas emissions. However, producing a barrel of oil from the tar sands produces five times more greenhouse gases than producing a barrel of conventional oil.<sup>22</sup> In addition, Canadians need to understand the impact of tar sands expansion on the health of Canada's land and water. Tar sands mining operations are licensed to divert almost 550 million cubic metres of water annually from the Athabasca River – three times the amount of water used annually by the city of Calgary.<sup>23</sup> Most of this water ends up in toxic "tailings" ponds that currently cover over 130 square kilometres – nearly two and half times the size of Prince Rupert – and are among the largest man-made structures on Earth. These sometimes leak into the

<sup>22</sup> Nyboer, John & Tu, JianJun. 2008. *GHG Emission Trend Analysis in the Fossil Fuel Production Industries, 2008 Update*. Burnaby: Canadian Industrial Energy End-Use Data and Analysis Centre, Simon Fraser University at 36, cited by Environment Canada, 2008. *National Inventory Report – Greenhouse Gas Sources and Sinks in Canada, 1995-2006* (Submission to the UN Framework Convention on Climate Change).

<sup>23</sup> Pembina Institute. 2009. *The Waters That Bind Us: Transboundary Implications of Oil Sands Development*, available at [www.oilsandswatch.org/pub/1789](http://www.oilsandswatch.org/pub/1789); City of Calgary. *Year end 2008 Water Efficiency Report*, available at [www.calgary.ca/docgallery/bu/water\\_services/conservation/2008\\_water\\_efficiency\\_report.pdf](http://www.calgary.ca/docgallery/bu/water_services/conservation/2008_water_efficiency_report.pdf).

surrounding groundwater, and pose a threat to the Athabasca River.<sup>24</sup> Increased pipeline capacity is a critical component of the growth of the tar sands. The dramatic growth in greenhouse gas emissions, and the significant impacts on water, air, and land, would not be possible without additional pipeline capacity. For this reason, the impacts of tar sands development should be a critical factor in making a decision on the Enbridge Gateway pipeline proposal. By way of contrast, the proposed terms of reference for the JRP process leave out consideration of climate change that will result from the pipeline and the expansion of the tar sands generally.

**The risk of tanker oil spills:** Third, Canadians need to understand and weigh the significant risks posed by lifting the ban on oil tanker traffic in BC's dangerous northern waters. An oil spill along the BC north central coast would devastate marine animals and their habitats as well as drastically affect the fishing and tourist industries, and the health of communities along the coast.<sup>25</sup> Based on the amount of oil proposed to travel through the Enbridge Gateway pipeline, there would be a crude oil spill of over 1,000 barrels about every five years, with a catastrophic spill of over 10,000 barrels once every 12 years.<sup>26</sup>

There is considerable uncertainty as to whether the JRP process will fully consider the risks of tankers, and as to whether this is the appropriate forum to consider whether to lift the tanker moratorium.

If consideration of these critical strategic level policy questions is left out of the environmental assessment process, then the federal government will be in the dark when it makes its decision about the pipeline – and First Nations governments and the public will be in the dark too. This is not a recipe for making the best choices about our energy future. In addition, the Supreme Court of Canada has held that the Crown has a duty to consult First Nations at the higher more strategic levels, as decisions made at the strategic level "may have potentially serious impacts on Aboriginal Title and Rights."<sup>27</sup> Indeed, the courts have acknowledged that consultation at the operational or project-specific level may have "little effect" if First Nations have not first been honourably consulted on higher level issues.

<sup>24</sup> Pembina Institute, cited above.

<sup>25</sup> Stuart Hertzog, *Oil and Water Don't Mix – Keeping Canada's West Coast Oil Free*, David Suzuki Foundation report, March 2003, at 29.

<sup>26</sup> Dogwood Institute, *Fact Sheet: Estimated Frequency of Oil Spills from Enbridge Inc.'s Northern Gateway Project*, March 5 2009, adapted from table 3.5 of Timothy Van Hinte. 2005. *Managing impacts of Major projects: An analysis of the Enbridge Gateway Pipeline Proposal*, Simon Fraser University thesis available at <http://ir.lib.sfu.ca/handle/1892/707>.

<sup>27</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 76.

Photo credit: Jessica Clogg



## 5. The proposed process fails to deal honourably with First Nations

The Crown has indicated that it intends to rely principally on the consultation efforts of Enbridge and the JRP process to meet its legal duties to First Nations,<sup>28</sup> despite the fact that the courts have held that: “The JRP has no mandate to conduct Aboriginal consultation,”<sup>29</sup> and that: “The honour of the Crown cannot be delegated” to third parties like Enbridge.<sup>30</sup>

Recent court decisions suggest that the Crown has to involve affected First Nations in decisions from the very earliest stages of designing the environmental and regulatory review process.<sup>31</sup> However, the Crown failed to meaningfully consult before referring the Enbridge Gateway pipeline project to a joint review panel in 2006. While government officials have since met with a number of First Nations to provide information about the proposed JRP process, they have been clear that they do not consider much about the process (e.g., panel membership, hearing process) to be negotiable. Finally, to date there has been little or no effort to work with First Nations to shape the Crown’s approach to consultation and accommodation on the Enbridge Gateway pipeline project beyond participation in the JRP.

The Supreme Court of Canada has said that deep consultation will likely entail “formal participation in the decision-making process” by affected First Nations.<sup>32</sup> Simply having an opportunity to engage as an afterthought to the public consultation process is not enough.<sup>33</sup> By way of contrast, the proposed JRP process is not designed to involve affected First Nations as decision-makers, and the draft JRP agreement refers to First Nations as simply a subset of

<sup>28</sup> *Approach to Crown Consultation for the Northern Gateway Project* (CEAA, February 2009).

<sup>29</sup> *Canada (Environment) v. Dene Tha’ First Nation*, 2006 FC 1354 (Fed. Ct.) affirmed 2008 FCA 20 (Fed. Ct. of Appeal), cited to Fed. Ct. at para. 35.

<sup>30</sup> *Haida Nation*, at para. 53.

<sup>31</sup> *Dene Tha’*.

<sup>32</sup> *Haida Nation* at para. 44.

<sup>33</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 64.

the ‘public’. The problems with the proposed process from the perspective of the Crown’s constitutional duties to First Nations are succinctly summed up in a recent letter from the Gitga’at Nation to CEAA and NEB:

*[W]e can say without hesitation that the draft JRP [agreement] and [terms of reference] do not provide a process and procedures that will take Gitga’at rights seriously....Canada’s efforts to uphold its environmental values in the Joint Review Panel process, will, despite CEAA’s best intentions, not respect or meaningfully address the Gitga’at’s constitutional rights. Most obviously, it gives no space for Gitga’at in the core decision-making process and thus fails to recognize and give effect to our pre-existing decision making rights in regard to our territory....It appears to us that the Gitga’at people and their rights are an afterthought.*<sup>34</sup>

## 6. Opportunity for a model process

In 2005 the Province and the First Nations Leadership Council entered into a New Relationship based on respect and recognition of Aboriginal Title and Rights; respect of each other’s respective laws and responsibilities; and for the reconciliation of Aboriginal and Crown titles and jurisdictions. They agreed to establish new processes and institutions for shared decision-making regarding land and resources. Provincial legislation has been proposed to embody these principles in law.

To date the federal Crown has been slower to embrace a similar approach. Designing an appropriate process for review and decision-making about the Enbridge Gateway pipeline project presents an excellent and timely opportunity for the federal Crown and First Nations to do so.

Photo credit: Jessica Clogg



## 7. Characteristics of a model process

Reforms to the review process for the Enbridge Gateway pipeline are required to address the two principle flaws identified above, namely:

<sup>34</sup> Letter from Gitga’at First Nation to Canadian Environmental Assessment Agency, January 30, 2009

- the failure to deal with higher level policy questions critical to decision-making about the Enbridge Gateway pipeline; and,
- the failure to deal honourably with First Nations in the design of the process.

It is very possible that the first issue could be dealt with by reactivating the West Coast Oil Ports Inquiry and related processes, with appropriate updating of their terms of reference in collaboration with First Nations. This approach initially envisioned two assessments that would proceed simultaneously: a) a comprehensive regional analysis of social and environmental impacts (including the impact on fisheries) of a marine tanker route and a marine terminal at Kitimat, as well as “the broader concerns and issues related to oil tanker movements on the West Coast as might be affected by the proposal”; and, b) “energy policy assessment” hearings to look at alternative means by which Canada’s energy needs should be met,<sup>35</sup> and in this context to consider whether a west coast oil port is needed at all.<sup>36</sup>

The second issue will also require direct engagement between the Crown and affected First Nations. Over the past three years, a number of First Nations have proposed a distinct First Nations Review Process for the Enbridge Gateway pipeline project,<sup>37</sup> with the purpose of:

- providing First Nations potentially affected by the Gateway pipeline a review process that is fair, open, and accountable to their communities;
- establishing a process that is designed, implemented, and guided by the First Nations who stand to be impacted by the proposed pipeline; and,
- protecting the constitutional rights of the affected First Nations.<sup>38</sup>

In this model, a panel of commissioners selected by participating First Nations who would carry out a review, potentially including issue-based hearings, community hearings and its own investigations, and report to the First Nations in order to inform their decisions with respect to the pipeline. Discussions between the Crown and First Nations would be required to harmonize the outcomes of the First Nations process with the Crown’s process.

Regardless of the precise approach used, at a minimum there is an obligation on the Crown to engage in good faith with First Nations with respect to the process itself. This includes the full process for meeting its constitutional duties, which must go beyond the

<sup>35</sup> At that time Canada’s oil import needs were front and centre. Today the need to transition away from fossil fuels and towards sustainable, renewable sources of energy would likely be a key focus.

<sup>36</sup> *West Coast Oil Ports Inquiry Statement of Proceedings* at 98 and 112.

<sup>37</sup> “Approval process for Enbridge Gateway process flawed”, November 28, 2008, joint press release, Office of the Wet’suwet’en/Council of the Haida Nation/Nadleh Whut’en First Nation/Nak’azdli First Nation.

<sup>38</sup> *Proposal for a First Nations Review Process for the Enbridge Gateway Pipeline* at 1.

mandate of CEAA and NEB to look at the full range of potential impacts of the Enbridge Gateway pipeline on the constitutionally protected title and rights of affected First Nations.

Above and beyond this, today in British Columbia First Nations and the Crown have committed to each other to move towards true shared decision-making that recognizes and respects the laws and responsibilities of both. The review of the Enbridge Gateway pipeline project provides an opportunity for the federal Crown to follow suit.

Photo courtesy of Rick Steiner



## 8. Make your voice heard

West Coast Environmental Law believes that getting the decision-making process “right” for the Enbridge Gateway Pipeline is a critical investment in the long-term ecological, social and economic well-being of affected communities and all British Columbians.

**There is an official opportunity to comment on the proposed JRP process and/or to propose alternatives until April 14, 2009.**

Comments should be sent by fax, mail or email to:

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