200 - 2006 West 10th Avenue
Vancouver, BC V6J 2B3
www.wcel.org

tel: 604.684.7378
fax: 604.684.1312
toll free: 1.800.330.WCEL (in BC)
email: admin@wcel.org

Legal Comment on Coastal First Nations Declaration

"No Tar Sands tankers in our waters"

On March 23rd, 2010 several First Nations peoples of the Central and North Pacific Coast and Haida Gwaii (the "Coastal First Nations") issued an unequivocal declaration banning Tar Sands crude oil tanker traffic from their territories.[1] The Coastal First Nations Declaration was prompted by a Tar Sands mega-project proposed by Enbridge Inc. The proposed 1,170 kilometre-long Enbridge Northern Gateway Pipeline project would stretch from the Alberta Tar Sands to a marine terminal at Kitimat and would result in an estimated 225 crude oil and condensate tankers a year travelling through the territories of Coastal First Nations.[2] The following commentary examines the legal significance of the Coastal First Nations Declaration.

Summary: *In making the March 23rd Declaration, Coastal First Nations exercised their ancestral laws, rights and responsibilities over the lands and waters of their territories. A federal government decision to allow the Enbridge Northern Gateway Pipeline project and related tanker traffic, contrary to the Coastal First Nations declaration, would infringe on their constitutionally-protected Aboriginal Title and Rights and breach Canada's international law obligations. The Coastal First Nations Declaration opens any company who facilitates the transportation of Tar Sands crude oil through Coastal First Nations territories to potential enforcement action grounded in these nations' respective laws and customs. Furthermore, the large number of impacted nations, the strength of opposition to the project, and weaknesses in the Crown's proposed review process create a volatile legal situation and a high probability of litigation by one or more First Nations that could delay or potentially derail the project.*

Legal authority for the Coastal First Nations Declaration

The Coastal First Nations have the right to issue a ban on crude oil tankers in their waters, based in their own ancestral laws, in Canadian constitutional law, and in international law.

Indigenous law: The decision-making authority of each Coastal First Nation is embedded in their distinct governance structures and millennia-old legal systems. Their legal authority and jurisdiction over their lands and waters have been witnessed and validated through the centuries in the feast hall, a principal element of many First Nations' governance structures in British Columbia. Today, this legal authority is exercised by hereditary chiefs with titles bestowed through the traditional feast system and/or decision-makers authorized by the nation through elected or other modern governance structures. The Coastal First Nations Declaration indicates that the rights and responsibilities embedded in their nations' own laws place on them a "solemn and sacred duty" to take action to protect their lands and waters from threats posed by oil tankers and oil spills to "this magnificent coast, its creatures, cultures and communities."

Canadian law: The Canadian courts have ruled that Aboriginal Title continues to exist in British Columbia.[3] This existing Aboriginal Title is protected by section 35(1) of the Canadian constitution.[4] In interpreting section 35(1), the Supreme Court of Canada has acknowledged that Aboriginal Title is not created by the constitution. Rather it comes from the historical reality that Aboriginal Peoples were the prior occupants of Canada, and the interaction of the common law with their "pre-existing systems of [A]boriginal law."[5] Aboriginal Title is a right to exclusive use and occupation, and encompasses a right to choose the uses to which the land and water are put.[6] The lands and waters of Coastal First Nations are unceded and have never been the subject of treaties with Canada. In making the March 23rd declaration, Coastal First Nations exercised their Aboriginal Title over the lands and waters of their territories.

International law: Canada is bound by numerous general and customary international legal principles which have been referred to in decisions and reports of the Inter-American Commission on Human Rights, such as the right of Indigenous Peoples to control and own their territories, and Indigenous Peoples' ownership of lands, territories and resources that they have historically occupied.[7] These rights are contained in the *American Declaration of the Rights and Duties of Man*, which Canada is obliged to respect as a member state of the Organization of American States.[8] Through the general principles of international law, and the *American Declaration*, Canada thus has an international legal obligation to respect First Nations' ownership and control over their own territories and resources.[9] In making the March 23rd declaration, the Coastal First Nations exercised their right of ownership and control over their territories as recognized in international law.

Legal significance of the Coastal First Nations Declaration

Coastal First Nations can take steps to enforce their declaration under their own laws, through the Canadian courts, and/or through legal action at the international level. The result is highly volatile legal situation and a strong probability of litigation by one or more First Nations that could delay or potentially derail the Enbridge Northern Gateway Pipeline project.

Declaration may be enforced in Indigenous law: The historical and anthropological record indicates that Coastal First Nations have defended their territories through legal, diplomatic and military means for millennia. The Coastal First Nations declaration of March 23rd 2010 opens project proponents and others to the potential of enforcement action grounded in the respective laws and customs of the Coastal First Nations.[10]

Implications when Aboriginal Title formally recognized by Crown or courts: Over the lifetime of the Enbridge Northern Gateway Pipeline project, should it be built (or any other pipeline following a similar route), it is almost inevitable that one or more impacted nations will achieve formal recognition of their existing Aboriginal Title through litigation or negotiation. Many of the Coastal First Nations are at advanced stages of treaty negotiations and/or have filed writs claiming Aboriginal Title. Decisions made by First Nations today grounded in their own laws send a stark signal about the potential future fate of a project as the result of a successful title case, or at the conclusion of treaty negotiations. In particular, once Aboriginal Title is formally recognized by the courts, the Supreme Court of Canada has ruled that First Nations' consent may be required to justify resource development in some cases.[11] Where this requirement

applies, it would also affect decisions made before title was 'proven' in court. If a court subsequently rules that the construction and operation of the Enbridge Northern Gateway pipeline and related tanker traffic should not have proceeded without First Nations consent, any approvals, permits, licences and tenures associated with it could potentially be invalidated.

Implications of the Crown's constitutional duties in the interim period*:* Canadian constitutional law also puts an obligation on the Crown to act honourably when it contemplates conduct that could negatively impact on Aboriginal Title and Rights in the so-called 'interim period' (i.e., prior to formal recognition of existing Aboriginal Title and/or Rights by the courts or through a treaty).This duty requires the Crown to consult and accommodate First Nations with a "credible but unproven claim" of rights that may be adversely impacted by a decision such as approving the Enbridge Northern Gateway Pipeline project and related tanker traffic.[12] While this does not provide First Nations with a veto it may, for example, oblige the Crown to avoid irreparable harm to the nation's lands and waters.[13] This duty is an ongoing one,[14] and the conduct of the Crown in making various process and substantive decisions about the project may be challenged in court. The Coastal First Nations issuing the March 23rd declaration are joined in their opposition to the Enbridge Northern Gateway Pipeline project by more than a dozen other potential impacted nations and tribal groups along the pipeline and tanker routes and downstream, as well as the provincial Union of BC Indian Chiefs. The number of impacted nations, the strength of their opposition, and the large number of process and substantive decisions required to move forward a project of this scale create a highly volatile legal situation and a strong probability of litigation by one or more First Nations that could delay or potentially derail the project.

Failure to respect Declaration violates Canada's international law commitments. Free, prior and informed consent is the international standard governing consultation with First Nations on issues such as approval of the Enbridge Northern Gateway Pipeline project and related tanker traffic. This standard provides that Indigenous Peoples must be informed about and consent freely to resource development projects that will affect their lands and resources, prior to government approval of the project. This standard is set out in the *United Nations Declaration on the Rights of Indigenous Peoples*,[15] which codifies the prevailing international legal norms on Indigenous rights. The government of Canada stated in the March 2010 Speech from the Throne that it will soon take steps to endorse the Declaration. Furthermore, as noted above, through the general principles of international law, and the *American Declaration of the Rights and Duties of Man*, Canada has an existing international legal obligation to respect First Nations' ownership and control over their own territories and resources.[16] A decision by the federal government to approve the Enbridge Northern Gateway Pipeline project and related oil tanker traffic, in the absence of First Nations consent, would violate Canada's international legal obligations, and make Canada vulnerable to a human rights challenge in an international (e.g., UN Human Rights Committee) or regional (e.g., Inter-American Commission on Human Rights) forum. If a First Nation takes international legal action against Canada for such a decision, there is a significant risk that a finding would be made against Canada, attracting negative world attention and creating further uncertainty for the Enbridge project. In addition, international human rights bodies such as the Inter-American Commission can request Precautionary Measures, which may include a request that a project not proceed further until such time as the First Nation's petition can be heard and decided on its merits.

Does the proposed Joint Review Panel (JRP) process mitigate legal risks associated with the Coastal First Nations Declaration?

The ongoing nature of the Crown's duties to First Nations; the wide range of procedural and substantive decisions to which they apply; the large number of affected nations; and the likelihood of eventual recognition of Aboriginal Title by the courts or in a treaty: 1) result in considerable risk of litigation and other legal uncertainty now and for decades to come for the Enbridge Northern Gateway Pipeline project; and 2) raise considerable doubt as to whether an affirmative recommendation/decision from the JRP could be relied on by Enbridge and its investors to avoid these legal risks.

Construction and operation of the Enbridge Northern Gateway Pipeline project requires a number of federal approvals, most notably a 'certificate of public convenience and necessity' under section 52 of the *National Energy Board Act*. The Enbridge Northern Gateway Pipeline project is thus subject to federal environmental assessment under the *Canadian Environmental Assessment Act*. The federal government has appointed a Joint Review Panel (JRP) that combines the responsibilities of the Canadian Environmental Assessment Agency and the National Energy Board. It will assess the project and make a recommendation to the federal Cabinet on whether the project should be built.

The federal government also released an "Aboriginal Consultation Framework" for the project in November 2009, which states that the federal government "will rely on the Joint Review Panel process to the extent possible to assist in fulfilling its legal duty to consult..." The Aboriginal Consultation Framework for the project, and the process leading to its development, has been the subject of extensive criticism from affected nations.

While the November 2009 Aboriginal Consultation Framework appears to have addressed some concerns associated with earlier versions, submissions from affected nations[17] note outstanding concerns that include the following:

- The federal government has consistently indicated that it is "not prepared to consider" repeated requests for a First Nations review process distinct from the public review process. It is only willing to discuss how consultation will be carried out "within the framework [the federal government has] provided."[18]
- The design of the JRP process and Aboriginal Consultation Framework do not accommodate First Nations governance, management and decision-making rights, which are inherent to their Aboriginal Title.
- The federal Crown designed its Consultation Framework without first undertaking "a preliminary assessment of the strength of the case supporting the existence" of the Aboriginal Title and Rights of affected nations, which the courts have repeatedly indicated is a critical first step in determining the nature and scope of the duty to consult.[19]
- The Aboriginal Consultation Framework asks First Nations to present evidence of potential impacts on their constitutionally-protected Aboriginal Title and Rights alongside "all interested parties" to the JRP, which is expected to consider "broad societal concerns." No criteria are provided to suggest that appropriate weight will be given to constitutionally protected rights as opposed to non-constitutional "societal concerns."

- The Enbridge JRP has been tasked by the federal government to "collect information about the nature and scope of potential or established Aboriginal and treaty rights and impacts on these rights" but does not itself have the mandate to consult or accommodate.[20]
- The federal government intends to rely on a single individual to engage with over 100 potentially affected Aboriginal groups[21] on any matters outside the mandate of the JRP, and to undertake consultation on the draft report of the JRP, including proposed accommodation/mitigation measures. This Crown Consultation Coordinator was unilaterally appointed by the federal Crown.
- No clear terms of reference, timelines or agreement with First Nations exists regarding promised consultation on the JRP report before it goes to federal Cabinet.

In examining whether the Crown has met its duties of consultation and accommodation, the courts will examine both procedural adequacy (i.e., the process of consultation) and the substantive outcomes from consultation. As noted above, there are a number of indications that the conduct of the Crown to date in designing its Aboriginal Consultation Framework has run afoul of legal principles established by the courts. In turn, while we are months, if not years from knowing the final result from the JRP process, over 99% of federal environmental assessment processes result in project approval. Approval of the Enbridge Northern Gateway Pipeline project would be contrary to the March 23rd Coastal First Nations declaration, as the project would involve transportation of Tar Sands crude oil by super tanker through the Coastal First Nations territories. Flowing from the foregoing analysis, First Nations can be anticipated to take the position that approval of the project would represent an infringement of their governance and decision-making rights, and a failure to accommodate these rights.

As noted above, the number of impacted nations, the strong opposition to the process, and weaknesses in the Crown's proposed review process create a constellation of circumstances that presents a substantial risk of litigation and other legal uncertainty for the Enbridge Northern Gateway Pipeline project. Furthermore, the ongoing nature of the Crown's duties, and the likelihood of eventual recognition of Aboriginal Title by the courts or in a treaty raise considerable doubt as to whether an affirmative recommendation/decision from the JRP could be relied on by Enbridge and its investors to avoid these legal risks.

March 24, 2010

Jessica Clogg, Executive Director & Senior Counsel,
West Coast Environmental Law

Josh Paterson, Staff Counsel, Aboriginal and Natural Resource Law,
West Coast Environmental law

References

[1] See http://pipeupagainstenbridge.ca.

[2] Enbridge Information Brochure, January 2009, accessed at www.northerngateway.ca/files/NGP-Brochure.pdf.

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

[4] *Constitution Act, 1982*.

[5] *Delgamuukw* at para 114.

[6] *Ibid* at para 166.

[7] See, for example, *Mary and Carrie Dann v. United States*, Inter-Am. C.H.R. Report No. 75/02 (2002), and *Maya Indigenous Communities v. Belize*, Inter-Am. C.H.R. Report No. 96/03 (2003).

[8] *Hul'qumi'num Treaty Group v. Canada*, Inter-Am. C.H.R. Report No. 105/09 (2009) at para 27.

[9] See Prof. S. James Anaya, *Indigenous Peoples in International Law* (2nd ed.) (Toronto: Oxford University Press, 2004) at p. 148.

[10] For examples of potential enforcement actions cited by First Nations leaders see March 23rd, 2010 media reports, e.g., "If somehow the pipeline goes ahead and tankers do come through Kitimat, we're prepared to put our boats right across the channel to stop them": *First Nations vow to use 'every legal means' to stop Enbridge pipeline: Pipeline to transport tar sands oil to Kitimat 'is dead'* (March 23, 2010: www.theprovince.com); "We are prepared to put boats across the channel," *Native groups vow to fight Enbridge pipeline* (March 23: 2010: www.reuters.com).

[11] *Delgamuukw* at para 168.

[12] *Haida Nation* v. *British Columbia (Ministry of Forests),* 2004 SCC 73 at para 37.

[13] *Ibid.* at para 47.

[14] *Ibid.* at para 32: "The jurisprudence of this court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution." Similarly the BC Supreme Court has held that: "The obligation arises upon knowledge of a claim and when infringement is contemplated. It is an ongoing obligation once the knowledge component is established. It is a process": *Huu-Ay-Aht First Nation* v. *British Columbia (Ministry of Forest*s), 2005 BCSC 697 at para 104.

[15] GA Res. 61/295, UN GAOR, 61st sess., Supp. No. 49, UN Doc. A/RES/61/295 (2007), Article 32.

[16] See Prof. S. James Anaya, *Indigenous Peoples in International Law* (2nd ed.)(Toronto: Oxford University Press, 2004) at p. 148.

[17] Submissions to CEAA on the Enbridge file are available on line at www.cea.gc.ca. See for example submissions from Kitimaat Village Council (March 4, 2010, www.ceaa.gc.ca/050/documents/41433/41433E.pdf) and Gitga'at First Nation (November 23, www.ceaa.gc.ca/050/documents/39875/39875E.pdf).

[18] "Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations": *Haida Nation* at para 46. Dismissing without discussion a key issue for the First Nation or a failure by the Crown to alter its position even when there has been extensive consultation may demonstrate a failure to reasonably accommodate: *Wii'litswx* v. *British Columbia (Minister of Forests)* 2008 BCSC 1139 at paras 194 and 247. The reasonableness of refusing to consider the possibility of a distinct First Nations review process, at least to address matters outside the mandate of the JRP is also called into question by a recent federal court decision, *Brokenhead Ojibway Nation v. Canada (Attorney General),* 2009 FC 484. This decision raises questions about the Crown's heavy reliance on the JRP process to meet its duties on the facts of the Enbridge case: "The NEB process may not be a substitute for the Crown's duty to consult where a project under review directly affects an area of unallocated land which is the subject of a land claim or which is being used by Aboriginal peoples for traditional purposes," particularly where "the eventual cumulative impact of development on the rights and traditional interests of Aboriginal peoples can be quite profound": at paras 28-29.

[19] *Haida Nation* at para 39.

[20] *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, at para. 35, affirmed 2008 FCA 20.

[21] The Crown's Aboriginal Consultation Framework refers to over 100 potentially affected Aboriginal groups. The number of affected peoples is substantially higher if potentially impacted nations downstream are included.