

# Duty to Consult

A legal doctrine discourages cooperation where proposed projects affect large numbers of First Nations

By Tom Flanagan

## APPROVAL OF THE ENBRIDGE INC. NORTHERN GATEWAY

proposal by the National Energy Board review panel has improved the odds of the pipeline being built, but there is still a long way to go. The biggest issue, now that B.C. Premier Christy Clark has also softened her tone, is the “duty to consult” (DTC) with First Nations.

DTC is a legal doctrine developed by the courts because aboriginal title has never been surrendered by treaty in most of British Columbia. Most Crown land in British Columbia is subject to claim, and some of it will eventually be transferred to First Nations when treaties are concluded. In the meantime, the courts have said, it would be wrong for governments to authorize actions that might devalue the land (cut the timber, mine the minerals, dam the rivers) without consulting the First Nations and trying to accommodate their concerns. The courts have said that the First Nations do not have a veto over development projects, but they do have a strong right for their interests to be considered.

DTC has also been extended in slightly different form to the Treaty 8 area, which includes northern Alberta and part of northeast B.C. There the issue is not aboriginal title, which was extinguished by Treaty 8, but continuing treaty rights, such as the right to hunt, fish and trap on Crown lands until those lands are taken up for other purposes.

DTC has blocked a few projects and added time and expense to others, but resource companies have learned to live with it. The time and expense are usually bearable for geographically delimited projects, such as oil and gas drilling, where one can deal with a relatively small number of First Nations.

Things become much more difficult, however, in the case of a long pipeline, such as the Northern Gateway, which would cross the “traditional territories” of dozens of First Nations. A useful pipeline has to transit all of these territories; it only takes one holdout First Nation to cause the whole pipeline to fail. In any large group of actors, there will always be some who see the world in different terms and will oppose what most see as the common good. The problem is exacerbated when

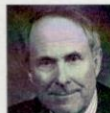
environmentalist organizations, well-funded by American foundations, whip up opposition among First Nations to any transport of bitumen.

A second problem is strategic. When many actors are involved in negotiating a bargain, everyone is tempted to hang back, waiting to see what others get, then raise the ante with new demands. This type of n-person Prisoner’s Dilemma can drive costs so high that a project becomes uneconomic.

Enbridge rival Kinder Morgan has been praised for taking a new approach to DTC, investing much more time and money in building relationships with First Nations (and other local communities) before getting down to detailed negotiations. It will be wonderful if the Kinder Morgan approach works for major pipelines in Canada, but we don’t know that yet. The company just filed its Trans Mountain Expansion application with the NEB in December 2013, so it is years away from decision time.

**The courts have said that the First Nations do not have a veto over development projects, but they do have a strong right for their interests to be considered.**

I hope I will be proven too pessimistic, but I fear that approval of major pipelines may be an issue transcending the ability of the industry to resolve and requiring senior governments to step in. Industry did not create the problem. Executive decisions of British Columbia and Canada ignored aboriginal title in the province. Politicians at all levels relabeled Indian bands as “First Nations,” thus enormously enhancing their negotiating power. Judicial decisions of Canadian courts created the duty to consult. If Canada’s oil and gas industry is to reach its full potential, Parliament may have to use its sovereign legislative power to create a new framework for the resolution of claims and the orderly approval of projects involving large numbers of First Nations. (A0)



**Tom Flanagan** is a Distinguished Fellow at the School of Public Policy, University of Calgary. His most recent publication is *The Wealth of First Nations: An Exploratory Study*.